
# FEDERAL REGISTER

Vol. 88 Tuesday,

No. 103 May 30, 2023

Pages 34411–34744

OFFICE OF THE FEDERAL REGISTER

The **FEDERAL REGISTER** (ISSN 0097–6326) is published daily, Monday through Friday, except official holidays, by the Office of the Federal Register, National Archives and Records Administration, under the Federal Register Act (44 U.S.C. Ch. 15) and the regulations of the Administrative Committee of the Federal Register (1 CFR Ch. I). The Superintendent of Documents, U.S. Government Publishing Office, is the exclusive distributor of the official edition. Periodicals postage is paid at Washington, DC.

The **FEDERAL REGISTER** provides a uniform system for making available to the public regulations and legal notices issued by Federal agencies. These include Presidential proclamations and Executive Orders, Federal agency documents having general applicability and legal effect, documents required to be published by act of Congress, and other Federal agency documents of public interest.

Documents are on file for public inspection in the Office of the Federal Register the day before they are published, unless the issuing agency requests earlier filing. For a list of documents currently on file for public inspection, see *www.federalregister.gov.*

**The seal of the National Archives and Records Administration authenticates the Federal Register** as the official serial publication established under the Federal Register Act. Under 44 U.S.C. 1507, the contents of the **Federal Register** shall be judicially noticed.

The **Federal Register** is published in paper and on 24x microfiche. It is also available online at no charge at *www.govinfo.gov*, a service of the U.S. Government Publishing Office.

The online edition of the **Federal Register** is issued under the authority of the Administrative Committee of the Federal Register as the official legal equivalent of the paper and microfiche editions (44 U.S.C. 4101 and 1 CFR 5.10). It is updated by 6:00 a.m. each day the **Federal Register** is published and includes both text and graphics from Volume 1, 1 (March 14, 1936) forward. For more information, contact the GPO Customer Contact Center, U.S. Government Publishing Office. Phone 202-512-1800 or 866-512-1800 (toll free). E-mail, *gpocusthelp.com.*

The annual subscription price for the **Federal Register** paper edition is $860 plus postage, or $929, for a combined **Federal Register, Federal Register** Index and List of CFR Sections Affected (LSA) subscription; the microfiche edition of the **Federal Register** including the **Federal Register** Index and LSA is $330, plus postage. Six month subscriptions are available for one-half the annual rate. The prevailing postal rates will be applied to orders according to the delivery method requested. The price of a single copy of the daily **Federal Register,** including postage, is based on the number of pages: $11 for an issue containing less than 200 pages; $22 for an issue containing 200 to 400 pages; and $33 for an issue containing more than 400 pages. Single issues of the microfiche edition may be purchased for $3 per copy, including postage. Remit check or money order, made payable to the Superintendent of Documents, or charge to your GPO Deposit Account, VISA, MasterCard, American Express, or Discover. Mail to: U.S. Government Publishing Office—New Orders, P.O. Box 979050, St. Louis, MO 63197-9000; or call toll free 1-866-512-1800, DC area 202-512-1800; or go to the U.S. Government Online Bookstore site, see *bookstore.gpo.gov.*

There are no restrictions on the republication of material appearing in the **Federal Register.**

**How To Cite This Publication:** Use the volume number and the page number. Example: 88 FR 12345.

**Postmaster:** Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

## SUBSCRIPTIONS AND COPIES

**PUBLIC**

**Subscriptions:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public subscriptions | **202–512–1806** |
| **General online information** | **202–512–1530; 1–888–293–6498** |

**Single copies/back copies:**

| | |
|---|---|
| Paper or fiche | **202–512–1800** |
| Assistance with public single copies | **1–866–512–1800 (Toll-Free)** |

**FEDERAL AGENCIES**

**Subscriptions:**

| | |
|---|---|
| Assistance with Federal agency subscriptions: | |
| Email | *FRSubscriptions@nara.gov* |
| Phone | **202–741–6000** |

The Federal Register Printing Savings Act of 2017 (Pub. L. 115-120) placed restrictions on distribution of official printed copies of the daily **Federal Register** to members of Congress and Federal offices. Under this Act, the Director of the Government Publishing Office may not provide printed copies of the daily **Federal Register** unless a Member or other Federal office requests a specific issue or a subscription to the print edition. For more information on how to subscribe use the following website link: *https://www.gpo.gov/frsubs.*

# Contents

**Federal Register**

Vol. 88, No. 103

Tuesday, May 30, 2023

---

**Separate Parts In This Issue**



---

**Reader Aids**

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents electronic mailing list, go to https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new, enter your e-mail address, then follow the instructions to join, leave, or manage your subscription.

## CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

# Rules and Regulations

Federal Register
Vol. 88, No. 103
Tuesday, May 30, 2023



## DEPARTMENT OF ENERGY

### 10 CFR Part 460

**[EERE–2009–BT–BC–0021]**

**RIN 1904–AF53**

## Energy Conservation Program: Energy Conservation Standards for Manufactured Housing; Extension of Compliance Date

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Department of Energy (DOE) is publishing a final rule to amend the compliance date for its manufactured housing energy conservation standards. Currently, manufacturers must comply with these standards on and after May 31, 2023. This final rule delays compliance until July 1, 2025, for Tier 2 homes, and until 60 days after issuance of enforcement procedures for Tier 1 homes. DOE is delaying the compliance date to allow DOE more time to establish enforcement procedures that provide clarity for manufacturers and other stakeholders regarding DOE's expectations of manufacturers and DOE's plans for enforcing the standards.

**DATES:** This final rule is effective May 30, 2023.

**ADDRESSES:** The docket for this rulemaking, which includes **Federal Register** notices, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket?D=EERE-2009-BT-BC-0021.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

**FOR FURTHER INFORMATION CONTACT:** Mr. Matthew Ring, U.S. Department of Energy, Office of the General Counsel (GC–33), 1000 Independence Avenue SW, Washington, DC 20585; Telephone: (202) 586–2555; Email: *matthew.ring@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

### Table of Contents



## I. Background

The Energy Independence and Security Act of 2007 (''EISA,'' Pub. L. 110–140) directs the U.S. Department of Energy (''DOE'' or, in context, ''the Department'') to establish energy conservation standards for manufactured housing (''MH'').[1] (42 U.S.C. 17071) Manufactured homes are constructed according to a code administered by the U.S. Department of Housing and Urban Development (''HUD Code''). 24 CFR part 3280. *See also generally* 42 U.S.C. 5401–5426. Structures, such as site-built and modular homes, that are constructed to state, local or regional building codes are excluded from the coverage of the HUD Code.[2]

EISA directs DOE to base its standards on the most recent version of the International Energy Conservation Code (''IECC'') and any supplements to that code, except in cases where DOE finds that the IECC is not cost-effective or where a more stringent standard would be more cost-effective, based on the impact of the IECC on the purchase price of manufactured housing and on total life-cycle construction and operating costs. (*See* 42 U.S.C. 17071(b)(1))

On June 17, 2016, DOE published in the **Federal Register** a notice of proposed rulemaking (''NOPR'') to propose energy conservation standards for manufactured housing, including proposals recommended by the negotiated rulemaking working group for manufactured housing. 81 FR 39756 (''June 2016 NOPR''). DOE received nearly 50 comments on the proposed rule during the comment period. In addition, DOE also received over 700 substantively similar form letters from individuals.

On August 3, 2018, DOE published a Notice of Data Availability (''NODA''), stating it was examining possible alternatives to the requirements proposed in the June 2016 NOPR and seeking further input from the public, including on first-time costs related to the purchase of manufactured homes. 83 FR 38073 (''August 2018 NODA''). Prior to the NODA, in December of 2017, the Sierra Club filed a suit against DOE in the U.S. District Court for the District of Columbia, alleging that DOE had failed to meet its statutory deadline for establishing energy efficiency standards for manufactured housing. *Sierra Club* v. *Granholm,* No. 1:17–cv–02700–EGS (D.D.C. filed Dec. 18, 2017). In November 2019, the court in the Sierra Club litigation entered a consent decree in which DOE agreed to complete the rulemaking by stipulated dates.

After evaluating the comments received in response to the June 2016 NOPR and the August 2018 NODA, DOE published a supplemental NOPR (''SNOPR'') on August 26, 2021, in which DOE proposed energy conservation standards for manufactured homes based on the 2021 IECC. 86 FR 47744 (''August 2021 SNOPR''). DOE's primary proposal in the August 2021 SNOPR was a ''tiered'' approach based on the 2021 IECC. The ''tiered'' approach identifies a subset of less stringent energy conservation standards for certain manufactured homes (based on retail list price) in light of the cost-effectiveness considerations required by EISA. DOE's alternate proposal was an ''untiered'' approach, wherein energy conservation standards for all manufactured homes would be based on certain thermal envelope components and specifications of the 2021 IECC. Both proposals replaced the June 2016 NOPR proposal. *Id.* DOE sought comment on these proposals, as

[1] The National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, defines ''manufactured home'' as ''a structure, transportable in one or more sections, which in the traveling mode is 8 body feet or more in width or 40 body feet or more in length or which when erected on-site is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems contained therein . . . .'' 42 U.S.C. 5402(6).

[2] *See* 42 U.S.C. 5403(f). *See also* 24 CFR 3282.12.

well as alternate thresholds, including a size-based threshold (*e.g.,* square footage, number of sections) and a region-based threshold, and alternative exterior wall insulation requirements (R–21) for certain HUD zones. *Id.*

On October 26, 2021, DOE published a NODA regarding updated inputs and results of the analyses presented in the August 2021 SNOPR (both ''tiered'' and ''untiered'' approaches), including a sensitivity analysis regarding an alternative sized-based tier threshold and an alternate exterior wall insulation requirement (R–21) for certain HUD zones. 86 FR 59042 (''October 2021 NODA''). In addition, DOE reopened the public comment period on the August 2021 SNOPR through November 26, 2021. DOE sought comments on the updated inputs and corresponding analyses, encouraged stakeholders to provide additional data to inform the analyses, and stated it might further revise the rulemaking analysis based on new or updated information. *Id.*

On May 31, 2022, DOE published a final rule codifying the current energy conservation standards for manufactured housing in a new part of the Code of Federal Regulations (''CFR'') under 10 CFR part 460, subparts A, B, and C (''May 2022 Final Rule''). 87 FR 32728. Subpart A of 10 CFR part 460 presents generally the scope of the rule and provides definitions of key terms. Subpart B establishes new requirements for manufactured homes that relate to climate zones, the building thermal envelope, air sealing, and installation of insulation, based on certain provisions of the 2021 IECC. Subpart C establishes new requirements based on the 2021 IECC related to duct sealing; heating, ventilation, and air conditioning (''HVAC''); service hot water systems; mechanical ventilation fan efficacy; and heating and cooling equipment sizing.

Under the energy conservation standards, the stringency of the requirements under subpart B are based on a tiered approach depending on the number of sections of the manufactured home. Accordingly, two sets of standards are established in subpart B (*i.e.,* Tier 1 and Tier 2). Both Tier 1 and Tier 2 incorporate building thermal envelope measures based on certain thermal envelope components subject to the 2021 IECC that DOE determined applicable and appropriate for manufactured homes. Tier 1 applies these building thermal envelope provisions to single-section manufactured homes, but only includes components at stringencies that would increase the incremental purchase price by less than $750 in order to address affordability concerns that were raised by HUD and other stakeholders during the consultation and rulemaking process. Tier 2 applies these same building thermal envelope provisions to multi-section manufactured homes but at higher stringencies specified for site-built homes in the 2021 IECC, with an alternate exterior wall insulation requirement (R–21) for climate zones 2 and 3 based on consideration of the design and factory construction techniques of manufactured homes, as presented in the August 2021 SNOPR and October 2021 NODA. Manufacturers can comply with the building thermal envelope requirements through a prescriptive pathway (*e.g.,* using materials with specified ratings) or a performance pathway based on overall thermal transmittance (*Uo*) performance. *See* 10 CFR 460.102(c). Further, the energy conservation standards for both tiers also include duct and air sealing, insulation installation, HVAC and service hot water system specifications, mechanical ventilation fan efficacy, and heating and cooling equipment sizing provisions, based on the 2021 IECC. DOE concluded that this approach is cost-effective based on the expected total life-cycle cost (''LCC'') savings for the lifetime of the home associated with implementation of the energy conservation standards. *See e.g.,* 87 FR 32742.

In the May 2022 Final Rule, DOE adopted a compliance date such that the standards would apply to manufactured homes that are manufactured on or after one year following the publication date of the final rule in the **Federal Register**, which is May 31, 2023. In doing so, DOE noted its belief that many manufacturers already have experience complying with efficiency requirements similar to what DOE required in the May 2022 Final Rule based on manufacturers' previous experience with HUD *Uo* requirements and ENERGY STAR Version 2 efficiency requirements for homes produced on or after June 1, 2020. 87 FR 32759. DOE did not specify its approach for enforcement of the standards in the May 2022 Final Rule, and noted that manufacturers would be able to comply with the standards as they were issued. In fact, DOE noted that many of the requirements in the standards would require minimal compliance efforts (*e.g.,* documenting the use of materials subject to separate Federal or industry standards, such as the R-value of insulation or U-factor values for fenestration). 87 FR 32758, 32790. Nevertheless, DOE noted in the May 2022 Final Rule that it may address compliance and enforcement issues and procedures in a future agency action (*see* 87 FR 32757–32758), which is discussed further in section II of this document.

On March 24, 2023, DOE published in the **Federal Register** a NOPR proposing to amend the compliance date for the manufactured housing energy conservation standards (88 FR 17745, ''March 2023 NOPR''). In that NOPR, DOE described the need to amend the compliance date for the manufactured housing standards, noting that it has not yet issued procedures for investigating and enforcing against noncompliance with the standards, and that a delay is necessary to ensure that DOE can receive and incorporate meaningful stakeholder feedback into its enforcement procedures prior to part 460's compliance date. Accordingly, DOE proposed to require compliance with the Tier 1 standards beginning 60 days after publication of its final enforcement procedures, and compliance with the Tier 2 standards beginning 180 days after publication of its final enforcement procedures. With respect to the requirements of subpart C of part 460, DOE would similarly expect compliance with those provisions beginning 60 days after publication of its final enforcement procedures for Tier 1 homes, and beginning 180 days after publication of its final enforcement procedures for Tier 2 homes. 88 FR 17746.

## II. Discussion of Final Rule

In this final rule, DOE is amending the compliance date for part 460 consistent with its proposed compliance date in the NOPR for Tier 1 (*i.e.,* 60 days after issuance of DOE's enforcement procedures for part 460). However, for Tier 2, DOE is amending the compliance date to July 1, 2025. After consideration of comments, DOE has determined that amending the compliance date to July 1, 2025, for Tier 2 homes will provide greater certainty for manufacturers versus an indeterminate date. Moreover, the July 1, 2025, compliance date will ensure DOE will have enough time to develop enforcement procedures and engage in the rulemaking process, including providing adequate time for stakeholders to submit robust feedback on DOE's proposed enforcement procedures, and DOE's consideration of that feedback. DOE believes extending the compliance date for Tier 2 homes to July 1, 2025, will also provide manufacturers with sufficient time to adjust their operations and practices consistent with DOE's enforcement procedures.

*A. Comments on the March 2023 NOPR*

Commenters were generally supportive of DOE's proposal to amend the compliance date for part 460. DOE received over 500 comments on the March 2023 NOPR. The vast majority of these comments were campaign form letters (Campaign Form Commenters) containing nearly identical commentary on the NOPR.[3] DOE also received several other comments from stakeholders. Comments and DOE responses are discussed in the following sections.

Need To Amend Compliance Date and Alternative Compliance Dates

The Campaign Form Commenters strongly urged DOE to amend the compliance date for part 460 until DOE's future enforcement procedures take effect. Campaign Form Commenters stated that it is virtually impossible for the industry to know whether its compliance efforts will be found satisfactory without a clear understanding of how DOE will enforce the standards or how they will be evaluated for compliance. Campaign Form Commenters stated that industry members need time to understand DOE's enforcement procedures and prepare their operations to ensure compliance with the energy standards. Campaign Form Commenters stated it is therefore imperative that DOE delay the compliance date and engage in rulemaking for test procedures, compliance, and enforcement before the DOE energy standards are implemented. The Northwest Energy Efficiency Alliance [4] (NEEA) stated that a short delay is reasonable for DOE to establish enforcement procedure clarity. The American Public Gas Association (APGA),[5] Kit HomeBuilders West (Kit HomeBuilders),[6] Skyline Champion Corporation (Skyline),[7] Cavco Industries, Inc. (Cavco),[8] and the Manufactured Housing Institute (MHI) [9] support amending the compliance date so that DOE may establish enforcement provisions for the standards to be fully realized and workable. (APGA at p. 1, Skyline at p. 1; Cavco at p. 1, MHI at p. 1) MHI further stated that the current compliance date could not come at a worse time for the only industry focused on providing attainable homeownership to the most vulnerable Americans, and that delaying the compliance date would alleviate some of these pressures, while affording DOE the opportunity to develop enforcement procedures missing from part 460 and resolve other issues. (MHI at p. 8) Hemminger Homes (Hemminger) stated that it would be hard to comply with the current DOE standards in part 460 since the details are not laid out as to what needs to be done, by whom, or the penalties that may be applied for not complying.[10] (Hemminger at p. 1) Hemminger stated that the postponement of the DOE implementation date is very important to all parties that will be affected by it. (Hemminger at p. 2) The Manufactured Housing Association for Regulatory Reform (MHARR) supports an indefinite extension of both the compliance and effective dates for part 460 pending development of new standards under part 460 and pending development of cost-effective testing, enforcement, and compliance criteria.[11] (MHARR at p. 4) MHARR stated that delay of the effective and compliance dates is essential because the standards cannot be complied with in their current form and enforcing the current part 460 without a set of adopted testing, enforcement, and compliance procedures would deprive manufacturers of due process rights. (MHARR at p. 5)

DOE agrees with the commenters that it is necessary to amend the compliance date for part 460. As noted in the March 2023 NOPR, DOE believes enforcement procedures will provide additional clarity to manufacturers and consumers regarding DOE's expectations of manufacturers and DOE's plans for enforcing the standards. Delaying the compliance date until after the enforcement procedures are issued provides manufacturers time to understand DOE's enforcement procedures and prepare their operations to ensure compliance with DOE's standards. Additionally, DOE will provide notice and opportunity for stakeholders to comment on its enforcement procedures in the rulemaking process to establish those procedures. As noted previously, DOE believes the compliance dates adopted in this final rule provide (1) time for DOE to develop enforcement procedures and engage in the rulemaking process necessary to codify those procedures, (2) clarity to manufacturers on when and how to comply, and (3) time for manufacturers to adjust their practices consistent with DOE's enforcement procedures. More specifically, DOE believes providing a set date for Tier 2 homes provides manufacturers with additional clarity on when compliance will be required so that manufacturers can build in the time necessary to make the adaptations to manufacturer processes required to implement the more stringent Tier 2 standards. Accordingly, DOE has finalized those compliance dates in part 460.

Skyline, Cavco, and MHI stated that DOE should allow for a longer compliance lead time after issuance of enforcement procedures given the vast design and process changes required by DOE's standards and the uncertainty regarding testing, compliance, and enforcement. (Skyline at p. 1, Cavco at p. 1, MHI at p. 2) MHI stated that, at present, manufacturers do not know what enforcement procedures will require, so they do not know whether the designs and processes created after May 2022 to attempt to comply with DOE's standards will comport with DOE's enforcement procedures, and that to date, DOE has provided no guidance on what enforcement procedures may require, so no work can be done to understand or apply them until they are made final. MHI further stated that, due to supply chain constraints, manufacturers may need to change designs or processes to comply with DOE's standards based on material availability and cost. (MHI at p. 10) Accordingly, Skyline, Cavco, and MHI stated that DOE should use a compliance lead time of 3 to 5 years after issuance of final enforcement procedures, like that typically seen in DOE's appliance energy efficiency standards, to permit the industry sufficient time to redesign floor plans, obtain approval from HUD for those designs, make capital improvements to manufacturing facilities, create new and different manufacturing processes, implement quality control procedures, and begin producing compliant homes. Skyline, Cavco, and MHI stated that, at minimum, DOE should provide a 1-year compliance lead time after issuance of enforcement procedures given that such procedures are likely to require manufacturers to start over with their efforts to comply with DOE's standards. (Skyline at p. 2, Cavco at p. 2, MHI at p. 9)

[3] DOE notes that it received letters from several state manufactured housing trade groups that contained similar substantive comments as the campaign form letters. DOE, therefore, addresses these state trade group letters in its responses to the Campaign Form Commenters. DOE received such letters from manufactured housing trade groups in the following states: Arizona, Alabama, Florida, Indiana, Michigan, Mississippi, Minnesota, Nevada, New Mexico, New York, Pennsylvania, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington (Northwest Housing Alliance), and Wisconsin.

[4] EERE–2009–BT–BC–0021–2562.

[5] EERE–2009–BT–BC–0021–2566.

[6] EERE–2009–BT–BC–0021–2181.

[7] EERE–2009–BT–BC–0021–2555.

[8] EERE–2009–BT–BC–0021–2568.

[9] EERE–2009–BT–BC–0021–2559.

[10] EERE–2009–BT–BC–0021–2570.

[11] EERE–2009–BT–BC–0021–2541.

DOE agrees that additional time after DOE issues enforcement procedures is appropriate for manufacturers, particularly for Tier 2 homes, and is therefore finalizing a compliance date of July 1, 2025, for Tier 2 homes. DOE notes that this date corresponds roughly to 3 years after the issuance of part 460.[12] DOE acknowledges that many manufacturers may need some time to adjust their practices to ensure homes are compliant with DOE's standards in a manner consistent with the forthcoming enforcement procedures. DOE disagrees that an extended period of 3 to 5 years after issuance of final enforcement procedures is necessary, as suggested by some commenters.[13] DOE believes that the compliance lead times in this final rule provide enough time for DOE to issue its enforcement procedures, while manufacturers begin modifying their practices to comply with DOE's standard. The compliance lead times also afford manufacturers time to gain a better understanding of DOE's enforcement process.[14] In addition, by setting a fixed date for compliance with Tier 2 standards, DOE is providing manufacturers with additional clarity, facilitating the ability of manufacturers to plan for the actions necessary to come into compliance with DOE's standards. Accordingly, DOE is finalizing a compliance date of July 1, 2025, for Tier 2 homes.

Twenty-one energy efficiency, environmental, and/or consumer advocate organizations filed joint comments (Joint Commenters) [15] in opposition to DOE's proposed amended compliance date, noting that the DOE standards are long overdue and the current energy efficiency standards for manufactured homes in the HUD Code are almost three decades old. (Joint Commenters at p. 1) Joint Commenters stated that DOE has the authority to enforce the standards now and that DOE gave no explanation in the March 2023 NOPR as to why a delay is necessary. (Joint Commenters at p. 1) Joint Commenters stated that, while the NOPR suggests the lack of a compliance program may reduce the consumer benefits, the NOPR also acknowledges that lack of a standard will remove the consumer benefits during the delay. Joint Commenters stated a possible, greater gain in energy savings with enforcement procedures does not excuse depriving many thousands of residents of needed energy savings. Joint Commenters further stated that manufacturers can meet the standard by May 31, 2023, especially since manufacturers have options for meeting the core envelope requirements. Joint Commenters noted that manufacturers have been preparing to meet the standard for almost a year, and have had many years of advance notice that a similar standard was coming. NEEA, separately, stated that the industry has been aware of the new efficiency target since August 26, 2021, and details since May 31, 2022, and conversations with NEEA partners indicate the industry can meet the requirements by May 31, 2023. (NEEA at p.1) Joint Commenters further noted that manufacturers are familiar with meeting the substantive requirements of the standards, and the many ENERGY STAR partners and participants in the NEEM+ program have experience building to efficiency levels similar to the DOE standards. Joint Commenters noted that DOE can address any immediate ambiguities or confusion with guidance and with appropriate flexibility until an enforcement procedures rule is complete, rather than delaying the compliance date. (Joint Commenters at p. 1–2)

Although DOE agrees with Joint Commenters that manufacturers have experience implementing efficiency measures similar to DOE's standards (*e.g.,* NEEM+, ENERGYSTAR, etc.) and some are capable of complying with the standards by May 31, 2023, DOE disagrees that additional time is unnecessary. While manufacturers may be able to comply with the standards now, manufacturers do not have a clear picture as to how DOE will evaluate compliance or address enforcement of noncompliance. As noted in the March 2023 NOPR, manufacturers need this clarity in order to ensure homes are compliant with DOE's standards in a manner consistent with DOE's expectations for compliance and enforcement. Manufacturers will need time to adjust their practices in accordance with DOE's forthcoming enforcement procedures to demonstrate compliance with the standards to minimize the potential for civil penalties due to noncompliance. Accordingly, DOE has determined that a delay of the compliance date until after promulgation of enforcement procedures is warranted. DOE did note in the March 2023 NOPR that some consumer benefits may be lost in delaying implementation of the standards. However, these benefits may not be fully realized if manufacturers do not fully comply with the amended standards and DOE lacks clarity on its enforcement processes. DOE believes that the absence of a clear, workable enforcement framework for manufacturers may jeopardize the full realization of the consumer benefits that will result from full implementation of the standards. Enforcement procedures provide the necessary backbone to help ensure the savings from the standard are fully realized.

Joint Commenters stated that if DOE decides it must delay the compliance date, it should set a new fixed date instead of an open-ended delay. Joint commenters stated that the open-ended delay DOE has proposed nullifies the Department's statutory duty to issue standards and that DOE has not offered any justification for proposing an open-ended delay as opposed to a delay of limited duration. Joint Commenters stated that a more limited delay would enable DOE to address the compliance issues that the Department claims warrant attention, while providing clearer guidance to all stakeholders regarding the path forward. (Joint Commenters at p. 2) Joint Commenters further stated that if DOE nonetheless delays the compliance date as proposed, compliance should be required shortly after the enforcement procedures are finalized. Joint Commenters stated that the compliance date delay following issuance of enforcement procedures

[12] Part 460 was issued on May 31, 2022, with an effective date of August 1, 2022.

[13] DOE notes that the statutory authority that applies to this rule (*i.e.,* EISA 2007) is not the same authority that applies to DOE's Appliance Standards Program (*i.e.,* the Energy Policy and Conservation Act), where DOE has established robust certification, compliance, and enforcement provisions. Therefore, any compliance and enforcement procedures pertaining to manufactured housing that are referenced in this rule or developed as part of the manufactured housing enforcement rulemaking have no relation DOE's Appliance Standards Program.

[14] For example, the Bipartisan Infrastructure Law (Pub. L. 117–58) and the Inflation Reduction Act (Pub. L. 117–369) provided incentives for various energy reduction measures in homes, including manufactured homes. *See e.g.,* sec. 40502 of Public Law 117–58 and sec. 13304 of Public Law 117–369. Over time, these incentives will help manufacturers transition to the Tier 2 standards as more homes are designed around the requirements of Tier 2 standards and other incentive programs that are similar to the Tier 2 standards.

[15] EERE–2009–BT–BC–0021–2567. The joint commenters include: American Council for an Energy-Efficient Economy, California Efficiency + Demand Management Council, Earthjustice, Elevate Innovations in Manufactured Homes (I'm HOME) Network, Institute for Energy and the Environment, Vermont Law and Graduate School, Institute for Market Transformation, National Association for State Community Services Programs, National Association of Energy Service Companies, National Association of State Energy Officials, National Housing Trust, Next Step Network, Northeast Energy Efficiency and Electrification Council, Northeast Energy Efficiency Partnerships, Northwest Energy Efficiency Alliance, Neighborhood Partnership Housing Services (NPHS), Natural Resources Defense Council, Responsible Energy Codes Alliance, Rewiring America, Sierra Club, and the Vermont Energy Investment Corporation (VEIC).

should be the same for Tier 2 homes as for Tier 1 homes (60 days). Joint Commenters state that DOE is not proposing to strengthen the standard or any changes to Tier 2, and DOE provides no explanation for the additional 120 days given for the compliance date for Tier 2 homes. (Joint Commenters at 2)

DOE disagrees with Joint Commenters that its proposed amended compliance date ''nullifies'' DOE's obligation to issue standards under EISA. The standards have been in effect since August 1, 2022. As noted in the March 2023 NOPR, manufacturers need clarity from DOE's forthcoming enforcement procedures in order to ensure homes comply with DOE's standards. Nevertheless, upon consideration of Joint Commenters' suggestion of a fixed date, DOE concludes that setting a fixed date for compliance with the Tier 2 home standards will provide added certainty to manufacturers, consumers, and other interested parties. It is imperative that DOE amend the compliance date to allow sufficient time for DOE to develop procedures, engage in the rulemaking process, and consider all necessary information and feedback obtained during the rulemaking to establish enforcement procedures. Additionally, as noted previously, manufacturers will need time to adjust their practices in accordance with DOE's forthcoming enforcement procedures to best ensure demonstrable compliance with the standards while minimizing the potential for civil penalties due to noncompliance. Accordingly, DOE has determined that the delay of the compliance dates adopted in this final rule is warranted. With respect to the difference between the compliance dates for Tier 1 and Tier 2 homes, DOE recognizes that it did not fully explain this distinction in the NOPR, but does so now. DOE has determined that additional time is necessary for manufacturers to make adjustments to their operations and practices to ensure compliance with the Tier 2 standards because the Tier 2 standards are inherently more energy efficient than the Tier 1 standards. In addition, by establishing a fixed date for Tier 2, manufacturers will have a greater ability to plan for the adjustments needed to achieve compliance as compared to an indeterminate future date, thus maximizing the probability of full compliance with the more stringent Tier 2 standards. Accordingly, DOE is implementing the July 1, 2025, compliance date for Tier 2 homes in this final rule.

Need for Enforcement Procedures

Campaign Form Commenters stated that the industry must be given a sufficient time to respond to DOE's proposed enforcement procedures with their feedback and concerns, and that DOE must seriously consider the recommendations provided by the industry and address these concerns in its final rule to ensure that DOE's enforcement procedures are feasible and support the continued production of affordable manufactured homes. Hemminger stated that it would be hard to comply with the current DOE standards in part 460 since the details are not laid out as to what needs done, by whom, or penalties that may be applied for not complying. (Hemminger at p. 1) Hemminger stated that if the DOE standards are reviewed and clarified, then manufacturers, their vendors, and inspection agencies would clearly know what is expected. (Hemminger at p. 2) Hemminger also stated that the entire network of people who produce, sell, deliver, install, inspect, and finance these homes need to know what is expected of them, and that in return potential homeowners will be able to decide whether or not they will be able to afford a home. Hemminger concluded by stating that everyone needs to be confident that homes being sold are fully compliant and customers need to be sure that they will not receive a notice of violation as well. (Hemminger at p. 2)

Skyline, Cavco, and MHI supported DOE's proposal to amend the compliance date to afford DOE additional time to establish enforcement procedures so that the benefits of DOE's standards can be fully realized. (Skyline at p. 1, Cavco at p. 1, MHI at 1) Skyline, Cavco, and MHI stated that DOE should create testing, compliance, and enforcement procedures that protect manufacturers from a vague and incalculable civil penalty, as well as potential civil liability. These commenters stated that EISA allows for a civil penalty of ''1 percent of the manufacturer's retail list price of the manufactured housing'' for violations of DOE's standards but that manufacturers generally do not create a ''retail list price,'' and that term is not recognized in the manufactured housing industry. (Skyline at p. 1–2, Cavco at p. 1–2, MHI at 3–4) MHI stated that enforcement procedures could help clarify what it stated are issues with DOE's current standards, such as manufacturers being unable to use certain components (*e.g.,* windows) in certain climate zones necessary to meet part 460, or potential conflicts with implementing the DOE standard and the HUD Code, particularly regarding furnace sizing requirements. (MHI at p. 4–5)

Joint Commenters stated that DOE should develop enforcement procedures as soon as possible. Joint Commenters stated that since HUD has not been able to incorporate the DOE standard in a timely way, and since its advisory committee (the Manufactured Housing Consensus Committee or ''MHCC'') has recommended that HUD not adopt the DOE standard but instead develop a weaker standard, DOE cannot at this point simply rely on HUD to ensure compliance. Instead, Joint Commenters stated that DOE should develop procedures to improve compliance in case HUD fails to incorporate the DOE standard, as a backup enforcement mechanism, and to provide compliance tools and facilitate measurement of compliance. DOE also should consider whether finalizing the test procedures that were issued as a draft in 2016 would add further clarity and improve compliance. (Joint Commenters at p. 2)

DOE agrees with commenters that enforcement procedures are necessary to provide clarity to manufacturers to ensure compliance with DOE's standards and the full realization of benefits of DOE's standards. Regarding specific issues raised by commenters for DOE to address in its enforcement procedures, DOE will consider these comments in its rulemaking to establish those procedures. DOE intends to engage in the rulemaking process in the coming months to establish enforcement procedures for part 460. As noted previously, DOE is adopting the compliance dates in this final rule to ensure that DOE has sufficient time to develop enforcement procedures, engage in the rulemaking process, and fully consider stakeholder feedback on the enforcement procedures. DOE encourages commenters to participate in that rulemaking and provide feedback to the Department.

DOE's 2021–2022 Rulemaking for Part 460

In addition to comments on DOE's proposal to amend the compliance date of part 460, commenters also commented on the standards of part 460, generally, and DOE's rulemaking to establish those standards (summarized in section I). Campaign Form Commenters stated that, while they support and commend DOE's decision to amend the compliance date to allow more time to establish enforcement procedures, DOE's proposal to amend the compliance date does not address the underlying concerns of the industry regarding DOE's standards. Campaign

Form Commenters stated that the standards did not take into consideration current construction methods and transportation requirements for manufactured homes, and that the standards were developed based on site-based construction standards and applied to a performance-based national code. Campaign Form Commenters further stated that, as the Nation's only form of unsubsidized affordable housing, the costs associated with the DOE's energy standards will increase the costs of manufactured homes, at a time when affordable housing is in high demand, and deprive many low-income and minority homebuyers the dream of homeownership. Hemminger stated that engineers may be required to redesign homes by changing roof systems, wall systems, floor systems, heat systems, carriers, and installer requirements to comply with the regulation, and that all of these will affect the prices that consumers will have to pay. Hemminger further stated that when comparing the cost versus value, the customer will not be able to save enough money over the time that they own their home to cover the additional purchase cost and financing needed, and if that is the situation, there will be fewer people that will be able to purchase a compliant home. (Hemminger at p. 2)

MHARR stated that, regardless of any delay of the compliance date, DOE's manufactured housing energy conservation standards should be withdrawn and redone because they would be destructive of the manufactured housing industry and the availability of affordable homeownership for lower and moderate-income Americans. (MHARR at p. 8) MHARR stated that the lack of enforcement and compliance procedures in current part 460 is proof of the inadequacy of DOE's rulemaking. (MHARR at p. 7) MHARR stated that no amount of delay or modification can remedy DOE's failure to abide by EISA's cost-effectiveness and HUD-coordination requirements in the rulemaking process, and that the failure to abide by EISA's requirements makes the standards of part 460 and any action to modify such standards invalid, arbitrary, and not in accordance with applicable law. (MHARR at p. 8) L.A. ''Tony'' Kovach [16] similarly stated that part 460 should be scrapped and redone, and that the standards are not cost-effective due to their effects on affordability. L.A. ''Tony'' Kovach also noted concerns of small manufacturers' ability to comply with DOE's standards and the role of such manufacturers, and larger manufacturers, in the rulemaking process.

Senator Tim Scott, Ranking Member of the Senate Committee on Banking, Housing and Urban Affairs (Senator Scott),[17] expressed concern that DOE's standards unnecessarily limit consumer choices and raise costs for families seeking affordable homeownership opportunities, stating that DOE expressly ignored the cost of testing, compliance, and enforcement in its part 460 rulemaking, which conflicts with EISA's requirement for DOE to consider cost-effective standards for manufactured homes. (Senator Scott at p. 1–2) Senator Scott stated that DOE's standards are overly broad, unduly burdensome, and undermine commonsense efforts to increase supply and assist families looking for affordable housing opportunities, and that DOE should delay the compliance date and consider withdrawing part 460 to incorporate appropriate modifications in consultation with HUD and the MHCC. (Senator Scott at p. 2)

Skyline, Cavco, and MHI stated that the failure of DOE to consider the cost of testing, compliance, and enforcement renders DOE's cost-effectiveness analysis for part 460 incomplete and inaccurate, and that DOE used flawed assumptions regarding increases in component part prices and interest rates in its analysis. Skyline, Cavco, and MHI stated that DOE should implement the delay rule not only to create testing, compliance, and enforcement provisions, but also to reconsider its cost analysis. Skyline, Cavco, and MHI further stated that DOE's current standards will price tens of thousands of homebuyers out of homeownership and cause them to remain in housing that is less energy efficient than today's manufactured homes, and that even modest purchase price increases disproportionately impact manufactured home purchasers who typically have incomes far below the national average. (Skyline at p. 2, Cavco at p. 2, MHI at p. 1–3) Skyline, Cavco, and MHI also stated that DOE should use the delayed compliance date to resolve its failure to adequately consult with HUD during the rulemaking for part 460, and that DOE should consult with HUD and the MHCC now to make modifications or additions to the standards. (Skyline at p. 2, Cavco at p. 2, MHI at p. 5)

MHI stated that requirements of DOE's standards are unworkable. More specifically, MHI stated that § 460.205's requirement to use Air Conditioning Contractors of America (ACCA) Manuals J and S creates an unworkable conflict with the HUD code and that there are currently no furnaces available that are both rated for use under the HUD Code and that comply with part 460. (MHI at p. 4) MHI further stated that windows with solar heat gain coefficient (SHGC) values required by part 460 cannot be used in homes above certain elevation, that the *Uo* performance requirements of Tier 2 would require removal of all windows in climate zone 3 homes (in violation of the HUD Code), and that the R–21 insulation necessary to comply with DOE's standards has never been implemented in manufactured homes. (MHI at p. 4–5) MHI stated that DOE should amend the compliance date of part 460 to also reconsider its cost-effectiveness analysis in the May 2022 Final Rule, particularly in light of recent market downturns. (MHI at p. 8) Kit HomeBuilders raised several questions regarding implementation of the standards with regard to sizing requirements under ACCA Manuals J and S, and insulation requirements. More specifically, Kit HomeBuilders stated that requirements of part 460 could force homebuyers to a more expensive foundation design that goes below frost depth which consists of more site preparation, form work, and concrete and material, and that the ACCA Manuals J and S requirements of part 460 would require additional software and cost and could be problematic for homes sold as lot models, dealer stock, and/or ''spec homes.'' Kit HomeBuilders stated that the current HUD heat-loss calculation method along with the new code updates would achieve the same, if not a better, scenario for HUD homes since the calculation would not be held up by site criteria while also providing furnace certification and economy temperatures as currently required.

DOE's only proposal in this rulemaking is whether to amend the compliance date of part 460. Therefore, comments regarding the substance of the May 2022 Final Rule, including the standards adopted by DOE and the rationale DOE offered in support of its decision, are out of the scope of the current rulemaking action. Nevertheless, DOE notes that it addressed many of the concerns raised by these commenters in the May 2022 Final Rule. Pursuant to EISA, DOE based its standards on the latest version of the IECC and performed a life-cycle cost-effectiveness analysis of its standards, which DOE determined to be cost-effective. *See e.g.,* 87 FR 32735, 32742. As part of its analysis, DOE considered the design and factory construction techniques of

[16] EERE–2009–BT–BC–0021–2517.

[17] EERE–2009–BT–BC–0021–2564.

manufactured homes, transportation issues, and potential need for redesign of manufactured homes. *See e.g.,* 87 FR 32764, 32767, 32772–73, 32790. These considerations were informed by the rulemaking working group negotiations and term sheet, as well as comments on the 2021 SNOPR and NODA. 87 FR 32742, 32749. DOE notes that it utilized feedback from consultations with HUD, as well as stakeholder comments, to address affordability concerns, which led to the tiered approach in part 460. *See e.g.,* 87 FR 32743–32745, 32756. Although DOE does not agree with the commenters' assertions regarding the substance of the May 2022 Final Rule, this disagreement does not affect DOE's determination with respect to the limited proposal at issue in this rulemaking. DOE concludes, after reviewing all submitted comments, that manufacturers and purchasers would benefit from additional clarity on DOE's procedures for ensuring compliance with its standards in the May 2022 Final Rule, which DOE will develop in a forthcoming enforcement procedures action.

Alignment With the HUD Code

The Arkansas Department of Labor and Licensing (ADLL) stated that it is responsible for enforcing the HUD Code in Arkansas, the authority for which is derived from the HUD process set for at 24 CFR 3282.301 through 3282.309. ADLL stated that it has received numerous inquiries from the industry, regulators, and lawmakers as to the impact of DOE's manufactured housing standards, stating that DOE's standards have caused substantial confusion in Arkansas given the conflicts between DOE's standards and the HUD Code.[18] (ADLL at p. 1) ADLL stated that this confusion is likely to continue until DOE's standards are aligned with the HUD Code. ADLL stated its understanding that any increase in energy efficiency requirement for manufactured homes would have to be set forth in the HUD Code to be enforced through ADLL, and that DOE should delay the compliance date of part 460 until such time as DOE can work with HUD to adopt any increased energy efficiency requirements into the HUD Code. (ADLL at p. 1–2)

Kit HomeBuilders stated its belief that HUD should be an integral part of incorporating DOE's standards into the HUD Code, while working with the industry on how this can be accomplished, which would benefit the industry by allowing HUD and its stakeholders the opportunity to work together on how requirements can be met and enforced. Senator Scott stated that any effort by DOE to develop standards should not undermine HUD's long-established requirements but must complement existing requirements to ensure appropriate consideration of the affordability and availability of such housing choices for consumers. (Senator Scott at p. 2) Skyline and Cavco commented that DOE's standards set forth several requirements that conflict with the HUD Code and ignore current component supply challenges and realities of manufactured home construction. Skyline and Cavco stated that, while these conflicts and challenges should be resolved through substantive rulemaking, some of them could potentially be resolved through testing, compliance, and enforcement, and that DOE should delay the compliance date for part 460 to attempt to resolve these conflicts and challenges through testing, compliance, and enforcement. (Skyline at p. 2, Cavco at p. 2)

MHI commented that DOE should consult with HUD and the MHCC for additions or modifications to DOE's standards. MHI stated that the MHCC refused to recommend wholesale adoption of DOE's standards into the HUD Code, preferring a more incremental approach, to preserve home affordability, and particularly noted that the MHCC determined that DOE circumvented the standards development process prescribed in EISA which requires cost justification and consultation with HUD. (MHI at p. 5–6) MHI stated that the MHCC's recommended changes to the HUD Code allow for testing, enforcement, and regulatory compliance within HUD's existing framework, which helps minimize costs to manufacturers and ultimately consumers, but that there still may be a gap in enforcement between HUD's final standards and DOE's final standards, which may need to be resolved. MHI commented that should HUD adopt the MHCC recommendations into the HUD code, manufacturers will be subject to two sets of conflicting regulations. MHI stated that HUD and DOE should consider engaging in joint rulemaking to ensure that the HUD Code and Energy rule are fully aligned, and that there is precedent for such joint rulemaking as HUD and the Department of Transportation engaged in similar joint rulemaking for manufactured home transportation standards. (MHI at p. 7–8)

Joint Commenters stated that DOE should assist HUD to incorporate the DOE standard into the HUD Code as soon as possible. Joint Commenters stated that having two different energy standards for manufactured homes does not benefit anyone, and applying HUD's compliance procedures would improve compliance and achieve greater energy savings. Joint Commenters stated that, to the extent possible, the DOE standard should be incorporated by reference into the HUD Code so that future updates of the DOE standard do not again lead to different standards and long delays. (Joint Commenters at p. 2) NEEA commented that the HUD design and inspection process for manufactured homes could be easily modified to achieve equivalent energy efficiency performance, and that DOE could provide validation of equivalence where DOE's language or approach differs and is more in line with HUD enforcement standard practice. NEEA also stated that the most significant challenges manufacturers face can be addressed if DOE would provide HUD with a crosswalk of equivalent energy efficiency. NEEA provided specific recommendations for four sections of the HUD Code that if used should be equivalent to the DOE standard: 24 CFR 3280.103 (light and ventilation), 3280.505 (air infiltration), 3280.506 (heat loss/heat gain), and 3280.715 (circulating air systems). (NEEA at p. 2–3)

As stated previously, DOE's only proposed action in this rulemaking is whether to amend the compliance date of part 460. Therefore, comments regarding potential future collaboration or rulemaking with HUD regarding DOE's standards and/or the HUD Code are outside the scope of the current rulemaking action. However, DOE notes that it addressed a number of the concerns raised by these commenters in the May 2022 Final Rule. As noted in that rule, DOE consulted with HUD in establishing its efficiency standards for manufactured homes. *See e.g.,* 87 FR 32736, 32742. Moreover, DOE made efforts to ensure that its standards would not prevent a manufacturer from complying with the requirements, including energy conservation requirements, set forth in the HUD Code at the time of that rulemaking. *See e.g.,* 87 FR 32736. Additionally, DOE provided a crosswalk of its standards and the relevant standards in the HUD Code to demonstrate how DOE's standards interact with the HUD Code. *See e.g.,* 87 FR 32782. Nevertheless, DOE agrees with commenters that enforcement procedures are necessary and will help provide clarity to manufacturers to ensure compliance with DOE's standards and provide

[18] EERE–2009–BT–BC–0021–2520.

expectations for DOE enforcement. Regarding specific issues raised by commenters for DOE to address in its enforcement procedures or with HUD, DOE will consider these comments while establishing those procedures. DOE intends to engage in the rulemaking process in the coming months to establish enforcement procedures for part 460. DOE encourages commenters to participate in that rulemaking and provide feedback to the Department to establish enforcement procedures that address the concerns of all stakeholders.

*B. Final Rule*

Based on the foregoing, under its authority to establish energy conservation standards for manufactured housing (42 U.S.C. 17071), DOE amends the compliance date for the manufactured housing energy conservation standards in 10 CFR part 460 until 60-days after promulgation of DOE's forthcoming enforcement procedures for Tier 1 homes, and until July 1, 2025, for Tier 2 homes. With respect to the requirements of subpart C of part 460, DOE requires compliance with those provisions beginning 60 days after publication of its final enforcement procedures for Tier 1 homes, and beginning July 1, 2025, for Tier 2 homes. Importantly, DOE has made minor changes to the regulatory text of § 460.1 from that which was proposed in the March 2023 NOPR, including the reservation of a new subpart D of part 460, which will contain DOE's forthcoming enforcement procedures. Upon issuance of DOE's enforcement procedures in subpart D, DOE will update the compliance date for Tier 1 homes in § 460.1 to state the specific calendar date by which manufacturers must comply once that date is known.

As noted in the March 2023 NOPR, DOE believes enforcement procedures will provide additional clarity to manufacturers and consumers regarding DOE's expectations of manufacturers and DOE's plans for enforcing the standards. Delaying the compliance date until after the enforcement procedures are issued provides manufacturers time to understand DOE's enforcement procedures and adjust their operations to ensure compliance with DOE's standards. DOE acknowledges that some of the consumer benefits (*e.g.,* cost savings) provided by DOE's standards will not be realized during the delay period. However, these benefits may not be fully realized in the absence of a delay if manufacturers lack clarity on what to expect from DOE's enforcement of such standards. DOE believes that the absence of a clear, workable enforcement framework for manufacturers jeopardizes the full realization of the consumer benefits that will result from full implementation of the standards. Amending the compliance date is therefore necessary to ensure the realization of the consumer benefits of DOE's standards. DOE believes the July 1, 2025, compliance date for Tier 2 provides manufacturers with additional clarity to plan for and make adjustments to their operations, consistent with DOE's enforcement procedures.

Accordingly, DOE delays the May 31, 2023, compliance date for the standards of 10 CFR part 460 until 60 days after DOE's publication of its final enforcement procedures for the Tier 1 standards, and until July 1, 2025, for the Tier 2 standards.

## IV. Administrative Procedure Act

The Administrative Procedure Act requires that publication of a rule be made not less than 30 days before its effective date, except as otherwise provided by the agency for good cause. 5 U.S.C. 553(d)(3). An explanation of this good cause must be included with the rule. *Id.* DOE has found good cause to dispense with this 30-day period required by the Administrative Procedure Act to make this final rule effective upon publication in the **Federal Register**. As discussed previously, amending the compliance date is necessary because DOE has yet to publish enforcement procedures for part 460. Enforcement procedures will provide additional clarity to manufacturers and consumers regarding DOE's expectations of manufacturers and DOE's plans for enforcing the standards. Delaying the compliance date until after the enforcement procedures are effective provides manufacturers time to understand DOE's enforcement procedures and prepare their operations to ensure compliance with DOE's standards.

Given the immediacy of the May 31, 2023, compliance date currently prescribed, DOE finds good cause to make this rule delaying that date effective on publication. 5 U.S.C. 553(d)(3). This will prevent a problematic scenario in which, after May 31, 2023, manufacturers would need to comply with the standards—without the benefit of relevant enforcement procedures—only to have the compliance date delayed weeks later. Moreover, this prevents manufacturers from being subject to legal actions (from DOE or otherwise) for potential noncompliance with DOE's standards in this period. DOE believes the need for immediate effect of this final rule to avoid these scenarios exceeds the need for persons affected by DOE's standards to have 30 days to prepare for amendment of the compliance date given that there is little (if any) burden to prepare for the amended compliance date of this rule. Rather, manufacturers will be able to continue working towards compliance with the standards (with the benefit of eventual DOE enforcement procedures) without facing a need to comply with DOE's standards for a matter of weeks before the amended compliance date takes effect. Accordingly, by making this final rule effective immediately, DOE is providing manufacturers with certainty that they need not comply with part 460 until after DOE issues enforcement procedures that will provide clarity for manufacturers' compliance with the standards.

Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this final rule before its effective date. The report will state that it has been determined that this final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

## V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

**List of Subjects in 10 CFR Part 460**

Administrative practice and procedure, Buildings and facilities, Energy conservation, Housing standards, Reporting and recordkeeping requirements.

**Signing Authority**

This document of the Department of Energy was signed on May 19, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 19, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

For the reasons stated in the preamble, DOE amends part 460 of chapter II of title 10, Code of Federal Regulations as set forth below:

## PART 460—ENERGY CONSERVATION STANDARDS FOR MANUFACTURED HOMES

■ 1. The authority citation for part 460 continues to read as follows:

**Authority:** 42 U.S.C. 17071; 42 U.S.C. 7101 *et seq.*

■ 2. Revise § 460.1 to read as follows:

### § 460.1 Scope.

This subpart establishes energy conservation standards for manufactured homes as manufactured at the factory, prior to distribution in commerce for sale or installation in the field. Manufacturers must apply the requirements of this part to a manufactured home subject to § 460.4(b) that is manufactured on or after 60 days after publication of final enforcement procedures for this part. DOE will amend this section to include the specific compliance date, once known. Manufacturers must apply the requirements of this part to a manufactured home subject to § 460.4(c) that is manufactured on or after July 1, 2025.

## Subpart D—[Added and Reserved]

■ 3. Add reserved subpart D.

[FR Doc. 2023–11043 Filed 5–26–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

## 10 CFR Part 609

**RIN 1901–AB59**

## Loan Guarantees for Clean Energy Projects

**AGENCY:** Loan Programs Office, Department of Energy.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** The Department of Energy (''DOE'') issues this interim final rule (''IFR'') amending the regulations implementing the loan guarantee provisions in Title XVII of the Energy Policy Act of 2005 (''Title XVII'') to implement provisions of the Inflation Reduction Act of 2022 (''IRA'') that expand or modify the authorities applicable to the Title XVII Loan Guarantee Program. Specifically, this IFR: establishes regulations necessary to implement the Energy Implementation Reinvestment (''EIR'') Program and other categories of projects authorized by the IRA for Title XVII loan guarantees; revises provisions directly related to DOE's implementation of the Title XVII Loan Guarantee Program as expanded by the IRA; amends provisions to conform with the broader changes to the Title XVII Loan Guarantee Program; and revises certain sections for clarity and organization. DOE is issuing an IFR due to the urgency to implement an additional potential $290 billion of loan authority for loan guarantees prior to the loan guarantee authority expiration in 2026 and to provide the opportunity for all eligible projects to seek loan guarantees under the new IRA provisions. The amendments in this IFR also facilitate the increased volume of applications resulting from the new authorities and funding in the IRA and provide efficiencies in the loan processing.

**DATES:** This IFR is effective May 30, 2023. DOE will accept comments, data, and information regarding this IFR no later than July 31, 2023.

**ADDRESSES:** Interested persons may submit comments, identified by RIN 1901–AB59, by any of the following methods:

*Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.

*Electronic Mail* (*Email): LPO.IFR@hq.doe.gov.* Include the RIN 1901–AB59 in the subject line of the message.

*Postal Mail:* Loan Programs Office, Attn: LPO Legal Department, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585–0121. Please submit one signed original paper copy. Due to potential delays in DOE's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

*Hand Delivery/Courier:* U.S. Department of Energy, Room 4B–122, 1000 Independence Avenue SW, Washington, DC 20585.

No telefacsimiles (faxes) will be accepted. For detailed instructions on submitting comments and additional information on the rulemaking process, see section IV of this document, *Public Participation.*

*Docket:* The docket, which includes **Federal Register** notices, comments, and other supporting documents and materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, some documents listed in the index, such as those containing information that is exempt from public disclosure, may not be publicly available. The docket web page can be found at the *www.regulations.gov* web page associated with RIN 1901–AB59. The docket web page contains simple instructions on how to access all documents, including public comments, in the docket. See section IV of this document, *Public Participation,* for information on how to submit comments through *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Steven Westhoff, Attorney-Adviser, Loan Programs Office, email: *LPO.IFR@hq.doe.gov,* or phone: (240) 220–4994.

**SUPPLEMENTARY INFORMATION:**

### Table of Contents



## I. Introduction

### *A. Inflation Reduction Act*

The Inflation Reduction Act of 2022 (''IRA'') [1] makes the single largest investment in climate and energy in American history, enabling the United States to tackle the climate crisis, advancing environmental justice, securing the nation's position as a world

[1] Public Law 117–169 (2022).

leader in domestic clean energy manufacturing, and putting the United States on a pathway to achieving the President's climate goals, including a net-zero economy by 2050. Within its energy and climate provisions, the IRA appropriates approximately $8.6 billion in credit subsidy and provides loan authority of up to $290 billion in total principal total for the Department of Energy's (''DOE'') Loan Programs Office (''LPO'') programs administered under Title XVII of the Energy Policy Act of 2005 (''Title XVII'').[2] The IRA provisions increase the authority to guarantee loans under section 1703 of Title XVII (''section 1703'') [3] by $40 billion in total principal. The IRA also added a new loan guarantee program, the Energy Infrastructure Reinvestment (''EIR'') Program, under section 1706 of Title XVII (''section 1706''),[4] to help retool, repower, repurpose, or replace energy infrastructure that has ceased operations or to enable operating energy infrastructure to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases. The IRA authorizes the Secretary of Energy (''Secretary'') to guarantee loans up to a total principal amount of $250 billion for the EIR Program. The Infrastructure Investment and Jobs Act (''IIJA'') amended Title XVII to authorize the Secretary to issue loan guarantees for new categories of projects under section 1703, including projects involving critical minerals processing, manufacturing, or recycling, as well as projects that do not fulfill the innovation requirement but are receiving financial support or credit enhancements from a State energy financing institution.[5] The loan authority and appropriations for section 1703 projects contained in the IRA enabled the Secretary to offer loan guarantees for these types of projects for the first time, as the IIJA provisions prohibited the use of previously appropriated funds for those types of loan guarantees.[6]

The loan authority and related appropriations for the credit subsidy costs of loan guarantees under sections 1703 and 1706 made available under the IRA are available through September 30, 2026. In order to fully implement the Title XVII Loan Guarantee Program as modified by the IRA and IIJA in a timely manner, DOE is revising 10 CFR part 609 (''part 609'') through this interim final rule (''IFR''). The IFR facilitates the submission of applications to DOE for the broader array of projects eligible for Title XVII loan guarantees following the enactment of the IRA and improves the application process for parties considering applying for loan guarantees.[7] The impact of the IRA on the interest in DOE's loan programs, including the Title XVII program, has been substantial. DOE has seen an increase from 61 to 111 active applications for loans and loan guarantees to the Loan Programs Office for Title XVII loan guarantees from August 1, 2022, through April 30, 2023, representing an increase in approximately $30.1 billion of new loan requests.[8]

### *B. Part 609 Background*

Title XVII, as amended, provides the Secretary the authority to issue loan guarantees for certain eligible projects, including innovative clean energy projects and energy infrastructure reinvestment projects.[9] DOE has administered the Title XVII Loan Guarantee Program pursuant to its regulations set forth at part 609, as required by the authorizing statute.[10] DOE has historically provided additional guidance to applicants and established requirements applicable to the Title XVII Loan Guarantee Program in the solicitations for loan guarantee applications, which are issued and updated from time to time. Part 609 sets forth the policies and procedures that DOE uses for the application process, which includes receiving, evaluating, and approving applications for loan guarantees to support eligible projects under Title XVII.[11] Part 609 applies to all applications, conditional commitments, and loan guarantee agreements under the Title XVII Loan Guarantee Program and provides specific guidance to program applicants regarding eligibility for the program, the loan guarantee application process and requirements, criteria for DOE's evaluation of applications, and the process for negotiation and execution of a loan guarantee agreement term sheet, conditional commitment, and loan guarantee agreement. Part 609 also describes the terms applicable to the loan guarantee.

Following DOE's issuance of initial guidelines and an initial solicitation for pre-applications for the program in 2006, DOE promulgated the original part 609 to implement and issue loan guarantees under the program in 2007.[12] In 2009, DOE amended part 609 to accommodate additional flexibility regarding liens and other collateral utilized for securing guaranteed loans.[13] DOE subsequently amended part 609 in 2011 to address the submission and treatment of trade secrets and other privileged commercial or financial information [14] and in 2012 to incorporate certain statutory changes to section 1702 of Title XVII [15] related to payment of credit subsidy costs.[16] In 2016, DOE promulgated additional amendments to part 609 to provide increased clarity and transparency, reduce paperwork, and provide a more workable interpretation of certain statutory provisions in light of DOE's experience with operation of the Title XVII program.[17] These amendments included removing a pre-application process and adopting a Part I and Part II application process, clarifying certain application limitations on technologies and locations, implementing the Risk-Based Charge, and a number of additional changes. In 2021, DOE amended part 609 to incorporate directives from Executive Order 13953 to clarify the eligibility of projects related to ''Critical Minerals,'' ''Critical Minerals Production,'' and related activities.[18]

## II. Discussion

This IFR establishes regulations necessary to implement the EIR Program

[2] Public Law 109–58, title XVII (2005), as amended; 42 U.S.C. 16511 *et seq.*

[3] 42 U.S.C. 16513.

[4] 42 U.S.C. 16517, as added by Public Law 117–169, sec. 50144(c) (2022).

[5] Public Law 117–169, sec. 50141 (2022). See also section II.A.1 of this document, *Section 1703 Clean Energy Projects.*

[6] DOE notes that this prohibition was eliminated by the amendments to the IIJA set forth in the Consolidated Appropriations Act, 2023 (Pub. L. 117–328).

[7] On June 1, 2022, prior to passage of the IRA, DOE issued a request for information (''RFI'') seeking comments from all interested parties regarding the implementation of the Energy Act of 2020 (Pub. L. 116–260, Div. Z (2020)) and the Infrastructure Investment and Jobs Act (''IIJA''; Pub. L. 117–58 (2021)), as well as other Title XVII program improvements. 87 FR 33141 (June 1, 2022); comment period extended through 87 FR 39081 (June 30, 2022). Aspects of this IFR address some of the topics covered in the RFI regarding implementation of Energy Act of 2020 and IIJA as those topics relate to amendments made by the IRA to the Title XVII program. DOE considered comments received on the June 1, 2022 RFI in addressing those topics in this IFR. Topics in the RFI, Energy Act of 2020, or IIJA not addressed by this IFR may be addressed by DOE in updated guidance of the Title XVII program, or in a subsequent rulemaking action. DOE will consider the comments received on the June 1, 2022 RFI in any future action.

[8] Source: *https://www.energy.gov/lpo/monthly-application-activity-report.*

[9] Public Law 109–58, title XVII (2005), as amended; 42 U.S.C. 16511 *et seq.*

[10] 42 U.S.C. 16515(b), (d).

[11] Public Law 109–58, title XVII (2005), as amended; 42 U.S.C. 16511 *et seq.*

[12] 72 FR 60116 (October 23, 2007).

[13] 74 FR 63544 (December 4, 2009).

[14] 76 FR 26579 (May 9, 2011).

[15] 42 U.S.C. 16512.

[16] 77 FR 29853 (May 21, 2012).

[17] 81 FR 90699 (December 15, 2016).

[18] 86 FR 3747 (Jan. 15, 2021).

authorized under section 1706 and other categories of projects made eligible for Title XVII loan guarantees by the IRA and revises provisions directly related to DOE's implementation of the Title XVII Loan Guarantee Program as expanded by the IRA and IIJA. The IFR retains those provisions of part 609 that are not impacted by DOE's plans for implementing the expanded Title XVII Loan Guarantee Program, which remain in full force and effect. In addition, the IFR makes other associated amendments to conform with the broader changes to part 609 to address the IRA, IIJA, and Energy Act of 2020 amendments.

Through publication of this IFR, DOE is also providing a comment period until July 31, 2023. Comments submitted during this period will be reviewed, and a final rule, responding to those comments as well as reflecting the experience DOE gains in implementing this IFR, will be issued at a later date.

*A. Expansion of Eligible Projects*

1. Section 1703 Clean Energy Projects

Under section 1703, DOE is authorized to support innovative energy projects that fall into one or more of the 13 categories specified in section 1703(b). With additional authority to guarantee up to a total principal amount of $40 billion provided by the IRA, DOE is ensuring that part 609 explicitly describes all categories of statutorily eligible projects to provide certainty to potential loan guarantee applicants regarding their ability to access the program. In the IFR, DOE provides that eligible projects under section 1703 include both innovative energy projects and innovative supply chain projects. (*See* 10 CFR 609.3(b), (c)). DOE has determined that supply chain projects that manufacture a product with an end-use set forth in section 1703(b) of Title XVII and that either (i) deploy a New or Significantly Improved Technology in the manufacturing process; or (ii) manufacture a product that represents a New or Significantly Improved Technology satisfy Title XVII's innovation requirement, as those projects deploy innovation within the scope of the DOE-funded project. In addition, the IFR includes eligibility requirements for projects seeking loan guarantees under section 1703 that receive financial support or credit enhancements from State energy financing institutions, providing that such projects are not required to satisfy Title XVII's innovation requirement in order to be determined eligible under the program.[19] (*See* 10 CFR 609.3(d)). The IIJA amended Title XVII to allow the issuance of loan guarantees to projects receiving this type of support from State energy financing institutions.[20] However, the IIJA also provided that DOE could not utilize amounts appropriated prior to the enactment of the IIJA for the cost of loan guarantees receiving support from State energy financing institutions, meaning that the IRA loan authority provided DOE with its first opportunity to offer loan guarantees to this type of project.[21]

Finally, the IRA enabled DOE to offer loan guarantees to projects that increase the domestically produced supply of critical minerals [22] by providing appropriations and loan authority for such projects. Similar to the State energy financing institution IIJA amendment, the IIJA's addition of critical minerals projects to the categories of projects eligible for Title XVII loan guarantees was coupled with a prohibition on the use of previously appropriated funds and commitment authority for those projects.[23] The enactment of the IRA and its authorization of additional Title XVII loan guarantee authority and appropriations allowed DOE to support critical minerals projects under Title XVII for the first time.

2. Energy Infrastructure Reinvestment Program

The IRA creates the new EIR Program under section 1706 to guarantee loans to projects that retool, repower, repurpose, or replace energy infrastructure that has ceased operations, or enable operating energy infrastructure to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases. The IRA appropriates $5 billion through September 30, 2026, to carry out the EIR Program, with a limitation on commitments to guarantee loans the total principal amount of which is not greater than $250 billion.[24]

Potential projects could include repurposing shuttered fossil energy facilities for clean energy production, retooling infrastructure from power plants that have ceased operations for new clean energy uses, or updating operating energy infrastructure with emissions control technologies, including carbon capture, utilization, and storage (''CCUS''). EIR could also support the transition of an oil or gas pipeline or refinery into a clean energy project, such as clean hydrogen or carbon dioxide transportation infrastructure. While the EIR Program does not have the same requirements as section 1703 loan guarantees with respect to projects utilizing innovative technology, all EIR projects are required to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases.

Since the passage of the IRA, DOE has engaged in significant stakeholder outreach, participating in over 11 listening sessions regarding EIR that have convened over 75 organizations and over 162 participants. A repeated comment received in the listening sessions is the need for DOE to provide additional clarity regarding the eligibility requirements and application process for EIR projects, including through updates to part 609.

The IFR includes provisions expanding the rule to describe the eligibility requirements for Title XVII loan guarantees for the categories of projects described in section 1706 and includes such projects as ''Eligible Projects'' for the purposes of the Title XVII Loan Guarantee Program. (*See* 10 CFR 609.3(e)).

*B. Approach to Title XVII Applications and Program Guidance*

The cumulative effect of the amendments to the Title XVII Loan Guarantee Program enacted through the IRA and provision of appropriations and loan authority under the IRA for categories of projects added by the Energy Act of 2020 and the IIJA is to materially expand the types of projects eligible for loan guarantees from DOE under Title XVII. The additional $40 billion of loan guarantee commitment authority for section 1703 projects is not allocated to specific technology categories as certain pre-IRA loan authority was, meaning that the program no longer needs to adopt technology-specific solicitations. The ability to support EIR projects, critical minerals projects, and State energy financing institution projects opens the door to a wide range of new project characteristics, and expands Title XVII to support both innovative and non-innovative projects. The prior version of part 609 and the solicitations for applications to the program contemplated relatively uniform, large scale infrastructure projects, such as utility scale power generation projects. However, both the changes to Title XVII

[19] 42 U.S.C. 16512(r), as added by Public Law 117–58, sec. 40401(c)(2)(C) (2021).

[20] See Public Law 117–58, sec. 40401(c) (2021).

[21] 42 U.S.C. 16512(r)(3), as added by Public Law 117–58, sec. 40401(c)(2)(C) (2021), and repealed by Public Law 117–328, div. D, tit. III, sec. 308 (2022).

[22] See 42 U.S.C. 16513(b)(13), added by the IIJA (Pub. L. 117–58, sec. 40401(a)(2)(A) (2021)).

[23] Public Law 117–58, sec. 40401(a)(2)(B), (C) (2021), repealed by Public Law 117–328, div. D, tit. III, sec. 308 (2022).

[24] Public Law 117–169, sec. 50144(a), (c) (2022).

resulting from recently enacted legislation and the rapidly evolving and advancing technologies in the United States energy sector require that DOE be able to support a more diverse set of clean energy projects. A single set of application requirements and factors for evaluating such projects impedes DOE's objectives of properly evaluating such diverse sets of potential projects and ensuring that the Title XVII Loan Guarantee Program is accessible to all potentially eligible projects. In addition, DOE expects that the additional loan authority granted by the IRA will result in a significant increase in the volume of applications submitted to the Title XVII Loan Guarantee Program, escalating the need for part 609 to provide clear direction with respect to eligibility and the administration of the program.

With the IFR, DOE removes from the Code of Federal Regulations the specific minimum application requirements applicable to potential applicants to the Title XVII program as well as eliminates from the regulation the detailed evaluation criteria applicable to DOE's review of Title XVII loan guarantee applications. DOE will subsequently issue guidance for the Title XVII Loan Guarantee Program, which will include the information historically set forth in the specific solicitations issued in connection with the program. DOE expects that these changes to the Title XVII Loan Guarantee Program will significantly improve the ability of applicants and potential applicants to understand the program requirements as they apply to specific categories of eligible projects and to navigate the Title XVII Loan Guarantee Program more efficiently. The IFR is a critical foundation allowing DOE to finalize comprehensive materials for potential applicants, improving access to, and administration of, this important program.

DOE will also capture and make public many of the recommendations made with respect to DOE's administration of the Title XVII Loan Guarantee Program in the course of the 2022 request for information.[25] This will include additional guidance regarding how DOE addresses matters pertaining to Justice40 [26] objectives, supporting the domestic clean energy supply chain, and addressing community, environmental, and labor matters with respect to the program.

*C. Conditional Commitments & Credit Subsidy Cost*

In the IFR, DOE specifies that it will obligate the credit subsidy cost of a loan guarantee at the time of Conditional Commitment, rather than its current practice of obligating credit subsidy cost at financial close of the Loan Guarantee Agreement. Under the prior version of part 609, the Secretary was authorized to terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement. This program modification represents an alignment of the Title XVII Loan Guarantee Program with other federal lending programs pursuant to the Federal Credit Reform Act of 1990. The impact of this change is to structure the Title XVII Loan Guarantee Program such that Conditional Commitments utilizing the loan authority and appropriations for the cost of loan guarantees provided by the IRA must be entered into prior to September 30, 2026, which represents the end of availability of these funds under the IRA. While not likely in the next several years, if appropriated funds are not available for the Secretary to pay credit subsidy costs at the time of Conditional Commitment, such costs may instead paid by the borrower.[27] In such a case, subject to the terms agreed upon as part of Conditional Commitment, the borrower-paid credit subsidy costs may be refunded if the parties do not close on a Loan Guarantee Agreement or if subsequent changes warrant a downward adjustment of the credit subsidy cost calculation.

*D. Fees*

In connection with the expected increase in the number of loan guarantee applications following the passage of the IRA, DOE has assessed the types and amounts of fees it expects to collect in connection with the administration of the Title XVII Loan Guarantee Program. In the IFR, DOE describes the categories of fees it will collect at the financial closing of a Title XVII loan guarantee and the other fees and charges it may collect from a Borrower after the issuance of a loan guarantee to provide additional clarity to the public with respect to fees associated with the program.

DOE has also determined it will no longer assess application fees in connection with the program. The Energy Act of 2020 amendments provide that a fee for the guarantee sufficient to cover the applicable administrative expenses of the Title XVII Loan Guarantee Program may be charged on or after financial close.[28] Historically, the application fee combined with the facility fee served to reimburse the federal government for the costs of administering the loan guarantee program. However, DOE believes it may be confusing to potential applicants to charge an ''application fee'' at financial closing of a loan guarantee. DOE has assessed the adequacy of the facility fee and has determined that it is sufficient to cover the applicable administrative expenses of the Title XVII Loan Guarantee Program without requiring a separate application fee. In the IFR, DOE confirms that it will charge the facility fee only at the financial closing of a loan guarantee, rather than charging a portion of the facility fee at conditional commitment in accordance with the Energy Act of 2020 amendments.

*E. Transaction Costs*

In the IFR, DOE confirms that the third-party advisor costs of DOE as loan guarantor represent the transaction costs associated with providing financing to the applicable project. For each of the categories of projects DOE has determined to be eligible under Title XVII, including those expanded categories allowed by the passage of the IRA, the financing of the relevant project will require the engagement by the applicant, any eligible lender, and DOE of third-party advisors to assist in the structuring and negotiation of the project's financing. The costs of such third-party advisors are directly attributable to the review, processing, closing and management of specific loan transactions and vary significantly in relation to the maturity and organization of the applicant and the complexity of the proposed project, among other factors. Third-party advisor costs are financing costs that may be included in the overall amount of Project Costs for an Eligible Project receiving a Title XVII loan guarantee. The services provided by third-party advisors directly support the financing and potential deployment of the project that is being proposed by an applicant and thus are appropriately borne by the applicant. This arrangement is customary in project finance.

DOE has confirmed that the costs associated with third-party advisors are easily distinguished from the administrative expenses associated with administering the Title XVII Loan

[25] See footnote 7, *supra.*

[26] See Executive Order 14008, ''Tackling the Climate Crisis at Home and Abroad,'' sec. 223, 86 FR 7619, 7631–7632 (February 1, 2021). See also *https://www.energy.gov/diversity/justice40-initiative.*

[27] 42 U.S.C. 16512(b).

[28] 42 U.S.C. 16512(h)(1), as amended by Public Law 116–260, sec. 9010(a)(3) (2020).

Guarantee Program, which includes payroll, expenses associated with third-party contractors and consultants that have been engaged by DOE in support of administering the Title XVII Loan Guarantee Program, and other overhead costs of LPO, which are incurred irrespective of the volume or complexity of loan guarantee applications. Transaction costs also exclude credit subsidy cost amounts.

Under the IFR, Transaction Costs are defined in § 609.2, and the method for the payment of these Transaction Costs as an element of Project Costs is retained within the rule in § 609.11.

*F. Project Costs*

In the IFR, DOE specifies that environmental remediation costs constitute eligible Project Costs for Energy Infrastructure Reinvestment Projects, as specified in the IRA. In addition, the definition of Project Costs in § 609.10 is modified to provide that in DOE's discretion, the costs of refinancing outstanding indebtedness that is directly associated with the Eligible Project may be included.

**III. Section-by-Section Analysis**

The amendments in this IFR redesignate and add additional sections to 10 CFR part 609 for organization and clarity and to conform to the IRA provisions. The following table displays the changes as follows:

SUMMARY TABLE OF SECTION ADDITIONS, REVISIONS, AND REDESIGNATIONS

| Section | Former title | Action | New title |
|---|---|---|---|
| § 609.1 | Purpose and scope | Revised | N/A. |
| § 609.2 | Definitions and interpretation | Revised | Definitions. |
| § 609.3 | Solicitations | New section added; redesignated as § 609.19 and revised. | Title XVII eligible projects. |
| § 609.4 | Submission of applications | Revised | N/A. |
| § 609.5 | Programmatic, technical, and financial evaluation of applications. | Revised | Evaluation of applications. |
| § 609.6 | Term sheets and conditional commitments. | Revised | N/A. |
| § 609.7 | Closing on the loan guarantee agreement. | Revised | N/A. |
| § 609.8 | Loan guarantee agreement | Revised | N/A. |
| § 609.9 | Lender servicing requirements | Revised | N/A. |
| § 609.10 | Project costs | Revised | N/A. |
| § 609.11 | Fees and charges | New section added, redesignated as § 609.13 and revised. | Transaction costs. |
| § 609.12 | Full faith and credit and incontestability | New section added, redesignated as § 609.14 and revised. | Credit ratings. |
| § 609.13 | Default, demand, payment, and foreclosure on collateral. | Redesignated as § 609.15 and revised | Fees and charges. |
| § 609.14 | Preservation of collateral | Redesignated as § 609.16 and revised | Full faith and credit and incontestability. |
| § 609.15 | Audit and access to records | Redesignated as § 609.17 and revised | Default, demand, payment, and foreclosure on collateral. |
| § 609.16 | Deviations | Redesignated as § 609.18 and revised | Preservation of collateral. |
| § 609.17 | N/A | § 609.15 redesignated as § 609.17 and revised. | Audit and access to records. |
| § 609.18 | N/A | § 609.16 redesignated as § 609.18 and revised. | Deviations. |
| § 609.19 | N/A | § 609.3 redesignated as § 609.19 and revised. | Title XVII loan guarantee program guidance. |

Provided below is a section-by-section analysis of the changes made by this IFR.

Title

The title of part 609 is revised from ''Loan Guarantees for Projects That Employ Innovative Technologies'' to ''Loan Guarantees for Clean Energy Projects,'' reflecting the expansion of Title XVII eligibility beyond projects that employ or deploy a New or Significantly Improved Technology.

§ 609.1

Part 609 prescribes policies and procedures for receiving, evaluating, and approving applications for loan guarantees. DOE is revising § 609.1(a) and (c) for clarity and updated legal references. DOE is also deleting § 609.1(d) because critical minerals projects are now specifically eligible and authorized for loan guarantees under section 1703(b).

§ 609.2

Section 609.2 is revised to incorporate definitions associated with the IRA and to make changes conforming to the remainder of revisions set forth in the IFR. DOE is adding the following definitions: ''Energy Infrastructure'', ''Energy Infrastructure Reinvestment Project'', ''Innovative Energy Project'', ''Innovative Supply Chain Project'', ''Maintenance Fee'', ''Reasonable Prospect of Repayment'', ''State'', ''State Energy Financing Institution'', ''State Energy Financing Institution Project'', ''Title XVII'', ''Title XVII Loan Guarantee Program'', and ''Transaction Costs''. DOE is revising the following definitions: ''Administrative Cost of a Loan Guarantee'', ''Applicant'', ''Application'', ''Borrower'', ''Commercial Technology'', ''Conditional Commitment'', ''Credit Subsidy Cost'', ''Davis-Bacon Act'', ''Eligible Lender'', ''Eligible Project'', ''Energy Infrastructure'', ''Equity'', ''Facility Fee'', ''Guaranteed Obligation'', ''Holder'', ''New or Significantly Improved Technology'', ''Project Costs'', ''Project Sponsor'', and ''Term Sheet''. The following definitions are deleted: ''Act'', ''Application Fee'', ''Preliminary Term Sheet'', and ''Solicitation''.

The interpretations in § 609.2(b) are deleted. These interpretations are not statutorily required and do not add or

reduce obligations, burdens, prohibitions, or restrictions. Given that DOE's understanding of how the implementation of the IRA-related provisions will be evolving and DOE's processing of higher volume applications may require further guidance, DOE will be issuing guidance at a future date. This will allow DOE to modify the guidance more quickly to ensure efficient processing of loan applications.

§ 609.3

Section 609.3, ''Solicitations,'' is redesignated and revised as § 609.19, ''Title XVII loan guarantee program guidance,'' to change the method for publishing invitations for applications for loan guarantees from a solicitation-based application process to a standing invitation published through DOE's Title XVII Loan Guarantee Program website; and to make conforming and clarifying changes.

DOE is adding a new § 609.3, ''Title XVII eligible projects,'' to distinguish and describe the expanded categories of eligible projects under Title XVII, as amended and authorized by the IRA and the IIJA. The new § 609.3 further defines these ''Eligible Project'' categories under Title XVII, including ''Innovative Energy Project'', ''Innovative Supply Chain Project'', ''State Energy Financing Institution Project'', and ''Energy Infrastructure Reinvestment Project''.

§ 609.4

Section 609.4, ''Submission of applications,'' is revised to incorporate the application references for the categories of projects made eligible for loan guarantees under the IRA and IIJA; to consolidate provisions regarding additional information, including credit assessment and credit rating requirements (moving language formerly at § 609.4(d)(22) and (e) to § 609.12; see also § 609.5(a)); to remove provisions related to the application fee that DOE will no longer assess; to delete other specific minimum application requirements previously set forth in the section; to reduce the period of time after which DOE may reject an incomplete application from four to two years; to further describe DOE's obligation to provide responses to applicant inquiries regarding the status of applications; and to make conforming and clarifying changes.

§ 609.5

Section 609.5, ''Programmatic, technical, and financial evaluation of applications,'' is revised to be titled ''Evaluation of applications''; to identify the application evaluation criteria applicable to specific categories of eligible projects; to add failure to meet ''know your customer'' requirements as a basis for application denial; to eliminate certain specific application evaluation criteria from the rule; and to make conforming and clarifying changes.

§ 609.6

Section 609.6, ''Term Sheets and conditional commitments,'' is revised to reduce the period of time for the negotiation of a term sheet from four years to two years; to remove references to fees payable in connection with the term sheet; to reflect the obligation of the credit subsidy cost at conditional commitment rather than loan guarantee closing; and to make conforming and clarifying changes.

§ 609.7

Section 609.7, ''Closing on the loan guarantee agreement,'' is revised to reflect the obligation of the credit subsidy cost at conditional commitment rather than loan guarantee closing (moving language formerly at § 609.7(b)(1) and (3) to § 609.6); to move the applicant requirements regarding credit ratings to a single section of the rule (moving language formerly at § 609.7(b)(9) to § 609.12); to add an explicit requirement, consistent with existing law, that review under the National Environmental Policy Act of 1969 (NEPA) be completed prior to closing; and to make conforming and clarifying changes.

§ 609.8

Section 609.8, ''Loan guarantee agreement,'' is revised to clarify certain terms applicable to all Title XVII loan guarantee agreements; to reflect the differing repayment terms for certain categories of Eligible Projects; and to make conforming and clarifying changes.

§ 609.9

Section 609.9, ''Lender servicing requirements,'' is revised for clarity.

§ 609.10

Section 609.10, ''Project costs,'' is revised to include all provisions of the rule pertaining to project costs in a single section of the rule; to incorporate the defined term ''Transaction Costs''; to specifically include interconnection costs; to include, in DOE's discretion, the costs of refinancing outstanding indebtedness relating to the Eligible Project; to include environmental remediation costs of Energy Infrastructure Reinvestment Projects as provided by the IRA; to include, in DOE's discretion with respect to projects consisting of distributed energy resources, the costs incurred by the end-user of each distributed energy resource pursuant to contractual arrangements with the Project Sponsor. to refer to cost information and criteria published in guidance on the Title XVII Loan Guarantee Program website; and to make conforming and clarifying changes.

§ 609.11

Section 609.11, ''Fees and Charges,'' is redesignated in part and revised as § 609.13. This IFR adds a new § 609.11, ''Transaction Costs,'' to reflect in a single rule provision all requirements applicable to the arrangements for third-party advisors, including retaining substantial portions of the latter part of the prior § 609.11 (former paragraphs (f)-(h)).

§ 609.12

Section 609.12, ''Full faith and credit and incontestability,'' is redesignated as § 609.14 and a new § 609.12, ''Credit Ratings,'' is added to reflect and further specify in a single rule provision all requirements regarding the submission of credit assessments or credit ratings in connection with an application for a loan guarantee. As discussed above, § 609.12 under this IFR incorporates certain provisions related to credit rating that had been in prior § 609.4 and 609.7. Based upon DOE's experience administering the Title XVII Loan Guarantee Program for over 15 years, credit assessments and credit ratings are no longer required by regulation simply because Project Costs exceed a certain threshold, but the Secretary retains the authority and discretion to require a credit assessment or credit rating for any project.

§§ 609.13–609.19

Sections 609.13–609.16 have been redesignated, and §§ 609.17–609.19 have been added, due to the changes described previously. The redesignated § 609.18, ''Deviations,'' has been amended to remove unnecessary specificity regarding the Secretary's discretion over charging and collection of fees. DOE has also made minor revisions to §§ 609.13–609.18 for clarity and organization. Redesignated § 609.19, ''Title XVII loan guarantee program guidance,'' is described in further detail previously, under the analysis of § 609.3.

## IV. Public Participation

DOE will accept comments, data, and information regarding this IFR on or before the date provided in the **DATES**

section at the beginning of this IFR. Interested parties may submit comments, data, and other information using any of the methods described in the **ADDRESSES** section at the beginning of this document.

*Submitting comments via www.regulations.gov.* The *www.regulations.gov* web page will require you to provide your name and contact information. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information the disclosure of which is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (''CBI'')). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the website will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

*Submitting comments via email, hand delivery/courier, or postal mail.* Comments and documents submitted via email, hand delivery/courier, or postal mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via postal mail or hand delivery/courier, please provide all items on a CD, if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are written in English, and that are free of any defects or viruses. Documents should not contain special characters or any form of encryption. If possible, documents should carry the electronic signature of the author.

*Confidential Business Information.* Pursuant to 10 CFR 1004.11, any person submitting information that they believe to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: One copy of the document marked ''confidential'' including all the information believed to be confidential, and one copy of the document marked ''non-confidential'' that deletes the information believed to be confidential. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and will treat it according to its determination. It is DOE's policy that all comments, including any personal information provided in the comments, may be included in the public docket, without change and as received, except for information deemed to be exempt from public disclosure.

## V. Regulatory and Notices Analysis

### *A. Executive Order 12866*

This IFR has been determined to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs (''OIRA'') of the Office of Management and Budget (''OMB'').

### *B. Administrative Procedure Act*

Section 553(a)(2) of the Administrative Procedure Act (''APA'') exempts from the APA's notice and comment procedures rulemakings that involve matters relating to public property, loans, grants, benefits, or contracts. As a rulemaking relating to the issuance of loans, DOE has determined that a notice of proposed rulemaking (and comment thereon) is not required for the amendments to part 609 in this IFR.[29]

Moreover, section 553(b)(3)(B) of the 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.

DOE has determined that prior notice and comment are contrary to the public interest given the ambitious timeline Congress has imposed on DOE for guaranteeing loans up to a total principal amount of $290 billion prior to the loan guarantee authority expiration in 2026 and to provide the opportunity for all eligible projects to seek loan guarantees under the new IRA provisions. Given the short award period, it is imperative that DOE put the IFR provisions in place concurrent with solicitation of comment to process the influx of applications that DOE has already received in response to the passage of the IRA and to best advise stakeholders on how to obtain loan funding. Specifically, DOE has seen an increase in active applications from 61 to 111 active applications to the Loan Programs Office for Title XVII loan guarantees from August 1, 2022 through April 30, 2023, representing an increase of approximately $30.1 billion in new Title XVII financing requests. Making the amendments in this IFR effective immediately helps facilitate the increased volume of applications resulting from the new authorities and funding in the IRA and IIJA and provide efficiencies in the loan processing. DOE anticipates the number of new active

[29] DOE has historically used notice and comment procedures for Title XVII Loan Guarantee Program rulemakings, but notes that this exemption is nonetheless available under the APA.

applications to continue to increase. In addition, with respect to specific stakeholder engagement regarding the new Energy Infrastructure Reinvestment program added by the IRA, DOE has held over a dozen stakeholder listening sessions where participants have requested additional information regarding program requirements and implementation. Thus, DOE believes that there is good cause that it is in the public interest to implement provisions in line with the IRA in an expeditious manner prior to notice and comment.

As noted previously, DOE is concurrently accepting comments on this IFR. DOE is committed to considering all comments received in response to this IFR and promptly publishing a final rule.

*C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires that an agency prepare an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990).

This IFR updates part 609. As noted in prior part 609 rulemaking actions, DOE is not obligated to prepare a regulatory flexibility analysis for this rulemaking because there is not a requirement to publish a general notice of proposed rulemaking for rules related to loans under the Administrative Procedure Act (5 U.S.C. 553(a)(2)).

*D. Paperwork Reduction Act of 1995*

Information collection requirements for the DOE regulations at 10 CFR part 609 pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and the procedure implementing that Act (5 CFR 1320.1 *et seq.*) are under OMB Control Number 1910–5134. On February 28, 2023, OMB approved a three-year extension of the information collection request previously approved under OMB Control Number 1910–5134. Because the information requested of applicants under the IFR and the Title 17 Program Guidance is materially the same as that collected under the current Title XVII Solicitations, and burdens and costs are the same, the Title 17 Program Guidance will utilize the same ICR authority as currently utilized for Title XVII applications. DOE is submitting a revision to its information collection request under OMB Control Number 1910–5134 in connection with this IFR. The revision adds the ''Program Guidance for Title 17 Clean Energy Financing Program'' as a collection instrument under the control number. The revision also explains the public reporting burden associated with the information collection under the Program Guidance for Title 17 Clean Energy Financing Program.

LPO uses the information an Applicant provides to determine whether the project proposed by the Applicant meets the eligibility and other legal requirements of the applicable Loan Guarantee Program. In addition, the information collected through the ICR assists the Department to meet its public transparency and accountability obligations, such as requirements and requests to deliver timely information on Title XVII Program and TELGP activities to OMB, Congress, and the public.

Public reporting burden for the requirements in this IFR is estimated to average 146.5 hours 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 are expected to be collected electronically. The public reporting burden anticipates that there will be 89 respondents to the information collection request annually. The burden estimate reflects an increase of 14 hours per response compared to the prior burden estimate. This increase results from the inclusion of information regarding an applicant's Community Benefits Plan in the information collection request. All Title XVII project applicants are required to submit a Community Benefits Plan with Part II of their application. To support the goal of building a clean and equitable energy economy, DOE projects are expected to (1) support meaningful community and labor engagement; (2) invest in America's workforce; (3) advance diversity, equity, inclusion, and accessibility; and (4) contribute to the President's goal that 40% of the overall project benefits flow to Disadvantaged Communities (DACs) (the Justice40 Initiative). The Justice40 Initiative aims to ensure that 40% of overall benefits of clean energy investment flow to disadvantaged communities, which can be identified by the Climate and Economic Justice Screening Tool.[30] A Community Benefits Plan for an LPO application does not need to entail extraordinary additional requirements beyond the normal course of project development activities. The Community Benefits Plan should be approximately 3–8 pages in length, and written in an executive summary format to identify project benefits described elsewhere in the application.

The revised recordkeeping and reporting requirements associated with this rulemaking are not mandatory until the information collection is approved by OMB.

Notwithstanding any other provision of law, a person is not required to respond to, and will not 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. Applying for benefits under Title XVII is voluntary.

*E. National Environmental Policy Act of 1969*

Pursuant to NEPA, DOE has analyzed this IFR in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this IFR qualifies for categorical exclusion under 10 CFR part 1021, subpart D appendix A5 as a rulemaking that amends an existing rule or regulation (*i.e.,* part 609) without changing the environmental effect of that rule. Therefore, DOE has determined that this IFR is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA and does not require an Environmental Assessment or an Environmental Impact Statement.

*F. Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on executive agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general

[30] Additional information can be found here: *https://www.energy.gov/diversity/justice40-initiative; https://www.whitehouse.gov/environmentaljustice/justice40/; https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5; https://www.whitehouse.gov/wp-content/uploads/2023/01/M-23-09_Signed_CEQ_CPO.pdf.*

standard and promote simplification and burden reduction.

With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires, in pertinent part, that executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them.

DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

*G. Executive Order 13132*

Executive Order 13132, ''Federalism,'' [31] imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations.[32]

DOE has examined this IFR and has determined that it will not preempt State law and 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. Accordingly, no further action is required by Executive Order 13132.

*H. Executive Order 13175*

Under Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' [33] DOE may not issue a discretionary rule that has ''Tribal'' implications and imposes substantial direct compliance costs on Indian Tribal governments. DOE has determined that this IFR will not have such effects and has concluded that Executive Order 13175 does not apply to this IFR.

*I. Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') [34] requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments and the private sector. For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy (2 U.S.C. 1532(a) and (b)). UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and tribal governments on a proposed ''significant intergovernmental mandate'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA.[35] DOE examined this IFR according to UMRA and its statement of policy and has determined that the IFR contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year by State, local, and tribal governments, in the aggregate, or by the private sector. The IFR establishes only requirements that are a condition of Federal assistance or a duty arising from participation in a voluntary program. Accordingly, no further assessment or analysis is required under UMRA.

*J. Treasury and General Government Appropriations Act of 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 [36] requires Federal agencies to issue a Family Policymaking Assessment for any proposed rule that may affect family well-being. This IFR will not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*K. Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 [37] provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). Pursuant to OMB Memorandum M–19–15, ''Improving Implementation of the Information Quality Act'' (April 24, 2019), DOE published updated guidelines which are available at: *https://www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.*

DOE has reviewed this IFR under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*L. Executive Order 13211*

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' [38] requires Federal agencies to prepare and submit to the OMB, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For

[31] 64 FR 43255 (August 4, 1999).

[32] 65 FR 13735 (March 14, 2000).

[33] 65 FR 67249, (November 9, 2000).

[34] Public Law 104–4 (1995).

[35] 62 FR 12820 (March 18, 1997); also available at *www.energy.gov/gc/office-general-counsel.*

[36] Public Law 105–277 (1998); 5 U.S.C. 601 note.

[37] Public Law 106–554 (2000); 44 U.S.C. 3516 note.

[38] 66 FR 28355 (May 22, 2001).

any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action will not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

*M. Congressional Review Act*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule. The report will state that it has been determined that the rule is a ''major rule'' as defined by 5 U.S.C. 804(2). In accordance with 5 U.S.C. 808(2), this IFR will be effective upon publication based upon DOE's finding of good cause that prior notice and public procedure thereon are contrary to the public interest. See section V.B of this document, *Administrative Procedure Act.*

## VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this Interim final rule; request for comments.

## List of Subjects in 10 CFR Part 609

Administrative practice and procedure, Energy, Loan programs, Reporting and recordkeeping requirements.

## Signing Authority

This document of the Department of Energy was signed on May 19, 2023, by Robert Marcum, Deputy Director, Loan Programs Office, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 19, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

■ For the reasons stated in the preamble, DOE revises part 609 of chapter II of title 10 of the Code of Federal Regulations to read as follows:

## PART 609—LOAN GUARANTEES FOR CLEAN ENERGY PROJECTS

Sec.



**Authority:** 42 U.S.C. 7254, 16511–16517.

### § 609.1 Purpose and scope.

(a) This part sets forth the policies and procedures that DOE uses for receiving, evaluating, and approving applications for loan guarantees to support Eligible Projects under Title XVII, including sections 1703 and 1706, of the Energy Policy Act of 2005.

(b) This part applies to all Applications, Conditional Commitments, and Loan Guarantee Agreements.

(c) Section 600.22 of title 10 of the Code of Federal Regulations shall not apply to actions taken under this part.

### § 609.2 Definitions.

When used in this part the following words have the following meanings.

*Administrative Cost of a Loan Guarantee* means

(1) The total of all administrative expenses that DOE incurs during:

(i) The evaluation of an Application for a Guarantee;

(ii) The negotiation and offer of a Term Sheet;

(iii) The negotiation of a Loan Guarantee Agreement and related documents, including the issuance of a Guarantee; and

(iv) The servicing and monitoring of a Loan Guarantee Agreement, including during the construction, startup, commissioning, shakedown, and operational phases of an Eligible Project.

(2) The Administrative Cost of a Loan Guarantee does not include Transaction Costs.

*Applicant* means a prospective Borrower, Project Sponsor, or Eligible Lender that submits an Application to DOE.

*Application* means a submission of written materials to DOE completed in accordance with the applicable requirements published by DOE in guidance on the Title XVII website.

*Attorney General* means the Attorney General of the United States.

*Borrower* means any Person that enters into a Loan Guarantee Agreement with DOE and issues or otherwise becomes obligated for the Guaranteed Obligations.

*Cargo Preference Act* means the Cargo Preference Act of 1954, 46 U.S.C. 55305, as amended.

*Commercial Technology* means a technology in general use in the commercial marketplace in the United States at the time the Term Sheet is offered by DOE. A technology is in general use if it is being used in three or more facilities that are in commercial operation in the United States for the same general purpose as the proposed project, and has been used in each such facility for a period of at least five years. The five-year period for each facility shall start on the in-service date of the facility employing that particular technology or, in the case of a retrofit of a facility to employ a particular technology, the date the facility resumes commercial operation following completion and testing of the retrofit. For purposes of this section, facilities considered to be in commercial operation for five years include projects that have been the recipients of a loan guarantee from DOE under this part whether or not commercial operations have commenced.

*Conditional Commitment* means a Term Sheet offered by DOE and accepted by the offeree of the Term Sheet, all in accordance with § 609.6.

*Contracting Officer* means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer or terminate DOE Loan Guarantee Agreements and related contracts on behalf of DOE.

*Credit Subsidy Cost* has the same meaning as ''cost of a loan guarantee'' in section 502(5)(C) of the Federal Credit Reform Act of 1990.

*Davis-Bacon Act* means the statute referenced in section 1702(k) of Title XVII.

*DOE* means the United States Department of Energy.

*Eligible Lender* means:

(1) Any Person formed for the purpose of, or engaged in the business of, lending money, including State Energy Financing Institutions, financial

institutions, and trusts or other entities designated as trustees or agents acting on behalf of institutional investors, bondholders, or other lenders that, as determined by DOE in each case, is:

(i) Not debarred or suspended from participation in a Federal Government contract or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR part 180);

(ii) Not delinquent on any Federal debt or loan;

(iii) Legally authorized and empowered to enter into loan guarantee transactions authorized by Title XVII and this part;

(iv) Able to demonstrate experience in originating and servicing loans for commercial projects similar in size and scope to the Eligible Project, or able to procure such experience through contracts acceptable to DOE; and

(v) Able to demonstrate experience as the lead lender or underwriter by presenting evidence of its participation in large commercial projects or energy-related projects or other relevant experience, or able to procure such experience through contracts acceptable to DOE; or

(2) The Federal Financing Bank.

*Eligible Project* has the meaning set forth in § 609.3.

*Energy Infrastructure* means a facility, and associated equipment, used for:

(1) The generation or transmission of electric energy; or

(2) The production, processing, and delivery of fossil fuels, fuels derived from petroleum, or petrochemical feedstocks.

*Energy Infrastructure Reinvestment Project* has the meaning set forth in § 609.3.

*Equity* means cash, and at DOE's sole discretion and subject to DOE's sole determination of value, in-kind contributions and property, in each case contributed to the permanent capital stock (or equivalent) of the Borrower or the Eligible Project by the shareholders or other owners of the Borrower or the Eligible Project. In-kind contributions may not include services, but may include physical and/or intellectual property. Equity does not include proceeds from the non-guaranteed portion of a Guaranteed Obligation, proceeds from any other non-guaranteed loan or obligation of the Borrower, or the value of any Federal, State, or local government assistance or support or any cost-share requirements under a Federal award.

*Facility Fee* means the fee, to be paid in the amount and in the manner provided in the Term Sheet, to cover the Administrative Cost of a Loan Guarantee for the period from the Application through issuance of the Guarantee.

*Federal Financing Bank* means an instrumentality of the United States Government created by the Federal Financing Bank Act of 1973, under the general supervision of the Secretary of the Treasury.

*Guarantee* means the undertaking of the United States of America, acting through the Secretary pursuant to Title XVII, to pay in accordance with the terms thereof, principal and interest of a Guaranteed Obligation.

*Guaranteed Obligation* means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees all or any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to Title XVII.

*Holder* means any Person that holds a promissory note made by the Borrower evidencing the Guaranteed Obligation (or his or her designee or agent).

*Innovative Energy Project* has the meaning set forth in § 609.3.

*Innovative Supply Chain Project* has the meaning set forth in § 609.3.

*Intercreditor Agreement* means any agreement or instrument (or amendment or modification thereof) among DOE and one or more other Persons providing financing or other credit arrangements to the Borrower (or an Eligible Project) or that otherwise provides for rights of DOE in respect of a Borrower or in respect of an Eligible Project, in each case in form and substance satisfactory to DOE.

*Loan Agreement* means a written agreement between a Borrower and an Eligible Lender containing the terms and conditions under which the Eligible Lender will make a loan or loans to the Borrower for an Eligible Project.

*Loan Guarantee Agreement* means a written agreement that, when entered into by DOE and a Borrower, and, if applicable, an Eligible Lender, establishes the obligation of DOE to guarantee the payment of all or a portion of the principal of, and interest on, specified Guaranteed Obligations, subject to the terms and conditions specified in the Loan Guarantee Agreement.

*Maintenance Fee* means the fee, to be paid in the amount and manner provided in the Term Sheet, to cover the Administrative Cost of a Loan Guarantee, other than extraordinary expenses, incurred in servicing and monitoring a Loan Guarantee Agreement after the issuance of the Guarantee.

*New or Significantly Improved Technology* means

(1) A technology, or a defined suite of technologies, concerned with the production, storage, consumption, or transportation of energy, including of associated critical minerals and other components or other eligible energy-related project categories under section 1703(b) of Title XVII, and that is not a Commercial Technology, and that either:

(i) Has only recently been developed, discovered, or learned; or

(ii) Involves or constitutes one or more meaningful and important improvements in productivity or value, in comparison to Commercial Technologies in use in the United States at the time the Term Sheet is issued.

(2) If regional variation significantly affects the deployment of a technology, such technology may still be considered ''New or Significantly Improved Technology'' if no more than 6 projects employ the same or similar technology as another project, provided no more than 2 projects that use the same or a similar technology are located in the same region of the United States.

*OMB* means the Office of Management and Budget in the Executive Office of the President.

*Person* means any natural person or any legally constituted entity, including a state or local government, tribe, corporation, company, voluntary association, partnership, limited liability company, joint venture, and trust.

*Project Costs* mean those costs, including escalation and contingencies, that are expended or accrued by a Borrower and are necessary, reasonable, customary, and directly related to the design, engineering, financing, construction, startup, commissioning, and shakedown of an Eligible Project, as specified in § 609.10. Project Costs do not include costs for the items set forth in § 609.10(d).

*Project Sponsor* means any Person that assumes substantial responsibility for the development, financing, and structuring of an Eligible Project and owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project or the Borrower.

*Reasonable Prospect of Repayment* has the meaning set forth in 42 U.S.C. 16512(d)(1)(B).

*Risk-Based Charge* means a charge that, together with the principal and interest on the Guaranteed Obligation, or at such other times as DOE may determine, is payable on specified dates during the term of a Guaranteed Obligation.

*Secretary* means the Secretary of Energy or a duly authorized designee or successor in interest.

*State* means any State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and any territory or possession of the United States.

*State Energy Financing Institution* means

(1) A quasi-independent entity or an entity within a State agency or financing authority established by a State:

(i) To provide financing support or credit enhancements, including loan guarantees and loan loss reserves, for Eligible Projects; and

(ii) To create liquid markets for eligible projects, including warehousing and securitization, or take other steps to reduce financial barriers to the deployment of existing and new Eligible Projects.

(2) The term ''State Energy Financing Institution'' includes an entity or organization established by an Indian Tribal entity or an Alaska Native Corporation to achieve the purposes described in paragraphs (1)(i) and (ii) of this definition.

*State Energy Financing Institution Project* has the meaning set forth in § 609.3.

*Term Sheet* means a written offer for the issuance of a loan guarantee, executed by the Secretary (or a DOE official authorized by the Secretary to execute such offer), delivered to the Applicant, that sets forth the detailed terms and conditions under which DOE and the Applicant will execute a Loan Guarantee Agreement.

*Title XVII* means Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16517), as amended.

*Title XVII Loan Guarantee Program* means the program administered by DOE pursuant to Title XVII, regulations under this part, DOE guidance and policy documents, and other applicable laws and requirements.

*Transaction Costs* mean:

(1)(i) Out-of-pocket costs of financial, legal, and other professional services associated with the financing of an Eligible Project, including services necessary to obtain required licenses and permits, prepare environmental reports and data, conduct legal and technical due diligence, develop and audit a financial model, negotiate the terms and provisions of project contracts and financing documents, including those costs associated with the advisors to DOE and any other Eligible Lender; and

(ii) Costs of issuing Eligible Project debt, such as commitment fees, upfront fees, and other applicable financing fees, costs and expenses imposed by Eligible Lenders.

(2) Transaction Costs do not include the Administrative Cost of a Loan Guarantee or Credit Subsidy Costs.

*United States* means the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and any territory or possession of the United States of America.

### § 609.3 Title XVII eligible projects.

(a)(1) DOE is authorized to provide loan Guarantees for certain categories of projects under Title XVII including:

(i) Innovative Energy Projects under section 1703 of Title XVII;

(ii) Innovative Supply Chain Projects under section 1703 of Title XVII;

(iii) State Energy Financing Institution Projects under section 1703 of Title XVII; and

(iv) Energy Infrastructure Reinvestment Projects under section 1706 of Title XVII.

(2) A Project meeting the applicable eligibility requirements set forth herein constitutes an ''Eligible Project'' under Title XVII.

(b) An eligible Innovative Energy Project is a project that:

(1) Falls within a category set forth in section 1703(b) of Title XVII;

(2) Is located in the United States;

(3) Is at one location, except that the project may be located at two or more locations if the project is comprised of installations or facilities employing a single New or Significantly Improved Technology that is deployed pursuant to an integrated and comprehensive business plan. An Innovative Energy Project located in more than one location is a single Eligible Project;

(4) Deploys a New or Significantly Improved Technology; and

(5) Avoids, reduces, utilizes, or sequesters air pollutants or anthropogenic emissions of greenhouse gases.

(c) An eligible Innovative Supply Chain Project is a project that:

(1) Manufactures a product with an end-use set forth in section 1703(b) of Title XVII;

(2) Is located in the United States;

(3) Is at one location, except that the project may be located at two or more locations if the project is comprised of installations or facilities employing a single New or Significantly Improved Technology that is deployed pursuant to an integrated and comprehensive business plan. An Innovative Supply Chain Project located in more than one location is a single Eligible Project;

(4) Either:

(i) Deploys a New or Significantly Improved Technology in the manufacturing process; or

(ii) Manufactures a product that represents a New or Significantly Improved Technology; and

(5) Avoids, reduces, utilizes, or sequesters air pollutants or anthropogenic emissions of greenhouse gases through:

(i) The relevant manufacturing process of the relevant product; or

(ii) The end-use of the component on a full life-cycle basis.

(d) An eligible State Energy Financing Institution Project is a project that:

(1) Falls within a category set forth in section 1703(b) of Title XVII;

(2) Is located at one or more locations in the United States;

(3) Avoids, reduces, utilizes, or sequesters air pollutants or anthropogenic emissions of greenhouse gases;

(4) Receives financial support or credit enhancements from a State Energy Financing Institution; and

(5) May include a partnership between one or more State Energy Financing Institutions and private entities, Tribal entities, or Alaska Native corporations in carrying out the project.

(e) An eligible Energy Infrastructure Reinvestment Project is a project that:

(1) Is located in the United States;

(2) Either:

(i) Enables operating Energy Infrastructure to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases; or

(ii) Retools, repowers, repurposes, or replaces Energy Infrastructure that has ceased operations; provided that if such project involves electricity generation through the use of fossil fuels, such project shall be required to have controls or technologies to avoid, reduce, utilize, or sequester air pollutants and anthropogenic emissions of greenhouse gases; and

(3) May include the remediation of environmental damage associated with Energy Infrastructure.

### § 609.4 Submission of applications.

(a) DOE may direct that Applications be submitted in more than one part; provided, that the parts of such Application, taken as a whole, contain such information published by DOE in guidance on the Title XVII Loan Guarantee Program website pursuant to § 609.19. In such event, subsequent parts of an Application may be filed only after DOE invites an Applicant to make an additional submission. If DOE directs that Applications be submitted in more than one part, the initial part of

an Application shall contain information sufficient for DOE to determine that the project proposed by an Applicant will be, or may reasonably become, an Eligible Project, and to evaluate such project's readiness to proceed. If there have been any material amendments, modifications, or additions made to the information previously submitted by an Applicant, the Applicant shall provide a detailed description thereof, including any changes in the proposed project's financing structure or other terms, promptly upon request by DOE.

(b) An Applicant may submit Applications for multiple proposed projects and for projects using different technologies; provided that an Applicant for an Innovative Energy Project or Innovative Supply Chain Project may not submit an Application or Applications for multiple Innovative Energy Projects or multiple Innovative Supply Chain Projects using the same technology. For purposes of this paragraph (b), the term ''Applicant'' shall include the Project Sponsor and any subsidiaries or affiliates of the Project Sponsor.

(c) DOE has no obligation to evaluate an Application that is not complete, and may proceed with such evaluation, or a partial evaluation, only in its discretion. DOE will not design an Eligible Project for Applicants, but may respond, in its discretion, in general terms to specific proposals. DOE's response to questions from potential Applicants are pre-decisional and preliminary in nature.

(d) Unless an Applicant requests an extension and such an extension is granted by DOE in its discretion, an Application may be rejected if it is not complete within two years from the date of submission (or date of submission of the first part thereof, in the case of Applications made in more than one part).

(e) DOE shall respond, in writing, to any inquiry by an Applicant about the status of its Application within ten (10) days of receipt of such request. If an Application has been pending before DOE for 180 days or more, such response shall include:

(1) A description of the current status of review of the Application;

(2) A summary of any factors that are delaying a final decision on the Application, a list of what items are required in order to reach a final decision, citations to authorities stating the reasons why such items are required, and a list of actions the Applicant can take to expedite the process; and

(3) An estimate of when a final decision on the Application will be made.

### § 609.5 Evaluation of applications.

(a) Applications will be considered in a merit-based review process, considering such factors determined and published by DOE in guidance on its Title XVII Loan Guarantee Program website pursuant to § 609.19. At any time, DOE may request additional information or supporting documentation from an Applicant.

(b) Applications will be denied if:

(1) The proposed project is not an Eligible Project;

(2) With respect to applications for Innovative Energy Projects and Innovative Supply Chain Projects, the applicable technology is not ready to be deployed commercially in the United States, cannot yield a commercially viable product or service in the use proposed in the Application, does not have the potential to be deployed in other commercial projects in the United States, or is not or will not be available for further commercial use in the United States;

(3) The Person proposed to issue the loan or purchase other debt obligations constituting the Guaranteed Obligations is not an Eligible Lender;

(4) The proposed project is for demonstration, research, or development;

(5) Significant Equity for the proposed project will not be provided by the date of issuance of the Guaranteed Obligations, or such later time as DOE in its discretion may determine;

(6) The proposed project does not present a Reasonable Prospect of Repayment of the Guaranteed Obligations;

(7) With respect to applications for Energy Infrastructure Reinvestment Projects such application fails to include an analysis of how the proposed project will engage with and affect associated communities or, where the Applicant is an electric utility, an assurance that Applicant will pass on the financial benefit from the Guarantee to the customers of, or associated communities served by, the electric utility; or

(8) The Applicant or Project Sponsor does not satisfy DOE's ''know your customer'' requirements.

(c) If an Application has not been denied pursuant to paragraph (b) of this section, DOE will evaluate the proposed project based on the criteria published by DOE in guidance on its Title XVII Loan Guarantee Program website pursuant to § 609.19.

(d) After DOE completes its review and evaluation of a proposed project, DOE will notify the Applicant in writing of its determination whether to proceed with due diligence and negotiation of a Term Sheet. DOE will proceed only if it determines that the proposed project is highly qualified and suitable for a Guarantee. Upon written confirmation from the Applicant that it desires to proceed, DOE and the Applicant will commence negotiations.

(e) DOE shall provide all Applicants with a reasonable opportunity to correct or amend any Application in order to meet the criteria set forth in this part or any other conditions required by DOE, prior to any denial of such Application. A determination by DOE not to proceed with a proposed project shall be final and non-appealable, but shall not prejudice the Applicant or other affected Persons from applying for a Guarantee in respect of a different proposed project pursuant to another, separate Application. Prior to DOE's denial of any Application, DOE shall advise the Applicant in writing, not less than ten (10) business days prior to the effective date of such denial. If an Application could be amended or corrected such that DOE would determine that the project is highly qualified and suitable for a Guarantee, DOE may set forth the reasons for such proposed denial along with a list of items that may be corrected or amended by the Applicant. If requested by any Applicant, DOE shall meet with such Applicant in order to address questions or concerns raised by the Applicant.

### § 609.6 Term sheets and conditional commitments.

(a) DOE, after negotiation of a Term Sheet with an Applicant, may offer such Term Sheet to an Applicant or such other Person that is an affiliate of the Applicant and that is acceptable to DOE. DOE's offer of a Term Sheet shall be in writing and signed by the Contracting Officer. DOE's negotiation of a Term Sheet imposes no obligation on the Secretary to offer a Term Sheet to the Applicant.

(b) DOE shall terminate its negotiations of a Term Sheet if it has not offered a Term Sheet in respect of an Eligible Project within two years after the date of the written notification set forth in § 609.5(d), unless extended in writing by DOE.

(c) If and when the offeree specified in a Term Sheet satisfies all terms and conditions for acceptance of the Term Sheet, including written acceptance thereof, the Term Sheet shall become a Conditional Commitment. Each Conditional Commitment shall include

an expiration date no more than two years from the date it is issued, unless extended in writing in the discretion of the Contracting Officer. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement. If applicable, the Conditional Commitment shall include the terms and conditions pursuant to which any Credit Subsidy Cost payment made by the Borrower to the Secretary is subject to refund to the Borrower in the event that the closing date of the Loan Guarantee Agreement does not occur.

(d) Prior to or on the date of the Conditional Commitment, DOE will ensure that:

(1) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the Guarantee;

(2) One of the following has occurred:

(i) Appropriated funds for the Credit Subsidy Cost are available;

(ii) The Secretary has received from the Borrower payment in full for the Credit Subsidy Cost and deposited the payment into the Treasury; or

(iii) A combination of one or more appropriations under paragraph (d)(2)(i) of this section and one or more payments from the Borrower under paragraph (d)(2)(ii) of this section has been made that is equal to the Credit Subsidy Cost; and

(3) The Department of the Treasury has been consulted as to the proposed terms and conditions of the Loan Guarantee Agreement.

(e) If, subsequent to execution of a Conditional Commitment, the financing arrangements of the Borrower, or in respect of an Eligible Project, change from those described in the Conditional Commitment, the Applicant shall promptly provide updated financing information in writing to DOE. All such updated information shall be deemed to be information submitted in connection with an Application. Based on such updated information, DOE may take one or more of the following actions:

(1) Determine that such changes are not material to the Borrower, the Eligible Project or DOE;

(2) Amend the Conditional Commitment accordingly, including by re-calculating the Credit Subsidy Cost in accordance with § 609.6(d);

(3) Postpone the expected closing date of the associated Loan Guarantee Agreement; or

(4) Terminate the Conditional Commitment.

### § 609.7 Closing on the loan guarantee agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE, after consultation with the Applicant, will set a closing date for execution of a Loan Guarantee Agreement.

(b) Prior to or on the closing date of a Loan Guarantee Agreement DOE will ensure that:

(1) Pursuant to section 1702(h) of Title XVII, DOE will receive from the Applicant the Facility Fee referred to in § 609.13(b) on the closing date;

(2) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement.

(2) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interest of the United States;

(3) Each holder of the Guaranteed Obligations is an Eligible Lender, and the servicer of the Guaranteed Obligations meets the servicing performance requirements of § 609.9(b);

(4) DOE has determined the principal amount of the Guaranteed Obligations expected to be issued in respect of the Eligible Project, as estimated at the time of issuance, will not exceed 80 percent of the Project Costs of the Eligible Project;

(5) DOE has completed all necessary reviews under the National Environmental Policy Act of 1969; and

(6) All conditions precedent specified in the Conditional Commitment are either satisfied or waived in writing by the Contracting Officer. If the counterparty to the Conditional Commitment has not satisfied all such terms and conditions on or prior to the closing date of the Loan Guarantee Agreement, DOE may, in its discretion, set a new closing date, or terminate the Conditional Commitment.

### § 609.8 Loan guarantee agreement.

(a) Only a Loan Guarantee Agreement executed by the Contracting Officer can obligate DOE to issue a Guarantee in respect of Guaranteed Obligations. DOE is not bound by oral representations.

(b) Each Loan Guarantee Agreement shall contain the following requirements and conditions, and shall not be executed until the Contracting Officer determines that the following requirements and conditions are satisfied:

(1) The Federal Financing Bank shall be the only Eligible Lender in transactions where DOE guarantees 100 percent (but not less than 100 percent) of the principal and interest of the Guaranteed Obligations issued under a Loan Guarantee Agreement. Where DOE guarantees 90 percent or less of the Guaranteed Obligation, the guaranteed portion may be separated from or ''stripped'' from the non-guaranteed portion of the Guaranteed Obligation, if the loan is participated, syndicated or otherwise resold in the secondary debt market.

(2) The Borrower shall be obligated to make full repayment of the principal and interest on the Guaranteed Obligations and other debt of a Borrower over a period not to exceed:

(i) In the case of an Innovative Energy Project, an Innovative Supply Chain Project, or a State Energy Financing Institution Project, the lesser of 30 years or 90 percent of the projected useful life of the Eligible Project's major physical assets, as calculated in accordance with U.S. generally accepted accounting principles and practices; and

(ii) In the case of an Energy Infrastructure Reinvestment Project, 30 years.

(3) If any financing or credit arrangement of the Borrower or relating to the Eligible Project, other than the Guaranteed Obligations, has an amortization period shorter than that of the Guaranteed Obligations, DOE shall have determined that the resulting financing structure allocates to DOE a reasonably proportionate share of the default risk, in light of:

(i) DOE's share of the total debt financing of the Borrower;

(ii) Risk allocation among the credit providers to the Borrower; and

(iii) Internal and external credit enhancements.

(4) The Guarantee does not finance, either directly or indirectly tax-exempt debt obligations, consistent with the requirements of section 149(b) of the Internal Revenue Code.

(5) The principal amount of the Guaranteed Obligations, when combined with funds from other sources committed and available to the Borrower, shall be sufficient to pay for expected Project Costs (including adequate contingency amounts) and otherwise to carry out the Eligible Project.

(6) There shall be a Reasonable Prospect of Repayment by the Borrower of the principal of and interest on the Guaranteed Obligations and all of its other debt obligations.

(7) The Borrower shall pledge collateral or surety determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations. Such collateral or security may include Eligible Project assets and assets not related to the Eligible Project.

(8) The Loan Guarantee Agreement and related documents shall include detailed terms and conditions that DOE deems necessary and appropriate to

protect the interests of the United States in the case of default, including ensuring availability of all relevant intellectual property rights, technical data including software, and technology necessary for DOE or any Person selected by DOE, to complete, operate, convey, and dispose of the defaulted Borrower or the Eligible Project.

(9) The Guaranteed Obligations shall not be subordinate in payment or lien priority to other financing. In DOE's discretion, Guaranteed Obligations may share a lien position with other financing on a *pari passu* basis.

(10) There is satisfactory evidence that the Borrower will diligently pursue the Eligible Project and is willing, competent, and capable of performing its obligations under the Loan Guarantee Agreement and the loan documentation relating to its other debt obligations.

(11) The Borrower shall have paid all fees and expenses due to DOE or the U.S. Government, including such amount of the Credit Subsidy Cost as may be due and payable from the Borrower at the time of the Conditional Commitment.

(12) The Borrower, any Eligible Lender, and each other relevant party shall take, and be obligated to continue to take, those actions necessary to perfect and maintain liens on collateral in respect of the Guaranteed Obligations.

(13) DOE or its representatives shall have access to the offices of the Borrower and the Eligible Project site at all reasonable times in order to monitor the—

(i) Performance by the Borrower of its obligations under the Loan Guarantee Agreement; and

(ii) Performance of the Eligible Project.

(14) DOE and Borrower have reached an agreement regarding the information that will be made available to DOE and the information that will be made publicly available.

(15) The Borrower shall have filed applications for or obtained any required regulatory approvals for the Eligible Project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, State, and local regulatory requirements.

(16) The Borrower shall have no delinquent Federal debt.

(17) The Project Sponsors have made or will make a significant Equity investment in the Borrower or the Eligible Project, and will maintain control of the Borrower or the Eligible Project as agreed in the Loan Guarantee Agreement.

(18) The Loan Guarantee Agreement and related agreements shall include such other terms and conditions as DOE deems necessary or appropriate to protect the interests of the United States.

(c) The Loan Guarantee Agreement shall provide that, in the event of a default by the Borrower:

(1) Interest on the Guaranteed Obligations shall accrue at the rate or penalty rate, as applicable, stated in the Loan Guarantee Agreement or the Loan Agreement until DOE makes full payment of the defaulted Guaranteed Obligations and, except when such Guaranteed Obligations are funded through the Federal Financing Bank, DOE shall not be required to pay any premiums, defaults, or prepayment penalties; and

(2) The holder of collateral pledged in respect of the Guaranteed Obligations shall be obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery.

(d)(1) An Eligible Lender or other Holder may sell, assign or transfer a Guaranteed Obligation to another Eligible Lender that meets the requirements of § 609.9. Such latter Eligible Lender shall be required to assume all servicing, monitoring, and reporting requirements as provided in the Loan Guarantee Agreement. Any transfer of the servicing, monitoring, and reporting functions shall be subject to the prior written approval of DOE.

(2) The Secretary, or the Secretary's designee or contractual agent, for the purpose of identifying Holders with the right to receive payment under the Guaranteed Obligations, shall include in the Loan Guarantee Agreement or related documents a procedure for tracking and identifying Holders of Guaranteed Obligations. Any contractual agent approved by the Secretary to perform this function may transfer or assign this responsibility only with the Secretary's prior written approval.

(e) Each Loan Guarantee Agreement shall require the Borrower to make representations and warranties, agree to covenants, and satisfy conditions precedent to closing and to each disbursement that, in each case, relate to its compliance with the Davis-Bacon Act and the Cargo Preference Act.

(f) The Applicant, the Borrower, or the Project Sponsor must estimate, calculate, record, and provide to DOE any time DOE requests such information and at the times provided in the Loan Guarantee Agreement all costs incurred in the design, engineering, financing, construction, startup, commissioning, and shakedown of the Eligible Project in accordance with generally accepted accounting principles and practices.

### § 609.9 Lender servicing requirements.

(a) When reviewing and evaluating a proposed Eligible Project, all Eligible Lenders (other than the Federal Financing Bank) shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating, and disbursing a loan made by it without a Federal guarantee.

(b) Loan servicing duties shall be performed by an Eligible Lender, DOE, or another qualified loan servicer approved by DOE. When performing its servicing duties, the loan servicer shall at all times exercise the level of care and diligence that a reasonable and prudent lender would exercise when servicing a loan made without a Federal guarantee, including:

(1) During the construction period, monitoring the satisfaction of all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement, or related documents;

(2) During the operational phase, monitoring and servicing the Guaranteed Obligations and collection of the outstanding principal and accrued interest as well as undertaking to ensure that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) Until the Guaranteed Obligations have been repaid, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or its other debt obligations.

### § 609.10 Project costs.

(a) The Project Costs of an Eligible Project are those costs, including escalation and contingencies, that are expended or accrued by a Borrower and are necessary, reasonable, customary, and directly related to the design, engineering, financing, construction, startup, commissioning, and shakedown of an Eligible Project.

(b) Project Costs include:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site

improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility;

(3) Costs of equipment purchases, including a reasonable reserve of spare parts to the extent required;

(4) Costs to provide facilities and services related to safety and environmental protection;

(5) Transaction Costs;

(6) Costs of necessary and appropriate insurance and bonds of all types including letters of credit and any collateral required therefor;

(7) Costs of design, engineering, startup, commissioning, and shakedown;

(8) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the Eligible Project;

(9) To the extent required by the Loan Guarantee Agreement and not intended or available for any cost referred to in paragraph (d) of this section, costs of funding any reserve fund, including without limitation, a debt service reserve, a maintenance reserve, and a contingency reserve for cost overruns during construction; provided that proceeds of a Guaranteed Obligation deposited to any reserve fund shall not be removed from such fund except to pay Project Costs, to pay principal of the Guaranteed Obligation, or otherwise to be used as provided in the Loan Guarantee Agreement;

(10) Capitalized interest necessary to meet market requirements and other carrying costs during construction;

(11) In DOE's sole discretion, the cost of refinancing outstanding indebtedness that is directly associated with the Eligible Project, including the principal amount of such indebtedness, accrued interest thereon, and any reasonable and customary prepayment premium or breakage costs; provided that DOE determines that the refinancing furthers the purpose of the Eligible Project.

(12) With respect to Energy Infrastructure Reinvestment Projects, the cost of remediation of environmental damage associated with the Energy Infrastructure; and

(13) Other necessary and reasonable costs, including, without limitation, previously acquired real estate, equipment, or other materials, costs of interconnection, and any engineering, construction, make-ready, design, permitting, or other work completed on an existing facility or project;

(c) Where a Project consists of the financing and installation of a series of distributed energy resources, DOE may deem the eligible Project Costs to consist of the reasonable and documented costs incurred by the end-user of each distributed energy resource in connection with the contractual agreement between the end-user and the Project Sponsor or its agent, provided that:

(1) DOE is able to validate such reasonable and documented costs through standard customer contracts and standard distributed energy resource system attributes; and

(2) The Borrower institutes a compliance system satisfactory to DOE to ensure that each distributed energy resource supported by a Guarantee complies with any eligibility criteria required by DOE, including with respect to approved customer contracts and approved distributed energy resource systems.

(d) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder's fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity's general and administrative expenses, and non-Eligible Project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying an innovative technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the Eligible Project, as determined by DOE;

(7) Expenses incurred after startup, commissioning, and shakedown of the facility, or, in DOE's discretion, any portion of the facility that has completed startup, commissioning, and shakedown;

(8) Borrower-paid Credit Subsidy Costs, the Administrative Cost of a Loan Guarantee, and any other fee collected by DOE; and

(9) Operating costs.

(e) Costs incurred in connection with an Eligible Project may be subject to such other criteria for inclusion as Project Costs as published by DOE from time to time in guidance on the Title XVII Loan Guarantee Program website pursuant to § 609.19.

### § 609.11 Transaction costs.

(a) Upon making a determination to engage independent consultants or outside counsel with respect to an Application, DOE will proceed to evaluate and process such Application only following execution by an Applicant or Project Sponsor, as appropriate, of an agreement satisfactory to DOE to pay the Transaction Costs charged by the independent consultants and outside legal counsel. Each Applicant, Borrower, or Project Sponsor, as applicable, shall be responsible for the payment of Transaction Costs associated with DOE's independent consultants and outside legal counsel in connection with an Application, Conditional Commitment, or Loan Guarantee Agreement, as applicable. Appropriate provisions regarding payment of such Transaction Costs shall also be included in each Term Sheet and Loan Guarantee Agreement or, upon a determination by DOE, in other appropriate agreements.

(b) Notwithstanding payment by Applicant, Borrower, or Project Sponsor, all services rendered by an independent consultant or outside legal counsel to DOE in connection with an Application, Conditional Commitment, or Loan Guarantee Agreement shall be solely for the benefit of DOE (and such other creditors as DOE may agree in writing). DOE may require, in its discretion, the payment of an advance retainer to such independent consultants or outside legal counsel as security for the collection of the fees and expenses charged by the independent consultants and outside legal counsel. In the event an Applicant, Borrower, or Project Sponsor fails to comply with the provisions of such payment agreement, DOE in its discretion, may stop work on or terminate an Application, a Conditional Commitment, or a Loan Guarantee Agreement, or may take such other remedial measures in its discretion as it deems appropriate.

(c) DOE shall not be financially liable under any circumstances to any independent consultant or outside counsel for services rendered in connection with an Application, Conditional Commitment, or Loan Guarantee Agreement except to the extent DOE has previously entered into an express written agreement to pay for such services.

### § 609.12 Credit ratings.

(a) Where conditions justify, in the sole discretion of the Secretary, DOE may require that an Applicant submit a preliminary credit assessment for the proposed project, reflecting the project without a Guarantee, from a nationally recognized statistical ratings organization.

(b) Where conditions justify, in the sole discretion of the Secretary, DOE may require that an Applicant provide

a credit rating for the proposed project, and subsequently provide updated ratings, from a nationally recognized statistical ratings organization.

**§ 609.13 Fees and charges.**

(a) Unless explicitly authorized by statute, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for the Credit Subsidy Cost, the Facility Fee, the Maintenance Fee, and any other fees charged by or paid to DOE relating to Title XVII or any Guarantee thereunder. An Applicant may, at any time, use non-Federal monies to pay the Credit Subsidy Cost or DOE fees.

(b) DOE may charge Applicants a non-refundable Facility Fee, payable on the closing date for the Loan Guarantee Agreement.

(c) In order to encourage and supplement private lending activity DOE may collect from Borrowers for deposit in the United States Treasury a non-refundable Risk-Based Charge which, together with the interest rate on the Guaranteed Obligation that LPO determines to be appropriate, will take into account the prevailing rate of interest in the private sector for similar loans and risks. The Risk-Based Charge shall be paid at such times and in such manner as may be determined by DOE, but no less frequently than once each year, commencing with payment of a pro-rated payment on the date the Guarantee is issued. The amount of the Risk-Based Charge will be specified in the Loan Guarantee Agreement.

(d) DOE may collect a Maintenance Fee as set forth in the Loan Guarantee Agreement. The Maintenance Fee shall accrue from the date of execution of the Loan Guarantee Agreement through the date of payment in full of the related Guaranteed Obligations. If DOE determines to collect a Maintenance Fee, it shall be paid by the Borrower each year (or portion thereof) in advance in the amount specified in the applicable Loan Guarantee Agreement.

(e) In the event a Borrower or an Eligible Project experiences difficulty relating to technical, financial, or legal matters or other events (*e.g.,* engineering failure or financial workouts), the Borrower shall be liable as follows:

(1) If such difficulty requires DOE to incur time or expenses beyond those customarily expended to monitor and administer performing loans, DOE may collect an extraordinary expenses fee from the Borrower that will reimburse DOE for such time and expenses, as determined by DOE; and

(2) For all fees and expenses of DOE's independent consultants and outside counsel, to the extent that such fees and expenses are elected to be paid by DOE notwithstanding the provisions of § 609.11.

**§ 609.14 Full faith and credit and incontestability.**

The full faith and credit of the United States is pledged to the payment of principal and interest of Guaranteed Obligations pursuant to Guarantees issued in accordance with Title XVII and this part. The issuance by DOE of a Guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such Guarantee; and that, but for fraud or material misrepresentation by the Holder, except when the Holder is the Federal Financing Bank, such Guarantee shall be legal, valid, binding, and enforceable against DOE in accordance with its terms.

**§ 609.15 Default, demand, payment, and foreclosure on collateral.**

(a) If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Holder may make written demand for payment upon the Secretary in accordance with the terms of the applicable Guarantee. If a Borrower defaults in making a required payment of principal or interest on a Guaranteed Obligation and such default has not been cured within the applicable grace period, the Secretary shall notify the Attorney General.

(b) Subject to the terms of the applicable Guarantee, the Secretary shall make payment within 60 days after receipt of written demand for payment from the Holder, provided that the demand for payment complies in all respects with the terms of the applicable Guarantee. Interest shall accrue to the Holder at the rate stated in the promissory note evidencing the Guaranteed Obligation, without giving effect to the Borrower's default in making a required payment of principal or interest on the applicable Guarantee Obligation or any other default by the Borrower, until the Guaranteed Obligation has been fully paid by DOE. Payment by the Secretary on the applicable Guarantee does not change Borrower's obligations under the promissory note evidencing the Guaranteed Obligation, Loan Guarantee Agreement, Loan Agreement, or related documents, including an obligation to pay default interest.

(c) Following payment by the Secretary pursuant to the applicable Guarantee, upon demand by DOE, the Holder shall transfer and assign to the Secretary (or his or her designee or agent) the promissory note evidencing the Guaranteed Obligation, all rights and interests of the Holder in the Guaranteed Obligation, and all rights and interests of the Holder in respect of the Guaranteed Obligation, except to the extent that the Secretary determines that such promissory note or any of such rights and interests shall not be transferred and assigned to the Secretary. Such transfer and assignment shall include, without limitation, all of the liens, security, and collateral rights of the Holder (or his or her designee or agent) in respect of the Guaranteed Obligation.

(d) Following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, the Secretary is authorized to protect and foreclose on the collateral, take action to recover costs incurred by, and all amounts owed to, the United States as a result of the defaulted Guarantee Obligation, and take such other action necessary or appropriate to protect the interests of the United States. In respect of any such authorized actions that involve a judicial proceeding or other judicial action, the Secretary shall act through the Attorney General. The foregoing provisions of this paragraph (d) shall not relieve the Secretary from his or her obligations pursuant to any applicable Intercreditor Agreement. Nothing in this paragraph (d) shall limit the Secretary from exercising any rights or remedies pursuant to the terms of the Loan Guarantee Agreement.

(e) The cash proceeds received as a result of any foreclosure on the collateral, or other action, shall be distributed in accordance with the Loan Guarantee Agreement (subject to any applicable Intercreditor Agreement).

(f) The Loan Guarantee Agreement shall provide that cash proceeds received by the Secretary (or his or her designee or agent) as a result of any foreclosure on the collateral or other action shall be applied in the following order of priority:

(1) Toward the pro rata payment of any costs and expenses (including unpaid fees, fees and expenses of counsel, contractors and agents, and liabilities and advances made or incurred) of the Secretary, the Attorney General, the Holder, a collateral agent, or other responsible person of any of them (solely in their individual capacities as such and not on behalf of or for the benefit of their principals),

incurred in connection with any authorized action following payment by the Secretary pursuant to a Guarantee or other default of a Guaranteed Obligation, or as otherwise permitted under the Loan Agreement or Loan Guarantee Agreement;

(2) To pay all accrued and unpaid fees due and payable to the Secretary, the Attorney General, the Holder, a collateral agent, or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(3) To pay all accrued and unpaid interest due and payable to the Secretary, the Attorney General, the Holder, a collateral agent, or other responsible person of any of them on a pro rata basis in respect of the Guaranteed Obligation;

(4) To pay all unpaid principal of the Guaranteed Obligation;

(5) To pay all other obligations of the Borrower under the Loan Guarantee Agreement, the Loan Agreement, and related documents that are remaining after giving effect to the preceding provisions and are then due and payable; and

(6) To pay to the Borrower, or its successors and assigns, or as a court of competent jurisdiction may direct, any cash proceeds then remaining following the application of all payment described in paragraphs (f)(1) through (5) of this section.

(g) No action taken by the Holder or its agent or designee in respect of any collateral will affect the rights of any person, including the Secretary, having an interest in the Guaranteed Obligations or other debt obligations, to pursue, jointly or severally, legal action against the Borrower or other liable persons, for any amounts owing in respect of the Guaranteed Obligation or other applicable debt obligations.

(h) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with exercise of rights as a lien holder or recovery of deficiencies due under the Guaranteed Obligation, the Secretary may take such action as he determines to be appropriate under the circumstances.

(i) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, the Secretary from purchasing any collateral or Holder's or other Person's interest in the Eligible Project upon foreclosure of the collateral.

(j) Nothing in this part precludes, nor shall any provision of this part be construed to preclude, forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower and the United States.

(k) The Holder and the Secretary may agree to a formal or informal plan of reorganization in respect of the Borrower, to include a restructuring of the Guaranteed Obligation and other applicable debt of the Borrower on such terms and conditions as the Secretary determines are in the best interest of the United States.

### § 609.16 Preservation of collateral.

(a) If the Secretary exercises his or her right under the Loan Guarantee Agreement to require the holder of pledged collateral to take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the collateral, the Secretary shall, subject to compliance with the Antideficiency Act, 31 U.S.C. 1341 *et seq.,* reimburse the holder of such collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.15, no party may waive or relinquish, without the consent of the Secretary, any such collateral to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as he determines are required or appropriate, taking into account the term of any applicable Intercreditor Agreement, to care for, preserve, protect or maintain collateral pledged in respect of Guaranteed Obligations. The cost of such contracts may be charged to the Borrower.

### § 609.17 Audit and access to records.

Each Loan Guarantee Agreement and related documents shall provide that:

(a) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the Eligible Project as are necessary, including the Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all Eligible Project assets and non-Eligible Project assets pledged in respect of the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all Eligible Project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals, and all other documents and records relating to the Borrower or the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the Eligible Project; and

(b) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the Borrower, Eligible Lender, or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender, DOE or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

### § 609.18 Deviations.

(a) Subject to the requirements of Title XVII and as otherwise permitted by applicable law, the Secretary may authorize deviations from the requirements of this part upon:

(1) Either receipt from the Applicant, Borrower, or Project Sponsor, as applicable, of—

(i) A written request that the Secretary deviate from one or more requirements; and

(ii) A supporting statement briefly describing one or more justifications for such deviation; or

(iii) A determination by the Secretary in his or her discretion to undertake a deviation;

(2) A finding by the Secretary that such deviation supports program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government; and

(3) If the waiver would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents, DOE's consultation with OMB and the Secretary of the Treasury.

(b) If a deviation under this section results in an increase in the applicable Credit Subsidy Cost, such increase shall be funded either by additional fees paid by the Borrower or on behalf of the Borrower by any third party or, if an appropriation is available, by means of an appropriations act. The Secretary has

discretion to determine how the cost of a deviation is funded.

**§ 609.19 Title XVII loan guarantee program guidance.**

(a) Invitations for the submission of Applications for loan guarantees for Eligible Projects shall be published on DOE's Title XVII Loan Guarantee Program website. The Title XVII Loan Guarantee Program website shall contain guidance for potential Title XVII Applicants and solicit applications for a Guarantee.

(b) The Title XVII Loan Guarantee Program website must include, at a minimum, the following guidance:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE for Guarantees under Title XVII;

(2) The method and further instructions for submission of Applications;

(3) The name and address of the DOE representative whom a potential Applicant may contact to receive further information;

(4) The programmatic, technical, financial, and other factors and criteria that DOE will use to evaluate Applications, including but not limited to consideration of the Reasonable Prospect of Repayment, the amount of Equity provided, and the reliance on other Federal assistance;

(5) The required contents of the Application, which may vary by category of Eligible Project; and

(6) Such other information as DOE may deem appropriate.

(c) Using procedures as may be announced by DOE, a potential Applicant may request a meeting with DOE to discuss its potential Application. At its discretion, DOE may meet with a potential Applicant, either in person or electronically, to discuss its potential Application. DOE's responses to questions from potential Applicants and DOE's statements to potential Applicants, including any initial thoughts on the eligibility of the project, are pre-decisional and preliminary in nature. Any such responses and statements are subject in their entirety to any final action by DOE with respect to an Application submitted in accordance with § 609.4.

[FR Doc. 2023–11104 Filed 5–26–23; 8:45 am]

BILLING CODE 6450–01–P

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Parts 91, 121, 125, and 135

**[Docket No. FAA–2022–0912; Amdt. Nos. 91–368, 121–388, 125–73, and 135–144]**

**RIN 2120–AL36**

# Updating Manual Requirements To Accommodate Technology

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

**ACTION:** Final rule.

**SUMMARY:** This final rule updates the Federal Aviation Administration (FAA) manual requirements to reflect industry use of electronic and paper manuals. The amendments apply to fractional ownership operations; domestic, flag, and supplemental operations; rules governing the operations of U.S.-registered civil airplanes which have a seating configuration of 20 or more passengers or a maximum payload capacity of 6,000 pounds or more when common carriage is not involved; and commuter and on-demand operations. This action requires manuals accessed in paper format to display the date of last revision on each page, and it requires manuals accessed in electronic format to display the date of last revision in a manner in which a person can immediately ascertain it. This action also revises the requirement for program managers or certificate holders to carry appropriate parts of the manual aboard airplanes during operations. The FAA instead requires program managers or certificate holders to ensure the appropriate parts of the manual are accessible to flight, ground, and maintenance personnel when such personnel are performing their assigned duties. Lastly, this rule updates outdated language that refers to accessing information in manuals kept in microfiche. The FAA removes this outdated language and simply requires that all manual information and instructions be displayed clearly and be retrievable in the English language.

**DATES:** This final rule is effective June 29, 2023.

**ADDRESSES:** For information on where to obtain copies of rulemaking documents and other information related to this final rule, see ''Additional Information'' in the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Sandra Ray, Voluntary Programs and Rulemaking Section, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (412) 329–3088; email *Sandra.ray@faa.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Executive Summary

The FAA is adopting without change, a notice of proposed rulemaking (NPRM),[1] which proposed several amendments in title 14, Code of Federal Regulations (14 CFR), part 91, subpart K, and parts 121, 125, and 135 to remove certain prescriptive manual requirements for certificate holders. This rulemaking amends §§ 91.1025, 121.135, 125.73, and 135.23 to remove the requirement to have the date of last revision on each page concerned as it applies to operators using electronic manuals. Further, this rule adds a separate requirement to allow certificate holders using electronic manuals flexibility in displaying the date of last revision, while maintaining the existing requirement for certificate holders with paper manuals.

In addition, this rulemaking clarifies in §§ 91.1023, 121.139, and 135.21 that program managers or certificate holders must ensure appropriate parts of the manual are accessible on each aircraft when the aircraft are away from their principal base of operations, in lieu of indicating that manuals must exist in any particular format. This rulemaking provides certificate holders flexibility regarding how their flight, ground, and maintenance personnel access electronic manuals and permits them to obtain information in a manner that reflects current technological capabilities.[2]

Lastly, this rulemaking amends §§ 91.1023, 121.139, 125.71, and 135.21 to update language that requires certificate holders accessing manuals in ''other than printed form'' to ensure there is a ''compatible reading device available to those persons that provides a legible image'' or ''a system that is able to retrieve the maintenance information and instructions in the English language.'' The FAA replaces this outdated language with a requirement that all manual information and instructions be displayed clearly and be retrievable in the English language.

## II. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code (U.S.C.). Subtitle I,

[1] Updating Manual Requirements to Accommodate Technology notice of proposed rulemaking, 87 FR 42109 (Jul. 14, 2022).

[2] Other regulations, such as 14 CFR 91.9, contain language that does not preclude referring to or carrying manuals that exist in an electronic format. This rule does not address such regulations.

Section 106 describes the authority of the FAA Administrator. Section 106(f) vests final authority in the Administrator for carrying out all functions, powers, and duties of the Administrator relating to the promulgation of regulations and rules.

Subtitle VII of title 49, Aviation Programs, describes in more detail the scope of the FAA's authority. This rulemaking is issued under the authority described in Subtitle VII, Aviation Programs, section 44701(a)(5). Under that section, the FAA is charged with prescribing regulations and minimum standards for other practices, methods, and procedures necessary for safety in air commerce and national security. This regulation is within the scope of that authority.

Authority for this particular rulemaking is also derived from 49 U.S.C. 44701(d)(1)(A), which specifically states the Administrator, when prescribing safety regulations, must consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest. Such authority applies to the oversight the FAA exercises to ensure safety of aviation operations, including review of manual information and instructions.

## III. Background

FAA regulations require operators subject to part 91, subpart K, and parts 121, 125, and 135 to prepare and keep current operations manuals for use and guidance of flight, ground operations, and management personnel. These manuals must contain specific information about operations and must include the names of management personnel; copies of operations specifications; and many procedures for weight and balance calculations, accident notifications, airworthiness determinations, reporting mechanical irregularities, maintenance, and refueling.[3] Manuals ensure appropriate employees and contractors providing service for an operator are aware of the necessary steps for operating, moving, and servicing an aircraft in a safe manner.

Operators currently use electronic and internet-based technology to provide their flight, ground, and maintenance personnel with access to the manuals in a variety of formats, including electronic flight bags (EFB) and portable electronic devices (PED). Such technology has caused many operators to utilize manuals in electronic format rather than accessing paper manuals. This final rule updates FAA manual requirements to reflect industry use of electronic and paper manuals.

### *A. Statement of the Problem*

Current manual requirements in applicable FAA regulations do not appropriately accommodate the use of electronic manuals. Further, the requirement that some certificate holders ''carry'' appropriate parts of the manual on each aircraft when away from their principal base of operations is outdated and no longer necessary due to modern technology. Prior to the advent of electronic manuals and the internet, operators were required to physically carry the ground servicing and maintenance parts of the manual aboard an aircraft to ensure the manual was available to personnel at out stations or other locations away from the certificate holder's principal base of operations. Personnel at out stations did not always have their own manuals, or access to necessary manuals, so they relied on the aircraft to carry the manuals to them. Technological advancements have now rendered this prescriptive requirement unnecessary because accessing electronic manuals is significantly easier for flight, ground, and maintenance personnel. The current language requires operators accessing manuals in ''other than printed form'' to ensure there is a ''compatible reading device available to those persons that provide a legible image'' or ''a system that is able to retrieve the maintenance information and instructions in the English language'' is outdated. The FAA promulgated this text during an era when certificate holders used microfiche technology to store and read manual information. The existing requirements do not reflect current technology.

### *B. The Notice of Proposed Rulemaking*

On July 14, 2022, the FAA published an NPRM titled ''Updating Manual Requirements to Accommodate Technology.''[4] In the NPRM, the FAA proposed revisions to manual requirements to reflect industry use of electronic and paper manuals, to remove outdated language, and simply require that all manual information and instructions be displayed clearly and be retrievable in the English language.

The NPRM provided for a 60-day comment period, which ended on September 12, 2022. The FAA received four comments from industry (National Business Aviation Association, The Cargo Airline Association, ABXAIR, and Airlines for America (A4A)) and one anonymous comment. All commenters generally supported the proposed revisions; however, A4A and the anonymous commenter recommended changes, as described in the Discussion of the Final Rule section of this preamble.

## IV. Discussion of the Final Rule

### *A. Date of Revision Display (§§ 91.1025, 121.135, 125.73, and 135.23)*

The FAA proposed to amend §§ 91.1025, 121.135, 125.73, and 135.23 to remove the requirement for the date of last revision on each page concerned as it applies to operators using electronic manuals. The FAA proposed to revise the introductory paragraphs of §§ 91.1025, 125.73, and 135.23 to state that each manual accessed in paper format must display the date of last revision on each page and that each manual accessed in electronic format must display the date of last revision in a manner in which a person can immediately ascertain it. The FAA proposed similar revisions to § 121.135, as it contains the same language requiring manuals to have the date of last revision on each page revised. Further, the FAA proposed to revise § 121.135(a) introductory text such that it includes the same regulatory text as the FAA adds to the other regulatory sections as discussed above. This rule also removes § 121.135(a)(3) because it contains the requirement to ''have the date of last revision on each page concerned,'' which would be duplicative of the language in § 121.135(a) introductory text. As a result, the NPRM proposed to designate § 121.135(a)(4) as § 121.135(a)(3). Finally, the FAA proposed to amend the introductory paragraph of § 125.73. While all of the above-referenced sections currently contain the requirement concerning the date of last revision on each revised page, the introductory paragraph of § 125.73 proposed to include an additional requirement that each manual has the ''revision number'' on each revised page.

A4A made two recommendations for changes in the final rule. First, A4A suggested that the FAA revise § 121.135 (and similar proposed sections) to replace ''immediately'' with ''reasonably.'' A4A stated this change would allow electronic manuals to have the date displayed at a location that is reasonably accessible for an ordinary person using the manual, including at the top of the section (*e.g.,* at the top of the table of contents displayed at the beginning of the screen), but not always visible after the user scrolls down in the manual. A4A believed safety would be

[3] See 14 CFR 91.1025, 121.135, 125.73, 135.23.

[4] 87 FR 42109 (July 14, 2022).

maintained because the user can easily access the revision date, such as scrolling to the top of the section to ascertain the revision date. A4A stated that requiring that a revision date be ''immediately'' available, regardless of scrolling, would be overly prescriptive and would require unnecessary retooling of existing manuals and software, which already allow users to easily determine the revision date by scrolling back to the top of the screen.

The FAA has considered the recommendation and determined to keep the existing language of ''immediately'' in the rule. The FAA's intent in using ''immediately'' is to require that manuals have the date of last revision readily accessible in the manual that the crewmember is using. ''Immediately'' means that a crewmember could scroll to find the date within the open document. The FAA determined that ''reasonably'' is not specific enough of a term and open to interpretation. A crewmember must be able to ascertain quickly that they are using the most current version of the manual.

A4A's second comment recommended that § 121.135 (and similar proposed sections) provide further flexibility on the requirement to ''display the date of last revision'' for manuals accessed in electronic format, which is a holdover requirement of paper manual systems. A4A stated that the objective of the requirement to display the date of last revision is to ensure and confirm that the technician is using the most up-to-date version of the manual. However, some operator systems have imposed revision access and control capabilities—*i.e.,* systems that force aviation maintenance technicians to access only current, applicable manual data and information, preventing the use of outdated manuals. A4A asserted that such capabilities undoubtedly achieve FAA's objective without needing a display of the revision date. However, in some cases, these manuals may not have the revision date in the text of the electronic format manual because the aviation maintenance technician cannot access previous versions. Accordingly, A4A recommended that the FAA allow for both ''display the date of last revision'' or ''ensure that only the last revision is accessible.''

The FAA has considered the recommendation and has determined to adopt the revisions to §§ 91.1025, 121.135, 125.73, and 135.23 as proposed in the NPRM. The FAA is requiring that the date of last revision be present somewhere in an electronic manual and is leaving the choice of where to place that date on the air carrier. For revision control purposes, there needs to be a method to confirm that employees are using the most current manual when performing their job duties. The FAA determined that the most straightforward way to confirm use of the correct version is to display the date of revision while giving the air carrier the flexibility of determining where to put that date. Additionally, only having one version of the manual on the website does not ensure that it is the most current version.

*B. Compatible Reading Device Update (§§ 91.1023, 121.139, 125.71, and 135.21)*

Sections 91.1023(g), 121.139(a), 125.71(f), and 135.21(g) require that, when manuals exist in other than printed form, certificate holders must carry compatible reading devices that provide legible images of maintenance information and instructions. In addition, certificate holders must have a system that is able to retrieve the maintenance information and instructions in the English language. The FAA promulgated these requirements when certificate holders used microfiche technology to ensure the information was readable, or retrievable, in the English language.

Specifically, the NPRM proposed to amend the requirements of §§ 91.1023, 121.139, and 135.21 to reflect the ability operators now have to access manuals using electronic devices in order to download the manual or access it via the internet. The proposed amendments to §§ 91.1023, 121.139, and 135.21 give certificate holders the flexibility to use technology in providing access to the electronic manual. Specifically, this final rule removes the requirement that certificate holders ''carry'' appropriate parts of the manual on each airplane when away from its principal base of operations. The NPRM proposed to replace the word ''carry'' or ''carried'' in the aforementioned sections with the requirement to ensure parts of the manual associated with personnel's assigned duties are accessible for flight, ground, and maintenance personnel ''at all times when those personnel are performing their duties.'' This language ensures personnel always have access to the necessary information while performing their assigned duties.

The FAA acknowledges that the revisions to §§ 91.1023, 121.139, and 135.21 could result in reliability concerns regarding certificate holders' ability to maintain consistent access to its manuals, *e.g.,* during electronic or internet outages. However, the final rule requires personnel to always have access to the relevant manual's information when they are performing their assigned duties. By using performance-based language to require certificate holders ensure availability when these personnel are performing their assigned duties, the final rule indicates certificate holders should maintain policies and procedures to address circumstances in which an electronic or internet outage may occur.

The previously discussed amendments to § 121.139 will result in the removal of paragraphs (a) and (b), replacing them with a single paragraph. Further, the FAA proposed to amend § 121.139 by changing the section heading to read ''Manual accessibility: Supplemental operations.''

The NPRM also proposed to amend §§ 91.1023(g), 121.139, 125.71(f), and 135.21(g) to require that all manual information and instructions be displayed clearly and be retrievable in the English language. Removing the compatible reading device requirement is appropriate because electronic manuals do not require a separate, compatible reading device to view the manual information. The NPRM proposed requiring all manual information and instructions be accessible to the appropriate personnel and appear in a manner in which they can read and comprehend the necessary provisions. Due to FAA's oversight of certificate holders' manuals, such manual information and instructions must be readable and retrievable in the English language for the FAA to review and approve the manual. Therefore, the requirement that all manual information and instructions under §§ 91.1023, 121.139, 125.71, and 135.21 be readable and retrievable in the English language codifies current practice and brings this regulatory requirement up-to-date.

The FAA received one comment on this proposal from an anonymous commenter. The anonymous commenter stated that the exception language in existing § 121.139(b) is very similar to the exception language in § 125.71(g). However, the FAA stated in the NPRM that the amendment to the similar requirement in § 125.71 is not needed. The commenter believed the rationale for the change in § 121.139 would appear to apply equally to § 125.71(g). The commenter suggested the FAA review § 125.71(g) again to determine if a similar change is warranted.

The FAA has reviewed the comment and the section in question and determined that no change is warranted. Under current § 121.139, certificate holders conducting supplemental operations are always required to carry manuals onboard the aircraft except if

the certificate holder performs all scheduled maintenance at specified stations where it keeps maintenance parts of the manual. The proposed revision would allow certificate holders to not carry the manuals onboard the aircraft as long as they are accessible while performing assigned duties, and thus this particularized exception is no longer needed. Section 125.71 requires that manuals must be made available, but it does not state that the manuals must be carried onboard the aircraft, as does § 121.139. Therefore, no change is required. Accordingly, the FAA adopts all amendments to §§ 91.1023, 121.139, 125.71, and 135.21 as proposed.

## V. Regulatory Notices and Analyses

Federal agencies consider impacts of regulatory actions under a variety of executive orders and other requirements. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is $165 million using the most current (2021) Implicit Price Deflator for the Gross Domestic Product. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this rule.

In conducting these analyses, the FAA has determined that this final rule: will result in benefits that justify costs; is not an economically ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; will not have a significant economic impact on a substantial number of small entities; will not create unnecessary obstacles to the foreign commerce of the United States; and will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

### *A. Regulatory Impact Analysis*

The FAA estimates the rulemaking will not result in additional costs to affected operators that conduct operations under part 91, subpart K, and parts 121, 125, and 135. The rule provides flexibility for the efficient use of electronic manuals for these operators. The modified requirements also ensure consistency for manual requirements for these operators. These flexibilities may reduce the administrative costs of maintaining and providing manual accessibility to these operators. The FAA determines changes to the rule will not adversely affect safety.

This rulemaking updates the manual display requirements for these affected operators to accommodate electronic manuals. In particular, the modified rules remove the requirement to have the date of last revision on each page concerned as it applies to operators using electronic manuals. This rule adds a separate requirement to allow operators using electronic manuals flexibility in displaying the date of last revision while maintaining the existing requirement for operators with paper manuals.

This rule also revises the current requirement to physically carry appropriate parts of the manual aboard airplanes for these operators. As a result, operators will have flexibility regarding how flight, ground, and maintenance personnel use electronic manuals and can provide access to each manual's information in a manner that reflects current technological capabilities.

Based on information from industry, affected operators currently provide their flightcrew personnel with access to manuals in electronic formats, including EFBs and PEDs.[5] In addition, most operators currently provide ground and maintenance personnel at their stations access to the manual information necessary for ground handling and servicing of aircraft through electronic devices such as computers and PEDs.

The FAA expects the incremental changes from this final rule to provide additional flexibilities to these operators for the efficient use of electronic manuals with no additional costs. These flexibilities may result in savings from avoided costs to these operators of maintaining and providing access to manuals for flightcrew, ground, and maintenance personnel. The FAA did not identify data to quantify with certainty the incremental savings of this rulemaking and the flexibilities it will provide to operators conducting operations under part 91, subpart K, and parts 125 and 135.

The Aviation Rulemaking Advisory Committee (ARAC) report provided information and insight on the potential costs and savings related to certain part 121 operators conducting operations to ensure appropriate parts of the manual are available for use by ground and maintenance personnel.[6] The report found technological advances and the availability of internet connections have eliminated the need for paper manuals for these operators.

The report identified potential cost savings that would include a reduction in weight through the elimination of paper manuals compared to equipment associated with non-paper manuals and a reduction in time auditing, updating, and printing paper manuals. In the report, one A4A member reported annual costs of approximately $500,000 for operators of part 121 airplanes to create paper manuals.[7] If this is representative of current costs for all 64 affected part 121 operators,[8] then the estimated annual savings are $32,000,000 (= $500,000 × 64). Over a five-year period of analysis, the present value savings are approximately $146.6 million at a three-percent discount rate or approximately $132.2 million at a seven-percent discount rate. The FAA notes that this cost-saving estimate is conservative because the ARAC report only provided information for one part

[5] Advisory Circular 120–76D (Oct. 27, 2017) describes an EFB as ''any device, or combination of devices, actively displaying EFB applications'' and EFB applications as ''generally replacing conventional paper products and tools, traditionally carried in the pilot's flight bag. EFB applications include natural extensions of traditional flight bag contents, such as replacing paper copies of weather with access to near-real-time weather information.'' This document can be accessed at *https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentID/1032166*. A portable electronic device refers to a cellular phone, laptop, tablet, or other portable electronic device on which the manual can be downloaded or accessed via the internet. Advisory Circular 120–76D (Oct. 27, 2017) describes these devices as ''consumer commercial off-the-shelf (COTS) electronic devices functionally capable of communications, data processing, and or/utility[.]'' This document can be accessed at *https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentID/1032166*.

[6] ARAC Input to Support Regulatory Reform of Aviation Regulations-ARAC Addendum Report at 74 (Sept. 12, 2017), available at *https://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/Phase%202%20Report_Final%20Recommendations_Post%20ARAC%20Mt_Sept%2018%20(1).pdf*.

[7] It is unclear if this estimate is net of incremental costs that would occur due to this final rule and does not include costs that would result regardless of this change.

[8] At the time of writing, there were 64 active part 121 certificate holders (data accessed January 14, 2022).

121 operator, and this rule also affects operators in part 91, subpart K, and parts 125 and 135 service.

The changes in this rulemaking will not have an adverse impact on safety because flightcrew members or inspectors will continue to be able to identify and ensure the manual or appropriate parts are up-to-date. Likewise, the changes to manual accessibility to these operators have no adverse impact on safety because flight, ground, and maintenance personnel have access to the necessary parts of the manual wherever these operators conduct their operations.

In addition, the FAA has determined no adverse safety implication will result from the final rule for flightcrews and other personnel because such personnel are required to have access to parts of the manual that are appropriate to their assigned duties when they are performing those duties. This rule alone will not result in new logistical issues related to connectivity because much of the current baseline maintenance activities rely on connectivity. In addition, as discussed in the ARAC report, in the unlikely event that connectivity is problematic or the on-ground electronic means is interrupted, maintenance activities will temporarily halt. While this may affect operations, it ensures that no adverse effect on safety occurs.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) of 1980, Public Law 96–354, (5 U.S.C. 601–612), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857, Mar. 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111–240, 124 Stat. 2504, Sept. 27, 2010), requires Federal agencies to consider the effects of the regulatory action on small business and other small entities and to minimize any significant economic impact. The term ''small entities'' comprises small businesses and 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.

This rule removes the requirement to have the date of last revision on each page concerned, as it applies to part 91, subpart K, and parts 121, 125, and 135 operators using electronic manuals and adds a separate requirement that allows operators using electronic manuals flexibility in displaying the date of last revision, while maintaining the requirement for operators using paper manuals. This rulemaking also revises the current requirement to carry appropriate parts of the manual aboard airplanes for these operators. As a result, this rulemaking provides operators with flexibility regarding how flight, ground, and maintenance personnel access the appropriate parts of the manual. The rulemaking, therefore, enables these operators to use electronic manuals efficiently and provide access to the manual information in a manner that reflects current technological capabilities.

The rulemaking will not result in additional costs to affected operators. The rulemaking does not mandate the use of an electronic format for manuals. Rather, the rule provides flexibility for the efficient use of electronic manuals. Such flexibility may reduce administrative costs of maintaining and providing manual accessibility to these operators. In addition, the FAA estimates that some operators will not incur savings from this rule because they currently benefit from these flexibilities.

Therefore, as provided in 5 U.S.C. 605(b), the head of the FAA certifies that this rulemaking will not result in a significant economic impact on a substantial number of small entities.

*C. International Trade Impact Assessment*

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this rulemaking and determined that it will have only a domestic impact and, therefore, will not create obstacles to the foreign commerce of the United States.

*D. Unfunded Mandates Assessment*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government having first provided the funds to pay those costs. The FAA determined that this final rule will not result in the expenditure of $165 million or more by State, local, or tribal governments, in the aggregate, or the private sector, in any one year.

*E. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. This rule does not include any new requirement for information collection or changes to existing information collections associated with this final rule. The existing information collection associated with all part 121 manual requirements was approved under Office of Management and Budget (OMB) control number 2120–0008, Part 121 Operating Requirements: Domestic, Flag, and Supplemental Operations. The information collection estimates the cost for the original manual for original certification and the cost of manual revisions. The information collection attributes the burden associated with manual revision to § 121.133 and does not attribute any burden to § 121.139. The FAA has determined this rulemaking does not require any adjustment in the estimate of public or government burden under the Paperwork Reduction Act.

The existing information collection associated with all part 135 manual requirements was approved under OMB control number 2120–0039, Part 135—Operating Requirements: Commuter and On-demand Operations and Rules Governing Persons on Board such Aircraft. This collection attributes the burden with manuals to § 135.21. The FAA has determined this rule does not require any adjustment in the estimate of public or government burden under the Paperwork Reduction Act.

The existing information collection associated with all part 125 manual requirements was approved under OMB control number 2120–0085, Certification and Operations: Airplanes with Seating Capacity of 20 or More Passenger Seats or Maximum Payload of 6,000 Pounds or More—14 CFR part 125. This collection associates the burden with manuals to § 125.71. The FAA has determined this rulemaking does not require any adjustment in the estimate of public or government burden under the Paperwork Reduction Act.

The existing information collection associated with all 14 CFR part 91, subpart K, was approved under OMB

control number 2120–0684, Fractional Ownership Programs. This collection attributes the burden with manuals to § 91.1023. The FAA has determined this rulemaking does not require any adjustment in the estimate of public or government burden under the Paperwork Reduction Act.

*F. International Compatibility*

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

*G. Environmental Analysis*

FAA Order 1050.1F identifies FAA actions that are categorically excluded from the preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6f for regulations and involves no extraordinary circumstances.

**VI. Executive Order Determinations**

*A. Executive Order 13132, Federalism*

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The FAA has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government and, therefore, will not have federalism implications.

*B. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

Consistent with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments,[9] and FAA Order 1210.20, American Indian and Alaska Native Tribal Consultation Policy and Procedures,[10] the FAA ensures that Federally Recognized Tribes (Tribes) are given the opportunity to provide meaningful and timely input regarding proposed Federal actions that have the potential to 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; or to affect uniquely or significantly their respective Tribes. The FAA has not identified any unique or significant effects, environmental or otherwise, on tribes resulting from this final rule.

*C. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use*

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The FAA has determined that it is not a ''significant energy action'' under the Executive order and is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

*D. Executive Order 13609, Promoting International Regulatory Cooperation*

Executive Order 13609, Promoting International Regulatory Cooperation, promotes international regulatory cooperation to meet shared challenges involving health, safety, labor, security, environmental, and other issues and to reduce, eliminate, or prevent unnecessary differences in regulatory requirements. The FAA has analyzed this action under the policies and agency responsibilities of Executive Order 13609 and has determined that this action will have no effect on international regulatory cooperation.

**VII. Additional Information**

*A. Electronic Access and Filing*

A copy of the NPRM, all comments received, this final rule, and all background material may be viewed online at *https://www.regulations.gov* using the docket number listed above. A copy of this final rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *https://www.federalregister.gov* and the Government Publishing Office's website at *https://www.govinfo.gov.* A copy may also be found on the FAA's Regulations and Policies website at *https://www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677. Commenters must identify the docket or amendment number of this rulemaking.

All documents the FAA considered in developing this final rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

*B. Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires the FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *https://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

**List of Subjects**

*14 CFR Part 91*

Air carriers, Air taxis, Aircraft, Airports, Aviation safety, Charter flights, Freight, Reporting and recordkeeping requirements, Transportation.

*14 CFR Part 121*

Air carriers, Aircraft, Airmen, Aviation safety, Charter flights, Reporting and recordkeeping requirements, Safety, Transportation.

*14 CFR Part 125*

Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

*14 CFR Part 135*

Air taxis, Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

**The Amendment**

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

## PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40101, 40103, 40105, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–

[9] 65 FR 67249 (Nov. 6, 2000).

[10] FAA Order No. 1210.20 (Jan. 28, 2004), available at *https://www.faa.gov/documentLibrary/media/1210.pdf.*

47531, 47534, Pub. L. 114–190, 130 Stat. 615 (49 U.S.C. 44703 note); articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180), (126 Stat. 11).

■ 2. Amend § 91.1023 by:

■ a. Revising paragraphs (f) and (g);

■ b. Removing paragraph (h); and

■ c. Redesignating paragraph (i) as paragraph (h).

The revisions read as follows:

**§ 91.1023 Program operating manual requirements.**

* * * * *

(f) The program manager must ensure the appropriate parts of the manual are accessible to flight, ground, and maintenance personnel at all times when such personnel are performing their assigned duties.

(g) The information and instructions contained in the manual must be displayed clearly and be retrievable in the English language.

* * * * *

■ 3. Amend § 91.1025 by revising the introductory text to read as follows:

**§ 91.1025 Program operating manual contents.**

Each program operating manual accessed in paper format must display the date of last revision on each page. Each program operating manual accessed in electronic format must display the date of last revision in a manner in which a person can immediately ascertain it. Unless otherwise authorized by the Administrator, the manual must include the following:

* * * * *

## PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 4. The authority citation for part 121 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40103, 40113, 40119, 41706, 42301 preceding note added by Pub. L. 112–95, sec. 412, 126 Stat. 89, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44729, 44732; 46105; Pub. L. 111–216, 124 Stat. 2348 (49 U.S.C. 44701 note); Pub. L. 112–95, 126 Stat. 62 (49 U.S.C. 44732 note); Pub. L. 115–254, 132 Stat. 3186 (49 U.S.C. 44701 note).

■ 5. Amend § 121.135 by:

■ a. Revising paragraph (a) introductory text;

■ b. Adding the word ''and'' at the end of paragraph (a)(2);

■ c. Removing paragraph (a)(3); and

■ d. Redesignating paragraph (a)(4) as paragraph (a)(3).

The revision reads as follows:

**§ 121.135 Manual contents.**

(a) Each manual accessed in paper format must display the date of last revision on each page. Each manual accessed in electronic format must display the date of last revision in a manner in which a person can immediately ascertain it. Each manual required by § 121.133 must:

* * * * *

■ 6. Revise § 121.139 to read as follows:

**§121.139 Manual accessibility: Supplemental operations.**

Each certificate holder conducting supplemental operations must ensure the appropriate parts of the manual are accessible to flight, ground, and maintenance personnel at all times when such personnel are performing their assigned duties. The information and instructions contained in the manual must be displayed clearly and be retrievable in the English language.

## PART 125—CERTIFICATION AND OPERATIONS: AIRPLANES HAVING A SEATING CAPACITY OF 20 OR MORE PASSENGERS OR A MAXIMUM PAYLOAD CAPACITY OF 6,000 POUNDS OR MORE; AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

■ 7. The authority citation for part 125 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40113, 44701–44702, 44705, 44710–44711, 44713, 44716–44717, 44722.

■ 8. Amend § 125.71 by revising paragraph (f) to read as follows:

**§ 125.71 Preparation.**

* * * * *

(f) The information and instructions contained in the manual must be displayed clearly and be retrievable in the English language.

* * * * *

■ 9. Amend § 125.73 by revising the introductory text to read as follows:

**§ 125.73 Contents.**

Each manual accessed in paper format must display the date of last revision on each page. Each manual accessed in electronic format must display the date of last revision in a manner in which a person can immediately ascertain it. The manual must include:

* * * * *

## PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

■ 10. The authority citation for part 135 continues to read as follows:

**Authority:** 49 U.S.C. 106(f), 106(g), 40113, 41706, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722, 44730, 45101–45105; Pub. L. 112–95, 126 Stat. 58 (49 U.S.C. 44730).

■ 11. Amend § 135.21 by:

■ a. Revising paragraphs (f) and (g); and

■ b. Removing paragraph (h).

The revisions read as follows:

**§ 135.21 Manual requirements.**

* * * * *

(f) The certificate holder must ensure the appropriate parts of the manual are accessible to flight, ground, and maintenance personnel at all times when such personnel are performing their assigned duties.

(g) The information and instructions contained in the manual must be displayed clearly and be retrievable in the English language.

■ 12. Amend § 135.23 by revising the introductory text to read as follows:

**§ 135.23 Manual contents.**

Each manual accessed in paper format must display the date of last revision on each page. Each manual accessed in electronic format must display the date of last revision in a manner in which a person can immediately ascertain it. The manual must include:

* * * * *

Issued under authority provided by 49 U.S.C. 106(f), 106(g), and 44701(a)(5), in Washington, DC on or about May 22, 2023.

**Billy Nolen,**

*Acting Administrator.*

[FR Doc. 2023–11246 Filed 5–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### 31 CFR Parts 544 and 578

## Publication of Cyber-Related Sanctions Regulations Web General License 1 and Subsequent Iterations

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Publication of web general licenses.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing four

general licenses (GLs) issued pursuant to the Cyber-Related, Non-Proliferation, and Hostages and Wrongfully Detained U.S. Nationals sanctions programs: GLs 1, 1A, 1B, and 1C, each of which was previously made available on OFAC's website.

**DATES:** GL 1 was issued on February 2, 2017. See **SUPPLEMENTARY INFORMATION** for additional relevant dates.

**FOR FURTHER INFORMATION CONTACT:** OFAC: Assistant Director for Licensing, 202–622–2480; Assistant Director for Regulatory Affairs, 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, 202–622–2490.

**SUPPLEMENTARY INFORMATION:**

**Electronic Availability**

This document and additional information concerning OFAC are available on OFAC's website: *www.treas.gov/ofac.*

**Background**

On February 2, 2017, OFAC issued GL 1 to authorize certain transactions otherwise prohibited by E.O. 13694 of April 1, 2015, (''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities,'' 80 FR 18077) as amended by E.O. 13757 of December 28, 2016 (''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities,'' 82 FR 1). Subsequently, OFAC issued three further iterations of GL 1: On March 15, 2018, OFAC issued GL 1A, which superseded GL 1, to authorize certain transactions otherwise prohibited by E.O. 13694 and by Section 224 of the Countering America's Adversaries Through Sanctions Act (CAATSA, 22 U.S.C. 9524); on February 17, 2021, OFAC issued GL 1B, which superseded GL 1A, to authorize certain transactions otherwise prohibited by E.O. 13694, Section 224 of CAATSA, and the Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 CFR part 544 (the WMDPSR); and on April 27, 2023, OFAC issued GL 1C, which superseded GL 1B, to authorize certain transactions otherwise prohibited by the Cyber-Related Sanctions Regulations, 31 CFR part 578 (the CRSR), the WMDPSR, and E.O. 14078 of July 19, 2022 (''Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home,'' 87 FR 43389). OFAC incorporated E.O. 13694, E.O. 13757, and portions of CAATSA into the CRSR on September 6, 2022. Each GL was made available on OFAC's website (*www.treas.gov/ofac*) when it was issued. The text of these GLs is provided below.

**OFFICE OF FOREIGN ASSETS CONTROL**

**Executive Order 13694 of April 1, 2015**

**Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities**

**GENERAL LICENSE NO. 1**

**Authorizing Certain Transactions With the Federal Security Service**

(a) Except as provided in paragraph (b), all transactions and activities otherwise prohibited pursuant to Executive Order (E.O.) 13694 of April 1, 2015 (''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities''), as amended by E.O. 13757 of December 28, 2016 (''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities''), are authorized that are necessary and ordinarily incident to:

(1) Requesting, receiving, utilizing, paying for, or dealing in licenses, permits, certifications, or notifications issued or registered by the Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB) for the importation, distribution, or use of information technology products in the Russian Federation, provided that (i) the exportation, reexportation, or provision of any goods or technology that are subject to the Export Administration Regulations, 15 CFR parts 730 through 774, is licensed or otherwise authorized by the Department of Commerce and (ii) the payment of any fees to the Federal Security Service for such licenses, permits, certifications, or notifications does not exceed $5,000 in any calendar year;

**Note to paragraph (a)(l):** Except for the limited purposes described in paragraph (a)(l), this paragraph does not authorize the exportation, reexportation, or provision of goods or technology to or on behalf of the Federal Security Service.

(2) Complying with law enforcement or administrative actions or investigations involving the Federal Security Service; and

(3) Complying with rules and regulations administered by the Federal Security Service.

(b) This general license does not authorize:

(1) The exportation, reexportation, or provision of any goods, technology, or services to the Crimea region of Ukraine; or

(2) The transfer of any property or debiting of any account blocked pursuant to any E.O. or statute, or 31 CFR chapter V, or any transactions or dealings otherwise prohibited by any E.O. other than E.O. 13694 as amended by E.O. 13757, or any other part of 31 CFR chapter V.

Andrea Gacki
Acting Director
Office of Foreign Assets Control
Dated: February 2, 2017

**OFFICE OF FOREIGN ASSETS CONTROL**

**Executive Order 13694 of April 1, 2015**

**Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities**

**Countering America's Adversaries Through Sanctions Act**

**Public Law 115–44, Aug. 2, 2017, 131 Stat. 886 (22 U.S.C. 9401 *et seq.*)**

**GENERAL LICENSE NO. 1A**

**Authorizing Certain Transactions With the Federal Security Service**

(a) Except as provided in paragraph (b), all transactions and activities otherwise prohibited pursuant to Executive Order (E.O.) 13694 of April 1, 2015 (''Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities''), as amended by E.O. 13757 of December 28, 2016 (''Taking Additional Steps to Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities''), or Section 224 of the Countering America's Adversaries Through Sanctions Act, Public Law 115–44, Aug. 2, 2017, 131 Stat. 886 (22 U.S.C. 9401 *et seq.*) (CAATSA), are authorized that are necessary and ordinarily incident to:

(1) Requesting, receiving, utilizing, paying for, or dealing in licenses, permits, certifications, or notifications issued or registered by the Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB) for the importation, distribution, or use of information technology products in the Russian Federation, provided that (i) the exportation, reexportation, or provision of any goods or technology that are subject to the Export Administration Regulations, 15 CFR parts 730 through 774, is licensed or otherwise authorized by the Department of Commerce and (ii) the payment of any fees to the Federal Security Service for such licenses, permits, certifications, or notifications does not exceed $5,000 in any calendar year;

**Note to paragraph (a)(1):** Except for the limited purposes described in paragraph (a)(l), this paragraph does not authorize the exportation, reexportation, or provision of goods or technology to or on behalf of the Federal Security Service.

(2) Complying with law enforcement or administrative actions or investigations involving the Federal Security Service; and

(3) Complying with rules and regulations administered by the Federal Security Service.

(b) This general license does not authorize:

(1) The exportation, reexportation, or provision of any goods, technology, or services to the Crimea region of Ukraine; or

(2) The transfer of any property or debiting of any account blocked pursuant to any E.O. or statute, or 31 CFR chapter V, or any transactions or dealings otherwise prohibited by any E.O. other than E.O. 13694 as amended by E.O. 13757, any section of CAATSA other than Section 224, or any other part of 31 CFR chapter V.

(c) Effective March 15, 2018, General License No. 1, dated February 2, 2017, is replaced and superseded in its entirety by this General License No. 1A.

John E. Smith
Director
Office of Foreign Assets Control
Dated: March 15, 2018

**OFFICE OF FOREIGN ASSETS CONTROL**

**Executive Order 13694 of April 1, 2015**

**Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities, as Amended**

**Cyber-Related Sanctions Regulations**

*31 CFR Part 578*

**Weapons of Mass Destruction Proliferators Sanctions Regulations**

*31 CFR Part 544*

**Section 224 of the Countering America's Adversaries Through Sanctions Act**

**22 U.S.C. 9524**

**GENERAL LICENSE NO. 1B**

**Authorizing Certain Transactions With the Federal Security Service**

(a) Except as provided in paragraph (b) of this general license, all transactions and activities prohibited by Executive Order (E.O.) 13694, as amended by E.O. 13757 of December 28, 2016, the Cyber-Related Sanctions Regulations, 31 CFR part 578 (CRSR), the Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 CFR part 544 (WMDPSR), or Section 224 of the Countering America's Adversaries Through Sanctions Act (CAATSA) (22 U.S.C. 9524) involving the Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB) are authorized, provided that such transactions and activities are necessary and ordinarily incident to:

(1) Requesting, receiving, utilizing, paying for, or dealing in licenses, permits, certifications, or notifications issued or registered by the Federal Security Service for the importation, distribution, or use of information technology products in the Russian Federation, provided that (i) the exportation, reexportation, or provision of any goods or technology that are subject to the Export Administration Regulations, 15 CFR parts 730 through 774, is licensed or otherwise authorized by the Department of Commerce; and (ii) the payment of any fees to the Federal Security Service for such licenses, permits, certifications, or notifications does not exceed $5,000 in any calendar year;

**Note to paragraph (a)(1):** Except for the limited purposes described in paragraph (a)(1), this paragraph does not authorize the exportation, reexportation, or provision of goods or technology to or on behalf of the Federal Security Service.

(2) Complying with law enforcement or administrative actions or investigations involving the Federal Security Service; and

(3) Complying with rules and regulations administered by the Federal Security Service.

(b) This general license does not authorize:

(1) The exportation, reexportation, or provision of any goods, technology, or services to the Crimea region of Ukraine;

(2) The transfer of any property or debiting of any account blocked pursuant to any E.O., statute, or 31 CFR chapter V; or

(3) Any transactions or activities otherwise prohibited by the CRSR, the WMDPSR, or any other part of 31 CFR chapter V; any E.O. other than E.O. 13694, as amended by E.O. 13757; any statute other than Section 224 of CAATSA; or any transactions or activities with any blocked person other than the blocked person described in paragraph (a) of this general license.

(c) Effective March 2, 2021, General License No. 1A, dated March 15, 2018, is replaced and superseded in its entirety by this General License No. 1B.

Bradley T. Smith

Acting Director

Office of Foreign Assets Control

Dated: March 2, 2021

**OFFICE OF FOREIGN ASSETS CONTROL**

**Cyber-Related Sanctions Regulations**

*31 CFR Part 578*

**Weapons of Mass Destruction Proliferators Sanctions Regulations**

*31 CFR Part 544*

**Executive Order 14078 of July 19, 2022**

**Bolstering Efforts To Bring Hostages and Wrongfully Detained United States Nationals Home**

**GENERAL LICENSE NO. 1C**

**Authorizing Certain Transactions With the Federal Security Service**

(a) Except as provided in paragraph (b) of this general license, all transactions prohibited by the Cyber-Related Sanctions Regulations, 31 CFR part 578 (CRSR), the Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 CFR part 544 (WMDPSR), or Executive Order (E.O.) 14078, involving the Federal Security Service (a.k.a. Federalnaya Sluzhba Bezopasnosti) (a.k.a. FSB) are authorized, provided that such transactions are ordinarily incident and necessary to:

(1) Requesting, receiving, utilizing, paying for, or dealing in licenses, permits, certifications, or notifications issued or registered by the Federal Security Service for the importation, distribution, or use of information technology products in the Russian Federation, provided that (i) the exportation, reexportation, or provision of any goods or technology that are subject to the Export Administration Regulations, 15 CFR parts 730 through 774, is licensed or otherwise authorized by the Department of Commerce; and (ii) the payment of any fees to the Federal Security Service for such licenses, permits, certifications, or notifications does not exceed $5,000 in any calendar year;

**Note to paragraph (a)(1).** Except for the limited purposes described in paragraph (a)(1), this paragraph does not authorize the exportation, reexportation, or provision of goods or technology to or on behalf of the Federal Security Service.

(2) Complying with law enforcement or administrative actions or investigations involving the Federal Security Service; or

(3) Complying with rules and regulations administered by the Federal Security Service.

(b) This general license does not authorize:

(1) The transfer of any property or debiting of any account blocked

pursuant to any E.O., statute, or 31 CFR chapter V; or

(2) Any transactions otherwise prohibited by the CRSR, the WMDPSR, or E.O. 14078, including transactions with any blocked person other than the blocked person described in paragraph (a) of this general license, unless separately authorized.

(c) Effective April 27, 2023, General License No. 1B, dated February 17, 2021, is replaced and superseded in its entirety by this General License No. 1C.

**Note 1 to General License No. 1C.** *See* Russia-related General License No. 42 for an authorization for certain transactions with the Federal Security Service prohibited by E.O. 14024.

**Note 2 to General License No. 1C.** The exportation, reexportation, sale, or supply, directly or indirectly, from the United States, or by a United States person, wherever located, of any goods, services, or technology to the so-called ''Donetsk People's Republic'' or ''Luhansk People's Republic'' (DNR/LNR) regions of Ukraine, or such other regions of Ukraine as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, pursuant to E.O. 14065, or to the Crimea region of Ukraine remains prohibited pursuant to authorities implemented by the Ukraine-/Russia-Related Sanctions Regulations, 31 CFR part 589, among others.

Andrea M. Gacki
Director
Office of Foreign Assets Control

Dated: April 27, 2023.

**Andrea M. Gacki,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2023–11488 Filed 5–26–23; 8:45 am]

**BILLING CODE 4810–AL–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 165

**[Docket Number USCG–2023–0431]**

**RIN 1625–AA00**

## Safety Zone; Laguna Madre, South Padre Island, TX

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone for certain navigable waters in the Laguna Madre. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by a firework display launched from a barge in the Laguna Madre, South Padre Island, Texas. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Corpus Christi or a designated representative.

**DATES:** This rule is effective from 9:30 p.m. through 11:59 p.m. on May 28, 2023.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Lieutenant Commander Anthony Garofalo, Sector Corpus Christi Waterways Management Division, U.S. Coast Guard; telephone 361–939–5130, email *CCWaterways@uscg.mil.*

**SUPPLEMENTARY INFORMATION:**

### I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

### II. Background Information and Regulatory History

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 it is impracticable. We must establish this safety zone immediately to protect personnel, vessels, and the marine environment from potential hazards created by the fireworks display and lack sufficient time to provide a reasonable comment period and then to consider those comments before issuing the rule.

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 contrary to the public interest because immediate action is needed to respond to the potential safety hazards associated with fireworks launched from a barge in the waters of the Laguna Madre.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Corpus Christi (COTP) has determined that potential hazards associated with the fireworks display from 9:30 p.m. through 11:59 p.m. on May 28, 2023, will be a safety concern for anyone within the waters of the Laguna Madre area with a 700 yard radius from the following point; 26°6′02.1″ N, 97°10′17.7″ W. The purpose of this rule is to ensure safety of vessels and persons on these navigable waters in the safety zone while the display of the fireworks takes place in the Laguna Madre.

### IV. Discussion of the Rule

This rule establishes a temporary safety zone from 9:30 p.m. through 11:59 p.m. on May 28, 2023. The safety zone will encompass certain navigable waters of the Laguna Madre and is defined by a 700-yard radius around the launching platform. The regulated area encompasses a 700-yard radius from the following point; 26°6′02.1″ N, 97°10′17.7″ W. The fireworks display will take place in waters of the Laguna Madre. No vessel or person is permitted to enter the temporary safety zone during the effective period without obtaining permission from the COTP or a designated representative, who may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 361–939–0450. The Coast Guard will issue Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts, as appropriate.

### V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

#### *A. Regulatory Planning and Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This 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, and duration of the safety zone. The temporary safety zone will be enforced for a short period of 2.5 hours. The zone is limited to a 700-yard radius from the launching position of in the navigable

waters of the Laguna Madre. The rule does not completely restrict the traffic within a waterway and allows mariners to request permission to enter the zone.

*B. Impact on Small Entities*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this 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 temporary 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 contact 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. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section above.

*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, 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 establishment of a temporary safety zone for navigable waters of the Laguna Madre in a zone defined by a 700 yard radius from the following coordinate: 26°6′02.1″ N, 97°10′17.7″ W. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by fireworks display in the waters of the Laguna Madre. It is categorically excluded from further review under paragraph L60 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A record of environmental consideration is not necessary, but will be provided if needed.

*G. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact 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.T08–0431 to read as follows:

### § 165.T08–0431 Safety Zone; Laguna Madre, South Padre Island, TX.

(a) *Location.* The following area is a safety zone: all navigable waters of the Laguna Madre encompassed by a 700-yard radius from the following point; 26°6′02.1″ N, 97°10′17.7″ W.

(b) *Effective period.* This section is effective from 9:30 p.m. through 11:59 p.m. on May 28, 2023.

(c) *Regulations.* (1) According to the general regulations in § 165.23 of this part, entry into the temporary safety zone described in paragraph (a) of this section is prohibited unless authorized by the Captain of the Port Sector Corpus Christi (COTP) or a designated representative. They may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 361–939–0450.

(2) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety

Marine Information Broadcasts as appropriate.

Dated: May 23, 2023.

**J.B. Gunning,**

*Captain, U.S. Coast Guard, Captain of the Port Sector Corpus Christi.*

[FR Doc. 2023–11430 Filed 5–25–23; 11:15 am]

**BILLING CODE 9110–04–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA–R05–OAR–2022–0744; FRL–10682–02–R5]**

## Air Plan Approval; Illinois; Second Maintenance Plan for 1997 Ozone NAAQS; Jersey County Portion of St. Louis Missouri-Illinois Area

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving, as a revision to the Illinois State Implementation Plan (SIP), the state's plan for maintaining the 1997 ozone National Ambient Air Quality Standard (NAAQS or standard) through 2032 in St. Louis, MO-IL area. The original St. Louis nonattainment area for the 1997 ozone standard included Jersey, Madison, Monroe and St. Clair Counties in Illinois and Franklin, Jefferson, St. Charles and St. Louis Counties and St. Louis City in Missouri. The SIP, submitted by the Illinois Environmental Protection Agency (IEPA) on August 24, 2022, addresses the second maintenance plan required for Jersey County, Illinois. EPA proposed to approve this action on March 14, 2023 and received no adverse comments.

**DATES:** This final rule is effective on June 29, 2023.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2022–0744. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Kathleen D'Agostino at (312) 886–1767 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Kathleen D'Agostino, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–1767, *DAgostino.Kathleen@epa.gov.*

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

### I. Background Information

On March 14, 2023, EPA proposed to approve Illinois' plan for maintaining the 1997 ozone NAAQS through 2032 in the St. Louis Area (88 FR 15629). An explanation of the Clean Air Act (CAA) requirements, a detailed analysis of the revisions, and EPA's reasons for proposing approval were provided in the notice of proposed rulemaking and will not be restated here. The public comment period for this proposed rule ended on April 13, 2023. EPA received no comments on the proposal.

### II. Final Action

EPA is approving the Jersey County second maintenance plan for the 1997 ozone NAAQS, submitted by IEPA on August 24, 2022, as a revision to the Illinois SIP. The second maintenance plan is designed to keep the St. Louis area in attainment of the 1997 ozone NAAQS through 2032.

### III. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial.

IEPA did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 31, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Volatile organic compounds.

Dated: May 23, 2023.

**Debra Shore,**

*Regional Administrator, Region 5.*

For the reasons stated in the preamble, title 40 CFR part 52 is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

■ 2. In § 52.720, the table in paragraph (e) is amended under the heading ''Attainment and Maintenance Plans'' by adding an entry for ''Ozone (8-hour, 1997) second maintenance plan'' before the entry for ''Ozone (8-hour, 2008) Determination of Attainment'' to read as follows:

(e) * * *

EPA-APPROVED ILLINOIS NONREGULATORY AND QUASI-REGULATORY PROVISIONS

| Name of SIP provision | Applicable geographic or nonattainment area | State submittal date | EPA approval date | Comments |
|---|---|---|---|---|
| * | * | * | * | * |
| **Attainment and Maintenance Plans** | | | | |
| * | * | * | * | * |
| Ozone (8-hour, 1997) second maintenance plan. | St. Louis area ..... | 8/24/2022 | 5/30/2023, [insert **Federal Register** citation]. | Jersey County only. |
| * | * | * | * | * |

* * * * *

[FR Doc. 2023–11357 Filed 5–26–23; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 52

**[EPA–R05–OAR–2022–0477; FRL–10516–02–R5]**

## Air Plan Approval; Ohio; Sulfur Dioxide Regulations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving, under the Clean Air Act (CAA), revised sulfur dioxide ($SO_2$) regulations submitted by Ohio on May 23, 2022. Ohio updated its regulations to make changes to facility information, remove requirements for shutdown facilities and units, consolidate county-wide requirements, and revise requirements for the Veolia Fort Hill plant in Miami, Ohio and the DTE St. Bernard facility in Cincinnati, Ohio. EPA believes that the revisions improve the clarity of the rules without affecting the stringency, and therefore is approving the submitted revisions with the exception of selected paragraphs in Ohio Administrative Code (OAC) Chapter 3745–18. EPA proposed to approve this action on January 26, 2023 and received no adverse comments.

**DATES:** This final rule is effective on June 29, 2023.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2022–0477. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Tyler Salamasick, at (312)886–6206 before visiting the Region 5 office.

**FOR FURTHER INFORMATION CONTACT:** Tyler Salamasick, Control Strategies Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6206, *salamasick.tyler@epa.gov.*

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

## I. Background Information

On January 26, 2023 (88 FR 4935), EPA proposed to approve revisions to Ohio's $SO_2$ regulations contained in Ohio OAC Chapter 3745–18 ''Sulfur Dioxide Regulations.'' An explanation of the CAA requirements, a detailed analysis of the revisions, and EPA's reasons for proposing approval were provided in the notice of proposed rulemaking and will not be restated here. The public comment period for the proposed rule ended on February 27, 2023. EPA received one supportive comment which stated that Ohio's changes add increased clarity within the regulations. EPA received no adverse comments on the proposal. Therefore, EPA is finalizing this action as proposed.

## II. Final Action

EPA is approving revisions and rescissions to OAC 3745–18 submitted by Ohio on May 23, 2022, with the exception of selected paragraphs in OAC 3745–18–04. Specifically, EPA is approving Ohio rules OAC 3745–18–01 through OAC 3745–18–06 [with the exception of OAC 3745–18–04(D)(2), (D)(3), (D)(5), (D)(6), (E)(2), (E)(3), and (E)(4)], OAC 3745–18–08, OAC 3745–18–10, OAC 3745–18–11, OAC 3745–18–15, OAC 3745–18–23, OAC 3745–18–24, OAC 3745–18–26, OAC 3745–18–28, OAC 3745–18–31, OAC 3745–18–33, OAC 3745–18–35, OAC 3745–18–37, OAC 3745–18–47, OAC 3745–18–49, OAC 3745–18–53, OAC 3745–18–54, OAC 3745–18–56, OAC 3745–18–61, OAC 3745–18–63, OAC 3745–18–68, OAC 3745–18–69, OAC 3745–18–77, OAC 3745–18–78, OAC 3745–18–80, OAC 3745–18–82 through OAC 3745–18–85, OAC 3745–18–91, and OAC 3745–18–92, as effective on February 2, 2022. EPA is removing Ohio rules OAC 3745–18–07, OAC 3745–18–09, OAC 3745–18–12 through OAC 3745–18–14, OAC 3745–18–16 through OAC 3745–18–22, OAC 3745–18–25, OAC 3745–18–27, OAC 3745–18–29, OAC 3745–18–30, OAC 3745–18–32, OAC 3745–18–34, OAC 3745–18–36, OAC 3745–18–38 through OAC 3745–18–46, OAC 3745–18–48, OAC 3745–18–50 through OAC 3745–18–52, OAC 3745–18–55, OAC 3745–18–57 through OAC 3745–18–60, OAC 3745–18–62, OAC 3745–18–64, OAC 3745–18–65, OAC 3745–18–67, OAC 3745–18–70 through OAC 3745–18–76, OAC 3745–18–79, OAC 3745–18–81, OAC 3745–18–86 through OAC 3745–18–89, OAC 3745–18–93, and OAC 3745–18–94. EPA is taking no action on OAC 37–18–04(D)(2), (D)(3), (D)(5), (D)(6), (E)(2), (E)(3), and (E)(4). These paragraphs have not been previously approved by EPA and are outside the cleanup intent of this final SIP revision.

## III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the Ohio Sulfur Dioxide Regulations described in section II of this preamble and set forth in the amendments to 40 CFR part 52 below. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information). Therefore, these materials have been approved by EPA for inclusion in the SIP, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[1]

Also in this document, as described in section II of this preamble and set forth in the amendments to 40 CFR part 52 below, EPA is removing provisions of the EPA-Approved Ohio Regulations and Statutes from the Ohio State Implementation Plan, which is incorporated by reference in accordance with the requirements of 1 CFR part 51.

## IV. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it approves a state program;
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994) directs Federal agencies to identify and address ''disproportionately high and adverse human health or environmental effects'' of their actions on minority populations and low-income populations to the greatest extent practicable and permitted by law. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

[1] 62 FR 27968 (May 22, 1997).

The Ohio EPA did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This action is subject to the Congressional Review Act, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 31, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Sulfur oxides.

Dated: May 23, 2023.

**Debra Shore,**

*Regional Administrator, Region 5.*

For the reasons stated in the preamble, title 40 CFR part 52 is amended as follows:

## PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

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

■ 2. In § 52.1870, the table in paragraph (c) is amended by revising the section entitled ''Chapter 3745–18 Sulfur Dioxide Regulations'' to read as follows:

(c) * * *

EPA-APPROVED OHIO REGULATIONS

| Ohio citation | Title/subject | Ohio effective date | EPA approval date | Notes |
|---|---|---|---|---|
| * | * | * | * | * |
| **Chapter 3745–18 Sulfur Dioxide Regulations** | | | | |
| 3745–18–01 | Definitions and incorporation by reference. | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–02 | General countywide emission limits. | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–03 | Compliance Time Schedules | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–04 | Measurement Methods and Procedures. | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | Except (D)(2), (D)(3), (D)(5), (D)(6), (E)(2), (E)(3), and (E)(4). |
| 3745–18–05 | Ambient and Meteorological Monitoring Requirements. | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–06 | General Emission Limit Provisions | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–08 | Allen county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–10 | Ashtabula county emissions limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–11 | Athens county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–15 | Butler county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–23 | Crawford county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–24 | Cuyahoga county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–26 | Defiance county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–28 | Erie county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–31 | Franklin county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–33 | Gallia county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–35 | Greene county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–37 | Hamilton county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–47 | Jefferson county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–49 | Lake county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |

EPA-APPROVED OHIO REGULATIONS—Continued

| Ohio citation | Title/subject | Ohio effective date | EPA approval date | Notes |
|---|---|---|---|---|
| 3745–18–53 ..... | Lorain county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–54 ..... | Lucas county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–56 ..... | Mahoning county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–61 ..... | Miami county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–63 ..... | Montgomery county emission limits. | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–66 ..... | Muskingum County Emission Limits. | 2/16/2017 | 10/11/2018, 83 FR 51361. | |
| 3745–18–68 ..... | Ottawa county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–69 ..... | Paulding county emission limits ... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–77 ..... | Ross county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–78 ..... | Sandusky county emission limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–80 ..... | Seneca county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–82 ..... | Stark County Emission Limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–83 ..... | Summit County Emission Limits ... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–84 ..... | Trumbull County Emission Limits | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–85 ..... | Tuscarawas County Emission Limits. | 2/3/2022 | PUBLICATION IN THE **FEDERAL REGISTER**], [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–90 ..... | Washington County Emission Limits. | 2/3/2022 | PUBLICATION IN THE **FEDERAL REGISTER**], [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–91 ..... | Wayne county emission limits ..... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |
| 3745–18–92 ..... | Williams county emission limits .... | 2/3/2022 | 5/30/2023, [INSERT **FEDERAL REGISTER** CITATION]. | |

* * * * * * *

* * * * *

[FR Doc. 2023–11355 Filed 5–26–23; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 60

**[EPA–HQ–OAR–2020–0556; FRL–8335–05–OAR]**

**RIN 2060–AV35**

## Testing Provisions for Air Emission Sources; Correction

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule; correction.

**SUMMARY:** The Environmental Protection Agency (EPA) is correcting a final rule that was published in the **Federal Register** on March 29, 2023, that will be effective on May 30, 2023. The final rule corrected and updated regulations for source testing of emissions. This correction does not change any final action taken by the EPA on March 29, 2023; this action merely corrects the amendatory instruction.

**DATES:** This correction is effective May 30, 2023. On March 29, 2023, the Director of the Federal Register approved the material listed in this correction for incorporation by reference as of May 30, 2023.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2020–0556. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically through *www.regulations.gov.*

**FOR FURTHER INFORMATION CONTACT:** Mrs. Lula H. Melton, Office of Air Quality Planning and Standards, Air Quality Assessment Division (E143–02), Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number: (919) 541–2910; fax number: (919) 541–0516; email address: *melton.lula@epa.gov.*

**SUPPLEMENTARY INFORMATION:** In the final rule published on March 29, 2023 (88 FR 18396), the following correction to an amendatory instruction to ''Part 60—Standards of Performance for New Stationary Sources, Subpart A—General Provisions'' is made.

### Correction

In FR Doc. 2023–04956, appearing on page 18396 in the **Federal Register** of March 29, 2023, the following correction is made. On page 18402, in

the first column, amendatory instruction 4 and the corresponding regulatory text is corrected to read as follows:

■ 4. Amend § 60.17 by:
■ a. Revising paragraphs (h)(187) and (201);
■ b. Redesignating paragraphs (h)(202) through (222) as paragraphs (h)(203) through (223), respectively; and
■ c. Adding new paragraph (h)(202).

The revisions and addition read as follows:

**§ 60.17 Incorporations by reference.**

* * * * *

(h) * * *

(187) ASTM D6216–20, Standard Practice for Opacity Monitor Manufacturers to Certify Conformance with Design and Performance Specifications, approved September 1, 2020; IBR approved for appendix B to part 60.

* * * * *

(201) ASTM D6784–02 (Reapproved 2008), Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved April 1, 2008; IBR approved for § 60.56c(b).

(202) ASTM D6784–16, Standard Test Method for Elemental, Oxidized, Particle-Bound and Total Mercury in Flue Gas Generated from Coal-Fired Stationary Sources (Ontario Hydro Method), approved March 1, 2016; IBR approved for appendix B to part 60.

* * * * *

Dated: May 24, 2023.

**Richard A. Wayland,**

*Director, Air Quality Assessment Division, Office of Air Quality Planning and Standards.*

[FR Doc. 2023–11407 Filed 5–26–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

**[PS Docket No. 22–217; DA 23–392; FR ID 143022]**

## Communications Assistance for Law Enforcement Act, Mandatory Electronic Filing of System Security and Integrity Policies and Procedures Documents

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Federal Communications Commission (the FCC or Commission), amends a rule to announce mandatory use of the CALEA Electronic Filing System (CEFS), which is available at: *https://www.fcc.gov/cefs* for certain required filings for telecommunications providers pursuant to the Communications Assistance for Law Enforcement Act (CALEA).

**DATES:** Effective June 29, 2023.

**FOR FURTHER INFORMATION CONTACT:** Rosemary Cabral, Attorney Advisor, Policy and Licensing Division, Public Safety and Homeland Security Bureau, at (202) 418–0662 or *Rosemary.Cabral@fcc.gov;* or Chris Fedeli, Attorney Advisor, Public Safety and Homeland Security Bureau at 202–418–1514 or *Christopher.Fedeli@fcc.gov.*

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Order in PS Docket No. 22–217, DA 23–392, adopted and released on May 15, 2023. The full text of this document is available at *https://docs.fcc.gov/public/attachments/DA-23-392A1.pdf.*

### Congressional Review Act

The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB), concurs, that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

### Final Regulatory Flexibility Certification

Under Section 604(a) of the Regulatory Flexibility Act, the Bureau is not required to prepare a final regulatory flexibility analysis because the Order does not require notice-and-comment rulemaking. Although not required in this particular situation, we are optionally including a Final Regulatory Flexibility Certification in this order since an Initial Regulatory Flexibility Certification was included in the *CEFS Announcement Public Notice.*

### Paperwork Reduction Act

This document does not adopt or propose new or substantively modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). This document may contain non-substantive modifications to an approved information collection. Any such modifications will be submitted to the Office of Management and Budget for review pursuant to OMB's non-substantive modification process.

### Synopsis

Section 105 of the Communications Assistance for Law Enforcement Act, 47 U.S.C. 1004, and section 229(b) of the Communications Act, 47 U.S.C. 229(b), require all covered entities to file System Security and Integrity (SSI) Plans with the Federal Communications Commission (Commission). The Commission first specified the requirements for telecommunications carriers' SSI Plans in 1999. Pursuant to § 1.20005 of the Commission's rules, all providers subject to CALEA must file their SSI Plans prior to commencing service and must re-file a complete updated SSI Plan within 90 days following any changes to information contained in a previously-filed SSI Plan. All SSI Plans must contain all information listed under §§ 1.20003 and 1.20004 of the Commission's rules.

On June 1, 2022, the Public Safety and Homeland Security Bureau (Bureau) announced the launch of CEFS, which allows covered entities to file System Security and Integrity Policies and Procedures Documents (SSI Plans) confidentially and securely online, eliminating the need for paper filing. Filers that seek to file confidentially or to preserve the confidentiality of a piece of information in a filing may still request such treatment under § 0.459 of the Commission's rules. Also, CEFS operates on a platform that links to the Commission Registration System (CORES) to reduce the need for filers to re-enter basic information that CORES users have already provided to the Commission. The new system will allow users to file SSI Plans electronically and, once they have electronically filed a plan in CEFS, to log back in to CEFS and retrieve and view that filing. CEFS encourages timely filings of new SSI Plans and updated SSI Plans and reduces the risk of filing errors that require re-submission.

In the *CEFS Announcement Public Notice,* the Bureau stated that electronic filing of SSI Plans in CEFS would initially be voluntary and proposed to make electronic filing mandatory six months later. The six-month transition period allowed regulated entities time to familiarize themselves with CEFS and CORES, if necessary, and obtain FCC Usernames and FCC Registration Numbers (FRNs) needed to file in CEFS. The transition period also allowed time for internal consideration of any further modifications to the new system. In

response to the *CEFS Announcement Public Notice,* we received no comments regarding the proposal to mandate electronic filing of SSI Plans or the timing of the proposed requirement. We received one comment from Subsentio, LLC (Subsentio), which serves as a Trusted Third Party (TTP) for entities subject to CALEA, requesting that CEFS implementation include the ability for TTPs to continue to file SSI Plans on behalf of multiple clients.

On December 12, 2022, the Bureau announced the availability of CEFS for voluntary filing of SSI Plans. During this time, the Bureau began accepting SSI Plans that were filed in CEFS voluntarily, and implementing enhancements to ensure that CEFS is operating effectively and efficiently when mandatory electronic filing takes effect.

Over the past decades, the Commission has made significant progress to upgrade and modernize its filing procedures. Given the well-established benefits of electronic filing, in this Order, we amend our rules to require the electronic filing of SSI Plans through the new database, CEFS. Specifically, the order amends § 1.20005 to announce mandatory use of the CALEA Electronic Filing System (CEFS) to file SSI Plans electronically. The new CEFS database will reduce the overall burden associated with these filings as well as increase the efficiency of our administrative processes significantly.

**List of Subjects in 47 CFR Part 1**

Communications common carriers, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

**Lauren Kravetz,**

*Chief of Staff, Public Safety and Homeland Security Bureau.*

**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

## PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461 note, unless otherwise noted.

■ 2. Amend § 1.20005 by revising paragraph (a) and adding paragraph (c) to read as follows:

**§ 1.20005 Submission of policies and procedures and Commission review.**

(a) Each telecommunications carrier shall file with the Commission the policies and procedures it uses to comply with the requirements of this subpart. These policies and procedures shall be filed before commencing service and, thereafter, within 90 days of a carrier's merger or divestiture or a carrier's amendment of its existing policies and procedures.

* * * * *

(c) As of June 29, 2023, any filings required by paragraph (a) of this section shall be submitted electronically through the Commission's CALEA Electronic Filing System (CEFS).

[FR Doc. 2023–11417 Filed 5–26–23; 8:45 am]

**BILLING CODE 6712–01–P**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 635

**[Docket No. 220919–0193; RTID 0648–XC999]**

### Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries; General Category Retention Limit Adjustment

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

**ACTION:** Temporary rule; retention limit adjustment.

**SUMMARY:** NMFS is adjusting the General category bluefin tuna (BFT) daily retention limit from the default of one large medium or giant BFT to three large medium or giant BFT. This daily retention limit applies to Atlantic Tunas General category (commercial) permitted vessels and Highly Migratory Species (HMS) Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT. This adjustment will be effective for the June through August time period until further modified.

**DATES:** Effective June 1, 2023, through August 31, 2023, or until NMFS announces via an action in the **Federal Register** another adjustment to the retention limit.

**FOR FURTHER INFORMATION CONTACT:** Larry Redd, Jr., *larry.redd@noaa.gov,* 301–427–8503.

**SUPPLEMENTARY INFORMATION:** Atlantic HMS fisheries, including BFT fisheries, are managed under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments are implemented by regulations at 50 CFR part 635. Section 635.27 divides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and as implemented by the United States among the various domestic fishing categories, per the allocations established in the 2006 Consolidated HMS FMP and its amendments. NMFS is required under the Magnuson-Stevens Act to provide U.S. fishing vessels with a reasonable opportunity to harvest quotas under relevant international fishery agreements such as the ICCAT Convention, which is implemented domestically pursuant to ATCA.

As described in § 635.27(a), the current baseline U.S. BFT quota is 1,316.14 metric tons (mt) (not including the 25 mt ICCAT allocated to the United States to account for bycatch of BFT in pelagic longline fisheries in the Northeast Distant Gear Restricted Area). The General category baseline quota is 710.7 mt. This baseline quota is further subdivided into subquotas by time period. The baseline subquota for the June through August time period is 355.4 mt. The default General category daily retention limit is one large medium or giant BFT (measuring 73 inches (185 cm) curved fork length (CFL) or greater) per vessel per day/trip and applies to General category permitted vessels and to HMS Charter/Headboat permitted vessels (when fishing commercially for BFT) (§ 635.23(a)(2)).

**Adjustment of General Category Daily Retention Limit**

Under § 635.23(a)(4), NMFS may increase or decrease the daily retention limit of large medium and giant BFT over a range of zero to five BFT per vessel after considering the regulatory determination criteria under § 635.27(a)(7).

NMFS has considered all of the relevant determination criteria and their applicability to the General category BFT retention limit for the June through August time period. After considering these criteria, NMFS has decided to increase the daily retention limit from one to three large medium or giant BFT per vessel per day/trip (*i.e.,* three BFT measuring 73 inches (185 cm) CFL or greater) for General category permitted vessels and for HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT. HMS Charter/

Headboat permitted vessels fishing recreationally under the Angling category restrictions must follow the Angling category retention and size limits.

Regardless of the duration of a fishing trip, the daily retention limit applies upon landing. For example (and specific to the June through August time period limit), whether a vessel fishing under the General category retention limit takes a 2-day trip or makes two trips in 1 day, the daily limit of three fish may not be exceeded upon landing. This General category retention limit is effective in all areas, except for the Gulf of Mexico, where NMFS prohibits targeting fishing for BFT, and applies to those vessels permitted in the General category, as well as to those HMS Charter/Headboat permitted vessels with a commercial sale endorsement when fishing commercially for BFT.

**Consideration of the Determination Criteria**

Regarding the usefulness of information obtained from catches in the particular category for biological sampling and monitoring of the status of the stock (§ 635.27(a)(7)(i)), biological samples collected from BFT landed by General category fishermen and provided by BFT dealers continue to provide NMFS with valuable parts and data for ongoing scientific studies of BFT age and growth, migration, and reproductive status. Additional opportunity to land BFT would support the continued collection of a broad range of data for these studies and for stock monitoring purposes.

NMFS also considered the catches of the General category quota to date and the likelihood of closure of the General category if no adjustment is made (§ 635.27(a)(7)(ii)). Commercial-size BFT are anticipated to migrate to the fishing grounds off the northeast U.S. coast by early June. Given the typically slow catch rates in early June, it is unlikely that increasing the retention limit from one BFT to three BFT per vessel for a short period of time would result in the subquota for the June through August time period to be reached. If catch rates increase, NMFS could take another action to reduce the trip limit to ensure the fishery would remain open throughout the June through August time period. In 2022, NMFS took similar action to increase the retention limit to three BFT per vessel in the first part of the June through August time period (87 FR 32094, May 27, 2022). When catch rates increased in late June, NMFS reduced the retention limit from three BFT per vessel back to the default limit of one BFT per vessel (87 FR 38673, June 29, 2022). NMFS found that when the retention limit was three BFT per vessel, the vast majority of successful trips (*i.e.,* General or Charter/Headboat trips on which at least one BFT is landed under General category quota) landed only one or two BFT. Specifically, from June 1 through July 2, 2022, 94 percent of the trips landed one BFT; 4 percent landed two; and only 2 percent landed three. NMFS expects catch rates this year will be similar (*i.e.,* low in the first part of June and then increasing). In short, NMFS adjusts the retention limit throughout the season in such a way that NMFS believes, informed by catch rates in past seasons and the catch rates during the current season, increases fishing opportunities while also increasing the likelihood that the fishery will remain open throughout the subquota time period and year. NMFS also is aware of and considered the recently published proposed rule that would set restricted-fishing days for the General category during the months of July 2023 through March 2024 (88 FR 13771, March 6, 2023). If finalized, this proposed rule would further increase the likelihood that the fishery would remain open throughout the June through August time period and year.

NMFS also considered the effects of the adjustment on the BFT stock and the effects of the adjustment on accomplishing the objectives of the 2006 Consolidated HMS FMP (§ 635.27(a)(8)(v) and (vi)). This retention limit adjustment would be consistent with established quotas and subquotas, which are implemented consistent with ICCAT Recommendation 22–10, ATCA, and the objectives of the 2006 Consolidated HMS FMP and amendments. In establishing these quotas and subquotas and associated management measures, ICCAT and NMFS considered the best scientific information available, objectives for stock management and status, and effects on the stock. This retention limit adjustment is in line with the established management measures and stock status determinations. It is also important that NMFS limit landings to the subquotas both to adhere to the subquota allocations and to ensure that landings are as consistent as possible with the pattern of fishing mortality (*e.g.,* fish caught at each age) that was assumed in the latest stock assessment. Because this action is similar to past actions in previous years, this retention limit adjustment is consistent with those objectives.

Another principal consideration in setting the retention limit is the objective of providing opportunities to harvest the available General category quota without exceeding the annual quota. This consideration is based on the objectives of the 2006 Consolidated HMS FMP and its amendments, and includes achieving optimum yield on a continuing basis and optimizing the ability of all permit categories to harvest available BFT quota allocations (related to § 635.27(a)(7)(x)). NMFS anticipates that General category participants in all areas and time periods will have opportunities to harvest the General category quota in 2023, through proactive inseason management such as retention limit adjustments and/or the timing and amount of quota transfers (based on consideration of the determination criteria regarding inseason adjustments), as practicable. As discussed above, NMFS will closely monitor General category catch rates associated with the various authorized gear types (*e.g.,* harpoon, rod and reel) during the June through August time period and actively adjust the daily retention limit as appropriate to enhance scientific data collection and ensure fishing opportunities in all respective time-period subquotas as well as ensure available quota is not exceeded.

A limit lower than three fish at the start of the June through August time period could result in diminished fishing opportunities for those General category vessels using harpoon gear, based on past fish behavior early in the season. Lower limits may also result in effort shifts from the General category to the Harpoon category, which could result in premature closure of the Harpoon category (related to § 635.27(a)(7)(iv)), and, potentially, additional inseason adjustments. General category harpoon landings have averaged less than 5 percent of the General category landings in recent years and these landings occur early in the season. A three-fish retention limit for an appropriate period of time will provide a greater opportunity to harvest the June through August subquota with harpoon gear in the General category while maintaining equitable distribution of fishing opportunities for harpoon and rod and reel General category participants.

Given these considerations, NMFS has determined that a three-fish General category retention limit is warranted for the beginning of the June through August time period. This retention limit would provide a reasonable opportunity to harvest the available U.S. BFT quota (including the expected increase in available 2023 quota based on 2022 underharvest), without exceeding it, while maintaining an equitable

distribution of fishing opportunities; help optimize the ability of the General category to harvest its available quota; allow the collection of a broad range of data for stock monitoring purposes; and be consistent with the objectives of the 2006 Consolidated HMS FMP and amendments.

**Monitoring and Reporting**

NMFS will continue to monitor the BFT fishery closely. Dealers are required to submit landing reports within 24 hours of a dealer receiving BFT. Late reporting by dealers compromises NMFS' ability to timely implement actions such as quota and retention limit adjustment, as well as closures, and may result in enforcement actions. Additionally, and separate from the dealer reporting requirement, General and HMS Charter/Headboat vessel owners are required to report their own catch of all BFT retained or discarded dead, within 24 hours of the landing(s) or end of each trip, by accessing *https://www.hmspermits.noaa.gov* or by using the HMS Catch Reporting app, or calling (888) 872–8862 (Monday through Friday from 8 a.m. until 4:30 p.m.).

Depending on the level of fishing effort and catch rates of BFT, NMFS may determine that additional adjustments are necessary to ensure available quota is not exceeded or to enhance scientific data collection from, and fishing opportunities in, all geographic areas. If needed, subsequent adjustments will be published in the **Federal Register**. In addition, fishermen may call the Atlantic Tunas Information Line at (978) 281–9260, or access *https://www.hmspermits.noaa.gov,* for updates on quota monitoring and inseason adjustments.

**Classification**

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act and regulations at 50 CFR part 635 and is exempt from review under Executive Order 12866.

The Assistant Administrator for NMFS (AA) finds that pursuant to 5 U.S.C. 533(b)(B), there is good cause to waive prior notice and opportunity to provide comment on this action, as notice and comment would be impracticable and contrary to this action for the following reasons. Specifically, the regulations implementing the 2006 Consolidated HMS FMP and amendments provide for inseason retention limit adjustments to respond to the unpredictable nature of BFT availability on the fishing grounds, the migratory nature of this species, and the regional variations in the BFT fishery. Providing prior notice and an opportunity for public comment on the change in the daily retention limit from the default level for the June through August time period would be impracticable. Based on available BFT quotas, fishery performance in recent years, and the availability of BFT on the fishing grounds, responsive adjustment to the General category BFT daily retention limit from the default level is warranted to allow fishermen to take advantage of availability of fish and of quota. NMFS could not have proposed these actions earlier, as it needed to consider and respond to updated data and information about fishery conditions and this year's landings. If NMFS was to offer a public comment period now, after having appropriately considered that data, it would preclude fishermen from harvesting BFT that are legally available consistent with all of the regulatory criteria, and/or could result in selection of a retention limit inappropriate to the amount of quota available for the period.

Fisheries under the General category daily retention limit will commence on June 1 and thus prior notice would be contrary to the public interest. Delays in increasing these retention limits would adversely affect those General and Charter/Headboat category vessels that would otherwise have an opportunity to harvest more than the default retention limit of one BFT per day/trip and may result in low catch rates and quota rollovers. Analysis of available data shows that adjustment to the BFT daily retention limit from the default level would result in minimal risks of exceeding the ICCAT-allocated quota. NMFS provides notification of retention limit adjustments by publishing the action in the **Federal Register**, emailing individuals who have subscribed to the Atlantic HMS News electronic newsletter, and updating the information posted on the Atlantic Tunas Information Line and on *https://www.hmspermits.noaa.gov.* With quota available and fish available on the grounds, and with no additional expected impacts to the stock, it would be contrary to the public interest to require vessels to wait to harvest the additional fish allowed through this action.

Adjustment of the General category retention limit needs to be effective June 1, 2023, or as soon as possible thereafter, to minimize any unnecessary disruption in fishing patterns, to allow the impacted sectors to benefit from the adjustment, and to not preclude fishing opportunities for fishermen in geographic areas with access to the fishery only during this time period. Foregoing opportunities to harvest the respective quotas may have negative social and economic impacts for U.S. fishermen that depend upon catching the available quota within the time periods designated in the 2006 Consolidated HMS FMP and amendments.

For all of the above reasons, the AA finds that pursuant to 5 U.S.C. 553(d), there is also good cause to waive the 30-day delay in effective date.

**Authority:** 16 U.S.C. 971 *et seq.* and 1801 *et seq.*

Dated: May 24, 2023.

**Jennifer M. Wallace,**

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

[FR Doc. 2023–11383 Filed 5–25–23; 8:45 am]

**BILLING CODE 3510–22–P**

# Proposed Rules

Federal Register
Vol. 88, No. 103
Tuesday, May 30, 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 TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2023–1203; Airspace Docket No. 23–AGL–12]**

**RIN 2120–AA66**

## Amendment of VOR Federal Airway V–233 and Revocation of VOR Federal Airway V–320 Due to the Decommissioning of the Mount Pleasant, MI, VOR

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

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

**SUMMARY:** This action proposes to amend Very High Frequency (VHF) Omnidirectional Range (VOR) Federal airway V–233 and revoke VOR Federal airway V–320. The FAA is proposing this action due to the planned decommissioning of the VOR portion of the Mount Pleasant, MI (MOP), VOR/Distance Measuring Equipment (VOR/DME) navigational aid (NAVAID). The Mount Pleasant VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

**DATES:** Comments must be received on or before July 14, 2023.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–1203 and Airspace Docket No. 23–AGL–12 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instructions for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

*Docket:* Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

**FOR FURTHER INFORMATION CONTACT:** Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

**SUPPLEMENTARY INFORMATION:**

### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would modify the National Airspace System (NAS) as necessary to preserve the safe and efficient flow of air traffic.

### Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it receives on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The FAA may change this proposal in light of the comments it receives.

*Privacy:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

### Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Operations office (see **ADDRESSES** section for address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Parkway, Fort Worth, TX 76177.

**Incorporation by Reference**

VOR Federal airways are published in paragraph 6010(a) of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

**Background**

The FAA is planning to decommission the VOR portion of the Mount Pleasant, MI (MOP), VOR/DME in March 2024. The Mount Pleasant VOR was one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the final policy statement notice, ''Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

Although the VOR portion of the Mount Pleasant VOR/DME is planned for decommissioning, the co-located DME portion of the NAVAID is being retained to support current and future NextGen PBN flight procedure requirements.

The Air Traffic Service (ATS) routes affected by the Mount Pleasant VOR decommissioning are VOR Federal airways V–233 and V–320. The remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the airways within the affected area. As such, the FAA proposes to remove the affected portion of V–233 and expand the existing gap in the airway, and to revoke V–320 in its entirety.

To address the proposed removal of the affected airway segment of V–233 and the revocation of V–320, instrument flight rules traffic could use adjacent VOR Federal airways V–78, V–133, V–420, and V–609, or receive air traffic control (ATC) radar vectors to fly through or around the affected area. Aircraft equipped with Area Navigation (RNAV) capabilities could also use RNAV route T–265 or file point to point through the affected area using the fixes and waypoints that will remain in place. Visual flight rules pilots who elect to navigate via the affected ATS routes could also take advantage of the adjacent VOR Federal airways or ATC services listed previously.

**The Proposal**

The FAA is proposing an amendment to 14 CFR part 71 by amending VOR Federal airway V–233 and revoking VOR Federal airway V–320 due to the planned decommissioning of the VOR portion of the Mount Pleasant, MI, VOR/DME. The proposed airway actions are described below.

*V–233:* V–233 currently extends between the Spinner, IL, VOR/Tactical Air Navigation (VORTAC) and the Goshen, IN, VORTAC; and between the Mount Pleasant, MI, VOR/DME and the Pellston, MI, VORTAC. The FAA proposes to remove the airway segment overlying the Mount Pleasant VOR/DME between the Mount Pleasant VOR/DME and the Gaylord, MI, VOR/DME. As amended, the airway would extend between the Spinner VORTAC and the Goshen VORTAC, and between the Gaylord VOR/DME and the Pellston VORTAC.

*V–320:* V–320 currently extends between the Pellston, MI, VORTAC and the Saginaw, MI, VOR/DME. The FAA proposes to remove the airway segment overlying the Mount Pleasant, MI, VOR/DME between the Traverse City, MI, VOR/DME and the Saginaw VOR/DME. Additionally, the FAA proposes to remove the airway segment between the Pellston VORTAC and the Traverse City VOR/DME as it overlays the same airway segment as V–193. As a result, the airway would be removed in its entirety.

The NAVAID radials in the VOR Federal airway V–233 description in the Proposed Amendment section below are unchanged and stated in degrees True north.

**Regulatory Notices and Analyses**

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

*Paragraph 6010(a) Domestic VOR Federal Airways.*

* * * * *

**V–233 [Amended]**

From Spinner, IL; INT Spinner 061° and Roberts, IL, 233° radials; Roberts; Knox, IN; to Goshen, IN. From Gaylord, MI; to Pellston, MI.

* * * * *

**V–320 [Removed]**

* * * * *

Issued in Washington, DC, on May 17, 2023.

**Brian Konie,**

*Acting Manager, Airspace Rules and Regulations.*

[FR Doc. 2023–11375 Filed 5–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

### 14 CFR Part 71

**[Docket No. FAA–2023–0919; Airspace Docket No. 23–AGL–11]**

**RIN 2120–AA66**

## Amendment of Class E Airspace; Rush City, MN

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

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

**SUMMARY:** This action proposes to amend the Class E airspace at Rush City, MN. The FAA is proposing this action as the result of an airspace review caused by the decommissioning of the Rush City non-directional beacon (NDB). The geographic coordinates of the airport would also be updated to coincide with the FAA's aeronautical database.

**DATES:** Comments must be received on or before July 14, 2023.

**ADDRESSES:** Send comments identified by FAA Docket No. FAA–2023–0919 and Airspace Docket No. 23–AGL–11 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instruction for sending your comments electronically.

* *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

* *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

* *Fax:* Fax comments to Docket Operations at (202) 493–2251.

*Docket:* Background documents or comments received may be read at *www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FAA Order JO 7400.11G, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *www.faa.gov/air_traffic/publications/.* You may also contact the Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington DC 20591; telephone: (202) 267–8783.

**FOR FURTHER INFORMATION CONTACT:** Rebecca Shelby, Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5857.

**SUPPLEMENTARY INFORMATION:**

### Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. 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. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the Class E airspace extending upward from 700 feet above the surface at Rush City Regional Airport, Rush City, MN, to support instrument flight rule (IFR) operations at this airport.

### Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should submit only one time if comments are filed electronically, or commenters should send only one copy of written comments if comments are filed in writing.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, the FAA will consider all comments it received on or before the closing date for comments. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or dely. The FAA may change this proposal in light of the comments it receives.

*Privacy:* In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT post 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–14FDMS), which can be reviewed at *www.dot.gov/privacy.*

### Availability of Rulemaking Documents

An electronic copy of this document may be downloaded through the internet at *www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

### Incorporation by Reference

Class E airspace is published in paragraph 6005 of FAA Order JO 7400.11, Airspace Designations and Reporting Points, which is incorporated by reference in 14 CFR 71.1 on an annual basis. This document proposes to amend the current version of that order, FAA Order JO 7400.11G, dated August 19, 2022, and effective September 15, 2022. These updates would be published subsequently in the next update to FAA Order JO 7400.11. That order is publicly available as listed in the **ADDRESSES** section of this document.

FAA Order JO 7400.11G lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

### The Proposal

The FAA is proposing an amendment to 14 CFR part 71 by modifying the Class E airspace extending upward from 700 feet above the surface to within a 6.4-mile (decreased from a 6.5-mile) radius of Rush City Regional Airport, Rush City, MN; removing the Rush City NDB from the airspace legal description; and updating the geographic coordinates of the airport to coincide with the FAA's aeronautical database.

This action is the result of an airspace review caused by the decommissioning of the Rush City NDB which provided navigation information for the instrument procedures at this airport.

**Regulatory Notices and Analyses**

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

**Environmental Review**

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

**List of Subjects in 14 CFR Part 71**

Airspace, Incorporation by reference, Navigation (air).

**The Proposed Amendment**

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

## PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

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

**§ 71.1 [Amended]**

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order JO 7400.11G, Airspace Designations and Reporting Points, dated August 19, 2022, and effective September 15, 2022, is amended as follows:

*Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.*

* * * * *

**AGL MN E5 Rush City, MN [Amended]**

Rush City Regional Airport, TX
(Lat 45°41′50″ N, long 092°57′08″ W)

That airspace extending upward from 700 feet above the surface within a 6.4-mile radius of Rush City Regional Airport.

* * * * *

Issued in Fort Worth, Texas, on May 22, 2023.

**Martin A. Skinner,**

*Acting Manager, Operations Support Group, ATO Central Service Center.*

[FR Doc. 2023–11351 Filed 5–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 622

**[Docket No. 230523–0137]**

**RIN 0648–BM03**

## Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Amendment 51

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes regulations to implement Amendment 51 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). For snowy grouper, this proposed rule would revise the sector annual catch limits (ACLs), commercial seasonal quotas, recreational fishing season, and recreational accountability measures (AMs). In addition, Amendment 51 would revise the acceptable biological catch (ABC), annual optimum yield (OY), and sector allocations of the total ACL. The purpose of this proposed rule and Amendment 51 is to end overfishing of snowy grouper, rebuild the stock, and achieve OY while minimizing, to the extent practicable, adverse social and economic effects.

**DATES:** Written comments must be received by June 29, 2023.

**ADDRESSES:** You may submit comments on the proposed rule, identified by ''NOAA–NMFS–2023–0026,'' by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *https://www.regulations.gov* and enter ''NOAA–NMFS–2023–0026'' in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit all written comments to Rick DeVictor, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments—enter ''N/A'' in the required fields if you wish to remain anonymous.

An electronic copy of Amendment 51, which includes a fishery impact statement and a regulatory impact review, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/node/151366.*

**FOR FURTHER INFORMATION CONTACT:** Rick DeVictor, telephone: 727–824–5305, or email: *rick.devictor@noaa.gov.*

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

**Background**

The Magnuson-Stevens Act requires that NMFS and the regional fishery management councils prevent overfishing and achieve, on a continuing basis, the OY from federally managed fish stocks. These mandates are intended to ensure that fishery resources are managed for the greatest overall benefit to the Nation, particularly with respect to providing food production and recreational opportunities and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act requires fishery managers to minimize bycatch and

bycatch mortality to the extent practicable.

All weights described in this proposed rule are in gutted weight.

In 2004, a stock assessment for snowy grouper was completed through the Southeast Data, Assessment, and Review (SEDAR) process (SEDAR 4), and it was determined that the stock was subject to overfishing and overfished. As a result of that stock status, Amendment 13C to the FMP established management measures to end overfishing (71 FR 55096, September 21, 2006) and Amendment 15A to the FMP established a rebuilding plan for snowy grouper (73 FR 14942, March 20, 2008). The rebuilding plan year started in 2006 with a target time to rebuild snowy grouper of 34 years.

The snowy grouper stock was assessed again in 2013 through SEDAR 36 and was determined to not be undergoing overfishing, although the stock was overfished but rebuilding. In response to the assessment and a subsequent ABC recommendation by the Council's Scientific and Statistical Committee (SSC), the Council and NMFS implemented management actions through the final rule for Regulatory Amendment 20 to the FMP (80 FR 43033, July 21, 2015). Regulatory Amendment 20 and its implementing final rule modified the ACL by setting it equal to the ABC and OY, increased the commercial trip limit to 200 lb (91 kg), and modified the recreational fishing season from the calendar year to May through August.

The most recent SEDAR stock assessment for South Atlantic snowy grouper (SEDAR 36 Update) was completed in 2021 and included data through 2018. The assessment used revised estimates for recreational catch from the Marine Recreational Information Program (MRIP) based on the Fishing Effort Survey (FES). In 2018, the MRIP fully transitioned its estimation of recreational effort to the mail-based FES. Previous estimates of recreational catch for snowy grouper were made using MRIP's Coastal Household Telephone Survey (CHTS) phone call-based methodology. As explained in Amendment 51, total recreational fishing effort estimates generated from the MRIP FES are different than those from the MRIP CHTS and earlier survey methods. This difference in estimates is because MRIP FES is designed to more accurately measure fishing activity, not because there was a sudden change in fishing effort. The MRIP FES is considered a more reliable estimate of recreational effort by the Council's SSC, the Council, and NMFS, and more robust compared to the MRIP CHTS method. The SSC reviewed the SEDAR 36 Update and found that the assessment was conducted using the best scientific information available, and was adequate for determining stock status and supporting fishing level recommendations. The findings of the assessment indicated that the South Atlantic snowy grouper stock remains overfished and is undergoing overfishing.

Following a notification from NMFS to a fishery management council that a stock is undergoing overfishing and is overfished, the Magnuson-Stevens Act requires the fishery management council to develop an FMP amendment with actions that immediately end overfishing and rebuild the affected stock. In a letter dated June 10, 2021, NMFS notified the Council that the snowy grouper stock is overfished and undergoing overfishing but continues to rebuild, and the Council subsequently developed Amendment 51 in response to the results of SEDAR 36 Update.

In addition to the proposed revisions to the sector ACLs and seasonal commercial quotas, the Council determined that further modifications to snowy grouper management measures are needed to help constrain recreational harvest to the proposed fishing levels in Amendment 51. The proposed rule would reduce the length of the recreational fishing season and would also adjust the recreational AMs to ensure they are effective at keeping recreational landings from exceeding the proposed recreational ACL and correct for ACL overages if they occur. The Council decided not to revise the current commercial trip limit or AMs, finding that those measures sufficiently ensured that the commercial harvest of snowy grouper is constrained to the ACL.

The Council determined that the actions in Amendment 51 would end overfishing of South Atlantic snowy grouper, rebuild the stock, and achieve OY while minimizing, to the extent practicable, adverse social and economic effects.

**Management Measures Contained in This Proposed Rule**

This proposed rule would revise the total and sector ACLs, seasonal commercial quotas, recreational fishing season, and the recreational AMs for snowy grouper in the South Atlantic exclusive economic zone (EEZ).

*Total ACLs*

As implemented through the final rule for Regulatory Amendment 20, the current total ACL and annual OY for snowy grouper are equal to the current ABC of 185,464 lb (84,125 kg). In Amendment 51, the Council would revise the ABC, and set the ABC, ACL, and annual OY equal to each other.

The proposed rule would revise the total ACL and annual OY equal to the recommended ABC of 119,654 lb (54,274 kg) for 2023; 121,272 lb (55,008 kg) for 2024; 122,889 lb (55,741 kg) for 2025; and 122,889 lb (55,741 kg), for 2026 and subsequent fishing years.

Amendment 51 would set a total ACL for snowy grouper in 2023, 2024, 2025, and in 2026, with the 2026 ACL in place for the subsequent fishing years. However, the ACL value for 2025 is identical to the ACL value for 2026. While NMFS is listing the ACL value for 2025 and 2026 in the **SUPPLEMENTARY INFORMATION** section of this proposed rule, in the proposed regulations section NMFS will state the total (and sector) ACLs for snowy grouper in 2025 and subsequent fishing years without repeating the same ACL value for 2026.

*Sector Allocations and ACLs*

The Council would revise the commercial and recreational allocations of the total ACL for snowy grouper in Amendment 51. The current sector ACLs for snowy grouper are based on the commercial and recreational allocations of the total ACL at 83 percent and 17 percent, respectively, that were revised in Regulatory Amendment 20. These allocations were determined using average commercial and recreational landings from 1986 to 2005, which included estimates of recreational catch from the MRIP CHTS method.

In Amendment 51, the Council would determine allocations using the average commercial and recreational landings from 1986 to 2005, but include the estimates of recreational catch during those years using the MRIP FES method from the SEDAR 36 Update. The Council would specify new commercial and recreational allocations of 87.55 percent and 12.45 percent, respectively, which results in a shift of allocation of 4.55 percent from the recreational sector to the commercial sector. The Council reasoned that using average landings from 1986 to 2005 was more appropriate because it would exclude the more recent years that had depth and area closures that may have affected the allocation calculations, and would strike the most appropriate balance between the needs of both sectors. The Council acknowledged that because the snowy grouper portion of the snapper-grouper fishery operates primarily in deeper water and is therefore more difficult to access for recreational

fishermen, when compared to snapper-grouper species in shallower water and closer to shore, the allocations between sectors have historically and consistently been much higher for the commercial sector. The Council considers this allocation to be fair and equitable to fishery participants in both the commercial and recreational sectors, and would be carried out in such a manner that no particular individual, corporation, or other entity would acquire an excessive share. The Council determined that this allocation is also reasonably calculated to promote conservation and is a wise use of the resource, since it would remain within the boundaries of a total ACL that is based upon an ABC recommendation from their SSC that incorporates best scientific information available. The Council acknowledged that the commercial sector would benefit with additional allocation, but that the economic shifts were relatively minor.

The commercial ACLs would be 104,757 lb (47,517 kg) for 2023; 106,174 lb (48,160 kg) for 2024; 107,589 lb (48,802 kg) for 2025; and 107,589 lb (48,802 kg) for 2026 and subsequent years.

The recreational ACLs would be 1,668 fish for 2023; 1,691 fish for 2024; 1,713 fish for 2025; and 1,713 fish for 2026 and subsequent years.

The commercial quota for snowy grouper is equivalent to the commercial ACL. Regulatory Amendment 27 to the FMP established two commercial fishing seasons for snowy grouper and divided the commercial quota between the seasons (85 FR 4588, January 27, 2020). The Council allocated 70 percent of the commercial quota to Season 1 from January through June, and 30 percent of the quota to Season 2 from July through December. Any remaining commercial quota from Season 1 is added to the commercial quota in Season 2, but any remaining quota from Season 2 is not be carried forward into the next fishing year. Amendment 51 and this proposed rule would not alter the current commercial fishing seasons or seasonal allocations of the commercial ACL.

Under Amendment 51, the commercial quotas in 2023 for Season 1 would be 73,330 lb (33,262 kg) and for Season 2 would be 31,427 lb (14,255 kg); in 2024, Season 1 would be 74,322 lb (33,712 kg) and Season 2 would be 31,852 lb (14,448 kg); in 2025, Season 1 would be 75,312 lb (34,161 kg) and Season 2 would be 32,277 lb (14,641 kg); and for 2026 and subsequent years, Season 1 would be 75,312 lb (34,161 kg) and Season 2 would be 32,277 lb (14,641 kg).

*Recreational Fishing Season*

Recreational harvest of snowy grouper is currently allowed from May 1 through August 31 each year. This proposed rule would revise the recreational fishing season for snowy grouper where harvest would be allowed only from May 1 through June 30. The recreational sector would be closed annually from January 1 through April 30, and from July 1 through December 31. During the proposed seasonal closures, the recreational bag and possession limits for snowy grouper would be zero. Shortening the time recreational fishing is allowed would help to reduce the risk that recreational harvest would exceed the proposed reduction to its sector ACL, while still allowing for retention of snowy grouper when recreational fishermen target co-occurring species, such as blueline tilefish, in some areas.

*Recreational AMs*

The current recreational AMs were established through Amendment 34 to the FMP (81 FR 3731, January 22, 2016). The AMs for snowy grouper include an in-season closure for the remainder of the fishing year if recreational landings reach or are projected to reach the recreational ACL, regardless of whether the stock is overfished. The AMs also include a post-season adjustment if recreational landings exceed the recreational ACL, and then during the following fishing year recreational landings will be monitored for a persistence in increased landings. If the total ACL for snowy grouper is exceeded and the stock is overfished, the length of the recreational fishing season and the recreational ACL are reduced by the amount of the recreational ACL overage.

This proposed rule would revise the recreational AMs for snowy grouper. Given the proposed 2-month fishing season, the current in-season closure and stock status-based post-season AM would be removed. The proposed recreational AM would be a post-season AM that would be triggered in the following fishing year if the recreational ACL was exceeded in the previous year. If recreational landings exceed the recreational ACL, NMFS would reduce the length of the recreational fishing season in the following year by the amount necessary to prevent the recreational ACL from being exceeded. However, the length of the recreational season would not be reduced if NMFS determines, using the best scientific information available, that a reduction is not necessary.

The Council's intent in revising the recreational AM is to avoid an in-season closure of the recreational sector and extend maximum fishing opportunities to the sector during the proposed 2-month recreational season. The proposed rule would remove the current potential duplicate AM application of a reduction in the recreational season length and a payback of the recreational ACL overage if the total ACL was exceeded. Under the proposed measure, the AM trigger would not be tied to the total ACL, but only to the recreational ACL. The proposed modification would ensure that an ACL overage in the recreational sector does not in turn affect the catch levels for the commercial sector. Any reduced recreational season length as a result of the AM being implemented would apply to the recreational fishing season in the year following a recreational ACL overage.

**Management Measures in Amendment 51 That Would Not Be Codified by This Proposed Rule**

In addition to the measures within this proposed rule, Amendment 51 would revise the overfishing limit (OFL) for snowy grouper and set the ACL equal to the ABC. The amendment would also revise the OY and the sector allocations.

*OFL, ABC, and Annual OY*

The current ABC for snowy grouper was approved in Regulatory Amendment 20, based upon a stock assessment (SEDAR 36) and recommendations from the Council's SSC.

Based on the SEDAR 36 Update, the Council's SSC recommended to the Council new OFL and ABC levels, with the ABC reduced from the OFL. The assessment and associated OFL and ABC recommendations for snowy grouper incorporated the revised estimates for recreational catch and effort from the MRIP FES. The SSC determined that the new OFL and ABC recommendations within Amendment 51 also represent the best scientific information available.

The Council chose to specify OY for snowy grouper on an annual basis and set it equal to the ABC and total ACL, in accordance with the guidance provided in the Magnuson-Stevens Act National Standard 1 Guidelines at 50 CFR 600.310(f)(4)(iv).

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Amendment 51, the FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to

further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

An initial regulatory flexibility analysis (IRFA) was prepared, as required by section 603 of the Regulatory Flexibility Act (RFA; 5 U.S.C. 603). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of the preamble. A summary of the analysis follows. A copy of this analysis is available from NMFS (see **ADDRESSES**).

This proposed rule, if implemented, would: (1) revise the snowy grouper total ACL, (2) revise the snowy grouper sector ACLs, (3) modify the snowy grouper recreational season, and (4) revise the recreational AMs for snowy grouper. The proposed changes to the ACL, as well as the sector allocations, would apply to all federally-permitted commercial vessels, federally-permitted charter vessels and headboats (for-hire vessels), and recreational anglers that fish for or harvest snowy grouper in Federal waters of the South Atlantic. The proposed changes to the recreational season and AMs would only apply to federally permitted owners and operators of for-hire vessels and recreational anglers. This proposed rule would not directly apply to federally-permitted dealers. Any change in the supply of snowy grouper available for purchase by dealers as a result of this proposed rule, and associated economic effects, would be an indirect effect of this rule and would therefore fall outside the scope of the RFA.

Although all components of this proposed rule would apply to for-hire vessels, they would not be expected to have any direct effects on these entities. For-hire vessels sell fishing services to recreational anglers. The proposed changes to the snowy grouper management measures would not directly alter the services sold by these vessels. Any change in demand for these fishing services, and associated economic effects, as a result of this proposed rule would be a consequence of a change in anglers' behavior, secondary to any direct effect on anglers and, therefore, an indirect effect of this proposed rule. Based on the historically-minimal level of charter-mode target effort for snowy grouper in the South Atlantic, NMFS does not expect any change in for-hire trip demand to result from this proposed rule; however, should it occur, the associated indirect effects would fall outside the scope of the RFA. For-hire captains and crew are allowed to retain snowy grouper under the recreational bag limit; however, they cannot sell these fish. As such, for-hire captains and crew are only affected as recreational anglers. The RFA does not consider recreational anglers to be entities, so they are also outside the scope of this analysis (5 U.S.C. 603). Small entities include small businesses, small organizations, and small governmental jurisdictions (5 U.S.C. 601(6) and 601(3)–(5)). Recreational anglers are not businesses, organizations, or governmental jurisdictions. In summary, only the impacts on commercial vessels will be discussed.

As of August 26, 2021, there were 579 valid or renewable South Atlantic snapper-grouper unlimited permits and 112 valid or renewable 225-lb (102-kg) trip-limited snapper-grouper permits. On average from 2015 through 2019, there were 161 federally-permitted commercial vessels with reported landings of snowy grouper in the South Atlantic. For the 161 commercially permitted vessels, the average annual vessel-level gross revenue from all species for 2015 through 2019 was $82,475 (2021 dollars) and snowy grouper accounted for approximately 6.1 percent of this revenue. For commercial vessels that harvest snowy grouper in the South Atlantic, NMFS estimates that economic profits are $3,299 (2021 dollars) or approximately 4 percent of annual gross revenue, on average. The maximum annual revenue from all species reported by a single one of the vessels that harvested snowy grouper from 2015 through 2019 was $638,709 (2021 dollars).

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (North American Industry Classification System code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. All of the commercial fishing businesses directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard. No other small entities that would be directly affected by this proposed rule have been identified.

This proposed rule would revise the total ACL for snowy grouper, based on the most recent recommendation from the Council's SSC in response to the SEDAR 36 Update. This catch limit would reflect a shift in recreational reporting units from the MRIP CHTS to the MRIP FES. The total ACL would be set equal to the ABC or 119,654 lb (54,274 kg) in 2023, 121,272 lb (55,008 kg) in 2024, and 122,889 lb (55,742 kg) in 2025 and subsequent years. Based on the current sector allocation percentages, the proposed changes to the catch limits would represent a decrease in the current commercial ACL for snowy grouper of 54,622 lb (24,776 kg) in 2023, 53,279 lb (24,167 kg) in 2024, and 51,937 lb (23,558 kg) in 2025 and subsequent years. However, as discussed below, this proposed rule would also modify the percentage of the total ACL that is allocated to the commercial sector and therefore economic effects to small entities are quantified as part of that discussion.

Amendment 51 would increase the commercial sector allocation from 83 percent of the total snowy grouper ACL to 87.55 percent. This, in conjunction with the proposed changes to the total ACLs, would result in a commercial ACL for snowy grouper of 104,757 lb (47,517 kg) in 2023 (73,330 lb [33,262 kg] in Season 1 and 31,427 lb [14,255 kg] in Season 2); 106,174 lb (48,160 kg) in 2024 (74,322 lb [33,712 kg] in Season 1 and 31,852 lb [14,448 kg] in Season 2); and 107,589 lb (48,802 kg) in 2025 and subsequent years (75,312 lb [34,161 kg] in Season 1 and 32,277 lb [14,641 kg] in Season 2). Relative to the status quo commercial ACL of 153,935 lb (69,824 kg), this would be a decrease of 49,178 lb (22,307 kg) in 2023; 47,761 lb (21,664 kg) in 2024; and 46,346 lb (21,022 kg) in 2025 and subsequent years. These decreases in the commercial ACL would be expected to result in corresponding decreases in aggregate ex-vessel revenue of $284,249 (2021 dollars) in 2023, $276,059 in 2024, and $267,880 in 2025 and subsequent years. Divided by the average number of vessels with reported landings of snowy grouper from 2015 through 2019, this translates to an annual loss in ex-vessel revenue that ranges from $1,664 (2021 dollars) to $1,766 per vessel, which is approximately 2 percent of average annual per vessel gross revenue. It is noted that snowy grouper makes up a relatively small portion of annual gross revenue for vessels that land the species (6.1 percent), and on trips where snowy grouper are harvested, it comprises less than a quarter of trip revenue, on average (2015 to 2019). Therefore,

NMFS assumes snowy grouper is harvested as a secondary, if not incidental, species on trips targeting other species and that the proposed rule would not materially affect fishing behavior, effort, or operating costs. As a result, the estimated reduction in annual ex-vessel revenue due to less snowy grouper available for harvest is assumed to be a straight loss in annual economic profits of $1,664 (2021 dollars) to $1,766 per vessel (approximately 50 percent to 54 percent of average annual economic profits). Individual fishing businesses, however, may experience varying levels of economic effects, depending on their fishing practices, operating characteristics, and profit maximization strategies.

The following discussion describes the alternatives that were not selected as preferred by the Council.

Three alternatives were considered for the proposed action to set the ABC, total ACL, and annual OY equal to 119,654 lb (54,274 kg) in 2023, 121,272 lb (55,008 kg) in 2024, and 122,889 lb (55,742 kg) in 2025 and subsequent years. The first alternative to the proposed action, the no action alternative, would maintain the current ABC, ACL, and annual OY of 185,464 lb (84,125 kg). Therefore, it would not be expected to change fishing practices or commercial harvests of snowy grouper, nor would it be expected to result in economic effects. This alternative was not selected by the Council because it would not end overfishing and it would be inconsistent with the SSC's latest catch limit recommendations and the transition to MRIP FES, and therefore, would not be based on the best scientific information available.

The second alternative would set the ACL and annual OY for snowy grouper equal to 95 percent of the most recent ABC recommendation from the SSC. Under the second alternative, both the ACL and annual OY would be set to 113,671 lb (51,560 kg) in 2023, 115,208 lb (52,257 kg) in 2024, and 116,745 lb (52,955 kg) in 2025 and subsequent years. Relative to the proposed total ACLs and assuming no change to the current sector allocations, this alternative would reduce the commercial ACL and annual OY by an additional 5,983 lb (2,714 kg) in 2023, 6,064 lb (2,751 kg) in 2024, and 6,144 lb (2,787 kg) in 2025 and subsequent years. These further reductions in the ACL would result in an estimated annual reduction in ex-vessel revenue and economic profits that is $34,582 (2021 dollars) to $35,512 ($215 to $221 per vessel) greater than what is expected under the proposed action. The Council did not select the second alternative because they felt it would be less effective at achieving the objectives of the FMP and that the current monitoring mechanisms in the South Atlantic, coupled with the existing and proposed management measures, would be sufficient at preventing overages, thus not requiring a buffer between the ABC and ACL.

The third alternative would set the ACL and annual OY for snowy grouper equal to 90 percent of the most recent ABC recommendation from the SSC. Under the third alternative, both the ACL and annual OY would be set to 107,689 lb (48,847 kg) in 2023, 109,145 lb (49,507 kg) 2024, and 110,600 lb (50,167 kg) in 2025 and subsequent years. Relative to the proposed total ACLs and assuming no change to the current sector allocations, this alternative would reduce the commercial ACL and annual OY by an additional 11,965 lb (5,427 kg) in 2023, 12,127 lb (5,501 kg) in 2024, and 12,289 lb (5,574 kg) in 2025 and subsequent years. These further reductions in the ACL would result in an estimated annual reduction in ex-vessel revenue and economic profits that is $69,158 (2021 dollars) to $71,030 ($430 to $441 per vessel) greater than what is expected under the proposed action. The Council did not select the third alternative because they felt it would be less effective at achieving the objectives of the FMP and that the current monitoring mechanisms in the South Atlantic, coupled with the existing and proposed management measures, would be sufficient at preventing overages, thus not requiring a buffer between the ABC and ACL.

Two alternatives were considered for the proposed action to revise sector allocations and ACLs for snowy grouper. The first alternative to the proposed action, the no action alternative, would retain the current commercial sector and recreational sector allocations as 83 percent and 17 percent, respectively, of the revised total ACL for snowy grouper. Based on the proposed total ACL schedule of 119,654 lb (54,274 kg) in 2023, 121,272 lb (55,008 kg) 2024, and 122,889 lb (55,742 kg) in 2025 and subsequent years, this alternative would result in a commercial ACL of 99,313 lb (45,048 kg) in 2023, 100,656 lb (45,657 kg) in 2024, and 101,998 lb (46,266 kg) in 2025 and subsequent years. Compared to the proposed commercial sector allocation of 87.55 percent, this alternative would result in a commercial ACL that is 5,444 lb (2,469 kg) lower in 2023, 5,518 lb (2,503 kg) lower in 2024, and 5,591 lb (2,536 kg) lower in 2025 and subsequent years. This would translate to an additional aggregate annual loss in ex-vessel revenue and economic profits of $31,466 (2021 dollars) to $32,316 ($195 to $201 per vessel) relative to the proposed action. The Council did not select the first alternative because the status quo sector allocation percentages are based on average landings from 1986 through 2005 in MRIP CHTS units and therefore do not reflect the intent or results of the original allocation formula when applied to the proposed ACL based on MRIP FES units. The terms ''MRIP CHTS units'' and ''MRIP FES units'' signify landings data that are in different scales and are not directly comparable.

The second alternative would allocate 73.36 percent of the revised total ACL for snowy grouper to the commercial sector and 26.64 percent of it to the recreational sector. Based on the proposed total ACL schedule, this alternative would result in a commercial ACL of 87,778 lb (39,815 kg) in 2023, 88,965 lb (40,354 kg) in 2024, and 90,151 lb (40,892 kg) in 2025 and subsequent years. Compared to the proposed commercial sector allocation of 87.55 percent, this alternative would result in a commercial ACL that is 16,979 lb (7,702 kg) lower in 2023, 17,209 lb (7,806 kg) lower in 2024, and 17,438 lb (7,910 kg) lower in 2025 and subsequent years. This would translate to an additional aggregate annual loss in ex-vessel revenue and economic profits of $98,139 (2021 dollars) to $100,792 ($610 to $626 per vessel) relative to the proposed action. The Council did not select the second alternative because they felt that the method used to determine the current allocations (average landings from 1986–2005) was more appropriate than the allocations formula adopted through the 2012 Comprehensive ACL Amendment to the FMP for unassessed species (77 FR 15916, March 16, 2012). They also felt that the second alternative would be less effective at achieving the objectives of the FMP and satisfying the needs of the commercial sector, in particular.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed rule. This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

**List of Subjects in 50 CFR Part 622**

Commercial, Fisheries, Fishing, Recreational, Snowy grouper, South Atlantic.

Dated: May 23, 2023.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, NMFS proposes to amend 50 CFR part 622 as follows:

## PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.183, revise paragraph (b)(8) to read as follows:

**§ 622.183 Area and seasonal closures.**

* * * * *

(b) * * *

(8) *Snowy grouper recreational sector closure.* The recreational sector for snowy grouper in the South Atlantic EEZ is closed each year from January 1 through April 30, and July 1 through December 31. During a recreational closure, the bag and possession limits for snowy grouper harvested in or from the South Atlantic EEZ are zero.

* * * * *

■ 3. In § 622.190, revise paragraphs (a)(1)(i) and (ii) to read as follows:

**§ 622.190 Quotas.**

* * * * *

(a) * * *

(1) * * *

(i) From January 1 through June 30 each year.

(A) 2023—73,330 lb (33,262 kg).

(B) 2024—74,322 lb (33,712 kg).

(C) 2025 and subsequent fishing years—75,312 lb (34,161 kg).

(ii) From July 1 through December 31 each year.

(A) 2023—31,427 lb (14,255 kg).

(B) 2024—31,852 lb (14,448 kg).

(C) 2025 and subsequent fishing years—32,277 lb (14,641 kg).

* * * * *

■ 4. In § 622.193, revise paragraph (b) to read as follows:

**§ 622.193 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).**

* * * * *

(b) *Snowy grouper*—(1) *Commercial sector.* (i) If commercial landings of snowy grouper, as estimated by the SRD, reach or are projected to reach the commercial ACL that is equal to the commercial quota specified in § 622.190(a)(1), the AA will file a notification with the Office of the Federal Register to close the commercial sector for the remainder of the fishing year. Applicable restrictions after a commercial quota closure are specified in § 622.190(c).

(ii) If commercial landings of snowy grouper, as estimated by the SRD, exceed the commercial ACL, and the combined commercial and recreational ACL specified in paragraph (b)(3) of this section is exceeded, and snowy grouper are overfished based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for that following fishing year by the amount of the commercial ACL overage in the prior fishing year.

(2) *Recreational sector.* (i) The recreational ACL for snowy grouper is 1,668 fish for 2023; 1,691 fish for 2024; and 1,713 fish for 2025 and subsequent fishing years.

(ii) If recreational landings for snowy grouper exceed the recreational ACL specified in paragraph (b)(2)(i) of this section, then during the following fishing year NMFS will reduce the length of the recreational fishing season by the amount necessary to prevent recreational landings from exceeding the recreational ACL in the following fishing year. NMFS will use the best scientific information available to determine if reducing the length of the recreational fishing season is necessary. When the recreational sector for snowy grouper is closed as a result of NMFS reducing the length of the recreational fishing season, the bag and possession limits for snowy grouper harvested in or from the South Atlantic EEZ are zero.

(3) *Total ACL.* The combined commercial and recreational ACL for snowy grouper in gutted weight is 119,654 lb (54,274 kg) for 2023; 121,272 lb (55,008 kg) for 2024; and 122,889 lb (55,741 kg) for 2025 and subsequent fishing years.

* * * * *

[FR Doc. 2023–11366 Filed 5–26–23; 8:45 am]

BILLING CODE 3510–22–P

# Notices

Federal Register
Vol. 88, No. 103
Tuesday, May 30, 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.

## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### Notice of Public Meeting of the Assembly of the Administrative Conference of the United States

**AGENCY:** Administrative Conference of the United States.

**ACTION:** Notice.

**SUMMARY:** The Assembly of the Administrative Conference of the United States will meet during a one-day hybrid plenary session to consider four proposed recommendations and to conduct other business. Written comments may be submitted in advance, and the meeting will be accessible to the public.

**DATES:** The meeting will take place on Thursday, June 15, 2023, from 9 a.m.–5 p.m. (ET). The meeting may adjourn early if all business is finished.

**ADDRESSES:** For those attending in person, the meeting will be held at The George Washington University Law School in the Jacob Burns Moot Court Room, 2000 H Street NW, Washington, DC 20052. There will be a virtual attendance option. Information on how the public can access the meeting will be available on the agency's website prior to the meeting at *https://www.acus.gov/meetings-and-events/plenary-meeting/79th-plenary-session.*

**FOR FURTHER INFORMATION CONTACT:** Shawne McGibbon, General Counsel (Designated Federal Officer), Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036; telephone 202–480–2080; email *smcgibbon@acus.gov.*

**SUPPLEMENTARY INFORMATION:** The Administrative Conference of the United States makes recommendations to Federal agencies, the President, Congress, and the Judicial Conference of the United States regarding the improvement of administrative procedures (5 U.S.C. 594). The membership of the Conference, when meeting in plenary session, constitutes the Assembly of the Conference (5 U.S.C. 595).

*Agenda:* Four proposed recommendations will be considered by the Assembly. In addition, there will be updates on past, current, and pending Conference initiatives, as well as other business. Summaries of the recommendations appear below:

*Artificial Intelligence in Retrospective Review of Agency Rules.* This proposed recommendation identifies best practices for agencies to consider when designing or using artificial intelligence or other algorithmic tools to identify rules that are outdated or redundant, contain typographical errors or inaccurate cross-references, or might benefit from elaboration or clarification. It also discusses how agencies can design these tools in a way that promotes transparency, public participation, and accountability.

*Disclosure of Agency Legal Materials.* This proposed recommendation identifies statutory reforms that, if enacted by Congress, would provide clear standards as to what legal materials agencies must publish and where they must publish them (whether in the **Federal Register**, on their websites, or elsewhere). The amendments would also account for technological developments and correct certain statutory ambiguities and drafting errors. The objective of these amendments would be to ensure that agencies provide ready public access to important legal materials in the most efficient way possible.

*Online Processes in Agency Adjudication.* This proposed recommendation identifies best practices for developing online processes by which private parties, representatives, and other participants in agency adjudications can file forms, evidence, and briefs; view case materials and status information; receive notices and orders; and perform other common adjudicative tasks.

*Virtual Public Engagement in Agency Rulemaking.* This proposed recommendation identifies best practices to promote enhanced transparency, accessibility, and accountability when agencies use virtual tools to engage the public in connection with agency rulemaking activities. It encourages agencies to offer virtual options when it would be beneficial to do so and offers best practices for structuring virtual public engagements in a way that meets public expectations and promotes valuable input for agency decision makers.

Additional information about the proposals and the agenda, as well as any changes or updates to the same, can be found at the 79th Plenary Session page on the Conference's website prior to the start of the meeting: at *https://www.acus.gov/meetings-and-events/plenary-meeting/79th-plenary-session.*

*Public Participation:* The Conference welcomes the virtual attendance of the public at the meeting. Members of the public wishing to view the meeting are asked to RSVP online at the 79th Plenary Session web page shown above no later than two days before the meeting to ensure adequate bandwidth. A link to a livestream of the meeting will be posted the morning of the meeting on the 79th Plenary Session web page. A video recording of the meeting will be available on the Conference's website shortly after the conclusion of the event at *https://youtube.com/@administrativeconferenceof9987.*

*Written Comments:* Persons who wish to comment on any of the proposed recommendations may do so by submitting a written statement either online by clicking ''Submit a comment'' on the 79th Plenary Session web page shown above or by mail addressed to: June 2023 Plenary Session Comments, Administrative Conference of the United States, Suite 706 South, 1120 20th Street NW, Washington, DC 20036. Written submissions must be received no later than 10:00 a.m. (ET), Friday, June 9, 2023, to ensure consideration by the Assembly.

(Authority: 5 U.S.C. 595.)

Dated: May 23, 2023.

**Shawne McGibbon,**

*General Counsel.*

[FR Doc. 2023–11362 Filed 5–26–23; 8:45 am]

**BILLING CODE 6110–01–P**

## AGENCY FOR INTERNATIONAL DEVELOPMENT

### OMB Submission: Safeguarding Against Exploitation, Sexual Abuse, Child Abuse, and Child Neglect

**AGENCY:** Agency for International Development.

**ACTION:** Notice of information collection.

**SUMMARY:** Under the provisions of the Paperwork Reduction Act, the U.S. Agency for International Development (USAID) seeks the Office of Management and Budget (OMB) approval for the new information collection for safeguarding against exploitation, sexual abuse, child abuse, and child neglect.

**DATES:** Submit comments on or before June 24, 2023.

**ADDRESSES:** Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

Written comments for this information collection should be sent within 30 days of publication of this notice via:

1. *Web:* Through the Federal eRulemaking Portal at *http://www.regulations.gov.* This website provides instructions and includes the ability to type short comments directly into the comment field or attach a file for lengthier comments.

2. *Email:* For comments sent via email, please address them to *compliance@usaid.gov* and cite OMB Submission: Safeguarding Against Exploitation, Sexual Abuse, Child Abuse, and Child Neglect in the subject line of the email.

**FOR FURTHER INFORMATION CONTACT:** Kathleen Stohs, *compliance@usaid.gov,* (202) 216–3183.

**SUPPLEMENTARY INFORMATION:**

### A. Need and Uses

The purpose of this collection is to enable the U.S. Agency for International Development to respond to allegations of exploitation, sexual abuse, child abuse, and child neglect and institute appropriate standards of behavior. Submissions will be required from recipients to comply with pending award requirements to safeguard against exploitation, sexual abuse, child abuse, and child neglect in USAID-funded programming. Information submitted by recipients as part of this collection will be presumed to be confidential. USAID takes the protection of personally identifiable information (PII) seriously and takes precautions to ensure the confidentiality and security of PII, consistent with USAID's Automated Directives System (ADS) Chapter 508 and does not request PII in this information collection. Agency staff must only share information on individual responses on a need-to-know basis and take steps to protect any sensitive information, including redacting sensitive information and limiting access.

*Notification:* A pending standard provision for assistance awards to nongovernmental organizations (NGOs) will require the recipient to (1) immediately inform, in writing, the Bureau for Management, Office of Management Policy, Budget, and Performance, Responsibility, Safeguarding, and Compliance Division (M/MPBP/RSC) at *partnerdisclosures@usaid.gov* and USAID Office of Inspector General (OIG), with a copy to the Agreement Officer whenever the recipient receives credible information from any source that alleges the recipient, subrecipient, employee, agent, intern, or any other person provided access or contact with beneficiaries under the award has engaged in any exploitation, sexual abuse, child abuse, and child neglect of any person, and supported or advanced these actions, or intentionally ignored or failed to act upon allegations of these actions; and (2) as soon as practicable, the recipient must provide in writing, as specified above: (i) additional information on any actions planned or taken in response to the allegation; and (ii) any actions planned or taken to assess, address, or mitigate factors that contributed to the incident.

*Information in the notification may include:* award title and number, organization name and sub-awardee name, if applicable, location of the program and the incident, the type of allegation, the date of the incident and/or allegation, information about the survivor—such as whether the survivor is a program participant, member of the community, staff, or other, and information about the subject of complaint such as whether they are a senior leader, employee, agent, intern, volunteer, or other. It may also identify: any actions taken or next steps to respond to the incident, resources available or provided to the survivor, steps taken to ensure the safety of the survivor(s) or whistleblower(s), the status of the investigation, any established organizational procedures or framework, interim measures or final measures taken or planned to address the subject of complaint, and any protective measures or organizational reforms, such as changes to applicable policies and procedures. The specific information provided may differ in each notification and will be up to each partner to determine, and the examples provided above are illustrative. Notifications should not include PII.

*Compliance Plan:* For awards exceeding $500,000, the recipient must develop, implement, and maintain a compliance plan, either in conjunction with or separate from the Trafficking in Persons Compliance Plan, that details risk analysis and mitigation measures that will be implemented during the period of performance of the award to prevent and address exploitation, sexual abuse, child abuse, and child neglect of any person. The recipient's compliance plan must be appropriate to the size and complexity of the award and to the nature and scope of the activities, including the particular risks presented by the operating context. The plan must include, at a minimum, the following:

(i) reasonable measures to reduce the risk of exploitation, sexual abuse, child abuse, and child neglect. Where implementation of projects under this award may involve children, this includes limiting unsupervised interactions with children and complying with applicable laws, regulations, or customs regarding harmful image-generating activities of children;

(ii) an awareness program to inform employees, agents, interns, or any other person provided access or contact with beneficiaries about the requirements of this provision, including the activities prohibited, the action that will be taken in response to violations, and the mechanism(s) for reporting allegations;

(iii) a description of how beneficiaries and local community members:

A. are made aware of the prohibited activities,

B. how they may report allegations, and

C. how (A) and (B) are carried out in a manner which is inclusive, culturally appropriate, and sensitive to the context;

(iv) safe, accessible, and publicly available reporting mechanism(s) that may be integrated with any existing or similar such mechanisms, for anyone to confidentially report exploitation, sexual abuse, child abuse, and child neglect, with appropriate safeguards to protect whistle-blowers and survivors, including express protection against retaliation for reporting, and documented procedures for protecting personally identifiable information (PII)

from unauthorized access and disclosure; and

(v) appropriate measures to protect survivors of or witnesses to any exploitation, sexual abuse, child abuse, and child neglect of any person and not prevent or hinder cooperating fully with U.S. Government authorities.

The recipient must provide a copy of the compliance plan to the Agreement Officer upon request.

**B. Annual Burden**

*Notifications*

*Respondents:* 218.
*Total Annual Responses:* 436.
*Total Burden Hours:* 1,744 hours.

*Compliance Plan*

*Respondents:* 165.
*Recordkeepers:* 2,365.
*Total Annual Responses/Records:* 2,530.
*Total Burden Hours:* 56,925 hours.

**C. Discussion of Comments**

A 60-day notice was published in the **Federal Register** at 86 FR 44684, on August 13, 2021. Eight five (85) comments were received.

*Comment:* The Agency received two comments requesting the basis and text of the new standard provision.

*Response:* USAID has made a series of commitments to strengthen protections for sexual exploitation and abuse, including the Recommendation on Ending Sexual Exploitation, Abuse, and Harassment in Development Co-operation and Humanitarian Assistance: Key Pillars of Prevention and Response, adopted by the Development Assistance Committee of the Organization for Economic Co-operation and Development (OECD–DAC) in 2019; and the Commitments of the 2018 United Kingdom Safeguarding Summit. Congress has shown continual interest in these topics. Consistent with section 7019(e) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2021 (Div. K, P.L. 116–260) and the accompanying Joint Explanatory Statement, State and USAID jointly submitted a report on allegations of, and steps to prevent and respond to, sexual exploitation and abuse committed by implementing partners of foreign assistance funds appropriated for State and USAID in Fiscal Year (FY) 2020—the third consecutive report annually requested by Congress on this subject. The USAID Office of Inspector General also recommended that the Agency establish a mandatory reporting requirement for sexual exploitation and abuse as part of an audit of USAID's response to sexual exploitation and abuse. The provision will incorporate the existing USAID Child Safeguarding Standards provision to strengthen protections for children, while providing clarity and consistency for partners.

The new standard provision, Safeguarding Against Exploitation, Sexual Abuse, Child Abuse, and Child Neglect, will be publicly available following the completion of the Information Collection process. The provision will be applicable to all U.S. and non-U.S. awards NGOs, including fixed amount awards and the full text of the provision will be provided in USAID's Automated Directive System (ADS) 303maa M20, 303mab M15, and 303mat M6. The provision includes requirements for the recipient to have and implement a set of publicly available standards, policies, or procedures to prevent, detect, address, and respond to allegations of exploitation, sexual abuse, child abuse, and child neglect that:

(1) prohibit employees, agents, interns, or any other person provided access or contact with beneficiaries, from engaging in any exploitation, sexual abuse, child abuse, and child neglect of any person during the period of performance, supporting or advancing these actions, or intentionally ignoring or failing to act upon allegations of these actions;

(2) are consistent with the Inter-Agency Standing Committee's Six Core Principles Relating to Sexual Exploitation and Abuse, as amended, available at *https://psea.interagencystandingcommittee.org/update/iasc-six-core-principles* and the Keeping Children Safe Standards, available at *https://www.keepingchildrensafe.global/accountability/;*

(3) require reporting of suspicions or concerns related to any exploitation, sexual abuse, child abuse, and child neglect of any person to the recipient;

(4) require a ''survivor-centered approach'' for responding to alleged violations of the prohibitions. Such an approach must ensure the survivor's dignity, experiences, considerations, needs, and resiliencies are placed at the center of the process;

(5) when a child is involved, require a ''best interest of the child determination'' for responding to alleged violations of the prohibitions. This determination considers the best possible outcome for a vulnerable child who has been exposed to violence, abuse, exploitation or neglect;

(6) include remedies for violations;

(7) monitor subrecipients, employees, agents, interns, or any other person provided access or contact with beneficiaries,

(8) details the actions that may be taken against subrecipients, employees, agents, interns, or any other person provided access or contact under the award who commit exploitation, sexual abuse, child abuse, and child neglect of any person or who fail to take reasonable steps to prevent it; and;

(9) provide transparency on hiring, screening, and employment practices, including on rehiring or transfer and referencing for subsequent employers.

For awards exceeding $500,000, the recipient must develop, implement, and maintain a compliance plan, either in conjunction with or separate from the Trafficking in Persons Compliance Plan, that details risk analysis and mitigation measures that will be implemented during the period of performance of the award to prevent and address exploitation, sexual abuse, child abuse, and child neglect of any person. The recipient's compliance plan must be appropriate to the size and complexity of the award and to the nature and scope of the activities, including the particular risks presented by the operating context. The plan must include, at a minimum, the following:

(i) reasonable measures to reduce the risk of exploitation, sexual abuse, child abuse, and child neglect. Where implementation of projects under this award may involve children, this includes limiting unsupervised interactions with children and complying with applicable laws, regulations, or customs regarding harmful image-generating activities of children;

(ii) an awareness program to inform employees, agents, interns, or any other person provided access or contact with beneficiaries about the requirements of this provision, including the activities prohibited, the action that will be taken in response to violations, and the mechanism(s) for reporting allegations;

(iii) a description of how beneficiaries and local community members:

A. are made aware of the prohibited activities,

B. how they may report allegations, and

C. how (A) and (B) are carried out in a manner which is inclusive, culturally appropriate, and sensitive to the context;

(iv) safe, accessible, and publicly available reporting mechanism(s) that may be integrated with any existing or similar such mechanisms, for anyone to confidentially report exploitation, sexual abuse, child abuse, and child

neglect, with appropriate safeguards to protect whistle-blowers and survivors, including express protection against retaliation for reporting, and documented procedures for protecting personally identifiable information (PII) from unauthorized access and disclosure; and

(v) appropriate measures to protect survivors of or witnesses to any exploitation, sexual abuse, child abuse, and child neglect of any person and not prevent or hinder cooperating fully with U.S. Government authorities.

*Comment:* The Agency received two comments requesting the definition of safeguarding.

*Response:* Although not defined in the provision, safeguarding against exploitation, sexual abuse, child abuse, and child neglect refers to the practice of implementing preventative, protection, and compliance measures for populations who may be at an increased risk for harm across an organization's operations, for the purposes of preventing harm, including but not limited to exploitation, abuse, and violence, generally.

*Comment:* The Agency received two comments requesting the definition of exploitation.

*Response:* For the purposes of the forthcoming standard provision, exploitation constitutes any actual or attempted abuse of a position of vulnerability, differential power, or trust, including for the purposes of profiting monetarily, socially, or politically. When carried out for a sexual purpose this constitutes sexual exploitation.[1]

*Comment:* The Agency received two comments requesting the definition of sexual abuse.

*Response:* For the purposes of the forthcoming standard provision, sexual abuse constitutes any actual or threatened physical intrusion of a sexual nature towards another person whether by force or under unequal or coercive conditions. When carried out against a child by an adult, such conduct is considered sexual abuse even in the absence of force or unequal or coercive conditions.[1]

*Comment:* The Agency received two comments requesting the definition of child abuse.

*Response:* For the purposes of the forthcoming standard provision, child abuse means emotional, physical, sexual, or any other ill-treatment carried out against a child by an adult.[2]

*Comment:* The Agency received two comments requesting the definition of neglect.

*Response:* For the purposes of the forthcoming standard provision, child neglect means a failure to provide for a child's basic needs in the absence of the child's parent or guardian when the care of the child is associated with the award activities.[3]

*Comment:* The Agency received two comments requesting the definition of credible information.

Although ''credible information'' is not defined, under the plain meaning of the term, if the source and circumstances support a reasonable belief that the event(s) described have occurred, the matter shall be referred to the Responsibility, Safeguarding, and Compliance (RSC) Division, the appropriate Agreement Officer, and Inspector General. This is an intentionally low threshold for initial disclosure, which upholds the policy to prohibit exploitation, sexual abuse, child abuse, and neglect.

*Comment:* The Agency received two comments requesting the definition of personnel, two comments requesting the definition of invitee and one comment requesting the definition of agent.

*Response:* Personnel, invitee, and agent have been replaced with the terms ''employees, agents, interns, or any other person provided access or contact with beneficiaries.''

For the purposes of the forthcoming standard provision, employee means individual who is engaged in the performance of this award as a direct employee, consultant, or volunteer of the recipient or any subrecipient.[4]

For the purposes of the forthcoming standard provision, agent means any individual, including a director, an officer, or an independent contractor, authorized to act on behalf of an organization.[4]

*Comment:* The Agency received two comments requesting the reasoning for allowing the combination of the Safeguarding Compliance Plan with the Trafficking in Persons Compliance Plan. One commenter asks if these requirements should remain separate as the Trafficking in Persons requirement is mandatory and one commenter recommends including Trafficking in Persons and Safeguarding Against Exploitation, Sexual Abuse, Child Abuse, and Child Neglect under one Compliance Plan.

*Response:* Recipients will maintain a ''Safeguarding Against Exploitation, Sexual Abuse, Child Abuse, and Child Neglect Compliance Plan,'' either in conjunction with or separate from the Trafficking in Persons Compliance Plan. These options are provided to allow recipients to streamline these administrative requirements and align with their organizational structures and policies as necessary.

*Comment:* The Agency received one comment requesting clarification regarding the dollar value impacted by the information collection.

If the estimated value of services required to be performed under the award outside the United States exceeds $500,000, the recipients will maintain a ''Safeguarding Against Exploitation, Sexual Abuse, Child Abuse, and Child Neglect Compliance Plan,'' either in conjunction with or separate from the Trafficking in Persons Compliance Plan.

*Comment:* The Agency received one comment requesting the process for the agency determining 253 reports of credible information.

*Response:* This number of reports is estimated based on the current number of notifications received and the predicted increase in number of reports received once the notification requirement is mandatory. This number has since been adjusted down to 218 based on the most recent data.

*Comment:* The Agency received two comments requesting the process for the agency determining two responses per respondent.

*Response:* The number of responses is calculated by the averaged expected number of notifications per instance, not by the individual recipients since that would be impossible to know.

*Comment:* The Agency received one comment asking if the Agency has 2,365 awards over $500,000.

*Response:* At the time of the information collection notice, the Agency had 2,365 awards over $500,000, which was used to determine the number of recordkeepers for the Safeguarding Compliance Plan.

*Comment:* The Agency received one comment requesting the process for the agency determining Agreement Officers will request Compliance Plans 200 times.

*Response:* Agreement Officers may request Compliance Plans from recipients that have them, and we estimated the number of expected requests to be 165 annually.

*Comment:* The Agency received two comments regarding solicitation requirements for USAID's Bureau for

[1] Section 3 of the UN Secretary-General's Bulletin—Special Measures for Protection from Sexual Exploitation and Sexual Abuse (ST/SGB/2003/13) and USAID Child Safeguarding Standards (Automative Directives System (ADS) 303maa M27).

[2] USAID Child Safeguarding Standards (ADS 303maa M27).

[3] USAID Child Safeguarding Standards (ADS 303maa M27).

[4] FAR 52.222–50 Combating Trafficking in Persons.

Humanitarian Assistance related to sexual exploitation and abuse, which recommends consolidating the requirements in the BHA Emergency Application Guidelines.

*Response:* Recipients would not need to develop a separate plan specifically for each award with overseas work that meets the threshold, as long as they otherwise have a plan in place that is suitable to address the nature and scope of activities to be performed and the size and complexity of the relevant award(s). The standard provision for assistance awards would apply across the Agency.

*Comment:* The Agency received one comment on ways to minimize the burden of the collection of information on respondents by initiating efforts to increase knowledge and awareness amongst recipients on best practices in collecting this information and preventing and managing safeguarding within their organization.

*Response:* The Agency will provide additional guidance on safeguarding against exploitation, sexual abuse, child abuse, and child neglect, including reporting guidance as part of its efforts under USAID's Policy on Protection from Sexual Exploitation and Abuse.

*Comment:* The Agency received one comment appreciating that the proposed collection of information is necessary as it will enable USAID to analyze where safeguarding risks are highest and help to align resources to effectively respond.

*Response:* The Agency appreciates the comment.

*Comment:* The Agency received one comment which supported the estimates of burden of the proposed collection of information.

*Response:* The Agency appreciates the comment.

*Comment:* The Agency received four comments recommending clarification for the term ''tolerated.''

*Response:* In order to be more specific, tolerated has been removed and replaced with the language: ''supporting or advancing these actions [exploitation, sexual abuse, child abuse and neglect], or intentionally ignoring or failing to act upon allegations of these actions.''

*Comment:* The Agency received one comment recommending clarification for the phrase ''minimum set of policies and internal controls necessary,'' including any criteria for USAID to assess the minimum standards.

*Response:* The forthcoming provision includes requirements for the recipient to have and implement a set of publicly available standards, policies, or procedures to prevent, detect, address, and respond to allegations of exploitation, sexual abuse, child abuse, and child neglect. These available standards, policies, or procedures must:

(1) prohibit employees, agents, interns, or any other person provided access or contact with beneficiaries, from engaging in any exploitation, sexual abuse, child abuse, and child neglect of any person during the period of performance, supporting or advancing these actions, or intentionally ignoring or failing to act upon allegations of these actions;

(2) are consistent with the Inter-Agency Standing Committee's Six Core Principles Relating to Sexual Exploitation and Abuse, as amended, available at *https://psea.interagencystandingcommittee.org/update/iasc-six-core-principles* and the Keeping Children Safe Standards, available at *https://www.keepingchildrensafe.global/accountability/;*

(3) require reporting of suspicions or concerns related to any exploitation, sexual abuse, child abuse, and child neglect of any person to the recipient;

(4) require a ''survivor-centered approach'' for responding to alleged violations of the prohibitions. Such an approach must ensure the survivor's dignity, experiences, considerations, needs, and resiliencies are placed at the center of the process;

(5) when a child is involved, require a ''best interest of the child determination'' for responding to alleged violations of the prohibitions. This determination considers the best possible outcome for a vulnerable child who has been exposed to violence, abuse, exploitation or neglect;

(6) include remedies for violations;

(7) monitor subrecipients, employees, agents, interns, or any other person provided access or contact with beneficiaries,

(8) details the actions that may be taken against subrecipients, employees, agents, interns, or any other person provided access or contact under the award who commit exploitation, sexual abuse, child abuse, and child neglect of any person or who fail to take reasonable steps to prevent it; and;

(9) provide transparency on hiring, screening, and employment practices, including on rehiring or transfer and referencing for subsequent employers.

*Comment:* The Agency received one comment recommending that the reporting systems under the Compliance Plan be expanded from ''beneficiaries'' to ''beneficiaries and bystanders.''

*Response:* The Agency considered this comment and expanded the reporting system to allow anyone to report exploitation, sexual abuse, child abuse, and child neglect, and this change is reflected in the reference to local community members in the updated language in this notice.

*Comment:* The Agency received one comment requesting consolidation of the notification requirements under one section, three comments requesting clarification on the timing for the three parts of the notification requirement, as there will be a time difference between part 1 and parts 2–3, and one comment requesting ''immediately notify'' be changed to ''promptly notify.'' One commenter recommended specific timelines (*e.g.,* 30 days, etc.).

*Response:* The Agency has considered this comment and revised the timing to ''immediately'' for the initial notification of credible information, consistent with the Trafficking in Persons requirement, and ''as soon as practicable'' for Notifications part (2) as reflected in the Need and Uses section of this notice to allow the necessary flexibility for responses where timelines are case-specific.

*Comment:* The Agency received one comment asking if the AIDAR 752.7037 Child Safeguarding Standards will be updated to be consistent with the forthcoming standard provision for assistance.

*Response:* The Agency anticipates that AIDAR 752.7037 and other relevant contract requirements will be updated pursuant to future rulemaking.

*Comment:* The Agency received one comment requesting the standards of behavior expected in the standard provision and recommending that the requirements for recipients related to exploitation, sexual abuse, child abuse, and child neglect be provided at the beginning of the standard provision that will result from this information collection.

*Response:* The standards of behavior, as outlined in the forthcoming standard provision, will prohibit employees, agents, interns, or any other person provided access or contact with beneficiaries, from engaging in any exploitation, sexual abuse, child abuse, and child neglect of any person during the period of performance, supporting or advancing these actions, or intentionally ignoring or failing to act upon allegations of these actions.

*Comment:* The Agency received seven comments requesting the safeguards for reporting confidential information and PII. One commenter recommended that the Standard Provision clearly state that reports to the Agreement Officer do not include PII about a survivor.

*Response:* USAID encourages partners not to share the PII, and the forthcoming provision states that the recipient should not share PII, unless specifically

requested by the Agency. Agency staff members must only share information on individual allegation reports related to allegations of misconduct on a need-to-know basis. This means information is only shared when there is a need in order to perform official duties and/or make an agency decision. As part of upholding a survivor-centered approach, USAID will provide internal guidance to USAID staff on responding to reports and safeguarding information related to misconduct allegations for all individuals involved (*e.g.,* survivors, witnesses, subjects of complaints).

The Office of Inspector General maintains their own policies related to the collection of PII and USAID's policies do not affect OIG's right to access this information.

*Comment:* The Agency received two comments requesting clarification on whether the zero-tolerance policy referenced in the awareness program is USAID's or the recipient's and recommending that the policy be the recipient's.

*Response:* The Safeguarding Compliance Plan will require an awareness program to inform employees, agents, interns, or any other person provided access or contact with beneficiaries about the requirements of this provision, including the activities prohibited, the action that will be taken in response to violations, and the mechanism(s) for reporting allegations. The language has been updated and reflected in the Needs and Uses section of this notice.

*Comment:* The Agency received two comments requesting clarification on the prohibited behavior to make it clear that these behaviors are prohibited by anyone engaged in delivery of the project and that beneficiaries have the right to be free of these behaviors.

*Response:* The Agency considered this comment and clarified that the prohibited behavior in this notice covers employees, agents, interns, or any other person provided access or contact with beneficiaries.

*Comment:* The Agency received one comment on the notification requirement's definition of ''immediately notify'' to mean following an initial credibility determination.

*Response:* Under the plain meaning of the term credible, if the source and circumstances support a reasonable belief that the events(s) described have occurred, the appropriate Agreement Officer and Inspector General must be immediately notified.

*Comment:* The Agency received two comments asking if the compliance plan requirement replaces the need to undergo a Due Diligence review on an annual or bi-annual basis.

*Response:* The compliance plan is created at the pre-award stage and does not replace annual or other regular reviews.

*Comment:* The Agency received one comment asking if the Safeguarding Compliance Plan will require specific criteria and one comment requesting a standard template.

*Response:* The Agency will not be prescriptive in the requirements for the Safeguarding Compliance Plan, to allow Recipients and subrecipients to develop plans appropriate to the size and complexity of the award. The minimum standards USAID will require will be reflected in the provision and are:

(i) reasonable measures to reduce the risk of exploitation, sexual abuse, child abuse, and child neglect. Where implementation of projects under this award may involve children, this includes limiting unsupervised interactions with children and complying with applicable laws, regulations, or customs regarding harmful image-generating activities of children;

(ii) an awareness program to inform employees, agents, interns, or any other person provided access or contact with beneficiaries about the requirements of this provision, including the activities prohibited, the action that will be taken in response to violations, and the mechanism(s) for reporting allegations;

(iii) a description of how beneficiaries and local community members:

A. are made aware of the prohibited activities,

B. how they may report allegations, and

C. how (A) and (B) are carried out in a manner which is inclusive, culturally appropriate, and sensitive to the context;

(iv) safe, accessible, and publicly available reporting mechanism(s) that may be integrated with any existing or similar such mechanisms, for anyone to confidentially report exploitation, sexual abuse, child abuse, and child neglect, with appropriate safeguards to protect whistle-blowers and survivors, including express protection against retaliation for reporting, and documented procedures for protecting personally identifiable information (PII) from unauthorized access and disclosure; and

(v) appropriate measures to protect survivors of or witnesses to any exploitation, sexual abuse, child abuse, and child neglect of any person and not prevent or hinder cooperating fully with U.S. Government authorities.

*Comment:* The Agency received one comment asking if subrecipients will be required to maintain their own compliance plans.

*Response:* Recipients and subrecipients that meet the $500,000 threshold will be required to maintain a compliance plan.

*Comment:* The Agency received one comment asking if these requirements will apply only to new awards or if it will be retroactive.

*Response:* Once the standard provision for assistance awards goes into effect, the requirement will apply to new and modified awards.

*Comment:* The Agency received two comments asking if organizations will be required to ''certify'' for Safeguarding as they currently are required to do with Trafficking in Persons.

*Response:* USAID will not require recipients or subrecipients to submit a certification as part of the new standard provision.

*Comment:* The Agency received two comments requesting clarification on the risk analysis and mitigation measures in the Safeguarding Compliance Plan and whether risk assessments are sufficient.

*Response:* The Agency will not be prescriptive in the requirements for the Safeguarding Compliance Plan, to allow Recipients and subrecipients to develop plans appropriate to the size and complexity of the award and assess and mitigate risk as appropriate.

*Comment:* The Agency received two comments noting limited actions that can be pursued with non-employees.

*Response:* USAID acknowledges that available actions may be fact-specific, including based on the relationship of those involved to the recipient.

*Comment:* The Agency received one comment requesting the definition of project beneficiaries.

*Response:* Although not defined in the forthcoming standard provision, ''beneficiary'' means any foreign national who is a recipient of, derives advantage from, or is helped by USAID foreign assistance. Such individuals are not employees of USAID nor providers of USAID development assistance.[5]

*Comment:* The Agency received two comments noting that the expansion of the types of concerns, specifically to include ''tolerating,'' to be reported is a substantial administrative burden.

*Response:* This increase in the administrative burden is necessary for USAID to respond to instances of exploitation, sexual abuse, child abuse, and child neglect, ensure recipients have appropriate internal controls to

[5] USAID ADS Chapter 252.

prevent and address such instances, and protect beneficiaries from harm.

Tolerated has been removed and replaced with the specific language: supporting or advancing these actions, or intentionally ignoring or failing to act upon allegations of these actions.

*Comment:* The Agency received two comments noting that a point of contact will be provided at the headquarters level.

*Response:* Recipients may designate a relevant point of contact based on their organizational structure.

*Comment:* The Agency received one comment requesting clarification on referral to local authorities in the notification section and whether this would be a requirement.

*Response:* The potential information that may be contained in a notification is illustrative and may not be required or applicable in every case. The notification provided by recipients may also identify any actions taken to investigate or respond to the allegation, which may include referral to local authorities, but the standard provision does not require referral to local authorities.

*Comment:* The Agency received two comments requesting clarification on the established organizational procedures or framework in the notification section.

*Response:* The potential information that may be contained in a notification is illustrative and may not be required in every case. In some instances, recipients may have established organizational policies, standards, frameworks, or procedures for responding to instances of exploitation, sexual abuse, child abuse, and child neglect.

*Comment:* The Agency received three comments requesting clarification on when the Safeguarding Compliance Plan would be submitted or requested.

*Response:* The submission of the compliance plan is by request of the Agreement Officer, and an Agreement Officer may ask for a Compliance Plan at their discretion.

*Comment:* The Agency received one comment on the inclusion of non-sexual child abuse and neglect to mandatory reporting diluting the importance of sexual exploitation and abuse measures.

*Response:* Strengthening requirements for sexual exploitation and abuse, in coordination with child abuse, exploitation, and neglect, is meant to allow for a consolidated, consistent approach for implementing partners to address safeguarding in the areas of sexual exploitation and abuse, trafficking in persons, and child safeguarding. Addressing these issues in a unified manner strengthens protections for beneficiaries and communities, while reducing duplication for partners.

*Comment:* The Agency received one comment noting that a ''credible information'' standard increases the administrative burden and asking if USAID would consider funding for recipients to address the additional burden.

*Response:* Credible information is the standard consistent with the Counter-Trafficking in Persons standard provision and the burden is consistent with the burden assessed for that requirement. This burden is necessary to enable USAID to respond to allegations of exploitation, sexual abuse, child abuse, and child neglect and institute appropriate standards of behavior. Consistency with existing standards further reduces burden on partners to determine the exact type of misconduct early in the process.

While final decisions on cost allowability, allocability and reasonableness will rest with the cognizant Agreement Officer, USAID recognizes the need to strengthen the aid community's overall capacity for safeguarding against exploitation, sexual abuse, child abuse, and child neglect, including individual organizations' varying levels of existing capacity.

*Comment:* The Agency received two comments requesting clarification on the difference between the routine reporting requirements in the Need and Uses section and the requirements outlined in the annual burden section of the **Federal Register** Notice and whether an annual report is required.

*Response:* The Need and Uses section outlines the new information collection requirements that will be part of the forthcoming standard provision, which is the Notification requirement and the Compliance Plan requirement. The annual burden section calculates the annual administrative burden of these requirements outlined in the Need and Uses section, which includes the burden for reporting notifications to the USAID Inspector General and the cognizant Agreement Officer. No annual report is required.

*Comment:* The Agency received one comment recommending that USAID notify Recipients of receipt of final investigative reports and not provide further inquiries if no violation is found to occur, unless there is reason to believe that the Recipient's final investigation is unsatisfactory.

*Response:* USAID will address procedures for consistent response to reports in internal guidance to staff.

**Kathleen Stohs,**

*Division Chief, Responsibility, Safeguarding, & Compliance Division, Office of Management Policy, Budget, and Performance, Bureau for Management.*

[FR Doc. 2023–11382 Filed 5–26–23; 8:45 am]

**BILLING CODE 6116–01–P**

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by June 29, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**Departmental Administration—Office of Safety, Security and Protection**

*Title:* Request for USDA Identification (ID) Badge.

*OMB Control Number:* 0505–0022.

*Summary of Collection:* The AD–1197 was initially created to support the HSPD–12 information collection as required for establishing the applicant's identity for PIV credential issuance. The information requested must be provided by Federal employees, contractors and other applicable individuals when applying for a USDA credential (identification card).

This information collection is necessary to comply with the requirements outlined in Homeland Security Presidential Directive (HSPD) 12, and Federal Information Processing Standard (FIPS) 201–3. USDA must implement an identity proofing, registration, and issuance process consistent with the requirements outlined in FIPS 201–3. This information collection form was required as part of USDA's identity proofing and registration process. After 10/27/06, form AD 1197 was eliminated from the HSPD–12 process with the USDA's participation in the GSA USAccess program, however the form continues to be utilized for the information collection and processing of USDA Site Badges (non-PIV). As USDA continues the HSPD–12 program, one estimate of burden has been calculated and one process description has been included.

*Need and Use of the Information:* Information will be collected using form AD 1197, Request for USDA Identification (ID) Badge, to issue a site badge to grant individuals short term assess to facilities. USDA has chosen to use GSA's USAccess program for HSPD–12 credentialing and identity management. The automated system includes six separate and distinct roles to ensure no one single individual can issue a credential without further validation from another authorized role holder. An automated notification workflow provides streamlined communication between role holder and the applicant, notifying each as to the respective steps in the process. If the information is not collected, Federal and non-Federal employees may not be permitted in some facilities and will not be allowed access to government computer systems.

*Description of Respondents:* Individuals or households.

*Number of Respondents:* 3,000.

*Frequency of Responses:* Reporting: On occasion.

*Total Burden Hours:* 3,000.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 2023–11426 Filed 5–26–23; 8:45 am]

**BILLING CODE 3412–BA–P**

## DEPARTMENT OF AGRICULTURE

## USDA Equity Commission

**AGENCY:** USDA.

**ACTION:** Notice of public and virtual meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the United States Department of Agriculture (USDA) and the Federal Advisory Committee Act (FACA), that a public meeting of the USDA Equity Commission (EC or Commission), Subcommittee for Agriculture and the Rural Community Economic Development (RCED) Subcommittee will convene to continue its work reviewing USDA programs, services, and policies for the purpose of making recommendations for how the Department can improve access and advance equity.

**DATES:** The EC meeting will be held Tuesday, June 27 through Thursday, June 29, 2023, from 10:00 a.m. EST to 6:00 p.m. EST each day.

*Oral Comments:* The Commission is providing the public an opportunity to provide oral comments and will accommodate as many individuals and organizations as time permits. Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. ET, June 13, 2023, and may only register for one speaking slot. Participants who wish to make oral comments must also be available to attend a tech-check before the meeting. Instructions for registering and participating in the meeting can be found on *https://www.usda.gov/equity-commission.*

*Written Comments:* Written public comments for consideration at the meeting will be accepted on or before 11:59 p.m. ET, June 13th. Comments submitted after this date will be provided to the Commission, but the Commission may not have adequate time to consider those comments prior to the meeting. The USDA Equity Commission strongly prefers comments be submitted electronically. However, written comments may also be submitted (*i.e.,* postmarked) via mail to the person listed in the **FOR FURTHER INFORMATION CONTACT** section by or before the deadline. Written comments will be accepted up to 15 days after the meeting for inclusion in the meeting minutes.

*Meeting Access:*

The public can participate via a zoom meeting link. Access information will be provided to registered individuals via email. Detailed information can be found at: *https://www.usda.gov/equity-commission.*

**FOR FURTHER INFORMATION CONTACT:** Cecilia Hernandez, Designated Federal Officer, USDA Equity Commission, Office of the Deputy Secretary, 1400 Independence Avenue SW, Room 6006–S, Washington, DC 20250–0235; Phone: (202) 913–5907; Email: *Equitycommission@usda.gov.*

**SUPPLEMENTARY INFORMATION:** The Commission and Subcommittees are authorized under section 1006(b)(3) of the American Rescue Plan Act of 2021, Public Law 117–2 (the Act) and operates in compliance with the Federal Advisory Committee Act, as amended, 5 U.S.C. app. 10.

On January 20, 2021, President Biden signed an Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government and committed to creating the USDA Equity Commission as part of his rural agenda and commitment to closing the racial wealth gap and addressing longstanding inequities in agriculture. Section 1006 of the American Rescue Plan directed USDA to create the Equity Commission and provided funds sufficient to ensure the Commission is well staffed and positioned to deliver on its charge.

The USDA Equity Commission will advise the Secretary of Agriculture and provide USDA with an analysis of how its programs, policies, systems, structures, and practices contribute to barriers to inclusion or access, systemic discrimination, or exacerbate or perpetuate racial, economic, health and social disparities and recommendations for action. The Agriculture Subcommittee reports to the Equity Commission and provides recommendations on issues of concern related to agriculture. The Rural Community Economic Development Subcommittee (RCED) also reports to the Equity Commission and is focused on issues related to rural community prosperity. The Equity Commission delivered an interim report and provided actionable recommendations in February 2023. A final report will be completed by winter of 2024.

*Meeting Agenda:* The agenda items may include, but are not limited to, welcome and introductions; administrative matters; introduction and presentation of the Agriculture

Subcommittee and Rural Community Economic Development Subcommittee recommendations; and deliberations and voting of recommendations to be included in the EC final report. Please check the USDA Equity Commission website (*https://www.usda.gov/equity-commission*) for an agenda 24–48 hours prior to June 27.

*Register for the Meeting:* The public is asked to pre-register for the meeting by visiting *https://www.usda.gov/equity-commission.* Your pre-registration must state: your name; organization or interest represented; if you are planning to give oral comments; and if you require special accommodations. USDA will also accept day-of registrations.

*Meeting Accommodations:* USDA is committed to making its electronic and information technologies accessible to individuals with disabilities by meeting or exceeding the requirements of Section 508 of the Rehabilitation Act (29 U.S.C. 794d), as amended. If you need reasonable accommodations, please make requests in advance for reasonable accommodations through the meeting registration link on *https://www.usda.gov/equity-commission.* Determinations for reasonable accommodations will be made on a case-by-case basis.

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, USDA, its agencies, offices, and 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 or 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.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

Dated: May 24, 2023.

**Cikena Reid,**

*USDA Committee Management Officer.*

[FR Doc. 2023–11405 Filed 5–26–23; 8:45 am]

**BILLING CODE 3410–01–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. APHIS–2023–0035]**

### General Conference Committee of the National Poultry Improvement Plan

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Notice of public meeting.

**SUMMARY:** We are giving notice that the General Conference Committee of the National Poultry Improvement Plan will be holding a public meeting.

**DATES:** The General Conference Committee public meeting will be held on Thursday, June 29, 2023, from 7:30 a.m. to 12:30 p.m.

**ADDRESSES:** The meeting will be held at the Sonesta Downtown Columbus Hotel, 33 East Nationwide Blvd., Columbus, OH 43215.

**FOR FURTHER INFORMATION CONTACT:** Dr. Elena Behnke, Senior Coordinator, National Poultry Improvement Plan, VS, APHIS, USDA, 1506 Klondike Road, Suite 101, Conyers, GA 30094; (770) 922–3496; email: *Elena.Behnke@usda.gov.*

**SUPPLEMENTARY INFORMATION:** The General Conference Committee (the Committee) of the National Poultry Improvement Plan (NPIP), representing cooperating State agencies and poultry industry members, serves an essential function by acting as liaison between the poultry industry and the Department in matters pertaining to poultry health.

Topics for discussion at the upcoming meeting include:

1. National Veterinary Services Laboratories Avian Influenza Update.
2. Salmonella Update.
3. Mycoplasma Update.
4. New Diagnostic Tests Seeking NPIP Approval.

The meeting will be open to the public; however, APHIS will be unable to allow public participation in session discussions due to time constraints. Written statements may be filed with the Committee before or after the meeting. Statements filed with the Committee must include the name of the Agency contact as listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to Docket No. APHIS–2023–0035 when submitting your statements.

**Reasonable Accommodations**

If needed, please request reasonable accommodations no later than June 9, 2023, by contacting the person listed under **FOR FURTHER INFOMRATION CONTACT**. Requests made after that date may be considered, but it may not be possible to fulfill them.

This notice of meeting is given pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. 10).

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: May 24, 2023.

**Cikena Reid,**

*USDA Committee Management Officer.*

[FR Doc. 2023–11419 Filed 5–26–23; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Food and Nutrition Service

### Agency Information Collection Activities: Assessment of Mobile Technologies for Using Supplemental Nutrition Assistance Program (SNAP) Benefits

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

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This is a new collection for the contract Assessment of Mobile Technologies for Using Supplemental Nutrition Assistance Program (SNAP) Benefits (Mobile Payment Pilot evaluation). The purpose of the Mobile Payment Pilot evaluation is to assess the effects of five pilot projects that will allow SNAP participants to use mobile payments to purchase food as an alternate option to a physical electronic benefit transfer (EBT) card.

**DATES:** Written comments must be received on or before July 31, 2023.

**ADDRESSES:** Comments may be sent to: Maya Sandalow, Food and Nutrition Service, U.S. Department of Agriculture, 1320 Braddock Place, 5th floor, Alexandria, VA 22314. Comments may also be submitted via email to *maya.sandalow@usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov,* and follow the online instructions for submitting comments electronically.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this information collection should be directed to Maya Sandalow at (703) 305–1615.

**SUPPLEMENTARY INFORMATION:**

*Comments are invited on:* (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions that were used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

*Title:* Assessment of Mobile Technologies for Using SNAP Benefits (Mobile Payment Pilot).

*Form Number:* N/A.

*OMB Number:* Not Yet Assigned.

*Expiration Date:* Not Yet Determined.

*Type of Request:* New Collection.

*Abstract:* The Supplemental Nutrition Assistance Program (SNAP) provides monthly benefits to low-income households to reduce food insecurity and improve health and well-being. Benefits are delivered via electronic benefit transfer (EBT), which is accepted at more than 250,000 authorized retailers nationwide. For nearly two decades, SNAP participants have used EBT in person at retailers, where they swipe their card at checkout using a point of sale (POS) terminal and enter their personal identification number (PIN) to pay for their purchases.

The Agricultural Act of 2018 (2018 Farm Bill) authorized the use of mobile payments from devices like cell phones, tablets, and smart watches, as an alternate option to a physical electronic benefit transfer (EBT) card to conduct a SNAP transaction. This authorization was subject to the result of five mobile payment pilot projects. Mobile payments may improve the customer experience; save participant and retailer time; reduce potential stigma of using EBT; reduce costs; and prevent benefit fraud, loss, or theft.

The U.S. Department of Agriculture, Food and Nutrition Service (FNS) selected five State SNAP agencies to participate in the Mobile Payment Pilot: Illinois, Louisiana, Massachusetts, Missouri, and Oklahoma. These State pilots include a variety of design implementation strategies in terms of payment model, retail partnerships, marketing plans, and pilot scale. The Mobile Payment Pilot Evaluation will assess the effects of the pilots, using information obtained from FNS, selected State SNAP agencies, retailers, and SNAP participants. The evaluation has four objectives: (1) assessing the implementation of the pilots, (2) examining the adoption and use of mobile technologies, (3) understanding implications for program integrity, and (4) assessing replicability and costs. In each of the five sites, the evaluation will conduct three rounds of semi-structured interviews with State SNAP agencies, EBT processors, retailers, and other partners. Interviews will occur during the pilot planning period and once the pilots are implemented, and will collect information about the pilot design and implementation.

In each of the five sites, the evaluation will also conduct two, 5-minute surveys and four focus groups among SNAP participants. One survey will be conducted among 250 participants who used mobile payments and the other will be conducted among 250 participants who did not use mobile payments. Similarly, two focus groups will be conducted with participants who used the technology and two others will be conducted with participants who did not use it.

In addition, the evaluation will collect SNAP administrative data, cost data, and retailer transaction data from the FNS ALERT and STARS systems. These data will be used to describe the adoption of mobile payment technologies and benefit redemption patterns by participant, retailer, and community characteristics.

Data collected from staff at State SNAP agencies, partners (such as EBT processors, mobile application vendors, and payment providers), and retailers will be used to describe how the pilots were planned and implemented. Data collected from SNAP participants will provide more information about their decisions to use or not use mobile payments, barriers to use, and participant satisfaction and user experience. Administrative, cost, and transaction data will provide insights on adoption and use of mobile payments. Ultimately, the findings will guide FNS in determining if expanding availability of mobile payments nationwide is cost-effective, secure, and accessible to participants.

*Affected Public:* Respondent groups identified include: SNAP participants in the pilot areas; members of State SNAP agencies; retailers in the pilot areas; and mobile payment processers and other vendors.

*Estimated Number of Respondents:* The total estimated number of respondents is 21,246. The number of respondents includes: 20,330 SNAP participants (13% of whom will complete surveys or focus groups); 103 State SNAP agency and other State agency staff; 210 staff from businesses supporting the Mobile Payment Pilots (such as mobile payment processors, mobile application providers, EBT hotlines, EBT processors, and/or token services providers); and 603 retailer staff offering mobile payments, including managers and other staff. The total estimated number of non-respondents is 11,190 and includes 10,934 SNAP participants (who will be contacted to

complete surveys or focus groups), 252 staff from businesses, and 4 State SNAP agency or other State agency staff.

The evaluation team will pretest the survey and semi-structured interviews. The team will conduct pretest interviews with nine SNAP participants for the two survey instruments, three State SNAP agency staff members for the key informant interview guide, and three retailer staff members for the retailer interview guide.

*Estimated Number of Responses per Respondent:* Across all respondents, the average number of responses is 7.91. Respondent groups include:

(1) SNAP participants who did and did not use mobile payments,

(2) State SNAP agency, other State agency, and business staff (including vendors who provide mobile application development, electronic benefit transfer processing, payment providers, and other services in support of mobile payments),

(3) Retailer staff overseeing the provision of mobile payments for the pilot projects at a corporate level, or staff working in a retailer location offering mobile payments.

SNAP participants in the pilot areas will be asked to participate in one survey or focus group (including participants who did or did not use mobile payments). SNAP participants will receive an advance letter to notify them about the survey, emails or text messages to assess their interest in participating in the survey, and a reminder letter to encourage them to complete the survey. Participants who choose to complete the survey will complete a five minute web or phone survey. SNAP participants in the pilot areas may also receive emails or text messages to ask if they would be interested in participating in a focus group. If they choose to participate in a focus group, the participant would receive a text message or phone call with several questions to ensure they are eligible to participate, followed by reminder emails or text messages to encourage them to attend the in-person focus group.

State SNAP agency, other State agency, and business staff will respond to up to three in-person or telephone interviews. Staff from these entities will receive an email to invite them to participate in an interview, before participating in an interview lasting up to 60 minutes. Selected State SNAP agency staff will provide administrative data one time and cost data on a quarterly basis 10 times.

Retailer staff will respond to up to two in-person interviews. Retailer staff will receive a screening telephone call to invite the retail store to participate in interviews with staff. The screener will include several questions to help the evaluation team tailor interview protocols for the store in advance. Following the screener, the retail store manager or other applicable staff will receive an email to invite them to participate in an interview. Each interview with a retail staff member will last between 15 and 30 minutes.

*Estimated Total Annual Responses:* 254,963 (168,077 respondents and 86,886 nonrespondents).

*Estimated Time per Response:* The estimated time of response varies from a few minutes to over an hour, depending on the respondent group, but averages 0.027 hours (or about 2 minutes) for all respondents as shown in the table below. State SNAP agency providing administrative and cost data will spend up to 8 hours per response.

*Estimated Total Annual Burden on Respondents:* 415,467 minutes (6,924 hours). See the table below for estimated total annual burden for each type of respondent.

**Tameka Owens,**

*Assistant Administrator, Food and Nutrition Service.*

| Type of respondents | Instruments | Sample size | Responsive | | | | | Non-responsive | | | | | Grand total annual burden estimate (hours) | Hourly wage rate | Total annualized cost of respondent burden |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Number of respondents | Frequency of response | Total annual responses | Hours per response | Annual burden (hours) | Number of non-respondents | Frequency of response | Total annual responses | Hours per response | Annual burden (hours) | | | |
| **Individuals/Household** | | | | | | | | | | | | | | | |
| SNAP Participants ... | Pretest: Client Experience Survey. | 12 | 9 | 1 | 9 | 0.5000 | 4.5 | 3 | 1 | 3 | 0.0167 | 0.1 | 4.6 | $7.25 | $42.88 |
| SNAP Participants ... | Pretest: Survey of Non-Adopters. | 12 | 9 | 1 | 9 | 0.5000 | 4.5 | 3 | 1 | 3 | 0.0167 | 0.1 | 4.6 | 7.25 | 42.88 |
| SNAP Participants ... | Client Experience Survey: Advance Letter. | 12,500 | 10,000 | 1 | 10,000 | 0.0501 | 501.0 | 2,500 | 1 | 2,500 | 0.0501 | 125.3 | 626.3 | 7.25 | 5,902.41 |
| SNAP Participants ... | Client Experience Survey: Email/ Text. | 10,000 | 8,000 | 8 | 64,000 | 0.0167 | 1,068.8 | 2,000 | 8 | 16,000 | 0.0167 | 267.2 | 1,336.0 | 7.25 | 12,591.80 |
| SNAP Participants ... | Client Experience Survey: Reminder Letter. | 8,125 | 6,500 | 1 | 6,500 | 0.0501 | 325.7 | 1,625 | 1 | 1,625 | 0.0501 | 81.4 | 407.1 | 7.25 | 3,836.56 |
| SNAP Participants ... | Client Experience Survey. | 12,500 | 1,250 | 1 | 1,250 | 0.0835 | 104.4 | 11,250 | 1 | 11,250 | 0.0167 | 187.9 | 292.3 | 7.25 | 2,754.46 |
| SNAP Participants ... | Survey of Non-Adopters: Advance Letter. | 12,500 | 10,000 | 1 | 10,000 | 0.0501 | 501.0 | 2,500 | 1 | 2,500 | 0.0501 | 125.3 | 626.3 | 7.25 | 5,902.41 |
| SNAP Participants ... | Survey of Non-Adopters: Email/ Text. | 10,000 | 8,000 | 8 | 64,000 | 0.0167 | 1,068.8 | 2,000 | 8 | 16,000 | 0.0167 | 267.2 | 1,336.0 | 7.25 | 12,591.80 |
| SNAP Participants ... | Survey of Non-Adopters: Reminder Letter. | 8,125 | 6,500 | 1 | 6,500 | 0.0501 | 325.7 | 1,625 | 1 | 1,625 | 0.0501 | 81.4 | 407.1 | 7.25 | 3,836.56 |
| SNAP Participants ... | Survey of Non-Adopters. | 12,500 | 1,250 | 1 | 1,250 | 0.0900 | 112.5 | 11,250 | 1 | 11,250 | 0.0167 | 187.9 | 300.4 | 7.25 | 2,831.03 |
| SNAP Participants ... | Focus Group: Recruitment Email/ Text. | 6,240 | 312 | 4 | 1,248 | 0.0167 | 20.8 | 5,928 | 4 | 23,712 | 0.0167 | 396.0 | 416.8 | 7.25 | 3,928.64 |
| SNAP Participants ... | Focus Group: Screener. | 312 | 250 | 1 | 250 | 0.0501 | 12.5 | 62 | 1 | 62 | 0.0167 | 1.0 | 13.6 | 7.25 | 127.81 |
| SNAP Participants ... | Focus Group: Reminder emails/ texts. | 250 | 200 | 2 | 400 | 0.0167 | 6.7 | 50 | 2 | 100 | 0.0167 | 1.7 | 8.4 | 7.25 | 78.70 |
| SNAP Participants ... | Focus Group Discussion Guide. | 200 | 200 | 1 | 200 | 1.50 | 300.0 | 0 | 1 | 0 | 0.00 | 0.0 | 300.0 | 7.25 | 2,827.50 |
| | | 31,264 | 20,330 | 8.15 | 165,616 | 0.026 | 4,357 | 10,934 | 7.92 | 86,630 | 0.020 | 1,722 | 6,079 | ..... | 57,295.45 |
| **Business (Profit, Non-Profit, or Farm)** | | | | | | | | | | | | | | | |
| Retail Business Staff | Pretest: Semi-structured interview guide. | 3 | 3 | 1 | 3 | 1.00 | 3.0 | 0 | 1 | 0 | 0.0167 | 0.0 | 3.0 | 59.31 | 231.31 |
| Vendor Staff ..... | Business: Semi-structured interview invitation email. | 262 | 210 | 1 | 210 | 0.0167 | 3.5 | 52 | 1 | 52 | 0.0167 | 0.9 | 4.4 | 59.31 | 337.36 |
| Vendor Staff ..... | Business: Semi-structured interview guide. | 210 | 210 | 1 | 210 | 1.00 | 210.0 | 0 | 1 | 0 | 0.00 | 0.0 | 210.0 | 59.31 | 16,191.63 |
| Retail Business Staff | Retailer: Interview Screener. | 800 | 600 | 1 | 600 | 0.0501 | 7.5 | 50 | 1 | 50 | 0.0167 | 0.8 | 8.4 | 22.15 | 961.75 |
| Retail Business Staff | Retailer: Semi-structured interview invitation email. | 600 | 600 | 1 | 600 | 0.0167 | 2.5 | 0 | 1 | 0 | 0.00 | 0.0 | 2.5 | 22.15 | 288.53 |

| Type of respondents | Instruments | Sample size | Responsive | | | | | Non-responsive | | | | | Grand total annual burden estimate (hours) | Hourly wage rate | Total annualized cost of respondent burden |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | Number of respondents | Frequency of response | Total annual responses | Hours per response | Annual burden (hours) | Number of non-respondents | Frequency of response | Total annual responses | Hours per response | Annual burden (hours) | | | |
| Retail Business Staff | Retailer: Semi-structured interview guide. | 600 | 600 | 1 | 600 | 0.50 | 225.0 | 0 | 1 | 0 | 0.00 | 0.0 | 225.0 | 22.15 | 8,638.50 |
| | | 1,065 | 813 | 2.73 | 2,223 | 0.250 | 557 | 252 | 1.00 | 252 | 0.017 | 4.208 | 561 | ..... | 26,649.07 |
| **State Government** | | | | | | | | | | | | | | | |
| State Program Staff | Pretest: Semi-structured interview guide. | 3 | 3 | 1 | 3 | 1.00 | 1.0 | 0 | 1 | 0 | 0.0167 | 0.0 | 1.0 | 59.31 | 231.31 |
| State Program Staff | State agency: Semi-structured interview invitation email. | 94 | 90 | 1 | 90 | 0.0167 | 2 | 4 | 1 | 4 | 0.0167 | 0.07 | 1.57 | 59.31 | 121.04 |
| State Program Staff | State agency: Semi-structured interview guide. | 90 | 90 | 1 | 90 | 1.00 | 90 | 0 | 1 | 0 | 0.00 | 0.0 | 90.00 | 59.31 | 6,939.27 |
| State Program Staff | Provide Administrative Data. | 5 | 5 | 1 | 5 | 8.00 | 40 | 0 | 1 | 0 | 0.00 | 0.0 | 40.00 | 59.31 | 3,084.12 |
| State Program Staff | Provide Cost Data ... | 5 | 5 | 10 | 50 | 3.00 | 150 | 0 | 1 | 0 | 0.00 | 0.0 | 150.00 | 59.31 | 11,565.45 |
| | | 107 | 103 | 2.31 | 238 | 1.195 | 285 | 4 | 1.000 | 4 | 0.017 | 0.1 | 284.57 | ..... | 21,941.19 |
| Total ..... | ..... | 32,436 | 21,246 | 7.911 | 168,077 | 0.031 | 5,198 | 11,190 | 8 | 86,886 | 0.020 | 1,727 | 6,924 | ..... | 105,885.71 |

[FR Doc. 2023–11386 Filed 5–26–23; 8:45 am]
BILLING CODE 3410–30–P

## DEPARTMENT OF AGRICULTURE

### Rural Utilities Service

**[Docket #: RUS–23–WATER–0001]**

### Notice of Funding Opportunity for the Technical Assistance and Construction for Innovative Regional Wastewater Treatment Solutions Grant Pilot Program

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Rural Utilities Services (RUS or the Agency), an agency of the United States Department of Agriculture (USDA), announces its Technical Assistance and Construction for Innovative Regional Wastewater Treatment Solutions (TAC–RWTS) Grant Pilot Program application window for Fiscal Year (FY) 2023. Grants may be made to eligible entities for the study, design, or construction of regional wastewater systems for historically impoverished communities in areas that have had difficulty installing traditional wastewater treatment systems due to soil conditions. Solutions must be innovative and account for strategic management and regulatory models. Successful applications will be selected by the Agency for funding and subsequently awarded from available funds for the TAC–RWTS Grant Pilot Program. All applicants are responsible for any expenses incurred in developing their applications.

**DATES:** Completed applications must be filed through *https://www.grants.gov/* by 11:59 p.m. Eastern Time (ET) on July 31, 2023. Late or incomplete applications will not be accepted.

**ADDRESSES:** Applications and all supporting documentation must be submitted electronically through *Grants.gov* via *https://www.grants.gov.* Instructions and additional resources, to include an Application Guide, are available at *https://www.rd.usda.gov/programs-services/water-environmental-programs/technical-assistance-and-construction-innovative-regional-wastewater-treatment-solutions-tac-rwts,* under the ''To Apply'' tab.

**FOR FURTHER INFORMATION CONTACT:** Christina Cerio, Community Programs Specialist, Water and Environmental Program, RUS, USDA, by email at *water-RD@usda.gov* or phone at (315) 403–3112. Persons with disabilities that require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice) or the 711 Relay Service.

**SUPPLEMENTARY INFORMATION:**

#### Overview

*Federal Awarding Agency Name:* Rural Utilities Service.

*Funding Opportunity Title:* Technical Assistance and Construction for Innovative Regional Wastewater Treatment Solutions Grant Pilot Program for Fiscal Year 2023.

*Announcement Type:* Notice of Funding Opportunity (NOFO).

*Funding Opportunity Number:* TAC–RWTS–FY23.

*Assistance Listing:* 10.761.

*Dates:* Completed electronic applications and supporting materials must be filed through *https://www.grants.gov/* by 11:59 p.m. ET on July 31, 2023. Late or incomplete applications will not be accepted.

*Rural Development (RD) Key Priorities:* The Agency encourages applicants to consider projects that will advance the following key priorities:

- Assisting rural communities recover economically through more and better market opportunities and through improved infrastructure;
- Ensuring all rural residents have equitable access to 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.* Grants will be made to qualified regional consortiums to identify, evaluate, and construct economically feasible, regional wastewater systems for historically impoverished communities in areas which have had difficulty installing traditional wastewater treatment systems due to soil conditions. A successful applicant will be, or coordinate with, a regional university to solve untreated raw sewage issues with innovative technologies, while taking into consideration strategic management and regulatory models. Grants are for wastewater-related technical assistance, including such services as developing needs assessments, testing wastewater options, preliminary design assistance, developing regulatory guidance, and submitting applications for financial assistance. Additionally, the grant funds may be used to construct the identified solutions, including eligible associated costs. Funding must benefit communities that are historically impoverished, as defined within this notice.

2. *Statutory and Regulatory Authority.* The program is authorized pursuant to 5 U.S.C. 301; 7 U.S.C. 1989; 16 U.S.C. 1005; Division B, Title VII General Provisions, Section 783 of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94); and Division A, Title VII General Provisions, Section 771 of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260). The program is implemented through 7 CFR part 1775, Technical Assistance Grants, and the provisions of this NOFO. Other Federal statutes and regulations are listed at 7 CFR 1775.8, Other Federal statutes.

3. *Definitions.* The terms and conditions provided in this NOFO are applicable to and for purposes of this NOFO only. In addition to the definitions provided below, the definitions found in 7 CFR 1775.2, Definitions, are also applicable to this grant opportunity.

*Consortium* means regional institutions of higher education, academic health and research institutes, economic development entities, or a combination thereof, located in the region identified to be served that have experience in addressing these issues in the region.

*Consortium agreement* means a document, signed and dated, by all members of the consortium, which identifies how each organization will interact, every member's level of commitment, roles and responsibilities, and the transfer of funds from the lead entity to other members. An appropriate level of detail should be included to outline, among other items: minimum and maximum levels of involvement, ownership of any resulting tangible or intangible items developed from the Consortium's efforts, and the use of resources. The agreement must address whether the members of the consortium will conduct work for the project directly, via contract, or some other arrangement. As part of the application, if the consortium agreement is more than 12 months old, a certification stating that none of the members or provisions within the existing document have been modified or otherwise changed must be provided. The consortium agreement must be in effect through the defined period of performance for the proposed project.

*Eligible project costs* means only those costs incurred during the grant period and that are directly related to the use and purposes of the TAC–RWTS Grant Pilot Program. See Section C.3. of this notice for eligible project costs.

*Historically impoverished* refers to any community meeting criteria for persistent poverty counties, which according to Division A, Title VII

General Provisions, Section 736 of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103), dated March 15, 2022, is any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial censuses, and 2007–2011 American Community Survey 5-year average.

*Mid-South* is a region of the United States consisting of Alabama, Arkansas, Kentucky, Missouri, Mississippi, Oklahoma, and Tennessee.

*Rural* means cities, towns, or unincorporated areas that individually have populations of no more than 10,000 inhabitants as adjusted by exclusion of individuals incarcerated on a long-term or regional basis and the exclusion of the first 1,500 individuals who reside in housing located on a military base, according to the most recent decennial Census of the United States. The area to be served may be made up of combinations of these eligible areas. If the applicable population figure cannot be obtained from the most recent decennial Census, RUS will determine the applicable population figure based on available population data. Facilities financed may be located in non-rural areas. However, funds may be used to finance only that portion of the facility serving rural areas, regardless of facility location.

4. *Application of Awards.* The Agency will review, evaluate, and score applications received in response to this notice based on 7 CFR part 1775 and the terms and conditions of this NOFO. The scoring criteria is found within this notice. Awards will be made in alignment with the eligibility and scoring criteria. The Agency advises all interested parties that the applicant bears the full burden in preparing and submitting an application in response to this notice, regardless if the project is selected for funding.

**B. Federal Award Information**

*Type of Award:* Grant.

*Fiscal Year Funds:* FY 2023.

*Available Funds:* A minimum of $5,150,091 is made available to eligible applicants, to remain available until expended. RUS may at its discretion, increase the total level of funding available in this notice from any available source provided the awards meet the requirements of the statute which made the funding available to the Agency.

*Award Amounts:* There is no stated minimum or maximum award.

*Anticipated Award Date:* July 1, 2023.

*Performance Period:* To be determined by application, not in excess of one calendar year for technical assistance based projects and four calendar years for construction based projects from the start of the period of performance. This includes the completion of application documents, environmental reviews, construction, transfer of facility, and any other associated actions. Any project containing construction will be considered to be construction-based.

*Renewal or Supplemental Awards:* Applications for renewal or supplementation of existing projects are NOT eligible to compete with applications for new Federal awards under this program. Funding provided through this NOFO does not guarantee or otherwise imply any future commitment of funding. Should additional RUS funding be needed to carry out the proposed scope of work, the application requirements of each program will be applicable.

*Type of Assistance Instrument:* Grant Agreement.

**C. Eligibility Information**

1. *Eligible Applicants.* Grants under this funding opportunity will be made to qualified regional consortiums. A consortium is as defined in Section A.3. of this NOFO. An applicant is eligible to apply for the TAC–RWTS grant, on behalf of the consortium, if it:

(a) Represents an eligible consortium;

(b) Is legally established prior to the submission of the application and located within one of the following:

(i) A state within the United States;

(ii) The District of Columbia;

(iii) The Commonwealth of Puerto Rico; or

(iv) A U.S. territory or Federally Associated State;

(c) Has the legal capacity and authority to carry out the grant purpose;

(d) Demonstrates that it possesses the financial, technical, and managerial capability to comply with federal and state laws and requirements. For construction projects whereby ownership is retained by the applicant or consortium, the applicant must demonstrate within the application that the facility owner has the capacity to own, operate, and maintain the facility;

(e) Has no delinquent debt to the federal government or no outstanding judgments to repay a federal debt; and,

(f) Is not a corporation that has been convicted of a felony (or had an officer or agent acting on behalf of the corporation convicted of a felony) within the past 24 months. Any corporation that has any unpaid federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability is not eligible.

2. *Ownership Eligibility.* Should the proposed project lead to the construction of a public wastewater facility that is owned, operated, and maintained by an entity that is not the TAC–RWTS applicant:

(a) The entity shall be:

(i) A public body, such as a municipality, county, district, authority, or other political subdivision of a state, territory or commonwealth;

(ii) An organization operated on a not-for-profit basis, such as an association, cooperative, or private corporation. The organization must be an association controlled by a local public body or bodies, or have a broadly based ownership by or membership of people of the local community; or

(iii) Indian Tribes on Federal and State reservations and other federally recognized Indian Tribes.

(b) The entity must be a party to the consortium agreement or otherwise confirm their commitment in writing from an authorized representative. The letter must reference the appropriate votes, resolutions, or other actions taken by the entity's leadership to participate and assume ownership of the constructed facility.

(c) The entity must be an active participant in the project and demonstrate the ability to own, operate, and maintain the facility, including compliance with state and Federal laws.

3. *Eligible Project Costs.* Funding must benefit communities that are located within Historically Impoverished communities, as defined within this notice. For technical assistance efforts, eligible project costs are addressed in 7 CFR 1775.36(g) and 2 CFR part 200, subpart E. Funding may be used to pay for construction costs, including constructing, enlarging, extending, or otherwise improving wastewater facilities. When a necessary part of the construction project, funding may be used to pay for:

(a) Reasonable fees and costs such as: legal, engineering, administrative services, fiscal advisory, recording, environmental analyses and surveys, possible salvage or other mitigation measures, planning, establishing or acquiring rights;

(b) Costs of acquiring interest in land; rights, leases, permits, rights-of-way; and other evidence of land or protection necessary for development of the facility;

(c) Purchasing or renting equipment necessary to install, operate, maintain, extend, or protect facilities;

(d) Cost of additional applicant labor and other expenses necessary to install and extend service;

(e) The cost for connecting the user to the main service line; and

(f) Initial operating expenses, for a period ordinarily not exceeding one year when the applicant is unable to pay such expenses and adequate documentation is provided related to long-term sustainability.

4. *Cost Sharing or Matching.* There is no cost sharing or matching requirement.

5. *Other.* A special focus of this funding opportunity is raw sewage discharge in rural communities in the Mid-South, particularly historically impoverished communities in areas that have had difficulty utilizing RUS programs. These communities face unique challenges, both due to income level and soil type. Emphasis should be placed on promoting racial equity of service in rural communities and ensuring access to communities suffering from systemic racism and other forms of discrimination. Evidence must be provided to support:

(a) The Applicant's assertion that the beneficiaries are historically impoverished.

(b) The Applicant's assertion as to the difficulties surrounding the proposed area's soil conditions and why installing traditional wastewater has not been effective.

**D. Application and Submission Information**

1. *Address to Request Application Package.* The FY 2023 TAC–RWTS Program Application Guide, copies of necessary forms and samples, and the program regulations are available at *https://www.rd.usda.gov/programs-services/water-environmental-programs/technical-assistance-and-construction-innovative-regional-wastewater-treatment-solutions-tac-rwts.*

Application information is also available at *https://www.grants.gov/.*

2. *Content and Form of Application Submission.*

(a) To be considered for funding, applicants must be an eligible entity and must submit a complete application by the deadline date. Applicants should consult the cost principles and general administrative requirements for grants pertaining to their organizational type when preparing the budget and completing other parts of the application. Applications should be prepared in conformance with program regulations, and departmental and other applicable regulations including 2 CFR parts 180, 182, 200, 400 and 421, or any successor regulations.

(b) Applicants should carefully review the TAC–RWTS FY 2023 Application Guide. The application guide provides specific, detailed instructions for each item of a complete application. The Agency emphasizes the importance of including every item and strongly encourages applicants to follow the instructions carefully, using the examples and illustrations in the TAC–RWTS FY 2023 Application Guide. Applicants should ensure they are using the most updated version of the TAC–RWTS Application Guide before submitting an application. Any updates to the TAC–RWTS Application Guide will be posted at *https://www.rd.usda.gov/programs-services/water-environmental-programs/technical-assistance-and-construction-innovative-regional-wastewater-treatment-solutions-tac-rwts.* For the requirements of complete applications under this announcement, refer to 7 CFR 1775.10. Projects proposing technical assistance will be administered following 7 CFR part 1775. Applications selected for funding that are proposing construction will be required to adhere to the terms and conditions of this NOFO, 2 CFR part 200, and other applicable guidelines for administering and servicing the award. The requirements provided in 7 CFR part 1775, 2 CFR part 200, and the NOFO should be reviewed prior to applying, and the ability to comply must be noted within this application. That includes application items which may require the submission of documentation of the entity that will own, operate, and maintain the facility upon completion. Projects that include both technical assistance and construction must demonstrate the ability to meet all applicable provisions. The items at 7 CFR 1775.10(c)(3), (4), and (5) are no longer required to be separately submitted as part of the application, as they are covered under the Financial Assistance General Certifications and Representations referenced in item 3(c) of this Section. The application and any materials with it become Federal records by law and cannot be returned to you.

3. *System for Award Management and Unique Entity Identifier.*

(a) 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, Universal Identifier and System for Award Management. To register in SAM, entities will be required to obtain and create a Unique Entity Identifier (UEI). Instructions for obtaining the UEI are available at *https://sam.gov/content/entity-registration.*

(b) Each applicant 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) Each applicant must ensure they complete the Financial Assistance General Representations and Certifications in SAM.

(d) Applicants must provide a valid UEI in its application, unless determined exempt under 2 CFR 25.110, Exceptions.

(e) 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.

(f) The entity that will retain the rights to own, operate, and maintain the constructed facility will also be required to complete the registration requirements outlined above. The timing of any requirements will be outlined in the Grant Agreement issued following the selection of an application.

4. *Submission Dates and Times.* Applications must be submitted electronically and received no later than 11:59 p.m., ET, on July 31, 2023 to be eligible for FY 2023 funding. If the submission deadline falls on Saturday, Sunday, or a federal holiday, the application is due the next business day. Late or incomplete applications will not be eligible for FY 2023 grant funding.

The Agency will not solicit or consider new scoring or eligibility information that is submitted after the application deadline. RUS also reserves the right to ask applicants for clarifying information and additional verification of assertions in the application.

5. *Intergovernmental Review.* Executive Order (E.O.) 12372, ''Intergovernmental Review of Federal Programs,'' is not required for this program.

6. *Funding Restrictions.* Applications must be for eligible purposes as defined above. Technical assistance applications must comply with the grant fund limitations found within 7 CFR 1775.5. Funding may not be used to pay for the following construction-related costs:

(a) Facilities which are not modest in size, design, and cost;

(b) Grant finder's fees;

(c) The construction of any new combined storm and sanitary sewer facilities;

(d) Any portion of the cost of a facility which does not serve a rural area;

(e) That portion of project costs normally provided by a business or industrial user, such as wastewater pretreatment, etc.;

(f) Rental for the use of equipment or machinery owned by the applicant;

(g) For other purposes not directly related to operating and maintenance of the facility being installed or improved; and

(h) Pay project costs when other funding is a guaranteed loan obtained in accordance with 7 CFR part 5019.

7. *Other Submission Requirements.* Applications and supporting information will not be accepted via, fax, electronic mail, or any other medium other than through *www.Grants.gov.*

**E. Application Review Information**

1. *Criteria.* All applications that are complete and eligible will be scored and ranked competitively. The categories for scoring criteria used are the following:

| Scoring criteria | Points |
|---|---|
| (1) Degree of Expertise: Applicant's experience in providing services similar to those proposed and description of successfully completed projects including the need that was identified and objectives accomplished. | Up to 10 points. |
| (a) More than ten years of experience | 10 points. |
| (b) Five to ten years of experience | 5 points. |
| (c) Less than five years of experience | 0 points. |
| (2) Applicant Resources: (staff vs. contract personnel) | Up to 10 points. |
| (a) At least 75% consortium staff | 10 points. |
| (b) 50% to 74.99% staff | 5 points. |
| (c) Less than 50% staff * (See Regulatory Requirement) | 0 points or Ineligible. |
| (3) Service Area: Direct Efforts Towards Identified Communities in Historically Impoverished Counties | Up to 15 points. |
| (4) Direct Efforts Towards Identified Communities in the Mid-South Region | Up to 15 points. |
| (5) Goals/Objectives: Goals/objectives are clearly defined and tied to need, results and measurable outcomes | Up to 10 points. |
| (6) Needs Assessment: The problem/issue being addressed is clearly defined, supported by data, and addresses the need. | Up to 10 points. |
| (7) Scope of Work: Extent to which the work plan clearly articulates a well-thought-out approach to accomplishing objectives; and clearly defines how the applicant would respond to historically impoverished communities in areas which have had difficulty installing traditional wastewater treatment systems due to soil conditions **. | Up to 35 points. |
| (8) Innovative Approach: Innovative Approach to Identifying and Targeting Wastewater Treatment | Up to 10 points. |
| (9) Sustainability: Applicant demonstrates ability to sustain project without federal award using a thorough financial analysis to include: cash on hand, projected revenues, outside source contributions, and show a steady increase to sustainability within five years. | Up to 10 points. |
| (10) In-Kind Support | Up to 10 points. |
| (a) Demonstrated commitment of non-federal resources of more than 25% of total budget | 10 points. |
| (b) Demonstrated commitment of non-federal resources 10–25% of total budget | 5 points. |
| (c) Less than 10 percent of non-federal resources of total budget | 0 points. |
| (11) Administrator Discretion: RUS Administrator may provide additional points based on the following factors: geographic, economic, agency priority issues ***. | Up to 15 points. |

* Technical Assistance related efforts must adhere to 7 CFR 1775.35(e)(3).

** USDA has an online resource that can be used for evaluation and determining soil conditions, which can then be used to support the proposed project scope of work. Resource can be accessed here: *https://websoilsurvey.sc.egov.usda.gov/.*

*** Administrator Points—To receive points, the project must be located in a Disadvantaged Community or a Distressed Community. A Disadvantaged Community will be 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. Additionally, all communities within the boundaries of Federally Recognized Tribes and Alaska Native Villages will also be determined to be Disadvantaged Communities by the Agency. Distressed Community will be 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.* The administrator points will be awarded solely on the aforementioned factors, up to a total of 15 points.

Applicants may contract with a nonaffiliated organization for not more than 49 percent of the grant to provide the proposed assistance. Projects proposing technical assistance efforts through contracting that exceed 49 percent are ineligible. RUS's definition of an affiliated organization is as follows:

In corporate law and taxes, an affiliate is a company that is related to another company, usually by being in the position of a member or a subordinate role (must be verified by organizational documentation). Two companies may be affiliated if one company has control over the other or if both are controlled by a third company. One corporation can be affiliated with another corporation by shareholdings, by holding a minority interest, or one corporation might be a subsidiary of another.

2. *Review and Selection Process.* RUS will acknowledge the application's receipt via an email to the applicant. The following actions will be taken:

(a) Incomplete or ineligible applications as of the deadline for submission will not be considered. If an application is determined to be incomplete or ineligible, the applicant will be notified in writing.

(b) Complete, eligible applications will be evaluated competitively by a review team, composed of at least three RUS employees selected from the Water Programs Division. They will make overall recommendations based on the program elements found in 7 CFR part 1775 and this NOFO, including review criteria presented in this notice. They will award points as described in the scoring criteria within this notice. Each application will receive a score based on the averages of the reviewers' scores and discretionary points awarded by the RUS Administrator. RUS reserves the right to request additional information once an application is determined to be

complete to minimize the risk of duplication of other federal efforts.

(c) Applications will be ranked, and grants awarded based upon the scoring results and funding availability. At RUS's discretion, projects scoring too low may not be awarded funding even if funding remains available.

(d) Regardless of the score an application receives, if RUS determines that the project is technically infeasible, RUS will notify the applicant, in writing, and no further action will be taken.

(e) The Agency reserves the right to offer the applicant less than the grant funding requested.

**F. Federal Award Administration Information**

1. *Federal Award Notices.*

(a) *Application Outcomes.* There are four possible outcomes following the submission of an application under the TAC–RWTS program. RUS reserves the right to make no grant award if all applications are ineligible, incomplete, and/or do not meet the established program objectives and priorities. RUS may determine that the application is:

(i) Eligible and selected for funding,

(ii) Eligible but offered less funds than requested,

(iii) Eligible but not selected for funding due to ranking of all applications, or

(iv) Ineligible for the grant.

(b) *Award Notices.* Applicants selected for funding will be sent an award letter, accompanied by a grant agreement, which outlines the terms and conditions of the award, and other applicable documents. Pursuant to the grant agreement, grant funds may be released over the course of the period of performance in reimbursement for the completion of eligible, approved activities which do not duplicate similar federal efforts or tasks. The grant agreement may also include reporting and pre-approval requirements consistent with 2 CFR part 200, 7 CFR part 1775, and this NOFO which if not met, may result in a delay in reimbursement, disallowance of expense, or a suspension of the grant.

(c) *Payments and Reimbursements.* Grantees will be reimbursed as delineated at 7 CFR 1775.18 and 1780.45, this NOFO, and the grant agreement, as applicable. No funds will be disbursed prior to Agency's receipt of the fully executed grant agreement. Funding requests may be submitted for allowable costs up to monthly and must include the appropriate supporting documentation. For construction-related projects, supporting documentation may include copies of payments made to contractors and other parties, and evidence of the completed work. The grantee is responsible for the monitoring and oversight of any construction development, including the monitoring of progress related to the goals and objectives of the award.

(d) *Scope of Services.* The scope of work will be attached to the executed grant agreement. The grantee is responsible for ensuring that all contractual, legal, and program requirements are met prior to starting work. Construction projects that require refinement to the scope of work post-obligation will provide an updated scope of work prior to proceeding with any design or entering into any contracts. RUS will review the scope of work to ensure that the project costs are eligible and then affix the revised scope of work to the grant agreement. The grantee must ensure that the updated scope of work documents and meets all accessibility, civil rights, environmental, and other applicable standards.

Any change in the scope of the project, budget adjustments of more than 10 percent of the total budget, or any other significant change in the project must be reported to and approved by the approval official by written amendment to the grant agreement. Any change not properly approved may be cause for termination of the grant.

(e) *Additional requirements.* All laborers, apprentices, and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to the Consolidated Farm and Rural Development Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with 40 U.S.C. 3141–3148. Further details on eligible applicants and projects may be found in the relevant regulations listed in Section C of this notice.

2. *Administrative and National Policy Requirements.* There are no known unusual Administrative and National Policy Requirements associated with the TAC–RWTS Grant Pilot Program.

3. *Reporting.* Performance reporting, including applicable forms, narratives, financials, and other documentation, are to be completed and submitted in accordance with this NOFO and the provisions of 7 CFR part 1775, 2 CFR part 200, and the grant agreement, as applicable. It will be the grantee's responsibility to demonstrate how the costs are associated to the goals and objectives of the award. Further, all grantees must submit an audit or financial information covering the defined period of performance as outlined in this NOFO, 7 CFR part 1775, 2 CFR part 200, subpart F, and the grant agreement, as applicable.

Any public facilities constructed through this award whereby ownership is retained by the grantee will be serviced in accordance with 2 CFR part 200 and the grant agreement. Should the facility be transferred to an eligible entity, as defined within this NOFO, the grantee will complete a review of the technical, managerial, and financial capacity of the entity prior to transfer. The analysis will be submitted to RUS for review prior to completing the transfer. The facility will be serviced by the grantee until such time that the conditions of 2 CFR part 200 and the grant agreement are met. This includes monitoring the disposition of the facility, partially or in whole, related to this award.

**G. Federal Awarding Agency Contacts**

For general questions about this announcement, please contact Christina Cerio at *Water-RD@usda.gov* or (315) 403–3112. The program website also provides up to date contact information at *https://www.rd.usda.gov/programs-services/water-environmental-programs/technical-assistance-and-construction-innovative-regional-wastewater-treatment-solutions-tac-rwts.*

**H. Domestic Content Procurement Preferences**

1. *Build America, Buy America.* Awardees that are Non-Federal Entities, defined pursuant to 2 CFR 200.1 as any State, local government, Indian tribe, Institution of Higher Education, or nonprofit organization, 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). 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. *American Iron and Steel.* Awardees that are not subject to BABAA requirements detailed above shall be governed by the American Iron and Steel (AIS) requirements mandated by the Consolidated Appropriations Act of 2023, Section 734 Division A, Title VII. Any requests for waiver of these requirements must be submitted pursuant to USDA's guidance available online at *https://www.rd.usda.gov/*

*water-and-waste-disposal-programs-american-iron-and-steel-requirement.*

**I. Other Information**

1. *Paperwork Reduction Act.* In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the information collection requirements associated with the programs, as covered in this notice, have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0572–0112.

2. *National Environmental Policy Act.* All recipients under this notice are subject to the requirements of 7 CFR part 1970, Environmental Policies and Procedures. However, awards for technical assistance under this notice are classified as a Categorical Exclusion (CE) according to 7 CFR 1970.53(b), CEs involving no or minimal disturbance without an environmental report, and usually do not require any additional documentation. RUS will review each grant application to determine its compliance with 7 CFR part 1970. The applicant may be asked to provide additional information or documentation to assist RUS with this determination.

3. *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, Reporting subaward and executive compensation information.

4. *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 (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.

5. *Nondiscrimination Statement.* In accordance with Federal civil rights laws and 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. 2023–11373 Filed 5–26–23; 8:45 am]

**BILLING CODE 3410–15–P**

## DEPARTMENT OF COMMERCE

### Foreign-Trade Zones Board

**[B–34–2023]**

### Foreign-Trade Zone (FTZ) 72, Notification of Proposed Production Activity; Dorel Juvenile Group Inc.; (Child Strollers, Walkers, and Car Seats); Columbus, Indiana

Dorel Juvenile Group Inc. submitted a notification of proposed production activity to the FTZ Board (the Board) for its facility in Columbus, Indiana within Subzone 72W. The notification conforming to the requirements of the Board's regulations (15 CFR 400.22) was received on May 15, 2023.

Pursuant to 15 CFR 400.14(b), FTZ production activity would be limited to the specific foreign-status material(s)/component(s) and specific finished product(s) described in the submitted notification (summarized below) and subsequently authorized by the Board. The benefits that may stem from conducting production activity under FTZ procedures are explained in the background section of the Board's website—accessible via *www.trade.gov/ftz.*

The proposed finished products include car seats (booster; convertible; infant), child car seat head rest assemblies, infant walkers, and child strollers (duty rate ranges from duty-free to 4.4%).

The proposed foreign-status materials and components include: plastic car seat bags; pads (car seat; walker; stroller); car seat components (plastic components (webbing guide; footrest assembly; snack tray assembly; hinge spacer; belt hook fastener; harness hook; headrest gear; torso adjuster button; cup holder; armrest assembly; base recline handle; canopy hoop; linkage assembly; cover for infant carrier base release cables); child car seat level indicators; metal components (headrest locking plate and two plastic pins; anti-rebound bar; washer plate; axle and plastic axle sleeve); rubber anti-skid runners; button adjustment assemblies for infant carrier handles; child car seat crotch assemblies; nylon components (strap with metal latch for car seat installation; harness with locking plastic buckle; harness strap; tether; strap with latch assembly); lap belts with nylon straps and plastic buckles; central front adjusters with infant splitter plate; steel rods); infant car seats; wheel and toy attachments for infant walkers; plastic resin; nylon components (belts with plastic lanyard guides; webbing; thread); magnetic chest clips; steel components (locking clip; S clip; C plate headrest

gear); plastic injection molds and components (ejector pin; ejector sleeve; hot runner system); electronic car seat cooling systems; paper and paperboard labels; cardboard displays; and, metal screws (duty rate ranges from duty-free to 11.4%). The request indicates that certain materials/components are subject to duties under section 301 of the Trade Act of 1974 (section 301), depending on the country of origin. The applicable section 301 decisions require subject merchandise to be admitted to FTZs in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary and sent to: *ftz@trade.gov.* The closing period for their receipt is July 10, 2023.

A copy of the notification will be available for public inspection in the ''Online FTZ Information System'' section of the Board's website.

For further information, contact Juanita Chen at *juanita.chen@trade.gov.*

Dated: May 24, 2023.

**Camille R. Evans,**

*Acting Executive Secretary.*

[FR Doc. 2023–11411 Filed 5–26–23; 8:45 am]

**BILLING CODE 3510–DS–P**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**[A–570–145]**

### Certain Freight Rail Couplers and Parts Thereof From the People's Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) determines that certain freight rail couplers and parts thereof (freight rail couplers) from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less-than-fair value (LTFV) during the period of investigation, January 1, 2022, through June 30, 2022.

**DATES:** Applicable May 30, 2023.

**FOR FURTHER INFORMATION CONTACT:** Drew Jackson or Zachary Shaykin, 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 or (202) 482–2638, respectively.

**SUPPLEMENTARY INFORMATION:**

#### Background

On March 13, 2023, Commerce published in the **Federal Register** the *Preliminary Determination* in this investigation.[1] Commerce invited interested parties to comment on the *Preliminary Determination.*

For a complete description of the events that followed the Preliminary Determination, see the Issues and Decision Memorandum.[2] The Issues and Decision Memorandum is a public document and is available electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

#### Period of Investigation

The period of investigation is January 1, 2022, through June 30, 2022.

#### Scope of the Investigation

The products covered by this investigation are freight rail coupler systems and certain components thereof from China. For a complete description of the scope of this investigation, *see* appendix I.

#### Scope Comments

During the course of this investigation and the concurrent LTFV and countervailing duty investigations of freight rail couplers from and Mexico, and China, Commerce received scope comments from interested parties. Commerce issued a Preliminary Scope Memorandum to address these comments and set aside a period of time for parties to address scope issues in scope case and rebuttal briefs.[3] We received comments from interested parties on the Preliminary Scope Memorandum, which we address in the Final Scope Memorandum.[4] As a result of these comments, we made certain changes to the scope of these investigations from that published in the *Preliminary Determination. See* appendix I.

#### Final Affirmative Determination of Critical Circumstances

In accordance with section 733(e) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.206(h), Commerce determines that critical circumstances exist with respect to imports of freight rail couplers from China for the China-wide entity. For a full description of the methodology and results of Commerce's critical circumstances analysis, *see* the Preliminary Decision Memorandum and the Issues and Decision Memorandum.

#### China-Wide Entity and Use of Adverse Facts Available (AFA)

For the purposes of this final determination, consistent with the *Preliminary Determination,*[5] we relied solely on the application of AFA for the China-wide entity, pursuant to sections 776(a) and (b) of the Act. Further, because no companies are eligible for a rate separate from the China-wide entity, we continue to find that all exporters of Chinese freight rail couplers are part of the China-wide entity. There is no new information on the record that would cause us to revisit our decision in the *Preliminary Determination.* Thus, we made no changes to our analysis or to the China-wide entity's dumping margin for the final determination. A detailed discussion of our application of AFA is provided in the *Preliminary Determination.*[6]

#### Combination Rates

Because no Chinese exporters qualified for a separate rate, producer/exporter combination rates were not calculated for this final determination.

#### Final Determination

Commerce determines that the following estimated weighted-average dumping margin exists for the POI:

[1] *See Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 88 FR 15372 (March 13, 2023) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum.

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China,'' dated concurrently with this notice (Issues and Decision Memorandum).

[3] *See* Memorandum, ''Preliminary Scope Decision Memorandum,'' dated March 28, 2023 (Preliminary Scope Memorandum).

[4] *See* Memorandum, ''Final Scope Decision Memorandum,'' dated concurrently with this notice (Final Scope Memorandum).

[5] *See Preliminary Determination* PDM at 6–9.

[6] *Id.*

| Exporter/producer | Estimated weighted-average dumping margin (percent) | Estimated weighted-average dumping margin adjusted for export subsidy offset(s) (percent) [7] |
|---|---|---|
| China-Wide Entity | 169.90 | 139.49 |

**Disclosure**

Because Commerce continues to find that all Chinese exporters of freight rail couplers are part of the China-wide entity and continues to rely solely on the application of AFA for the China-wide entity, there are no calculations to disclose for this final determination.

**Continuation of Suspension of Liquidation**

As a result of our *Preliminary Determination* and pursuant to section 735(c)(1)(B) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to continue to suspend liquidation of subject merchandise as described in the ''Scope of the Investigation'' section entered, or withdrawn from warehouse, for consumption, on or after March 13, 2023, which is the date of publication of the affirmative *Preliminary Determination* in the **Federal Register**, at the cash deposit rate indicated above.

Pursuant to section 735(c)(1)(B)(ii) of the Act and 19 CFR 351.210(d), we will instruct CBP to require a cash deposit for such entries of merchandise equal to the amount by which the normal value exceeds the U.S. price as follows: (1) for all Chinese exporters of subject merchandise, the cash deposit rate will be equal to the estimated dumping margin established for the China-wide entity; and (2) for all third country exporters of subject merchandise, the cash deposit rate is also the cash deposit rate applicable to the China-wide entity. These suspension of liquidation instructions will remain in effect until further notice.

If the U.S. International Trade Commission (ITC) issues a final affirmative injury determination, we intend to issue an antidumping duty order and continue to require a cash deposit of estimated antidumping duties for such entries of subject merchandise in the amounts indicated above, in accordance with section 736(a) of the Act. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated, and all estimated duties deposited as a result of the suspension of liquidation will be refunded or canceled.

**ITC Notification**

In accordance with section 735(d) of the Act, we will notify the ITC of our final affirmative determination of sales at LTFV. Because the final determination in this proceeding is affirmative, in accordance with section 735(b) of the Act, the ITC will make its final determination as to whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports of freight rail couplers from China no later than 45 days after our final determination.

If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all cash deposits will be refunded or canceled, as Commerce determines to be appropriate. If the ITC determines that such injury does exist, Commerce intends to issue an antidumping duty order directing CBP to assess, upon further instruction by Commerce, antidumping duties on all imports of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation, as discussed above in the ''Continuation of Suspension of Liquidation'' section.

**Notification Regarding Administrative Protective Order**

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

**Notification to Interested Parties**

This determination is issued and published pursuant to sections 735(d) and 777(i) of the Act, and 19 CFR 351.210(c).

Dated: May 22, 2023.

**Lisa W. Wang,**

*Assistant Secretary for Enforcement and Compliance.*

## Appendix I

**Scope of the Investigation**

The scope of this investigation covers certain freight railcar couplers (also known as ''fits'' or ''assemblies'') and parts thereof. Freight railcar couplers are composed of two main parts, namely knuckles and coupler bodies but may also include other items (*e.g.,* coupler locks, lock lift assemblies, knuckle pins, knuckle throwers, and rotors). The parts of couplers that are covered by the investigation include: (1) E coupler bodies, (2) E/F coupler bodies, (3) F coupler bodies, (4) E knuckles, and (5) F knuckles, as set forth by the Association of American Railroads (AAR). The freight rail coupler parts (*i.e.,* knuckles and coupler bodies) are included within the scope of the investigation when imported separately. Coupler locks, lock lift assemblies, knuckle pins, knuckle throwers, and rotors are covered merchandise when imported in an assembly but are not covered by the scope when imported separately.

Subject freight railcar couplers and parts are included within the scope whether finished or unfinished, whether imported individually or with other subject or nonsubject parts, whether assembled or unassembled, whether mounted or unmounted, or if joined with nonsubject merchandise, such as other nonsubject parts or a completed railcar. Finishing includes, but is not limited to, arc washing, welding, grinding, shot blasting, heat treatment, machining, and assembly of various parts. When a subject coupler or subject parts are mounted on or to other nonsubject merchandise, such as a railcar, only the coupler or subject parts are covered by the scope.

The finished products covered by the scope of this investigation meet or exceed the AAR specifications of M–211, ''Foundry and

[7] For the export subsidy offset calculation, see Commerce's Memorandum, ''Freight Rail Couplers from the People's Republic of China: Export Subsidy Offset Calculation for the Final Determination,'' dated concurrently with this notice.

Product Approval Requirements for the Manufacture of Couplers, Coupler Yokes, Knuckles, Follower Blocks, and Coupler Parts'' and/or AAR M–215 ''Coupling Systems,'' or other equivalent domestic or international standards (including any revisions to the standard(s)).

The country of origin for subject couplers and parts thereof, whether fully assembled, unfinished or finished, or attached to a railcar, is the country where the subject coupler parts were cast or forged. Subject merchandise includes coupler parts as defined above that have been further processed or further assembled, including those coupler parts attached to a railcar in third countries. Further processing includes, but is not limited to, arc washing, welding, grinding, shot blasting, heat treatment, painting, coating, priming, machining, and assembly of various parts. The inclusion, attachment, joining, or assembly of nonsubject parts with subject parts or couplers either in the country of manufacture of the in-scope product or in a third country does not remove the subject parts or couplers from the scope.

The couplers that are the subject of this investigation are currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) statistical reporting number 8607.30.1000. Unfinished subject merchandise may also enter under HTSUS statistical reporting number 7326.90.8688. Subject merchandise attached to finished railcars may also enter under HTSUS statistical reporting numbers 8606.10.0000, 8606.30.0000, 8606.91.0000, 8606.92.0000, 8606.99.0130, 8606.99.0160, or under subheading 9803.00.50. Subject merchandise may also be imported under HTSUS statistical reporting number 7325.99.5000. These HTSUS subheadings are provided for convenience and customs purposes only; the written description of the scope of this investigation is dispositive.

## Appendix II

**List of Topics Discussed in the Final Issues and Decision Memorandum**



[FR Doc. 2023–11358 Filed 5–26–23; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

### Notice of Scope Ruling Applications Filed in Antidumping and Countervailing Duty Proceedings

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** The U.S. Department of Commerce (Commerce) received scope ruling applications, requesting that scope inquiries be conducted to determine whether identified products are covered by the scope of antidumping duty (AD) and/or countervailing duty (CVD) orders and that Commerce issue scope rulings pursuant to those inquiries. In accordance with Commerce's regulations, we are notifying the public of the filing of the scope ruling applications listed below in the month of April 2023.

**DATES:** Applicable May 30, 2023.

**FOR FURTHER INFORMATION CONTACT:** Terri Monroe, AD/CVD Operations, Customs Liaison Unit, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230, telephone: (202) 482–1384.

### Notice of Scope Ruling Applications

In accordance with 19 CFR 351.225(d)(3), we are notifying the public of the following scope ruling applications related to AD and CVD orders and findings filed in or around the month of April 2023. This notification includes, for each scope application: (1) identification of the AD and/or CVD orders at issue (19 CFR 351.225(c)(1)); (2) concise public descriptions of the products at issue, including the physical characteristics (including chemical, dimensional and technical characteristics) of the products (19 CFR 351.225(c)(2)(ii)); (3) the countries where the products are produced and the countries from where the products are exported (19 CFR 351.225(c)(2)(i)(B)); (4) the full names of the applicants; and (5) the dates that the scope applications were filed with Commerce and the name of the ACCESS scope segment where the scope applications can be found.[1] This notice does not include applications which have been rejected and not properly resubmitted. The scope ruling applications listed below are available on Commerce's online e-filing and document management system, Antidumping and Countervailing Duty Electronic Service System (ACCESS), at *https://access.trade.gov.*

*Scope Ruling Applications*

Fresh Garlic from the People's Republic of China (China) (A–570–831); whole garlic cloves (in brine);[2] produced in and exported from China; submitted by Roland Foods, LLC; April 6, 2023; ACCESS scope segment ''Roland Foods.''

Circular Welded Non-Alloy Steel Pipe from Mexico (A–201–805); certain black, plain-ended, threaded, or threaded-and-coupled circular welded steel pipe;[3] produced in the United States, exported to Mexico for finishing, and re-imported into the United States; submitted by Productos Laminados; April 17, 2023; ACCESS scope segment ''Prolamsa Pipe Finished in Mexico.''

Tapered Roller Bearings and Parts Thereof, Finished or Unfinished from China (A–570–601); low-carbon steel

[1] *See Regulations to Improve Administration and Enforcement of Antidumping and Countervailing Duty Laws,* 86 FR 52300, 52316 (September 20, 2021) (''It is our expectation that the **Federal Register** list will include, where appropriate, for each scope application the following data: (1) identification of the AD and/or CVD orders at issue; (2) a concise public summary of the product's description, including the physical characteristics (including chemical, dimensional and technical characteristics) of the product; (3) the country(ies) where the product is produced and the country from where the product is exported; (4) the full name of the applicant; and (5) the date that the scope application was filed with Commerce.'').

[2] The products are a pickled product with the following ingredients: garlic, water, salt, lactic acid, acetic acid, and citric acid. The whole garlic cloves (in brine) have a pH of 2.9 plus/minus 0.2.

[3] The products for which a ruling is requested are addressed under the following three production scenarios: Scenario 1A: A Schedule 40 pipe, with an exterior diameter of 1.315 inches, and a wall thickness of 0.133 inches, produced from U.S. origin steel coil—(a) Hydrostatic testing and (b) coating occur in Mexico; Scenario 1B: A Schedule 40 pipe, with an exterior diameter of 1.315 inches, and a wall thickness of 0.133 inches, produced from Mexican origin steel coil—(a) Hydrostatic testing and (b) coating occur in Mexico; Scenario 2A: A Schedule 40 pipe, with an exterior diameter of 1.315 inches, and a wall thickness of 0.133 inches, produced from U.S. origin steel coil—(a) Hydrostatic testing, (b) coating, and (c) threading occur in Mexico. Plastic covers are added to the threads for protection; Scenario 2B: A Schedule 40 pipe, with an exterior diameter of 1.315 inches, and a wall thickness of 0.133 inches, produced from Mexican origin steel coil—(a) Hydrostatic testing, (b) coating, and (c) threading occur in Mexico. Plastic covers are added to the threads for protection; Scenario 3A: A Schedule 40 pipe, with an exterior diameter of 1.315 inches, and a wall thickness of 0.133 inches, produced from U.S. origin steel coil—(a) Hydrostatic testing, (b) coating, (c) threading of the pipe, and (d) attaching the couplings occur in Mexico; Scenario 3B: A Schedule 40 pipe, with an exterior diameter of 1.315 inches, and a wall thickness of 0.133 inches, produced from Mexican origin steel coil—(a) Hydrostatic testing, (b) coating, (c) threading of the pipe, and (d) attaching the couplings occur in Mexico.

blanks (steel blanks); [4] produced in and exported from China; submitted by Precision Components, Inc.; April 24, 2023; ACCESS scope segment ''Steel Blanks.''

**Notification to Interested Parties**

This list of scope ruling applications is not an identification of scope inquiries that have been initiated. In accordance with 19 CFR 351.225(d)(1), if Commerce has not rejected a scope ruling application nor initiated the scope inquiry within 30 days after the filing of the application, the application will be deemed accepted and a scope inquiry will be deemed initiated the following day—day 31.[5] Commerce's practice generally dictates that where a deadline falls on a weekend, Federal holiday, or other non-business day, the appropriate deadline is the next business day.[6] Accordingly, if the 30th day after the filing of the application falls on a non-business day, the next business day will be considered the ''updated'' 30th day, and if the application is not rejected or a scope inquiry initiated by or on that particular business day, the application will be deemed accepted and a scope inquiry will be deemed initiated on the next business day which follows the ''updated'' 30th day.[7]

In accordance with 19 CFR 351.225(m)(2), if there are companion AD and CVD orders covering the same merchandise from the same country of origin, the scope inquiry will be conducted on the record of the AD proceeding. Further, please note that pursuant to 19 CFR 351.225(m)(1), Commerce may either apply a scope ruling to all products from the same country with the same relevant physical characteristics, (including chemical, dimensional, and technical characteristics) as the product at issue, on a country-wide basis, regardless of the producer, exporter, or importer of those products, or on a company-specific basis.

For further information on procedures for filing information with Commerce through ACCESS and participating in scope inquiries, please refer to the Filing Instructions section of the Scope Ruling Application Guide, at *https://access.trade.gov/help/Scope_Ruling_Guidance.pdf.* Interested parties, apart from the scope ruling applicant, who wish to participate in a scope inquiry and be added to the public service list for that segment of the proceeding must file an entry of appearance in accordance with 19 CFR 351.103(d)(1) and 19 CFR 351.225(n)(4). Interested parties are advised to refer to the case segment in ACCESS as well as 19 CFR 351.225(f) for further information on the scope inquiry procedures, including the timelines for the submission of comments.

Please note that this notice of scope ruling applications filed in AD and CVD proceedings may be published before any potential initiation, or after the initiation, of a given scope inquiry based on a scope ruling application identified in this notice. Therefore, please refer to the case segment on ACCESS to determine whether a scope ruling application has been accepted or rejected and whether a scope inquiry has been initiated.

Interested parties who wish to be served scope ruling applications for a particular AD or CVD order may file a request to be included on the annual inquiry service list during the anniversary month of the publication of the AD or CVD order in accordance with 19 CFR 351.225(n) and Commerce's procedures.[8]

Interested parties are invited to comment on the completeness of this monthly list of scope ruling applications received by Commerce. Any comments should be submitted to James Maeder, Deputy Assistant Secretary for AD/CVD Operations, Enforcement and Compliance, International Trade Administration, via email to *CommerceCLU@trade.gov.*

This notice of scope ruling applications filed in AD and CVD proceedings is published in accordance with 19 CFR 351.225(d)(3).

Dated: May 23, 2023.

**James Maeder,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.*

[FR Doc. 2023–11359 Filed 5–26–23; 8:45 am]

**BILLING CODE 3510–DS–P**

[4] The products are hollow cylinders with dimensions from 2 inches to 39 inches. These steel blanks weigh between one and 25 kilograms. The products are made from low-carbon alloy steel with a carbon content of 0.18 to 0.22 percent and manganese of 0.060 to 0.095 percent. These products are not made of bearing steel.

[5] In accordance with 19 CFR 351.225(d)(2), within 30 days after the filing of a scope ruling application, if Commerce determines that it intends to address the scope issue raised in the application in another segment of the proceeding (such as a circumvention inquiry under 19 CFR 351.226 or a covered merchandise inquiry under 19 CFR 351.227), it will notify the applicant that it will not initiate a scope inquiry, but will instead determine if the product is covered by the scope at issue in that alternative segment.

[6] *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[7] This structure maintains the intent of the applicable regulation, 19 CFR 351.225(d)(1), to allow day 30 and day 31 to be separate business days.

[8] *See Scope Ruling Application; Annual Inquiry Service List; and Informational Sessions,* 86 FR 53205 (September 27, 2021).

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### Evaluation of Jobos Bay National Estuarine Research Reserve; Notice of Public Meeting; Request for Comments

**AGENCY:** Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration, Department of Commerce.

**ACTION:** Notice of public meeting and opportunity to comment.

**SUMMARY:** The National Oceanic and Atmospheric Administration (NOAA), Office for Coastal Management, will hold an in-person public meeting to solicit input on the performance evaluation of the Jobos Bay National Estuarine Research Reserve. NOAA also invites the public to submit written comments.

**DATES:** NOAA will hold an in-person public meeting on Wednesday, June 7, 2023, at 5 p.m. Atlantic Standard Time. NOAA will consider all relevant written comments received by Friday, June 16, 2023.

**ADDRESSES:** Comments may be submitted by one of the following methods:

- *In-Person Public Meeting:* Provide oral comments during the in-person public meeting on Wednesday, June 7, 2023, at 5 p.m. Atlantic Standard Time at the Jobos Bay Reserve Visitor Center, Road 705, Kilometer 2.3, Main Street, Aguirre, Puerto Rico.
- *Email:* Send written comments to Ralph Cantral, evaluator, NOAA Office for Coastal Management, at *Ralph.Cantral@noaa.gov.* Include ''Comments on Performance Evaluation of Jobos Bay National Estuarine Research Reserve'' in the subject line of the message. NOAA will accept anonymous comments; however, the written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive personally identifiable information, such as account numbers and Social Security numbers, should not be included with

the comments. Comments that are not related to the performance evaluation of the Jobos Bay National Estuarine Research Reserve or that contain profanity, vulgarity, threats, or other inappropriate language will not be considered.

**FOR FURTHER INFORMATION CONTACT:** Ralph Cantral, evaluator, NOAA Office for Coastal Management, by email at *Ralph.Cantral@noaa.gov* or by phone at (843) 474–1357. Copies of the previous evaluation findings, reserve management plan, and reserve site profile may be viewed and downloaded at *https://coast.noaa.gov/czm/evaluations/.* A copy of the evaluation notification letter and most recent progress report may be obtained upon request by contacting Ralph Cantral.

**SUPPLEMENTARY INFORMATION:** Section 315(f) of the Coastal Zone Management Act (CZMA) requires NOAA to conduct periodic evaluations of federally approved national estuarine research reserves. The evaluation process includes holding one or more public meetings, considering public comments, and consulting with interested Federal, State, and local agencies and members of the public. During the evaluation, NOAA will consider the extent to which the Commonwealth of Puerto Rico has met the national objectives, adhered to the management program approved by the Secretary of Commerce, and adhered to the terms of financial assistance under the CZMA. When the evaluation is complete, NOAA's Office for Coastal Management will place a notice in the **Federal Register** announcing the availability of the final evaluation findings.

*Authority:* 16 U.S.C. 1461.

**John R. King,**

*Chief, Business Operations Division, Office for Coastal Management, National Ocean Service, National Oceanic and Atmospheric Administration.*

[FR Doc. 2023–11433 Filed 5–26–23; 8:45 am]

**BILLING CODE 3510–JE–P**

## COMMODITY FUTURES TRADING COMMISSION

### Agency Information Collection Activities: Notice of Intent To Request Approval for Collection 3038–0117, Exemption From Derivatives Clearing Organization Registration

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice.

**SUMMARY:** The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is announcing an opportunity for public comment on a proposed information collection by the agency. Under the Paperwork Reduction Act (''PRA''), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment. This notice announces the intention of the Commission to request approval for Collection 3038–0117, Exemption from Derivatives Clearing Organization Registration.

**DATES:** Comments must be submitted on or before July 31, 2023.

**ADDRESSES:** You may submit comments, identified by ''Notice of Intent to Request for Approval for Collection 3038–0117, Exemption from Derivatives Clearing Organization Registration,'' by any of the following methods:

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

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

**FOR FURTHER INFORMATION CONTACT:** Eileen Chotiner, Division of Clearing and Risk, Commodity Futures Trading Commission, (202) 418–5467; email: *echotiner@cftc.gov,* and refer to OMB Control No. 3038–0117.

**SUPPLEMENTARY INFORMATION:** Under the PRA, 44 U.S.C. 3501 *et seq.,* Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of Information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3 and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA, 44 U.S.C. 3506(c)(2)(A), requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed information collection including each proposed extension of an existing information collection, before submitting the collection to OMB for approval. To comply with this requirement, the CFTC is publishing notice of its intent to request approval for an existing collection in use without a currently approved OMB control number relating to the granting of exemptions from registration as a Derivatives Clearing Organization (''DCO''). An agency may not conduct or sponsor, and a person is not required to respond to, an information collection unless it displays a currently valid OMB control number.

*Title:* Exemption from Derivatives Clearing Organization Registration (OMB Control No. 3038–0117). This is a request for approval for an existing collection in use without a currently approved OMB control number.

*Abstract:* This information collection is associated with CFTC regulations codifying the policies and procedures that the Commission follows with respect to granting exemptions from registration as a DCO for the clearing of proprietary swaps for U.S. persons and futures commission merchants (''FCMs''). The rules include reporting requirements that are collections of information requiring approval under the PRA. Specifically, section 39.6 of the Commission's regulations specifies the conditions and procedures under which a clearing organization may apply for exemption from registration as a DCO, the information that must be provided to the Commission to obtain and maintain such exemption, and procedures for termination of an exemption. *See* 17 CFR 39. The information that is collected under these regulations is necessary for the Commission to determine whether a clearing organization qualifies for exemption from DCO registration, to evaluate the continued eligibility of the exempt DCO for exemption from registration, to review compliance by the exempt DCO with any conditions of such exemption, or to conduct its oversight of U.S. persons and the swaps that are cleared by U.S. persons through the exempt DCO.

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

- Whether the proposed collection of information is necessary for the proper performance of the functions of the CFTC, including whether the information will have a practical use;
- The accuracy of the CFTC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, usefulness, and clarity of the information to be collected; and
- Ways to minimize the burden of collection of information on those who

are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that you believe is exempt from disclosure under the Freedom of Information Act (''FOIA''), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the CFTC's regulations.[1]

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

*Burden Statement:* The provisions of part 39 of the CFTC's Regulations include reporting requirements that constitute information collections within the meaning of the PRA. With respect to the ongoing reporting obligations associated with exemption from DCO registration, the CFTC believes that exempt DCOs incur an aggregate annual time-burden of 257 hours.

*Respondents/affected entities:* Derivatives Clearing Organizations.

*Estimated number of respondents:* 9.

*Estimated average burden hours per respondent:* 29 hours.[2]

*Estimated total annual burden hours on respondents:* 257 hours.

*Frequency of collection:* On occasion.

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

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

Dated: May 24, 2023.

**Robert Sidman,**

*Deputy Secretary of the Commission.*

[FR Doc. 2023–11423 Filed 5–26–23; 8:45 am]

**BILLING CODE 6351–01–P**

[1] 17 CFR 145.9.

[2] Average burden hours per respondent rounded to the nearest full hour.

## DEPARTMENT OF EDUCATION

**[Docket No.: ED–2023–SCC–0095]**

### Agency Information Collection Activities; Comment Request; Evaluation of the REL Midwest Teaching Fractions Toolkit

**AGENCY:** Institute of Education Sciences (IES), Department of Education (ED).

**ACTION:** Notice.

**SUMMARY:** In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

**DATES:** Interested persons are invited to submit comments on or before July 31, 2023.

**ADDRESSES:** To access and review all the documents related to the information collection listed in this notice, please use *https://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0095. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *https://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

**FOR FURTHER INFORMATION CONTACT:** For specific questions related to collection activities, please contact Felicia Sanders, (202) 245–6264.

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

*Title of Collection:* Evaluation of the REL Midwest Teaching Fractions Toolkit.

*OMB Control Number:* 1850–NEW.

*Type of Review:* New ICR.

*Respondents/Affected Public:* Individuals or Households.

*Total Estimated Number of Annual Responses:* 206.

*Total Estimated Number of Annual Burden Hours:* 187.

*Abstract:* The U.S. Department of Education is supporting the development and evaluation of a toolkit that supports the implementation of effective grade 6 fractions instruction based on the evidence-based recommendations in the Developing Effective Fractions Instruction for Kindergarten Through 8th Grade practice guide. The evaluation will rigorously test the efficacy of the toolkit in improving teacher self-efficacy and practices for fraction computation and rate and ratio instruction as well as student learning outcomes in grade 6 mathematics. The evaluation will use a blocked randomized controlled trial design in which schools within each district or within each block of similar schools will be randomly assigned to receive the toolkit. The evaluation will be conducted in 40 Illinois schools during the 2024/25 school year.

The evaluation will focus on measuring the toolkit's impact on three key outcomes: teacher self-efficacy for fraction computation and rate and ratio instruction, classroom practice for fraction computation and rate and ratio instruction, and students' ability to solve fraction computation and rate and ratio problems.

In addition to collecting data to measure teacher and student outcomes, the evaluation team will collect data to document the implementation of the

toolkit in treatment schools and the service contrast between treatment and control schools and to describe the characteristics of participating schools, teachers, and students at baseline.

The evaluation will produce a publicly available report that summarizes evaluation findings. The findings from the evaluation will inform further refinement of the toolkit, to be released to the public after the evaluation.

Dated: May 24, 2023.

**Juliana Pearson,**

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

[FR Doc. 2023–11432 Filed 5–26–23; 8:45 am]

**BILLING CODE 4000–01–P**

## DEPARTMENT OF ENERGY

### Notice of Availability of Interim Guidance on Packaging, Transportation, Receipt, Management, Short-Term and Long-Term Storage of Elemental Mercury, Extension of Public Comment Period

**AGENCY:** Office of Environmental Management, Department of Energy.

**ACTION:** Notice of availability; request for comments: extension of public comment period.

**SUMMARY:** On May 2, 2023, a **Federal Register** Notice was issued that announced the Notice of Availability (NOA) of the U.S. Department of Energy (DOE) Interim Guidance on Packaging, Transportation, Receipt, Management, Short-Term and Long-Term Storage of Elemental Mercury (Interim Guidance). The NOA contained errors that limited the public's ability to review and comment on the Interim Guidance. A correction was issued in the **Federal Register** on May 9, 2023. Following a request to extend the comment period, DOE is extending the public comment period for the Interim Guidance from June 1, 2023, to July 3, 2023.

**DATES:** The comment period for the NOA published on May 2, 2023 (88 FR 27495), and corrected on May 9, 2023 (88 FR 29896), is extended to July 3, 2023. DOE will consider all comments submitted or postmarked by July 3, 2023. Comments submitted to DOE concerning the Interim Guidance prior to this announcement do not need to be resubmitted as a result of this extension of the comment period.

**ADDRESSES:** Additional information regarding the Interim Guidance and other related documents are available online at: *https://www.energy.gov/em/long-term-management-and-storage-elemental-mercury.*

- *Email: david.haught@hq.doe.gov.* Please submit comments as an email message or email attachment (*i.e.,* Microsoft Word or PDF file format) without encryption.
- *Postal Mail:* Please submit comments by U.S. Mail to David Haught, Office of Environmental Management, U.S. Department of Energy, EM–4.22, 1000 Independence Avenue SW, Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Questions concerning the Interim Guidance can be sent to David Haught, Office of Environmental Management, U.S. Department of Energy, EM–4.22, 1000 Independence Avenue SW, Washington, DC 20585, (301) 903–1765, or to *david.haught@hq.doe.gov.*

**Signing Authority**

This document of the Department of Energy was signed on May 23, 2023, by Kristen G. Ellis, Acting Associate Principal Deputy Assistant Secretary for Regulatory and Policy Affairs, Office of Environmental Management. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 24, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

[FR Doc. 2023–11380 Filed 5–26–23; 8:45 am]

**BILLING CODE 6450–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. NJ23–11–000]**

### Oncor Electric Delivery Company LLC; Notice of Filing

Take notice that on May 22, 2023, Oncor Electric Delivery Company LLC submits tariff filing: TFO Tariff Rate Changes, to be effective May 1, 2023.

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 June 12, 2023.

Dated: May 23, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–11413 Filed 5–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. AD23–7–000]**

### PJM Capacity Market Forum; Supplemental Notice of Forum

As announced in the April 19, 2023 Notice in this proceeding, the Federal Energy Regulatory Commission (Commission) will convene a Commissioner-led forum to examine the PJM Interconnection, L.L.C. (PJM) capacity market in the above-captioned proceeding on June 15, 2023 from approximately 12:00 p.m. to 5:00 p.m. Eastern Time, following the Commission's scheduled open meeting. The forum will be held in-person at the Commission headquarters at 888 First Street NE, Washington, DC 20426 in the Commission Meeting Room.

The purpose of this forum is to solicit varied perspectives on the current state of the PJM capacity market, potential improvements to the market, and to consider related proposals to address resource adequacy. The forum will include three panels that will explore whether the PJM capacity market is achieving its objective of ensuring resource adequacy at just and reasonable rates, discuss potential market design reforms that may be needed to achieve this objective, and discuss state Commissioners' and state representatives' views on these issues. The agenda for this forum attached to this Supplemental Notice provides more detail for each panel.

While the forum is not for the purpose of discussing any specific matters before the Commission, some forum discussions may involve issues raised in proceedings that are currently pending before the Commission. These proceedings include, but are not limited to:

| | |
|---|---|
| PJM Interconnection, L.L.C | Docket Nos. ER22–962, et al. |
| PJM Interconnection, L.L.C | Docket Nos. ER23–729, et al.; EL23–19, et al. |
| PJM Interconnection, L.L.C | Docket No. ER23–1038–001. |
| PJM Interconnection, L.L.C | Docket No. ER23–1067–000. |
| PJM Interconnection, L.L.C | Docket No. ER23–1609–000. |
| PJM Interconnection, L.L.C | Docket No. ER23–1700–000. |
| PJM Interconnection, L.L.C | Docket No. EL21–78–000. |
| *SOO Green HVDC Link ProjectCo, LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL21–103–000. |
| *Roy J. Shanker* v. *PJM Interconnection LLC* | Docket No. EL23–13–000. |
| *Essential Power OPP, LLC, et al.* v. *PJM Interconnection, L.L.C* | Docket No. EL23–53–000. |
| *Aurora Generation, LLC, et al.* v. *PJM Interconnection, L.L.C* | Docket No. EL23–54–000. |
| *Coalition of PJM Capacity Resources* v. *PJM Interconnection, L.L.C* | Docket No. EL23–55–000. |
| *Talen Energy Marketing, LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL23–56–000. |
| *Lee County Generating Station, LLC* v. *PJM Interconnection, L.L.C* | Docket Nos. EL23–57, et al. |
| *SunEnergy1, LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL23–58–000. |
| *Lincoln Generating Facility, LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL23–59–000. |
| *Parkway Generation Keys Energy Center LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL23–60–000. |
| *Old Dominion Electric Cooperative* v. *PJM Interconnection, L.L.C* | Docket No. EL23–61–000. |
| *Energy Harbor LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL23–63–000. |
| *Calpine Corp.* v. *PJM Interconnection, L.L.C* | Docket No. EL23–66–000. |
| *Invenergy Nelson LLC* v. *PJM Interconnection, L.L.C* | Docket No. EL23–67–000. |

Attached to this Supplemental Notice is an agenda for the forum, which includes the forum program and expected panelists.

Panelists are asked to submit advance materials to provide any information related to their respective panel (*e.g.,* summary statements, reports, whitepapers, studies, or testimonies) that panelists believe should be included in the record of this proceeding by June 2, 2023. Panelists should file all advance materials in the AD23–7–000 docket in eLibrary.

The forum will be open to the public and there is no fee for attendance. Information will also be posted on the Calendar of Events on the Commission's website, *www.ferc.gov,* prior to the event.

The forum will be transcribed and webcast. Transcripts will be available for a fee from Ace Reporting (202–347–3700). 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.

Commission forums are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov,* call toll-free (866) 208–3372 (voice) or (202) 208–8659 (TTY), or send a fax to (202) 208–2106 with the required accommodations.

For more information about this forum, please contact Katherine Scott at *katherine.scott@ferc.gov* or (202) 502–8190. For information related to logistics, please contact Sarah McKinley at *sarah.mckinley@ferc.gov* or (202) 502–8368.

Dated: May 23, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

**PJM Capacity Market Forum**

**Docket No. AD23–7–000**

**June 15, 2023**

**Agenda and Speakers**

*12:00 p.m.–12:20 p.m.:* Welcome and Opening Remarks

*12:20 p.m.–1:30 p.m.:* Panel 1: Objectives and Outcomes of PJM's Capacity Market

This panel will explore whether the PJM capacity market is achieving its objective of ensuring resource adequacy at just and reasonable rates. To facilitate an open and thoughtful dialogue, we suggest panelists be prepared to discuss questions such as (1) is the PJM capacity market fulfilling its objectives? If not, why not?; (2) do changes to the resource mix and load, including wide-spread electrification and increased risks due to extreme weather, require changes to the structure of the capacity market?; (3) are there other drivers that may be

preventing the PJM capacity market from achieving its objectives?

*Panelists*

- Manu Asthana, President and CEO, PJM Interconnection, L.L.C.
- Joseph Bowring, President, Monitoring Analytics, Inc.
- Jim Robb, President and CEO, North American Electric Reliability Corporation
- Phil Moeller, Executive Vice President, Business Operations Group and Regulatory Affairs, Edison Electric Institute
- Greg Poulos, Executive Director, Consumer Advocates of the PJM States

*1:30 p.m.–1:40 p.m.:* Break

*1:40 p.m.–3:30 p.m.:* Panel 2: Capacity Market Design Reforms

This panel will focus on market design reforms that could better achieve the objectives of PJM's capacity market, including those currently under consideration in PJM's Critical Issue Fast Path stakeholder process. We suggest panelists be prepared to discuss questions such as (1) what reforms might improve the capacity auction's ability to send efficient signals for entry and exit?; (2) what changes might send more efficient signals for resources to perform in real-time?; and (3) what other changes to PJM's current capacity market design might better achieve its objectives?

*Panelists*

- Adam Keech, Vice President of Market Design and Economics, PJM Interconnection, L.L.C.
- Joseph Bowring, President, Monitoring Analytics, Inc.
- Glen Thomas, President, PJM Power Providers Group
- Marji Philips, Senior Vice President, Wholesale Market Policy, LS Power
- Todd Snitchler, President and CEO, Electric Power Supply Association
- Michelle Bloodworth, President and CEO, America's Power
- Susan Bruce, PJM Industrial Customer Coalition
- Casey Roberts, Senior Attorney, Sierra Club
- James Wilson, Principle, Wilson Energy Economics

*3:30 p.m.–3:40 p.m.:* Break

*3:40 p.m.–4:40 p.m.:* Panel 3: Roundtable with State Representatives

This panel will be a roundtable with state Commissioners and other state representatives that will reflect on discussions in the first and second panels. This panel may include discussion on how the PJM capacity market has been functioning and potential changes.

*Panelists*

- Dan Conway, Commissioner, Public Utilities Commission of Ohio
- Joe Fiordaliso, President, New Jersey Board of Public Utilities
- Kent Chandler, Chairman, Kentucky Public Service Commission
- Emile Thompson, Chairman, District of Columbia Public Service Commission
- William Fields, Deputy People's Counsel, Maryland Office of People's Counsel
- Ruth Ann Price, Deputy Public Advocate, Delaware Division of the Public Advocate

*4:40 p.m.–5:00 p.m.:* Closing Remarks

[FR Doc. 2023–11416 Filed 5–26–23; 8:45 am]

BILLING CODE 6717–01–P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER19–1634–003; ER14–152–012; ER13–1141–006; ER13–1142–006; ER13–1143–009; ER13–1144–009; ER20–2452–004; ER20–2453–005; ER20–844–003; ER10–2196–008; ER20–528–003; ER17–1849–007; ER19–1009–002; ER16–918–005; ER10–2740–016; ER19–1633–003; ER15–1657–013; ER19–1638–003.

*Applicants:* Tiverton Power LLC, SEPG Energy Marketing Services, LLC, Rumford Power LLC, Rocky Road Power, LLC, Rhode Island State Energy Center, LP, Revere Power, LLC, Nautilus Power, LLC, Lincoln Power, L.L.C., Lakewood Cogeneration Limited Partnership, Hamilton Projects Acquiror, LLC, Hamilton Patriot LLC, Hamilton Liberty LLC, Essential Power Rock Springs, LLC, Essential Power OPP, LLC, Essential Power Newington, LLC, Essential Power Massachusetts, LLC, Elgin Energy Center, LLC, Bridgeport Energy LLC.

*Description:* Supplement to December 30, 2022, Triennial Market Power Analysis for Northeast Region of Lakewood Cogeneration Limited Partnership, et al.

*Filed Date:* 5/22/23.

*Accession Number:* 20230522–5120.

*Comment Date:* 5 p.m. ET 6/12/23.

*Docket Numbers:* ER22–1166–001.

*Applicants:* Duke Energy Florida, LLC, Duke Energy Progress, LLC, Duke Energy Carolinas, LLC.

*Description:* Compliance filing: Duke Energy Florida, LLC submits tariff filing per 35: Updated 676 Compliance Filing Docket No. ER22–1166–000 to be effective 2/23/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5138.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1495–001.

*Applicants:* SEP II, LLC.

*Description:* Tariff Amendment: SEP II Amendment to a Pending Filing to be effective 3/30/2023.

*Filed Date:* 5/22/23.

*Accession Number:* 20230522–5165.

*Comment Date:* 5 p.m. ET 6/12/23.

*Docket Numbers:* ER23–1932–000.

*Applicants:* Tri-State Generation and Transmission Association, Inc.

*Description:* § 205(d) Rate Filing: Initial Filing of Rate Schedule FERC No. 355 to be effective 4/21/2023.

*Filed Date:* 5/22/23.

*Accession Number:* 20230522–5166.

*Comment Date:* 5 p.m. ET 6/12/23.

*Docket Numbers:* ER23–1933–000.

*Applicants:* Tri-State Generation and Transmission Association, Inc.

*Description:* § 205(d) Rate Filing: Amendment to Service Agreement FERC No. 804 to be effective 4/19/2023.

*Filed Date:* 5/22/23.

*Accession Number:* 20230522–5174.

*Comment Date:* 5 p.m. ET 6/12/23.

*Docket Numbers:* ER23–1934–000.

*Applicants:* Idaho Power Company.

*Description:* § 205(d) Rate Filing: SA 467—IPC–PAC Kinport Construction Agreement to be effective 4/14/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5000.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1934–000.

*Applicants:* Idaho Power Company.

*Description:* Filing Withdrawal: Withdrawal of SA 467 to be effective N/A.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5190.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1935–000.

*Applicants:* Idaho Power Company.

*Description:* § 205(d) Rate Filing: SA #468—IPC–PAC MidPoint Construction Agreement to be effective 4/14/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5001.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1936–000.

*Applicants:* Elektron Power LLC.

*Description:* Baseline eTariff Filing: Elektron Power LLC MBR Application to be effective 5/23/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5044.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1937–000.

*Applicants:* Arizona Public Service Company.

*Description:* § 205(d) Rate Filing: Service Agreement No. 402, Amendment No. 1 to be effective 7/23/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5087.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1938–000.

*Applicants:* Northern States Power Company, a Minnesota corporation.

*Description:* § 205(d) Rate Filing: 2023–05–23 GRE SISA Laketown 738–NSP to be effective 5/24/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5096.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1939–000.

*Applicants:* Pike Solar LLC.

*Description:* Baseline eTariff Filing: Pike Solar MBR to be effective 7/20/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5102.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1940–000.

*Applicants:* Midcontinent Independent System Operator, Inc., Great River Energy.

*Description:* Compliance filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35: 2023–05–23_GRE Schedule 50 Cost Recovery to be effective N/A.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5103.

*Comment Date:* 5 p.m. ET 6/13/23.

*Docket Numbers:* ER23–1941–000.

*Applicants:* Carson Hybrid Energy Storage LLC.

*Description:* Tariff Amendment: Notice of Cancellation to be effective 5/24/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5183.

*Comment Date:* 5 p.m. ET 6/13/23.

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 23, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–11415 Filed 5–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

### Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas & Oil Pipeline Rate and Refund Report filings:

**Filings Instituting Proceedings**

*Docket Numbers:* RP23–776–000.

*Applicants:* Transcontinental Gas Pipe Line Company, LLC.

*Description:* Compliance filing: Rate Schedule S–2 OFO Refund Report May 2023 to be effective N/A.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5004.

*Comment Date:* 5 p.m. ET 6/5/23.

*Docket Numbers:* RP23–777–000.

*Applicants:* El Paso Natural Gas Company, L.L.C.

*Description:* § 4(d) Rate Filing: Negotiated Rate Agreement Update (SRP July 2023) to be effective 7/1/2023.

*Filed Date:* 5/23/23.

*Accession Number:* 20230523–5093.

*Comment Date:* 5 p.m. ET 6/5/23.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: May 23, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–11414 Filed 5–26–23; 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:* EG23–162–000.

*Applicants:* SMT Mission LLC.

*Description:* SMT Mission LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5143.

*Comment Date:* 5 p.m. ET 6/8/23.

*Docket Numbers:* EG23–163–000.

*Applicants:* SMT Los Fresnos LLC.

*Description:* SMT Los Fresnos LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5144.

*Comment Date:* 5 p.m. ET 6/8/23.

*Docket Numbers:* EG23–164–000.

*Applicants:* SMT Rio Grande LLC.

*Description:* SMT Rio Grande LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5152.

*Comment Date:* 5 p.m. ET 6/8/23.

*Docket Numbers:* EG23–165–000.

*Applicants:* SMT Rio Grande II LLC.

*Description:* SMT Rio Grande II LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5166.

*Comment Date:* 5 p.m. ET 6/8/23.

*Docket Numbers:* EG23–166–000.

*Applicants:* SMT Harlingen II LLC.

*Description:* SMT Harlingen II LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5188.

*Comment Date:* 5 p.m. ET 6/8/23.

*Docket Numbers:* EG23–167–000.

*Applicants:* Appaloosa Solar I, LLC.

*Description:* Appaloosa Solar I, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5192.

*Comment Date:* 5 p.m. ET 6/8/23.

*Docket Numbers:* EG23–168–000.

*Applicants:* Pome BESS LLC.

*Description:* Pome BESS LLC submits Notice of Self-Certification of Exempt Wholesale Status.

*Filed Date:* 5/18/23.

*Accession Number:* 20230518–5206.

*Comment Date:* 5 p.m. ET 6/8/23.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER16–407–001.
*Applicants:* Dominion Bridgeport Fuel Cell, LLC.
*Description:* Compliance filing: Bridgeport Fuel Cell, LLC submits tariff filing per 35: Notice of Succession filing to be effective 5/19/2023.
*Filed Date:* 5/18/23.
*Accession Number:* 20230518–5178.
*Comment Date:* 5 p.m. ET 6/8/23.
*Docket Numbers:* ER21–253–004.
*Applicants:* Monongahela Power Company, The Potomac Edison Company, West Penn Power Company, PJM Interconnection, L.L.C.
*Description:* Compliance filing: Monongahela Power Company submits tariff filing per 35: SFCs Compliance Filing to May 4, 2023 Order in ER21–253 to be effective 1/1/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5115.
*Comment Date:* 5 p.m. ET 6/9/23.
*Docket Numbers:* ER23–1918–000.
*Applicants:* CPV Saddleback Ridge Wind, LLC.
*Description:* § 205(d) Rate Filing: Notice of Succession to Shared Facilities Agreement Rate Schedule to be effective 5/19/2023.
*Filed Date:* 5/18/23.
*Accession Number:* 20230518–5147.
*Comment Date:* 5 p.m. ET 6/8/23.
*Docket Numbers:* ER23–1919–000.
*Applicants:* Northern States Power Company, a Wisconsin corporation.
*Description:* § 205(d) Rate Filing: 2023–05–18 DPC SISA-North Wal 170–NSP to be effective 5/19/2023.
*Filed Date:* 5/18/23.
*Accession Number:* 20230518–5148.
*Comment Date:* 5 p.m. ET 6/8/23.
*Docket Numbers:* ER23–1920–000.
*Applicants:* CPV Canton Mountain Wind, LLC.
*Description:* § 205(d) Rate Filing: Notice of Succession to Certificate of Concurrence to be effective 5/19/2023.
*Filed Date:* 5/18/23.
*Accession Number:* 20230518–5149.
*Comment Date:* 5 p.m. ET 6/8/23.
*Docket Numbers:* ER23–1921–000.
*Applicants:* Southwest Power Pool, Inc.
*Description:* § 205(d) Rate Filing: 1636R28 Kansas Electric Power Cooperative, Inc. NITSA and NOA to be effective 5/1/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5032.
*Comment Date:* 5 p.m. ET 6/9/23.
*Docket Numbers:* ER23–1922–000.
*Applicants:* Southwest Power Pool, Inc.
*Description:* § 205(d) Rate Filing: Tariff Clean-Up Filing 2Q2023 to be effective 7/19/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5036.
*Comment Date:* 5 p.m. ET 6/9/23.
*Docket Numbers:* ER23–1923–000.
*Applicants:* Southwest Power Pool, Inc.
*Description:* § 205(d) Rate Filing: 3114R5 Resale Power Group of Iowa to be effective 5/1/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5051.
*Comment Date:* 5 p.m. ET 6/9/23.
*Docket Numbers:* ER23–1924–000.
*Applicants:* Midcontinent Independent System Operator, Inc., Republic Transmission, LLC.
*Description:* § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii: 2023–05–19_Republic Transmission Request for Incentive Rate Abandonment Recovery to be effective 7/19/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5077.
*Comment Date:* 5 p.m. ET 6/9/23.
*Docket Numbers:* ER23–1925–000.
*Applicants:* Virginia Electric and Power Company, PJM Interconnection, L.L.C.
*Description:* § 205(d) Rate Filing: Virginia Electric and Power Company submits tariff filing per 35.13(a)(2)(iii: VEPCO and DEP submit Amended Interconnection Agreement, SA No. 3453 to be effective 5/16/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5110.
*Comment Date:* 5 p.m. ET 6/9/23.
*Docket Numbers:* ER23–1928–000.
*Applicants:* Appaloosa Solar I, LLC.
*Description:* Baseline eTariff Filing: Appaloosa Solar I, LLC MBR Tariff to be effective 5/20/2023.
*Filed Date:* 5/19/23.
*Accession Number:* 20230519–5123.
*Comment Date:* 5 p.m. ET 6/9/23.

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 19, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–11408 Filed 5–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. IC23–12–000]**

### Commission Information Collection Activities (FERC–521); Comment Request; Extension

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Notice of information collection and request for comments.

**SUMMARY:** In compliance with the requirements of the Paperwork Reduction Act of 1995 (PRA), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on FERC–521 (Payments for Benefits from Headwater Improvements).

**DATES:** Comments on the collection of information are due July 31, 2023.

**ADDRESSES:** You may submit comments (identified by Docket No. IC23–12–000) by one of the following methods:

- *Electronic Filing (preferred):* 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:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
  - *Mail via any other service:* Federal Energy Regulatory Commission, Secretary of the Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

*Instructions:* All submissions must be formatted and filed in accordance with submission guidelines at: *https://www.ferc.gov/help/submission-guide.asp.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

*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/docs-filing/docs-filing.asp.*

**FOR FURTHER INFORMATION CONTACT:** Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663.

**SUPPLEMENTARY INFORMATION:**

*Title:* FERC–521, Payments for Benefits from Headwater Improvements.

*OMB Control No.:* 1902–0087.

*Type of Request:* Three-year extension of the FERC–521 information collection requirements with no changes to the reporting requirements.

*Abstract:* The purpose of FERC–521 is to implement information collections pursuant to section 10(f) of the Federal Power Act (FPA).[1] Under Section 10(f) licensees of unlicensed non-Federal hydroelectric power projects that are directly benefited by a headwater project must pay an equitable portion of the annual costs of interest, maintenance, and depreciation of the headwater project. This payment is called the headwater benefit payment. The Commission requires basic project information including location and storage capacity to be filed by the owner of any headwater project constructed by the United States, a licensee, or a pre-1920 permittee that is upstream from a non-Federal hydroelectric project.

*Type of Respondents:* There are two types of entities that respond, Federal and Non-Federal storage and hydropower project owners. The Federal entities that typically respond include the U.S. Army Corps of Engineers and the U.S. Department of Interior Bureau of Reclamation. The Non-Federal entities may consist of any Municipal or Non-Municipal hydropower project owner.

*Estimate of Annual Burden*[2] *and cost:*[3] The Commission estimates the total Public Reporting Burden for this information collection as:

FERC–521—PAYMENTS FOR BENEFITS FROM HEADWATER IMPROVEMENTS

| | Number of respondents | Annual number of responses per respondent | Total number of responses | Average burden & cost per response | Total annual burden hours & total annual cost | Cost per respondent ($) |
|---|---|---|---|---|---|---|
| | (1) | (2) | (1) * (2) = (3) | (4) | (3) * (4) = (5) | (5) ÷ (1) |
| Federal and Non-Federal project owners ..... | 3 | 1 | 3 | 40 hrs.; $3,640 ..... | 120 hrs.; $10,920 ..... | $3,640 |

The total estimated annual cost burden to each respondent is $3,640 [40 hours * $91.00/hour = $3,640].

*Comments:* 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 23, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–11398 Filed 5–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Project No. 15311–000]**

### Neptune Pumped Storage 2, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On May 8, 2023, Neptune Pumped Storage 2, 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 Soldier Camp Pumped Storage Project (or project). The project would be located on Lobster Creek in Curry County, OR, approximately 4 miles north of the Rogue River. 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.

Neptune Pumped Storage 2, LLC has proposed to construct: (1) an upper reservoir with a surface area of 50 acres and a storage volume of approximately 3,000 acre-feet created by a 5,600-foot-long, 70-foot-high rockfill embankment ring dike; (2) a lower reservoir with a surface area of 50 acres and a storage volume of approximately 3,000 acre-feet created by a 5,700-foot-long, 70-foot-high rockfill embankment ring dike; (3) a 1,825 foot-long steel and concrete penstock with a diameter of 22-feet; (4) a 550-foot-long, 120-foot-wide concrete powerhouse/pump station located on the lower reservoir shoreline containing 6 generating/pumping units for a total generating capacity of 550 MW; (5) an approximate 13-mile, 230-kilovolt (kV) transmission line from a proposed substation near the powerhouse to an existing substation on Nesika Beach Dump Rd that would interconnect to the regional transmission grid; (6) an approximately 1.7-mile-long underground pipeline with a 100 cfs capacity and a diameter of 2.5-feet diverting water from Lobster Creek for initial fill and annual maintenance fill; and, (7) appurtenant facilities. The proposed project would be operated as a closed-loop system and generate an estimated annual average of 1,606 gigawatt-hours.

*Applicant Contact:* Mr. Nate Sandvig, Rye Development, LLC, 220 NW 8th Ave, Portland, OR, 97209, (503) 309–2496, *nathan@ryedevelopment.com.*

*FERC Contact:* Jeffrey Ackley at *jeffrey.ackley@ferc.gov.*

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of

[1] 16 U.S.C. 803.

[2] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 Code of Federal Regulations 1320.3.

[3] The estimates for cost per response are derived using the 2022 FERC average salary plus benefits of $188,922/year (or $91.00/hour). Commission staff finds that the work done for this information collection is typically done by wage categories similar to those at FERC.

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 *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* (866) 208–3676 (toll free), or (202) 502–8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–15311–000.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's website at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–15311–000) in the docket number field to access the document. For assistance, contact FERC Online Support.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: May 23, 2023.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2023–11397 Filed 5–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

**[Docket No. EL23–69–000]**

### Secure-the-Grid Coalition; Notice of Filing

Take notice that on May 15, 2023, pursuant to Rule 207 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.207 (2022), Secure-the-Grid Coalition (Petitioner) filed a request to the Commission to direct that the North American Electric Reliability Corporation create a new or modified physical security Reliability Standard.

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. All interventions, or protests must be filed on or before the comment date.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original copy of the pleading by U.S. mail to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions by any other courier in docketed proceedings should be delivered to, Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 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://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.

*Comment Date:* 5:00 Eastern Time on June 13, 2023.

Dated: May 23, 2023.

**Debbie-Anne A. Reese,**

*Deputy Secretary.*

[FR Doc. 2023–11412 Filed 5–26–23; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OAR–2023–0239; FRL–10952–01–OAR]**

### Proposed Information Collection Request; Comment Request; Recordkeeping and Reporting Requirements for Fuels Regulatory Streamlining

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency is planning to submit an information collection request (ICR). ''Recordkeeping and Reporting Requirements for Fuels Regulatory Streamlining (EPA ICR No. 2607.03, OMB Control No. 2060–0731) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through January 31, 2024. An Agency may not conduct, or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** Comments must be submitted on or before July 31, 2023.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–HQ–OAR–2023–0239, online using *www.regulations.gov* (our preferred method), by email to *a-and-r-Docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential

Business Information (CBI) or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** Anne-Marie Pastorkovich, Mail Code 6405A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460; telephone number: (202) 343–9623; email address: *pastorkovich.anne-marie@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, WJC West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The telephone number for the Docket Center is (202) 566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the Paperwork Reduction Act (PRA), EPA is soliciting comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** document to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

*Abstract:* This ICR is related to information collected under 40 CFR part 1090, Fuels Regulatory Streamlining. The final rule, entitled ''Fuels Regulatory Streamlining'' has been published in the **Federal Register**. In general, the information to be collected will be used to ensure that gasoline meets standards for sulfur, benzene, RVP and oxygenate blending, and that diesel fuel meets the appropriate standard for sulfur. These fuel standards are designed to protect human health and the environment, and to reduce the harmful effects of emissions from motor vehicles and motor vehicle fuels.

The recordkeeping and reporting associated with each party is directly related to that party's opportunity to create, control, or alter the product's characteristics. Parties who manufacture fuels (*e.g.,* refiners) generally have more recordkeeping and reporting requirements than those who merely distribute them.

The information under this ICR will be collected by the EPA's Compliance Division, within the Office of Transportation and Air Quality, Office of Air and Radiation, and by the EPA's Air Enforcement Division, within the Office of Civil Enforcement, Office of Enforcement and Compliance Assurance. The information collected will be used by the EPA to evaluate compliance with the fuel quality requirements of part 1090 under the final rule. This oversight by EPA is necessary to ensure the goals of the Clean Air Act are met. Proprietary information (*i.e.,* information claimed as CBI) may be submitted by regulated parties; such information must be clearly marked by the submitter. Information claimed as CBI by the submitter will be handled in accordance with EPA regulations at 40 CFR part 2 and established Agency procedures. Registration and reporting activities will be conducted via EPA systems that will provide a method of identifying information claimed as CBI by the submitter (*e.g.,* reporting formats contain a Y/N field asking submitters if they would like to claim the information as CBI).

*Form numbers:* EPA form numbers 5900–364, 5900–474, 5900–475, 5900–476, 5900–477, 5900–478, 5900–479, 5900–480, 5900–624, 5900–625, 5900–626, 5900–627, 5900–628, 5900–629, 5900–630.

*Respondents/affected entities:*

- Manufacturers of fuels—including refiners of gasoline and diesel.
- Manufacturers of regulated blendstocks, such as those who manufacturer butane, pentane, ethanol denaturant.
- Blenders, including those who blend oxygenate and detergent into gasoline.
- Transmix processors and blenders.
- Additive manufacturers, including those who produce oxygenate, detergent, or other additives.
- Parties in fuel distribution system, including pipelines, terminals, trucks, wholesale, and retail gasoline stations.
- Third parties who submit reports on behalf of the parties listed above, such as laboratories, auditors, and surveyors.

*Respondent's obligation to respond:* Mandatory, under 40 CFR part 1090.

*Estimated number of respondents:* 134,918 (total).

*Frequency of response:* Annually, quarterly, on occasion.

*Total estimated burden:* 550,205 hours (per year). Burden is defined at 5 CFR 1320.03(b).

*Total estimated cost:* $37,542,321 (per year), includes $5,744,016 annualized capital or operation & maintenance costs.

*Changes in estimates:* The OMB inventory for the expiring collection is 7,905,905 responses; for this renewal, the total will be 7,926,769. The change is an increase of 20,864 responses. The OMB inventory for the expiring collection is 608,992 hours; for the renewal, the total will be 550,205 hours. The change is a decrease of (58,787). The total cost for the expiring collection is $36,787,434; for the renewal, the total will be $37,542,321. The change is an increase of $754,887. Most of the change is due to minor updates to assumptions about respondents or time required to report. Decrease in hours is expected because most parties will have completed registration and other initial changes and updates by now. It should be noted that we changed our multiplier for calculating purchased services, based upon consultation with industry on the RFS ICR renewal (OMB Control No. 2060–0725); specifically, we now use a 2.5 multiplier to calculate purchased services cost rather than 2.0. This is based upon feedback from industry about increased overhead/benefit costs.

**Byron J. Bunker,**

*Director, Compliance Division, Office of Transportation and Air Quality.*

[FR Doc. 2023–11402 Filed 5–26–23; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–0405; FR ID 143030]**

### Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as

required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before July 31, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control Number:* 3060–0405.

*Title:* Form 2100, Schedule 349—FM Translator or FM Booster Station Construction Permit Application.

*Form Number:* FCC Form 2100, Schedule 349.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit entities; State, Local or Tribal Government; Not-for-profit institutions.

*Number of Respondents and Responses:* 1,250 respondents; 3,750 responses.

*Estimated Time per Response:* 0.5 hours–1.5 hours.

*Frequency of Response:* On occasion reporting requirement; Third party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 4,050 hours.

*Total Annual Cost:* $4,447,539.

*Needs and Uses:* The Commission is requesting an extension of this information collection in order to receive approval/clearance from the Office of Management and Budget (OMB) for three years.

Form 2100, Schedule 349, FM Translator or FM Booster Station Construction Permit Application, is used to apply for authority to construct a new FM translator or FM booster broadcast station, or to make changes in the existing facilities of such stations.

*Schedule 349's Online Notice (third party disclosure) Requirement; 47 CFR 73.3580.* Schedule 349 also contains a third-party disclosure requirement, pursuant to 47 CFR 73.3580. Section 73.3580, as amended in the Commission's *2020 Public Notice Second Report and Order,* discussed below, requires local public notice of the filing of all applications to construct a new broadcast station, including an FM translator or booster station. Notice is given by an applicant posting notice of the application filing on its station website, its licensee website, its parent entity website, or on a publicly accessible, locally targeted website, for 30 consecutive days beginning within five business days of acceptance of the application for filing. The online notice must link to a copy of the application as filed in the Commission's LMS licensing database.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–11399 Filed 5–26–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–1124; FR ID 143031]**

### Information Collection Being Reviewed by the Federal Communications Commission

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the Federal Communications Commission (FCC or Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collections. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. The FCC may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

**DATES:** Written PRA comments should be submitted on or before July 31, 2023. If you anticipate that you will be submitting comments but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

**ADDRESSES:** Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

**FOR FURTHER INFORMATION CONTACT:** For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

**SUPPLEMENTARY INFORMATION:**

*OMB Control No.:* 3060–1124.

*Title:* 80.231, Technical Requirements for Class B Automatic Identification System (AIS) Equipment.

*Form No.:* Not applicable.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Business or other for-profit entities.

*Number of Respondents:* 20 respondents; 50,020 responses.

*Estimated Time per Response:* 1 hour per requirement.

*Frequency of Response:* On occasion reporting requirement and third-party disclosure requirement.

*Obligation to Respond:* Required to obtain or retain benefits. Statutory

authority for this information collection is contained in 47 U.S.C. 154, 303, 307(e), 309 and 332 of the Communications Act of 1934, as amended.

*Total Annual Burden:* 50,020 hours.

*Annual Cost Burden:* $25,000.

*Needs and Uses:* On September 19, 2008, the Commission adopted a Second Report and Order, FCC 08–208, which added a new section 80.231, which requires that manufacturers of Class B Automatic Identification Systems (AIS) transmitters for the Marine Radio Service include with each transmitting device a statement explaining how to enter static information accurately and a warning statement that entering inaccurate information is prohibited. The Commission is seeking to extend this collection in order to obtain the full three-year clearance from OMB. Specifically, the information collection requires that manufacturers of AIS transmitters label each transmitting device with the following statement: *WARNING:* It is a violation of the rules of the Federal Communications Commission to input an MMSI that has not been properly assigned to the end user, or to otherwise input any inaccurate data in this device. Additionally, prior to submitting a certification application (FCC Form 731, OMB Control Number 3060–0057) for a Class B AIS device, the following information must be submitted in duplicate to the Commandant (CG–521), U.S. Coast Guard, 2100 2nd Street SW, Washington, DC 20593–0001: (1) The name of the manufacturer or grantee and the model number of the AIS device; and (2) copies of the test report and test data obtained from the test facility showing that the device complies with the environmental and operational requirements identified in IEC 62287–1. After reviewing the information described in the certification application, the U.S. Coast Guard will issue a letter stating whether the AIS device satisfies all of the requirements specified in IEC 62287–1. A certification application for an AIS device submitted to the Commission must contain a copy of the U.S. Coast Guard letter stating that the device satisfies all of the requirements specified in IEC–62287–1, a copy of the technical test data and the instruction manual(s).

These reporting and third-party disclosure requirements aid the Commission monitoring advance marine vessel tracking and navigation information transmitted from Class B AIS devices to ensure that they are accurate and reliable, while promoting marine safety.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–11404 Filed 5–26–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL COMMUNICATIONS COMMISSION

**[OMB 3060–1149; FR ID 143247]**

### Information Collection Being Submitted for Review and Approval to Office of Management and Budget

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Pursuant to the Small Business Paperwork Relief Act of 2002, the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission may not conduct or sponsor a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

**DATES:** Written comments and recommendations for the proposed information collection should be submitted on or before June 29, 2023.

**ADDRESSES:** Comments should be sent 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. Your comment must be submitted into *www.reginfo.gov* per the above instructions for it to be considered. In addition to submitting in *www.reginfo.gov* also send a copy of your comment on the proposed information collection to Nicole Ongele, FCC, via email to *PRA@fcc.gov* and to *Nicole.Ongele@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** below.

**FOR FURTHER INFORMATION CONTACT:** For additional information or copies of the information collection, contact Nicole Ongele at (202) 418–2991. To view a copy of this information collection request (ICR) submitted to OMB: (1) go to the web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

**SUPPLEMENTARY INFORMATION:** As part of its continuing effort to reduce paperwork burdens, as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the FCC invited the general public and other Federal Agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. Pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the FCC seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

*OMB Control Number:* 3060–1149.

*Title:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

*Form Number:* N/A.

*Type of Review:* Extension of a currently approved collection.

*Respondents:* Individuals or households, Business or other for-profit, Not-for-profit institutions, and State, Local, or Tribal government.

*Number of Respondents and Responses:* 259,600 respondents and 259,600 responses.

*Estimated Time per Response:* .166 hours (10 minutes).

*Frequency of Response:* One-time reporting requirement.

*Obligation to Respond:* Voluntary.

*Total Annual Burden:* 43,267 hours.

*Total Annual Cost:* No cost.

*Needs and Uses:* The information collection activity will garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or change in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management. Feedback collected under this generic clearance will provide useful information, but it will not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods of assessing potential nonresponse bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

Federal Communications Commission.

**Marlene Dortch,**

*Secretary, Office of the Secretary.*

[FR Doc. 2023–11400 Filed 5–26–23; 8:45 am]

**BILLING CODE 6712–01–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Notice to All Interested Parties of Intent To Terminate Receivership

*Notice is hereby given* that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institution listed below, intends to terminate its receivership for said institution.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIP

| Fund | Receivership name | City | State | Date of appointment of receiver |
|---|---|---|---|---|
| 10363 ..... | The Park Avenue Bank ..... | Valdosta ..... | GA ..... | 04/29/2011 |

The liquidation of the assets for the receivership has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors. Based upon the foregoing, the Receiver has determined that the continued existence of the receivership will serve no useful purpose. Consequently, notice is given that the receivership shall be terminated, to be effective no sooner than thirty days after the date of this notice. If any person wishes to comment concerning the termination of the receivership, such comment must be made in writing, identify the receivership to which the comment pertains, and sent within thirty days of the date of this notice to: Federal Deposit Insurance Corporation, Division of Resolutions and Receiverships, Attention: Receivership Oversight Section, 600 North Pearl, Suite 700, Dallas, TX 75201. No comments concerning the termination of this receivership will be considered which are not sent within this time frame.

(Authority: 12 U.S.C. 1819)

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on May 24, 2023.

**James P. Sheesley,**

*Assistant Executive Secretary.*

[FR Doc. 2023–11385 Filed 5–26–23; 8:45 am]

**BILLING CODE 6714–01–P**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Meetings

**TIME AND DATE:** Thursday, June 1, 2023 at 10:30 a.m.

**PLACE:** Hybrid Meeting: 1050 First Street NE, Washington, DC (12th Floor) and virtual.

**Note:** For those attending the meeting in person, current COVID–19 safety protocols for visitors, which are based on the CDC COVID–19 hospital admission level in Washington, DC, will be updated on the commission's contact page by the Monday before the meeting. See the contact page at *https://www.fec.gov/contact/.* If you would like to virtually access the meeting, see the instructions below.

**STATUS:** The June 1, 2023 Open Meeting has been canceled.

**CONTACT PERSON FOR MORE INFORMATION:** Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Individuals who plan to attend in person and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Laura E. Sinram, Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the meeting date.

(Authority: Government in the Sunshine Act, 5 U.S.C. 552b)

**Vicktoria J. Allen,**

*Deputy Secretary of the Commission.*

[FR Doc. 2023–11566 Filed 5–25–23; 4:15 pm]

**BILLING CODE 6715–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–855S]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments must be received by July 31, 2023.

**ADDRESSES:** When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: __, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

**FOR FURTHER INFORMATION CONTACT:** William N. Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:**

**Contents**

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–855S Medicare Enrollment Application—Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Suppliers

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

**Information Collection**

1. *Type of Information Collection Request:* Revision of the currently approved collection; *Title of Information Collection:* Medicare Enrollment Application—Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) Suppliers; *Use:* The primary function of the Form CMS–855S Medicare enrollment application for suppliers of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) is to gather information from the supplier that tells us who the supplier is, whether the supplier meets certain qualifications to be a Medicare DMEPOS supplier, where the supplier practices or renders services, and other information necessary to establish correct claims payments. *Form Number:* CMS–855S (OMB control number: 0938–1056); *Frequency:* Yearly; *Affected Public:* Private Sector, Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 32,790; *Total Annual Responses:* 32,790; *Total Annual Hours:* 67,886. (For policy questions regarding this collection contact Frank Whelan at 410–786–1302.)

Dated: May 24, 2023.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2023–11401 Filed 5–26–23; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[Document Identifier: CMS–10728, CMS–10834, CMS–4040, CMS–R–297 and CMS–2728]**

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**DATES:** Comments on the collection(s) of information must be received by the OMB desk officer by *June 29, 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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

**FOR FURTHER INFORMATION CONTACT:** William Parham at (410) 786–4669.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Value in Opioid Use Disorder Treatment Demonstration; *Use:* Value in Opioid Use Disorder Treatment (Value in Treatment) is a 4-year demonstration program authorized under section 1866F of the Social Security Act (Act), which was added by section 6042 of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act). The purpose of Value in Treatment, as stated in the statute, is to ''increase access of applicable beneficiaries to opioid use disorder treatment services, improve physical and mental health outcomes for such beneficiaries, and to the extent possible, reduce Medicare program expenditures.'' As required by statute, Value in Treatment was implemented January 1, 2021. Section 1866F(c)(1)(A)(ii) specifies that individuals and entities must apply for and be selected to participate in the Value in Treatment demonstration pursuant to an application and selection process established by the Secretary.

Section 1866F(c)(2)(B)(iii) specifies that in order to receive CMF and performance-based incentive payments under the Value in Treatment program, each participant shall report data necessary to: monitor and evaluate the Value in Treatment program; determine if criteria are met; and determine the performance-based incentive payment. *Form Number:* CMS–10728 (OMB control number: 0938–1388); *Frequency:* Annually; *Affected Public:* Individuals and Households; *Number of Respondents:* 388; *Total Annual Responses:* 388; *Total Annual Hours:* 282. (For policy questions regarding this collection contact Rebecca VanAmburg) at 410–786–0524.)

2. *Type of Information Collection Request:* New collection (Request for a new OMB control number); *Title of Information Collection:* Requirement for Electronic Prescribing for Controlled Substances (EPCS) for a Covered Part D Drug Under a Prescription Drug Plan or an MA–PD Plan; *Use:* Section 2003 of the SUPPORT for Patients and Communities Act of 2018 requires that prescribing of a Schedule II, III, IV, and V controlled substance under Medicare Part D be done electronically in accordance with an electronic prescription drug program beginning January 1, 2021, subject to any exceptions, which HHS may specify. In the calendar year (CY) 2021 and 2022 Physician Fee Schedule (PFS) final rules, CMS finalized the electronic prescribing for controlled substances (EPCS) requirements and exceptions at 42 CFR 423.160(a)(5). Compliance for prescribers not in long-term care facilities begins in CY 2023. Compliance for prescribers in long-term care facilities begins in CY 2025.

EPCS requirements do not require prescribers or pharmacies to submit additional data to CMS; however, CMS did finalize one exception that requires data collection. The EPCS exception, at § 423.160(a)(5)(iv), requires a prescriber to apply for a waiver if the prescriber is unable to conduct EPCS due to circumstances beyond the prescriber's control. This collection of information is necessary to provide adequate and timely exception from the EPCS requirements if the prescriber is unable to conduct EPCS due to circumstances beyond the prescriber's control. *Form Number:* CMS–10834 (OMB control number: 0938–NEW); *Frequency:* Annually; *Affected Public:* Private Sector (Business or other for-profits, Not-for-Profit Institutions), and Public sector (State, Local or Tribal Governments); *Number of Respondents:* 100; *Total Annual Responses:* 100; *Total Annual Hours:* 17. (For policy questions regarding this collection contact Mei Zhang at (410) 786–7837).

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Request for Enrollment in Supplementary Medical Insurance (SMI); *Use:* CMS regulations 42 CFR 407.11 lists the CMS–4040 as the application to be used by individuals who are not eligible for monthly Social Security/Railroad Retirement Board benefits or free Part A. The CMS–4040 solicits the information that is used to determine entitlement for individuals who meet the requirements in section 1836 as well as the entitlement of the applicant or their spouses to an annuity paid by OPM for premium deduction purposes. The application follows the application questions and requirements used by SSA. This is done not only for consistency purposes but to comply with other Title II and Title XVIII requirements because eligibility to Title II benefits and free Part A under Title XVIII must be ruled out in order to qualify for enrollment in Part B only. *Form Number:* CMS–4040 (OMB control number: 0938–0245); *Frequency:* Once; *Affected Public:* Individuals or households; *Number of Respondents:* 42,011; *Total Annual Responses:* 42,011; *Total Annual Hours:* 10,503. (For policy questions regarding this collection contact Carla Patterson at 410–786–8911.)

4. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Request for Employment Information; *Use:* The form CMS–L564, also referred to as CMS–R–297, is used, in conjunction with form CMS–40–B, Application for Supplementary Medical Insurance, during an individual's special enrollment period (SEP). Completed by an employer, the CMS–L564 provides proof of an applicant's employer group health coverage. The Social Security Administration (SSA) uses it to obtain information from employers regarding whether a Medicare beneficiary's coverage under a group health plan is based on current employment status. The form is available online via *Medicare.gov* and *CMS.gov* for individuals who are requesting the SEP to obtain and submit to their employer for completion. The employer must complete and sign the form, and submit it to the individual to accompany their enrollment or late enrollment penalty reduction request. The information on the completed form is reviewed

manually by SSA. *Form Number:* CMS–R–297 (OMB control number: 0938–0787); *Frequency:* Once; *Affected Public:* Individuals or households, Business or other for-profits, Not-for-profit institutions; *Number of Respondents:* 676,526; *Total Annual Responses:* 676,526; *Total Annual Hours:* 56,355. (For policy questions regarding this collection contact Carla Patterson at 410–786–8911.)

5. *Type of Information Collection Request:* Reinstatement with change of a previously approved collection; *Title of Information Collection:* End Stage Renal Disease Medical Evidence Report Medicare Entitlement and/or Patient Registration; *Use:* Section 226A (2) of the Social Security Act specifically states that a person must be ''medically determined to have end stage renal disease. . . .'' Similarly, Section 188(a) of the law states ''The benefits provided by parts A and B of this title shall include benefits for individuals who have been determined to have end stage renal disease as provided in Section 226A''. The End Stage Renal Disease (ESRD) Medical Evidence (CMS–2728) is completed for all ESRD patients either by the first treatment facility or by a Medicare-approved ESRD facility when it is determined by a physician that the patient's condition has reached that stage of renal impairment that a regular course of kidney dialysis or a kidney transplant is necessary to maintain life.

The data reported on the CMS–2728 is used by the Federal Government, ESRD Networks, treatment facilities, researchers and others to monitor and assess the quality and type of care provided to end stage renal disease beneficiaries. The data collection captures the specific medical information required to determine the Medicare medical eligibility of End Stage Renal Disease claimants. It also collects data for research and policy on this population.

The three main data systems available for evaluating the ESRD program and for monitoring epidemiology, access, and quality and reimbursement effects on quality are: (1) The United States Renal Data System (USRDS) provides basic data on patterns of incidence of ESRD in the United States. The USRDS database is intended to be used for biomedical research by investigators throughout the United States and abroad. The USRDS data is intended to supplement (and not replace) public use files produced by CMS. (2) United Network for Organ Sharing (UNOS) focus is on organ donation, transplantation and educational activities. (3) The ESRD Program Management and Medical System (PMMIS), maintained by CMS, provide the foundation data for the USRDS. This system, as required by Public Law 95–292, section C(1)(A), is designed to serve the needs of the Department of Health and Human Services in support of program analysis, policy development, and epidemiological research.

The ESRD PMMIS includes information on both Medicare and non-Medicare ESRD patients and on Medicare approved ESRD hospitals and dialysis facilities. The methods of ESRD data collection (*e.g.,* use of same forms, sharing of analysis) by CMS, UNOS, and USRDS have all agreed on a common data collection process that will provide needed additional information on the ESRD population.

Subsequent to publishing the 60-day **Federal Register** notice on December 15, 2022 (87 FR 76625), questions were added to the form and other were clarified. *Form Number:* CMS–2728 (OMB control number: 0938–0046); *Frequency:* Yearly; *Affected Public:* Private Sector (Business or other for-profits, Not-for-Profit Institutions); *Number of Respondents:* 7,828; *Total Annual Responses:* 138,000; *Total Annual Hours:* 138,000. (For policy questions regarding this collection contact Lisa Rees at (816) 426–6353).

Dated: May 24, 2023.

**William N. Parham, III,**

*Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.*

[FR Doc. 2023–11403 Filed 5–26–23; 8:45 am]

**BILLING CODE 4120–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for OMB Review; Child and Family Services Plan, Annual Progress and Services Report, and Annual Budget Expenses Request and Estimated Expenditures (CFS–101) (0970–0426)

**AGENCY:** Children's Bureau; Administration for Children and Families; United States Department of Health and Human Services.

**ACTION:** Request for public comment.

**SUMMARY:** The Administration for Children and Families (ACF) is requesting a 3-year extension of the collection of information under the Child and Family Services Plan (CFSP), the Annual Progress and Services Report (APSR), and the Annual Budget Expenses Request and Estimated Expenditures (Child and Family Services (CFS)–101): Office of Management and Budget (OMB) #0970–0426, expiration September 30, 2023. There are minor changes to the CFS–101 form and no changes to the burden hours.

**DATES:** *Comments due within 30 days of publication.* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of 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'' of by using the search function. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

**SUPPLEMENTARY INFORMATION:**

*Description:* Under title IV–B, subparts 1 and 2, of the Social Security Act (the Act), States, Territories, and tribes are required to submit a CFSP. The CFSP lays the groundwork for a system of coordinated, integrated, and culturally relevant family services for the subsequent 5 years (45 CFR 1357.15(a)(1)). The CFSP outlines initiatives and activities the State, Tribe or Territory will carry out in administering programs and services to promote the safety, permanency, and well-being of children and families, including, as applicable, those activities conducted under the John H. Chafee Foster Care Program for Successful Transition to Adulthood (section 477 of the Act); and the State grant authorized by the Child Abuse Prevention and Treatment Act (CAPTA). By June 30 of each year, States, Territories, and Tribes are also required to submit an APSR and a financial report called the CFS–101. The APSR is a yearly report that discusses progress made by a State, Territory or Tribe in accomplishing the goals and objectives cited in its CFSP (45 CFR 1357.16(a)). The APSR contains new and updated information about service needs and organizational capacities throughout the 5-year plan period and includes information on the use of the Family First Transition Grants and Funding Certainty Grants authorized by the Family First

Transition Act included in Public Law 116–94. The CFS–101 has three parts. Part I is an annual budget request for the upcoming fiscal year. Part II includes a summary of planned expenditures by program area for the upcoming fiscal year, the estimated number of individuals or families to be served, and the geographical service area. Part III includes actual expenditures by program area, numbers of families and individuals served by program area, and the geographic areas served for the last complete fiscal year.

*Respondents:* States, Territories, and Tribes must complete the CFSP, APSR, and CFS–101. Tribes and Territories are exempted from the monthly caseworker visits reporting requirement of the CFSP/APSR. There are approximately 180 tribal entities that currently receive IV–B funding. There are 53 States (including Puerto Rico, the District of Columbia, and the Virgin Islands) that must complete the CFSP, APSR, and CFS–101. There are a total of 233 possible respondents.

ANNUAL BURDEN ESTIMATES

| Instrument | Total number of respondents | Total number of responses per respondent | Average burden hours per response | Total burden hours | Annual burden hours |
|---|---|---|---|---|---|
| APSR | 233 | 3 | 82 | 57,318 | 19,106 |
| CFSP | 47 | 1 | 123 | 5,781 | 1,927 |
| CFS–101, Part I, II, and III | 233 | 3 | 5 | 3,495 | 1,165 |
| Caseworker Visits | 53 | 3 | 99.33 | 15,794 | 5,265 |

*Estimated Total Annual Burden Hours:* 27,463.

*Authority:* Title IV–B, subparts 1 and 2 of the Social Security Act (the Act), and title IV–E, section 477 of the Act; sections 106 and 108 of CAPTA (42 U.S.C. 5106a. and 5106d.); and Public Law 116–94, the Family First Transition Act within section 602, subtitle F, title I, division N of the Further Consolidated Appropriations Act, 2020.

**Mary B. Jones,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2023–11378 Filed 5–26–23; 8:45 am]

**BILLING CODE 4184–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Administration for Children and Families

### Submission for Office of Management and Budget Review; Operation Allies Welcome Afghan Supplement Survey (New Collection)

**AGENCY:** Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services.

**ACTION:** Request for public comments.

**SUMMARY:** The Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services is proposing to collect data for a new Operation Allies Welcome (OAW) Afghan Supplement Survey.

**DATES:** *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of 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. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

**SUPPLEMENTARY INFORMATION:**

*Description:* Under the Afghanistan Supplemental Appropriations Act, 2022, and Additional Afghanistan Supplemental Appropriations Act, 2022, Congress authorized ORR to provide resettlement assistance and other benefits available to refugees to specific Afghan populations in response to their emergency evacuation and resettlement. The OAW Afghan Supplement Survey is a sample survey of Afghan households entering the United States under OAW, collecting both household- and individual-level information. It will generate nationally representative data on OAW Afghans' well-being, integration outcomes, and progress towards self-sufficiency. Data collected will help ORR and service providers better understand the impact of services and on-going service needs of OAW Afghan populations.

*Respondents:* OAW Afghan populations.

ANNUAL BURDEN ESTIMATES

| Instrument | Total number of respondents | Total number of responses per respondent | Average burden hours per response | Total/annual burden hours * |
|---|---|---|---|---|
| OAW Afghan Supplement Survey Contact Update Requests | 1,100 | 1 | 0.05 | 55 |
| OAW Afghan Supplement Survey | 1,100 | 1 | 0.92 | 1,012 |

* Survey is one-time and will be completed within the 1st year.

*Estimated Total Annual Burden Hours:* 1,067.

**Authority**

Division C, Title III, Public Law 117–43, 135 Stat. 374
Division B, Title III, Public Law 117–70, 1102 Stat. 4

**Mary B. Jones,**

*ACF/OPRE Certifying Officer.*

[FR Doc. 2023–11377 Filed 5–26–23; 8:45 am]

**BILLING CODE 4184–45–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection: Public Comment Request; Information Collection Request Title: Health Workforce Connector

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with the requirement for public comment on proposed data collection projects of the Paperwork Reduction Act of 1995, HRSA announces plans to submit an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). Prior to submitting the ICR to OMB, HRSA seeks comments from the public regarding the burden estimate, below, or any other aspect of the ICR.

**DATES:** Comments on this ICR should be received no later than July 31, 2023.

**ADDRESSES:** Submit your comments to *paperwork@hrsa.gov* or mail the HRSA Information Collection Clearance Officer, Room 14N39, 5600 Fishers Lane, Rockville, Maryland 20857.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, email *paperwork@hrsa.gov* or call Samantha Miller, the HRSA Information Collection Clearance Officer, at 301–443–3983.

**SUPPLEMENTARY INFORMATION:** When submitting comments or requesting information, please include the ICR title for reference.

*Information Collection Request Title:* Health Workforce Connector OMB No. 0906–0031—Revision.

*Abstract:* The Health Workforce Connector's (HWC) goal is to help connect skilled professionals to communities in need by allowing approved Site Points of Contact (POCs) at National Health Service Corps (NHSC), Nurse Corps Scholarship and Loan Repayment Programs (Nurse Corps), Substance Use Disorder Treatment and Recovery (STAR) Loan Repayment Program, Pediatric Specialty Loan Repayment Program (PS), Nursing Training, and Teaching Health Center Graduate Medical Education (THCGME) sites to post available opportunities and update site profiles. The HWC provides a central platform to connect participants, including but not limited to those in the NHSC, Nurse Corps, STAR, PS, Nursing Training, and THCGME programs with facilities that are approved for performance of their service obligation. The HWC has become a resource that connects any health care professional or student interested in providing primary care services in underserved communities with facilities in need of health care providers. The HWC also allows users to create a profile, search for approved sites, find job and training opportunities, and connect with other clinicians who are similarly interested in working with underserved populations. The HWC is searchable by Site POCs. Individuals can use the HWC's search capability with Google Maps.

The burden estimates below have changed from the estimates of burden provided in the previous notice (60-day notice published on August 12, 2020, vol. 85, No. 156, pp. 48708–09). The estimated burden total is significantly lower in this revised notice because it is based on the estimated total number of new users who will create accounts and publish profiles and does not include many existing program participants and site POCs who already have existing accounts.

*Need and Proposed Use of the Information:* Information will be collected from users in the following two ways:

(1) *Account Creation:* For job seekers, creating an account is optional. To create an account the user must enter their first name, last name, and email address. Those mandatory fields will be used to send an automated email allowing the user to validate their login credentials. In addition, for job seekers participating in the programs listed above, their HWC account will be linked to their existing program file in the Bureau of Health Workforce Management Information Systems Solution database and allow an initial import of existing data at the request of the user.

(2) *Profile Completion:* Users may fill out a profile, but this function will be optional and includes fields such as location, discipline, specialty, and languages spoken. The information collected, if published by the user, can be searched by approved Site POCs seeking potential candidates for health care job opportunities at their site. Job seekers also can set their security and privacy settings on their accounts to make their profiles searchable by other end users or private at any time. In addition, all information collected through the HWC will be stored within existing secure the Bureau of Health Workforce Management Information Systems Solution databases and will be used internally for report generation on an as-needed basis.

*Likely Respondents:* Potential users include individuals searching for a health care job opportunity at a NHSC, Nurse Corps, STAR, PS, Nursing Training, or THCGME approved health care facility and health care facility POCs searching for potential candidates to fill open health care job opportunities at their sites.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR is summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Form name | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (in hours) | Total burden hours |
|---|---|---|---|---|---|
| Account Creation | 5,008 | 1 | 5,008 | .08 | 400.64 |
| Complete Profile | 4,164 | 1 | 4,164 | 1.00 | 4,164 |
| Total | [1] 5,008 | | 5,008 | | 4,564.64 |

[1] The 4,164 respondents who complete their profiles are a subset of the 5,008 respondents who create accounts.

HRSA specifically requests comments on (1) the necessity and utility of the proposed information collection for the proper performance of the agency's functions, (2) the accuracy of the estimated burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2023–11418 Filed 5–26–23; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Submission to OMB for Review and Approval; Public Comment Request; Rural Public Health Workforce Training Network Program Data Collection

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

**DATES:** Comments on this ICR should be received no later than June 29, 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 Review—Open for Public Comments'' or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the HRSA Information Collection Clearance Officer, at *paperwork@hrsa.gov* or call (301) 594–4394.

**SUPPLEMENTARY INFORMATION:**

*Information Collection Request Title:* Rural Public Health Workforce Training Network Program Data Collection—OMB No. 0915–xxxx–NEW.

*Abstract:* The Rural Public Health Workforce Training Network (RPHWTN) Program Data Collection is authorized by section 330A(f) of the Public Health Service Act (42 U.S.C. 254c(f)). Furthermore, section 2501 of the American Rescue Plan Act of 2021 (ARP, Pub. L. 117–2) provides funding for the Department of Health and Human Services to carry out activities related to expanding and sustaining a public health workforce, including to respond to COVID–19. The RPHWTN program, which is managed by the Federal Office of Rural Health Policy at HRSA, intends to expand public health capacity by supporting health care job development, training, and placement in rural communities. This grant program intends to address the ongoing critical need for trained public health professionals in health care facilities serving rural communities by establishing networks that will develop formal training/certification programs. The long-term objective of this program is to enhance clinical and operational capacity to adequately address population health needs of rural communities negatively impacted by COVID–19, including long COVID–19. The HRSA Office of Planning, Analysis, and Evaluation will work with the Federal Office of Rural Health Policy to design and distribute surveys to RPHWTN grantees and trainees, which will serve as program data collection tools. Grantees will establish networks that support health care job development, training, and placement in rural communities. Trainees are individuals participating in the training programs made possible through the RPHTWN-supported networks established by program grantees. To accomplish RPHWTN program goals, HRSA would like to collect the following type of information from respondents:

- *From grantees:* training content, count of trainings and attendees, specific strategies in supporting patients with long COVID–19 and behavioral health needs, and trainee retention/completion.
- *From trainees:* limited demographic information (age, ZIP code, race, and ethnicity), skills needed to fulfill roles in specific tracks selected, skill assessment, professional and/or educational experience, and career goals/intentions.

A 60-day notice was published in the **Federal Register** on December 9, 2022, vol. 87, No. 236; pp. 75639–75640. There were no public comments.

*Need and Proposed Use of the Information:* Per OMB memo M–21–20, the ARP provides funding for critical resources to respond to the public health crisis the nation faces resulting from the COVID–19 pandemic. The memo emphasizes the need for a swift government-wide response, underscoring the need to ensure the public's trust in how the federal government implements ARP programs and distributes ARP funding. Accountability and transparency of federal government spending and achieving results are necessary for effective stewardship of these funds. To this end, federal awarding agencies must collect recipient performance reports in a manner that enables the federal government to articulate the outcomes of federal financial assistance to the American people. HRSA seeks to collect performance information that measures progress in achieving program goals and objectives, ensures payment integrity, and demonstrates equity-

oriented results—all while minimizing the reporting burden to federal financial assistance recipients. Data from grantees is necessary for understanding programmatic activities supported by this HRSA investment, providing program monitoring and oversight, assessing the sustainability of program-supported activities, and ultimately affording HRSA the insights and ability to make specific, evidence informed policy and program recommendations moving forward. To successfully accomplish the goals of this program in supporting job development and training, it is also crucial that HRSA receives a clear understanding of trainees' existing and needed skillsets, their reception to/feedback about the trainings they receive, and a sense of their potential career trajectories as they pertain to the workforce training tracks specified by HRSA in the program Notice of Funding Opportunity (HRSA–22–117). There are several consequences of the federal government not collecting the data for the RPHWTN program as described herein. These include: (1) the inability to monitor grant activities and therefore inability to ensure sufficient oversight of and accountability for this HRSA investment, (2) a lost opportunity to better understand the workforce capacity-building needs of the rural communities that HRSA serves, and (3) a failure to gather key information that could ultimately lead to more evidence informed policy and program recommendations in the future.

*Likely Respondents:* Respondents of these surveys will be RPHWTN grantees and trainees.

*Burden Statement:* Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

| Type of respondent | Form name | Number of respondents | Number of responses per respondent | Total responses | Average burden per response (hours) | Total burden hours |
|---|---|---|---|---|---|---|
| Grantees | Baseline Survey | 32 | 1 | 32 | 0.25 | 8.00 |
| | Follow-Up Survey | 32 | 2 | 64 | 0.13 | 8.53 |
| | Exit Survey | 32 | 1 | 32 | 0.25 | 8.00 |
| Trainees | Trainee Survey | 500 | 2 | 1,000 | 0.25 | 250.00 |
| Total | | 596 | | 1,128 | | 274.53 |

**Maria G. Button,**

*Director, Executive Secretariat.*

[FR Doc. 2023–11384 Filed 5–26–23; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Library of Medicine; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a 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 materials, 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 Library of Medicine Special Emphasis Panel; Conflicted Applications and R01–K99–R13.

*Date:* July 28, 2023.

*Time:* 11:00 a.m. to 4:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Library of Medicine, 8600 Rockville Pike, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Ali Sharma, Ph.D., Scientific Review Officer, Division of Extramural Programs, National Library of Medicine, NIH, 6705 Rockledge Drive, Suite 500, Bethesda, MD 20892–7968, *ali.sharma@nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: May 23, 2023.

**Miguelina Perez,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–11394 Filed 5–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 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 26, 2023.

*Time:* 1:30 p.m. to 5:30 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 3G56, Rockville, MD 20892 (Virtual Meeting).

*Contact Person:* Poonam Tewary, 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 3G56, Rockville, MD 20852, (301) 761–7219, *tewaryp@mail.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 23, 2023.

**Tyeshia M. Roberson-Curtis,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–11395 Filed 5–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### National Center for Complementary & Integrative Health; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Center for Complementary and Integrative Health Special Emphasis Panel; NCCIH Training and Education Review Panel (CT).

*Date:* June 29–30, 2023.

*Time:* 10 a.m. to 2 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Center for Complementary and Integrative Democracy II, 6707 Democracy Blvd., Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Michael Eric Authement, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH, NIH, 6707 Democracy Boulevard, Bethesda, MD 20817, *michael.authement@nih.gov*.

*Contact Person:* Jessica Marie McKlveen, Ph.D., Scientific Review Officer, Director, Office of Scientific Review, Division of Extramural Activities, NCCIH, NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20817, *jessica.mcklveen@nih.gov*.

*Name of Committee:* National Center for Complementary and Integrative Health Special Emphasis Panel; Pilot Projects Increasing the Impact of the NIH Centers for Advancing Research on Botanicals and Other Natural Products.

*Date:* June 30, 2023.

*Time:* 3 to 5 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Center for Complementary and Integrative Democracy II, 6707 Democracy Blvd., Bethesda, MD 20817 (Virtual Meeting).

*Contact Person:* Michael Eric Authement, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH, NIH, 6707 Democracy Boulevard, Bethesda, MD 20817, *michael.authement@nih.gov*.

*Contact Person:* Jessica Marie McKlveen, Ph.D., Scientific Review Officer, Director, Office of Scientific Review, Division of Extramural Activities, NCCIH, NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20817, *jessica.mcklveen@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: May 24, 2023.

**Victoria E. Townsend,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–11431 Filed 5–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

### Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Office of AIDS Research Advisory Council.

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The meeting will be videocast and can be accessed from the NIH Videocasting and Podcasting website (*http://videocast.nih.gov/*).

*Name of Committee:* Office of AIDS Research Advisory Council.

*Date:* June 22, 2023.

*Time:* 12:15 p.m. to 5:00 p.m.

*Agenda:* The sixty third meeting of the Office of AIDS Research Advisory Council (OARAC) will feature presentations related to HIV and women; the OAR Director's Report; updates from the Clinical Guidelines Working Groups of OARAC; updates from NIH HIV-related advisory councils; report outs and discussions on OAR's Early-Career Investigators and HIV & Aging signature programs; and public comment.

*Place:* Office of AIDS Research, 5601 Fishers Lane, Room 1D13 Grand Hall, Rockville, MD 20852 (Hybrid Meeting: Virtual and in person. Virtual meeting link will be available at *https://videocast.nih.gov/watch=49574*).

*Contact Person:* Corette' Byrd, RN, MS, HIVinfo Program Manager, Office of AIDS Research, Office of the Director, National Institutes of Health, 5601 Fishers Lane, Rockville, MD 20852, (301) 761–7369, *OARACInfo@nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has procedures at *https://www.nih.gov/about-nih/visitor-information/campus-access-security* for entrance into on-campus and off-campus facilities. All visitor vehicles, including taxicabs and hotel and airport shuttles, will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.oar.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.14, Intramural Research Training Award; 93.22, Clinical Research Loan Repayment Program for Individuals from Disadvantaged Backgrounds; 93.232, Loan Repayment Program for Research Generally; 93.39, Academic Research Enhancement Award; 93.936, NIH Acquired Immunodeficiency Syndrome Research Loan Repayment Program; 93.187, Undergraduate Scholarship Program for Individuals from Disadvantaged Backgrounds, National Institutes of Health, HHS)

Dated: May 23, 2023.

**Tyeshia M. Roberson-Curtis,**

*Program Analyst, Office of Federal Advisory Committee Policy.*

[FR Doc. 2023–11396 Filed 5–26–23; 8:45 am]

**BILLING CODE 4140–01–P**

## DEPARTMENT OF HOMELAND SECURITY

**[Docket ID FEMA–2014–0022]**

### Technical Mapping Advisory Council; Meeting

**AGENCY:** Federal Emergency Management Agency, DHS

**ACTION:** Notice of federal advisory committee meeting.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) Technical Mapping Advisory Council (TMAC) will hold an in-person public meeting with a virtual option on Tuesday, June 13, 2023, and Wednesday, June 14, 2023. The meeting will be open to the public in-person and via a Microsoft Teams Video Communications link.

**DATES:** The TMAC will meet on Tuesday, June 13, 2023, and Wednesday, June 14, 2023, from 8:00 a.m. to 5:00 p.m. Eastern Time (ET). Please note that the meeting will close early if the TMAC has completed its business.

**ADDRESSES:** The meeting will be held in-person at ADDRESS to be inserted at a later date], and virtually using the following Microsoft Teams Video Communications link (Tuesday Link: *https://tinyurl.com/5h427wau;* Wednesday Link: *https://tinyurl.com/5n7yutnm*). Members of the public who wish to attend the in-person or virtual meeting must register in advance by sending an email to *FEMA-TMAC@fema.dhs.gov* (Attn: Brian Koper) by 5:00 p.m. ET on Friday, June 9, 2023.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered by the TMAC, as listed in the **SUPPLEMENTARY INFORMATION** caption below. Associated meeting materials will be available upon request after Tuesday, June 6, 2023. The draft 2022 TMAC Annual Report will be available for review after Tuesday, June 6, 2023. To receive a copy of any relevant materials, please send the request to: *FEMA-TMAC@fema.dhs.gov* (Attn: Brian Koper). Written comments to be considered by the committee at the time of the meeting must be submitted and received by Wednesday, June 7, 2023, 5:00 p.m. ET identified by Docket ID FEMA–2014–0022, and submitted by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* Address the email to: *FEMA-TMAC@fema.dhs.gov.* Include the docket number in the subject line of the message. Include name and contact information in the body of the email.
- *Instructions:* All submissions received must include the words ''Federal Emergency Management Agency'' and the docket number for this action. Comments received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. You may wish to review the Privacy & Security Notice via a link on the homepage of *www.regulations.gov.*
- *Docket:* For docket access to read background documents or comments received by the TMAC, go to *http://www.regulations.gov* and search for the Docket ID FEMA–2014–0022.

A public comment period will be held on Tuesday, June 13, 2023, from 3:30 p.m. to 4:00 p.m. ET and Wednesday, June 14, 2023, from 12:00 p.m. to 12:30 p.m. ET. The public comment period will not exceed 30 minutes. Please note that the public comment period may end before the time indicated, following the last call for comments. Contact the individual listed below to register as a speaker by Wednesday, June 7, 2023, 5:00 p.m. ET. Please be prepared to submit a written version of your public comment.

FEMA is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** caption as soon as possible.

**FOR FURTHER INFORMATION CONTACT:** Brian Koper, Designated Federal Officer for the TMAC, FEMA, 400 C Street SW, Washington, DC 20472, telephone 202–646–3085, and email *brian.koper@fema.dhs.gov.* The TMAC website is: *https://www.fema.gov/flood-maps/guidance-partners/technical-mapping-advisory-council.*

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the *Federal Advisory Committee Act,* Public Law 117–286, 5 U.S.C. ch. 10.

In accordance with the *Biggert-Waters Flood Insurance Reform Act of 2012,* the TMAC makes recommendations to the FEMA Administrator on: (1) how to improve, in a cost-effective manner, the (a) accuracy, general quality, ease of use, and distribution and dissemination of flood insurance rate maps and risk data; and (b) performance metrics and milestones required to effectively and efficiently map flood risk areas in the United States; (2) mapping standards and guidelines for (a) flood insurance rate maps, and (b) data accuracy, data quality, data currency, and data eligibility; (3) how to maintain, on an ongoing basis, flood insurance rate maps and flood risk identification; (4) procedures for delegating mapping activities to State and local mapping partners; and (5) (a) methods for improving interagency and intergovernmental coordination on flood mapping and flood risk determination, and (b) a funding strategy to leverage and coordinate budgets and expenditures across Federal agencies. Furthermore, the TMAC is required to submit an annual report to the FEMA Administrator that contains: (1) a description of the activities of the Council; (2) an evaluation of the status and performance of flood insurance rate maps and mapping activities to revise and update Flood Insurance Rate Maps; and (3) a summary of recommendations made by the Council to the FEMA Administrator.

*Agenda:* The purpose of this meeting is for the TMAC members to discuss the content of the 2023 TMAC Annual Report. Any related materials will be available upon request prior to the meeting to provide the public an opportunity to review the materials. The full agenda and related meeting materials will be available upon request by Tuesday, June 6, 2023. To receive a copy of any relevant materials, please send the request to: *FEMA-TMAC@fema.dhs.gov* (Attn: Brian Koper).

**Nicholas A. Shufro,**

*Deputy Assistant Administrator for Risk Management, Federal Insurance and Mitigation Administration, Resilience, Federal Emergency Management Agency, Department of Homeland Security.*

[FR Doc. 2023–11425 Filed 5–26–23; 8:45 am]

**BILLING CODE 9110–12–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–6392–D–02]**

## Order of Succession for the Office of the Chief Information Officer

**AGENCY:** Office of the Chief Information Officer, HUD.

**ACTION:** Notice of order of succession.

**SUMMARY:** In this notice, the Chief Information Officer (CIO) for the Department of Housing and Urban Development designates the Order of Succession for the Office of the Chief Information Officer. This Order of Succession supersedes all prior Orders of Succession for the Office of the Chief Information Officer, including the Order of Succession published in the **Federal Register** on September 14, 2016.

**DATES:** *Applicable date:* May 23, 2023.

**FOR FURTHER INFORMATION CONTACT:** John B. Shumway, Assistant General Counsel for Administrative Law, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 9244, Washington, DC 20410, telephone number (202) 405–5190 (this is not a toll-free number). HUD welcomes and is prepared to

receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

**SUPPLEMENTARY INFORMATION:** The CIO for the Department of Housing and Urban Development is issuing this Order of Succession of officials authorized to perform the functions and duties of the CIO when, by reason of absence, disability, or vacancy in office, the CIO is not available to exercise the powers or perform the duties of the office. This Order of Succession is subject to the provisions of the Federal Vacancies Reform Act of 1998 (5 U.S.C. 3345–3349d). This publication supersedes all prior orders of succession for the Office of the Chief Information Officer, including the Order of Succession published in the **Federal Register** on September 14, 2016 (81 FR 63200). Accordingly, the CIO designates the following Order of Succession:

**Section A. Order of Succession**

Subject to the provisions of the Federal Vacancies Reform Act of 1998 during any period when, by reason of absence, disability, or vacancy in office, the Chief Information Officer for the Department of Housing and Urban Development is not available to exercise the powers or perform the duties of the Chief Information Officer, the following officials within the Office of the Chief Information Officer are hereby designated to exercise the powers and perform the duties of the Office, including the authority to waive regulations. No individual who is serving in an office listed below in an acting capacity may act as the Chief Information Officer pursuant to this Order of Succession. These officials shall perform the functions and duties of the office in the order specified herein, and no official shall serve unless all the other officials, whose position titles precede theirs in this order, are unable to serve by reason of absence, disability, or vacancy in office.

(1) Deputy Chief Information Officer;

(2) Assistant Chief Information Officer for IT Infrastructure and Operations;

(3) Chief Technology Officer;

(4) Chief Information Security Officer;

(5) Assistant Chief Information Officer for Business and IT Resource Management;

(6) Assistant Chief Information Officer for Customer Relationship and Performance Management.

**Section B. Authority Superseded**

This Order of Succession supersedes all prior Orders of Succession for the Office of the Chief Information Officer, including the Order of Succession published on September 14, 2016 (81 FR 63200).

*Authority:* Section 7(d), Department of Housing and Urban Development Act, 42 U.S.C. 3535(d).

Dated: May 23, 2023.

**Elizabeth Niblock,**

*Chief Information Officer.*

[FR Doc. 2023–11376 Filed 5–26–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–6392–D–01]**

## Delegation of Authority for the Office of the Chief Information Officer

**AGENCY:** Office of the Secretary, HUD.

**ACTION:** Notice of delegation of authority.

**SUMMARY:** Through this notice, the Secretary of the Department of Housing and Urban Development delegates to the Chief Information Officer (CIO) all authority and responsibility for the Department's information technology (IT) and authority to serve as the Department's Senior Information Technology Executive. This delegation of authority supersedes all prior delegations of authority for the Office of the Chief Information Officer, including the delegation of authority published in the **Federal Register** on November 1, 2011.

**DATES:** This delegation of authority is effective May 23, 2023.

**FOR FURTHER INFORMATION CONTACT:** John B. Shumway, Assistant General Counsel for Administrative Law, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 9244, Washington, DC 20410, telephone number (202) 405–5190 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

**SUPPLEMENTARY INFORMATION:** The Chief Information Officer is responsible for meeting the requirements of section 5125 of the Clinger-Cohen Act (40 U.S.C. 11315), which established the position of the Chief Information Officer. Additional responsibilities of the CIO derive from the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the Privacy Act of 1974 (5 U.S.C. 552(a)), and the E-Government Act of 2002. Accordingly, the Secretary delegates as follows:

**Section A. Authority Delegated**

The Secretary of HUD hereby delegates to the CIO all authority and responsibility for the Department's information technology (IT), except those already delegated to the Government National Mortgage Association (Ginnie Mae), including management of the Department's information technology resources and the authority to serve as the Department's Senior Information Technology Executive. In carrying out such duties and responsibilities, the CIO shall be responsible for meeting the requirements of section 5125 of the Clinger-Cohen Act (40 U.S.C. 11315), the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), and the E-Government Act of 2002. The CIO shall, among other duties:

1. Ensure compliance by all HUD program offices with the prompt, efficient, and effective implementation of Information Resources Management responsibilities.

2. Provide advice and other assistance to the Secretary of HUD and other senior management personnel of HUD to ensure that information technology (IT) is acquired and information resources are managed effectively and efficiently.

3. Approve and implement all Technology Modernization Fund (TMF) funding and development activities including, but not limited to, the authority to sign Interagency Agreements.

4. Promote the effective and efficient design and operation of all major IT processes for HUD, including improvements to work processes of the Department. Monitor and evaluate the performance of IT programs of HUD based on applicable performance measurements, and advise the Secretary of HUD and IT Governance/Oversight Boards regarding whether to continue, modify, or terminate a program or project.

5. Serve as a member of the executive branch Chief Information Officers Council, participate in its functions, and monitor the Department's implementation of IT standards promulgated by the Secretary of Commerce.

6. Serve as a representative to the Interagency Committee on Government

Information established under section 207(c) of the E-Government Act.

7. Perform any additional duties that are assigned to the CIO by applicable law, including Office of Management and Budget (OMB) regulations and circulars.

8. Consistent with the roles and responsibilities of IT Governance/Oversight Boards, design, implement, and maintain HUD process for maximizing the value and assessing and managing the risks of IT acquisitions, in accordance with section 5122 of the Clinger-Cohen Act.

9. Monitor the Department's compliance with the policies, procedures, and guidance in OMB Circular A–130 (or equivalent guidance), and recommend or take appropriate corrective action in instances of failures to comply and, as required by the Circular, report to the OMB Director.

10. To meet the objectives of the Government Paperwork Elimination Act (Pub. L. 105–277), the CIO must ensure that the Department's methods for use and acceptance of electronic signatures are compatible with the relevant policies and procedures issued by the OMB Director.

11. Carry out duties pursuant to 44 U.S.C. 3506 including:

a. Carry out the agency's information resource management activities to improve agency productivity, efficiency, and effectiveness.

b. Comply with the requirements of this subchapter and related policies established by the Director of the Office of Management and Budget.

c. *Exclusion:* The CIO shall not be responsible for the Information Collections Submission Process pursuant to the Paperwork Reduction Act as this function was realigned under the Chief Data Officer within the Office of Policy Development and Research.

12. Ensure that HUD web pages and the information contained on the web pages are accessible, available, and secure.

13. In consultation with OMB, OGC, and other agencies, as appropriate, the CIO will coordinate with the appropriate HUD offices to ensure that the Department implements sections 206(c) and 206(d) of the E-Government Act (electronic rulemaking submissions and electronic dockets).

14. The CIO will have ultimate responsibility for ensuring that the Department fulfills its responsibilities under Title III of the E-Government Act, the Federal Information Security Management Act, by:

a. Consistent with 44 U.S.C. 3544, designating a senior Department official who will report to the CIO and have responsibility for departmentwide information security as the official's primary duty, including the following responsibilities: Developing and maintaining an OMB-approved departmentwide information security program consistent with the requirements of 44 U.S.C. 3544(b), 44 U.S.C. 3543, and 40 U.S.C. 11331.

16. Consistent with section 207(d) of the E-Government Act, the CIO will ensure that the Department complies with all OMB policies relating to the categorization of information.

17. In coordination with OGC and OPA, the CIO will ensure that privacy notices posted on HUD websites comply with OMB guidance (see section 208(c) of the E-Government Act).

**Section B. Authority Excepted**

The authority delegated in this document does not include the authority to sue or be sued or to issue or waive regulations.

**Section C. Authority To Redelegate**

The CIO is authorized to redelegate to employees of HUD any of the authority delegated under section A above.

**Section D. Authority Superseded**

This delegation of authority supersedes all prior delegations of authority for the Office of the Chief Information Officer including the delegation of authority published on November 1, 2011 (76 FR 67471.) The Secretary may revoke the authority authorized herein, in whole or part, at any time.

*Authority:* Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: May 23, 2023.

**Marcia L. Fudge,**

*Secretary.*

[FR Doc. 2023–11379 Filed 5–26–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7076–N–15]**

## 60-Day Notice of Proposed Information Collection: Family Unification Program; OMB Control No.: 2577–0259

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, (PIH), HUD.

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting reinstatement without change of a previously approved collection for which approval has expired. The reinstatement of this previously approved PRA collection for which approval has expired is required in order to withdraw this PRA. The information collection required for the Family Unification Program (described below) is now covered under OMB# 2577–0169.

**DATES:** *Comments Due Date:* July 31, 2023.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal.

Written comments and recommendations for the proposed information collection can be sent within 60 days of publication of this notice to *OIRA_submission@omb.eop.gov* or *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Anna Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

**FOR FURTHER INFORMATION CONTACT:** Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov,* telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in section A.

**A. Overview of Information Collection**

*Title of Information Collection:* Family Unification Program (FUP).

*OMB Approval Number:* 2577–0259.

*Type of Request:* Reinstatement without change of a previously approved collection for which approval has expired.

*Form Number:* HUD–52515; HUD–50058; HUD–2993; HUD- 96011; HUD–2990; HUD–2991; and HUD–2880; SF–424; SF–LLL.

*Description of the need for the information and proposed use:* The reinstatement of this previously approved PRA collection for which approval has expired is required in order to withdraw this PRA. The information collection required for the Family Unification Program (described below) is now covered under OMB# 2577–0169. The Family Unification Program (FUP) is a program, authorized under section 8(x) of the United States Housing Act of 1937 (42 U.S.C. 1437(X), that provides housing choice vouchers to PHAs to assist families for whom the lack of adequate housing is a primary factor in the imminent placement of the family's child or children in out-of-home care; or the delay in the discharge of the child, or children, to the family from out-of-home care. Youths at least 18 years old and not more than 21 years old (have not reached 22nd birthday) who left foster care at age 16 or older and who do not have adequate housing are also eligible to receive housing assistance under the FUP. As required by statute, a FUP voucher issued to such a youth may only be used to provide housing assistance for the youth for a maximum of 18 months. Vouchers awarded under FUP are administered by PHAs under HUD's regulations for the Housing Choice Voucher program (24 CFR part 982).

*Respondents:* Public Housing Agencies.

| Description of information collection | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response | Annual cost |
|---|---|---|---|---|---|---|---|
| SF424 (0348–0043) Application for Federal Assistance. | 265 | Annual | 1 | 1 | 265 | $35.00 | $9,275 |
| SF LLL (0348–0046) Lobbying Form | 10 | Annual | 1 | 1 | 10 | 35.00 | 350 |
| HUD–96011 (2535–0118) 3rd Party Documentation Facsimile Transmittal. | 265 | Annual | 1 | 1 | 265 | 35.00 | 9,275 |
| HUD–2993 Acknowledgement of Application Receipt (2577–0259). | 13 | Annual | 1 | 1 | 13 | 35.00 | 455 |
| Logic Model-HUD–96010 (2535–0114) | 265 | Annual | 1 | 1 | 0 | 35.00 | 0 |
| PCWA Statement of Need (maximum of 5 pages) | 265 | Annual | 1 | 2 | 596 | 35.00 | 20,860 |
| Memorandum of Understanding between PHA and PCWA. | 265 | Annual | 1 | 6 | 1,590 | 35.00 | 55,650 |
| Rating Criteria 1: Area-Wide Housing Opportunities. Narratives (up to 20 pages). Logic Model (HUD–96010). | 265 | Annual | 1 | 3 | 795 | 35.00 | 27,825 |
| Rating Criteria 2: PCWA Commitments. Narratives (up to 10 pages). Other Documentation. | 265 | Annual | 1 | 1 | 331 | 35.00 | 11,585 |
| Rating Criteria 3: Self-Sufficiency Programs. Narrative: (up to 6 pages) Documentation: Excerpt from Administrative Plan or policies manual for FSS program operations Certification: FUP recipients enrolled in FSS. | 265 | Annual | 1 | 1 | 133 | 35.00 | 4,655 |
| Rating Criteria 4: Local Coordination Letter of Support | 265 | Annual | 1 | 1 | 265 | 35.00 | 9,275 |
| PCWA Contractor Documentation | 265 | Annual | 1 | 1 | 265 | 35.00 | 9,275 |
| HUD2990, Certification of Consistency with the RC/EZ/EC–IIs Strategic Plan. | 265 | Annual | 1 | 1 | 0 | 35.00 | 0 |
| Funding Application HUD–52515 (2577–0169). Includes leasing schedule. | 265 | Annual | 1 | 1 | 265 | 35.00 | 9,275 |
| Affirmatively Furthering Fair Housing Statement (addendum). | 265 | Annual | 1 | 1 | 265 | 35.00 | 9,275 |
| HUD2880, Applicant/Recipient Disclosure/Update Report (2510–0011). | 265 | Annual | 1 | 1 | 0 | 35.00 | 0 |
| HUD2991, Certification of Consistency with the Consolidated Plan. | 265 | Annual | 1 | 1 | 0 | 35.00 | 0 |
| Subtotal (Application) | 265 | Annual | 1 | 25 | 5,058 | 35 | 177,030 |
| Family Report HUD–50058 (2577–0083) | 242 | Annual | 75 | 1 | 363 | 35.00 | 12,705 |
| Baseline adjustment | 10 | Annual | 1 | 1 | 5 | 35.00 | 175 |
| @Program and Accounting Recordkeeping | 242 | Annual | 1 | 5 | 1,210 | 35.00 | 42,350 |
| Subtotal (Reporting/Recordkeeping) | | | | 11 | 1,578 | 35 | 55,230 |
| Total | 265 | Annual | 1 | 36 | 6,636 | 35.00 | 232,260 |

## B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the 'proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

## C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

**Lora D. Routt,**

*Acting Chief, Office of Policy, Programs and Legislative Initiatives.*

[FR Doc. 2023–11390 Filed 5–26–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–7076–N–14]**

### 60-Day Notice of Proposed Information Collection: Allocation of Operating Fund Grant Under the Operating Fund Formula: Data Collection; OMB Control No.: 2577–0029

**AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, (PIH), HUD.

**ACTION:** Notice.

**SUMMARY:** HUD is seeking approval from the Office of Management and Budget (OMB) for the information collection described below. In accordance with the Paperwork Reduction Act, HUD is requesting comment from all interested parties on the proposed collection of information. The purpose of this notice is to allow for 60 days of public comment.

**DATES:** *Comments Due Date:* July 31, 2023.

**ADDRESSES:** Interested persons are invited to submit comments regarding this proposal. Written comments and recommendations for the proposed information collection can be submitted within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function. Interested persons are also invited to submit comments regarding this proposal by name and/or OMB Control Number and can be sent to: Colette Pollard, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at *PaperworkReductionActOffice@hud.gov.*

**FOR FURTHER INFORMATION CONTACT:** Erica Mahoney, Office of Policy, Programs and Legislative Initiatives, PIH, Department of Housing and Urban Development, 451 7th Street SW, (Room 3178), Washington, DC 20410; telephone 202–402–6488, (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* Copies of available documents submitted to OMB may be obtained from Ms. Mahoney.

**SUPPLEMENTARY INFORMATION:** This notice informs the public that HUD is seeking approval from OMB for the information collection described in section A.

**A. Overview of Information Collection**

*Title of Information Collection:* Allocation of Operating Funds under the Operating Fund Formula: Data Collection.

*OMB Approval Number:* 2577–0029.

*Type of Request:* Extension of currently approved collections.

*Form Number:* HUD–52722 and HUD–52723.

*Description of the need for the information and proposed use:* Public Housing Agencies (PHAs) use this information in budget submissions which are reviewed and approved by HUD field offices as the basis for obligating the operating fund grant. This information is necessary to calculate the eligibility for the operating fund grant under the Operating Funding Program regulations, as amended. The Operating Fund is designed to provide the amount of operating funds needed for well-managed PHAs. PHAs submit the information electronically with these forms.

HUD collects information for the HUD–52723 and HUD–52722 through web-based forms in the Operating Fund Web Portal. HUD discontinued using VBA enhanced Excel tools to collect this data after CY 2022. Web-based forms improve the availability of the forms to PHAs, improve data integrity, and secure transfer of the data from the PHA to HUD. Web-based forms should not increase the burden to complete.

TOTAL ESTIMATED BURDENS

| Information collection | Number of respondents | Frequency of response | Responses per annum | Burden hour per response | Annual burden hours | Hourly cost per response | Annual cost |
|---|---|---|---|---|---|---|---|
| HUD–52723 | 6,200 | 1 | 0.33 | 2,046 | 2,046 | $37.66 | $77,052 |
| HUD–52722 | 6,200 | 1 | 0.42 | 2,604 | 2,604 | 37.66 | 98,067 |
| Total | | | | 4,650 | | | 175,119 |

**B. Solicitation of Public Comment**

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

**C. Authority**

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Dated: May 18, 2023.

**Lora D. Routt,**

*Acting Chief, Office of Policy, Programs and Legislative Initiatives.*

[FR Doc. 2023–11389 Filed 5–26–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

**[Docket No. FR–6331–N–02C]**

### Extension of Public Interest, General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance: Final Notice

**AGENCY:** Office of the Secretary, Department of Housing and Urban Development (HUD).

**ACTION:** Final notice.

**SUMMARY:** In accordance with the Build America, Buy America Act (BABA), this notice advises that HUD is extending the previously issued public interest, general applicability waiver for an

additional period of one year to the Buy America Domestic Content Procurement Preference (''Buy America Preference,'' or ''BAP'') as applied to Federal Financial Assistance (''FFA'') provided to Tribes, Tribally Designated Housing Entities (''TDHE''s), and other Tribal Entities (hereinafter collectively ''Tribal Recipients'').

**DATES:** Applicable May 23, 2023 for HUD Tribal FFA obligated by HUD on or after the effective date of the waiver. In addition, in the case of FFA obligated by HUD in Tribal programs on or after May 14, 2023 but prior to the effective date of this Final Waiver, the waiver applies to all expenditures incurred on or after the effective date of the Final Waiver.

**FOR FURTHER INFORMATION CONTACT:** Faith Rogers, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10126, Washington, DC 20410–5000, at (202) 402–7082 (this is not a toll-free number). HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech and communication disabilities. To learn more about how to make an accessible telephone call, please visit *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.* HUD encourages submission of questions about this document be sent to *BuildAmericaBuyAmerica@hud.gov.*

**SUPPLEMENTARY INFORMATION:**

## I. Build America, Buy America

The Build America, Buy America Act (''BABA'' or ''the Act'') was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (''IIJA'') (Pub. L. 117–58). The Act establishes a domestic content procurement preference, the BAP, for Federal infrastructure programs. Section 70914(a) of the Act establishes that no later than 180 days after the date of enactment, HUD must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, the Act further defines a project to include ''the construction, alteration, maintenance, or repair of infrastructure in the United States'' and includes within the definition of infrastructure those items traditionally included along with buildings and real property. Thus, starting May 14, 2022, new awards of HUD FFA, and any of those funds newly obligated by HUD then obligated by the grantee for infrastructure projects, are covered under BABA provisions of the Act, 41 U.S.C. 8301 note, unless covered by a waiver.

## II. HUD's Progress in Implementation of the Act Generally

Since the enactment of the Act, HUD has worked diligently to develop a plan to fully implement the BAP across its FFA programs awarding funds to non-Tribal Recipients. HUD understands that advancing Made in America objectives is a continuous effort and believes setting forth a transparent schedule of future implementation in those programs provides industry partners and non-Tribal Recipients with the time and notice necessary to efficiently and effectively implement the BAP. HUD recently announced plans to move forward with the implementation of the new BAP requirements in connection with its award of FFA to non-Tribal Recipients in a manner designed to maximize coordination and collaboration to support long-term investments in domestic production. HUD continues its efforts to implement the Act in those programs consistent with the guidance and requirements of the Made in America Office of the Office of Management and Budget, including guidance concerning appropriate compliance with the BAP.

In order to ensure orderly implementation of the BAP across HUD's FFA programs awarding funds to non-Tribal Recipients, HUD has provided public interest, general applicability waivers in order to implement the BAP in phases in connection with the application of the BAP in such programs and announced a corresponding implementation plan for all non-Tribal Recipients. As part of those efforts, HUD has published two general applicability, public interest waivers covering Exigent Circumstances and De Minimis and Small Grants, which can be found at *https://www.hud.gov/program_offices/general_counsel/BABA.*

Additionally, as noted above, HUD previously published a one-year general applicability, public interest waiver of the BAP in connection with FFA provided to Tribal Recipients [1] effective May 14, 2022 to provide the agency with sufficient time to complete the Tribal consultation process regarding implementation of the BAP in connection with infrastructure projects. During the pendency of such waiver, HUD actively participated in governmentwide consultation efforts with respect to the applicability of the provisions of the Build America, Buy America Act to Tribal Recipients, generally. Specifically, on September 21, 2022, eight agencies (U.S. Department of the Interior, U.S. Department of Agriculture, U.S. Department of Housing and Urban Development, U.S. Department of Homeland Security, U.S. Department of Energy, U.S. Department of Transportation, U.S. Department of Commerce, and U.S. Small Business Administration) participated in a joint consultation hosted by the White House Council on Native American Affairs to consult with Tribal Nations on discretionary Buy America Preference provisions and the waiver categories characterized in the OMB memorandum. Based on the consultations held, Tribes were requested to provide written comments and feedback by October 20, 2022 for Federal agency consideration. The resulting comments were received by the White House Council and distributed to agencies on October 25, 2022.

HUD is now moving forward with consultation on specific plans for implementation of the BAP in HUD's FFA provided to Tribal Recipients, in light of the comments received from the Tribal leaders and the progress the agency has made implementing the BAP in other FFA programs. In order to appropriately engage in consultation as described in HUD's Tribal Government-to-Government Consultation Policy,[2] consistent with President Biden's ''Tribal Consultation and Strengthening Nation-to-Nation Relationships'' Memorandum regarding the appropriate application of BAP to such entities, HUD needs an additional period of time

[1] For purposes of this waiver, the term ''Tribal Recipients'' includes all recipients of grants or loan guarantees administered by HUD's Office of Native American Programs. This includes Indian tribes and TDHEs receiving grants and loan guarantee assistance under the Native American Housing Assistance and Self-Determination Act's (NAHASDA's) Indian Housing Block Grant Program and Title VI Loan Guarantee Program, and Indian tribes and Tribal Organizations receiving Indian Community Development Block Grant funds under the Housing and Community Development Act of 1974. It also includes Federal Financial Assistance provided by HUD to the Department of Hawaiian Home Lands (''DHHL'') which receives annual grant funding under the Native Hawaiian Housing Block Grant (''NHHBG'') program. HUD will seek feedback from DHHL on BAP implementation and has an interest in ensuring that the NHHBG program aligns with the broader Indian Housing Block Grant program given the similarities amongst the two programs and the fact that they are both authorized under ''NAHASDA''.

[2] *https://www.hud.gov/program_offices/public_indian_housing/ih/regs/govtogov_tcp.* See also 81 FR 40893.

in which to further consult on the more specific application of the BAP to HUD's Tribal Recipients.

**III. Waiver Authority**

Under section 70914(b), HUD and other Federal agencies have authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under section 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. Pursuant to section 70914(d)(2), when seeking to extend a waiver of general applicability, HUD is required to provide for a public comment period of not less than 30 days on the continued need for such waiver.

On May 14, 2022, HUD published a General Applicability Waiver of Build America, Buy America Provisions as Applied to Tribal Recipients of HUD Federal Financial Assistance for a period of one year. The current waiver expires on May 14, 2023. During this time period, HUD participated in an interagency Tribal Consultation on the implementation of BABA and participated in an interagency workgroup to address issues raised during the joint consultation.

**IV. Tribal Infrastructure and HUD Programs**

Many Tribal communities still lack basic infrastructure such as roads, running water, and indoor plumbing. The need for safe, decent, and sanitary housing is immense. In its 2017 Housing Needs Study, HUD concluded that 68,000 new units were needed in Indian Country to replace inadequate units and eliminate severe overcrowding. That same study found that the lack of infrastructure was the number one barrier to housing development in many Tribal communities. Not only is infrastructure in many Tribal communities in dire need of repair and modernization, but Tribes also often find it difficult to locate available supplies, suppliers, and construction labor necessary to develop that infrastructure.

The COVID–19 pandemic compounded the infrastructure challenges faced by many Native American communities. Recent feedback from Tribal Recipients has disclosed the numerous challenges they experienced while implementing the various HUD COVID–19 relief programs. A lack of supplies and a lack of available contractors working in Tribal communities were identified as the primary challenges faced by Tribal Recipients. Tribal Recipients indicated to HUD that procuring supplies and materials can be very difficult at times, and this made HUD-funded infrastructure projects challenging to implement to completion and at budgeted cost. Even when supplies were available for purchase, increased costs for steel, lumber, and transportation combined with lack of developers to bid on projects led to a backlog of construction projects and severely impacted Tribes' ability to complete important infrastructure projects and construct new housing.

Unfortunately, many Tribes are more disconnected from American supply chains than the average HUD grantee due to their remoteness. For example, some Alaska Native villages are not on the road system, must develop infrastructure and housing during an extremely short construction season, and must grapple with unique transportation limitations, including having to ship basic construction materials only twice per year by barge at extremely elevated costs. These Tribes often report to HUD that it can be a major challenge to secure space on a barge for construction materials. At times, even when space is secured, any unexpected setbacks faced, such as loss of cargo, materials damaged through shipping, or miscalculation of the appropriate amount or quality of materials needed, can result in infrastructure and housing projects being delayed an entire construction season. These Tribes end up waiting for the next barge in six months and face cost overruns.

Annually, HUD provides over $1 billion in FFA to almost 600 sovereign Tribal Nations. Programs like the Indian Housing Block Grant (''IHBG'') and the Indian Community Development Block Grant (''ICDBG'') program are critical programs that allow the Federal Government to carry out its trust responsibilities and support affordable housing and infrastructure development in Tribal communities. Under these programs, HUD provides block grant funding to Tribal Recipients to help address these housing and infrastructure needs—particularly for the benefit of low- and moderate-income families. HUD anticipates that the BAP will apply to some projects funded under these programs. Accordingly, HUD must ensure that Tribal Recipients are able to effectively implement the BAP in a manner that ensures that the purposes of BABA are carried out, while at the same time preventing additional undue barriers to the development of Tribal infrastructure, which has suffered from decades of underinvestment.

HUD has determined that the prior one-year waiver period was insufficient to fully consult and assess the impacts that BAP will have on HUD's Tribal Recipients. While the interagency consultation webinar provided HUD with some additional insight into how the BAP will impact Tribal communities generally, HUD is particularly interested in seeking more tailored Tribal feedback on the impact of the BAP on infrastructure projects that are funded under HUD's various Tribal programs. Additionally, since the interagency webinar was held in 2022, HUD has determined to implement the BAP in a phased manner across its non-Tribal programs. With the benefit of this recent determination, HUD needs additional time to seek Tribal feedback on whether and when HUD should take a similar phased approach with respect to the implementation of the BAP under its Tribal programs. HUD will also assess the unique and diverse conditions of Tribal communities across Indian Country and determine how the BAP should be applied after taking those conditions into account. Additional time is needed to consult with Tribal Leaders.

**V. Public Interest in a General Applicability Waiver of Buy America Provisions for Tribes, TDHEs, and Other Tribal Entities (''Tribal Recipients'')**

HUD sought public comment on a limited, one-year extension of HUD's existing public interest, general applicability waiver of the BAP in connection with HUD's FFA to Tribal Recipients to provide the Department with sufficient time to complete consultation consistent with HUD's Tribal Government-to-Government Consultation Policy. HUD's 'Tribal Government-to-Government Consultation Policy' was adopted in compliance with Executive Order 13175, ''Consultation with Indian Tribal Governments,'' and outlines the internal procedures and principles HUD must follow when communicating and coordinating on HUD programs and activities that affect Native American Tribes. HUD's Tribal Consultation policy recognizes the right of Tribes to self-government and facilitates Tribal

participation and input in HUD's implementation of programs and FFA directed to Tribal communities.

In fiscal year 2023, Tribal Entities received over $1 billion through the Department's programs. Infrastructure is an eligible activity under some of these programs and could be subject to the BAP. HUD believes that full compliance with the BAP will create ongoing demand for domestically produced products and deepen domestic supply chains. Because the potential application of BAP mandated by the Act would be new to all HUD Tribal FFA recipients, HUD has not had the benefit of engaging in fulsome consultation consistent with its Tribal Consultation policy concerning the application of the BAP to Tribal Recipients—particularly with respect to how the BAP should apply to HUD's various Tribal programs, how the BAP should be phased in to allow for successful implementation, and how compliance will be verified. While HUD participated in a general consultation session as part of a governmentwide interagency process regarding the general application of the BAP to Tribal Recipients, because of the significance and potentially wide scope of new requirements necessary to demonstrate compliance with BAP or to seek waivers of BAP for specific products or projects, it is imperative that HUD further engage in Tribal consultation on the specific intended application of the BAP to FFA awarded to HUD's Tribal Recipients.

HUD now has the benefit of having fully considered an appropriate method of phased implementation across its other FFA programs and has begun the methodical implementation of the BAP in those other FFA programs. With the benefit of this experience and the benefit of the governmentwide consultation efforts, HUD will conduct a more tailored consultation process with the Tribal Recipients of HUD FFA specifically focused on the BAP application to HUD's various Tribal housing and community development programs. HUD believes that the Tribal consultation process is necessary for the successful implementation of the BAP across its covered FFA programs funding infrastructure projects, that a full and meaningful Tribal consultation process will allow HUD to determine the potential impact of the Act's Buy America Preference on Tribal governments and communities and will inform a tailored implementation for Tribal Recipients that recognizes the sovereignty and unique status of Tribal governments. Accordingly, HUD has determined that it would be contrary to the public's interest to apply the BAP to FFA awards to Tribal Recipients prior to completion of further Tribal consultation. In addition, HUD published the proposed waiver in the **Federal Register** with an extension of the comment period to May 8, 2023.

## VI. Planned Tribal Consultation

Similar to other HUD programs, HUD will seek Tribal feedback consistent with HUD's Tribal Government-to-Government Consultation Policy and Executive Order 13175 on when and how to phase in the BAP for FFA provided to Tribal Recipients. HUD will also solicit Tribal feedback on other related issues, including how to effectively implement the BAP for extremely remote communities, such as remote Native Alaskan Villages, that are more disconnected from traditional supply chains, have an extremely short construction seasons, are located off the road system, and are reliant on barges to ship construction materials. HUD acknowledges that rural Tribal communities and Alaska Native Villages have expressed major concerns about availability of American-made products and continue to struggle with challenges because of their proximity away from main supply sources. Tribes are already facing major challenges with accessing construction materials, and major cost overruns due to a lack of available materials—particularly in remote Tribal communities.

During the one-year waiver period, HUD has identified various scheduled national and regional convenings and conferences where HUD intends to host in-person Tribal consultation sessions with Tribal leaders to discuss the BAP. Currently, HUD is scheduled to present during the Forum on Affordable Housing and Community Development Annual Conference. Additionally, HUD will seek to engage with Tribes and Tribal housing practitioners at the various quarterly and semi-annual regional housing association meetings that are planned during the one-year waiver period. These association meetings are routinely attended by HUD Tribal Recipients who will be charged with complying with the BAP once it goes into effect. Consistent with past practice, HUD also intends to conduct some Tribal consultation virtually. HUD will do so by soliciting written feedback from Tribal leaders specifically addressing the impact of the BAP on HUD's Tribal programs.

After receiving Tribal feedback, HUD will seek to implement the BAP in a manner that advances the Made in America objectives while also ensuring that the BAP implementation does not serve as a major barrier to Tribal communities' efforts to develop critical infrastructure. Many Tribal communities lack running water, sewer, roads, and basic infrastructure. HUD will implement the BAP in a thoughtful manner that ensures that Tribal Recipients can effectively implement the BAP without substantial negative impacts on planned and ongoing critical infrastructure projects. HUD will also seek to provide additional technical assistance resources to ensure that Tribal Recipients can build capacity and be in a better position to comply with the BAP. Therefore, HUD is extending for a period of one year the waiver of its general applicability, public interest waiver of the application of the BAP in connection with FFA awards to Tribal Recipients that are obligated by HUD during the pendency of the waiver.

## VII. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M–22–11, ''Memorandum for Heads of Executive Departments and Agencies,'' published on April 18, 2022, agencies are expected to assess ''whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products'' as appropriate before granting a public interest waiver. HUD's analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based in the cost of foreign-sourced products.

## VIII. Limited Duration of the Waiver

HUD remains committed to the successful implementation of the important BAP across its programs providing covered FFA for infrastructure projects, while recognizing the unique government-to-government relationship it has with Tribal Recipients receiving HUD FFA for infrastructure projects. HUD is committed to engaging in a timely consultation process as noted above to further this goal.

## IX. Solicitation of Comments

As required under section 70914 of the Act, HUD solicited comment from the public on the waiver announced in a Notice on its website for a period of 30 days and published the proposed waiver in the **Federal Register**. A total of three comments were received in response to the proposed one-year waiver extension. HUD thoroughly reviewed and considered each of the comments in determining to move forward with the issuance of this waiver and implementation plan as published

in this Final Notice. Two of the commenters were very supportive of the one-year waiver extension. One of the commenters opposed the one-year extension waiver with respect to steel, in particular. HUD appreciates the comments and believes the one-year waiver extension of the application of the BAP as set forth in this Final Notice is appropriate and in the public interest in light of the importance of HUD's planned tribal consultation.[3] HUD will continue to monitor the implementation of the BAP across its programs to ensure the most robust application possible in light of the important public interests discussed above.

This Final Notice is applicable to Tribal FFA obligated by HUD on or after the effective date of this Final Notice throughout the one-year waiver period. This Final Notice is also applicable to any expenditures of Tribal FFA obligated by HUD between May 14, 2023 and the effective date of this Final Notice that occur on or after the effective date of this Final Notice.

Dated: May 23, 2023.

**Marcia L. Fudge,**

*Secretary.*

[FR Doc. 2023–11363 Filed 5–26–23; 8:45 am]

**BILLING CODE 4210–67–P**

## DEPARTMENT OF JUSTICE

### Antitrust Division

### United States v. Cargill Meat Solutions Corp., et al.; Response of the United States to Public Comments on the Proposed Final Judgments

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that the Response of the United States to Public Comments on (a) the proposed Final Judgment as to Defendants Cargill Meat Solutions Corp. and Cargill, Inc. (''Cargill''), Wayne Farms, LLC (''Wayne''), and Sanderson Farms, Inc. (''Sanderson'') (collectively, ''Processor Settling Defendants''); and (b) the proposed Final Judgment as to Webber, Meng, Sahl and Company, Inc., d/b/a WMS & Company, Inc. (''WMS'') and G. Jonathan Meng (''Meng'') (collectively, ''Consultant Settling Defendants'') has been filed with the United States District Court for the District of Maryland in *United States of America* v. *Cargill Meat Solutions Corp., et al.,* Civil Action No. 22–cv–1821.

Copies of the Public Comments and the United States' Response are available for inspection on the Antitrust Division's website at *http://www.justice.gov/atr.*

**Suzanne Morris,**

*Deputy Director Civil Enforcement Operations, Antitrust Division.*

### United States District Court for the District of Maryland

*United States of America,* Plaintiff, v. *Cargill Meat Solutions Corporation, et al.,* Defendants.

Civil Action No.: 22–cv–1821

### Response of Plaintiff United States to Public Comments on the Proposed Final Judgments

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (the ''Tunney Act''), the United States of America responds to the public comments received by the United States about (a) the proposed Final Judgment in this case as to Defendants Cargill Meat Solutions Corp. and Cargill, Inc. (''Cargill''), Wayne Farms, LLC (''Wayne''), and Sanderson Farms, Inc. (''Sanderson'') (collectively, ''Processor Settling Defendants''); and (b) the proposed Final Judgment in this case as to Webber, Meng, Sahl and Company, Inc., d/b/a WMS & Company, Inc. (''WMS'') and G. Jonathan Meng (''Meng'') (collectively, ''Consultant Settling Defendants''). The Processor Settling Defendants and the Consultant Settling Defendants are collectively the ''Settling Defendants.''

After this Response has been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d), the United States will move that the Court enter the proposed Final Judgments.[1]

After careful consideration of the comments submitted, the United States continues to believe that the proposed remedies will address the harm alleged in the Complaint and are therefore in the public interest. The proposed Final Judgments will prevent the Settling Defendants from conspiring to (1) assist their competitors in making compensation decisions, (2) exchange current and future, disaggregated, and identifiable compensation information, and (3) facilitate this anticompetitive agreement. The United States appreciates that some commenters believe that other significant issues remain in the poultry industry. And the United States does not contend that the proposed Final Judgments address all potential issues in the poultry industry. The question before the court, however, is limited to whether the proposed Final Judgments appropriately address the antitrust claims alleged in the Complaint against the Settling Defendants. Upon a thorough review of the comments, the United States believes that the proposed Final Judgments do resolve those claims in the public interest.

#### I. Procedural History

On July 25, 2022, the United States filed a civil Complaint against the Settling Defendants to enjoin them from collaborating on decisions about poultry plant worker compensation, including through the exchange of compensation information, which suppressed competition in the nationwide and local labor markets for poultry processing. The Complaint alleges that this conduct is anticompetitive and violates Section 1 of the Sherman Act, 15 U.S.C. 1. The Complaint also alleges that Defendants Sanderson and Wayne acted deceptively in the manner in which they compensated poultry growers in violation of Section 202(a) of the Packers and Stockyards Act, 1921, as amended and supplemented, 7 U.S.C. 192(a) (the ''PSA''). As explained below, the proposed settlement as to the PSA claim is not subject to review under the Tunney Act.

Contemporaneously, the United States filed the proposed Final Judgments as to the Processor Settling Defendants [2] and the Consultant Settling Defendants, as well as Stipulations signed by these parties that consent to entry of the proposed Final Judgments after compliance with the requirements of the Tunney Act. (ECF 2 & 3.) On September 12, 2022, the United States filed a Competitive Impact Statement describing the proposed Final Judgments. (ECF 37.)

The United States arranged for the publication of the Complaint, the proposed Final Judgments, and the Competitive Impact Statement in the **Federal Register** on September 16, 2022, and caused notice regarding the same, together with directions for the submission of written comments relating to the proposed Final

[3] HUD has and will continue to provide training sessions with grantees to increase grantees' knowledge about Build America, Buy America and the Buy America Preference requirements as they relate to HUD programs and HUD FFA used by Non-Federal entities to purchase iron and steel, construction materials, and manufactured products to be used infrastructure projects.

[1] On January 27, 2023, the United States moved the Court to permit the United States to publish the public comments on the Antitrust Division's website, due to the expense of publishing the comments in the **Federal Register** and the accessibility to the public of the Division's website. Those comments can be accessed at *www.justice.gov/atr.*

[2] On July 22, 2022, the Processor Settling Defendants announced that a joint venture of Cargill and Wayne acquired Sanderson. The terms of the proposed Final Judgment apply to all successors of the Processor Settling Defendants.

Judgments, to be published in *The Washington Post* every day from September 15–21, 2022. The 60-day period for public comment has now ended. The United States received five public comments in response, which are described below and attached as Exhibit A hereto.[3]

## II. Standard of Judicial Review

The Clayton Act, as amended by the Tunney Act, requires that proposed consent judgments in cases brought by the United States under the antitrust laws be subject to a 60-day comment period, after which the court shall determine whether entry of the proposed Final Judgments ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B).

In considering these statutory factors, the court's inquiry is necessarily a limited one, because the government is entitled to ''rather broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *U.S. Airways Grp., Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States* v. *Charleston Area Med. Ctr.,* No. 2:16–cv–3664, 2016 WL 6156172, at *2 (S.D. W. Va. Oct. 21, 2016) (noting that in evaluating whether the proposed final judgment is in the public interest, the inquiry is ''a narrow one'' and only requires the court to determine if the remedy effectively addresses the harm identified in the complaint); *United States* v. *InBev N.V./S.A.,* No. 08–cv–1965, 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited, as the court only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable'').

As the United States Court of Appeals for the District of Columbia Circuit has held, under the Tunney Act, a court considers the relationship between the remedy secured and the specific allegations in the government's complaint, whether the decree is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether the decree may positively harm third parties, among other factors. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Instead,

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.*'' More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

*Bechtel,* 648 F.2d at 666 (emphasis added) (citations omitted).[4]

In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 38 F. Supp. 3d at 74–75 (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant ''due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case''). The ultimate question is whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.' '' *Microsoft,* 56 F.3d at 1461 (*quoting United States* v. *Western Elec. Co.,* 900 F.2d 283, 309 (D.C. Cir. 1990)). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

[3] The United States received these public comments on October 11, 2022, November 15, 2022 (two comments), November 16, 2022, and November 17, 2022. In Exhibit 1 attached herein, the United States has redacted any personally identifying information relating to the authors of the comments.

[4] *See also BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass'').

In its 2004 amendments to the Tunney Act,[5] Congress made clear its intent to preserve the practical benefits of employing consent decrees in antitrust enforcement, stating that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language made explicit what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11. A court can make its public-interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways,* 38 F. Supp. 3d at 76; *see also United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); S. Rep. No. 93–298 93d Cong., 1st Sess., at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

## III. The Investigation, the Harm Alleged in the Complaint, and the Proposed Final Judgments

The proposed Final Judgments are the culmination of a thorough, comprehensive investigation conducted by the Antitrust Division of the U.S. Department of Justice regarding the Settling Defendants' conspiracy to collaborate on decisions about poultry plant worker compensation, exchange compensation information, and facilitate such conduct through data consultants. Based on the evidence gathered, the United States concluded that this collaboration and information-sharing was anticompetitive and violated Section 1 of the Sherman Act, 15 U.S.C. 1, because it suppressed competition in the nationwide and local labor markets for poultry processing plant workers. This conspiracy distorted the competitive process, disrupted the competitive mechanism for setting wages and benefits, and harmed a generation of poultry processing plant workers by unfairly suppressing their compensation.

Specifically, the United States concluded that, from 2000 or before, the Processor Settling Defendants, Consulting Settling Defendants, and their poultry processing and consultant co-conspirators exchanged compensation information through the dissemination of survey reports in which they shared current and future, detailed, and identifiable plant-level and job-level compensation information for poultry processing plant workers. The shared information allowed poultry processors to determine the wages and benefits their competitors were paying—and planning to pay—for specific job categories at specific plants.

The United States further concluded that the Processor Settling Defendants and their co-conspirators exchanged confidential, competitively sensitive information about poultry plant workers at annual meetings, which they attended in person. From at least 2000 to 2002 and 2004 to 2019, the Consultant Settling Defendants facilitated, supervised, and participated in these annual in-person meetings among the Processor Settling Defendants and their co-conspirators and facilitated their exchange of information about poultry processing worker compensation information.

The Processor Settling Defendants' and their co-conspirators' collaboration on compensation decisions and exchange of competitively sensitive compensation information extended beyond the shared survey reports and in-person annual meetings. The Processor Settling Defendants and their co-conspirators repeatedly contacted each other to seek and provide advice and assistance on poultry processing worker compensation decisions, including by sharing further non-public information regarding each other's wages and benefits. This demonstrates a clear agreement between competitors to ask for help with compensation decisions and to provide such help to others upon request.

In sum, this conspiracy enabled the Processor Settling Defendants and their co-conspirators to collaborate with and assist their competitors in making decisions about worker compensation, including wages and benefits, and to exchange information about current and future compensation plans. Through this conspiracy, the Processor Settling Defendants artificially suppressed compensation for poultry processing workers.

The proposed Final Judgments provide effective and appropriate remedies for this competitive harm. They have several components, which the Settling Defendants agreed to abide by during the pendency of the Tunney Act proceedings and which the Court ordered in the Stipulations and Orders of July 26, 2022 (ECF 11 & 12).

Among other terms, the proposed Final Judgment for the Processor Settling Defendants requires the Processor Settling Defendants to:

a. end their agreement to collaborate with and assist in making compensation decisions for poultry processing workers and their anticompetitive exchange of compensation information with other poultry processors;

b. submit to a monitor (determined by the United States in its sole discretion) for a term of 10 years, who will examine the Processor Settling Defendants' compliance with both the terms of the proposed Final Judgment and U.S. federal antitrust law generally, across their entire poultry businesses; and

c. provide significant and meaningful restitution to the poultry processing workers harmed by their anticompetitive conduct, who should have received competitive compensation for their valuable, difficult, and dangerous labor.

The proposed Final Judgment for the Processor Settling Defendants also prohibits the Processor Settling Defendants from retaliating against any employee or third party for disclosing information to the monitor, an antitrust enforcement agency, or a legislature, among other terms.

Under the proposed Final Judgment for the Consultant Settling Defendants, the Consultant Settling Defendants are restrained and enjoined from:

a. providing survey services involving confidential competitively sensitive information;

b. participating in non-public trade association meetings that involve either the exchange of confidential competitively sensitive information or involve the business of poultry processing; and

[5] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

c. engaging in non-public communications with any person engaged in the business of poultry processing other than as a party or fact witness in litigation, among other terms.

Each proposed Final Judgment provides that it will expire 10 years from the date of its entry, except that after five years from the date of its entry, each Final Judgment may be terminated upon notice by the United States to the Court and the relevant Settling Defendants that continuation of the relevant Final Judgment is no longer necessary or in the public interest.

## IV. Summary of Public Comments and the United States' Response

The United States did not receive any public comments concerning the proposed Final Judgment relating to the Consultant Settling Defendants and received five comments concerning the proposed Final Judgment relating to the Processor Settling Defendants. These comments were submitted by Professor Peter C. Carstensen (''Carstensen Comment''); Ms. Trina B. McClendon (''McClendon Comment''); Farm Action (''Farm Action Comment''); the Campaign for Family Farms and the Environment (''CFFE Comment''); and the Campaign for Contract Agriculture Reform (''CCAR Comment'').

Professor Carstensen is the Fred W. & Vi Miller Chair in Law Emeritus at University of Wisconsin Law School. While now retired, during his professional career Professor Carstensen specialized in antitrust law with a particular interest in competition issues in agricultural markets.[6] He credits the United States for challenging the information-sharing conduct as anticompetitive and asks the Antitrust Division and the FTC to revisit its shared guidance ''to emphasize that such conduct among rivals is likely to be unlawful.'' [7] He also approves of the provisions relating to the tournament system for poultry growers and the PSA.[8] However, Professor Carstensen expresses concern that the United States has not yet brought suit against the other conspirators in the information-sharing conduct and asks the Court to seek assurance from the United States that it will.[9] Finally, he argues that the proposed Final Judgment's prohibitions on exchanging information should forbid the exchange of confidential business information of any kind.[10]

Ms. McClendon is the owner/operator of Trinity Poultry Farm, LLC, an eight-house poultry farm in Amite County, Mississippi, where she has grown chickens for Sanderson for two decades.[11] Her comments argue ''against the buyout of Sanderson Farms by Cargill and Continental Grain,'' [12] and she encourages the United States to ''[s]top the consolidation of America's food and put the farmer first.'' [13] Ms. McClendon also details problems with the tournament system for poultry growers—which she argues ''should be overhauled and reconstructed''—including ''grower pay extortion by integrators'' and a ''lack of transparency.'' [14] She asks that the United States ''reverse this proposed Final Judgment''; ''stop this buyout'' of Sanderson by Cargill and Wayne; ''strip these companies of their right to continue doing business unchecked''; and ''in addition to the $84 million fine that you assessed to these companies for wage suppression, an additional fine be assessed to directly aid all growers who have suffered for the last thirty years under the weight of undue and unfair pressure brought to bear by these corporate Goliath's.'' [15] Ms. McClendon also warns that the Settling Defendants will ''manipulate this proposed Final Judgment to their benefit.'' [16]

Farm Action is ''a farmer-led advocacy organization dedicated to building a food and agriculture system that works for everyday people instead of a handful of powerful corporations.'' [17] Farm Action's comment asks the Court to enter the proposed Final Judgment ''in its entirety,'' calling it fair, adequate, and reasonable.[18] Farm Action does not critique or suggest any changes to the proposed Final Judgments.

CFFE is a coalition of state and national organizations that works ''to support family farmers, rural communities and a vibrant, sustainable food system.'' [19] CFFE approves of the Division's enforcement of the PSA and ''long overdue enforcement action with respect to how poultry companies treat both processing plant workers and contract poultry growers.'' [20] CFFE calls for the court-appointed monitor to ensure that the parties do not attempt to evade the proposed Final Judgment's grower requirements.[21] CFFE also asks the United States to expand its action under the PSA and its investigation into information-sharing related to plant worker compensation to include other growers and information-sharing related to growers.[22] CFFE expresses disappointment that the United States did not challenge the Sanderson acquisition.[23]

CCAR ''represents farmers, ranchers, and poultry growers across the United States.'' [24] CCAR ''greatly appreciate[s]'' and is ''very supportive'' of the provisions of the proposed Final Judgment ''that prohibit conduct that directly affects poultry growers,'' although it urges the court-appointed monitor to take care that the parties to which these provisions apply do not find a way to circumvent them.[25] CCAR recommends the United States challenge future consolidation in agricultural markets and re-examine past mergers and states it was disappointed that the acquisition of Sanderson by Cargill and Wayne ''was allowed to proceed.'' [26] It also urges the Division to broaden its inquiry into information-sharing in the poultry industry to include sharing related to growers and production details.[27]

* * * * *

While the United States takes seriously all of the issues raised in the public comments, much of the CCAR and CFFE Comments and all of the McClendon Comment focus on either the portion of the Processor Settling Defendants' proposed Final Judgment relating to the PSA or on the acquisition of Sanderson by Cargill and Wayne, rather than on whether the proposed Final Judgments adequately resolve the antitrust claims against the Settling Defendants for collaborating on decisions about poultry plant worker compensation, including through the exchange of compensation information, and facilitating this anticompetitive agreement.

The Tunney Act applies only to final judgments or decrees in proceedings brought by the United States under the antitrust laws. *See* 15 U.S.C. 16. The PSA is not an antitrust law. Thus, the provisions of the proposed Final

[6] Carstensen Comment at 1.

[7] *Id.* at 1–2.

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.*

[11] McClendon Comment at 1.

[12] *Id.* at 1

[13] *Id.* at 2.

[14] *Id.* at 2–3; *see generally id.* at 3–7. While Ms. McClendon describes issues relating to the tournament system, she does not discuss the provisions of the proposed Final Judgments related to the tournament system and the PSA.

[15] *Id.* at 7.

[16] *Id.* at 1.

[17] Farm Action Comment at 1.

[18] *Id.* at 25, 4.

[19] CFFE Comment at 1.

[20] *Id.* at 2.

[21] *Id.* at 3.

[22] *Id.*

[23] *Id.* at 1.

[24] CCAR Comment at 1.

[25] *Id.* at 5–6.

[26] *Id.* at 4–5.

[27] *Id.* at 8.

Judgments related to the PSA are not subject to Tunney Act review.[28]

Comments regarding the acquisition of Sanderson are also not subject to Tunney Act review in this matter because the Complaint does not challenge the Sanderson acquisition. Rather, the Complaint alleges that the Settling Defendants' multi-decade collaboration on compensation decisions, sharing of compensation information, and facilitation of such conduct was anticompetitive and that Wayne and Sanderson violated the Packers and Stockyards Act. Under the Tunney Act, the court reviews only whether the proposed remedies address the violations the United States has alleged in its complaint.[29] Potential harms arising from that acquisition that were identified by some public comments are therefore outside the permissible scope of review under the Tunney Act.[30]

The United States understands that some of the commenters are advocating for additional enforcement in the poultry industry. Parts of the CCAR and CFFE Comments urge the United States to continue working to address ''the antitrust implications of industry data sharing activities.'' [31] The Carstensen Comment focuses almost wholly on information-sharing; it asks the United States to continue pursuing other conspirators, to ''forbid any exchange of confidential business information of any kind'' between the Settling Defendants, and to ''revisit [its] outdated guidance on information exchange to emphasize that such conduct among rivals is likely to be unlawful absent specific, limited justifications.'' [32]

The United States does not contend that the proposed Final Judgments resolve all issues in the poultry industry, but these comments are outside the scope of Tunney Act review. They concern conduct not challenged in the Complaint and thus do not provide a basis for measuring the relief included in the proposed Final Judgments.[33] The proposed Final Judgments do address the claims raised against the Settling Defendants.

Additionally, the United States believes the proposed Final Judgments demonstrate to companies both inside and outside the poultry industry that anticompetitive information-sharing risks significant legal consequences, and the broad scope of the monitor contained in the proposed Final Judgments provides protection against anticompetitive information-sharing in contexts other than poultry processing compensation. The United States takes the conduct alleged in the Complaint seriously; the investigation into such conduct is ongoing and the United States will pursue additional claims where the evidence and the law justifies action. Members of the public are encouraged to submit information about potentially unlawful exchanges of information between competitors to the Department of Justice Antitrust Division's Citizen Complaint Center (*https://www.justice.gov/atr/citizen-complaint-center*).

## V. Conclusion

After careful consideration of the public comments, the United States continues to believe the proposed Final Judgments provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint and are therefore in the public interest. The United States will move this Court to enter the proposed Final Judgments after the public comments and this response are published as required by 15 U.S.C. 16(d).

Dated: May 23, 2023.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA

Kathleen Simpson Kiernan,

U.S. Department of Justice, Antitrust Division, Civil Conduct Task Force, 450 Fifth Street NW, Suite 8600, Washington, DC 20530, Tel: 202–353–3100, Fax: 202–616–2441, Email: *Kathleen.Kiernan@usdoj.gov*.

[FR Doc. 2023–11388 Filed 5–26–23; 8:45 am]

**BILLING CODE 4410–11–P**

[28] Competitive Impact Statement at 3; *see also* 15 U.S.C. 12(a). The PSA-related provisions include changes to compensation and disclosure requirements for Sanderson and Wayne growers.

[29] *See Microsoft,* 56 F.3d at 1459. Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Id.* at 1459–60.

[30] The United States has statutory authority to review certain proposed transactions under the Hart-Scott-Rodino Act, 15 U.S.C. 18a, but contrary to some of the public comments the United States does not ''approve'' transactions. *See, e.g., Steves and Sons, Inc.* v. *JELD–WEN, Inc.,* 988 F.3d 690, 713–14 (4th Cir. 2021) (''The Department's decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources.''); *see also In re High Fructose Corn Syrup Antitrust Litig.,* 295 F.3d 651, 664 (7th Cir. 2002).

[31] CFFE Comment at 3 (highlighting the impact of such information-sharing on poultry growers); CCAR Comment at 8 (recommending the United States ''consider the anti-trust implications of such data sharing arrangements regarding poultry growers and production details as well'').

[32] Carstensen Comment at 2.

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. 18–31]**

### Morris & Dickson Co., LLC; Order

On May 19, 2023, I issued and served on the parties a Decision and Order (the Decision and Order) revoking, effective 30 days from the date of publication in the **Federal Register**, Certificate of Registration Nos. RM0314790 and RM0335732 issued to Morris & Dickson, Co., LLC (Respondent). By motion dated May 20, 2023, Respondent requested a stay of the Decision and Order. On May 21, I issued an order soliciting additional information from Respondent and asking the Government to respond to Respondent's Motion for Stay. On May 22, both parties responded. Respondent clarified that it was requesting a stay of at least 90-to-120 days so that it can renew settlement negotiations with the Government. Respondent's May 22, 2023 Letter re Motion for Stay, at 1. Respondent also stated that a stay was necessary to mitigate the impact on its ''customers, employees, and other stakeholders,'' including pharmacies, hospitals, and patients. *Id.* at 4–5. The Government indicated that it opposed any stay request, but stated that it was ''open to settlement offers'' and suggested it was willing to engage in settlement negotiations with Respondent. Government's Opposition to Motion to Stay, at 3.

Upon consideration of the entire record before me, the public interest—in particular, the potential need for Respondent's customers and their patients to find new suppliers given the revocation of Respondent's registrations—and the possibility for renewed settlement negotiations, I hereby order that the May 19, 2023 Decision and Order will be effective on August 28, 2023—ninety days from the date of the Decision and Order's publication in the **Federal Register**. This change is reflected in the published Decision and Order.

*It is so ordered.*

### Signing Authority

This document of the Drug Enforcement Administration was signed on May 23, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the

document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

[FR Doc. 2023–11370 Filed 5–26–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF JUSTICE

### Drug Enforcement Administration

**[Docket No. 18–31]**

### Morris & Dickson Co., LLC; Decision and Order

On May 2, 2018, the Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause (OSC) and Immediate Suspension of Registration (ISO) to Morris & Dickson Co., LLC (Respondent), of Louisiana. Administrative Law Judge (ALJ) Exhibit (ALJX) 1, at 1. The OSC informed Respondent of the immediate suspension of its Certificates of Registration Nos. RM0314790 and RM0335732 (registrations) [1] and proposed their revocation pursuant to 21 U.S.C. 824(a)(4) and 823(b) because it alleged that Respondent's continued registrations were inconsistent with the public interest. *Id.*

Respondent requested a hearing before a DEA ALJ, which was conducted from May 13 to May 16, 2019. On August 29, 2019, the ALJ issued a Recommended Decision (RD), which was transmitted to the Agency along with the administrative record on November 26, 2019.[2] The Agency has incorporated portions of the ALJ's RD herein.

The Government presented a *prima facie* case. Respondent ultimately admitted to and accepted some responsibility for its failures in effectively applying its customer due diligence in assessing orders of controlled substances, its failures to implement a suspicious order monitoring system ''consistent with best practices for compliance,'' and its failures to adequately resolve red flags on orders that it shipped. *See infra* section V. Respondent also admitted that its three suspicious order reports to DEA during the relevant time period were insufficient. *Id.* Nonetheless, Respondent presented testimony and evidence aimed at rebutting the Government's case with regard to the scope of its regulatory noncompliance during the relevant time period.

After thoroughly reviewing the entire record, the Agency finds substantial record evidence that Respondent's continued registration is inconsistent with the public interest in light of the long-term, egregious failures of Respondent in its responsibility as a distributor to maintain effective controls against diversion of controlled substances. Furthermore, the Agency finds that Respondent has failed to demonstrate that the Agency should continue to entrust it with its controlled substance registrations.

## I. Summary of the Allegations

1. The OSC primarily alleged that Respondent failed to maintain effective controls against diversion when it failed to report to DEA thousands of unusually large orders for hydrocodone and oxycodone, which constituted potential suspicious orders, and when it shipped orders to customers without resolving red flags of diversion or reporting the orders to DEA in violation of 21 U.S.C. 823(b)(1) and (e)(1) as well as 21 CFR 1301.71(a) and 1301.74(b). OSC, at 2. Further, the OSC alleged that Respondent failed to adequately design and operate a system to alert Respondent to suspicious orders of controlled substances and failed to report the suspicious orders to DEA in violation of 21 CFR 1301.74(b). *Id.*

2. The allegations included that, from January 2014 until April 2018, Respondent shipped approximately 7,000 unusually large orders of oxycodone and almost 5,000 unusually large orders of hydrocodone. OSC, at 5; Govt Prehearing, at 8. During this time, Respondent filed a total of only three suspicious order reports with DEA.

3. Furthermore, the OSC alleged that, from approximately January 2014 to April 2018,[3] Respondent failed to carry out its due diligence and suspicious order monitoring policies and failed to conduct or failed to document the resolution of meaningful due diligence into orders placed by the following pharmacies: Wallace Drug Company, Inc.; Bordelon's Super-Save Pharmacy; Folse Pharmacy; Pharmacy Specialties Group, Inc.; Dave's Pharmacy; the Wellness Pharmacy, Inc.; Wilkinson Family Pharmacy; and Hephzibah Pharmacy, L.L.C. (hereinafter, the exemplar pharmacies).

## II. The Witnesses

### *A. The Government's Witnesses*

The Government presented its case through the testimony of six witnesses and the introduction of 70 exhibits. The Government's first witness was the Acting Section Chief of the Pharmaceutical Investigation Section of the DEA (the Section Chief), who testified generally regarding the regulatory requirements for distributors. Tr. 47–87. The Government also presented testimony from two Diversion Investigators (DI 1 and DI 2) regarding the history of the investigation and the identification of Government exhibits.[4] *See* RD, at 11–12 (citing Tr. 94–101; 144–177). Next, the Government presented testimony from the Chief of the Statistical Services Section of DEA, G.R., who was qualified without objection as an expert in ''developing and implementing statistical models and methods of analyzing large and complex data sets.'' RD, at 13 (citing Tr. 192). G.R. testified to the methodology he employed in analyzing the statistical data that was used by DEA in its determination that Respondent had failed to report suspicious orders.[5] RD, at 12–15 (citing Tr. 187–245). The Government also presented testimony from the Group Supervisor of the New Orleans Field Division (the GS), who was accepted as an expert in ''the identification of common red flags suggestive of an illicit pharmaceutical operation and as well [as] with respect to the requirements imposed on DEA registrants to identify and investigate

[1] Respondent sought and obtained a temporary restraining order against enforcement of the ISO. *See* ALJX 89, at 7. On May 18, 2018, the DEA Acting Administrator rescinded the ISO issued on May 2, 2018. Tr. 12; *see Stip.* 26.

[2] On October 8, 2019, Respondent filed Exceptions to the Recommended Decision (Resp Exceptions) and on November 7, 2019, the Government filed a response to Respondent's Exceptions. On January 5, 2022, Respondent filed a Motion to Reopen the Administrative Record. On January 14, 2022, the Government filed an opposition to this motion and on January 21, 2022, Respondent filed a Reply Memorandum in Support of its Motion to Reopen the Administrative Record. The Agency addresses the Exceptions throughout and the Motion to Reopen at the end of this Decision.

[3] The allegations for three of the exemplar pharmacies only spanned a subset of this timeframe: Wellness Pharmacy, January 2014–December 2017; Wilkinson Family Pharmacy, January 2014–April 2017; Hephzibah Pharmacy, April 2017–May 2017. Govt Prehearing, at 3.

[4] The Government presented testimony from a third Diversion Investigator (DI 3) to rebut the testimony of Respondent's witness, however, the Agency agrees with the RD that the testimony of DI 3 was not essential to the case and is therefore not including it herein. RD, at 20.

[5] G.R. testified that he had corrected DEA's admitted error in the calculations in the OSC, which applied a Three Interquartile Range (IQR) to the median of the data set, or the 50th percentile, instead of the 75th percentile, and as a result, produced a larger group of outliers. Tr. 204, 208–09. G.R. further acknowledged that the error was identified by Respondent's expert. Tr. 218.

such red flags when they become aware of them.'' RD, at 16 (citing Tr. 282).[6]

*B. Respondent's Witnesses*

Respondent presented its case through the testimony of three witnesses and the introduction of ten exhibits. Respondent's first witness was Kenneth A. Weinstein, Tr. 501–689, who was the Vice President of the consulting firm Analysis Group, Inc. (AGI), and was accepted without objection as an expert in statistical analysis related to controlled substance distribution and in pharmacy ordering and inventory management. RD, at 22 (citing Tr. 513–14; 520–21). Weinstein authenticated Respondent Exhibit (RX) 14, pages 15–19, and RX 28 and 29. Tr. 506, 562–68. Weinstein testified generally regarding the use of the Tukey analytical model in developing Suspicious Order Monitoring systems and testified specifically regarding what he found to be deficiencies in G.R.'s statistical analysis in this case. Weinstein also testified regarding AGI's compliance work for Respondent after DEA had issued the OSC.

Respondent's second witness was Scott Irelan, Tr. 693–840, who had worked for Respondent for 31 years before becoming the Director of Corporate Compliance and Security in May 2018 after the OSC was issued. Irelan testified regarding his current role at Respondent, the remedial measures that Respondent had put in place since the issuance of the OSC, Respondent's preexisting compliance measures during the relevant time period, and Respondent's acceptance of responsibility.

Respondent's final witness was Louis Milione,[7] Tr. 841–1057, who was, at the time, the Senior Managing Director of Guidepost Solutions. Respondent hired Guidepost Solutions to enhance Respondent's compliance system. Tr. 878–79. Milione was previously the Assistant Administrator of the Diversion Control Division at DEA and was offered and accepted without objection as an expert ''in diversion.'' Tr. 851. He testified regarding his factual interactions with Respondent during his tenure at DEA [8] and regarding the work Guidepost performed for Respondent to improve its compliance with DEA requirements.[9]

## III. Findings of Fact

The Parties agree to 47 stipulations (Stips.), which are accepted as facts in these proceedings. The Agency incorporates all of these into the record—the most relevant of which are summarized here. *See* RD, at 33–38. Between January 2014 and May 2018, Respondent submitted a total of three suspicious order reports to DEA. Stip. 7. In this same approximate timeframe, Respondent supplied controlled substances, including oxycodone and hydrocodone, to Wallace, Bordelon's, Folse, Pharmacy Specialties, and Dave's pharmacies. Respondent also supplied Hephzibah with controlled substances, including oxycodone and hydrocodone, between April and May 2017, Wellness Pharmacy between January 2014 and December 2017, and Wilkinson [10] between January and April 2017. *See* Stips. 11–20. The timeframe of the allegations in the OSC are hereinafter referred to as ''the relevant timeframe.''

*A. DEA's Investigation*

In 2017, while investigating pharmacies in Louisiana selling high volumes of oxycodone and hydrocodone, the DEA New Orleans Division discovered that some of those pharmacies were supplied by Respondent. Tr. 92. During a subsequent audit, Respondent told DEA that it used Pro Compliance Reports and its employees to identify suspicious orders. Tr. 93.

DEA served Respondent with three separate subpoenas and several requests for clarification between February 1, 2018, and April 2018.[11] RD, at 44–50. The subpoenas related to Respondent's identification of suspicious orders, due diligence, internal investigations, and internal policies and practices, and also identified specific pharmacies. Government Exhibits (GX) 7, 8, 10, 12, 15. Respondent responded via letters and produced some documentation. For example, GX 9 contains an undated letter from Jacob Dickson, stating that Respondent submitted only two suspicious order reports to DEA because it ''utilizes a pro-active approach to avoid diversion of controlled drugs, including: screening new pharmacy customers; aggressively monitoring orders for controlled drugs; and eliminating pharmacy customers who fill orders for controlled drugs in excess of acceptable ratios, accept cash payments, fill prescriptions for the 'Holy Trinity' and/or other unacceptable practices.'' GX 9, at 1; Tr. 319. The undated letter also states that ''DEA and applicable regulations do not require that a wholesale distributor maintain records of each and every internal investigation conducted on *possible* suspicious orders.'' GX 9, at 1–2 (emphasis in original); Tr. 319–20. The letter further explained that once Respondent has cleared a possible suspicious order, ''no record is maintained.'' GX 9, at 2. The undated letter explained that Respondent used a ''four-fold approach to monitor all prescription drug orders and detect unusual ordering patterns, amounts, and cash payments to identify potentially suspicious orders.'' GX 9, at 2; Tr. 321. The four-fold approach included: use of Pro Compliance Reports; preparing a Market Basket Report of each customer on a monthly basis; since April 2017, use of software that identifies orders that are more than 10 times the ''average dosage units ordered on a given drug on a certain day with the last 90 days of ordering patterns of the same drug''; the experience of the employees who fill the orders for controlled substances; and the input of delivery drivers and salesmen. GX 9, at 3–4.

Government Exhibit 11 is Respondent's (signed by Paul Dickson) supplemental undated response to DEA following up on subpoenas issued to Respondent. Tr. 144–45, 324; GX 11, at 2. This response states that ''[b]ecause formal records are not kept in the regular course of business on the

[6] The Agency adopts the ALJ's credibility findings regarding the Section Chief, the DIs, G.R., and the GS. RD, at 11–12, 15, 19.

[7] Milione is currently the Principal Deputy Administrator of DEA. Despite his return to the Agency, it is noted that Milione has not had any contacts with the Administrator nor anyone participating in the decisionmaking in this matter about and due to his prior involvement with this case.

[8] Respondent presented evidence, including testimony from Milione, about a meeting with Respondent at Respondent's invitation that occurred in August 2016 when Milione was in the role of Assistant Administrator of the Diversion Control Division at DEA. Tr. 856–861; RX 21; RX 11 (PowerPoint slide deck). Milione testified that, at that meeting, he believed that Paul Dickson, Sr., was committed to his regulatory obligations and sincere. Tr. 873. The powerpoint slides from that meeting, which Respondent submitted into evidence, generally support Respondent's statements regarding the workings of its previous SOM at a high level and its termination of customers pursuant to its due diligence efforts. RX 11; *see infra* n.61 regarding termination of Respondent's customers, and *infra* n.89 regarding evidence of the sincerity of Paul Dickson, Sr.

[9] The testimonies of Weinstein, Milione, and Irelan are afforded full credibility in this Decision on all points that are within their expertise and relevant to the final decision as further found herein. This Decision has found all major points of conflict between the Government's and Respondent's witnesses to be largely irrelevant to the Agency's adjudication of the allegations. The Agency analyzes the evidentiary weight of portions of the testimony of these witnesses in balance with other evidence on the record where relevant. It is noted that, although Irelan's testimony regarding acceptance of responsibility is analyzed in the Sanction Section *infra,* it is afforded full credibility.

[10] Wilkinson Family Pharmacy voluntarily surrendered its DEA Certificate of Registration for Cause. Stip. 20.

[11] The Agency adopts the findings of fact in the RD related to these subpoenas and Respondent's response and summarizes herein. RD, at 44–50.

investigation of orders which do not result in the finding of a 'suspicious order' per 21 CFR 1301.74, the email communications produced herewith represent the most responsive records maintained.'' GX 11, at 2; Tr. 324.

At the same time, Respondent produced an external hard drive containing documents in response to the February subpoenas. Tr. 146. Again, DEA emailed Respondent to ensure a complete response, which Respondent generally affirmed and also then provided a phone log [12] with the earliest entry dated January 5, 2016. GX 12–14. In response to the subpoena for policies and trainings, Respondent informed DEA that its training of employees on suspicious order monitoring ''does not necessitate or result in the production of documents.'' GX 16, at 1. Respondent's reply included two policy and procedure documents, which Respondent described as containing ''some limited direction as to suspicious order monitoring.'' *Id.;* Tr. 174–76; GX 17, 18.

*B. General Regulatory Obligations*

21 CFR 1301.74(b) requires distributors to

> . . . design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Field Division Office of the Administration in his area of suspicious orders when discovered by the registrant. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.
>
> *Id.*

Respondent received a copy of a letter sent on September 27, 2006, by DEA to distributors of controlled substances. Tr. 62–63; GX 3, at 1. The letter emphasized that ''[d]istributors are, of course, one of the key components of the distribution chain. If the closed system is to function properly as Congress envisioned, distributors must be vigilant in deciding whether a prospective customer can be trusted to deliver controlled substances only for lawful purposes.'' GX 3, at 1. The letter therefore, reminded distributors of their ''responsibilities . . . in view of the prescription drug abuse problem our nation currently faces.'' *Id.* Further, the letter reminded distributors of their duty under the regulation to ''design and operate a system to disclose to the registrant suspicious orders of controlled substances,'' and their duty to report suspicious orders to DEA upon discovering the suspicious order. *Id.* at 2. In addition, the letter reminded distributors of their duty to exercise due diligence to avoid filling suspicious orders. *Id.* Finally, the letter provided distributors with 14 examples derived from DEA investigations of a customer's behavior that might be indicative of diversion. *Id.* at 3. The letter states that these examples are not all-inclusive and that ''[d]istributors should consider the totality of the circumstances when evaluating an order for controlled substances, just as DEA will do when determining whether the filling of an order is consistent with the public interest within the meaning of 21 U.S.C. 823(e).'' *Id.* DEA sent the same letter a second time on February 7, 2007. Tr. 64–65; GX 69.

Government Exhibit 4 is a December 20, 2007 letter that the DEA sent to every distributor of controlled substances. Tr. 63–64; GX 4, at 1. The stated purpose of this letter was to again remind distributors of the requirement to inform DEA of suspicious orders. GX 4, at 1. The letter reminded distributors that in addition to ''maintain[ing] effective controls against diversion,'' they are also required to ''report suspicious orders of controlled substances.'' *Id.* The letter reminded registrants that the regulation requires that these orders be reported ''*when discovered* by the registrant.'' *Id.* (emphasis in original). The letter also reminded distributors ''that their responsibility does not end merely with the filing of a suspicious order report. Registrants must conduct an independent analysis of suspicious orders prior to completing a sale to determine whether the controlled substances are likely to be diverted from legitimate channels'' in accordance with their requirements to maintain effective controls against diversion in 21 U.S.C. 823(e). *Id.* The letter also informed registrants that DEA interpreted the list of types of suspicious orders to be ''disjunctive and [ ] not all inclusive.'' 21 CFR 1301.74(b).

DEA maintains an Automation of Reports and Consolidated Orders System (ARCOS). Tr. 69–70. Distributors are required to report to ARCOS all shipments of controlled substances in schedules I and II and all narcotic controlled substances in schedule III. Stip. 9; Tr. 70. In April 2008, DEA met with Respondent's President Paul Dickson, Sr., and discussed Respondent's legal obligations and requirements as a distributor, including suspicious order requirements, the need to know its customers, and the need to conduct due diligence. Tr. 67–68. At the time, DEA reviewed its ARCOS data with Respondent to show customers who had anomalies and to demonstrate ''things that [Respondent] should be looking at and questioning [its] customers [about].'' Tr. 68–69. In 2013 and 2015, DEA conducted distributor conferences and Jacob Dickson, Respondent's compliance officer,[13] attended both conferences. Tr. 66–67. Both sides also presented evidence about a meeting with Jacob Dickson, Paul Dickson Sr., C.G. (a former compliance officer at Respondent) and officials from DEA, including Milione, in which Respondent presented its Suspicious Order Monitoring (SOM) system to DEA. *See* RX 11 (powerpoint); *see supra* n.8.

Respondent filed three suspicious order reports during the relevant time period. Stip. 7. The first, dated April 7, 2014, states that ''[a]t this time, and pending further review by you or M&D, M&D has stopped selling schedule II through schedule V drugs to the captioned pharmacy.'' GX 6, at 1. The next report is dated April 26, 2017, and states that the pharmacy in question ''purchased a quantity of 60 cartons of prefilled 10 mg morphine sulphate syringes . . . This was a substantial increase over a total sales of one carton in the prior four months.'' GX 6, at 35. The letter states that the order was investigated but does not discuss the resolution of this investigation, nor whether the order was filled. *Id.* The final report was filed on the same day, April 26, 2017, and gives no facts related to what order was deemed suspicious nor any information about an investigation or whether the order was shipped. GX 6, at 36.

Distributors are required to design and operate a suspicious order monitoring system that identifies suspicious orders. 21 CFR 1301.74(b). Suspicious orders include, but are not

[12] Regarding the exemplar pharmacies, the phone log contains two entries concerning the Pharmacy Specialties Group, with a DEA registration number ending in ''589.'' GX 14, at 4, 31; GX 23, at 1. Those entries are dated March 7, 2016, and December 13, 2017. GX 14, at 4, 31. There is one entry concerning Dave's Pharmacy, with a DEA registration number ending in ''386.'' GX 14, at 23; GX 24, at 1. That entry is dated February 16, 2017. GX 14, at 23. There are three entries concerning Hephzibah Pharmacy, with a DEA registration number ending in ''695.'' GX 14, at 23, 26; GX 25, at 1. Those entries are dated March 17 and 21, 2017, and June 20, 2017. GX 14, at 23, 26. There are five entries concerning Wilkinson Family Pharmacy, with a DEA registration number ending in ''198.'' GX 14, at 24; GX 27, at 1. Those entries are dated April 19, 20, 21, and 24, 2017. GX 14, at 24. There are three entries concerning Wallace Drugs, with a DEA registration number ending in ''363.'' GX 14, at 31; GX 20, at 1. Those entries are all dated January 9, 2018. GX 14, at 31; RD, at n.12. *See supra* section III.D.

[13] The GS testified that ''one time [Jacob Dickson] was marked as president and then in the other time it was compliance officer.'' Tr. 67. In a letter to DEA in response to subpoenas, Jacob Dickson's title was listed as Vice President, SOM Manager. GX 9, at 4.

limited to, three stated criteria: orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency. *Id.*

Additionally, a distributor's general duty to prevent diversion includes the duty to perform due diligence on its customers. *Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36500 (2007); *see also Masters Pharmaceuticals, Inc.,* 80 FR 55418, 55476 (2015), *pet. for review denied, Masters Pharmaceuticals, Inc.* v. *Drug Enf't Admin.,* 861 F.3d 206 (D.C. Cir. 2017). The GS testified that if the required due diligence at the customer level identifies red flags indicative of diversion, Tr. 328, those red flags render an individual order suspicious and trigger the investigation or reporting requirement, even if the regulatory criteria in 21 CFR 1301.74(b) are not present, *e.g.,* the order size is not unusual. Tr. 477–478; *see also Masters Pharm., Inc.,* 80 FR at 55477 (stating that ''an order is not only suspicious by virtue of its internal properties—*i.e.,* being of unusual size, pattern, or frequency—but by virtue of the suspicious nature of the pharmacy which placed [the order]'').

The Agency's decision in *Masters* sets forth that a distributor must either investigate suspicious circumstances on an order and resolve all indicia of diversion or decline to fill the order and report it to DEA. *Masters Pharm., Inc.,* 80 FR at 55478.

### *C. Red Flags—Customer Due Diligence*

The record evidence establishes that customer red flags indicative of potential diversion include a pharmacy customer that: dispenses a high volume of narcotics; dispenses the trinity drug cocktail; [14] dispenses disproportionally more controlled substances than non-controlled substances; [15] fills prescriptions for customers who live far away from the pharmacy; fills prescriptions for a high volume of patients who pay for prescriptions in cash; [16] fills prescriptions for practitioners whose DEA registrations cannot be verified; [17] fills a disproportionate volume of controlled substance prescriptions written by only a few prescribers; and/or orders excessive quantities of a limited variety of controlled substances. Tr. 297, 299–301, 335, 411, 427, 489–90, 648–49, 681, 1037; *see also* Pro Compliance Reports GX 20–56. Weinstein noted that red flags are visible in a pharmacy's dispensing data and not its ordering data.[18] Tr. 679. Irelan admitted that, during the relevant time period, due diligence was not being applied at the ordering level.[19] Tr. 722–23.

The GS testified that when Respondent received the Pro Compliance Reports in GX 20–56 that demonstrated red flags of diversion, it was obligated to resolve the red flags and document their resolution. Tr. 474–76. Based on the record testimony of the experts, and the *Masters* decision, the Agency finds that when a distributor is aware of red flags indicating diversion of controlled substances from a customer, at a minimum, it is obligated to investigate further and resolve the red flags, or, if it chooses not to investigate and resolve, it must report the order as suspicious to DEA and not ship the controlled substances. *See infra,* section IV.A.4.

[14] The trinity drug cocktail consists of an opioid, such as hydrocodone, a benzodiazepine, such as alprazolam, and a muscle relaxer, such as Soma, and the combination of substances is still a red flag even if each element is prescribed by different prescribers. Tr. 55, 300, 344.

[15] The record contains varying evidence as to the threshold percentage of a pharmacy customer's controlled substance fills relative to its non-controlled substance fills that would trigger a red flag for the distributor. *See* Tr. 351, 461 (The GS testifying that if the percentage of controlled substance prescriptions filled exceeds 15 percent of total prescriptions, it is a red flag); Tr. 1030 (Milione testifying that if a pharmacy is filling controlled substance prescriptions at a percentage exceeding the national average, then the distributor can resolve the red flag without reporting a suspicious order); Tr. 867 (Irelan testifying that the previous SOM system involved monitoring ''for customers that were getting a little closer to 20 percent of that ratio''); RD, at n.5 (noting that the *Masters* decision found the threshold to be around 20 percent for controlled versus 80 to 90 percent for non-controlled, *Masters Pharm., Inc.,* 80 FR at 55480, but finding that the GS presented the most credible evidence at 15 percent).

The Agency finds the exact percentage threshold to be largely irrelevant to determine in this case, because in every instance of the Government's allegations, this particular red flag was flagged by the Pro Compliance Reports that were created for Respondent. Furthermore, all of the pharmacy customers in the allegations were dispensing controlled substances at 20 percent or more of their total dispensing—with one customer at one point dispensing as high as 69 percent controlled substances, *see* GX 26, at 11 (Wellness). The only exception was Bordelon's dispensing at 17 percent controlled substances, but which Pro Compliance reported as being ''slightly higher than national average.'' GX 21, at 6. Furthermore, seven of the eight exemplar pharmacies demonstrated multiple red flags in addition to this one. It is indisputable that Respondent was aware of this red flag for each of these customers at a customer level due to the Pro Compliance Reports in its possession.

[16] The record contains varying evidence as to the threshold percentage of cash payments for controlled substance prescription fills at a pharmacy customer that would trigger a red flag for the distributor. *See* Tr. 328 (The GS testifying that any pharmacy customer exceeding 9 percent cash payments from customers should raise red flags); *see also* 1036–37 (Milione testifying that a high percentage of cash in controlled versus non controlled prescriptions is a red flag, but can be resolved with due diligence, the records of which must be maintained); Tr. 681 (Weinstein testifying that if a pharmacy has ''a substantially higher percentage of cash payments for controlled substances than it did for a non-controlled substances, that would be a [potential] red flag of diversion,'' but that he does not have ''a particular definition of substantial or significant,'' because it was more of a ''relative comparison''); *but see* Tr. 649 (Weinstein answered that it was ''fair'' to say that when a distributor becomes aware of factors, such as cash payments, ''they're significant red flags of diversion.'').

Again, the Agency finds the exact percentage threshold for cash payments to be largely irrelevant to determine in this case, because in every instance of the Government's allegations, this particular red flag was flagged by the Pro Compliance Reports that were created for Respondent. As detailed herein, the percentages of cash paid by Respondent's customers at issue were also particularly high, *see, e.g.,* 41 percent, GX 22, at 12 (Folse). It is indisputable that Respondent was aware of this red flag for each of these customers at a customer-level based on the Pro Compliance Reports in its possession.

[17] The Pro Compliance Reports additionally contain reports of prescribers whose DEA controlled substance registrations ''could not be verified through DEA-Verify.com'' and whose controlled substance prescriptions were filled by Respondent's customers. *See, e.g.,* GX 22, at 17; Tr. 336 (June 2017 Report showing that Folse filled controlled substances prescribed by 23 practitioners whose registrations could not be verified). Both Irelan and Milione testified that the portion of the Pro Compliance Reports concerning the verification of prescriber DEA numbers is unreliable. Tr. 765–66, 797, 901. Milione also testified that a distributor needs to hold and report a suspicious order if it is aware that a customer is filling prescriptions for a practitioner with no DEA registration. Tr. 1025. Although the Agency agrees with the RD, at n.14, that during the relevant timeframe, there is no evidence in the record that Respondent resolved the red flags presented by these reports demonstrating unverified registrations, even if they were unreliable, the Agency also finds that there is more than enough evidence on the record that Respondent did not resolve the other clearly established red flags of diversion and therefore finds it unnecessary to address these additional red flags in this Decision.

[18] The fact that the red flags applied to the customer generally and not to each individual order, *see* ALJX 89, at 99, is irrelevant to this adjudication, because under the relevant legal requirements, Respondent cannot ignore red flags that demonstrate that its customers are potentially diverting controlled substances and continue to fill those individual orders without resolving each of those red flags. *See* Tr. 477–478. At a minimum, Respondent must either have stopped the shipments and reported orders to DEA or resolved and documented each of the red flags. *See Masters Pharm., Inc.,* 861 F.3d at 222–23.

[19] It is noted that Respondent attempted to introduce and the ALJ rejected, Exhibit 32C, based on lack of identification. Tr. 447. Respondent's stated purpose was to impeach the Government's witness in demonstrating that Respondent's due diligence files did include photographs as described in its policy, Tr. 447, contrary to the GS's testimony that he did not ''recall any'' photographs, Tr. 322; RX 32C. The GS testified credibly that he did not recall seeing the file with the photograph ''at all.'' Tr. 447. The Agency has reviewed the document and notes that it did include a photograph; however, the Agency is not finding that Respondent's compliance with its policy on this issue is relevant to this decision and, therefore, the exhibit marked for identification as RX 32C plays no role in the adjudication of this matter. Further, if this exhibit had been included in the record, standing alone, it bodes poorly for Respondent concerning its failure to report suspicious orders for terminated customers. *See infra* n.61.

*D. Pro Compliance and Market Basket Reports*

In conducting customer due diligence, Respondent used, at least up to and including during the hearing, Pro Compliance Reports,[20] which provide analysis of a pharmacy's dispensing data to include key indicators of red flags of diversion, such as the percentage of a customer's business that represents controlled substance dispensing, the volume of cash payments, and the amount of trinity drug cocktails filled. Tr. 464–65, 716–17. In this case, the reports in Respondent's possession for the exemplar pharmacies demonstrated numerous red flags of diversion, and the Agency finds substantial record evidence that Respondent did not adequately document the resolution of those red flags or report the orders to DEA as suspicious.[21] Additionally, the reports in evidence for the exemplar pharmacies appear to demonstrate violations of Respondent's purported policy of ''eliminating pharmacy customers who fill orders for controlled drugs in excess of acceptable ratios, accept cash payments, prescribe the 'Holy Trinity' and/or other unacceptable practices.'' GX 9, at 1. According to Respondent, Market Basket Reports[22] were prepared for each customer on a monthly basis as part of its due diligence. GX 9, at 3–4. The reports identified percentages of controlled substances in total dispensing. *Id.; see, e.g.,* GX 59. Respondent no longer uses Market Basket reports but continues to use Pro Compliance Reports. Tr. 716.

The GS testified that he did not find evidence that Respondent ever rejected a controlled substance order from any of the exemplar pharmacies, nor did he find documentation that Respondent dispelled all of the red flags in these reports. Tr. 385–86, 316,[23] 413.

1. Folse Pharmacy

The record evidence demonstrates that the Pro Compliance Initial Risk Evaluation Report provided to Respondent for Folse Pharmacy designated the pharmacy as ''high risk.'' GX 22, at 5; Tr. 328. Further, Pro Compliance Reports for Folse Pharmacy in Respondent's possession demonstrated that during the time period of the allegations, Folse Pharmacy's dispensing practices raised numerous red flags, including: high percentages[24] of controlled substance prescriptions, high percentages of controlled substance prescriptions paid for in cash,[25] an increase[26] in the number of oxycodone dosage units dispensed, and dispensing of trinity cocktail prescriptions.[27] *See* RD, at 51–53. Furthermore, in June 2017, a Pro Compliance Report recommended that Respondent engage with Folse's owner to ''gain a better understanding of [its] dispensing practices . . . .'' GX 22, at 17. The record does not include evidence of an investigation into or resolution of the red flags identified. Further, the record is clear that Respondent did not report any orders from this customer to DEA as suspicious and there is no record evidence that Respondent stopped shipping to this customer as a result of these reports. Tr. 340; Stip. 13.

2. Bordelon's

Pro Compliance Reports for Bordelon's Super Save Pharmacy in Respondent's possession demonstrated that during the time period of the allegations, Bordelon's dispensing practices raised numerous red flags, including: high percentages[28] of controlled substance prescriptions, higher than average oxycodone and hydrocodone units, and dispensing of trinity cocktail prescriptions.[29] *See* RD, at 53–54. In March 2017, a Pro Compliance Report recommended that Respondent engage with Bordelon's owner to ''gain a better understanding of [its] dispensing practices . . . .'' GX 21, at 6. The record is clear that Respondent did not report any orders from this customer to DEA as suspicious and there is no record evidence that Respondent stopped shipping to this customer as a result of these reports. Tr. 347–48; Stip. 12.

3. Wallace Drug Company

Pro Compliance Reports for Wallace in Respondent's possession demonstrated that during the time period of the allegations, Wallace's dispensing practices raised numerous red flags, including, but not limited to: high percentages of controlled substance prescriptions paid for in cash,[30] higher than average dosages of oxycodone and hydrocodone, and dispensing of trinity cocktail prescriptions.[31] *See* RD, at 54–55. In August 2017, a Pro Compliance Report recommended that Respondent engage with Wallace's owner to ''gain a better understanding of [its] dispensing practices.'' GX 20, at 6. Respondent produced phone log entries on January 9, 2018, for Wallace. *See* GX 14, at 31 (note stating that the pharmacy salesman had been contacted and Respondent recommended that he return the order, noting ''might need to check on this guy'' and ''looks like he is hitting this stuff hard!''). Another note on the same date states that the customer was contacted and the customer explained the large order. According to the note, Respondent's employee recommended the return of the hydrocodone and the customer returned it. This note did not occur

[20] Each Pro Compliance Report contains a statement regarding the Controlled Substances Act (CSA) requirement on manufacturers and distributors to design and operate a system that will disclose suspicious orders of controlled substances. *See, e.g.,* GX 23, at 11; Tr. 355.

[21] Respondent argues that ''the Government offered no evidence to demonstrate that Respondent failed to dispel suspicion.'' ALJX 89, at 100. The Agency finds this argument to be circular. Respondent did not maintain adequate documentation of its resolution of red flags or suspicious orders, so there is no evidence to demonstrate whether it did or did not conduct the due diligence necessary to resolve the red flags. *See infra* n.80. As described herein, the Agency requires documentation of Respondent's due diligence for many reasons.

[22] Respondent points out that the GS's testimony regarding the Market Basket reports was possibly based on a misinterpretation of the numbers. ALJX 89, at 30 (citing Tr. 409, 423–425). In adjudicating the allegations, this Decision focuses on the Pro Compliance Reports in which there is more than enough information to support the Agency's finding that the alleged customers presented red flags of diversion, the resolution of which was not adequately documented, yet Respondent continued to ship. The Market Basket Reports are only considered to demonstrate that Respondent was conducting some due diligence.

[23] Respondent points to Irelan's testimony to contest the notion that Respondent was not stopping shipments based on reports; however, the citations to his testimony support that Respondent was generally conducting some due diligence as it had described in its letters to DEA in response to the subpoena, not that the red flags at issue for the exemplar pharmacies were resolved. ALJX 89, at 16; *see also, e.g.,* RX 31.001 (notes on pharmacies other than exemplar).

[24] According to the Pro Compliance Reports in evidence, percentages of controlled substances during the relevant time period ranged from approximately 30 to 36 percent of Folse's total dispensing. GX 22, at 12–17.

[25] According to the Pro Compliance Reports in evidence, percentages of controlled substance dispensing paid for in cash ranged from approximately 18 to 41 percent. GX 22, at 12–14, 17.

[26] Between September 2013 and November 2014, the number of oxycodone dosage units dispensed increased from 40,812 to 52,571. GX 22, at 12; Tr. 330–31 (The GS describing this increase as ''a very big red flag''); *see also* Tr. 471–74.

[27] In June 2017, Folse dispensed nine trinity drug cocktails and in September 2016, Folse dispensed twenty-two trinity drug cocktails. GX 22, at 17, 14; Tr. 300, 335–36.

[28] In March 2017, the percentage of controlled substances dispensed represented 17 percent of Bordelon's total dispensing, which Pro Compliance reported to be ''slightly higher than national averages.'' GX 21, at 5–6.

[29] In March 2017, Bordelon's dispensed four trinity drug cocktails. GX 20, at 5–6.

[30] In August 2017, 31 percent of controlled substance prescriptions filled by Wallace were paid for in cash. GX 20, at 5.

[31] In August 2017, Wallace dispensed three trinity drug cocktails. GX 20, at 5–6; Tr. 349–50.

until five months after the Pro Compliance Report for Wallace, which demonstrated multiple additional red flags of diversion for which there is no documented resolution. Therefore, it is unclear whether the employee flagging this particular order knew that there might be further reason to suspect that this pharmacy was engaging in diversion in order to be able to adequately resolve the suspicious circumstances surrounding the order. Even if this note arguably provided a documented resolution of an unusually large order, the other red flags for this customer are unresolved and unaccounted for. There is also no record evidence that Respondent reported the unusually large order or any orders from this customer to DEA and there is no record evidence that Respondent stopped shipping to this customer as a result of these reports or notes. Tr. 353; Stip. 11.

4. Pharmacy Specialties Group

Pro Compliance Reports for Pharmacy Specialties in Respondent's possession demonstrated that during the time period of the allegations, Pharmacy Specialties' dispensing practices raised numerous red flags, including: high percentages [32] of controlled substance prescriptions, high percentages of controlled substance prescriptions paid for in cash,[33] an increase [34] in the number of hydrocodone, oxycodone, and benzodiazepine dosage units dispensed, and dispensing of trinity cocktail prescriptions.[35] *See* RD, at 55–57. In February 2016, a Pro Compliance Report recommended that Respondent engage with Pharmacy Specialties' owner to ''gain a better understanding of [its] dispensing practices.'' GX 23, at 6. Respondent's phone logs demonstrate that an employee raised a concern on March 7, 2016, regarding Pharmacy Specialties Group; however, there is no record documentation of how the concern was resolved and Respondent continued to distribute. *See* GX 14, at 4 (''[C]heck out this guys usage for item [ ] compared to his overall warehouse purchasing, this seems quite elevated to me. . . . .???? ''). This note identifies a suspicious order; however, according to the record evidence, Respondent did not report the order to DEA. Further, there is no documented investigation or resolution of the concern raised by the employee in the record. On December 13, 2017, another note reads, ''Henry will give the customer a warning about his Oxy purchases. Too much cash, too much growth. Will re-run and if no improvement will either restrict or cut off completely.'' *Id.* at 31. Although this note seems to set forth a plan for compliance, it does not include any indication of an investigation into or resolution of the red flags identified. Further, the record evidence is clear that Respondent did not report this order or any orders from this customer to DEA and there is no record evidence that Respondent stopped shipping to this customer as a result of these reports. Tr. 362; Stip. 14.

5. Dave's Pharmacy

Pro Compliance Reports for Dave's Pharmacy in Respondent's possession demonstrated that during the time period of the allegations, Dave's dispensing practices raised numerous red flags, including: high percentages [36] of controlled substance prescriptions, high percentages of controlled substance prescriptions paid for in cash,[37] increases [38] in the number of oxycodone dosage units dispensed, and dispensing of trinity cocktail prescriptions.[39] *See* RD, at 57–59. In March 2014, a Pro Compliance Report recommended that Respondent engage with Dave's owner to ''gain a better understanding of [its] dispensing practices. . . .'' [40] GX 24, at 6. It also states that this pharmacy ''represents a relatively *high risk* to [Respondent].'' *Id.* (emphasis in original). A year later, on February 16, 2017, Respondent's phone logs contain the following note about Dave's: ''Talked to [D.J.] about the issues at his store. He will let the doctors know that he will no longer be filling these scripts.'' GX 14, at 23. According to the record evidence, Respondent did not elicit or document an explanation for the red flags and the record is clear that Respondent never reported this order or any orders from this customer to DEA. Further, there is no record evidence that Respondent stopped shipping to this customer as a result of these reports. Tr. 384–85; Stip. 15.

6. Hephzibah Pharmacy

A Pro Compliance Report for Hephzibah Pharmacy in Respondent's possession demonstrated that during the time period of the allegations, Hephzibah's dispensing practices raised numerous red flags, including: high percentages [41] of controlled substance prescriptions, high percentages of controlled substance prescriptions paid for in cash,[42] and dispensing of trinity cocktail prescriptions.[43] *See* RD, at 59–60. In February 2017, a Pro Compliance Report recommended that Respondent engage with Hephzibah's owner to ''gain a better understanding of [its] dispensing practices. . . .'' GX 25, at 6.

Jacob Dickson sent an email to a DI stating that Respondent had ceased business with Hephzibah because Respondent did not support the customers who ''wished to change their business model;'' however, Respondent ''did not find these accounts to exhibit suspicious activity or excessive orders.'' GX 72, at 1. Respondent's phone logs state on March 17, 2017, that ''they must work on clearing up issues that Pro Compliance found, high cash, trinity & high quantities on Hydrocodone and Oxycodone. Will re-run in 90 days.'' GX 14, at 23. On March 21, 2017, there is a follow up entry that states, ''After a couple of months, they decided they would rather change wholesalers than cooperate with our compliance program.'' *Id.* at 26. Although the notes demonstrate that Respondent was

[32] According to the Pro Compliance Reports in evidence, the percentages of controlled substances ranged from approximately 24 to 30 percent of Pharmacy Specialties' total dispensing. GX 23, at 5, 18; Tr. 353–54.

[33] According to the Pro Compliance Reports in evidence, the percentages of controlled substances dispensing paid for in cash ranged from approximately 28 percent to 31 percent. GX 23, at 5–6, 16, 18, 18.

[34] From February 2016 to October 2016, the number of hydrocodone dosage units dispensed increased by 25 percent, while from October 2016 to September 2017, the number of dosage units of oxycodone, hydrocodone, and benzodiazepines dispensed increased by 148, 89, and 106 percent respectively. GX 23, at 16, 18; Tr. 358–59.

[35] In February 2016, October 2016, and September 2017, Pharmacy Specialties dispensed trinity drug cocktails. GX 23, at 6, 16; Tr. 355, 358–59.

[36] According to the Pro Compliance Reports in evidence, percentages of controlled substances during the relevant time period ranged from approximately 20 to 22 percent of Dave's total dispensing. GX 24, at 5, 18–21, 24, 30; Tr. 362–67.

[37] According to the Pro Compliance Reports in evidence, percentages of controlled substance dispensing paid for in cash ranged from approximately 17 to 35 percent. GX 24, at 18–21, 23, 24, 30; Tr. 364–67.

[38] For example, from March 2014 to January 2015, the number of oxycodone dosage units dispensed increased from 17,889 to 29,994, and from May 2014 compared to December 2015, the number of dosage units of oxycodone increased by 205 percent. GX 24, at 18, 19, 21; Tr. 364; *see also* RD, at 57–59.

[39] Between March 2014 and January 2015, Dave's dispensed 57 trinity drug cocktails. GX 24, at 18; Tr. 364. Between May 2014 and December 2015, Dave's dispensed 27 trinity drug cocktails, and between December 2015 and June 2016, Dave's dispensed 33 trinity drug cocktails. GX 24, at 19–20. Tr. 365–66. Further, between June and November 2016, Dave's dispensed 37 trinity drug cocktails and in June 2017, Dave's dispensed 14. GX 24, at 21, 24.

[40] This Pro Compliance Report identifies Dave's second highest prescriber as having eighty-five incidents of prescribing trinity drug cocktails.

[41] In February 2017, controlled substance prescriptions constituted 27 percent of Hephzibah's total dispensing. GX 25, at 6; Tr. 370–71.

[42] In February 2017, the percentage of controlled substance dispensing paid for in cash was 36 percent. GX 25, at 6, 12; Tr. 371.

[43] In February 2017, Hephzibah dispensed nine trinity drug cocktails. GX 25, at 5–6; Tr. 371.

conducting some due diligence, this statement contradicts Jacob Dickson's email asserting that Respondent terminated the business relationship and also that Respondent did not find the accounts to exhibit suspicious activity when it clearly had identified red flags through Pro Compliance Reports. *See* GX 72, at 1 (listing Hephzibah Pharmacy as an account that Respondent ''chose to close'').[44]

7. The Wellness Pharmacy

Pro Compliance Reports for the Wellness Pharmacy in Respondent's possession demonstrated that during the time period of the allegations, Wellness's dispensing practices raised red flags of very high percentages of controlled substance prescriptions and high numbers of dosage units of hydrocodone and oxycodone. *See* RD, at 60–61. Although Pro Compliance's initial risk assessment evaluated Wellness as ''low risk,'' it also revealed that between April and June 2013, 67 percent of all prescriptions dispensed by Wellness were for controlled substances. Further Pro Compliance Reports during the relevant time period demonstrated that Wellness's percentage of controlled substance prescriptions continued to range from approximately 64 to 69 percent. GX 26, at 10–12, 14, 21; Tr. 374. There is no record evidence that Respondent reported these orders to DEA or any orders from this pharmacy, documented the resolution of the red flags, or stopped shipping to this customer as a result of the red flags that these reports identified. Tr. 384–85; Stip. 17.

8. Wilkinson Family Pharmacy

Pro Compliance Reports for Wilkinson Family Pharmacy in Respondent's possession demonstrated that during the time period of the allegations, Wilkinson's dispensing practices raised numerous red flags, including: high percentages [45] of controlled substance prescriptions, increases in oxycodone, high percentages of controlled substance prescriptions paid for in cash,[46] higher than average dosages of oxycodone and hydrocodone, and dispensing of trinity cocktail prescriptions.[47] *See* RD, at 61–63. In January 2017, a Pro Compliance Report recommended that Respondent engage with Wilkinson's owner to ''gain a better understanding of [its] dispensing practices.'' GX 27, at 26.[48] There is no record evidence that Respondent reported these orders or any orders from this customer to DEA, or stopped shipping to this customer as a result of these reports. Tr. 384–85; Stip. 19.

The Government has presented substantial record evidence that Respondent distributed controlled substances to the exemplar pharmacies during the relevant time period in the face of red flags of diversion, including high percentages of controlled substance prescriptions, high percentages of controlled substance prescriptions paid for in cash, dispensing of trinity cocktail prescriptions, and increases and higher than average dosages of particular schedule II controlled substances. All of these red flags were specifically identified by Pro Compliance Reports in Respondent's possession. Although some of the notations provided by Respondent demonstrated that employees had suspicions about certain orders and had made some contacts, none of the notations adequately resolved the red flags and none of the orders were reported to DEA as suspicious. In the documents Respondent produced to DEA, the GS did not find any indication that the Compliance officer stopped shipment of any order of controlled substances identified as suspicious. Tr. 315–16, 385. It is noted that most of these customers displayed not just one red flag, but multiple red flags of diversion—most of them well over any arguable threshold that would require investigation, *see supra* notes 15–16—and there is insufficient record evidence that Respondent conducted or documented due diligence to resolve these numerous red flags of diversion presented by its customers.

*E. Suspicious Orders Under 21 CFR 1301.74(b)*

The Government alleged that Respondent failed to design and operate an effective system to disclose to Respondent suspicious orders and to report those orders to DEA. OSC, at 8. DEA used statistical analysis of orders placed by Respondent's customers for oxycodone and hydrocodone to ''identify extremely large individual pharmacy transactions and extremely large monthly volume totals,'' in order to demonstrate the failures of Respondent's SOM system and reporting. *Id.* The GS explained that the reporting of suspicious orders is particularly important for DEA to be able to ''conduct an investigation'' and identify potential diversion. Tr. 284–86.

G.R. testified regarding the statistical analysis that he performed for the investigation, including his use of a statistical methodology called the Tukey method to identify outlier transactions that represented possible suspicious orders. Tr. 225; 236–37. G.R. testified that Tukey uses an interquartile range, which is the difference between the first and third quartiles, and then is multiplied by a factor of one-and-a-half to six (IQR multiplier). Tr. 202. Although there is no single multiplier to use, Tr. 523, the higher the IQR multiplier, the fewer outliers will be identified. Tr. 523–24. G.R. used an IQR multiplier of 3 to calculate a smaller group of outliers to identify ''what are called far out or extreme outliers.'' Tr. 203, 233, 242. G.R. testified that the transactions that he identified using three IQR above the 75th percentile represented unusually large transactions, which would normally occur less than one percent of the time. Tr. 238–39.

G.R. testified that he analyzed Respondent's sales of oxycodone and

[44] The Agency agrees with the ALJ's finding that the phone log note deserves more weight as to what occurred with this pharmacy than Jacob Dickson's email. RD, at 136 n.60.

[45] According to the Pro Compliance Reports in evidence, percentages of controlled substances during the relevant time period ranged from approximately 9 to 42 percent of Wilkinson's total dispensing. GX 27, at 20–23. 25–26; Tr. 367, 378–380.

[46] According to the Pro Compliance Reports in evidence, percentages of controlled substance dispensing paid for in cash ranged from approximately 17 to 38 percent and cash paid for non-controlled substance prescriptions was significantly lower. GX 27, at 20–23; Tr. 378–380.

[47] Between March 2014 and January 2015, Wilkinson dispensed twenty-six trinity drug cocktails. GX 27, at 21; Tr. 378. Between January 2015 and January 2016, Wilkinson dispensed twenty-one trinity drug cocktails, and between December January 2016, and August 2016, Wilkinson dispensed twenty trinity drug cocktails. GX 27, at 22–23. Tr. 379. Further, in January 2017, Wilkinson dispensed fourteen trinity drug cocktails, and in June 2017, Wilkinson dispensed 14. GX 27, at 26, 32.

[48] Respondent produced an email from March 4, 2014, from Wilkinson, which appeared to be in response to a Pro Compliance Report that Respondent had sent to Wilkinson. Wilkinson's explanation primarily focuses on cash payments. RX 05.001. The GS testified that this showed ''some'' due diligence. Tr. 452. There was extensive dispute about the introduction of this exhibit during the hearing. Tr. 453–458. It appeared that Respondent did try to offer the exhibit into evidence, Tr. 453, and then offered it subject to connection. Tr. 455. The ALJ ultimately determined to send it to the Agency as part of the administrative record. RD, at 104 n.41. The Agency has considered this exhibit because the contested nature of the hearing at this point has made it difficult to determine whether this exhibit was offered. The exhibit demonstrates that Respondent conducted ''some'' due diligence on Wilkinson. However, it is noted that the document does not demonstrate the resolution of each of the red flags of diversion, nor does it reflect any independent analysis of Respondent's statements regarding the cash red flag. Ultimately, the Agency accepts that Respondent conducted ''some'' due diligence for Wilkinson. Further, even if Respondent had adequately resolved the red flags for this pharmacy, there is more than enough evidence of Respondent's failures to conduct due diligence to support the Agency's finding that Respondent's registrations are inconsistent with the public interest.

hydrocodone from January 1, 2014, to April 30, 2018, and compared every transaction the pharmacy made from January 1, 2014, to April 30, 2018, against every other transaction made during the same time period to the same pharmacy, which he called a ''fixed-frame analysis.'' Tr. 197–98; 226–27. He credibly testified that he used the fixed-frame analysis because he was looking for ''a ballpark estimate of scale, size of outlier population,'' as opposed to the exact number of outliers. Tr. 227, 234.

Government Exhibits 65 and 66 contain all of the transactions concerning oxycodone shipments that Respondent reported to DEA between January 1, 2014, and April 30, 2018, as well as the results of G.R.'s corrected analysis using the above-described methodology. Tr. 71–72. GX 65, 66; Tr. 71–72, 211–12. G.R.'s corrected analysis identified the following amounts of Respondent's oxycodone and hydrocodone sales as outliers, *i.e.,* unusually large, from January 1, 2014, to April 30, 2018.

| Substance | 2014 | 2015 | 2016 | 2017 | [49] 2018 | Total |
|---|---|---|---|---|---|---|
| Oxycodone | 2,097 | 1,857 | 1,546 | 1,361 | 391 | 7,252 |
| Hydrocodone | 1,919 | 1,314 | 1,006 | 536 | 173 | 4,948 |

Tr. 212–13; GX 65–66, at Summary tab; Government Demonstrative Exhibit (GDX), at 10.

G.R.'s corrected analysis also identified approximately 450 potential outliers for Respondent's oxycodone and hydrocodone sales for seven [50] of the exemplar pharmacies from January 1, 2014, to April 30, 2018. Tr. 213–14, 216–17, 243; GDX, at 11.[51] *See* RD, at 68 for table. The Agency is considering the review of the exemplar pharmacies' unusually large orders for oxycodone and hydrocodone only to further demonstrate the general failure of Respondent to identify, investigate and report suspicious orders.[52]

In response to criticism from Respondent's expert, G.R. also conducted a ''look-back analysis,'' which, according to G.R., produced results ''consistent with what [he] found using the'' [53] fixed-frame analysis method. Tr. 228, 235. In his look-back analysis, G.R. looked at ''the entire population'' and not only the seven exemplar pharmacies in the OSC showing unusually large transactions. Tr. 230. G.R. testified that statistical analysis is ''one piece of the analysis that is necessary to comply with DEA's regulations governing distributors.'' Tr. 223–24, 1084–90. *See* GX 73 and 74 (analysis using the look-back methodology that Weinstein recommended). The look-back analysis for oxycodone transactions revealed 6,816 outlier transactions, a 6 percent reduction when compared to the fixed-frame analysis of 7,252 that the Government previously found. Tr. 1091; GX 73, at Summary tab. The look-back analysis for hydrocodone transactions revealed 5,222 outlier transactions, a 5.5 percent increase when compared to the fixed-frame analysis of 4,948 that the Government previously found. Tr. 1092; GX 74, at Summary tab.[54]

Respondent presented the testimony of its own expert, Weinstein, who opined that G.R.'s analysis failed to reliably identify unusually large or suspicious orders. Tr. 558. Weinstein based his criticism of G.R.'s analysis on four factors: (1) the use of a four-year fixed-frame as opposed to the look-back method; (2) the failure to consider the schedule change of hydrocodone in late 2014 from schedule III to schedule II; (3) the failure to consider package size and formulation; and (4) the use of the line item approach as opposed to a cumulative approach. RD, at 70; Tr. 525–28, 541–46, 558.

Weinstein credibly explained his criticisms of G.R.'s analysis in detail, opining that the factors he identified both over-estimated, *see, e.g.,* Tr. 552, and under-estimated, *see, e.g.,* Tr. 552–53, the number of outliers that could have potentially constituted suspicious orders.

Weinstein notably ''did not conduct an original analysis to determine, retrospectively, which of Respondent's orders from 2014 through 2018 should have been identified as suspicious.'' Resp Exceptions, at 40; *see also* RD, at 25, 75. Respondent argues that it is not Respondent's burden to do so. Resp Exceptions, at 40 (citing *Steadman* v. *Securities and Exchange Comm'n,* 450 U.S. 91, 100–03 (1981); *Masters Pharm., Inc.,* 80 FR at 55473; 21 CFR 130.44(e)).

Even if the Agency fully credits Weinstein's criticism of G.R.'s analysis, the Government has clearly demonstrated its *prima facie* case that Respondent failed to design and operate a system to identify suspicious orders and report them to DEA and Respondent admits as much. *See, e.g.,* Tr. 666 (Weinstein testifying that the numbers run in early 2018 would have identified suspicious orders in similar quantities to what Respondent is currently reporting); Tr. 813 (Irelan testifying that he accepts responsibility for the Government's allegations in the OSC, paragraph 10, regarding the failure to design and operate an adequate SOM system). The G.R. analysis, according to G.R.'s credible testimony, offered a ballpark estimate of the scale of suspicious orders that Respondent neglected to identify and report to DEA. RD, at 12, and 136; *accord* Tr. 404 (The GS testifying that he asked G.R. to conduct an analysis ''to get a sense of just mathematically quantifying how many suspicious orders could theoretically have been missed by

[49] January 1, 2018, to April 30, 2018. Tr. 212, 226.

[50] G.R.'s corrected analysis did not identify any unusually large transactions of oxycodone or hydrocodone that Respondent shipped to Hephzibah Pharmacy. ALJX 14, at 4; Tr. 230. However, the Pro Compliance Report for Hephzibah Pharmacy demonstrated multiple red flags of diversion. *Supra* section III.D.6.

[51] The tables reflect transaction size, not frequency. Tr. 244.

[52] It is noted that Weinstein conducted a ''look-back'' analysis of G.R.'s data; Tr. 537–38, 550–51, 693, RDX–4; *see also* RD, at 73 (table analyzing these amounts). The Agency acknowledges that Respondent demonstrated Weinstein's analysis produced significantly lower results; ''nearly half of the outlier transactions he identified in 2017 and 2018 would not have been identified as outliers.'' ALJX 89, at 38 (citing Tr. 529–30, 568; RX 28 and 29)).

[53] Respondent argued in its Exceptions that G.R.'s look-back analysis could not be characterized as ''substantially similar'' to the fixed-frame analysis because although the numerical size of outliers was similar, each analysis found substantially different outliers. Resp Exceptions, at 41–42. Respondent's point is noted; however, both analyses identified numerous outliers and, ultimately, the number of outliers that could have represented suspicious orders under both analyses far exceeded the three that Respondent reported to DEA during the relevant timeframe. Further, Respondent did not demonstrate adequate documentation of its resolution of suspicious orders nor is there information on the record that Respondent stopped shipping.

[54] Respondent contests the Government's introduction of this rebuttal evidence in its Exceptions. Resp Exceptions, at 40–41. As further explained herein, the Agency credits Weinstein's criticism of G.R.'s analysis. The exact number of unreported suspicious orders is unnecessary for the Government to prove or the Agency to conclude in finding a violation because Respondent was responsible for creating and maintaining an adequate SOM system and identifying and reporting suspicious orders. Here, it is clear from the evidence that Respondent's SOM system during the relevant timeframe was inadequate.

Morris & Dickson'' [55]). Respondent argued that the Government's case was founded [56] on establishing specific outliers that Respondent failed report to DEA as suspicious orders. Resp Exceptions, at 43 (citing *e.g.,* OSC, at 37, 46, 54, 65, 74, 84, 93); *see also* ALJX 52, at 20. However, the Agency does not find it necessary to count and identify the exact number of specific outliers, and the reason why is simple. Respondent is charged with violating a non-prescriptive regulation, which clearly places the burden on the distributor to design and operate a system to disclose to the distributor suspicious orders of controlled substances under Agency guidelines.[57] The DEA regulations notably do not prescribe *exactly* what SOM system to use or what constitutes a suspicious order—what constitutes an order of unusual size, an order deviating substantially from a normal pattern, etc. Respondent, in its defense, did not attempt to demonstrate that the system that it had in place during the relevant time period adequately identified suspicious orders—in fact, Irelan took responsibility for Respondent's SOM system failures and failure to adequately report suspicious orders to DEA. Tr. 731, 733. Based on the evidence in the record and Respondent's admitted failures, the Agency finds that Respondent clearly violated 21 CFR 1301.74(b) in failing to design and operate its system and in failing to investigate or report suspicious orders to DEA. Respondent's attempts to distract the Agency from the notion that it did not adequately meet the regulatory obligation by picking apart DEA's ballpark estimate demonstrating the potential magnitude of Respondent's violations are unavailing. The Agency notes that Respondent contests the quantity of suspicious orders that G.R. identified as unreported to DEA; but G.R.'s analysis, which he notably calibrated to only identify extreme outliers, Tr. 203, shows that the number of unreported suspicious orders for these two controlled substances during the relevant timeframe could have potentially been in the thousands.[58]

*F. Respondent's Policies and Procedures During the Relevant Timeframe*

Respondent produced a Policies and Procedure Manual and a Standard Operating Procedures (SOP) Manual in response to DEA's investigation. GX 17 and 18. The Policies and Procedure Manual states, ''Where a Compliance Officer sees a ratio of controlled drugs ordered out of the normal range, or the overall quantity is too high compared with the volume of the account, the Compliance Officer has a duty to investigate by calling the account. The Compliance Officer may stop shipment on any order if he or she finds the order to be unusually suspicious.'' GX 17, at 12. The Policies and Procedures Manual notably does not indicate an obligation to report suspicious orders to DEA. The GS testified that in his review of Respondent's records, he did not see documentation of stopped suspicious orders. Tr. 315–16. The SOP Manual [59] states that Respondent ''keeps a system in operation which is designed to discover those purchasing patterns of controlled substances which exceed the norm and could possibly be related to diversion activities.'' GX 18, at 19. The GS testified that this statement does not adequately reflect the obligations in 21 CFR 1301.74(b). Tr. 307. Further, although the SOP Manual describes various analytical reports regarding drug sales and drug volumes, the GS testified that he did not see any references to these reports in Respondent's relevant records. Tr. 308–09, 491. The SOP Manual does clearly state that ''[w]hen a suspicious pattern or purchase is identified by any of the above methods the customer is contacted in some but not all cases and asked for a written explanation for the unusual order. In all cases,[60] a letter is sent to the DEA indicating a possible suspicious order.'' GX 18, at 20.

*G. Respondent's Former SOM System*

Irelan testified that Respondent's SOM system during the time period comprising the allegations (former SOM System) was ''not as robust as what we have today.'' Tr. 738–40 (citing *e.g.,* GX 19, at 3); *see also* RX 31.001 and 31.002 (notes that were part of Respondent's former SOM System). The former SOM system included: know your customer efforts; an electronic customer profile (ECP); a market basket system; reports from Pro Compliance; direct contact with and soliciting of information from customers; and reliance on Respondent's sales force and those who actually filled orders for controlled substances. Tr. 866–70; GX 9, at 2–3; GX 17, at 12; GX 18, at 19–20.

Irelan testified that Respondent's former SOM system would send an email or text message to the compliance officer, C.G., when an order was flagged as suspicious and the order would ship if C.G. did not take action to stop it. Tr. 728, 778.

Irelan testified that Respondent's former SOM system was ''not consistent with best practices . . . . because it didn't hold the order. It didn't give an opportunity to resolve red flags before shipping.'' Tr. 729. Additionally, Irelan testified that ''the calculation that the system was using [to identify potentially suspicious orders] was only using ten times a 90-day average,'' which made it ''inadequate.'' Tr. 729; *see also* Tr. 321–22 (The GS testimony that 8 times the average could still be a suspicious order); Tr. 652 (Weinstein testifying that this calculation was not sufficient based on DEA guidance). Regarding the former SOM system, Milione testified that his ''understanding is they accepted that there were things wrong with it, that the

[55] It is noted that Respondent uses a different quote from the GS that stated that the intent of the analysis was ''to quantify, you know, just how many orders are we talking about that fell outside of just a normal pattern or set amount'' and that ''the analysis showed that there were roughly, 14,000 orders that should have been reported as suspicious based on the quantity that was ordered.'' Respondent's Exceptions, at 45 (quoting Tr. 293). Given the several contextual parameters that the GS used in these statements, like ''just a normal pattern or set amount'' and ''based on the quantity that was ordered,'' the Agency does not find this statement to be inconsistent with the GS's statement at Tr. 404, regarding the purpose of G.R.'s analysis.

[56] The Government's Prehearing Statement states that G.R. ''will testify that a standard statistical outlier analysis is a reasonable method to identify unusual transactions in the context of pharmaceutical distribution.'' ALJX 7, at 6. The description of G.R.'s testimony in both the Government's Prehearing Statement and Third Supplemental Prehearing Statement discusses the manner in which G.R. arrived at his calculations and established reasonable thresholds. *Id.* at 6–8; ALJX 52, at 20 (''G.R. will testify that his analysis identified the following unusually large transactions for the exemplar pharmacies.''). The Agency additionally agrees with the rationale of the ALJ that G.R.'s testimony regarding the intent of his statistical analysis did not give rise to a new allegation. *See* RD, at 96 n.33.

[57] The December 20, 2007 letter that DEA sent to manufacturers and distributors stated that ''[t]he regulation clearly indicates that it is the sole responsibility of the registrant to design and operate such a system. Accordingly, DEA does not approve or otherwise endorse any specific system for reporting suspicious orders.'' GX 4, at 1.

[58] Respondent further made arguments related to what it determined as inconsistent analysis in the RD related to G.R.'s outlier numbers. Resp Exceptions, at 44–46. The Agency finds that G.R.'s analysis provides a ballpark of the egregiousness of Respondent's failures to design and operate the required system. *See* Tr. 227, 224.

[59] The SOP Manual states that the details of Respondent's suspicious order monitoring program ''are confidential and therefore are not made a part of this manual.'' Tr. 306; GX 18, at 17.

[60] The GS testified that customers should be contacted in all cases. Tr. 484. *Masters* may provide some room for nuance if Respondent stops shipment of the orders and reports to DEA; however, none of this nuance is represented in the SOP Manual. Additionally, the policy states that ''in all cases,'' DEA is required to be notified, when in fact, DEA was only notified three times during the relevant time period and the record evidence established that Respondent neither reported to DEA nor adequately documented the resolution of red flags for the exemplar pharmacies or generally for suspicious orders during the relevant time period. *See supra* III.D.

reporting to DEA was insufficient.'' Tr. 989. Further, he stated, ''it was clear that there was an issue'' and that after reviewing the system, his company told Respondent that ''there are certain things that should be enhanced knowing what DEA expected.'' Tr. 990–91. For example, ''one of the big things was a way to flag orders [in] real time and in an appropriate way with some kind of an algorithm and then report those flagged orders to DEA.'' Tr. 991.

Respondent also argues that as a result of its former SOM system, it had ceased supplying controlled substances to 42 pharmacies from 2014 to 2016. RX 11, at 14 (powerpoint slide); Tr. 871. Respondent's expert acknowledged that if those customers had been terminated based on Respondent's SOM program, it should have filed suspicious order reports with DEA. Tr. 1015–16; *see also Masters Pharm., Inc.,* 80 FR at 55477 (holding that a distributor discovering a suspicious order must either stop shipping and report to DEA or investigate and resolve the red flags). If Respondent stopped shipping and terminated a customer as a result of discovering a suspicious order, that order should have been reported to DEA. There is no evidence that the 42 customers from 2014 to 2016 were reported to DEA—in fact, the evidence establishes that there was only one suspicious order report filed during this timeframe on April 7, 2014. *See* GX 6, at 1.[61]

*H. Respondent's New SOM System*

Respondent requested confidentiality related to its current SOM system and policies; therefore, this Decision incorporates by reference the findings of the RD related to Respondent's system and summarizes herein at as high a level as possible while appropriately adjudicating the facts.[62] *See* RD, at 75–82. Guidepost[63] undertook seven corrective measures on Respondent's behalf. Tr. 882. Those measures included: (1) establishing an anti-diversion compliance regulatory affairs team; (2) enhancing Respondent's SOM system; (3) redeveloping Respondent's ECP; (4) enhancing Respondent's ''know your customer protocols''; (5) enhancing Respondent's due diligence investigative protocols; (6) conducting employee training; and (7) documenting everything and reporting to DEA. Tr. 882–900. The Analysis Group, Inc., (AGI) was also brought in to develop a live real-time order monitoring system that would identify suspicious orders. Tr. 885. Between May 14, 2018, and July 29, 2018, Respondent submitted 58 suspicious order reports to the DEA. RX 20. In those 58 reports, Respondent informed the DEA of approximately 3,915 suspicious orders. *Id.* Applying Respondent's new SOM program to its orders from early 2018, Weinstein identified a similar number of suspicious orders.[64] Tr. 666, 676, 682–83. Respondent's current SOM system holds customer's orders as ''potentially suspicious'' and prevents the orders from being shipped until the Compliance team has reviewed. Tr. 668–69, 672; 582. Furthermore, Respondent currently documents its due diligence regarding suspicious orders in the Enhanced Customer Profiles in a readily-retrievable format. Tr. 737, 716; RD, at 79.

## IV. Analysis

A distributor's registration may be suspended or revoked upon a finding that the distributor ''has committed such acts as would render [its] registration under section 823 of this title inconsistent with the public interest as determined under such section . . . .'' 21 U.S.C. 824(a)(4). With regard to distributors of schedule II controlled substances, Congress has set forth five factors to consider when determining whether the distributor's registration would be in the public interest. The factors to be considered are:

(1) maintenance of effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels;

(2) compliance with applicable State and local law;

(3) prior conviction record of applicant under Federal or State laws relating to the manufacture, distribution, or dispensing of such substances;

(4) past experience in the distribution of controlled substances; and

(5) such other factors as may be relevant to and consistent with the public health and safety.

21 U.S.C. 823(b).[65]

[61] It is also noted that Jacob Dickson's letter stated that Respondent had ceased supplying 142 retail pharmacies ''due to questions and concerns that the pharmacies were overdispensing controlled substances. After ceasing doing business with these 'bad accounts' [Respondent] has seen very few examples which would justify the reporting of a suspicious order.'' GX 9, at 5. Milione testified that Mr. Dickson ''specifically took pride in being able to say, look, this—every year there has been this—this many customers that they focused on and identified. And I think—I don't know the exact math. It was 125, 135 customers from 2008 to 2016 that were terminated or suspended . . . based upon their compliance suspicious order monitoring program.'' Tr. 870–71. Respondent provided transcribed testimony from Mr. Dickson in a separate hearing stating that Respondent eliminated 142 customers ''because in some form or fashion they might have been suspicious and diverting.'' RX 1, at 61. It is unclear how many of these customers were terminated during the relevant timeframe—other than the 42 customers that were terminated during 2014 to 2016. Without the benefit of evidence or testimony regarding the circumstances of the terminations during the relevant timeframe, it is difficult for the Agency to determine what weight to give these terminations, *see* RD, at n.32; however, the language on the record describing these orders as ''suspicious and diverting'' or ''overdispensing'' or ''bad accounts'' certainly brings into question whether they could constitute additional violations of the suspicious order reporting requirement. *See also* RD, at 136. In sum, without further evidence explaining the circumstances of the terminations or the reasons why they were unreported to DEA, the Agency cannot give Respondent's terminations during the relevant timeframe the weight that Respondent requests to demonstrate its compliance. These terminations are not being considered as further violations of DEA regulations, but they are also not given weight for Respondent in the public interest inquiry. Finally, the Agency notes that whether Respondent's SOM System was adequate prior to the relevant timeframe is not a matter currently before the Agency.

[62] *See, e.g.,* Tr. 15 (Respondent requesting confidentiality based on ''proprietary trade secrets of the Analysis Group regarding the customized suspicious order monitoring system that they have developed for the Respondent, as well as all of the different functionality of the Respondent's suspicious order monitoring system.''); ALJX 82. The Agency has provided a high-level summary of these improvements to demonstrate consideration of the scope of Respondent's remedial measures. The numbers of suspicious orders have been included because the Agency finds this information to be relevant to the adjudication of this matter.

[63] Respondent paid Guidepost a large sum of money between the time the OSC/ISO was issued and May 2019 to be brought into compliance with DEA regulations. Tr. 973–74, 992 (*see* RD, at 76 for further details). Milione testified that Respondent has ''spared no expense'' in becoming compliant with DEA regulations. Tr. 992.

[64] Although Respondent did not run its new system on the old data during the time period covered by the OSC, Tr. 682, 686, Weinstein did testify that Respondent applied its current SOM system to the orders Respondent received in early 2018 (covering some of the allegations in the OSC) and Weinstein testified that using the current SOM system ''[c]ertainly there were some that would have been identified in those months. And in a similar number to what's being identified currently.'' Tr. 666; *see also* Tr. 676 (data from April 2018 (in the relevant timeframe) produced a roughly similar volume of flagged orders, which ''tends to be in the hundreds each month that are identified by the thresholds''). It is noted that these numbers reflect the quantity of orders that would have been flagged for suspicion and does not ''take into account any due diligence'' etc. Tr. 677. This testimony is not included in this Decision to prove the number of suspicious orders that DEA should have received in early 2018, but, instead, is included to further support the Agency's finding that Respondent's suspicious order monitoring and reporting during the relevant timeframe was insufficient to meet the regulatory requirements.

[65] 21 U.S.C. 823(e) also applies to distributors of controlled substances. The section sets forth the identical factors to be considered regarding a registration to distribute controlled substances in schedules III, IV, and V, as are contained in 21 U.S.C. 823(b) concerning schedules I and II. The Government's allegations are focused primarily on Respondent's distribution of schedule II controlled substances, but in 2014, during the time period of the allegations, hydrocodone was changed from a schedule III to a schedule II controlled substance. Tr. 539. Additionally, Respondent is a registered distributor of controlled substances in schedules II–

The Agency considers these public interest factors in the disjunctive and may rely on any one or a combination of factors and give each factor the weight the Agency deems appropriate in determining whether to revoke a registration or to deny a pending application for renewal of a registration. *Masters Pharm., Inc.,* 80 FR at 55472 (applying DEA decisions on the public interest factors in 21 U.S.C. 823(f) to the public interest factors for distributors in 21 U.S.C. 823(b) and (e)); *see also Southwood Pharm, Inc.,* 72 FR at 36497–98. Any one factor, or combination of factors, may be decisive. *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993). There is no need to enter findings on each of the factors.[66] *Hoxie* v. *Drug Enf't Admin.,* 419 F.3d 477, 482 (6th Cir. 2005); *Masters Pharm., Inc.,* 80 FR at 55473.

The Government bears the initial burden of proof and must justify revocation by a preponderance of the evidence. *Steadman,* 450 U.S. at 100–03; *Masters Pharm., Inc.,* 80 FR at 55473; 21 CFR 1301.44(e). If the Government makes a *prima facie* case for revocation, then the burden of proof shifts to the registrant to show why its continued registration would not be inconsistent with the public interest. *Masters Pharm., Inc.,* 80 FR at 55473; *see also Med. Shoppe—Jonesborough,* 73 FR 364, 387 (2008).

In this case, the Government contends that Respondent's continued registrations are inconsistent with the public interest based on Factors One and Four. ALJ–90, at 27–29.

*A. Respondent's Failure To Maintain Effective Controls Against Diversion and its Experience With Controlled Substances (Factors One and Four)*[67]

With respect to Factor One, concerning the maintenance of effective controls against diversion, DEA has promulgated regulations to guide the regulated community. Specifically,

> All applicants and registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances. In order to determine whether a registrant has provided effective controls against diversion, the Administrator shall use the security requirements set forth in [21 CFR] 1301.72–1301.76 as standards for the physical security controls and operating procedures necessary to prevent diversion.

21 CFR 1301.71(a).

DEA's security regulations further provide that:

> The registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Field Division Office of the Administration in his area of suspicious orders when discovered by the registrant. Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.

21 CFR 1301.74(b).

The OSC alleges that Respondent failed to maintain ''effective controls against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels,'' in violation of 21 U.S.C. 823(b)(1) and 21 CFR 1301.71(a). ALJX 1, at 3, paras. 7, 10. Second, the OSC alleges that Respondent failed to adequately ''design and operate a system to disclose to the registrant suspicious orders of controlled substances'' and report them to DEA, in violation of 21 CFR 1301.74(b). ALJX 1, at 3, paras. 8, 10.

Factor Four involves a registrant's past experience in the distribution of controlled substances, which the Government has argued is appropriately considered along with its maintenance of effective controls against diversion. *See, e.g., Masters Pharm., Inc.,* 80 FR at 55473. In this case, Respondent argues that its experience in the distribution of controlled substances ''is extensive,'' as it was ''founded in 1841 and distributes more than 33,000 products,'' and that its history of compliance weighs against a finding that Respondent's registration is inconsistent with the public interest. ALJX 89, at 115–116 (citing RX 1, at 13:16, 15:10). Although Respondent's arguments have been considered, Respondent's misconduct as described further herein precludes a finding that Respondent's experience establishes a ''history of compliance.'' *See Novelty Distributors, Inc.,* 73 FR 52689, 52702 (2008) (analyzing the identical factor for distributors under 21 U.S.C. 823(h)).

1. A Suspicious Order

To begin, the regulations require distributors to ''design and operate a system to disclose to the registrant suspicious orders of controlled substances.'' 21 CFR 1301.74(b). The regulations provide that, at minimum, a suspicious order includes ''orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency.'' *Id.; see* section IV.A.3. These three criteria are non-exclusive and registrants may encounter other considerations beyond those spelled out in the regulation that could qualify an order as suspicious. *Masters Pharm., Inc.,* 80 FR at 55473–74; *Masters Pharm., Inc.,* 861 F.3d at 221 (noting the regulatory criteria for suspicion are ''exemplary rather than exhaustive''). For example, a distributor might find a pharmacy's orders for controlled substances to be suspicious not only based on their exhibiting the characteristics set forth in the regulation, but also based upon the ''pharmacy's business model, dispensing patterns, or other characteristics.'' *Masters Pharm., Inc.,* 80 FR at 55473–74; *see also id.* at 55477 (stating that ''an order is not only suspicious by virtue of its internal properties—*i.e.,* being of unusual size, pattern, or frequency—but by virtue of the suspicious nature of the pharmacy which placed [the order]''). The identification of a suspicious order that is based on the nature of the pharmacy's business takes place at the customer-level. *See infra* section IV.A.4.

In order to conclude that an order for controlled substances is suspicious, a ''distributor is not required to establish, to a statistical certainty, that a pharmacy was likely diverting controlled substances.'' *Masters Pharm., Inc.,* 80 FR at 55480. In fact, suspicion is a low standard, defined as merely one's '' 'apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence, or possibly no evidence.' '' *Masters Pharm., Inc.,* 80 FR at 55478 (quoting Black's Law Dictionary 1585 (9th ed. 2009)). Thus, if a distributor is aware of any indication of ''the existence of something wrong'' concerning the size, frequency, or pattern of an order, then the distributor is obligated to report it to the DEA. *Masters Pharm., Inc.,* 80 FR at 55478. Because suspicion is a low standard, a distributor's obligation to report suspicious orders is triggered long before the distributor would have

V; therefore, the Agency, even when referring only to (b), considers the identical public interest factors under both sections 823(b) and (e) in this section.

[66] Respondent argues that ''an independent consideration of each of these [five] factors [at 21 U.S.C. 823(b)(1–5)] weigh[s] against a finding that Respondent's continued registration is inconsistent with the public interest.'' ALJX 89, para. 291. In other words, although the Government only submitted evidence relevant to Factor One and Factor Four, Respondent urges the Agency to find evidence relevant to all five Factors. The Agency declines to adjudicate, at Respondent's request, arguments that the Government did not make, yet notes that if it were to do as Respondent requests, the ensuing analysis of all five Factors would continue to point to the revocation of Respondent's registration.

[67] While listing the five public interest factors of 21 U.S.C. 823(b), the Government specifically notes that it does not rely on Factors Three or Five and makes no argument concerning Factor Two. ALJ–90, at 27–29 & n.12. Further, the Government combines its analysis of Factors One and Four. *Id.* at 28–44. The Government notes that where it has not made allegations with respect to Factors Three and Five, the factors do not weigh for or against revocation. *See* ALJX 90, at n.12. As such, although the Agency has considered all five factors, its analysis focuses on Factors One and Four.

probable cause to believe that a customer is engaged in diversion. *Id.* As *Masters* explains, suspicion is not contingent on evidence that the order will be diverted or that the customer is engaged in diversion. *Id.* With regard to the reporting requirement, the Agency's emphasis is on *suspicion* and not conclusive proof of diversion. *Id.* at 55420 (explaining that tying suspicion to evidence of diversion ''imposes a higher standard than that of the plain language of the regulation, which requires only that the order be suspicious'').

2. Respondent's Failure To Adequately Design and Operate a Suspicious Order Monitoring System

When a distributor's suspicious order monitoring (SOM) system places a hold on a customer's order for controlled substances because the order is of unusual size, pattern, or frequency, the order meets the specific criteria of being suspicious. *Masters Pharm., Inc.,* 80 FR at 55479; *Masters Pharm., Inc.,* 861 F.3d at 216–17 (affirming the Acting Administrator's ruling that ''orders held by the [distributor's SOM systems] met the regulatory definition of 'suspicious orders' ''). DEA has made clear that it does not endorse any particular system for identifying suspicious orders. GX 4, at 1; Tr. 59–60, 76, 210, 497, 646.

In this case, Respondent's SOM system during the relevant time period did not have the capability to hold an order that was flagged as ''potentially suspicious.'' Tr. 728, 778. Therefore, the system could not comply with the DEA legal requirements. Tr. 729 (Irelan testifying that the SOM system was ''not consistent with best practices'' because ''[i]t didn't give an opportunity to resolve red flags before shipping.'')

Additionally, the witnesses were in agreement that Respondent's SOM system during the relevant time period was inadequate to identify orders of unusual size in that it only flagged orders that were ''ten times a 90-day average,'' Tr. 729–30, 321, 652.[68]

Further, while Respondent had written policies and procedures, those policies and procedures only identified three suspicious orders over a period of four years and four months that were reported to the DEA. Respondent admits that its previous policies were inadequate. Tr. 720–21. Respondent had a policy of producing monthly and daily reports, yet none is apparent in the Administrative Record, and although Respondent maintained a proprietary database, RX 11, at 5, there is no record evidence from this database.

Finally, although Respondent argues that the record supports that it was conducting due diligence into its customers, Respondent admits that it did not adequately document that due diligence, nor did it apply that due diligence at an order level. *See infra* section IV.A.4. Respondent's policy of not documenting its due diligence, GX 9, was also inconsistent with the *Masters* decision. *See id.*

In sum, the Agency finds substantial record evidence that Respondent failed to design and operate an adequate SOM system in violation of 21 CFR 1301.74(b).

3. Respondent's Failure To Report Suspicious Orders Under the Listed Criteria in 21 CFR 1301.74(b)

As explained above, DEA regulations obligate distributors of controlled substances to not only design and operate a system to identify suspicious orders, but to also report all suspicious orders to DEA. 21 CFR 1301.74(b). In other words, DEA regulations require distributors like Respondent ''to alert DEA when their retail-pharmacy customers *attempt* to obtain unusual amounts of a controlled substance, because such attempts are powerful evidence that the pharmacies are operating illegally.'' *Masters Pharm., Inc.,* 861 F.3d at 217–18 (emphasis in original).[69] Moreover, the Agency has previously held that filing ARCOS reports does not satisfy a distributor's obligation to notify DEA of suspicious orders, *Southwood Pharm., Inc.,* 72 FR at 36501, nor does filing reports on a routine or periodic schedule. *Masters Pharm., Inc.,* 80 FR at 55478.

The purpose of the DEA's reporting requirement is ''to provide investigators in the field with information regarding potential illegal activity in an expeditious manner.'' *Masters Pharm., Inc.,* 80 FR at 55483 n.169 (quoting *Southwood Pharm., Inc.,* 72 FR at 36501). As such, when a distributor obtains ''information that an order is suspicious but then chooses to ignore that information and fails to report the order,'' the distributor violates its regulatory obligation. *Id.* at 55478.

Here, DEA presented evidence using the Tukey statistical model to determine a ballpark number of suspicious orders that an adequate SOM system might have identified during the time period in the allegations both for the eight exemplar pharmacies and for Respondent's customer base at large for two frequently abused controlled substances: oxycodone and hydrocodone. The ballpark estimate found numerous potential suspicious orders for seven out of the eight exemplar pharmacies, and for the overall customers, it found that 7,252 sales of oxycodone and 4,948 sales of hydrocodone during this time period should have possibly been reported as suspicious to DEA.[70]

The ballpark numbers constitute substantial evidence that there were far more suspicious orders that should have been identified, investigated, or reported than the mere three that Respondent reported during the time period. Even taking into consideration all of the criticism levied on DEA's modeling by Respondent's expert, he himself admitted that the data run during the beginning of 2018 produced similar results to the quantity that Respondent was reporting under the new system, which, in a little over a year, amounted to 3,915 suspicious orders. As such, the Agency agrees with the ALJ that the three suspicious order reports filed during the relevant timeframe ''barely scratched the surface,'' RD, at 140, and finds it clear that the Government has proven by substantial evidence that Respondent failed to investigate or report potentially thousands of suspicious orders of oxycodone and hydrocodone to DEA. *Supra* section III.E.

Furthermore, the *Southwood* decision explained that even *after* a suspicious order is reported to DEA, a distributor must conduct some due diligence and only ship the order ''if it is able to determine that the order is not likely to be diverted into illegal channels.'' *Masters Pharmaceuticals,* 861 F.3d 206 (2017) (citing *Southwood Pharm., Inc.,* 72 FR at 36500). Here, it is undisputed that Respondent submitted three suspicious order reports to DEA during the relevant time period. The GS testified that Respondent shipped these orders without documenting any resolution of the suspicious circumstances that caused Respondent to report them to DEA. Tr. 294. Thus, the Agency finds substantial record evidence that Respondent's lack of documentation of its investigation into and resolution of these red flags,

[68] DEA sent a letter in December 20, 2007, warning distributors that a SOM system ''rely[ing] on rigid formulas to define whether an order is suspicious may be failing to detect suspicious orders.'' GX 4, at 2.

[69] Suspicious orders meeting the definition in 21 CFR 1301.74(b) must be reported to DEA, and Respondent did not argue otherwise. *See, e.g.,* Tr. 732, 1024; RX 20.001, at 1. There is additionally no record evidence that Respondent investigated these suspicious orders and resolved them at any time.

[70] It is noted that the ballpark numbers that G.R. testified to support a conclusion that Respondent failed to identify, resolve, or report suspicious orders under the criteria in § 1301.74(b) to DEA—not whether Respondent failed to conduct customer due diligence generally.

coupled with its shipping of the suspicious orders, demonstrates additional violations of Respondent's regulatory obligations to provide effective controls and procedures to guard against diversion of controlled substances.

4. Customer Due Diligence and Red Flags

It is inherent in the obligation under 21 CFR 1301.71(a) to maintain ''effective controls'' against diversion that ''a registrant has an affirmative duty to protect against diversion by knowing its customers and the nature of [their controlled substances] sales.'' *Holloway Distributing,* 72 FR 42118, 42124 (2007).[71] Therefore, a distributor is required to act on '' 'information which raise[s] serious doubt as to the legality of [the customer's] business practices,' '' also referred to as red flags,[72] indicative of diversion. *Masters Pharm., Inc.,* 80 FR at 55477 (alteration in original) (quoting *Southwood Pharm., Inc.,* 72 FR at 36498). A distributor must also ''conduct a reasonable investigation to determine the nature of a potential customer's business before it sells to the customer.'' *Id.* Furthermore, a distributor has a continuing obligation to perform due diligence of a customer throughout the distributor's relationship with that customer. *Id.* at 55477. *Masters* clarified that ''although a distributor's investigation of the order (coupled with its previous due diligence efforts) may properly lead it to conclude that the order is not suspicious, the investigation must dispel all red flags indicating that a customer is engaged in diversion to render the order non-suspicious and exempt it from the requirement that the distributor 'inform' the Agency about the order.'' *Id.* at 55478.

The record evidence and testimony from multiple experts in this case, the Pro Compliance Reports themselves, and prior DEA decisions have all clearly demonstrated that such suspicious circumstances, or red flags, include a pharmacy that: dispenses a high volume of narcotics;[73] dispenses the trinity drug cocktail;[74] dispenses disproportionally more controlled substances than non-controlled substances;[75] fills prescriptions for a high volume of patients who pay for prescriptions in cash;[76] fills a disproportionate volume of controlled substance prescriptions written by only a few prescribers;[77] and orders excessive quantities of a limited variety of controlled substances.[78] *See supra* section III.C. A distributor fails to maintain effective controls against diversion when the distributor continues to distribute controlled substances to a pharmacy that exhibits red flags of diversion without resolving those red flags. *Masters Pharm., Inc.,* 80 FR at 55457 (faulting the distributor for supplying controlled substances ''while ignoring numerous red flags as to the legitimacy of the pharmacy's dispensing of controlled substances''); *cf. Top RX Pharmacy,* 78 FR 26069, 26082 (2013) (applying a similar principle to pharmacies filling prescriptions that contain red flags of abuse or diversion); *see also Novelty Distributors, Inc.,* 73 FR 52689, 52699 (2008) (applying a similar principle to list I chemical distributors under 21 U.S.C. 823(h) (''Fundamental to its obligation to maintain effective controls against diversion, a distributor must review every order and identify suspicious transactions. Further, it must do so prior to shipping the products. Indeed, a distributor has an affirmative duty to forgo a transaction if, upon investigation, it is unable to determine that the proposed transaction is for legitimate purposes.'')).[79] A distributor has an obligation to guard against diversion, and as such, must resolve red flags of diversion presented by its customers or decline to ship the controlled substance. 21 U.S.C. 823(b), (e); 21 CFR 1301.71(a).

When a customer demonstrates red flags of diversion, the distributor must report a suspicious order to DEA unless the distributor conducts a due diligence investigation, which ''must dispel all red flags indicative that a customer is engaged in diversion.'' *Masters Pharm., Inc.,* 80 FR at 55478. ''Put another way, if, even after investigating the order, there is any remaining basis to suspect that a customer is engaged in diversion, the order must be deemed suspicious and the [DEA] must be informed.'' *Id.; see also id.* at 55479 n.164 (same).

In upholding DEA's interpretation of the due diligence requirement in the *Masters* decision, the D.C. Circuit Court of Appeals stated:

As we have emphasized throughout this opinion, it is not necessary for a distributor of controlled substances to investigate suspicious orders if it reports them to DEA and declines to fill them. But if a distributor chooses to shoulder the burden of dispelling suspicion in the hopes of shipping any it finds to be non-suspicious, and the distributor uses something like the SOMS Protocol to guide its efforts, then the distributor must actually undertake the

[71] *See also Holloway Distributing,* 72 FR 42118, 42124 (2007) (finding that a distributor of List I chemicals' ''policy—which is fairly characterized as 'see no evil, hear no evil'—is fundamentally inconsistent with the obligations of a DEA registrant'').

[72] It is noted that Agency Adjudications have used the term ''red flag'' as early as 1998 and federal courts have used the term as early as 1986. *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR 79188, 79195 n.23 (2016), *pet. for rev. denied,* 881 F.3d 823 (11th Cir. 2018). In general, a red flag is any ''circumstance that does or should raise a reasonable suspicion as to the validity of a prescription [or order].'' *Pharmacy Doctors Enters. d/b/a Zion Clinic Pharmacy,* 83 FR at 10896 n.31 (quoting *Hills Pharmacy, L.L.C.,* 81 FR at 49839). Red flags are, in essence, ''warning signs'' or ''suspicious circumstances'' that alert the registrant that something is not right. *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR at 79195 n.23.

[73] *Masters Pharm., Inc.,* 80 FR at 5548–81 n.168 (explaining where a distributor had information that 50 percent of the prescriptions filled by a pharmacy were for controlled substances, while the average pharmacy only fills about 20 percent, the distributor ''had substantial information which raised a strong suspicion as to the legitimacy of [the pharmacy's] dispensing practices''); GX 3, at 3.

[74] *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR at 79194 (''The combination of a benzodiazepine, a narcotic and carisoprodol is 'well known in the pharmacy profession' as being used 'by patients abusing prescription drugs.' '' (quoting *E. Main St. Pharmacy,* 75 FR 66149, 66163 (2010))).

[75] *Masters Pharm., Inc.,* 80 FR at 55456; GX 3, at 3.

[76] *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR at 79194 (' '[A]ny reasonable pharmacist knows that a patient that (sic) wants to pay cash for a large quantity of controlled substances is immediately suspect.' '' (quoting *E. Main St. Pharmacy,* 75 FR 66149, 66158 (2010))).

[77] GX 3, at 3.

[78] *Masters Pharm., Inc.,* 80 FR at 55421; GX 3, at 3.

[79] Respondent introduced testimony regarding whether Respondent could continue to ship during a due diligence investigation into customer-level red flags of diversion—arguing that there is a certain amount of discretion involved and that stopping shipments would disrupt the supply chain. *See, e.g.,* Tr. 1049, 1050, 1042; 649. The record does not support a finding that Respondent did, in fact, adequately dispel all of the red flags on these customers at any time (before or after distributing), or that Respondent adequately documented purported resolutions of the red flags. The *Masters* decision cannot be read to intend to create a loophole in which a distributor could avoid reporting requirements and continue to ship orders of controlled substances while conducting lengthy investigations into red flags. Such an interpretation would not meet the requirement that a distributor maintain effective controls against diversion. To the extent that, as Respondent argues, there may be some discretion in the decision of when to ship, it is abundantly clear that a distributor cannot ship if it cannot determine that the ''proposed transaction is for legitimate purposes,'' *Novelty Distributors* 73 FR at 52699, or without resolving '' 'information which raise[s] serious doubt as to the legality of [a potential or existing customer's] business practices.' '' *Masters Pharm., Inc.,* 80 FR at 55477 (alteration in original) (quoting *Southwood Pharm., Inc.,* 72 FR at 36,498). Further, Respondent's supply chain argument is weakened by the fact that Respondent had a duty to and was purportedly running reports on prospective customers; therefore, it knew about many of the red flags in the eight exemplar pharmacies before engaging in business with them. *See, e.g.,* GX 25, at 4 (Initial Risk Evaluation Report for Hephzibah Pharmacy LLC); RX 11, at 15 (powerpoint demonstrating turned down prospective accounts based on Pro Compliance Reports).

investigation. For example, when an employee uses the SOMS Protocol to confirm or dispel suspicion based on the amount of controlled medication the pharmacy is selling, the employee must request a 'UR,' *i.e.,* a document showing the pharmacy's 'actual dispensing[s] . . . of each drug.' [*Masters Pharm., Inc.,*] 80 FR [55418,] 55420 [(2015)]. Moreover, the investigating employee must 'document' customers' explanations for suspicious orders, so that he or she can verify those explanations and make sure they are consistent over time. *Id.* at 55428 n.21. Additionally, if a customer's explanation for its order is 'inconsistent with other information the investigator has obtained about or from the customer, . . . the [investigator] must conduct 'additional investigation to determine whether [its customer is] filling legitimate prescriptions.' *Id.* at 55477. Finally, the investigation must dispel all of the 'red flags' that gave rise to the suspicion that the customer was diverting controlled substances. *Id.* at 55478. The Administrator recognized that, if investigating employees fail to take such basic steps, the SOMS (or similar protocol) does not function as an effective tool for dispelling suspicion.

*Masters Pharm., Inc.,* 861 F.3d at 222–23. The D.C. Circuit made clear that all red flags must be resolved or the order must be reported to DEA as suspicious.

In this case, Respondent received numerous Pro Compliance Reports that raised multiple red flags for each of the relevant customers during the relevant time period. *See* GX 20–56; *supra* section III.D. The Pro Compliance Reports themselves clearly identify specific red flags in Respondent's customers' data and frequently recommend further discussions and onsite visits to resolve them. *See, e.g.,* GX 21, at 6; *supra* III.E. Although Respondent produced some minimal evidence consisting of phone logs for some of the exemplar pharmacies in the OSC, *see supra* n.12 and section III.D., which indicated a few instances over the several year timeframe where Respondent had engaged with these customers regarding red flags and/or suspicious orders, there is not adequate documentation as to how Respondent resolved the red flags, even as Respondent continued to fill these orders without reporting them to DEA. Moreover, the GS credibly testified that documentation was an essential component of due diligence. Tr. 298–99 (''[I]f you don't document it how are you going to remember it, how are you going to be able to prove it happened''). The *Masters* decision further pointed out that documentation is essential in maintaining effective controls against diversion to ensure that customers are consistent in their explanations regarding red flags. *Masters Pharm., Inc.,* 80 FR at 55428 n.21. The D.C. Circuit also affirmed the Agency's position that if a distributor undertakes an investigation into its customer's potential diversion, then it must document and ''dispel all of the 'red flags' that gave rise to the suspicion that the customer was diverting controlled substances'' to avoid the requirement to report the suspicious order to DEA. *Masters Pharm., Inc.,* 861 F.3d at 222–23.

Here, Respondent acknowledged the paucity of documentation in its records that might show that it had resolved red flags. *See, e.g.,* Tr. 720; GX 9, at 1–2. Contrary to Respondent's argument (ALJ–89, at 101–03, paras. 272–75), the absence of documentation of resolving red flags does indeed constitute evidence that the red flags were never resolved. *See Masters Pharm., Inc.,* 861 F.3d at 218.[80] While Respondent did conduct some due diligence, such as by obtaining Pro Compliance Reports and by preparing its own monthly Market Basket Reports of its customers, ordering the reports without taking appropriate action based on the content of those reports does not come close to satisfying the regulatory obligation to conduct due diligence. These Pro Compliance Reports identify multiple red flags from Respondent's pharmacy customers—demonstrating that Respondent was aware of these red flags—while the records it produced do not resolve them in any substantive way to demonstrate effective controls against diversion. *See, e.g.,* GX 20–56 (the Pro Compliance Reports for the exemplar pharmacies). Respondent's employees even noted occasions where information in the Pro Compliance Reports was specifically concerning to them or where they were aware of additional indicia of diversion or suspicious orders, yet these orders were neither reported to DEA nor is there record evidence to support a finding that Respondent resolved all of the red flags that gave rise to the suspicion. *See, e.g.,* Respondent's employee's comments, at GX 14, at 4 (''[T]his seems quite elevated to me. . . . .????'') and 31 (''Henry will give the customer a warning about his Oxy purchases. Too much cash, too much growth. Will re-run and if no improvement will either restrict or cut off completely.''). The note documenting this interaction not only fails to offer any resolution of the suspicious circumstances or indicate any reporting to DEA, but also indicates that Respondent knew of the existence of a suspicious order and that the customer was given a warning—providing it with a chance to amend its behavior and further avoid detection from DEA. The regulations require resolution or reporting, not implementation of a ''second chance'' or ''three strikes you're out'' program.

A distributor fails to conduct meaningful due diligence that satisfies its regulatory duties where it merely ''accept[s] at face value whatever superficial explanation'' the pharmacy offers and then fails to independently verify it. *Masters Pharm., Inc.,* 80 FR at 55457. Further, conducting due diligence but then failing to act on the findings is also inadequate. *See Southwood Pharm., Inc.,* 72 FR at 36500 (finding the distributor's due diligence efforts to be inadequate where the distributor possessed information that customers were diverting controlled substances yet the distributor continued to provide them with controlled substances). Thus, as the GS credibly testified as an expert witness, the Agency finds that even though Respondent produced some due diligence files to DEA, Respondent seemed to ''conduct due diligence and ignore the red flags that are in [its] face and continue to ship'' without documenting the resolution of red flags or reporting to DEA, in violation of DEA regulations. Tr. 463; *see also* Tr. 80 (testimony of the Section Chief: ''[Y]ou can ask for all these things, but you have to do something with it.''). As the evidence shows, Respondent continued to distribute controlled substances despite the red flags raised in its due

[80] To permit Respondent to escape any liability for its lack of adequate controls to protect against diversion merely because Respondent created a policy that did not require documentation of how those controls were exercised would nullify the purpose of the statutory and regulatory requirements. Further, the Agency agrees with the ALJ that Respondent's intentional strategy of not presenting the testimony of any witness who was actually involved in Respondent's purported resolution of red flags further undermines its argument that the red flags were actually resolved. *Id.* Finally, Agency decisions have frequently described the importance of documentation to meet DEA regulatory requirements in other contexts. *See Kaniz F. Khan-Jaffery, M.D.,* 85 FR 45667, 45686 (2020) (''DEA's ability to assess whether controlled substances registrations are consistent with the public interest is predicated upon the ability to consider the evidence and rationale of the practitioner at the time that she prescribed a controlled substance—adequate documentation is critical to that assessment.'' (citing *Cynthia M. Cadet, M.D.,* 76 FR 19450, 19464 (2011))). In particular, the *Masters* decision affirmatively stated the requirement for distributors to document their resolutions of red flags and gave a rational basis for that requirement—ensuring that the information is memorialized for the resolution of future indicia of diversion. *Masters Pharm., Inc.,* 80 FR at 55,428 n.21. This basis is very apparent here where Respondent's customer base is large and the shipments are numerous. As such, the Agency finds that Respondent's failure to maintain adequate documentation indicates a violation of the requirements to maintain effective controls against diversion.

diligence files and without either adequately documenting an investigation or resolution of the red flags or refusing to ship and reporting the orders to DEA. As such, Respondent's due diligence was clearly insufficient to meet DEA's legal requirements. *See also* RD, at 120–128 (finding that Respondent did not either dispel all red flags for Folse, Bordelon's, Wallace, Pharmacy Specialties, Dave's Pharmacy, Hephzibah, Wellness, and Wilkinson or report the customers to DEA and refuse to ship).

5. Summary of Public Interest Factors

There is substantial record evidence that Respondent failed to adequately design a suspicious order monitoring system and failed to report suspicious orders to DEA. Further, Respondent failed to report controlled substance orders from customers displaying red flags of diversion and in such cases failed to either cease shipment, or, alternatively, to investigate, resolve, and document the resolution of the red flags. Thus, the Agency finds that Respondent failed to maintain effective controls against diversion of controlled substances into other than legitimate medical, scientific, and industrial channels in violation of 21 CFR 1301.71(a). The Agency also finds that Respondent failed to adequately design and operate a system to disclose to the registrant suspicious orders of controlled substances and report those orders to DEA in violation of 21 CFR 1301.74(b). *See also* RD, at 138. These violations constitute failures to maintain effective controls against diversion under 21 U.S.C. 823(b)(1) and demonstrate negative experience in distribution under 21 U.S.C. 823(b)(4) and weigh strongly in favor of revoking Respondent's Certificates of Registration.

*B. Respondent's Integrated Enterprise*

DEA has requested revocation of both Respondent's registration at its distribution center in Shreveport, Louisiana, and Respondent's second registration in New Orleans (Jefferson Parish). Respondent argues that DEA has not ''alleged any misconduct to have occurred at Respondent's Jefferson location or adduced any evidence or testimony at the hearing regarding Respondent's Jefferson registration.'' Resp Exceptions, at 49.

The Agency has frequently ''treat[ed] two separately organized business entities as one integrated enterprise . . . based on the overlap of ownership, management, and operations of the two entities.'' *Jones Total Health Care Pharmacy, L.L.C., and SND Health Care, L.L.C.,* 81 FR 79188, 79222 (2016) (citing *MB Wholesale, Inc.,* 72 FR 71956, 71958 (2007)). ''[W]here misconduct has previously been proved with respect to the owners, officers, or key employees of a pharmacy, the Agency can deny an application or revoke a registration of a second or subsequent pharmacy where the Government shows that such individuals have influence over the management or control of the second pharmacy.'' *Superior Pharmacy I and Superior Pharmacy II,* 81 FR 31310, 31341, n.71 (2016). Further, the Agency may revoke a registration without misconduct attributable to that particular registration if the Agency finds that the registrant committed egregious misconduct under a second registration. *Roberto Zayas, M.D.,* 82 FR 21410, 21430 (2017) (revoking physician's DEA registration in Florida due to conduct attributed to a Texas registration that had expired).

When a practitioner registrant acts in a manner inconsistent with the public interest, in determining whether to revoke, DEA looks to whether the practitioner can be entrusted with a registration. *See, e.g. Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016). If a practitioner holding multiple registrations cannot be entrusted with one, then it would be difficult to justify entrusting the same practitioner with another in a separate location. Similarly, when a corporate entity is owned and operated by individuals who have acted inconsistently with the public interest and have misused one of their registrations, the Agency cannot ignore this fact when considering whether to entrust those same individuals with another registration. Furthermore, even if Respondent has not used the Jefferson registration for distribution, this fact does not prevent it from using its registration for distribution in the future.[81] *See Suntree Pharmacy and Suntree Medical Equipment, LLC,* 85 FR 73753, 73766 (2020).

The lens through which Congress has instructed the Agency to assess each distributor registration is whether or not such registration is consistent with the public interest. 21 U.S.C. 823(b). In this case, if Respondent was allowed to simply shift its operations to an entity with the same ownership, then the effect of the violations found herein against Respondent would be a nullity and there would be nothing to prevent Respondent's Jefferson location from continuing to act inconsistently with the public interest. It would be inconsistent with the intent of the CSA to permit such an easily implementable loophole, while it is consistent with Agency decisions to close the loophole by treating the two overlapping entities as one integrated enterprise for purposes of sanction.

Therefore, due to the uncontested commonality of ownership, management, and operations, *see* RD, at 154, the Agency finds that it is appropriate to treat Respondent's two registrations as one integrated enterprise.

**V. Sanction**

The Government has established a *prima facie* case to revoke Respondent's registration; therefore, the Agency will review any evidence and argument that Respondent submitted to determine whether or not Respondent has presented ''sufficient mitigating evidence to assure the Administrator that [it] can be trusted with the responsibility carried by such a registration.'' *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988)). '' 'Moreover, because ''past performance is the best predictor of future performance,'' *ALRA Labs, Inc.* v. *Drug Enf't Admin.,* 54 F.3d 450, 452 (7th Cir. 1995), [the Agency] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [the registrant's] actions and demonstrate that [registrant] will not engage in future misconduct.' '' *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (quoting *Medicine Shoppe,* 73 FR 364, 387 (2008)); *see also Samuel S. Jackson, D.D.S.,* 72 FR at 23853; *John H. Kennnedy,* M.D., 71 FR 35705, 35709 (2006); *Prince George Daniels, D.D.S.,* 60 FR 62884, 62887 (1995). The issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent; therefore, the Agency looks at factors, such as the acceptance of responsibility and the credibility of that acceptance as it relates to the probability of repeat violations or behavior and the nature of the misconduct that forms the basis for sanction, while also considering the Agency's interest in deterring similar acts. *See Arvinder Singh, M.D.,* 81 FR 8247, 8248 (2016).

*A. Acceptance of Responsibility*

1. Standing and Authority To Accept Responsibility

Respondent contends that it has unequivocally accepted responsibility

[81] The ALJ noted that Respondent's exhibits demonstrate that it uses the Jefferson location to ''secure controlled substances'' and makes distributions out of its Shreveport facility. RD, at 156 (citing RX 1, at 15, 16).

for the proven misconduct and that Irelan, as its Controlled Substance Compliance Officer, was both authorized by Respondent and an appropriate person to accept responsibility on behalf of Respondent. Resp Exceptions, at 8. The Agency agrees that neither Agency regulations nor prior Agency decisions clearly preclude Irelan from accepting responsibility on behalf of Respondent and will therefore consider his acceptance of responsibility on its merits. Further, the Agency finds that the record supports that Mr. Irelan is responsible for preventing the reoccurrence of Respondent's compliance failures and accepts that Irelan obtained authority from Respondent to accept responsibility at the hearing. *See* Tr. 803 (Irelan is responsible for continued remedial measures), Tr. 1072–74;[82] *but see* Tr. 804 (decisions also go through the chain of command and to the Board).

Ultimately, as explained above, the Agency has long stated that when the Government has presented a *prima facie* case, the burden shifts to the respondent to demonstrate why it can still be entrusted with a registration in spite of its misconduct and the Agency has emphatically emphasized the requirement that respondent unequivocally accept responsibility to establish that trust. *See, e.g., Jeffrey Stein, M.D.,* 84 FR 46968, 46972 (2019); *see also Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988) (describing revocation as a remedial measure ''based upon the public interest and the necessity to protect the public from those individuals who have misused controlled substances or their DEA Certificate of Registration, and who have not presented sufficient mitigating evidence to assure the Administrator that they can be trusted with the responsibility carried by such a registration''). For several reasons, Irelan's testimony has not adequately convinced the Agency that Respondent unequivocally accepts responsibility for its past misconduct.

2. Minimization and Characterization of the Misconduct

Here, Irelan accepted responsibility for Respondent failing to effectively apply its customer due diligence in assessing orders of controlled substances, Tr. 722–23, for Respondent failing to implement and maintain a suspicious order monitoring system ''consistent with best practices for compliance,'' Tr. 729, 731,[83] and for the fact that ''[t]he reporting that was being done, there were three suspicious order reports to the DEA, and that was insufficient,'' Tr. 731, 733. Irelan also testified that he accepted responsibility for Respondent shipping orders of controlled substances from January 2014 to May 2018 without resolving red flags and testified that he is responsible ''for preventing reoccurrence of the company's past failures with respect to application of customer due diligence.'' Tr. 807, 721.[84]

In discussing his acceptance of responsibility for Respondent's failure to apply its customer due diligence, Irelan specifically testified that, based on his review of Respondent's records before May 2018, Respondent conducted ''a tremendous amount of due diligence'' on its customers. Tr. 704–05, 710. Irelan caveated that Respondent did not keep the due diligence documentation ''in such a way as to make it . . . easily accessible.'' Tr. 705 (referring to ''notes on paper,'' ''notes . . . kept in a database'' and ''limited notes in our enhanced customer profile''). Nonetheless, the Agency finds that Irelan's statements claiming a ''tremendous amount of due diligence'' were aimed at minimizing the extent of Respondent's misconduct, which the Agency has previously weighed against a finding of unequivocal acceptance of responsibility. *See Ronald Lynch, M.D.,* 75 FR 78745, 78754 (2010) (finding that Respondent did not accept responsibility after noting that he ''repeatedly attempted to minimize his [egregious] misconduct''; *see also Michael White, M.D.,* 79 FR 62957, 62967 (2014)). Additionally, Irelan's insistence that Respondent was conducting this ''tremendous amount'' of due diligence ''but it was not applied at the order level,'' *e.g.,* Tr. 828, not only minimizes the violation but fails to acknowledge its scope. At the end of the day, the fact that Respondent was not *applying* the due diligence to the orders (investigating/stopping/reporting) is possibly the most impactful aspect of Respondent's violation. If Respondent was conducting due diligence that was not documented or could not be retrieved such that it could be applied to the actual filling of orders, then Respondent was not exercising effective controls against diversion because employees filling future orders would not know if there were customer-level red flags or whether they were resolved.

Further, Irelan's statements regarding whether Respondent's monitoring systems were ''consistent with best practices'' also clearly minimized the scope of Respondent's misconduct and did not demonstrate a full grasp of the breadth of the misconduct alleged—which was that Respondent had violated DEA regulations,[85] not failed to implement ''best practices.'' Respondent's attempt to characterize the DEA regulations as being merely best practices as opposed to affirmative legal requirements both minimizes the severity of the violations and also demonstrates a failure to grasp of the significance of the requirements.

3. Scope of the Misconduct

The requisite acceptance of responsibility hinges on the respondent demonstrating an understanding both of the past misconduct and its extent. *See Jones,* 881 F.3d at 833. Here, the ALJ found that Irelan did not ''acknowledge the *scope* of the Respondent's misconduct,'' and therefore, his acceptance was equivocal. RD, at 151 (citing *Arvinder Singh, M.D.,* 81 FR at 8250–51).

As Respondent stated in its Exceptions:

> Multiple United States Courts of Appeal have upheld DEA's acceptance of responsibility requirement as rational on the grounds that if a respondent ''does not understand the extent of the past misconduct or its current responsibilities under the law,

[82] The ALJ did not admit RX 54; however, the Agency accepts that Irelan had authority to make compliance decisions and speak for Respondent in the proceeding.

[83] *Compare* Tr. 731 (Respondent's counsel asked whether the SOM system ''was consistent with best practices *and* compliance'' (emphasis added)). Whether or not this distinction from the previous statement was an error of speech, the Agency finds this statement to not differ significantly from the previous statement—in both, there was clearly a purposeful avoidance of taking responsibility for the full scope of Respondent's actions and an attempt to characterize the DEA regulations as being merely best practices as opposed to affirmative legal requirements.

[84] When Government Counsel asked him whether he accepted responsibility in several specific paragraphs of the OSC, Irelan either refused or testified that he was not in a position to answer. *See* RD, at 86. For a few of the paragraphs, Irelan's reservations seemed to be that Respondent conducted at least some additional due diligence on some of the eight pharmacies, but Irelan admitted that the due diligence was not properly applied. *See, e.g.,* Tr. 832–33, 828–29. Given the contested nature of this part of the hearing, the Agency does not find these failures to accept responsibility to imply that Irelan has not accepted responsibility for the misconduct. *See* Resp Exceptions, at 24 (arguing that these were not proven allegations). However, the Agency does find, as explained herein, that Irelan's continual insistence on referring to all of the due diligence that Respondent was conducting—while not documenting it in a retrievable manner nor applying it to the orders—was clearly intended to minimize Respondent's misconduct.

[85] Even if Respondent chose its language to avoid drawing legal conclusions, the use of the term ''best practices'' was not sufficient to accurately describe the violations found herein and was clearly aimed at minimizing them. *See supra* n.83.

the DEA rationally could doubt that the [respondent] would faithfully comply in the future with its obligations under the CSA.'' *Jones Total Health Care Pharmacy, LLC* v. [*Drug Enf't Admin.*], 881 F.3d 823, 833 (11th Cir. 2018); *accord MacKay* v. [*Drug Enf't Admin.*], 664 F.3d 808, 820 (10th Cir. 2011) (admittance of fault is relevant to Administrator's consideration of whether a respondent will change its future behavior). As Respondent's current Compliance Director, Mr. Irelan has assessed Respondent's past controlled substance compliance failures and is responsible for preventing their reoccurrence.

Resp Exceptions, at 13.

In contrast to Respondent's final statement above, there were a few times where Irelan's limited involvement and knowledge of the misconduct indisputably impeded his ability to accept full responsibility, such as when, regarding Wellness Pharmacy, he was unable to state what due diligence ''specifically was performed for that account.'' Tr. 831. The Agency finds that Irelan's admission that he had not familiarized himself with the specific due diligence performed by Respondent for the exemplar pharmacies demonstrates that he did not actually have the knowledge required to accept unequivocal responsibility on behalf of Respondent for the full extent of the violations found. Irelan's assertion that Respondent did conduct a ''tremendous amount'' of due diligence is also inconsistent with his stated lack of knowledge regarding the amount of due diligence conducted for the limited number of customers included in the OSC's allegations. It seems logical that in cultivating an understanding of Respondent's violations in order to adequately accept responsibility, Irelan would have focused his review on the customers most relevant to the allegations. Therefore, Irelan does not seem to have been equipped to meet Respondent's burden in accepting responsibility.

4. Trust in Respondent

Although the Agency does not challenge Irelan's authority to act on behalf of Respondent in accepting responsibility, the burden is on *Respondent* to credibly and candidly demonstrate that it can be entrusted with a registration. Respondent chose to meet that burden by presenting Irelan's testimony in lieu of a principal or an individual who had knowledge of the full scope of the violations. Although the Agency does not contest that Respondent *could* choose Irelan to accept responsibility on its behalf, that finding does not mean that Irelan was equipped to do so unequivocally.

It is noted that the Agency has long held that the misconduct of an entity's principal is properly considered in determining whether to revoke the entity's registration. *Chip RX, L.L.C., d/b/a City Ctr. Pharmacy,* 82 FR 51433, 51438 (2017) (citing *G & O Pharmacy of Paducah,* 68 FR 43752, 43753 (2003)). An essential element of Respondent's showing of trust is that the registrant and its principals accept responsibility for their misconduct by acknowledging their wrongdoing. *Sun & Lake Pharmacy,* 76 FR 24533 (citing *Medicine Shoppe,* 73 FR at 387; *Jackson,* 72 FR at 23853; *Kennedy,* 71 FR at 35709). In this case, at least one of Respondent's principals, Paul Dickson, Sr., bears at least some responsibility for the misconduct, and Irelan bears none. *See* Tr. 723.

Irelan opined that C.G. and Jacob Dickson, who were in charge of compliance during the relevant time period, were responsible for Respondent's misconduct, but was not sure enough of the ''dynamics'' or ''reporting process'' to opine about whether Paul Dickson, Sr., carried any responsibility. Tr. 808–09. The extent of the misconduct is an important factor in the Agency's ability to determine whether to entrust Respondent with a registration and Irelan's inability to testify to the level of involvement and knowledge of Respondent's principals in the misconduct demonstrates another reason why the Agency cannot deem his acceptance of responsibility to be adequate such that the Agency can entrust Respondent with a registration. In fact, Respondent's submitted evidence includes testimony from the Hearing on the Motion for Temporary Restraining Order [86] in which Paul Dickson, Respondent's president, testified that he was primarily responsible for development of Respondent's SOM program and that he designed the system. RX 1, at 33. Paul Dickson further told the Court that in designing the system, he knew that he ''didn't do a perfect job,'' but that ''it was the best that [he] could do. And [he] think[s] it's dang good. And [he doesn't] think a single person has gotten hurt by [their] drugs. [He] sure do[esn't] know of one . . . . So [he] think[s] it works.'' RX 1, at 57. These statements from the president of a family-owned and -operated company so strongly miss the point of the requirements of a DEA registrant that they further undercut the Agency's ability to entrust Respondent with a registration. To equate a registrant's compliance with an agency's closed regulatory system with the consequence of knowing whether anyone was hurt ''by [their] drugs'' exhibits a stark misunderstanding of the regulatory requirement.

The Agency finds that Irelan's inability to describe Paul Dickson's involvement in the proven misconduct further demonstrates the inadequacy of Respondent's acceptance of responsibility in this proceeding. In all, Irelan's lack of understanding and recognition of the full scope of the misconduct and attempts to minimize the misconduct lead the Agency to conclude that Respondent's acceptance of responsibility was equivocal and insufficient to ensure that Respondent can be entrusted with a registration.

*B. Remedial Measures*

When a registrant fails to make the threshold showing of acceptance of responsibility, the Agency has stated that it need not address the registrant's remedial measures. *Daniel A. Glick, D.D.S.,* 80 FR 74800, 74,810 (2015); *see also Ajay S. Ahuja, M.D.,* 84 FR at 5498 n.33; *Jones Total Health Care Pharmacy, L.L.C., & SND Health Care, L.L.C.,* 81 FR at 79202; *The Medicine Shoppe,* 79 FR 59504, 59510 (2014). A registrant does not unequivocally accept responsibility for its actions simply by taking remedial measures. *Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 & 5195,* 77 FR 62316, 62346 (2012). Refusal to acknowledge the *full scope of misconduct,* even with remedial measures, is a risk to the public interest. *Arvinder Singh, M.D.,* 81 FR 8247, 8250–51 (2016) (emphasis added).

The ALJ characterized Respondent's remedial measures as ''impressive.'' RD, at 152. The Agency similarly credits the efforts that the record reflects Respondent undertook to improve its compliance with DEA's requirements after being served with the OSC. As the ALJ appropriately stated, the Agency has also made it abundantly clear that remediation alone is not adequate to avoid a sanction and that limited-to-no-weight is given to remedial measures when the effort is not made until after

[86] It is noted that the ALJ excluded pages 147 to 216 of this transcript as irrelevant, but allowed pages 1 through 146 because Respondent offered it as remedial, mitigation, or community impact evidence. ALJX 59, at 6 (citing ALJX 29, at 2, 4.) Although it is also noted that the hearing in which these statements were made was related to the public interest in the context of the ISO, the ALJ found, and the Agency agrees, that this evidence bears some relevance to the current inquiry. *Id.* Furthermore, Respondent argues in its Exceptions that ''[t]his testimony is relevant evidence of Respondent's credibility and good faith intent in working with DEA to stop diversion.'' Resp Exceptions, at 31. For the reasons stated above, the Agency finds that, if anything, Paul Dickson's remarks seem indignant that DEA is pursuing enforcement, seem aimed at minimizing the misconduct, and display a lack of understanding and respect for the regulatory requirements.

enforcement begins. *See Mireille Lalanne, M.D.,* 78 FR 47750, 47777 (2013) (quoting *Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48897 (2011) (''The Agency has recognized that a cessation of illegal behavior only when 'DEA comes knocking at one's door,' can be afforded a diminished weight borne of its own opportunistic timing.'')); *see also Southwood Pharm. Inc.,* 72 FR at 36503 (giving no weight to respondent's ''stroke-of-midnight decision'' to cease supplying suspect pharmacies with controlled substances and to employ a compliance officer).[87]

Additionally, the ALJ found that, based on prior Agency decisions, he could give no weight to Respondent's remedial measures given the lack of Respondent's unequivocal acceptance of responsibility. RD, at 152.[88] [89] As the Agency has consistently held, ''past performance is the best predictor of future performance.'' *Lesly Pompy, M.D.,* 84 FR 57749, 57761 (2019); *see also Jones Total Health Care Pharmacy, LLC* v. *Drug Enf't Admin.,* 881 F.3d 823, 833 (11th Cir. 2018) (affirming refusal to consider remedial measures where registrant did not accept responsibility for its misconduct); *Pharmacy Doctors Enterprises, Inc.* v. *Drug Enf't Admin.,* 789 F. App'x 724, 2019 WL 4565481, at *7–8 (11th Cir. Sept. 20, 2019) (same).[90]

In this case, even if the Agency gave weight to Respondent's remedial measures, the measures are outweighed by the fact that it has not adequately established that Respondent as an entity fully understands the scope of the misconduct such that it can be entrusted with regulatory compliance in the future.

### C. The Extent of the Misconduct

The record demonstrates that Respondent's violations of the law were not isolated occurrences, but took place over the course of four years and involved multiple customers. *See Garrett Howard Smith, M.D.,* 83 FR at 18910 (collecting cases) (''The egregiousness and extent of [the] misconduct are significant factors in determining the appropriate sanction.''). In spite of its self-described status as a privately-owned company that has been in business for 177 years,[91] Respondent maintained sparse documentation of its SOM procedures generally and maintained very little documentation of its resolution of red flags of diversion displayed by its customers or of individual suspicious orders. The record evidence demonstrates that Respondent attended two conferences, held a personal meeting with DEA, and received multiple letters in which DEA emphasized the critical importance of a distributor's role in preventing diversion given the opioid crisis in the nation and reminded distributors of their obligations under the law. A letter from DEA dated September 27, 2006, stated ''[G]iven the extent of prescription drug abuse in the United States, along with the dangerous and potentially lethal consequences of such abuse, even just one distributor that uses its DEA registration to facilitate diversion can cause enormous harm.'' GX 3, at 2. In spite of Respondent's established knowledge regarding the criticality of its role in preventing ''dangerous and potentially lethal consequences,'' Respondent did not adequately resolve or document investigation into the numerous red flags indicating diversion that its own Pro Compliance Reports identified on the exemplar pharmacies and failed to report a multitude of suspicious orders to DEA.

### D. Deterrence

Finally, both specific and general deterrence strongly weigh in favor of revoking Respondent's registration. *See Daniel A. Glick, D.D.S.,* 80 FR at 74810. The record demonstrates that Respondent violated DEA regulations over a lengthy time period—failing to report a multitude of suspicious orders to DEA and depriving DEA of valuable information about pharmacies and practitioners who might have been engaging in diversion or violating their obligations as DEA registrants, thus contributing to the country's devastating prescription drug abuse problem. Under these circumstances and on this record, a sanction less than revocation [92] would

[87] In its Exceptions, Respondent points to the factual distinctions between cited cases in the RD and the circumstances in this case and also points to numerous other settled cases that, in Respondent's opinion, demonstrate that the sanction here is unfair. Resp Exceptions, at 25 and 33. However, ''the issue of trust is necessarily a fact-dependent determination based on the circumstances presented by the individual respondent,'' and it is the respondent's burden to bear. *See, e.g., Stein,* 84 FR at 46,972. And contrary to Respondent's arguments, the proposed sanction is supported by similar sanctions in other recent distributor adjudications where the Agency similarly found that respondents' registrations were inconsistent with the public interest and that those respondents had not demonstrated that they could be entrusted with a registration. *See Southwood Pharm., Inc.,* 72 FR at 36487 (rejecting the ALJ's sanction because it was ''insufficient to protect the public interest. While [the Agency is] mindful of the corrective measures engaged in by Respondent, its sales of extraordinary quantities of controlled substances to entities which it had reason to know were diverting the drugs caused extraordinary harm to public health and safety.''); *see also Masters Pharm., Inc.,* 80 FR at 55501.

[88] Respondent repeatedly asserts that these adjudications are difficult to defend due to what it claims is an unfair system—that Respondent must accept responsibility prior to knowing what misconduct has been proven. Resp Exceptions, at 7. Respondent chose litigation strategies presumably based on the longstanding structure and content of Agency decisions in these adjudications and the Agency does not fault it for those decisions. In the end, Respondent had the burden to prove that it could be entrusted with a registration and it has failed to meet that burden. *See Masters Pharm., Inc.,* 861 F.3d 206 (D.C. Cir. 2017) (rejecting arguments that DEA's structure of requiring acceptance of responsibility is unfair, because ''under longstanding DEA precedent, once DEA presents enough evidence at hearing to show that a registered vendor or distributor of controlled substances has 'committed acts inconsistent with the public interest,' the 'registrant must present[] . . . mitigating evidence' including evidence that it has 'accept[ed] responsibility for its actions and demonstrate[d] that it will not engage in future misconduct'' (quoting *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008)). Furthermore, the Agency's finding on this issue does not hinge on whether Irelan has accepted responsibility for each proven allegation, but instead hinges on Irelan's persistent minimization of the misconduct and further on Respondent's overall failure to demonstrate that *Respondent* has *unequivocally* accepted responsibility and can be trusted with a registration.

[89] Respondent argues that Milione's testimony regarding the August 2016 meeting with Paul Dickson, Sr., *supra* n.8, demonstrates Respondent's ''good faith and sincerity, which flatly contradict the ALJ's intent-laden description of Respondent's compliance as 'cavalier''' and argues that this fact is relevant in considering Respondent's likelihood towards recidivism. Resp Exceptions, at 30 (citing RD, at 156). The Agency cannot give this meeting or Paul Dickson's sincerity during this moment in time the weight that Respondent requests it be afforded given that the evidence demonstrates that for approximately two years prior to this meeting and two years afterwards, Respondent was not complying with DEA regulations. Further, Respondent did not present the Agency with Paul Dickson's testimony at this hearing to be able to weigh his credibility and sincerity either in 2016, when this meeting occurred, or at the time of the hearing. The transcribed testimony that Respondent did submit from Paul Dickson demonstrated that he believed his SOM system to be ''dang good''—a statement with which the Agency emphatically disagrees. *See* RX 1, at 57.

[90] *See also Hills Pharmacy, LLC,* 81 FR 49815, 49847 (2016) (''[T]here is no need to consider Respondent's remedial efforts as they are rendered irrelevant by its failure to acknowledge its misconduct.''); *Daniel A. Glick, D.D.S.,* 80 FR 74800, 74810 (2015) (''[S]ince the Respondent has not tendered an unequivocal acceptance of responsibility, under established Agency precedent, [it] is foreclosed from a favorable result in these proceedings and the issue of remedial actions is irrelevant.'').

[91] *See also* RX 1, at 21 (estimating Respondent's number of retail pharmacy customers at ''approximately 600 primary . . . and another 200 secondary that fluctuates'') and 22–23 (''[O]nly competition are what's called 'the big three,' the global companies'').

[92] Respondent argues without support that a sanction short of revocation would serve the same deterrence goals and would prevent harm to the community that would result from closing Respondent. Resp Exceptions, at 28, 31. The Agency does not consider community impact in its decisions. *See infra* n.96. As Respondent notes, it is difficult to know what level of sanction would deter future non-compliance in the registrant community, but in Respondent's case, where the violations were blatant, long-term, and impactful, the Agency finds, given the record before it, that revocation offers an appropriate deterrent effect.

send a message to the current and prospective registrant community that compliance with DEA regulations is not a condition precedent to maintaining a DEA registration and that a distributor can spend years insufficiently reporting suspicious orders and inadequately resolving red flags presented by its customers, so long as it finally invests in the procedures it should have had in place all along after it is caught and faces potential consequences.[93]

Although Respondent has implemented remedial measures, it has not adequately demonstrated that its leadership can be entrusted to continue these measures and prevent reoccurrence of what happened prior to the issuance of the OSC, which amounted to a SOM system that was not designed or operated in a way that would adequately prevent diversion of controlled substances nor provide DEA with information critical to its mission. Respondent argues that the ALJ erred in finding that ''the continued registration of a fully remediated registrant with an 'impressive' anti-diversion regime, along with evidence of good faith desire to prevent diversion, does not serve the public interest.'' [94] Resp Exceptions, at 1. However, Respondent's argument neglects to mention that remediation is irrelevant without continued trust. Respondent wants credit for ''commission[ing] former top DEA officials to design their ideal anti-diversion system,'' *id.,* because it believes that as long as it has invested the money now, it will prevent DEA from enforcing against it. There are several considerations other than remediation that the Agency uses in determining sanction as explained herein. The fact is that, under these circumstances and on this record, Respondent has not adequately convinced the Agency that it can be entrusted with a registration—its acceptance of responsibility did not prove that it or its principals understand the full extent of their wrongdoing, the effect that it had on the Agency and the American public, and the potential harm that it caused.[95] It was Respondent's burden to prove that it could be entrusted to protect the public interest in maintaining a DEA registration—and it has failed to do so.

Having reviewed the record in its entirety, the Agency finds that Respondent cannot be entrusted with a DEA registration and orders that its registration be revoked. The Agency addresses collateral matters and additional issues raised in Respondent's Exceptions before issuing a final Order.

## VI. Motion To Reopen

On January 5, 2022, Respondent filed a Motion to Reopen the Administrative Record. Respondent seeks to introduce evidence of post-hearing conduct that it argues demonstrates acceptance of responsibility and successful remediation.[96] Although not specifically contemplated in the CSA or regulations, DEA decisions have repeatedly held that the Administrator may, in her discretion, order that the administrative record be reopened. The party moving to reopen, however, bears a heavy burden. *See INS* v. *Abudu,* 485 U.S. 94, 110 (1988); *see also Cities of Campbell* v. *FERC,* 770 F.2d 1180, 1191 (D.C. Cir. 1985) (''Reopening an evidentiary hearing is a matter of agency discretion and is reserved for extraordinary circumstances.'' (citations omitted)); *Nance* v. *EPA,* 645 F.2d 701, 717 (9th Cir. 1981).

The Agency finds that Respondent has not met its burden to reopen the record. In all DEA administrative proceedings, there is inevitably at least some delay between the hearing and the final decision of the Administrator.[97] Allowing parties to reopen the record to introduce evidence of acceptance of responsibility and remedial measures taken during that delay would create a recursive loop further delaying the conclusion of proceedings to the detriment of the public interest. *See, e.g., Abudu,* 485 U.S. at 107; *Qoku* v. *Gonzales,* 156 F. App'x. 703, 705 (5th Cir. 2005). As the Supreme Court observed in *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* ''[a]dministrative consideration of evidence . . . always creates a gap between the time the

---

Furthermore, again, Respondent has not adequately established trust, *see supra* Section V.A.4, which is crucial to demonstrate the appropriateness of a sanction less than revocation under the Agency's consideration of specific deterrence. Respondent also argues that the ALJ erred in its deterrence analysis by failing to consider the Government's purported unwillingness to engage Respondent in settlement negotiations. Resp Exceptions, at 33–35. While a settlement agreement between the Government and a respondent may be a way to provide enforceable assurances of the respondent's future compliance, the parties have not reached such a settlement here. Accordingly, and although the Agency has considered alternative sanctions as Respondent has requested, it has decided that revocation currently is the most appropriate sanction as explained herein.

[93] DEA decisions have demonstrated concern that giving weight to last minute remedial measures would show the regulated community that a registrant ''can unlawfully distribute controlled substances until [it] gets caught, and as long as [it] then acknowledges wrongdoing and puts on evidence that [it] has reformed, [it] will get a slap on the wrist.'' *David Ruben, M.D.,* 78 FR 38363, 38387 (2013); *see also Southwood Pharm., Inc.,* 72 FR 36487, 36504 (2007) (''A precedent which ignores how irresponsibly a registrant has acted and allows it to maintain its registration based on its claim of having reformed its business practices, could well prompt other registrants to ignore their obligations under the Act and sell massive quantities of controlled substances to diverters.'').

[94] Respondent argues that its ''current conduct is the best evidence that its continued registration is consistent with the public interest.'' Resp Exceptions, at 7. However, remediation is notably not an enumerated public interest factor under 21 U.S.C. 823(b). Remediation is a factor that the Administrator considers in reviewing the extent to which sanctions are appropriate and only after the Government has made a *prima facie* case demonstrating that the allegations support a finding that Respondent's continued registration is not in the public interest. *See, e.g., Samuel S. Jackson, D.D.S.,* 72 FR at 23,853.

[95] Respondent attached to its Exceptions the Department of Justice Office of the Inspector General (OIG) September 2019 Review of the Drug Enforcement Administration's Regulatory and Enforcement Efforts to Control the Diversion of Opioids—claiming that the report is DEA's motivation for pursuing ''the harshest sanction'' against Respondent. The report is dated September 2019—a month after the ALJ's issuance of the RD. Furthermore, DEA subpoenaed Respondent as early as February 1, 2018; therefore, temporally, the OIG's findings could not have motivated the Agency's investigation into Respondent. Such allegations are a distraction from the issue at hand—Respondent failed to comply with its regulatory obligations and neither the Agency nor the country could possibly have the ability to know what might have happened had those suspicious orders been reported to DEA and to what extent diversion and abuse might have been prevented. What the Agency does know is that Respondent's failures were monumental, and Respondent clearly misses the point in arguing that ''had the Respondent more consistently reported suspicious orders with the DEA, it has been established that the reports would have been ignored.'' Resp Exceptions, at 5.

[96] Respondent also requests to reopen the record to introduce evidence of the impact revoking its registration would have on the community. Motion to Reopen, at 20–22. The Agency has consistently found that community impact is not a relevant consideration under the public interest factors. *E.g., Stephen E. Owusu,* D.P.M., 87 FR 3343, 3351 n.21 (2022); *George Pursley, M.D.,* 85 FR 80,162, 80,188 n. 82 (2020); *Frank Joseph Stirlacci, M.D.,* 85 FR 45229, 45239 (2020). Accordingly, Respondent's community impact evidence is not grounds to reopen the record. Further, Respondent made arguments that it should be allowed to introduce evidence that it concedes is not an independent basis to reopen the record but argues is properly admitted if the record is reopened. Reply ISO Motion to Reopen, at 12. Nonetheless, the Agency is not reaching a finding on the admissibility of this evidence because it is not granting Respondent's Motion to Reopen.

[97] The delay between the hearing and the issuance of the final decision in this matter was longer than is typical for the Agency, but the proceedings were delayed partially at Respondent's request. On March 9, 2020, Respondent wrote a letter to the then-Acting Administrator asking that the Agency postpone issuing a Final Order ''to allow the COVID–19 crisis to abate or the parties to reach a final settlement . . . .'' *See* Letter from Respondent. Respondent then requested yet another delay in its Motion to Reopen asking that the Administrator delay the issuance of a final order ''until after [Respondent's] new counsel has had an opportunity to resolve the matter with DEA's Chief Counsel.'' Motion to Reopen, at 4, n.4. Respondent cannot request to delay the proceedings and then claim that a failure to reopen the record is somehow prejudicial to Respondent because of its requested delay.

record is closed and the time the administrative decision is promulgated . . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.'' 435 U.S. 519, 554–55 (1978) (quoting *ICC* v. *Jersey City,* 322 U.S. 503, 514 (1944) (citing *Northern Lines Merger Cases,* 396 U.S. 491, 521 (1970)).

Respondent had the opportunity to, and did, introduce evidence related to its acceptance of responsibility and remedial measures at the hearing. That evidence was entered into the record and considered in the ALJ's Recommended Decision and this Final Order.

**VII. Lucia**

The Agency has carefully considered Respondent's Exceptions to the Recommended Decision, has addressed them throughout the record, and addresses the remaining herein.

In its Exceptions, Respondent notes that ''as [it] has repeatedly and consistently objected, including at the hearing, this entire proceeding was unconstitutional.'' (citing Tr. 20:23–22:17). Respondent contends that ''[t]he presiding ALJ in this matter was unconstitutionally appointed when these proceedings began and unconstitutionally continued to preside over these proceedings after the Attorney General purportedly ratified his appointment.'' (citing *Lucia* v. *Securities and Exchange Comm'n,* 138 S. Ct. 2044, 2055 (2018) (hereinafter, *Lucia*)). The Agency will note the factual sequence of events surrounding Respondent's *Lucia* claims.

Respondent's Prehearing Statement, filed on August 3, 2018, averred, ''Respondent may file a motion before this Tribunal related to the constitutionality of the DEA's administrative process given the U.S. Supreme Court's recent decision in [*Lucia*].'' ALJX 8, at 37. During the Prehearing Conference, Respondent's attorney stated, ''with regards to the *Lucia* case, this is obviously no disrespect intended to the Court but we do think that it's a significant issue that should we proceed to hearing, we do want to address and I would like to file a motion about it.'' The ALJ replied, ''Well, if you're going to file a motion about it, I obviously would need to take a look at it . . . . Apparently, if you file a motion, there's a good chance you'll wind up with a different Judge . . . . I'm just putting you on notice that that's what's likely to happen.'' Prehearing, Tr. 36. The ALJ ordered that ''[y]ou obviously can file motions tomorrow if you want to but any motions I'm going to need to rule on I would like to have no later than October 23rd. . . .'' Tr. 42–43.

On October 26, 2018, Respondent submitted a letter on the record alerting the Tribunal that it had commenced an action in the United States District Court for the Western District of Louisiana seeking an ''injunction enjoining DEA and DOJ from requiring Morris & Dickson to appear in any administrative proceeding, including the upcoming hearing scheduled for November 13, 2018, unless and until a constitutionally valid administrative system has been established.'' ALJX 26, at 1. On October 31, 2018, Respondent filed another letter with the Tribunal explaining that it did not file a motion with the ALJ because the Agency ''has no authority to entertain a facial constitutional challenge'' and that ''[t]he Louisiana Court will resolve that question. Morris & Dickson simply provides this Tribunal notice of that filing and requests sufficient time to allow the Louisiana Court (and, if necessary, the Fifth Circuit Court of Appeals) to make its ruling.'' ALJX 34, at 1–2.

On December 31, 2018, Respondent submitted a letter notifying the Tribunal that ''[o]n December 28, 2018, the District Court in the Western District of Louisiana dismissed Respondent's complaint without prejudice, finding that it did not have jurisdiction to hear Morris & Dickson's claims'' and attaching the decision. ALJX 47, at 1. The Decision stated that, although Respondent's argument was ''somewhat close,'' ''in light of the policy problem created by crafting a 'constitutional claim' exception to Congress's ability to channel initial review through agencies, the Court finds that Morris & Dickson's separation-of-powers claims are not 'wholly collateral' to the proceeding before Judge Dorman because they were raised in an attempt to delay or defeat administrative enforcement of the CSA.'' *Id.* at 30.

On January 15, 2019, the ALJ issued an Order Lifting the Stay and Third Prehearing Ruling. ALJX 51. The Order stated that Respondent indicated during a telephonic conference on the previous day that it ''w[ould] not seek to maintain the stay in this case pending its appeal to the United States Court of Appeals for the Fifth Circuit'' [98] and that ''it w[ould] not file a motion seeking to recuse [the ALJ] from this case based on the Supreme Court's decision in *Lucia* . . . .'' *Id.* at 1.

The next time Respondent raised the *Lucia* issue was at the beginning of the hearing on May 13, 2019. Respondent's lawyer made a self-described ''statement of the record, simply,'' Tr. 23, that ''we respectfully renew for the record our objection to the hearing and proceeding.'' Tr. 22. However, Respondent's lawyer also agreed that Respondent was ready to go to hearing that day and made no further motions or requests for a new ALJ. Tr. 24.

On October 25, 2018, the Attorney General ratified the prior appointment of the DEA ALJs, including ALJ Dorman, and ''approved their appointments as his own under the Constitution.'' *See* Office of the Attorney General, Order No. 4.315–2018.[99] It is noted that, at the time that the hearing took place in this matter, ALJ Dorman's appointment as an Administrative Law Judge had been ratified. Respondent never formally requested reassignment nor availed itself of the opportunity to request interlocutory review to the Administrator on any ruling of the ALJ or any *Lucia*-related issue pursuant to 21 CFR 1316.62. Had Respondent contested the matter formally with the Agency, the Agency would have assigned another ALJ, *see* Prehearing, Tr. 36, and saved significant Agency resources. The Agency further finds that ALJ Dorman's appointment was ratified before the hearing. Due to Respondent's calculated choice to preserve the matter for the record, Tr. 23, but not raise it in any way that the Agency might have had the capacity to address and remedy itself, the Agency considers the argument waived for purposes of finalizing this adjudication.

Having found that Respondent cannot be entrusted with a DEA registration, the Agency issues the following Order revoking Respondent's DEA registrations.

**Order**

Pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a)(4) and 21 U.S.C. 823(b), (e), I hereby revoke DEA Certificates of Registration Nos. RM0314790 and RM0335732 issued to Morris & Dickson, Co., LLC. Further, pursuant to 28 CFR 0.100(b) and the authority vested in me by 21 U.S.C. 824(a)(4) and 21 U.S.C.

[98] Respondent's appeal to the United States Court of Appeals for the Fifth Circuit was dismissed by its own motion. *See Morris and Dickson* v. *William Barr, et al.,* No. 19–30043, 2019 WL 3230978 (5th Cir. Apr. 1, 2019).

[99] Although not considered material to this Decision, a copy of this Order will be included in the administrative record for future reference.

823(b), (e), I hereby deny any pending application of Morris & Dickson, Co., LLC to renew or modify these registrations, as well as any other pending application of Morris & Dickson, Co., LLC. This Order is effective August 28, 2023.

**Signing Authority**

This document of the Drug Enforcement Administration was signed on May 19, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

**Scott Brinks,**

*Federal Register Liaison Officer, Drug Enforcement Administration.*

[FR Doc. 2023–11369 Filed 5–26–23; 8:45 am]

**BILLING CODE 4410–09–P**

## DEPARTMENT OF LABOR

### Bureau of Labor Statistics

### Information Collection Activities; Comment Request

**AGENCY:** Bureau of Labor Statistics, Department of Labor.

**ACTION:** Notice of information collection; request for comment.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the ''Current Population Survey (CPS).'' A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before July 31, 2023.

**ADDRESSES:** Send comments to Erin Good, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room G225, 2 Massachusetts Avenue NE, Washington, DC 20212. Written comments also may be transmitted by email to *BLS_PRA_Public@bls.gov.*

**FOR FURTHER INFORMATION CONTACT:** Erin Good, BLS Clearance Officer, at 202–691–7628 (this is not a toll free number). (See **ADDRESSES** section.)

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The CPS has been the principal source of the official Government statistics on employment and unemployment for over 75 years. The CPS is a monthly sample survey of 60,000 eligible households. The labor force information gathered through the survey is of paramount importance in keeping track of the economic health of the Nation. The survey is the only source of monthly data on total employment and unemployment. The Employment Situation news release contains data from this survey and is designated as a Principal Federal Economic Indicator (PFEI). Moreover, the survey also yields data on the characteristics of persons not in the labor force. The CPS data are used monthly, in conjunction with data from other sources, to analyze the extent to which, and with what success, the various components of the American population are participating in the economic life of the Nation.

The labor force data gathered through the CPS are provided to users in the greatest detail possible, in conjunction with the demographic information obtained in the survey. In brief, the labor force data can be broken down by sex, age, race, ethnicity, marital status, family composition, educational level, veteran status, certification and licensing status, disability status, and other characteristics. Through such breakdowns, one can focus on the employment situation of specific population groups as well as on general trends in employment and unemployment. Information of this type can be obtained only through demographically oriented surveys such as the CPS.

The basic CPS data also are used as an important platform on which to base the data derived from the various supplemental questions that are administered in conjunction with the survey. By coupling the basic data from the monthly survey with the special data from the supplements, one can get valuable insights on the behavior of American workers and on the social and economic health of their families.

There is wide interest in the monthly CPS data among Government policymakers, legislators, economists, the media, and the general public. While the data from the CPS are used in conjunction with data from other surveys in assessing the economic health of the Nation, they are unique in various ways. Specifically, they are the basis for much of the monthly Employment Situation report, a PFEI. They provide a monthly, nationally representative measure of total employment, including farm work, self-employment, and unpaid family work; other surveys are generally restricted to the nonagricultural wage and salary sector, or provide less timely information. The CPS provides data on all job seekers, and on all persons outside the labor force, while payroll-based surveys cannot, by definition, cover these sectors of the population. Finally, the CPS data on employment, unemployment, and on persons not in the labor force can be linked to the demographic characteristics of the many groups that make up the Nation's population, while the data from other surveys often have limited demographic information. Many groups, both in the government and in the private sector, are eager to analyze this wealth of demographic and labor force data.

**II. Current Action**

Office of Management and Budget clearance is being sought for a revision of the Current Population Survey. BLS is seeking approval to remove two questions that collected information about the impact of the COVID–19 pandemic on where people worked. These questions, which ask about telework or work at home in February 2020, have been included on the CPS since October 2022 to measure the impact of the COVID–19 pandemic on the labor force. BLS feels that enough time has passed since the onset of the pandemic and its impact on how people work. These questions would not provide meaningful data going forward.

**III. Desired Focus of Comments**

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the agency, including whether the information will have practical utility.

• 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.

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

*Title of Collection:* Current Population Survey (CPS).

*OMB Number:* 1220–0100.

*Type of Review:* Revision.

*Affected Public:* Households.

*Total Respondents:* 42,500 per month.

*Frequency:* Monthly.

*Total Responses:* 510,000.

*Average Time per Response:* 8.1 minutes.

*Estimated Total Burden Hours:* 68,850 hours.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, on May 23, 2023.

**Leslie A. Bennett,**

*Chief, Division of Management Systems.*

[FR Doc. 2023–11421 Filed 5–26–23; 8:45 am]

**BILLING CODE 4510–24–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Petition for Modification of Application of Existing Mandatory Safety Standards

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

**DATES:** All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before June 29, 2023.

**ADDRESSES:** You may submit comments identified by Docket No. MSHA–2023–0017 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0017.

2. *Fax:* 202–693–9441.

3. *Email: petitioncomments@dol.gov.*

4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

*Attention:* S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

**FOR FURTHER INFORMATION CONTACT:** S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

**SUPPLEMENTARY INFORMATION:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

#### I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

#### II. Petition for Modification

*Docket Number:* M–2023–005–C.

*Petitioner:* Peabody Southeast Mining LLC, 701 Market Street, St. Louis, Missouri 63101.

*Mine:* Shoal Creek Mine, MSHA ID No. 01–02901, located in Tuscaloosa and Walker Counties, Alabama.

*Regulation Affected:* 30 CFR 75.507–1(a), Electric equipment other than power-connection points; outby the last open crosscut; return air; permissibility requirements.

*Modification Request:* The petitioner requests a modification of the existing standard, 30 CFR 75.507–1(a), to allow the use of low voltage, battery-powered non-permissible testing and diagnostic equipment used in return air outby the last open crosscut.

The petitioner states that:

(a) The mine utilizes the continuous mining and longwall methods of mining.

(b) Mining equipment, *e.g.,* longwall equipment and continuous mining machine, occasionally breaks down in areas of the mine where permissible equipment is required, and it may not be safe or possible to move the equipment into intake air to perform diagnostics or repairs.

(c) MSHA-approved permissible diagnostic and testing equipment is not available for all types of testing and diagnostics.

(d) Accurate testing of electrical systems and diagnosing problems with such systems in electric mining equipment in return air outby the last open crosscut is critical to miners' safety.

The petitioner proposes the following alternative method:

(a) Non-permissible electronic testing and diagnostic equipment to be used includes:

—Hilti PD–E Laser;
—Fluke 922 Airflow Meter Manometer;
—Sharp EL–501X Calculator;
—Fluke 117 Electrician's Multimeter;
—Fluke 1AC Volt Alert Pocket Tester;
—Fluke 2AC Non-Contact Voltage Tester;
—Fluke 177 Digital Multimeter;
—Fluke 381 Remote Display Clamp Meter;
—Fluke 1555 FC 10 kV Insulation Tester;
—Fluke 1550C FC kV Insulation Tester Kit;
—Fluke 1587 FC Multimeter;
—Fluke 773 Milliamp Process Clamp Meter;
—Fluke 87V Industrial Multimeter;
—Fluke 1550C FC kV Insulation Tester Kit; and
—Fluke 789 FC ProcessMeter;
—Texas TI–84 Calculator;
—Texas TI–36X Calculator.

Other testing and diagnostic equipment may be used only if approved in advance by the MSHA District Manager.

(b) All non-permissible testing and diagnostic equipment used in return air

outby the last open crosscut shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible electronic testing and diagnostic equipment in return air outby the last open crosscut.

(d) Non-permissible electronic testing and diagnostic equipment shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible electronic equipment is being used, the equipment shall be de-energized immediately and withdrawn from the return air outby the last open crosscut.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All electronic testing and diagnostic equipment shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Qualified personnel who use electronic testing and diagnostic equipment shall be properly trained to recognize the hazards and limitations associated with use of the equipment.

In support of the proposed alternative method, the petitioner submitted a list and specifications of the low voltage, battery-powered non-permissible electronic testing and diagnostic equipment.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

**Song-ae Aromie Noe,**

*Director, Office of Standards, Regulations, and Variances.*

[FR Doc. 2023–11428 Filed 5–26–23; 8:45 am]

**BILLING CODE 4520–43–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Petition for Modification of Application of Existing Mandatory Safety Standards

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

**DATES:** All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before June 29, 2023.

**ADDRESSES:** You may submit comments identified by Docket No. MSHA–2023–0018 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0018.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

*Attention:* S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

**FOR FURTHER INFORMATION CONTACT:** S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

**SUPPLEMENTARY INFORMATION:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

#### I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

#### II. Petition for Modification

*Docket Number:* M–2023–006–C.

*Petitioner:* Peabody Southeast Mining LLC, 701 Market Street, St. Louis, Missouri 63101.

*Mine:* Shoal Creek Mine, MSHA ID No. 01–02901, located in Tuscaloosa and Walker Counties, Alabama.

*Regulation Affected:* 30 CFR 75.1002(a), Installation of electric equipment and conductors; permissibility.

*Modification Request:* The petitioner requests a modification of the existing standard, 30 CFR 75.1002(a), to allow the use of low voltage, battery-powered non-permissible testing and diagnostic equipment on the longwall face or within 150 feet of pillar workings.

The petitioner states that:

(a) The mine utilizes the continuous mining and longwall methods of mining.

(b) Mining equipment, *e.g.,* longwall equipment and continuous mining machine, occasionally breaks down in areas of the mine where permissible equipment is required, and it may not be safe or possible to move the equipment into intake air to perform diagnostics or repairs.

(c) MSHA-approved permissible diagnostic and testing equipment is not available for all types of testing and diagnostics.

(d) Accurate testing of electrical systems and diagnosing problems with such systems in electric mining equipment on the longwall face or within 150 feet of pillar workings is critical to miners' safety.

The petitioner proposes the following alternative method:

(a) Non-permissible electronic testing and diagnostic equipment to be used includes:

—Hilti PD–E Laser;
—Fluke 922 Airflow Meter Manometer;
—Sharp EL–501X Calculator;
—Fluke 117 Electrician's Multimeter;
—Fluke 1AC Volt Alert Pocket Tester;
—Fluke 2AC Non-Contact Voltage Tester;
—Fluke 177 Digital Multimeter;
—Fluke 381 Remote Display Clamp Meter;
—Fluke 1555 FC 10 kV Insulation Tester;
—Fluke 1550C FC kV Insulation Tester Kit;
—Fluke 1587 FC Multimeter;
—Fluke 773 Milliamp Process Clamp Meter;
—Fluke 87V Industrial Multimeter;
—Fluke 1550C FC kV Insulation Tester Kit; and

—Fluke 789 FC ProcessMeter;

—Texas TI–84 Calculator;

—Texas TI–36X Calculator.

Other testing and diagnostic equipment may be used if approved in advance by the MSHA District Manager.

(b) All non-permissible testing and diagnostic equipment used on the longwall face or within 150 feet of pillar workings shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible electronic testing and diagnostic equipment on the longwall face or within 150 feet of pillar workings.

(d) Non-permissible electronic testing and diagnostic equipment shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible electronic equipment is being used, the equipment shall be de-energized immediately and withdrawn from the longwall or more than 150 feet from pillar workings.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) All electronic testing and diagnostic equipment shall be used in accordance with the safe use procedures recommended by the manufacturer.

(g) Qualified personnel who use electronic testing and diagnostic equipment shall be properly trained to recognize the hazards and limitations associated with use of the equipment.

In support of the proposed alternative method, the petitioner submitted a list and specifications of the low voltage, battery-powered non-permissible electronic testing and diagnostic equipment.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

**Song-ae Aromie Noe,**

*Director, Office of Standards, Regulations, and Variances.*

[FR Doc. 2023–11434 Filed 5–26–23; 8:45 am]

**BILLING CODE 4520–43–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Petition for Modification of Application of Existing Mandatory Safety Standards

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

**DATES:** All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before June 29, 2023.

**ADDRESSES:** You may submit comments identified by Docket No. MSHA–2023–0016 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0016.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

*Attention:* S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

**FOR FURTHER INFORMATION CONTACT:** S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

**SUPPLEMENTARY INFORMATION:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and Title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

#### I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

#### II. Petition for Modification

*Docket Number:* M–2023–004–C.

*Petitioner:* Peabody Southeast Mining LLC, 701 Market Street, St. Louis, Missouri 63101.

*Mine:* Shoal Creek Mine, MSHA ID No. 01–02901, located in Tuscaloosa and Walker Counties, Alabama.

*Regulation Affected:* 30 CFR 75.500(d), Permissible electric equipment.

*Modification Request:* The petitioner requests a modification of the existing standard, 30 CFR 75.500(d), to allow the use of low voltage, battery-powered non-permissible testing and diagnostic equipment in or inby the last open crosscut.

The petitioner states that:

(a) The mine utilizes the continuous mining and longwall methods of mining.

(b) Mining equipment, *e.g.,* longwall equipment and continuous mining machine, occasionally breaks down in areas of the mine where permissible equipment is required, and it may not be safe or possible to move the equipment into intake air to perform diagnostics or repairs.

(c) MSHA-approved permissible diagnostic and testing equipment is not available for all types of testing and diagnostics.

(d) Accurate testing of electrical systems and diagnosing problems with such systems in electric mining equipment in or inby the last open crosscut is critical to miners' safety.

The petitioner proposes the following alternative method:

(a) Non-permissible electronic testing and diagnostic equipment to be used includes:

—Hilti PD–E Laser;

—Fluke 922 Airflow Meter Manometer;

—Sharp EL–501X Calculator;

—Fluke 117 Electrician's Multimeter;

—Fluke 1AC Volt Alert Pocket Tester;

—Fluke 2AC Non-Contact Voltage Tester;

—Fluke 177 Digital Multimeter;

—Fluke 381 Remote Display Clamp Meter;

—Fluke 1555 FC 10 kV Insulation Tester;
—Fluke 1550C FC kV Insulation Tester Kit;
—Fluke 1587 FC Multimeter;
—Fluke 773 Milliamp Process Clamp Meter;
—Fluke 87V Industrial Multimeter;
—Fluke 1550C FC kV Insulation Tester Kit; and
—Fluke 789 FC ProcessMeter;
—Texas TI–84 Calculator;
—Texas TI–36X Calculator.

Other testing and diagnostic equipment may be used if approved in advance by the MSHA District Manager.

(b) All non-permissible testing and diagnostic equipment used in or inby the last open crosscut shall be examined by a qualified person as defined in 30 CFR 75.153 prior to use to ensure the equipment is being maintained in a safe operating condition. The examination results shall be recorded in the weekly examination book and made available to MSHA and the miners at the mine.

(c) A qualified person as defined in 30 CFR part 75.151 shall continuously monitor for methane immediately before and during the use of non-permissible electronic testing and diagnostic equipment in or inby the last open crosscut.

(d) Non-permissible electronic testing and diagnostic equipment shall not be used if methane is detected in concentrations at or above 1.0 percent. When 1.0 percent or more methane is detected while the non-permissible electronic equipment is being used, the equipment shall be de-energized immediately and withdrawn outby the last open crosscut.

(e) All hand-held methane detectors shall be MSHA approved and maintained in permissible and proper operating condition as defined in 30 CFR 75.320.

(f) Except for time necessary to troubleshoot under actual mining conditions, coal production in the section shall cease. However, coal may remain in or on the equipment to test and diagnose the equipment under ''load.''

(g) All electronic testing and diagnostic equipment shall be used in accordance with the safe use procedures recommended by the manufacturer.

(h) Qualified personnel who use electronic testing and diagnostic equipment shall be properly trained to recognize the hazards and limitations associated with use of the equipment.

In support of the proposed alternative method, the petitioner submitted a list and specifications of the low voltage, battery-powered non-permissible electronic testing and diagnostic equipment.

The petitioner asserts that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

**Song-ae Aromie Noe,**

*Director, Office of Standards, Regulations, and Variances.*

[FR Doc. 2023–11427 Filed 5–26–23; 8:45 am]

**BILLING CODE 4520–43–P**

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

### Petition for Modification of Application of Existing Mandatory Safety Standard

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Notice.

**SUMMARY:** This notice is a summary of a petition for modification submitted to the Mine Safety and Health Administration (MSHA) by the party listed below.

**DATES:** All comments on the petition must be received by MSHA's Office of Standards, Regulations, and Variances on or before June 29, 2023.

**ADDRESSES:** You may submit comments identified by Docket No. MSHA–2023–0014 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0026.
2. *Fax:* 202–693–9441.
3. *Email: petitioncomments@dol.gov.*
4. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.

*Attention:* S. Aromie Noe, Director, Office of Standards, Regulations, and Variances. Persons delivering documents are required to check in at the receptionist's desk in Suite 4E401. Individuals may inspect copies of the petition and comments during normal business hours at the address listed above. Before visiting MSHA in person, call 202–693–9455 to make an appointment, in keeping with the Department of Labor's COVID–19 policy. Special health precautions may be required.

**FOR FURTHER INFORMATION CONTACT:** S. Aromie Noe, Office of Standards, Regulations, and Variances at 202–693–9440 (voice), *Petitionsformodification@dol.gov* (email), or 202–693–9441 (fax). [These are not toll-free numbers.]

**SUPPLEMENTARY INFORMATION:** Section 101(c) of the Federal Mine Safety and Health Act of 1977 and title 30 of the Code of Federal Regulations (CFR) part 44 govern the application, processing, and disposition of petitions for modification.

#### I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

1. An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or
2. The application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, sections 44.10 and 44.11 of 30 CFR establish the requirements for filing petitions for modification.

#### II. Petition for Modification

*Docket Number:* M–2023–002–M.

*Petitioner:* U.S. Silica Company, 4800 Oklahoma Hwy 1 North, Mill Creek, Oklahoma 74856.

*Mine:* Mill Creek Plant #37, MSHA ID No. 34–00377, located in Johnston County, Oklahoma.

*Regulation Affected:* 30 CFR 56.13020 (Use of compressed air).

*Modification Request:* The petitioner requests a modification of 30 CFR 56.13020 to allow compressed air to be directed towards persons for use in a clothes cleaning booth.

The petitioner states that:

(a) The petitioner proposes to implement a clothes cleaning process.

(b) The alternative method provides a direct reduction of a miners' exposures to respirable dust, thus reducing their health risks.

(c) The proposed alternative method has been developed jointly between Unimin Corporation and the National Institute for Occupational Safety and Health (NIOSH) and has been successfully tested by NIOSH.

The petitioner proposes the following alternative method:

(a) The petitioner will use a clothes cleaning booth, CCB Elite I, serial number 5406, manufactured by S.K. Bowling, Inc.

(b) Only miners trained in the operation of the clothes cleaning booth (booth) will be permitted to use the booth to clean their clothes.

(c) The petitioner will incorporate the NIOSH Clothes Cleaning Process and

manufacturer's instruction manuals into their MSHA part 46 training plan and train affected miners in the process.

(d) Miners entering the booth shall examine valves and nozzles for damage or malfunction and will close the door fully before opening the air valve. Any defects shall be repaired prior to the booth being used.

(e) Miners entering the booth shall wear eye protection, ear plugs or muffs for hearing protection, and respiratory protection meaning a full-face or half-mask respirator that meets or exceeds the minimum requirements of an N95 filter to which the miner has been fit-tested. As an alternative, the use of a full-face respirator will also meet the requirement for eye protection. A sign will be conspicuously posted that states the above personal protective equipment is required when entering the booth.

(f) Air flow through the booth will be at least 2,000 cubic feet per minute (cfm) to maintain negative pressure during the use of the cleaning system in order to prevent contamination of the environment outside the booth. Airflow will be in a downward direction, thereby moving contaminants away from the miner's breathing zone.

(g) Air pressure through the spray manifold will be limited to 30 pounds per square inch or less. A lock box with a single, plant manager-controlled key will be used to prevent regulator tampering.

(h) The spray manifold will consist of a 2-inch square tube with ¼ inch wall thickness, capped at the base and actuated by an electrically controlled valve at the top.

(i) Air nozzles shall not exceed 30 pound(s) per square inch gauge.

(j) The uppermost spray of the spray manifold will be located below the booth user's breathing zone. Some type of mechanical device can be used to cover the upper air nozzles to meet the specific height of the user.

(k) Air nozzles shall be guarded to eliminate the possibility of incidental contact, which could create mechanical damage to the air nozzles during the clothes cleaning process.

(l) The petitioner shall conduct periodic maintenance checks of the booth in accordance with the recommendations contained in the manufacturer's instruction manual.

(m) The air receiver tank supplying air to the manifold system will be of sufficient volume to permit no less than 20 seconds of continuous cleaning time.

(n) An appropriate hazard warning sign will be posted on the booth to state, at a minimum, ''Compressed Air'' and ''Respirable Dust.''

(o) A pressure relief valve designed for the booth's air reservoir will be installed.

(p) The mine will exhaust dust-laden air from the booth into a local exhaust ventilation system or duct outside the facility while ensuring there is no re-entrainment back into the structure.

In support of the proposed alternative method, the petitioner submitted specifications of the dust booth; installation and operating instructions of the dust booth to be used; and The Dust Control Handbook for Industrial Minerals, Mining, and Processing.

The petitioner asserts that the alternate method proposed will at all times guarantee no less than the same measure of protection afforded the miners under the mandatory standard.

**Song-ae Aromie Noe,**

*Director, Office of Standards, Regulations, and Variances.*

[FR Doc. 2023–11422 Filed 5–26–23; 8:45 am]

**BILLING CODE 4520–43–P**

## OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

### Notice of Meeting: National Intelligence University Board of Visitors

**AGENCY:** National Intelligence University (NIU), Office of the Director of National Intelligence (ODNI).

**ACTION:** Notice of federal advisory committee meeting.

**SUMMARY:** The ODNI is publishing this notice to announce that the following Federal Advisory Committee meeting of the National Intelligence University Board of Visitors will take place. This meeting is closed to the public.

**DATES:** Thursday June 8, 2023, 9:00 a.m. to 12:00 p.m., Bethesda, MD.

**ADDRESSES:** National Intelligence University, 4600 Sangamore Road, Bethesda, MD 20816.

**FOR FURTHER INFORMATION CONTACT:** Ms. Patricia ''Patty'' Larsen, Designated Federal Officer, (301) 243–2118 (Voice), *excom@odni.gov* (email). Mailing address is National Intelligence University, Roberdeau Hall, Washington, DC 20511. Website: *http://ni-u.edu/wp/about-niu/leadership-2/board-of-visitors/.*

**SUPPLEMENTARY INFORMATION:** This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C. 1001–1014), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.140 and 102–3.150. The meeting includes the discussion of classified information and classified materials regarding intelligence education issues and the Director of National Intelligence, or her designee, in consultation with the ODNI Office of General Counsel, has determined the meeting will be closed to the public under the exemptions set forth in 5 U.S.C. 552b(c)(1) and 552b(c)(2).

*I. Purpose of the Meeting:* The Board will discuss critical issues and advise the Director of National Intelligence on controlled unclassified or classified information as defined in 5 U.S.C. 552b(c)(1) and discuss matters related solely to the internal personnel rules and practices of NIU under 5 U.S.C. 552b(c)(2) and therefore will be closed to the public.

*II. Agenda:* Welcome and Call to Order, Presidential Update, Presidential Candidates (Personnel), and Governance Discussion.

*III. Meeting Accessibility:* The public or interested organizations may submit written statements to the National Intelligence University Board of Visitors about its mission and functions. Written statements may be submitted at any time or in response to the stated agenda of a planned meeting of the National Intelligence University Board of Visitors.

*IV. Written Statements:* All written statements shall be submitted to the Designated Federal Officer for the National Intelligence University Board of Visitors, and this individual will ensure that the written statements are provided to the membership for their consideration.

**Robert A. Newton,**

*Committee Management Officer and Deputy Chief Operating Officer.*

[FR Doc. 2023–11367 Filed 5–26–23; 8:45 am]

**BILLING CODE P**

## NATIONAL TRANSPORTATION SAFETY BOARD

**[Docket No.: NTSB–2023–0005]**

### Information Collection: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

**AGENCY:** National Transportation Safety Board (NTSB).

**ACTION:** Notice and request for comments for a new information collection.

**SUMMARY:** Under the Paperwork Reduction Act (PRA) of 1995, the NTSB invites public comment on the agency's intent to submit to the Office of Management and Budget (OMB) an Information Collection Request (ICR),

seeking Generic Clearance for a new collection. Specifically, the NTSB intends to seek OMB approval on generic clearance for qualitative feedback on agency service delivery.

**DATES:** Submit written comments regarding this proposed collection of information by July 31, 2023.

**ADDRESSES:** You may send comments, identified by Docket Number (No.) NTSB–2023–0005, by any of the following methods:

- *Federal e-Rulemaking Portal: https://www.regulations.gov.*
- *Email: rulemaking@ntsb.gov.*
- *Fax:* 202–314–6090.
- *Mail/Hand Delivery/Courier:* NTSB, Office of General Counsel, 490 L'Enfant Plaza East SW, Washington, DC 20594.

*Instructions:* All submissions in response to this Notice must include Docket No. NTSB–2023–0005. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided.

*Docket:* For access to the docket, including comments received, go to *https://www.regulations.gov* and search under Docket No. NTSB–2023–0005.

**FOR FURTHER INFORMATION CONTACT:** Casey Blaine, Deputy General Counsel, (202) 314–6080, *rulemaking@ntsb.gov.*

**SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

*Form Number:* To be determined by specific collections.

*Type of Request:* New Collection.

*Type of Review:* Regular.

*Type of Review Requested:* 3 years from the date of approval.

*Summary of the Collection of Information:* With the goal of ensuring that the Federal Government provided the highest quality service as possible, Executive Order (E.O.) 12862 (Setting Customer Service Standards) was issued to set customer service standards to a level that either matched or exceeded the best service available in the private sector. Accordingly, E.O. 12862 directed Federal agencies to create customer surveys to obtain information on customer satisfaction. E.O. 14058 (Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government) was later issued and reiterated the Federal Government's commitment to improve a customer's experience in an agency's service delivery. E.O. 14058 defined service delivery as an action related to a Federal benefit or service provided to a customer.

To ensure that the NTSB's service delivery is effective and meets its customer needs, the NTSB seeks OMB approval of a generic clearance to collect qualitative feedback on the agency's service delivery. This proposed IC provides a means to garner qualitative feedback in an efficient, timely manner in accordance with the commitment to improving service delivery.

Qualitative feedback is information that will provide insights into stakeholder perceptions, experiences, and expectations; provide an early warning of issues with service; or focus attention on areas where communication, training, or changes in operations might improve delivery of products and services. This feedback will allow for ongoing, collaborative, and actionable communications between the NTSB and its stakeholders. It will also allow for feedback to contribute directly to the improvement of program management.

The feedback solicited will target areas that include, but are not limited to: 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 is not collected, vital feedback from stakeholders on the agency's services will be unavailable.

The agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collection is voluntary;
- The collection is low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and is low-cost for both the respondents and the Federal Government;
- The collection is non-controversial and does 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;
- Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, the agency must indicate the qualitative nature of the information);
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study. The types of collections that this generic clearance covers include, but are not limited to:
- Customer comment cards/ complaint forms;
- Qualitative customer satisfaction surveys (*e.g.,* post-meeting surveys; web surveys); and
- In-person observation testing (*e.g.,* website or software usability tests).

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such as collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections under this request 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.

*Current Actions:* New collection of information.

*Type of Review:* New Collection.

*Affected Public:* Individuals and Households, Businesses and Organizations, and State, Local, or Tribal Government.

*Total Estimated Annual Burden Hours:* 1,250.

*Estimated Average Burden Hours per Respondent:* 30 minutes.

*Frequency of Response:* On occasion, per request.

*Total Estimated No. of Annual Responses:* 15,000.

The 1,250 annual burden hours requested are based on the number of collections the NTSB expects to conduct over the requested three-year period for this generic clearance.

*Estimated Total Annual Burden Cost:* $0.

Participation in this collection is voluntary, and there are no costs to respondents beyond the time spent participating in the surveys.

*Request for Comments:* Prior to submitting the ICR to the Office of Information and Regulatory Affairs (OIRA), 5 CFR 1320.8(d)(1) requires agencies to provide a 60-day Notice in the **Federal Register** and otherwise consult with members of the public and affected agencies. Thus, through this Notice, the NTSB currently is soliciting public comments that include: (1) whether the proposed collection is necessary for the NTSB to perform its mission; (2) the accuracy of the estimated burden; (3) ways for the NTSB to enhance the quality, usefulness, and clarity of the IC; and (4) ways to minimize burden without reducing the quality of the IC. The NTSB will summarize and/or include comments received in the agency's request for OMB approval.

**Jennifer Homendy,**

*Chair.*

[FR Doc. 2023–11364 Filed 5–26–23; 8:45 am]

**BILLING CODE 7533–01–P**

## POSTAL SERVICE

### Product Change—Priority Mail, First-Class Package Service & Parcel Select Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Date of required notice:* May 30, 2023.

**FOR FURTHER INFORMATION CONTACT:** Sean C. Robinson, 202–268–8405.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on May 22, 2023, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail, First-Class Package Service & Parcel Select Contract 24 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2023–164, CP2023–168.

**Sean Robinson,**

*Attorney, Corporate and Postal Business Law.*

[FR Doc. 2023–11410 Filed 5–26–23; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–97547; File No. SR–CboeEDGX–2023–036]**

### Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

May 23, 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 10, 2023, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the 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

Cboe EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') proposes to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://markets.cboe.com/us/options/regulation/rule_filings/edgx/*), at the Exchange's Office of the Secretary, 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 its Fee Schedule applicable to its equities trading platform (''EDGX Equities'') as follows: (1) by modifying and introducing certain Add/Remove Volume Tiers; (2) by eliminating certain Growth Tiers; (3) by modifying the criteria of the Non-Displayed Add Volume Tiers; (4) by eliminating certain Non-Displayed Step-Up Tiers; (5) by eliminating certain Retail Growth Tiers; and (6) by introducing new fee code DX and modifying the description and fee associated with fee code DQ. The Exchange proposes to implement these changes effective May 1, 2023.[3]

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the ''Act''), to which market participants may direct their order flow. Based on publicly available information,[4] no single registered equities exchange has more than 16% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a ''Maker-Taker'' model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity. The Exchange's Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above $1.00, the Exchange provides a standard rebate of $0.00160 per share for orders that add liquidity and assesses a fee of $0.0030 per share

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee changes on May 1, 2023 (SR–CboeEDGX–2023–034). On May 10, 2023, the Exchange withdrew that filing and submitted this proposal.

[4] *See* Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (April 21, 2023), available at *https://www.cboe.com/us/equities/market_statistics/.*

for orders that remove liquidity.[5] For orders in securities priced below $1.00, the Exchange provides a standard rebate of $0.00009 per share for orders that add liquidity and assesses a fee of 0.30% of the total dollar value for orders that remove liquidity.[6] Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Add/Remove Volume Tiers

Under footnote 1 of the Fee Schedule, the Exchange currently offers various Add/Remove Volume Tiers. In particular, the Exchange offers three Add Volume Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes B,[7] V,[8] Y,[9] 3,[10] and 4,[11] where a Member reaches certain add volume-based criteria. First, the Exchange is proposing to introduce a new Add Volume Tier 2 and a new Add Volume Tier 5 to provide Members an additional manner in which they could receive an enhanced rebate if certain criteria is met. The proposed criteria for proposed Add Volume Tier 2 is as follows:

• Add Volume Tier 2 provides a rebate of $0.0025 per share for securities priced above $1.00 to qualifying orders (*i.e.,* orders yielding fee B, V, Y, 3, or 4) where Member adds an ADV [12] (excluding fee codes ZA [13] or ZO [14]) ≥0.18% of the TCV [15] or Members adds an ADV (excluding fee codes ZA or ZO) ≥20,000,000.

The criteria for proposed Add Volume Tier 5 is as follows:

• Add Volume Tier 5 provides a rebate of $0.0029 per share for securities priced above $1.00 to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where Member adds a Retail Order ADV (*i.e.,* yielding fee codes ZA or ZO) ≥0.45% of the TCV.

The Exchange believes proposed Add Volume Tier 2 and proposed Add Volume Tier 5 provide rebates commensurate with the difficulty of meeting the criteria associated with the proposed tiers.

Second, the Exchange proposes to modify the criteria of existing Add Volume Tier 1. Currently, the criteria for Add Volume Tier 1 is as follows:

• Add Volume Tier 1 provides a rebate of $0.0020 per share for securities priced above $1.00 to qualifying orders (*i.e.,* orders yielding fee B, V, Y, 3, or 4) where Member adds an ADV ≥0.20% of the TCV.

Now, the Exchange proposes to exclude retail orders from the calculation of ADV, lower the TCV threshold, and add an additional prong of criteria that Members may satisfy to achieve the enhanced rebate. The proposed criteria is as follows:

• Add Volume Tier 1 provides a rebate of $0.0020 per share for securities priced above $1.00 to qualifying orders (*i.e.,* orders yielding fee B, V, Y, 3, or 4) where Member adds an ADV (excluding fee codes ZA and ZO) ≥0.15% of the TCV or Member adds an ADV (excluding fee codes ZA and ZO) ≥16,000,000.

Third, the Exchange proposes to renumber current Add Volume Tiers 2 and 3 and modify the criteria of proposed Add Volume Tiers 3 and 4 (current Add Volume Tiers 2 and 3). Currently, Add Volume Tiers 2 and 3 (proposed Add Volume Tiers 3 and 4) read as follows:

• Add Volume Tier 2 provides a rebate of $0.0027 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where (1) Member adds an ADV ≥0.22% of the TCV; or (2) Member adds an ADV ≥25,000,000.

• Add Volume Tier 3 provides a rebate of $0.0029 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where Member adds an ADV ≥0.65% of the TCV.

Now, the Exchange proposes to exclude retail orders from the calculation of ADV. The proposed criteria for current Add Volume Tiers 2 and 3 (proposed Add Volume Tiers 3 and 4) is as follows:

• Proposed Add Volume Tier 3 provides a rebate of $0.0027 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where (1) Member adds an ADV (excluding fee codes ZA and ZO) ≥0.22% of the TCV; or (2) Member adds an ADV (excluding fee codes ZA and ZO) ≥25,000,000.

• Proposed Add Volume Tier 4 provides a rebate of $0.0029 per share to qualifying orders (*i.e.,* orders yielding fee codes B, V, Y, 3, or 4) where Member adds an ADV (excluding fee codes ZA and ZO) ≥0.65% of the TCV.

The proposed modifications to current Add Volume Tier 1 and proposed Add Volume Tiers 3 and 4 removes retail orders from the calculation of ADV. By removing retail orders from the calculation of ADV, the Exchange is limiting the amount of orders that qualify for ADV. However, in Add Volume Tier 1 the Exchange has also proposed to lower the TCV percentage and provided additional criteria by which Members may receive an enhanced rebate. The Exchange has also proposed to introduce a new Add Volume Tier 2, which offers a slightly higher rebate for achieving criteria that is slightly more difficult than Add Volume Tier 1. The Exchange believes that by introducing proposed Add Volume Tier 2, decreasing the difficulty of the criteria under Add Volume Tier 1, and removing retail orders from the calculation of ADV in proposed Add Volume Tiers 3 and 4, Members are still incentivized to add volume on the Exchange, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.

Growth Tiers

In addition to the Add/Remove Volume Tiers offered under footnote 1, the Exchange also offers Growth Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes B, V, Y, 3, and 4, where a Member reaches certain add volume-based criteria, including ''growing'' its volume over a certain baseline month. The Exchange now proposes to discontinue Growth Tiers 1–3, as no Members have satisfied the criteria within the past six months and the Exchange no longer wishes to, nor is required to, maintain such tiers.[16] More

[5] *See* EDGX Equities Fee Schedule, Standard Rates.

[6] *Id.*

[7] Fee code B is appended to orders adding liquidity to EDGX in Tape B securities.

[8] Fee code V is appended to orders adding liquidity to EDGX in Tape A securities.

[9] Fee code Y is appended to orders adding liquidity to EDGX in Tape C securities.

[10] Fee code 3 is appended to orders adding liquidity to EDGX in the pre and post market in Tapes A or C securities.

[11] Fee code 4 is appended to orders adding liquidity to EDGX in the pre and post market in Tape B securities.

[12] ''ADV'' means average daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day. ADV is calculated on a monthly basis.

[13] Fee code ZA is appended to Retail Orders that add liquidity.

[14] Fee code ZO is appended to Retail orders that adds liquidity during the pre- and post-market.

[15] ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

[16] On April 28, 2023, the Commission issued Securities Exchange Act Release No. 97406 (the ''Notice''), which temporarily suspended File Number SR–CboeEDGX–2023–016 (the ''March Filing''). As a result of the Notice, the Exchange's

Continued

specifically, the proposed change removes these tiers as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow. The Exchange notes that it proposed a new Growth Tier 1 in its April 2023 fee filing (the ''April Filing'') [17] and the tier proposed in the April Filing shall remain in effect following the suspension of its March 2023 proposed fees. As a result of the Notice, existing Growth Tiers 1 and 2, which were proposed in the Exchange's March Filing, shall revert back to Growth Tiers 4 and 5 as they originally appeared in February 2023, prior to the Exchange's March Filing.[18]

Non-Displayed Add Volume Tiers

In addition to the Add/Remove Volume Tiers and Growth Tiers offered under footnote 1, the Exchange also offers Non-Displayed Add Volume Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes DM,[19] HA,[20] MM,[21] and RP,[22] where a Member reaches certain volume-based criteria offered in each tier. The Exchange now proposes to amend the criteria of current Non-Displayed Add Volume Tiers 1–3. Currently, the criteria for Non-Displayed Add Volume Tiers 1–3 is as follows:

• Non-Displayed Add Volume Tier 1 provides a rebate of $0.0015 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Member has an ADAV [23] ≥0.05% of TCV for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP; or (2) Member has an ADAV ≥4,000,000 for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

• Non-Displayed Add Volume Tier 2 provides a rebate of $0.0020 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Member has an ADAV ≥0.08% of TCV for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP; or (2) Member has an ADAV ≥7,000,000 for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

• Non-Displayed Add Volume Tier 3 provides a rebate of $0.0025 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Member has an ADAV ≥0.10% of TCV for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP; or (2) Member has an ADAV ≥9,000,000 for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

Now, the Exchange proposes to revise the second prong of criteria in Non-Displayed Add Volume Tiers 1–3. The proposed criteria for Non-Displayed Add Volume Tiers 1–3 is as follows:

• Non-Displayed Add Volume Tier 1 provides a rebate of $0.0015 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Member has an ADAV [24] ≥0.05% of TCV for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP; or (2) Member has an ADAV ≥5,000,000 for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

• Non-Displayed Add Volume Tier 2 provides a rebate of $0.0020 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Member has an ADAV ≥0.08% of TCV for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP; or (2) Member has an ADAV ≥8,000,000 for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

• Non-Displayed Add Volume Tier 3 provides a rebate of $0.0025 per share to qualifying orders (*i.e.,* orders yielding fee code DM, HA, MM, or RP) where (1) Member has an ADAV ≥0.10% of TCV for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP; or (2) Member has an ADAV ≥10,000,000 for Non-Displayed orders that yield fee codes DM, HA, HI, MM or RP.

The proposed modifications to Non-Displayed Add Volume Tiers 1–3 is intended to incentivize Members to add non-displayed retail volume on the Exchange by slightly increasing the difficulty of the criteria that must be achieved in order to receive an enhanced rebate. By increasing the difficulty of a criteria while keeping the enhanced rebate the same, the proposed criteria slightly increases the difficulty required for Members to meet the applicable tier threshold while continuing to encourage Members to add non-displayed liquidity to the Exchange, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.

Non-Displayed Step-Up Tiers

In addition to the Add/Remove Volume Tiers, Growth Tiers, and the Non-Displayed Add Volume Tiers under footnote 1, the Exchange also offers Non-Displayed Step-Up Volume Tiers that each provide an enhanced rebate for Members' qualifying orders yielding fee codes DM, HA, MM, and RP, where a Member reaches certain volume-based criteria, including ''growing'' its volume over a certain baseline month. The Exchange now proposes to discontinue Non-Displayed Step-Up Tiers 1 and 2, as no Members have satisfied the criteria within the past six months and the Exchange no longer wishes to, nor is required to, maintain such tiers.[25] More specifically, the proposed change removes these tiers as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow. As a result of the Notice, existing Non-Displayed Step-Up Volume Tier 1, which was proposed in the Exchange's March Filing, shall revert back to Non-Displayed Step-Up Volume Tier 3 as it originally appeared in February 2023, prior to the Exchange's March Filing.[26]

proposed changes to its fee schedule as detailed in SR–CboeEDGX–2023–016 have been temporarily suspended, and all proposed changes to the Growth Tiers mentioned in this paragraph refer to the Growth Tiers as they appeared on the Exchange's fee schedule on February 28, 2023.

[17] *See* Securities Exchange Act Release No. 97393 (April 27, 2023); SR–CboeEDGX–2023–030 (April 17, 2023) (''Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fee Schedule'').

[18] *Id.*

[19] Fee code DM is appended to orders that add liquidity using MidPoint Discretionary Order within discretionary range.

[20] Fee code HA is appended to non-displayed orders that add liquidity.

[21] Fee code MM is appended to non-displayed orders that add liquidity using Mid-Point Peg.

[22] Fee code RP is appended to non-displayed orders that add liquidity using Supplemental Peg.

[23] ''ADAV'' means average daily added volume calculated as the number of shares added per day. ADAV is calculated on a monthly basis.

[24] ''ADAV'' means average daily added volume calculated as the number of shares added per day. ADAV is calculated on a monthly basis.

[25] Pursuant to the Notice issued by the Commission on April 28, 2023 (*supra* note 16), the Exchange's proposed changes to its fee schedule as detailed in SR–CboeEDGX–2023–016 have been temporarily suspended, and all proposed changes to the Non-Displayed Step-Up Tiers mentioned in this paragraph refer to the Non-Displayed Step-Up Tiers as they appeared on the Exchange's fee schedule on February 28, 2023. The Exchange notes that current Non-Displayed Step-Up Tier 1 (as of April 1, 2023) will be renumbered back to Non-Displayed Step-Up Tier 3 as the Notice stays the implementation of the fees as described in SR–CboeEDGX–2023–016.

[26] *Supra* note 16.

Retail Growth Tiers

Pursuant to footnote 2 of the Fee Schedule, the Exchange offers Retail Volume Tiers which provide Retail Member Organizations (''RMOs'') [27] an opportunity to receive an enhanced rebate from the standard rebate for Retail Orders [28] that add liquidity (*i.e.,* yielding fee code ZA or ZO). Currently, the Retail Volume Tiers offer three Retail Growth Tiers, where a Member is eligible for an enhanced rebate for qualifying orders (*i.e.,* yielding fee code ZA or ZO) meeting certain add volume-based criteria, including ''growing'' its volume over a certain baseline month. The Exchange now proposes to eliminate Retail Growth Tiers 1 and 2, as Members have not consistently satisfied the criteria of these tiers over the past six months and the Exchange no longer wishes to, nor is required to, maintain such tiers. More specifically, the proposed change removes these tiers as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

Fee Codes DQ and DX

In the Exchange's March Filing, the Exchange proposed an amendment to fee code DQ, which is appended to Midpoint Discretionary Orders (''MDOs'') [29] entered with a Quote Depletion Protection (''QDP'') [30] order instruction. QDP is designed to provide enhanced protections to MDOs by tracking significant executions that constitute the best bid or offer on the EDGX Book [31] and enabling Users to avoid potentially unfavorable executions by preventing MDOs entered with the optional QDP instruction from exercising discretion to trade at more aggressive prices when QDP has been triggered.[32] The Exchange proposed amending fee code DQ to be appended to MDOs entered with a QDP instruction that added liquidity to the Exchange. There was no proposed change to the fee associated with fee code DQ. At the time of the March Filing, MDOs entered with the QDP instruction were appended fee code DQ and assessed a flat fee of $0.00040 per share in securities at or above $1.00 and 0.30% of dollar value for securities priced below $1.00. Also in its March Filing, the Exchange proposed to introduce fee code DX, which would be appended to MDOs with a QDP instruction that remove liquidity from the Exchange. Orders appended with fee code DX would be assessed a fee of $0.00100 per share in securities at or above $1.00 and 0.30% of dollar value for securities priced below $1.00. As a result of the Notice issued by the Commission on April 28, 2023, the Exchange's March Filing was temporarily suspended and all proposed changes to fee codes DX and DQ mentioned in this paragraph refer to the fee codes as they appeared on the Exchange's fee schedule on February 28, 2023.[33]

As a result of the reversion back to the February 28, 2023, fee schedule, the Exchange now proposes to amend fee code DQ to be appended to MDOs entered with a QDP instruction that add liquidity to the Exchange. There would be no change to the fee associated with fee code DQ. Also as a result of the reversion back to the February 28, 2023, fee schedule, the Exchange also now proposes to introduce fee code DX, which would be appended to MDOs with a QDP instruction that remove liquidity from the Exchange. Orders appended with fee code DX would be assessed a fee of $0.0010 per share in securities at or above $1.00 and 0.30% of dollar value for securities priced below $1.00.[34] While the Exchange notes the difference between the fees assessed for fee codes DX and DQ, the Exchange believes that charging a lower fee for MDOs entered with a QDP instruction that add liquidity to the Exchange under fee code DQ will incentivize Users to submit liquidity-adding MDOs containing a QDP instruction, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[35] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [36] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) [37] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4) [38] as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange believes that its proposal to: (1) introduce new Add Volume Tiers 2 and 5 and modify current Add Volume Tiers 1, 2, and 3; and (2) modify Non-Displayed Add Volume Tiers 1–3 reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. Additionally, the Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges,[39] including the Exchange,[40] and are reasonable, equitable and non-discriminatory because they are open to

[27] *See* EDGX Rule 11.21(a)(1). A ''Retail Member Organization'' or ''RMO'' is a Member (or a division thereof) that has been approved by the Exchange under this Rule to submit Retail Orders.

[28] *See* EDGX Rule 11.21(a)(2). A ''Retail Order'' is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

[29] *See* Exchange Rule 11.8(g).

[30] *See* Exchange Rule 11.8(g)(10).

[31] *See* Exchange Rule 1.5(d).

[32] *See* Securities Exchange Act Release No. 89007 (June 4, 2020), 85 FR 35454 (June 10, 2020) (SR–CboeEDGX–2020–010) (''Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend the Rule Relating to MidPoint Discretionary Orders to Allow Optional Offset or Quote Depletion Protection Instructions'').

[33] *Supra* note 16.

[34] The Exchange notes that its April Filing proposed an amendment of the rate associated with fee code DX from $0.00060 to $0.0010. The rate of $0.0010 proposed above is in-line with the rate of $0.0010 proposed in the April Filing and the Exchange is merely re-introducing the proposed rate of $0.0010 as a result of the Notice and subsequent suspension of the proposed changes contained within its March Filing.

[35] 15 U.S.C. 78f(b).

[36] 15 U.S.C. 78f(b)(5).

[37] *Id.*

[38] 15 U.S.C. 78f(b)(4).

[39] *See e.g.,* BZX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

[40] *See e.g.,* EDGX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Competing equity exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.

In particular, the Exchange believes its proposal to: (1) introduce new Add Volume Tiers 2 and 5 and modify current Add Volume Tiers 1, 2, and 3; and (2) modify Non-Displayed Add Volume Tiers 1–3 is reasonable because the revised tiers will be available to all Members and provide all Members with an additional opportunity to receive an enhanced rebate or a reduced fee. The Exchange further believes the proposed modifications to its Add/Remove Volume Tiers and Non-Displayed Add Volume Tiers will provide a reasonable means to encourage liquidity adding displayed orders and liquidity adding non-displayed orders, respectively, in Members' order flow to the Exchange and to incentivize Members to continue to provide liquidity adding volume to the Exchange by offering them an additional opportunity to receive an enhanced rebate or reduced fee on qualifying orders. An overall increase in activity would deepen the Exchange's liquidity pool, offers additional cost savings, support the quality of price discovery, promote market transparency and improve market quality, for all investors.

The Exchange believes that its proposal to eliminate Growth Tiers 1–3,[41] Non-Displayed Step-Up Volume Tiers 1 and 2,[42] and Retail Growth Tiers 1 and 2 is reasonable because the Exchange is not required to maintain these tiers or provide Members an opportunity to receive enhanced rebates. The Exchange believes the proposal to eliminate these tiers is also equitable and not unfairly discriminatory because it applies to all Members (*i.e.,* the tiers will not be available for any Member). The Exchange notes that Members have not consistently satisfied the criteria over the past six months. The Exchange also notes that the proposed rule change to remove these tiers merely results in Members not receiving an enhanced rebate, which, as noted above, the Exchange is not required to offer or maintain. Furthermore, the proposed rule change to eliminate Growth Tiers 1–3, Non-Displayed Step-Up Volume Tiers 1 and 2, and Retail Growth Tiers 1 and 2 enables the Exchange to redirect resources and funding into other programs and tiers intended to incentivize increased order flow.

The Exchange believes the proposed addition of fee code DX and the revised applicability of fee code DQ are reasonable as the Exchange offers many other fee codes that are specifically designed for orders that add liquidity to the Exchange or remove liquidity from the Exchange.[43] While the fee assessed for orders appended with fee code DX will be slightly higher than the fee assessed for orders appended with fee code DQ, the Exchange believes that promoting liquidity-adding MDOs containing a QDP instruction represents an equitable allocation of fees and rebates and is not unfairly discriminatory because the fees will apply to all Members who add or remove liquidity utilizing an MDO with a QDP instruction, equally. Furthermore, the Exchange believes that assessing a lower fee under fee code DQ will promote a reasonable means to encourage liquidity adding volume to the Exchange for MDOs utilizing a QDP instruction. While Members are assessed a small fee to utilize MDOs with a QDP instruction, the Exchange believes that promoting liquidity adding activity would help deepen the Exchange's liquidity pool, support the quality of price discovery, and improve market quality, for all investors.

The Exchange believes that the proposed changes to its Add/Remove Volume Tiers and Non-Displayed Add Volume Tiers are reasonable as they do not represent a significant departure from the criteria currently offered in the Fee Schedule. The Exchange also believes that the proposal represents an equitable allocation of fees and rebates and is not unfairly discriminatory because all Members will be eligible for the proposed new tiers and have the opportunity to meet the tiers' criteria and receive the corresponding enhanced rebate if such criteria is met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying the new proposed tiers. While the Exchange has no way of predicting with certainty how the proposed changes will impact Member activity, based on the prior months volume, the Exchange anticipates that at least one Member will be able to satisfy proposed Add Volume Tier 1, at least two Members will be able to satisfy proposed Add Volume Tier 2, at least two Members will be able to satisfy proposed Add Volume Tier 3, at least one Member will be able to satisfy proposed Add Volume Tier 4, at least 1 Member will be able to satisfy proposed Add Volume Tier 5, at least two Members will be able to satisfy proposed Non-Displayed Add Volume Tier 1, at least two Members will be able to satisfy proposed Non-Displayed Add Volume Tier 2, and at least one Member will be able to satisfy proposed Non-Displayed Add Volume Tier 3. The Exchange also notes that proposed changes will not adversely impact any Member's ability to qualify for enhanced rebates offered under other tiers. Should a Member not meet the proposed new criteria, the Member will merely not receive that corresponding enhanced rebate. Furthermore, the proposed rule change to eliminate Growth Tiers 1–3, Non-Displayed Step-Up Volume Tiers 1 and 2, and Retail Growth Tiers 1 and 2 enables the Exchange to redirect resources and funding into other programs and tiers intended to incentivize increased order flow.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.''

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes to the Exchange's Add/Remove Volume Tiers and Non-Displayed Add Volume Tiers will apply to all Members equally in that all Members are eligible for each of the Tiers, have a reasonable opportunity to

[41] *Supra* note 16.

[42] *Supra* note 25.

[43] *See e.g.,* EDGX Equities Fee Schedule, Fee Codes 3 and 6.

meet the Tiers' criteria and will receive the enhanced rebate on their qualifying orders if such criteria is met. In addition, the Exchange proposal to eliminate Growth Tiers 1–3, Non-Displayed Step-Up Volume Tiers 1 and 2, and Retail Growth Tiers 1 and 2 will not impose any burden on intramarket competition because it applies to all Members uniformly, as in, the tiers will no longer be available to any Member. The Exchange does not believe the proposed changes burden competition, but rather, enhances competition as it is intended to increase the competitiveness of EDGX by amending an existing pricing incentive and adopting pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

The Exchange believes the proposal to introduce the DX fee code does not impose a burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fees associated with fee code DX would apply to all Members equally in that all Members would be subject to the same flat fee for the execution of an MDO with a QDP instruction that removes liquidity from the Exchange. Although MDOs entered with the QDP instruction would be subject to the pricing described in this proposed rule change, the Exchange does not believe that pricing would impose any significant burden on intramarket competition as this fee would be applied in the same manner to the execution of any MDO entered with a QDP instruction that removes liquidity from the Exchange. Both MDO and the associated QDP instruction are available to all Members on an equal and non-discriminatory basis. As a result, any Member can decide to use (or not use) the QDP instruction based on the benefits provided by that instruction in potentially avoiding unfavorable executions, and the associated charge that the Exchange proposes to introduce. As discussed, any firm that chooses to use the QDP instruction with an MDO that removes liquidity would be charged the same flat fee for the execution of orders that are entered with this instruction. The proposal to modify fee code DQ to apply only to MDO orders using the QDP instruction that add liquidity to the Exchange similarly does not impose a burden on intramarket competition in that the applicability of the fee code will apply equally to all Members in that all Members would be subject to the same flat fee for the execution of an MDO with a QDP instruction that adds liquidity to the Exchange and the Exchange does not propose a change to the existing fee.

Next, the Exchange believes the proposed rule changes does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 16% of the market share.[44] Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, 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.'' [45] The fact that this market is competitive has also 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'. . . .'' [46] Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [47] and paragraph (f) of Rule 19b–4 [48] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–CboeEDGX–2023–036 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange

[44] *Supra* note 3.

[45] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[46] *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)).

[47] 15 U.S.C. 78s(b)(3)(A).

[48] 17 CFR 240.19b–4(f).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGX–2023–036. 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–CboeEDGX–2023–036, and should be submitted on or before June 20, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[49]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–11356 Filed 5–26–23; 8:45 am]

**BILLING CODE 8011–01–P**

[49] 17 CFR 200.30–3(a)(12).

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

**[Docket No. FAA–2023–1076]**

### Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Aging Aircraft Program (Widespread Fatigue Damage)

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

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The collection involves submittal of limits of validity of engineering data that supports the structural maintenance program (hereafter referred to as LOV) for certain airplane models. The information to be collected will be used to demonstrate compliance with FAA regulations requiring establishment and incorporation of LOV into the airplane's structural maintenance program.

**DATES:** Written comments should be submitted by July 31, 2023.

**ADDRESSES:** Please send written comments:

*By Electronic Docket: www.regulations.gov* (Enter docket number into search field).

*By mail:* Kamruz Zaman, Federal Aviation Administration, Policy and Standards Division, 1600 Stewart Ave., Suite 410, Westbury, NY 11590.

*By fax:* 516–794–5531.

**FOR FURTHER INFORMATION CONTACT:** Kamruz Zaman by email at:

*Kamruz.Zaman@faa.gov;* phone: 516–228–7355.

**SUPPLEMENTARY INFORMATION:**

*Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

*OMB Control Number:* 2120–0743.

*Title:* Aging Aircraft Program (Widespread Fatigue Damage).

*Form Numbers:* There are no FAA forms associated with this collection.

*Type of Review:* Renewal of an information collection.

*Background:* The ''Aging Aircraft Program (Widespread Fatigue Damage)'' final rule amended FAA regulations pertaining to certification and operation of transport category airplanes to preclude widespread fatigue damage in those airplanes. This collection requires that design approval holders submit LOV to the responsible Aircraft Certification Service office for approval to demonstrate compliance with § 26.21 or § 26.23, as applicable. This collection also requires that operators submit the LOV to their Principal Maintenance Inspectors to demonstrate compliance with § 121.1115 or § 129.115, as applicable.

*Respondents:* Approximately 27 design approval holders and operators.

*Frequency:* Information is collected on occasion.

*Estimated Average Burden per Response:* 2.72 hours.

*Estimated Total Annual Burden:* 408 hours.

Issued in Washington, DC, on May 24, 2023.

**Monica Caldwell,**

*Directives & Forms Management Officer (DMO/FMO), Aircraft Certification Service.*

[FR Doc. 2023–11372 Filed 5–26–23; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for effective date(s).

**FOR FURTHER INFORMATION CONTACT:** OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

**Notice of OFAC Action(s)**

On May 23, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

## Individuals

1. KIM, Sang Man (Korean: 김상만) (a.k.a. KIM, Sangman), Russia; Korea, North; DOB 25 Apr 1965; POB North Pyongan Province, North Korea; nationality Korea, North; Gender Male; Digital Currency Address - XBT 1D6gG9iKEhPitTcWRJiniuj1jYM2hNeAfJ; alt. Digital Currency Address - XBT 1FCNgfZWpYMeYhy9t18AAkTBu8AsdoAc1Z; Digital Currency Address - ETH 0x97b1043abd9e6fc31681635166d430a458d14f9c; alt. Digital Currency Address - ETH 0xb6f5ec1a0a9cd1526536d3f0426c429529471f40; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Digital Currency Address - USDT 0xb6f5ec1a0a9cd1526536d3f0426c429529471f40; Digital Currency Address - USDC 0xb6f5ec1a0a9cd1526536d3f0426c429529471f40; Passport 109420132 (Korea, North) issued 16 Oct 2019 expires 16 Oct 2024; alt. Passport 827220538 (Korea, North); alt. Passport 563220082 (Korea, North) (individual) [DPRK4].

   Designated pursuant to section 1(a)(iv) of Executive Order 13810 of September 20, 2017, "Imposing Additional Sanctions With Respect to North Korea," (E.O. 13810) for being a North Korean person, including a North Korean person that has engaged in commercial activity that generates revenue for the Government of North Korea or the Workers' Party of Korea.

## Entities

1. PYONGYANG UNIVERSITY OF AUTOMATION (a.k.a. COMMAND AUTOMATION COLLEGE OF THE CHOSUN PEOPLE'S ARMY; a.k.a. KIM IL MILITARY UNIVERSITY; a.k.a. KIM IL POLITICAL MILITARY UNIVERSITY; a.k.a. KIM IL SUNG MILITARY UNIVERSITY; a.k.a. KIM IL-SUNG UNIVERSITY AUTOMATION UNIVERSITY; a.k.a. MILITARY CAMP 144 OF THE KOREAN PEOPLE'S ARMY; a.k.a. MIRIM COLLEGE; a.k.a. MIRIM UNIVERSITY; a.k.a. NO. 144 MILITARY CAMP OF THE CHOSUN PEOPLE'S ARMY; a.k.a. UNIVERSITY OF AUTOMATION), Pyongyang, Korea, North; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Established Date 1981; Target Type Government Entity [DPRK2].

   Designated pursuant to section 1(a)(i) of Executive Order 13687 of January 2, 2015, "Imposing Additional Sanctions With Respect to North Korea," (E.O. 13687) for being

an agency, instrumentality, or controlled entity of the Government of North Korea or the Workers' Party of Korea.

2. TECHNICAL RECONNAISSANCE BUREAU (a.k.a. 3RD BUREAU OF THE RGB; a.k.a. 3RD DEPARTMENT SIGNAL INTELLIGENCE; a.k.a. 3RD TECHNICAL SURVEILLANCE BUREAU; a.k.a. TECHNICAL RECONNAISSANCE TEAM; a.k.a. "THIRD BUREAU"), Korea, North; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Target Type Government Entity [DPRK2].

   Designated pursuant to section 1(a)(i) of E.O. 13687 for being an agency, instrumentality, or controlled entity of the Government of North Korea or the Workers' Party of Korea.

3. 110TH RESEARCH CENTER (a.k.a. "LAB 110"; a.k.a. "UNIT 110"), Pyongyang, Korea, North; Shenyang, China; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Target Type Government Entity [DPRK2].

   Designated pursuant to section 1(a)(i) of E.O. 13687 for being an agency, instrumentality, or controlled entity of the Government of North Korea or the Workers' Party of Korea.

4. CHINYONG INFORMATION TECHNOLOGY COOPERATION COMPANY (a.k.a. JINYONG IT COOPERATION COMPANY), Korea, North; Secondary sanctions risk: North Korea Sanctions Regulations, sections 510.201 and 510.210; Transactions Prohibited For Persons Owned or Controlled By U.S. Financial Institutions: North Korea Sanctions Regulations section 510.214; Organization Type: Other information technology and computer service activities [DPRK2].

   Designated pursuant to section 1(a)(i) of E.O. 13687 for being an agency, instrumentality, or controlled entity of the Government of North Korea or the Workers' Party of Korea.

*Authorities:* E.O. 13687, 80 FR 819, 3 CFR, 2015 Comp., p. 259; E.O. 13810, 82 FR 44705, 3 CFR, 2017 Comp., p. 379.

Dated: May 23, 2023.

**Andrea Gacki,**

*Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2023–11352 Filed 5–26–23; 8:45 am]

**BILLING CODE 4810–AL–C**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

### Notice of OFAC Sanctions Actions

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section for effective date.

**FOR FURTHER INFORMATION CONTACT:** OFAC: Andrea Gacki, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or the Assistant Director for Sanctions Compliance & Evaluation, tel.: 202–622–2490.

**SUPPLEMENTARY INFORMATION:**

#### Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

#### Notice of OFAC Action(s)

On May 24, 2023, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons are blocked under the relevant sanctions authority listed below.

**BILLING CODE 4810–AL–P**

**Individuals**

1. AYUTO, Siyaat (a.k.a. AYUTO, Siyad; a.k.a. AYUUTO, Siyaad; a.k.a. AYUUTO, Siyat; a.k.a. YUSUF, Siyaad Isaaq), Kamjiron, Somalia; Hargeisa, Somalia; Lower Juba, Somalia; DOB 1981; alt. DOB 1982; POB Beer Xaani, Somalia; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," 66 FR 49079, as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

2. BURHAN, Macalin, Lower Juba, Somalia; Salagle, Middle Juba, Somalia; DOB 1981; alt. DOB 1982; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

3. CALI, Maxamed, Wayanta, Lower Juba, Somalia; DOB 1983; alt. DOB 1984; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

4. DHEERE, Mumin (a.k.a. DHEERE, Muumin; a.k.a. DHERE, Mumin), Jilib, Middle Juba, Somalia; Wayanta, Lower Juba, Somalia; DOB 1985; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

5. HIREY, Mohamed Abdullah, Jilib, Middle Juba, Somalia; Kamsuuma, Lower Juba, Somalia; DOB 1954; alt. DOB 1955; nationality Somalia; Gender Male; Secondary

sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

6. KABADHE, Ahmed, Jubaland, Somalia; Jilib, Middle Juba, Somalia; DOB 1975; alt. DOB 1976; alt. DOB 1977; alt. DOB 1978; alt. DOB 1979; alt. DOB 1980; POB Galkayo, Mudug, Galmudug, Somalia; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

7. ROOBOW, Cabdi (a.k.a. DHEERE, Suhayb; a.k.a. DHEERE, Suheib; a.k.a. SHINI, Abdi Rooble), Qudus, Lower Juba, Somalia; DOB 1981; alt. DOB 1982; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

8. XUUROOW, Hasaan Abshir (a.k.a. XUUROW, Xassan Cabshir), Lower Juba, Somalia; DOB 1982; alt. DOB 1983; alt. DOB 1984; alt. DOB 1985; alt. DOB 1986; alt. DOB 1987; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

9. AADAN, Hassan Yariisow (a.k.a. YARIISOW, Xasan; a.k.a. YARIISOW, Xassan), Tortoroow, Lower Shabelle, Somalia; DOB 1990; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

10. AADAN, Siciid Abdullahi (a.k.a. HAJI, Sayid Abdullahi Adan; a.k.a. INO, Siciid Abdullah Haji), Tortoroow, Lower Shabelle, Somalia; DOB 1998; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as

amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

11. GUHAAD, Cumar (a.k.a. GUHAAD, Omar), Daaru Salaam, Middle Shabelle, Somalia; DOB 1972; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

12. HUSSEIN, Ali Ahmed, Tortoroow, Lower Shabelle, Somalia; DOB 1980; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

13. IBRAHIM, Aadan Yusuf Saciid (a.k.a. "ABDULLAHI, Hussein"), Beled Amin, Lower Shabelle, Somalia; DOB 1987; alt. DOB 1988; alt. DOB 1989; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

14. JISS, Aadan, Daaru Salaam, Middle Shabelle, Somalia; DOB 1977; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

15. MALAYLE, Shiek Aadan Abuukar, Jameeco Jilyaale, Lower Shabelle, Somalia; DOB 1962; nationality Somalia; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886 (individual) [SDGT] (Linked To: AL-SHABAAB).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support

for, or goods or services to or in support of, AL-SHABAAB, a person whose property and interests in property are blocked pursuant to E.O. 13224.

16. ABDI, Abdulwahab Noor (Arabic: عبدالوهاب نور عبدي) (a.k.a. ABDI, Abdlwahab Noor; a.k.a. ABDI, Abduwahab Nur), Nasser Square, Dubai, United Arab Emirates; Musheer Building, Flat 202, Al Rumailah, Ajman, United Arab Emirates; DOB 01 Jan 1970; POB Filtu, Ethiopia; nationality Ethiopia; Gender Male; Passport EP3446365 (Ethiopia) issued 10 Dec 2014 expires 09 Dec 2019; Identification Number 784197051728729 (United Arab Emirates) (individual) [SOMALIA].

    Designated pursuant to section 1(a)(ii)(F) of Executive Order 13536 of April 12, 2010, "Blocking Property of Certain Persons Contributing to the Conflict in Somalia," 75 FR 19869, as amended by Executive Order 13620 of July 20, 2012, "Taking Additional Steps To Address the National Emergency With Respect to Somalia," 77 FR 43481 (E.O. 13536, as amended), for having engaged, directly or indirectly, in the import or export of charcoal from Somalia on or after February 22, 2012.

17. BARREH, Mariam (a.k.a. BARRE OMAR, Marian; a.k.a. BARREH OMAR, Mariam; a.k.a. "BARRE, Marian"), Altawun Area, Alkhan, Sharjah, United Arab Emirates; PO Box 80367, Ajman, United Arab Emirates; DOB 01 Jan 1971; alt. DOB 10 Apr 1971; POB Kismayo, Somalia; nationality Djibouti; alt. nationality Somalia; Gender Female; Passport 19RF19428 (Djibouti) issued 28 Dec 2020 expires 28 Dec 2025; Identification Number 156087 (Djibouti) (individual) [SOMALIA].

    Designated pursuant to section 1(a)(ii)(F) of E.O. 13536, as amended, for having engaged, directly or indirectly, in the import or export of charcoal from Somalia on or after February 22, 2012.

18. MUSSE, Bashir Khalif (a.k.a. MOOSA, Basheer Khalid; a.k.a. MOOSA, Basheer Khalif; a.k.a. MOSSA, Bashir Khalif; a.k.a. MOUSSA, Bachir Kalif; a.k.a. MUSA, Bashir Khalif; a.k.a. MUSSE, Bachir Khalif; a.k.a. "MOOSA, Bashir"; a.k.a. "MUSSE, Bashir"), Dubai, United Arab Emirates; PO Box 80367, Ajman, United Arab Emirates; DOB 01 Jan 1967; POB Garowe, Puntland, Somalia; nationality Djibouti; Gender Male; Passport 16RE41878 (Djibouti) issued 26 May 2016 expires 25 May 2021; alt. Passport 16RF20973 (Djibouti) expires 11 Oct 2023; Identification Number 784-1967-5350265-5 (United Arab Emirates); Residency Number 083698992 (United Arab Emirates) expires 15 May 2020 (individual) [SOMALIA].

    Designated pursuant to section 1(a)(ii)(F) of E.O. 13536, as amended, for having engaged, directly or indirectly, in the import or export of charcoal from Somalia on or after February 22, 2012.

19. NAAJI, Ali Ahmed (a.k.a. HAJI, Ali Ahmed; a.k.a. NAJI, Ali Ahmed; a.k.a. NAJI, Cali Axmed; a.k.a. "NAJI, Ali"), Kismayo, Somalia; DOB 01 Jan 1974; nationality Somalia; Gender Male (individual) [SOMALIA].

    Designated pursuant to section 1(a)(ii)(F) of E.O. 13536, as amended, for having engaged, directly or indirectly, in the import or export of charcoal from Somalia on or after February 22, 2012.

**Entities**

1. AL NEZAM AL ASASY GENERAL TRADING L.L.C (Arabic: النظام الأساسي للتجارة العامة ش.ذ.م.م.) (a.k.a. AL NEZAAM AL ASASY GENERAL TRADING COMPANY; a.k.a. ALNEZAM AL ASASY GENERAL TRADING), PO Box 40450, Dubai, United Arab Emirates; Kuwait Building 104, Deira, Dubai, United Arab Emirates; Organization Established Date 24 Aug 2011; Identification Number 196181 (United Arab Emirates); License 658287 (United Arab Emirates); Registration Number 1081418 (United Arab Emirates) [SOMALIA] (Linked To: ABDI, Abdulwahab Noor).

   Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Abdulwahab Noor ABDI, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

2. BUSHRA BACHIR SHIPPING AND LOGISTICS SERVICES L.L.C. (a.k.a. BUSHRA BACHIR SHIPING AND LOGISTICS SERVICES LLC; a.k.a. BUSHRA BACHIR SHIPPING & LOGISTIC SERVICES L.L.C.), Al Nokhitha Building, Office No. 222, PO Box 80367, Al Hamriya, Dubai, United Arab Emirates; Djibouti; License 894208 (United Arab Emirates) [SOMALIA] (Linked To: MUSSE, Bashir Khalif).

   Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Bashir Khalif MUSSE, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

3. JAMAME BROTHERS COMPANY (a.k.a. JAMAME BROTHERS COMPANY EXPORT & IMPORT; a.k.a. JAMAME BROTHERS COMPANY EXPORT AND IMPORT; a.k.a. JAMAME BROTHERS COMPANY LIMITED; a.k.a. JAMAME BROTHERS OF COMPANIES), Mogadishu, Somalia; Ali Naji Building, Shoping Street, Kismayo, Somalia; Organization Established Date 25 Jun 2010; Organization Type: Non-specialized wholesale trade; Certificate of Incorporation Number SCCI/378/13 (Somalia) [SOMALIA] (Linked To: NAAJI, Ali Ahmed).

   Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Ali Ahmed NAAJI, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

4. KISMAYO GENERAL TRADING LLC (a.k.a. KEISMAIO GENERAL TRADING; a.k.a. KISMAYO GENERAL TRADING; a.k.a. KISMAYO GENERAL TRADING L.L.C), 18A Street, Corniche Deira, Deira, Dubai, United Arab Emirates; PO Box 64871, Deira, Dubai, United Arab Emirates; PO Box 80367, Dubai, United Arab Emirates; Al Hamriya, Dubai, United Arab Emirates; Organization Established Date 05 May 2002; Organization Type: Non-specialized wholesale trade; Identification Number 68753 (United Arab Emirates); alt. Identification Number 59260 (United Arab Emirates); License 533917 (United Arab Emirates) [SOMALIA] (Linked To: MUSSE, Bashir Khalif).

   Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Bashir Khalif MUSSE, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

5. RED SEA TRANSIT & TRANSPORT SERVICE (a.k.a. RED SEA MARITIMES SURVEYORS SARL; a.k.a. RED SEA SHIPPING AGENCY; a.k.a. RED SEA SURVEYOR MARITIME; a.k.a. RED SEA TRANSIT AND TRANSPORT; a.k.a. RED

SEA TRANSIT AND TRANSPORT SERVICE), Rue de Paris 10, Djibouti, Djibouti; Website www.redsurveyor.site; Organization Established Date 01 Jan 2009; Organization Type: Other reservation service and related activities; Registration Number 10586/B/SARL (Djibouti) [SOMALIA] (Linked To: MUSSE, Bashir Khalif).

Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Bashir Khalif MUSSE, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

6. ROYAL SHIPPING AGENCY, Rue de Moscow, Djibouti; Rue de Paris 10, Djibouti, Djibouti; Organization Type: Other transportation support activities; Registration Number 253 (Djibouti) [SOMALIA] (Linked To: MUSSE, Bashir Khalif).

Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Bashir Khalif MUSSE, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

7. SITTI GENERAL TRADING LLC (Arabic: سيتي للتجارة العامة ش.ذ.م.م.) (a.k.a. SITTI GENERAL TRADING FZCO; a.k.a. SITTI GENERAL TRADING L.L.C), New Dubai, Dubai, United Arab Emirates; Al Nokhitha Building, Office No. 222, PO Box 80367, Al Hamriya, Dubai, United Arab Emirates; Organization Established Date 05 May 2002; Organization Type: Non-specialized wholesale trade; License 533917 (United Arab Emirates); Registration Number 10809045 (United Arab Emirates) [SOMALIA] (Linked To: MUSSE, Bashir Khalif).

Designated pursuant to section 1(a)(ii)(H) of E.O. 13536, as amended, for being owned or controlled by, directly or indirectly, Bashir Khalif MUSSE, a person whose property and interests in property are blocked pursuant to E.O. 13536, as amended.

Dated: May 24, 2023.

**Andrea M. Gacki,**

*Director, Office of Foreign Assets Control, U.S. Department of the Treasury.*

[FR Doc. 2023–11406 Filed 5–26–23; 8:45 am]

**BILLING CODE 4810–AL–C**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### Proposed Collection; Requesting Comments on Form 1041

**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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 1041, U.S. Income Tax Return for Estates and Trusts, and related Schedules D, I, J, K–1, and Form 1041–V.

**DATES:** Written comments should be received on or before July 31, 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 No. 1545–0092 in the subject line of the message.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of this collection should be directed to Jon Callahan, (737) 800–7639, at Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW, Washington, DC 20224, or through the internet at *jon.r.callahan@irs.gov.*

**SUPPLEMENTARY INFORMATION:** The IRS is currently seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

*Title:* U.S. Income Tax Return for Estates and Trusts.

*OMB Number:* 1545–0092.

*Form Number:* Form 1041 and associated schedules.

*Abstract:* Internal Revenue Code section 6012 requires that an annual income tax return be filed for estates and trusts. The IRS uses the data to determine that the estates, trusts, and beneficiaries filed the proper returns and paid the correct tax.

*Current Actions:* There are changes to the existing collection. (1) Form 1041 removed lines for obsolete credits, added lines for new credits, and separated checkboxes and sublines into separate lines for clarity; (2) obsolete information collections were removed; and (3) the estimated number of responses was updated to reflect current filings and future estimates.

*Type of Review:* Revision of a currently approved collection.

*Affected Public:* Businesses or other for-profits; and Individuals and households.

*Estimated Number of Responses:* 11,330,423.

*Estimated Time per Respondent:* 31 hours, 30 minutes.

*Estimated Total Annual Burden Hours:* 356,948,857.

The following paragraph applies to all of 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 as long as 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 24, 2023.

**Jon R. Callahan,**

*Tax Analyst.*

[FR Doc. 2023–11424 Filed 5–26–23; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0652]**

## Agency Information Collection Activity: Request for Nursing Home Information in Connection With Claim for Aid and Attendance

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before July 31, 2023.

**ADDRESSES:** Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0652'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

**FOR FURTHER INFORMATION CONTACT:** Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0652'' in any correspondence.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Authority:* 38 U.S.C. 501(a)(2), 1115(1)(E), 1311(c), 1315(h), 1502, and 5503.

*Title:* Request for Nursing Home Information in Connection with Claim for Aid and Attendance (VA Form 21–0779).

*OMB Control Number:* 2900–0652.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* VA Form 21–0779 is used to gather the necessary information to determine eligibility for pension and aid and attendance benefits based on nursing home status. The form also requests information regarding Medicaid status and nursing home care charges, so VA can determine the proper rate of payment.

No changes have been made to this form. The respondent burden has decreased due to the estimated number of receivables averaged over the past year.

*Affected Public:* Private Sector.

*Estimated Annual Burden:* 2,895 hours.

*Estimated Average Burden per Respondent:* 10 minutes.

*Frequency of Response:* One time.

*Estimated Number of Respondents:* 17,367.

By direction of the Secretary.

**Maribel Aponte,**

*VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.*

[FR Doc. 2023–11409 Filed 5–26–23; 8:45 am]

**BILLING CODE 8320–01–P**


# FEDERAL REGISTER

Vol. 88 Tuesday,
No. 103 May 30, 2023

Part II

## Department of Transportation

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 171, 172, et al.
Hazardous Materials: Harmonization With International Standards; Proposed Rule

**DEPARTMENT OF TRANSPORTATION**

**Pipeline and Hazardous Materials Safety Administration**

**49 CFR Parts 171, 172, 173, 175, 176, 178, and 180**

**[Docket No. PHMSA–2021–0092 (HM–215Q)]**

**RIN 2137–AF57**

# Hazardous Materials: Harmonization With International Standards

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

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

**SUMMARY:** PHMSA proposes to amend the Hazardous Materials Regulations to maintain alignment with international regulations and standards by adopting various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements.

**DATES:** Comments must be received by July 31, 2023. To the extent possible, PHMSA will consider late-filed comments while a final rule is developed.

**ADDRESSES:** You may submit comments by any of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, Docket Operations, M–30, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

*Instructions:* Include the agency name and docket number PHMSA–2021–0092 (HM–215Q) or RIN 2137–AF57 for this rulemaking at the beginning of your comment. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided. If sent by mail, comments must be submitted in duplicate. Persons wishing to receive confirmation of receipt of their comments must include a self-addressed stamped postcard.

*Docket:* For access to the dockets to read background documents (including the Preliminary Regulatory Impact Analysis (PRIA)) or comments received, go to *http://www.regulations.gov* or DOT's Docket Operations Office (*see* **ADDRESSES**).

*Confidential Business Information:* Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA; 5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as ''PROPIN.'' Submissions containing CBI should be sent to Candace Casey, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any commentary that PHMSA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** Candace Casey, Standards and Rulemaking, or Aaron Wiener, International Program, at 202–366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, East Building, 2nd Floor, Washington, DC 20590–0001.

**SUPPLEMENTARY INFORMATION:**

## Table of Contents



## I. Executive Summary

The Pipeline and Hazardous Materials Safety Administration (PHMSA) proposes to amend certain sections of the Hazardous Materials Regulations (HMR; 49 CFR parts 171 to 180) to maintain alignment with international regulations and standards by adopting various changes, including changes to proper shipping names (PSN), hazard classes, packing groups (PG), special provisions (SP), packaging authorizations, air transport quantity limitations, and vessel stowage requirements. The proposed amendments are discussed in detail in ''Section V. Section-by-Section Review of NPRM Proposals.''

Adoption of the regulatory amendments proposed in this NPRM will maintain the high safety standard currently achieved under the HMR. PHMSA also notes that because harmonization of the HMR with international regulations and consensus standards could reduce delays and interruptions of hazardous materials during transportation, the proposed amendments may also lower greenhouse gas (GHG) emissions and safety risks to minority, low-income, underserved, and other disadvantaged populations and communities in the vicinity of interim storage sites and transportation arteries and hubs.

The following list summarizes noteworthy proposals set forth in this NPRM:

- *Incorporation by Reference:* PHMSA proposes to incorporate by reference updated versions of the following international hazardous materials regulations and standards: the 2023–2024 edition of the International Civil Aviation Organization Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions); Amendment 41–22 to the International Maritime Dangerous Goods Code (IMDG Code); and the 22nd revised edition of the United Nations Recommendations on the Transport of Dangerous Goods—Model Regulations (UN Model Regulations);
- *Hazardous Materials Table:* PHMSA proposes amendments to the Hazardous Materials Table (HMT; 49 CFR 172.101) to add, revise, or remove certain PSNs, hazard classes, PGs, SPs, packaging authorizations, bulk packaging requirements, and passenger and cargo aircraft maximum quantity limits.

• *Polymerizing Substances:* In 2017—as part of the HM–215N final rule [1]—PHMSA added four new Division 4.1 (flammable solid) entries for polymerizing substances to the HMT and added defining criteria, authorized packagings, and safety requirements including, but not limited to, stabilization methods and operational controls into the HMR. These changes remained in effect until January 2, 2019, while PHMSA used the interim period to review and research the implications of the polymerizing substance amendments. In 2020—as part of the HM–215O [2] final rule—PHMSA extended the date the provisions remained in effect from January 2, 2019, to January 2, 2023, to allow for the additional research to be completed on the topic. In this NPRM, PHMSA proposes to remove the phaseout date (January 2, 2023) from the transport provisions for polymerizing substances to allow for continued use of the provisions.

• *Cobalt dihydroxide powder containing not less than 10 percent respirable particles:* PHMSA proposes to add a new entry to HMT, ''UN3550 Cobalt dihydroxide powder, *containing not less than 10% respirable particles*'' and corresponding packaging provisions. Cobalt is a key strategic mineral used in various advanced medical and technical applications around the world, including various types of batteries. Historically, this hazardous material has been classified and transported as a Class 9 material under ''UN3077, Environmentally hazardous substance, solid, n.o.s.'' however testing required under Registration, Evaluation, Authorisations and Restriction of Chemicals (REACH) regulations [3] for comprehensive GHS testing, determined that this material poses an inhalation toxicity hazard. Following this determination, the 22nd revised edition of the UN Model Regulations developed a new entry on the Dangerous Goods List (DGL) and packaging authorizations specifically for this hazardous material to facilitate continued global transport of this material. In this NPRM, PHMSA proposes to do likewise by adding a new entry for cobalt dihydroxide containing not less than 10 percent respirable particles and assigning it UN3550 on the HMT, in addition to adding packaging provisions, including the authorization to transport this material in flexible IBCs. PHMSA expects that these provisions will facilitate the continued transport of this material, to keep global supply chains open. *See* 172.101 of the Section-by-Section Review for additional discussion of these amendments.

• *Lithium Battery Exceptions:* PHMSA proposes to remove the exceptions provided for small lithium cells and batteries for transportation by aircraft. This is consistent with the elimination of similar provisions in the ICAO Technical Instructions. *See* 173.185 of the Section-by-Section Review for additional discussion of these amendments.

All the proposed amendments are expected to maintain the HMR's high safety standard for the public and the environment. Additionally, PHMSA anticipates that there are safety benefits to be derived from improved compliance related to consistency amongst domestic and international regulations. PHMSA solicits comment on the amendments proposed in this NPRM pertaining to the need, benefits, and costs of the proposed HMR revisions; impact on safety and the environment; impact on environmental justice and equity; and any other relevant information. In addition, PHMSA solicits comment regarding approaches to reducing the costs of this rule while maintaining or increasing safety benefits. As further explained in the PRIA, PHMSA expects that the aggregate benefits of the amendments proposed in this NPRM justify their aggregate costs. Nonetheless, PHMSA solicits comment on specific changes (*e.g.,* greater flexibility with regard to a particular proposal) that might improve the rule.

## II. Background

The Federal Hazardous Materials Transportation Law (49 U.S.C. 5101, *et seq.*) directs PHMSA to participate in relevant international standard-setting bodies and encourages alignment of the HMR with international transport standards, as consistent with promotion of safety and the public interest. *See* 49 U.S.C. 5120. This statutory mandate reflects the importance of international standard-setting activity, in light of the globalization of commercial transportation of hazardous materials. Harmonization of the HMR with those efforts can reduce the costs and other burdens of complying with multiple or inconsistent safety requirements between nations. Consistency between the HMR and current international standards can also enhance safety by (1) ensuring that the HMR are informed by the latest best practices and lessons learned; (2) improving understanding of, and compliance with, pertinent requirements; (3) facilitating the flow of hazardous materials from their points of origin to their points of destination, thereby avoiding risks to the public and the environment from release of hazardous materials due to delays or interruptions in the transportation of those materials; and (4) enabling consistent emergency response procedures in the event of a hazardous materials incident.

PHMSA participates in the development of international regulations and standards for the transportation of hazardous materials. It also adopts within the HMR international consensus standards and regulations consistent with PHMSA's safety mission. PHMSA reviews and evaluates each international standard it considers for incorporation within the HMR on its own merits, including the effects on transportation safety, the environmental impacts, and any economic impact. PHMSA's goal is to harmonize with international standards without diminishing the level of safety currently provided by the HMR or imposing undue burdens on the regulated community.

In final rule HM–181,[4] PHMSA's predecessor, the Research and Special Programs Administration (RSPA), comprehensively revised the HMR for greater consistency with the UN Model Regulations. The UN Model Regulations constitute a set of recommendations issued by the United Nations Sub-Committee of Experts (UNSCOE) on the Transport of Dangerous Goods and on the Globally Harmonized System of Classification and Labelling of Chemicals (GHS). The UN Model Regulations are amended and updated biennially by the UNSCOE and serve as the basis for national, regional, and international modal regulations, including the ICAO Technical Instructions and IMDG Code.

PHMSA has evaluated recent updates to the international standards, including review of numerous updated standards for the design, manufacture, testing, and use of packagings, and proposes to revise the HMR to adopt changes consistent with revisions to the 2023–2024 edition of the ICAO Technical Instructions, Amendment 41–22 to the IMDG Code, and the 22nd revised edition of the UN Model Regulations, all of which will be published by or in effect on January 1, 2023,[5] while also ensuring the changes are consistent with

[1] 82 FR 15796 (Mar. 30, 2017).

[2] 85 FR 27810 (May 11, 2020).

[3] Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006.

[4] 55 FR 52401 (Dec. 21, 1990).

[5] Amendment 41–22 of the IMDG Code will become mandatory on January 1, 2024. Voluntary compliance begins on January 1, 2023.

PHMSA's safety mission. Consequently, PHMSA proposes to incorporate by reference these revised international regulations, several new or updated International Organization for Standards (ISO) standards, and a new Organization for Economic Co-operation and Development (OECD) standard. The regulations and standards incorporated by reference are authorized for use for domestic transportation, under specific conditions, in part 171, subpart C of the HMR.

PHMSA issued an enforcement discretion on November 28, 2022,[6] stating that while PHMSA is considering the 2023–2024 Edition of the ICAO Technical Instructions and Amendment 41–22 of the IMDG Code for potential adoption into the HMR, PHMSA and other federal agencies that enforce the HMR (the Federal Railroad Administration (FRA), the Federal Aviation Administration (FAA), the Federal Motor Carrier Safety Administration (FMCSA), and the United States Coast Guard (USCG)) will not take enforcement action against any offeror or carrier who uses these standards as an alternative to complying with current HMR requirements when all or part of the transportation is by air with respect to the ICAO Technical Instructions, or by vessel with respect to the IMDG Code. In addition, PHMSA and its partners will not take enforcement action against any offeror or carrier who offers or accepts for domestic or international transportation by any mode packages marked or labeled in accordance with these standards. This notice remains in effect until withdrawn or otherwise modified.

## III. Incorporation by Reference Discussion Under 1 CFR Part 51

According to the Office of Management and Budget (OMB), Circular A–119, ''*Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities,*'' government agencies must use voluntary consensus standards wherever practical in the development of regulations.

PHMSA currently incorporates by reference into the HMR all or parts of numerous standards and specifications developed and published by standard development organizations (SDO). In general, SDOs update and revise their published standards every two to five years to reflect modern technology and best technical practices. The National Technology Transfer and Advancement Act of 1995 (NTTAA; Pub. L. 104–113) directs federal agencies to use standards developed by voluntary consensus standards bodies in lieu of government-written standards whenever possible. Voluntary consensus standards bodies develop, establish, or coordinate technical standards using agreed-upon procedures. OMB issued Circular A–119 to implement section 12(d) of the NTTAA relative to the utilization of consensus technical standards by federal agencies. This circular provides guidance for agencies participating in voluntary consensus standards bodies and describes procedures for satisfying the reporting requirements in the NTTAA. Accordingly, PHMSA is responsible for determining which standards currently referenced in the HMR should be updated, revised, or removed, and which standards should be added to the HMR. Revisions to materials incorporated by reference in the HMR are handled via the rulemaking process, which allows for the public and regulated entities to provide input. During the rulemaking process, PHMSA must also obtain approval from the Office of the Federal Register to incorporate by reference any new materials. The Office of the Federal Register issued a rulemaking[7] that revised 1 CFR 51.5 to require that an agency detail in the preamble of an NPRM the ways the materials it proposes to incorporate by reference are reasonably available to interested parties, or how the agency worked to make those materials reasonably available to interested parties. Proposed changes to the material incorporated by reference in the HMR are discussed in detail in the § 171.7 discussion in ''Section V. Section-by-Section Review of NPRM Proposals.''

The UN Model Regulations, the United Nations Manual of Tests and Criteria (UN Manual of Tests and Criteria),[8] and the OECD standard (*i.e.,* Test No. 439) are free and easily accessible to the public on the internet, with access provided through the parent organization websites. The ICAO Technical Instructions, IMDG Code, and all ISO standard references are available for interested parties to purchase in either print or electronic versions through the parent organization websites. The price charged for those references not freely available helps to cover the cost of developing, maintaining, hosting, and accessing these standards and regulations.

## IV. Amendments Not Being Proposed for Adoption

PHMSA determined that certain elements of updated international regulations and standards should not be adopted into the HMR because the structure of the HMR is such that it makes adoption unnecessary, or PHMSA has deemed it is a safer approach to authorize certain transport requirements through issuance of a special permit rather than allow for general applicability by adopting those requirements into the HMR. Use of a special permit allows for greater oversight and development of transport history and data prior to determining whether to adopt the terms of the special permit in the HMR for broad application.

The following is a list of international regulations and standards updates that PHMSA is not proposing for adoption in this NPRM, and the rationale for those decisions:

- *Fiber-reinforced plastic UN portable tanks:* The 22nd revised edition of the UN Model Regulations and Amendment 41–22 of the IMDG Code include provisions for the design, construction, approval, use, and testing of fiber-reinforced plastic (FRP) UN portable tanks. These are UN portable tanks with shells made of FRP materials instead of traditional steel. PHMSA is not proposing to make corresponding amendments to the HMR to authorize general multi-modal transport of FRP UN portable tanks. PHMSA believes further research is necessary in areas covering material fatigue, suitability of the pool fire test and impact testing as packaging qualification methods, and in the identification of the most appropriate non-destructive test methodology to qualify FRP UN portable tanks. The results of this research will be used to better gauge the appropriateness of full adoption of the provisions, amendments to the requirements for approval or use, or a continued exclusion from the HMR. However, PHMSA is proposing an amendment to § 171.25—Additional requirements for the use of the IMDG Code—that would allow limited import and export of FRP UN portable tanks within a single port area. *See* ''Section V. Section-by-Section Review of NPRM Proposals'' for a discussion of § 171.25 changes.
- *Pressure receptacles:* The 22nd revised edition of the UN Model Regulations, the 2023–2024 edition of the ICAO Technical Instructions, and Amendment 41–22 to the IMDG Code

[6] *https://www.phmsa.dot.gov/regulatory-compliance/phmsa-guidance/phmsa-notice-enforcement-policy-regarding-international.*

[7] 79 FR 66278 (Nov. 7, 2014).

[8] U.N. Econ. Comm'n for Europe, Transportation Division, Manual of Tests and Criteria, 7th Rev. Ed., Amend. 1, U.N. Sales No. 21. VIII. 2 (2021).

amended various definitions and other language concerning the terms ''pressure receptacles'' and associated requirements for assessing conformance of UN cylinders built to ISO standards. PHMSA is not proposing to make changes to the HMR consistent with these amendments. Terminology used in international standards and HMR differ such that an evaluation is necessary to determinate the full impacts beyond merely using consistent terminology. PHMSA may consider making relevant changes regarding UN cylinders as needed in future rulemakings.

• *Aerosol containers:* The 22nd revised edition of the UN Model Regulations, the 2023–2024 edition of the ICAO Technical Instructions, and Amendment 41–22 to the IMDG Code adopted maximum internal pressure limits for aerosol containers. Prior to these changes, these international regulations and standards had no specific pressure limits for aerosol containers. PHMSA welcomes this additional safety measure for the transport of aerosol containers, as it makes aerosol containers constructed and filled in accordance with international standards more consistent with existing domestic requirements for aerosol containers, which are subject to internal pressure limits as part of the performance standards for their construction and use. Noting existing differences in the HMR, include the definition for aerosol and the performance standards for their construction and use and thus because of the complexity involved in trying to harmonize the maximum pressure limits, PHMSA is not proposing to adopt these internationally implemented maximum internal pressure limits. Such harmonization would necessitate a review and evaluation beyond the scope of this rulemaking.

## V. Section-by-Section Review of NPRM Proposals

The following is a section-by-section review of proposed amendments to harmonize the HMR with international regulations and standards.

### *A. Part 171*

#### Section 171.7

Section 171.7 provides a listing of all voluntary consensus standards incorporated by reference into the HMR, as directed by the NTTAA. PHMSA evaluated updated international consensus standards pertaining to PSNs, hazard classes, PGs, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements. PHMSA contributed to the development of those standards—each of which build on the well-established and documented safety histories of earlier editions—as it participated in the discussions and working group activities associated with their proposal, revision, and approval. Those activities, in turn, have informed PHMSA's evaluation of the effect the updated consensus standards would have on safety, when incorporated by reference and with provisions adopted into the HMR. Further, PHMSA notes that some of the consensus standards proposed for incorporation by reference within the HMR in this rulemaking have already been adopted into the regulatory schemes of other countries. Additionally, as noted above, PHMSA has issued past enforcement discretions authorizing their use of the consensus standards as an interim strategy for complying with current HMR requirements. PHMSA is not aware of adverse safety impacts from that operational experience. For these reasons, PHMSA expects their incorporation by reference will maintain the high safety standard currently achieved under the HMR. Therefore, PHMSA proposes to add or revise the following incorporation by reference materials.[9]

• In paragraph (t)(1), incorporate by reference the 2023–2024 edition of the ICAO Technical Instructions, to replace the 2021–2022 edition, which is currently referenced in §§ 171.8; 171.22 through 171.24; 172.101; 172.202; 172.401; 172.407; 172.512; 172.519; 172.602; 173.56; 173.320; 175.10, 175.33; and 178.3. The ICAO Technical Instructions specify detailed instructions for the international safe transport of dangerous goods by air. The requirements in the 2023–2024 edition have been amended to align better with the 22nd revised edition of the UN Model Regulations and the International Atomic Energy Agency (IAEA) Regulations for the Safe Transport of Radioactive Material. Notable changes in the 2023–2024 edition of the ICAO Technical Instructions include new packing and stowage provisions, new and revised entries on its Dangerous Goods List, and editorial corrections. The 2023–2024 edition of the ICAO Technical Instructions is available for purchase on the ICAO website at *https://store.icao.int/en/shop-by-areas/safety/dangerous-goods*.

• In paragraph (v)(2), incorporate by reference the 2022 edition of the IMDG Code, Incorporating Amendment 41–22 (English Edition), to replace Incorporating Amendment 40–20, 2020 Edition, which is currently referenced in §§ 171.22; 171.23; 171.25; 172.101; 172.202; 172.203; 172.401; 172.407; 172.502; 172.519; 172.602; 173.21; 173.56; 176.2; 176.5; 176.11; 176.27; 176.30; 176.83; 176.84; 176.140; 176.720; 176.906; 178.3; and 178.274. The IMDG Code is a unified international code that outlines standards and requirements for the transport of dangerous goods by sea (*i.e.,* by vessel). Notable changes in Amendment 41–22 of the IMDG Code include new packing and stowage provisions, new and revised entries on its Dangerous Goods List, and editorial corrections. Distributors of the IMDG Code can be found on the International Maritime Organization (IMO) website at: *https://www.imo.org/en/publications/Pages/Distributors-default.aspx*.

• In paragraph (w), incorporate by reference or remove the following ISO documents to include new and updated standards for the specification, design, construction, testing, and use of gas cylinders:

—ISO 9809, Parts 1 through 3. ISO 9809 is comprised of four parts (ISO 9809–1 through 9809–4) and specifies minimum requirements for the material, design, construction, and workmanship; manufacturing processes; and examination and testing at time of manufacture for various types of refillable seamless steel gas cylinders and tubes. PHMSA proposes to incorporate by reference the most recent versions of Parts 1 through 3.

• Incorporate by reference the third edition of ISO 9809–1:2019(E), ''*Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 1: Quenched and tempered steel cylinders and tubes with tensile strength less than 1100 Mpa*'' in paragraph (w)(32). Additionally, PHMSA proposes a sunset date of December 31, 2026, for continued use and phase out of the second edition of ISO 9809–1:2010, which is currently referenced in § 178.37, § 178.71, and § 178.75. Part 1 of ISO 9809 is applicable to cylinders and tubes for compressed, liquefied, and dissolved gases and for quenched and tempered steel cylinders and tubes with a maximum actual tensile strength of less than 1100 MPa, which is equivalent to U.S. customary unit of about 160,000 psi. As part of its periodic review of all standards, ISO reviewed ISO 9809–

[9] All other standards that are set out as part of the regulatory text of § 171.7(w) were previously approved for incorporation by reference and no changes are proposed.

1:2010(E) and published an updated version, ISO 9809–1:2019(E), which was published in 2019 and adopted in the 22nd revised edition of the UN Model Regulations. The updated standard has technical revisions including limiting the bend test only for prototype tests. Updating references to this document would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to the design and construction of UN cylinders. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and concludes incorporation of the revised third edition will maintain or improve the safety standards associated with its use.

• Incorporate by reference the third edition of ISO 9809–2:2019(E), ''*Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 2: Quenched and tempered steel cylinders and tubes with tensile strength greater than or equal to 1100 MPa*'' in paragraph (w)(35). ISO 9809–2:2019 is the third edition of ISO 9809–2. Additionally, PHMSA proposes a sunset date of December 31, 2026, for continued use and phaseout of the second edition of ISO 9809–2:2010, which is currently referenced in § 178.71, and § 178.75. ISO 9809–2:2019 specifies minimum requirements for the material, design, construction and workmanship, manufacturing processes, examination and testing at time of manufacture for refillable seamless steel gas cylinders and tubes with water capacities up to and including 450 L. Part 2 of ISO 9809 is applicable to cylinders and tubes for compressed, liquefied, and dissolved gases and for quenched and tempered steel cylinders and tubes with an actual tensile strength greater than or equal to 1100 MPa. As part of its periodic review of all standards, ISO reviewed ISO 9809–2:2010 and published an updated version, ISO 9809–2:2019, in 2019; this updated version was adopted in the 22nd revised edition of the UN Model Regulations. The updated standard has technical revisions including expanded cylinder size (*i.e.,* allowed water capacity is extended from below 0.5 L to up to and including 450 L); the introduction of specific batch sizes for tubes; limiting the bend test only for prototype tests; the addition of test requirements for check analysis (tolerances modified); and the addition of new test requirements for threads. Updating references to this document would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to the design and construction of UN cylinders. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and concludes incorporation of the revised third edition will maintain or improve the safety standards associated with its use.

• Incorporate by reference the third edition of ISO 9809–3:2019(E), ''*Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 3: Normalized steel cylinders and tubes*'' in paragraph (w)(38). Additionally, PHMSA proposes a sunset date of December 31, 2026, for continued use phaseout of the second edition of ISO 9809–3:2010, which is currently referenced in § 178.71 and § 178.75. ISO 9809–3 is applicable to cylinders and tubes for compressed, liquefied, and dissolved gases and for normalized or normalized and tempered, steel cylinders and tubes. As part of its periodic review of all standards, ISO reviewed ISO 9809–3:2010 and published an updated version, ISO 9809–3:2019. The updated standard has technical revisions including: a wider scope of cylinders (*i.e.,* allowed water capacity is extended from below 0.5 L up to and including 450 L); the introduction of specific batch sizes for tubes; limiting the bend test only for prototype tests; the addition of test requirements for check analysis (tolerances modified); and the addition of new test requirements for threads. Updating references to the 2019 edition would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations, which added this version pertaining to the design and construction of UN cylinders. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and concludes incorporation of the revised third edition will maintain or improve the safety standards associated with its use.

—Incorporate by reference supplemental amendment ISO 10462:2013/Amd 1:2019(E), ''*Gas cylinders—Acetylene cylinders—Periodic inspection and maintenance—Amendment 1*'' in paragraph (w)(48). This proposed change would add a reference to ISO 10462:2013/Amd 1:2019(E) in § 180.207(d)(3), where ISO 10462:2013 is currently required, and add a sunset date of December 31, 2024, for continued use and phaseout of ISO 10462:2013 without the supplemental amendment. ISO 10462:2013 specifies requirements for the periodic inspection of acetylene cylinders as required for the transport of dangerous goods and for maintenance in connection with periodic inspection. It applies to acetylene cylinders with and without solvent and with a maximum nominal water capacity of 150 L. As part of a periodic review of its standards, ISO reviewed ISO 10462:2013, and in June 2019 published a short supplemental amendment, ISO 10462:2013/Amd 1:2019. The supplemental document includes updates such as simplified marking requirements for rejected cylinders. Updating references to this document would align the HMR with documents referenced in the 22nd revised edition of the UN Model Regulations pertaining to the requalification procedures for acetylene UN cylinders. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and concludes the incorporation of the supplemental document maintains the HMR safety standards for use of acetylene cylinders.

—Incorporate by reference the third edition of ISO 11117:2019(E), ''*Gas cylinders—Valve protection caps and guards—Design, construction and tests*'' in paragraph (w)(56). This amendment would authorize the use of the third edition until further notice and add an end date of December 31st, 2026, to the authorization for use of the second edition, ISO 11117:2008 and the associated corrigendum, which are currently referenced in § 173.301b. ISO 11117 specifies the requirements for valve protection caps and valve guards used on cylinders for liquefied, dissolved, or compressed gases. The changes in this revised standard pertain to the improvement of the interoperability of both the valve protection caps and the valve guards, with the cylinders and the cylinder valves. To that end, the drop test, the marking, and test report requirements have been revised and clarified. Updating references to this document would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to valve protection on UN pressure receptacles. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not

expect any degradation of safety standards in association with its use.

—Incorporate by reference ISO 11118:2015/Amd 1:2019(E), ''*Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods—Amendment 1*'' in paragraph (w)(59). ISO 11118:2015/Amd 1:2019(E) is a short supplemental amendment that is intended to be used in conjunction with ISO 11118:2015, which is currently referenced in § 178.71. This amendment would authorize the use of this supplemental amendment in conjunction with ISO 11118:2015 until further notice and add an end date of December 31, 2026, until which ISO 11118:2015 may continue to be used without this supplemental amendment. ISO 11118:2015, which specifies minimum requirements for the material, design, inspections, construction and workmanship, manufacturing processes, and tests at manufacture of non-refillable metallic gas cylinders of welded, brazed, or seamless construction for compressed and liquefied gases including the requirements for their non-refillable sealing devices and their methods of testing. ISO 11118:2015/Amd 1:2019 corrects the identity of referenced clauses and corrects numerous typographical errors. The amendment also includes updates to the marking requirements in the normative Annex A, which includes clarifications, corrections, and new testing requirements. Updating references to this document would align the HMR with documents referenced in the 22nd revised edition of the UN Model Regulations pertaining to non-refillable UN cylinders. PHMSA has reviewed this amended document as part of its regular participation in the review of amendments proposed for the UN Model Regulations and determined that the added corrections and clarifications provide important additional utility for users of ISO 11118:2015(E) and does not expect any degradation of safety standards in association with its use.

—Incorporate by reference ISO 11513:2019, ''*Gas cylinders—Refillable welded steel cylinders containing materials for sub-atmospheric gas packaging (excluding acetylene)—Design, construction, testing, use and periodic inspection*'' in paragraph (w)(71). ISO 11513:2019 is the second edition of ISO 11513. This amendment would authorize the use of the second edition and add an end date to the authorization for use of the first edition, ISO 11513:2011 (including Annex A), which is currently referenced in § 173.302c, § 178.71, and § 180.207. ISO 11513 specifies minimum requirements for the material, design, construction, workmanship, examination and testing at manufacture of refillable welded steel cylinders for the sub-atmospheric pressure storage of liquefied and compressed gases. The second edition has been updated to amend packing instructions and remove a prohibition on the use of ultrasonic testing during periodic inspection. Updating references to this document would align the HMR with documents referenced in the 22nd revised edition of the UN Model Regulations pertaining to the shipment of adsorbed gases in UN pressure receptacles. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use.

—Incorporate by reference ISO 16111:2018, ''*Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride*'' in paragraph (w)(80). ISO 16111:2018 is the second edition of ISO 16111. This amendment would authorize the use of the second edition until further notice and add an end date of December 31, 2026, on the authorization to use the first edition, ISO 16111:2008, which is referenced in §§ 173.301b, 173.311, and 178.71. ISO 16111 defines the requirements applicable to the material, design, construction, and testing of transportable hydrogen gas storage systems which utilize shells not exceeding 150 L internal volume and having a maximum developed pressure not exceeding 25 MPa. This updated standard includes additional information pertaining to service temperature conditions which have been described in detail; new references related to shell design; modified drop test conditions; modified acceptance criteria for leak testing; modified hydrogen cycling conditions; new warning labelling; and updated information on safety data sheets. Updating references to this document would align the HMR with documents referenced in the 22nd revised edition of the UN Model Regulations pertaining to metal hydride storage systems. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use.

—Incorporate by reference ISO 17871:2020(E), ''*Gas cylinders—Quick-release cylinder valves—Specification and type testing*'' in paragraph (w)(83). ISO 17871:2020 is the second edition of ISO 17871. This amendment would authorize the use of the second edition and add an end date of December 31st, 2026, to the authorization for use of the first edition, ISO 17871:2015(E), which is currently referenced in 173.301b. This document, in conjunction with ISO 10297 and ISO 14246, specifies design, type testing, marking, and manufacturing tests, and examinations requirements for quick-release cylinder valves intended to be fitted to refillable transportable gas cylinders, pressure drums and tubes which convey certain gases such as compressed or liquefied gases or extinguishing agents charged with compressed gases to be used for fire-extinguishing, explosion protection, and rescue applications. As part of its regular review of its standards, ISO updated and published the second edition of ISO 17871 as ISO 17871:2020. The 2020 edition of this standard broadens the scope to include quick release valves for pressure drums and tubes and specifically excludes the use of quick release valves with flammable gases. Other notable changes include the addition of the valve burst test pressure, the deletion of the flame impingement test, and the deletion of internal leak tightness test at −40 °C for quick release cylinder valves used only for fixed fire-fighting systems installed in buildings. Updating references to this document would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to the shipment of gases in UN pressure receptacles. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use.

—Incorporate by reference ISO 21172–1:2015/Amd 1:2018, ''*Gas cylinders—Welded steel pressure drums up to 3000 litres capacity for the transport of gases—Design and construction—Part 1: Capacities up to 1000 litres—Amendment 1*'' in paragraph (w)(89). ISO 21172–1:2015/Amd1:2018 is a short supplemental amendment that is intended to be used in conjunction with ISO 21172–1:2015, which is currently referenced in § 178.71. This

amendment would authorize the use of this supplemental document in conjunction with the first edition, ISO 21172–1:2015. It would also add an end date of December 31, 2026, until which ISO 21172–1:2015 may continue to be used without this supplemental amendment. ISO 21172–1:2015 specifies the minimum requirements for the material, design, fabrication, construction, workmanship, inspection, and testing at manufacture of refillable welded steel gas pressure drums of volumes 150 L to 1000 L and up to 300 bar (30 MPa) test pressure for compressed and liquefied gases. This supplemental amendment includes updated references and removes the restriction on corrosive substances. Updating references to this document would align the HMR with documents referenced in the 22nd revised edition of the UN Model Regulations pertaining to the design and construction of UN pressure drums. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use.

—Incorporate by reference ISO 23088:2020, ''*Gas cylinders—Periodic inspection and testing of welded steel pressure drums—Capacities up to 1000 l*'' in paragraph (w)(91). This amendment would incorporate by reference the first edition of ISO 23088, which specifies the requirements for periodic inspection and testing of welded steel transportable pressure drums of water capacity from 150 L up to 1,000 L and up to 300 bar (30 MPa) test pressure intended for compressed and liquefied gases in § 180.207. This new standard was adopted in the 22nd revised edition of the UN Model Regulations because it fulfills the need for specific periodic inspection instructions for pressure drums constructed in accordance with ISO 21172–1. Incorporating by reference this document would align the HMR with standards adopted in the 22nd revised edition of the UN Model Regulations pertaining to the design, construction, and inspection of UN pressure drums. PHMSA has reviewed this document as part of its regular participation in the review of amendments proposed for the UN Model Regulations and expects that its addition will facilitate the continued use of UN pressure drums with no degradation of safety.

• In paragraph (aa)(3), incorporate by reference the OECD Guidelines for the Testing of Chemicals ''Test No. 439: In Vitro Skin Irritation: Reconstructed Human Epidermis Test Method'' (2015). This Test Guideline (TG) provides an in vitro procedure that may be used for the hazard identification of irritant chemicals. PHMSA proposes to reference this test in § 173.137, and to authorize the use of this test method in addition to those already referenced in that section. This test method is used to specifically exclude a material from classification as corrosive and to maintain alignment with the 22nd revised edition of the UN Model Regulations. This test method provides an in vitro procedure that may be used for the hazard identification of irritant chemicals (substances and mixtures). OECD test methods can be found in the OECD iLibrary available at *https://www.oecd-ilibrary.org/*.

• In paragraph (dd), incorporate by reference United Nations standards including:

—''The Recommendations on the Transport of Dangerous Goods—Model Regulations,'' 22nd revised edition (2021), Volumes I and II, in paragraph (dd)(1), which are referenced in §§ 171.8; 171.12; 172.202; 172.401; 172.407; 172.502; 172.519; 173.22; 173.24; 173.24b; 173.40; 173.56; 173.192; 173.302b; 173.304b; 178.75; and 178.274. The Model Regulations provide framework provisions promoting uniform development of national and international regulations governing the transportation of hazardous materials by various modes of transport. At its tenth session on December 11, 2020, the UNSCOE on the Transport of Dangerous Goods adopted amendments to the UN Model Regulations on the Transport of Dangerous Goods concerning, inter alia, electric storage systems (including modification of the lithium battery mark and provisions for transport of assembled batteries not equipped with overcharge protection), requirements for the design, construction, inspection and testing of portable tanks with shells made of fiber reinforced plastics (FRP) materials, modified listings of dangerous goods; and additional harmonization with the IAEA Regulations for the Safe Transport of Radioactive Material. PHMSA participates in the development of the UN Model Regulations and has determined that the amendments adopted in the 22nd revised edition support the safe transport of hazardous materials and as such are appropriate for incorporation in the HMR. The 22nd revised edition of the UN Model Regulations is available online at: *https://unece.org/transport/dangerous-goods/un-model-regulations-rev-22*.

—''The Manual of Tests and Criteria, Amendment 1 to the Seventh revised edition'' (Rev.7/Amend.1) (2021), in paragraph (dd)(2)(ii), which is referenced in §§ 171.24, 172.102; 173.21; 173.56; 173.57; 173.58; 173.60; 173.115; 173.124; 173.125; 173.127; 173.128; 173.137; 173.185; 173.220; 173.221; 173.224; 173.225; 173.232; part 173, appendix H; 175.10; 176.905; and 178.274. The Manual of Tests and Criteria contains instruction for the classification of hazardous materials for purposes of transportation according to the UN Model Regulations. At its tenth session the Committee of Experts on the Transport of Dangerous Goods and on the Globally Harmonized System of Classification and Labelling of Chemicals adopted a set of amendments to the seventh revised edition of the Manual, which were circulated and collected in amendment 1 to the seventh revised edition. The new amendments adopted in December 2020 pertain to the transport of explosives, including alignment with revised Chapter 2.1 of the GHS, classification of self-reactive substances and polymerizing substances, and the assessment of the thermal stability of samples and temperature control assessment for transport of self-reactive substances and organic peroxides. PHMSA has reviewed and approved the amendments adopted in this document and further expects that their incorporation in the HMR will provide an additional level of safety. PHMSA proposes to incorporate by reference this document as a supplement, to be used in conjunction with the seventh revised edition (2019). The amendments to the manual can be accessed at *https://unece.org/transport/dangerous-goods/rev7-files*.

—''Globally Harmonized System of Classification and Labelling of Chemicals (GHS),'' ninth revised edition (2021) in paragraph (dd)(3), which is referenced in § 172.401. The GHS standard provides a basic scheme to identify the hazards of substances and mixtures and to communicate these hazards. At its tenth session on December 11, 2020, the Committee of Experts on the Transport of Dangerous Goods and on the Globally Harmonized System of

Classification and Labelling of Chemicals adopted a set of amendments to the eighth revised edition of the GHS which include, inter alia: revisions to Chapter 2.1 (explosives) to better address their explosion hazard when they are not in their transport configuration; revisions to decision logics; revisions to classification and labelling summary tables in Annex 1; revisions and additional rationalization of precautionary statements; and updates of references to OECD test guidelines for the testing of chemicals in Annexes 9 and 10. PHMSA has reviewed and approved the amendments incorporated in this document and further expects that its incorporation in the HMR will provide an additional level of safety. The ninth revised edition of the GHS can be accessed at *https://unece.org/transport/standards/transport/dangerous-goods/ghs-rev9-2021*.

Section 171.12

Section 171.12 prescribes requirements for shipments of hazardous materials in North America, including use of the Transport Canada (TC) Transportation of Dangerous Goods (TDG) Regulations. In rule HM–215N,[10] PHMSA amended the HMR to expand recognition of cylinders and pressure receptacles, and certificates of equivalency—Transport Canada's equivalent of a special permit—approved in accordance with the TDG Regulations. The goal of these amendments was to promote flexibility and permit the use of modern technology for the requalification and use of pressure receptacles, to expand the universe of pressure receptacles authorized for use in hazardous material transport, to reduce the need for special permits, and to facilitate cross-border transportation of these pressure receptacles. In accordance with § 171.12(a)(4), when the provisions of the HMR require the use of either a DOT specification or a UN pressure receptacle for transport of a hazardous material, a packaging authorized by Transport Canada's TDG Regulations may be used only if it corresponds to the DOT specification or UN standard. HM–215N revised paragraph (a)(4)(iii) to include a table listing Canadian Railway Commission (CRC), Board of Transport Commissioners for Canada (BTC), Canadian Transport Commission (CTC) or Transport Canada (TC) specification cylinders, in accordance with the TDG Regulations, and in full conformance with the TDG Regulations, that correspond with a DOT specification cylinder.

However, there are currently no TC specification cylinders corresponding to DOT specification cylinders listed in the table for DOT–8 and DOT–8AL cylinders used to transport acetylene. During the development of HM–215N, PHMSA conducted a comparative analysis of DOT and TC cylinder specifications and only those TC cylinder specifications that corresponded directly to DOT cylinder specifications were included. The result was that PHMSA did not include TC–8WM and TC–8WAM specifications for the transport of acetylene in the table of corresponding cylinders at § 171.12(a)(4)(iii). This omission was primarily due to concerns over differing solvent authorizations, calculations, and methods of construction for the design associated with the TC–8WM and TC–8WAM specifications. PHMSA conducted a second comparative analysis of DOT and TC cylinder specifications for transport of acetylene and concluded that the initial concerns were unwarranted. Therefore, PHMSA proposes to add TC–8WM and TC–8WAM specifications to the table of corresponding DOT specifications in § 171.12(a)(4)(iii) as comparable cylinders to DOT–8 and DOT–8AL, respectively.

PHMSA's supplemental review indicates the differences between the TC and DOT specifications for transport of acetylene are minor and the standard for safety of transportation of acetylene in cylinders under the HMR is maintained. This proposal would allow for TC acetylene cylinders manufactured in Canada to be filled, used, and requalified (including rebuild, repair, reheat-treatment) in the United States, facilitating cross border movement of acetylene and eliminates the need for a special permit to allow transport of acetylene in these TC–8WM and TC–8AWM cylinders while maintaining an equivalent level of safety. Additionally, this proposal would provide reciprocity to Transport Canada's authorized use of DOT–8 and DOT–8AL cylinders for acetylene transport.

Section 171.23

Section 171.23 outlines the requirements for specific materials and packagings transported under the ICAO Technical Instructions, IMDG Code, Transport Canada TDG Regulations, or the IAEA Regulations. It also includes authorized use, under specific conditions, of pi-marked pressure receptacles that comply with the Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR), and the EU Directive 2010/35/EU,[11] and marked with a pi (π) symbol to denote such compliance for transport of hazardous materials. PHMSA proposes to amend the language in the provisions for pi-marked pressure receptacles in paragraph (a)(3) to clarify the scope of pressure receptacles authorized by this section. Pressure receptacles is a collective term that may be used to refer to many types of pressurized containers of various sizes, such as cylinders, tubes, pressure drums, closed cryogenic receptacles, metal hydride storage systems, bundles of cylinders or salvage pressure receptacles. When PHMSA adopted the provisions for pi-marked pressure receptacles,[12] we did not intend to broadly apply the scope to all pressure receptacle types. Instead, PHMSA's intent was to apply the authorized use of pi-marked pressure receptacles domestically to only cylinders, as indicated in current paragraph (a)(3)(iii), which specifically references cylinders. Some of the pressure receptacles authorized in accordance with the ADR standard do not have an equivalent packaging authorized in the HMR, and some have large capacities, both of which give pause to PHMSA with respect to the hazardous materials authorized in these packagings. Therefore, PHMSA proposes to replace the words ''pressure receptacles'' in paragraph (a)(3) with ''cylinders with a water capacity not exceeding 150 L,'' as defined in § 171.8, to specify the scope of pi-marked pressure receptacles authorized under § 171.23. PHMSA expects that this amendment will improve safety by providing additional clarity with regard to the scope of authorized use of pi-marked pressure receptacles for transport of hazardous material in the United States. PHMSA is aware of growing interest in the authorization for use of other pi-marked pressure receptacles and PHMSA plans to address that issue in a future rulemaking.

Section 171.25

Section 171.25 outlines additional requirements for the use of the IMDG Code in addition to those found in § 171.22 and § 171.23. As discussed above in Section IV. Amendments Not Being Considered for Adoption, specifically Issue #1, PHMSA is not proposing to adopt provisions for UN FRP portable tanks in the HMR.

[10] 82 FR 15796 (Mar. 30, 2017).

[11] U.N. Econ. Comm'n for Europe, Transportation Division, Agreement Concerning the Int'l Carriage of Dangerous Goods by Road, 110th Sess., ECE/TRANS/300, U.N. Sales No. E. 21. VIII. 1 (2020).

[12] 85 FR 75680 (Nov. 25, 2020).

However, to facilitate limited import and export of these tanks in international commerce, and to gain additional experience with their transport, PHMSA proposes to add a new paragraph § 171.25(c)(5) that would prohibit the general transportation of UN FRP portable tanks designed and constructed in accordance with Chapter 6.10 of the IMDG Code within the United States, yet allow for the tanks to be transported within a single port area in the United States in accordance with the provisions of § 171.25(d) covering the use of the IMDG Code in port areas. This action will maintain the safe transportation of hazardous material under the HMR while facilitating international commerce by permitting the import or export of hazardous materials in UN FRP portable tanks and limiting their use and movement within the confines of a single port area.

*B. Part 172*

Section 172.101 Hazardous Materials Table (HMT)

The HMT summarizes terms and conditions governing transportation of listed hazardous materials under the HMR. For each entry, the HMT identifies information such as the PSN, UN identification number, and hazard class. The HMT specifies additional information or reference requirements in the HMR such as hazard communication, packaging, quantity limits aboard aircraft, and stowage of hazardous materials aboard vessels. PHMSA proposes several changes to the HMT as discussed below. For purposes of the Government Publishing Office's typesetting procedures, proposed changes to the HMT appear under three sections of the HMT: ''remove,'' ''add,'' and ''revise.'' Certain entries in the HMT, such as those with revisions to the PSNs, appear as a ''remove'' and ''add.'' Proposed amendments to the HMT include the following:

New HMT Entry

PHMSA proposes to add new entry, ''UN3550, Cobalt dihydroxide powder, *containing not less than 10% respirable particles,* Division 6.1, PG I'' to the HMT. Cobalt is a key strategic mineral used in various advanced medical and technical applications around the world, and it is essential to keep the global supply chains for this material open. This material has a 40-year history of safe global transport as ''UN3077, Environmentally hazardous substance, solid, n.o.s., Class 9'' in different forms, including as crude material directly from mines, high moisture content paste, and very fine refined powders in flexible IBCs rated for PG III. However, recent testing required for compliance with the REACH Regulation in the European Union, and subsequent evaluation against the hazard classification criteria of the EU Classification, Labelling, and Packaging (CLP) Regulation resulted in a classification of Acute toxicity by inhalation Category 1, which is equivalent to the Division 6.1 hazard classification. As a result of this testing, it was determined that when this material is in fine powder form, it must no longer be transported as Class 9 miscellaneous hazard material. In powder form, cobalt dihydroxide powder must now be classified as a Division 6.1 toxic-by-inhalation solid material, for which a unique UN identification number and associated classification, hazard communication, and packing instructions does not currently exist in the HMT. This change in classification led to the development of the new UN identification number UN3550 and associated transportation requirements by the UNSCOE. To that end, the UNSCOE developed appropriate packaging provisions, including a special packaging condition, which permits the continued use of certain flexible IBCs. PHMSA notes that other forms of cobalt dihydroxide powder may continue to be classified and described as ''UN3077, Environmentally hazardous, solid, n.o.s., 9, PG III.'' Specifically, the UNSCOE addressed shipper concerns that flexible IBCs are not otherwise permitted for transport of Division 6.1 toxic solids, yet there is a 40-year record of safe transport of the refined material as UN3077 material in flexible IBCs, with no recorded accidents, incidents, or health issues. PHMSA proposes to also add a corresponding special provision (IP22) to indicate that the use of certain flexible IBCs is permitted for UN3550, which is discussed further in § 172.102 of this Section-by-Section Review). The other packaging provisions for this cobalt dihydroxide powder are consistent with those for other Division 6.1 solid materials assigned PG I, such as ''UN3467, Organometallic compound, solid, toxic, n.o.s.'' An entry for UN3550 was also added in the 2023–2024 ICAO Technical Instructions and aligns with the proposed packaging requirements in this NPRM. PHMSA agrees with the UN provision to allow for the continued transport of this hazardous material in flexible IBCs, or in accordance with other special provisions and packaging requirements outlined in Part 173. The addition of this new HMT entry will maintain the HMR's safety standard for transportation of Division 6.1 solid materials.

HMT Corrections

PHMSA proposes to make corrections to multiple HMT entries that were inadvertently modified in previous rulemakings. Specifically, for the PGII and PGIII entries for ''UN3129, Water-reactive liquid, corrosive, n.o.s'' and ''UN3148, Water-reactive liquid, n.o.s'', the references to exceptions in § 173.151 in Column 8A were removed and replaced with the word ''None''. While there are no exceptions these materials when assigned to PGI, PHMSA did not intend to remove the exceptions for PGII and III materials. Additionally, for the PGIII entry for ''UN3148, Water-reactive liquid, n.o.s'', the ''G'' in Column 1, which indicates that a technical name must be provided in association with the proper shipping name, was also inadvertently deleted. PHMSA expects that making these editorial corrections will prevent frustrations in shipping due to the inadvertent removal of the reference to authorized shipping exceptions and confusion regarding the required shipping description. PHMSA also proposes a correction to the entry ''UN0512, Detonators, electronic programmable for blasting''. In HM–215P, PHMSA added three new entries for electronic detonators to distinguish them from electric detonators, which have different functioning characteristics but similar regulatory provisions for their transport. PHMSA incorrectly assigned an obsolete special provision, Special Provision 103, which was removed from the HMR by final rule HM–219C.[13] UN0512 is comparable to the entry UN0255 and therefore should reflect the same special provision, Special Provision 148. Therefore, PHMSA proposes to remove the reference to Special Provision 103 in Column 7 for UN0512 and replace it with Special Provision 148 consistent with the entry of UN0255. PHMSA expects that this correction will remove confusion surrounding additional provisions for these detonators. Lastly, PHMSA proposes a correction to the proper shipping name for UN3380, which should read ''Desensitized explosive, solid, n.o.s.''. In the previous HM–215 rulemaking, the word ''explosive'' was inadvertently made plural. This spelling is in conflict with a similar material on the HMT, ''UN3379. Desensitized explosive, liquid, n.o.s.'' and international regulations. Therefore, PHMSA expects that this correction will remove

[13] 85 FR 75680 (November 25, 2020).

confusion surrounding the proper shipping name for these materials.

Lastly, PHMSA proposes to make a correction to the HMT entry for ''UN1791, Hypochlorite Solutions''. In HM–215O, PHMSA added stowage codes 53 and 58—which require stowage ''separated from alkaline compounds'' and ''separated from cyanides,'' respectively—to Column 10B of the HMT for several hazardous materials for consistency with changes included in Amendment 39–18 of the IMDG Code. These stowage codes were intended to be applied to several HMT entries to ensure proper segregation between acids and both amines and cyanides but should not have included UN1791. Therefore, PHMSA proposes to remove stowage codes 53 and 58 from Column 10B for this entry. PHMSA expects that this correction will remove the burden faced by shippers who have had to segregate hypochlorite solutions for compliance with the HMR, which is inconsistent with the requirements of the IMDG Code.

Column (2) Hazardous Materials Descriptions and Proper Shipping Names

Section 172.101(c) describes column (2) of the HMT and the requirements for hazardous materials descriptions and PSNs. PHMSA proposes to consolidate two entries in the HMT that are currently listed under ''UN1169, Extracts, aromatic, liquid'' (PGII and PGIII) and ''UN1197, Extracts, flavoring, liquid'' (PGII and PGIII). Specifically, PHMSA proposes to remove the table entry for ''UN1169, Extracts, aromatic, liquid'' and modify the PSN associated with the table entry for UN1197 to reflect materials that have been historically transported separately under UN1169 and UN1197. The 22nd revised edition of the UN Model Regulations made these same changes, deleting UN1169 from the Dangerous Goods List and changing the PSN for UN1197 to ''Extracts, liquid, for flavor or aroma'' to remove confusion associated with selection of the appropriate PSNs across the various languages of nations engaged in international shipments of the material. It became apparent that, whether for a flavor extract or aroma extract, the PSNs were often used interchangeably as there is no difference between the two with regard to classification, hazard communication, and packaging for transport. PHMSA agrees that the existence of two interchangeable UN numbers does not provide any additional value and, therefore, proposes to remove the table entry for UN1169 and modify the PSN for UN1197 to read ''Extracts, liquid, *for flavor or aroma*''. Additionally, PHMSA proposes to amend the text of paragraph (c)(12)(ii), which outlines requirements for generic or n.o.s. descriptions. The text of this paragraph provides an example using ''Extracts, flavoring, liquid.'' Therefore, PHMSA proposes to amend the wording of that example by replacing ''Extracts, flavoring, liquid'' with ''Extracts, liquid, for flavor or aroma'' to correspond to the amended PSN for UN1197. This proposed action maintains the current level of safety for transportation of liquid extracts.

Column (3) Hazard Class or Division

Section 172.101(d) describes column (3) of the HMT, which designates the hazard class or division corresponding to the PSN of that entry. Consistent with changes adopted in the 22nd revised edition of the UN Model Regulations, PHMSA proposes to change the primary hazard classification for the entry ''UN1891, Ethyl Bromide,'' from a toxic liquid of Division 6.1 to a Class 3 flammable liquid. This change in classification is consistent with the change adopted in the 2023–2024 ICAO Technical Instructions as well as the UN Model Regulations and is based on new test data indicating that the flash point and boiling point of ethyl bromide has a core flammability hazard according to the Class 3 classification criteria of the ICAO Technical Instructions. More specifically, different data sources showed that its flash point of −20 °C (−4 °F) and its boiling point of 38 °C (100.4 °F) meet the criteria for assignment as a Class 3 at the PG II level—the criteria of which is having a flash point <23 °C and boiling point >35 °C. Additionally, rather than classifying ethyl bromide solely as a Class 3 flammable liquid, it was determined that the Division 6.1 hazard still applies and should remain assigned as a subsidiary hazard. This is consistent with the HMR precedence of the hazard table in § 173.2a that instructs for a material that meets criteria for classification as both Class 3 and Division 6.1 (except for when a material meets the PG I poison-by-inhalation criteria), the flammability hazard takes precedence and is the primary hazard. These changes in hazard class and associated packaging requirements were adopted to ensure that the hazards of ethyl bromide are accurately communicated and appropriately packaged. PHMSA reviewed these findings and agrees that it is appropriate to classify ethyl bromide as a flammable liquid, with a subsidiary Division 6.1 hazard. Because of this change in hazard class, additional conforming changes to the HMT entry for ethyl bromide are required in column (6), as discussed below. Additionally, PHMSA expects that clearly identifying the flammability hazard posed by this material will improve safety by ensuring that the material is handled appropriately before and during transport.

Column (6) Label Codes

Section 172.101(g) describes column (6) of the HMT, which contains label codes representing the hazard warning labels required for a package filled with a material conforming to the associated hazard class and proper shipping name, unless the package is otherwise excepted from labeling. The first code is indicative of the primary hazard of the material. Additional label codes are indicative of subsidiary hazards. As discussed above, PHMSA proposes to modify the primary hazard class for ''UN1891, Ethyl bromide'' to Class 3. Consistent with this change, PHMSA proposes to assign Class 3 as the primary hazard label and Division 6.1 as a subsidiary hazard label. Consequently, PHMSA proposes to amend column (6) of the HMT for this entry to reflect the warning labels required for the transport of this hazardous material. PHMSA expects that this proposed change will improve safety by clearly communicating the transportation hazards of this material.

Column (7) Special Provisions

Section 172.101(h) describes column (7) of the HMT, which assigns special provisions for each HMT entry. Section 172.102 provides for the meaning and requirements of the special provisions assigned to entries in the HMT. The proposed revisions to column (7) of certain entries in the HMT are discussed below.

Special Provision 396

PHMSA proposes to add a new special provision, Special Provision 396, and assigning it to ''UN3538, Articles containing non-flammable, non-toxic gas, n.o.s.'' For additional information, *see* § 172.102 of the Section-by-Section Review.

Special Provision 398

PHMSA proposes to assign a newly added special provision, Special Provision 398, which pertains to the potential classification of butylene and butylene mixtures as UN1012. This special provision clarifies that butylene mixtures and certain butylene isomers may be assigned to UN1012, while specifically excluding isobutylene from this UN classification. For additional

information, *see* § 172.102 of the Section-by-Section Review.

Special Provisions A4 and A5

PHMSA proposes to assign Special Provision A4 to the entry ''UN2922, Corrosive liquid, toxic, n.o.s.'' and Special Provision A5 to the entry ''UN2923, Corrosive solid, toxic, n.o.s.''. Special Provisions A4 and A5 address liquids and solids in PG I that also pose an inhalation toxicity hazard by limiting or prohibiting their transportation on aircraft. In principle, all liquids or solids that have an inhalation toxicity hazard, and assigned PG I, should be subject to one of the two special provisions, as appropriate. However, UN2922 and UN2923 are assigned Class 8 as the primary hazard and Division 6.1 as a subsidiary hazard because of classification guidelines which require hazardous materials that meet the criteria of Class 8 and that have an inhalation toxicity of dusts and mists (LC50) in the range of PG I, but toxicity through oral ingestion or dermal contact only in the range of PG III or less, must be assigned to Class 8 as the primary hazard rather than Division 6.1. In reviewing these provisions, the ICAO Dangerous Goods Panel (DGP) determined that additional restrictions should be implemented for these hazardous materials as the corrosive classification assigned to UN2922 and UN2923 does not negate the inhalation toxicity hazard. Because of the inhalation hazard posed by these materials, the 2023–2024 ICAO Technical Instructions included an amendment to impose quantity limits for transportation of these materials by air. PHMSA agrees with this determination and therefore proposes to assign Special Provision A4 to UN2922, which prohibits it from transport on passenger and cargo aircraft. PHMSA also proposes to assign Special Provision A5 to UN2923, which prohibits this material on passenger aircraft and limits the amount that may be transported on cargo aircraft. PHMSA expects that correcting this conflict will improve safety by prohibiting corrosive materials that also pose inhalation hazards on passenger aircraft and limiting their transport on cargo aircraft.

Special Provisions A224 and A225

PHMSA proposes to add two new air special provisions, A224 and A225, and assign them to HMT entries ''UN3548, Articles containing miscellaneous dangerous goods, n.o.s.'' and ''UN3538, Articles containing non-flammable, non-toxic gas, n.o.s.,'' respectively. These special provisions would allow for transport on both passenger aircraft and cargo aircraft under certain conditions. For additional information, *see* 172.102 of the Section-by-Section Review. Also, *see* § 172.102 of the Section-By-Section Review below for a detailed discussion of the special provision amendments addressed in this NPRM.

Column (8) Packaging

Section 172.101(i) explains the purpose of column (8) in the HMT. Columns (8A), (8B), and (8C) specify the applicable sections for exceptions, non-bulk packaging requirements, and bulk packaging requirements, respectively. Columns (8A), (8B), and (8C) are completed in a manner which indicates that ''§ 173.'' precedes the designated numerical entry. Column (8A) contains exceptions from some of the requirements of this subchapter. The referenced exceptions are in addition to those specified in subpart A of part 173 and elsewhere in subchapter C. The word ''None'' in this column means no packaging exceptions are authorized, except as may be provided by special provisions in column (7). For example, the entry ''151'' in column (8A), associated with the proper shipping name ''Nitrocellulose with water,'' indicates that, for this material, packaging exceptions are provided in § 173.151 of this subchapter.

PHMSA proposes to remove references to § 173.151, which provide exceptions for Class 4 hazardous materials, in column (8A), and add the word ''None'' for three solid desensitized explosive entries: ''UN2555, Nitrocellulose with water *with not less than 25 percent water by mass*''; ''UN2556, Nitrocellulose with alcohol *with not less than 25 percent alcohol by mass, and with not more than 12.6 percent nitrogen, by dry mass*''; and ''UN2557, Nitrocellulose, *with not more than 12.6 percent nitrogen, by dry mass* mixture with *or* without plasticizer, with or without pigment.'' These changes would remove the applicability of the limited quantity exceptions for these hazardous materials to correct an inconsistency regarding solid desensitized explosives. Consistent with the UN Model Regulations, PHMSA has not authorized limited quantity packaging exceptions for 30 other solid desensitized explosives.[14] Solid desensitized explosives are explosive substances which are wetted with water or alcohols or are diluted with other substances to form a homogeneous solid mixture to suppress their explosive properties. Like PG I materials, solid desensitized explosives in PG II are specifically prohibited from transport under the limited quantity provisions in the UN Model Regulations. However, this inconsistency was identified with respect to air transport by the ICAO DGP (Dangerous Goods Panel), resulting in a similar amendment in the 2023–2024 ICAO Technical Instructions. In this NPRM, PHMSA also proposes related editorial amendments in § 173.27, general requirements for transportation by aircraft (*see* additional discussion in § 173.27 of Section-by-Section Review). PHMSA expects that correcting this oversight to require that these nitrocellulose mixtures be transported in accordance with all requirements of the HMR, rather than permitting the use of the limited quantity exceptions in § 173.151, will not only add an additional level of safety, but that it will also facilitate the transport of these materials by streamlining packaging and hazard communication requirements to be consistent with requirements for similar materials and with international regulations.

Column (9) Quantity Limitations

Section 172.101(j) explains the purpose of column (9) in the HMT. Column (9) specifies quantity limitations for packages transported by air and rail. Column (9) is divided into two columns: column (9A) provides quantity limits for passenger aircraft/rail, and column (9B) provides quantity limits for cargo aircraft.

Consistent with changes adopted in the 2023–2024 edition of the ICAO Technical Instructions, PHMSA proposes to amend the quantity limitations for UN 1891, Ethyl bromide, when transported by passenger aircraft. Previously, the maximum net quantity per package for passenger aircraft was 5 L on the Dangerous Goods List of the ICAO Technical Instructions; this same quantity limit is currently in place for passenger aircraft, as indicated in column (9A) of the HMT. As a result of the reclassification of UN1891 as a Class 3 flammable liquid, the permitted quantity was reduced in the ICAO Technical Instructions to 1L per packaging. This change is in line with the quantity limits for many other Class 3 materials. PHMSA proposes to make a corresponding change for passenger

[14] UN1310, UN1320, UN1321, UN1322, UN1336, UN1337, UN1344, UN1347, UN1348, UN1349, UN1354, UN1355, UN1356, UN1357, UN1517, UN1571, UN2555, UN2556, UN2557, UN2852, UN2907, UN3317, UN3319, UN3344, UN3364, UN3365, UN3366, UN3367, UN3368, UN3369, UN3370, UN3376, UN3380, and UN3474.UN1517, UN1571, UN2555, UN2556, UN2557, UN2852, UN2907, UN3317, UN3319, UN3344, UN3364, UN3365, UN3366, UN3367, UN3368, UN3369, UN3370, UN3376, UN3380, and UN3474.

aircraft limits in column (9A). With regard to cargo aircraft, no changes to the 60 L maximum net quantity were made in the ICAO Technical Instructions, as that limit is the same for Class 3 and Division 6.1 materials. PHMSA expects that this change will provide an additional level of safety commensurate to the newly recognized flammability hazard posed by this material.

PHMSA also proposes to modify the packaging limits aboard cargo aircraft for three battery entries: ''UN2794, Batteries, wet, filled with acid, electric storage''; ''UN2795, Batteries, wet, filled with alkali, electric storage''; and ''UN3292, Batteries, containing sodium.'' Specifically, these changes would limit the quantity per packaging to 400 kg, as there is currently no limit for these items. Typically, these articles must be packed in UN specification packagings, and 400 kg is the maximum quantity permitted in such packagings. These proposed changes are consistent with changes made in the 2023–2024 ICAO Technical Instructions, which were made as a correction to an inconsistency between the ICAO Technical Instructions and the UN Model Regulations. Therefore, in column (9B) of the HMT, the words ''no limit'' will be replaced by 400 kg. PHMSA expects that this change will streamline packaging requirements by providing packaging limits for similar items in similar packagings, consistent with analogous international regulations. This streamlining will also increase safety by increasing clarity on the packaging limits for these similar items.

Section 172.102 Special Provisions

Section 172.102 lists special provisions applicable to the transportation of specific hazardous materials. Special provisions contain various provisions including packaging requirements, prohibitions, and exceptions applicable to particular quantities or forms of hazardous materials. PHMSA proposes the following revisions to the special provisions in this section:

Special Provision 78

Special Provision 78 currently states that ''UN1002, Air, compressed'' may not be used to describe compressed air which contains more than 23.5% oxygen. It also stipulates that compressed air containing more than 23.5% oxygen must be shipped using the description ''UN3156, Compressed gas, oxidizing, n.o.s.'' which has a Class 5 subsidiary hazard classification. PHMSA proposes to amend Special Provision 78, in order to provide additional clarity with regard to the permitted use of the proper shipping description UN1002. In an effort to address specific mixtures of nitrogen and oxygen that are commercially called ''synthetic air,'' the 22nd revised edition of the UN Model Regulations includes a new special provision that was intended to clarify that ''synthetic air'' may be transported under UN1002, provided that it does not contain more than 23.5% oxygen. ''Synthetic air'' is typically a mixture containing up to 23.5% oxygen with the balance being nitrogen. This mixture is used in a variety of applications, including medical and non-medical, and may be used when ambient air is not sufficient due to the presence of contaminants. This new special provision specifies that mixtures of nitrogen and oxygen containing not less than 19.5% and not more than 23.5% oxygen by volume may be transported under UN1002 when no other oxidizing gases are present. It also states that a Division 5.1 subsidiary hazard label is not required for any concentrations within this limit. While this language is not drastically different than the current language in the HMR, PHMSA expects that rewording Special Provision 78 to include the 19.5% lower bound for oxygen and the note regarding the use of the Division 5.1 subsidiary hazard label will improve safety by providing clearer and more useful instructions for shippers of compressed synthetic or ambient air.

Special Provision 156

PHMSA proposes to amend Special Provision 156 to require that, when transported by air, a shipping paper, such as an air waybill accompanying the shipment must indicate that the package containing asbestos is not restricted for shipment. Currently, this special provision excepts asbestos from the requirements of 49 CFR Subchapter C when it is immersed or fixed in a natural or artificial binder—such as cement, plastics, asphalt, resins, or mineral ore—in such a way that no escape of hazardous quantities of respirable asbestos fibers can occur. It was noted that confusion over whether a shipment was or was not excepted from the regulations had led to delays and frustrated shipments. The 2023–2024 ICAO Technical Instructions amended a similar special provision to assist in providing evidence of compliance with its requirements. PHMSA's proposed amendment to Special Provision 156 would require that, when transported by air, packages or shipping documentation be marked to indicate that the package containing asbestos is not restricted for shipment. PHMSA expects that this requirement will facilitate the safe shipment of asbestos by preventing them from being mistaken as fully regulated hazardous materials.

Special Provision 387

Special Provision 387 provides shippers of polymerizing substances with information regarding stabilization requirements for their shipments. As discussed below, in an earlier rulemaking, PHMSA placed sunset dates on the HMR provisions concerning transport provisions for polymerizing substances to allow time for the completion of research on various topics concerning their transport and to gather and review empirical evidence concerning the appropriate transport provisions for polymerizing substances. In line with other amendments proposed in this NPRM for the transport of polymerizing substances, PHMSA is proposing to amend Special Provision 387 to remove the sunset date of January 2, 2023. The result of this proposed amendment is that the existing stabilization requirements noted in this special provision remain and the sunset date is removed. *See* 173.21 of the Section-by-Section Review for the full discussion of changes pertaining to polymerizing substances.

Special Provision 396

PHMSA proposes to add a new special provision, Special Provision 396, and assign it to ''UN3538, Articles containing non-flammable, non-toxic gas, n.o.s,'' to authorize the transport of large and robust articles (*e.g.,* transformers) that include cylinders containing UN1066 ''Nitrogen''; UN1956 ''Compressed gas N.O.S.''; or UN1002 ''Air, compressed'' with the valves open to allow low quantities of gas to be constantly supplied through a pressure regulator from a gas cylinder connected to the transformer. Similar provisions were added in the 22nd revised edition of the UN Model Regulations and Amendment 41–22 of the IMDG Code to address shipments of transformers, which are typically pressurized with nitrogen or with air but are not gas tight. Prior to 2020, transformers were transported as ''UN 3363, Dangerous Goods in Machinery/Apparatus''; however, the packing provisions for UN3363 imposed quantity limits requiring multiple approvals from competent authorities as specified in Special Provision 136 in the HMR (SP 301 in the UN Model Regulations). Following more recent amendments to

the UN Model Regulations, these transformers were eligible for transport under UN 3538, the provisions which allow these transformers to be transported unpackaged, do not explicitly require the transformer to be gas-tight, but instead require the valves to be closed during transport. To obviate the need for an approval each time such transformers are transported, a new special provision was added to the 22nd revised edition of UN Model Regulations because these transformers only emit small quantities of nitrogen or synthetic air, which are neither flammable, toxic, corrosive, nor oxidizing. PHMSA proposes several safety controls in shipments of this type that are largely consistent with the provisions adopted in the UN Model Regulations and the IMDG Code. These proposed controls include requiring that cylinders be connected to the article through pressure regulators and have fixed piping to keep the pressure below 35 kPa (0.35) bar; the cylinders must be secured to prevent shifting; the cylinders and other components must be protected from damage and impacts during transport; the shipping paper must include a reference to shipping under this special provision; and if placed inside a cargo transport unit (CTU), the CTU must be well ventilated. PHMSA notes that these international regulations require marking the CTU with the asphyxiation warning mark for CTUs. The HMR has not adopted this mark and is not proposing to do so at this time. PHMSA is not proposing this mark because it views the additional controls, specifically, the indication on the shipping paper, as well as other operational controls noted in the proposed special provision, as providing sufficient warning to those in the transport chain of the dangers present and mitigation of potential hazards. PHMSA expects that the addition of this special provision will facilitate the transport of this specialized machinery without imposing excessive manufacturing requirements to ensure gas tightness to prevent the release of relatively innocuous gases during transport.

Special Provision 398

PHMSA proposes to add Special Provision 398, pertaining to the classification of hazardous materials under UN1012, Butylene. This new special provision would clarify that butylene mixtures and certain butylene isomers may be assigned to UN1012, while specifically excluding UN1055, Isobutylene from this UN classification. Butylene, also known as butene, includes four different isomers, corresponding to one general chemical formula, C4H8. One of these isomers is isobutylene, which, while similar to the other three isomers, has been assigned a separate UN number, UN1055, which has its own set of packaging provisions. To avoid ''UN1055, Isobutylene'' being classified and transported under UN1012, this amendment would facilitate consistent and proper classification of this group of hazardous materials. This clarification for UN1012, Butylene, was added in the 22nd revised edition of the UN Model Regulations for consistency with European regulations, which made similar changes to avoid ''UN1055, Isobutylene'' being classified and transported under UN1012. PHMSA proposes to add this clarifying special provision with the expectation that it will facilitate consistent and proper classification of this group of hazardous materials.

Special Provision 421

Special Provision 421 is assigned to the four polymerizing substance entries in the HMT. Currently this special provision notes that these entries will no longer be effective on January 2, 2023, unless extended or terminated prior to this date. As discussed in the ''Executive Summary'' section of this rulemaking, PHMSA had placed sunset dates on the HMR provisions concerning transport provisions for polymerizing substances to allow time for the completion of research on various topics concerning their transport and to gather and review empirical evidence concerning the appropriate transport provisions for polymerizing substances. As we have completed this review, we are proposing to delete Special Provision 421 and to maintain the existing polymerizing substance HMT entries.

Special Provision 441

PHMSA proposes to add a new Special Provision 441, assigning it to ''UN1045, Fluorine, compressed.'' This new special provision would specifically address gas mixtures containing fluorine and inert gases in UN pressure receptacles in accordance with changes adopted in the 22nd revised edition of the UN Model Regulations. Specifically, this change would provide latitude with regard to the maximum allowable working pressure when fluorine is a part of a mixture, which contains less reactive gases, such as nitrogen, when the mixture is transported in UN pressure receptacles. As a strongly oxidizing gas, pure fluorine requires specific safety measures because it reacts spontaneously with many organic materials and metals. Additionally, because of its reactive properties, the UN Model Regulations limit the maximum allowable working pressure for pure fluorine in cylinders to 30 bar and a minimum test pressure of 200 bar is also required. However, prior to changes adopted in the 22nd revised edition of the UN Model Regulations, there was no guidance on the maximum allowable working pressure and minimum test pressure for mixtures of gases which contain fluorine. Commercially, these mixtures are often placed on the market and used in concentrations, which may include as little as one percent fluorine combined with noble gases, or ten to twenty percent fluorine mixed with nitrogen. Due to the lack of specific provisions addressing fluorine gas mixtures, such mixtures containing relatively inconsequential amounts of fluorine were subject to the same requirements (restrictive maximum allowable working pressures) as pure fluorine. Given that fluorine, in a mixture with inert gases or nitrogen, is less reactive towards materials than pure fluorine, the UNSCOE determined that gas mixtures containing less than 35% fluorine by volume should no longer be treated like pure fluorine and may use a higher maximum allowable working pressure. The new packing provision added in the 22nd revised edition of the UN Model Regulations allows for pressure receptacles containing mixtures of fluorine and inert gases (including nitrogen) to have higher working pressures by allowing for consideration of the partial pressures exerted by the other constituents in the mixture, rather than limiting the pressure in the receptacle based on fluorine alone. Specifically, the provision permits mixtures of fluorine and nitrogen with a fluorine concentration below 35% by volume to be filled in pressure receptacles up to a maximum allowable working pressure for which the partial pressure of fluorine does not exceed 31 bar absolute. Additionally, for mixtures of true inert gases and fluorine, where the concentration of fluorine is below 35% by volume, pressure receptacles may be filled up to a maximum allowable working pressure for which the partial pressure of fluorine does not exceed 31 bar absolute, provided that when calculating the partial pressure, the coefficient of nitrogen equivalency is determined and accounted for in accordance with ISO 10156:2017. Finally, the newly added provision for these two types of gas mixtures limits the working pressure to 200 bar or less

and requires that the minimum test pressure of pressure receptacles for these mixtures equals 1.5 times the working pressure or 200 bar, with the greater value to be applied. While PHMSA is not adding similar provisions for this type of mixture in DOT specification cylinders in this rulemaking, PHMSA has evaluated the rationale and the methods for determining the pressure limits in UN pressure receptacles and finds that they provide an equivalent level of safety. For this reason, PHMSA proposes to adopt the packing instruction as drafted in the UN Model Regulations as a new special provision for UN1045.

Special Provision A54

Special Provision A54 specifies that, irrespective of the quantity limits in column (9B) of the § 172.101 table, a lithium battery, including a lithium battery packed with, or contained in, equipment that otherwise meets the applicable requirements of § 173.185, may have a mass exceeding 35 kg, if approved by the Associate Administrator prior to shipment. PHMSA proposes to amend this special provision to require that, when this special provision is used, the special provision number must be indicated on the shipping paper. PHMSA expects that this amendment will enhance safety by improving the communication of potential hazards, as without such indication, the need for shipment acceptance staff to check and ensure a copy of the approval accompanying the shipment can potentially be missed.

Special Provisions A224 and A225

The 2023–2024 ICAO Technical Instructions added two new special provisions permitting the transport of articles containing hazardous materials aboard passenger and cargo aircraft. Currently these articles are forbidden from transport on passenger and cargo aircraft, as specified in column (9) of the HMT. However, the ICAO DGP developed these packaging provisions, which include provisions that ensure appropriate gas containment during transport. The aim of these special provisions was to facilitate the transport of large articles containing environmentally hazardous substances (such as aircraft landing gear struts filled with hydraulic fluid) and large articles containing a non-flammable, non-toxic gas (such as new types of magnetic resonance imaging (MRI) scanners which often contain compressed helium as well as lithium cells or batteries). These amendments were adopted in the 2022–2023 ICAO Technical Instructions and PHMSA proposes to mirror these provisions by adding two new air-specific special provisions, A224 and A225, and assigning them to HMT entries ''UN3548, Articles containing miscellaneous dangerous goods, n.o.s.'' and ''UN 3538, Articles containing non-flammable, non-toxic gas, n.o.s.'' respectively.

These special provisions would allow for the transport of large articles containing a non-flammable, non-toxic gas or environmentally hazardous substances on both passenger aircraft and cargo aircraft only under certain conditions. Specifically, under Special Provision A224, ''UN3548, Articles containing miscellaneous dangerous goods, n.o.s.'' would be permitted on passenger and cargo aircraft, provided that the only dangerous goods in the article are environmentally hazardous substances with or without lithium cells or batteries that comply with § 173.185(c). Similarly, under Special Provision A225, ''UN3538, Articles containing non-flammable, non-toxic gas, n.o.s.'' would be permitted aboard passenger and cargo aircraft, provided that the article contains only a Division 2.2 gas that does not have a subsidiary hazard but excluding refrigerated liquefied gases and other gases forbidden for transport on passenger aircraft with or without lithium cells or batteries that comply with § 173.185(c). In addition to containing only the permitted hazardous materials, the special provision would also require that shippers comply with additional packaging requirements, specified in § 173.232, and that the special provision be indicated on shipping documentation.

The ICAO DGP agreed that these provisions were appropriate given that environmentally hazardous substances pose a very low hazard in air and that non-flammable, non-toxic gases without subsidiary hazard are already allowed on both passenger and cargo aircraft as well as certain other articles containing similar gases. PHMSA agrees and expects that, in addition to aligning the HMR with recent changes added to the 2023–2024 ICAO Technical Instructions, the addition of these provisions will facilitate the transport of these materials by air while maintaining the current level of safety for air transport of certain hazardous materials.

IP Codes

*IP Codes are special* provisions that are assigned to specific commodities, applicable when that commodity is transported in IBCs. Table 2 in § 172.102 specifies the requirements corresponding to the IP Code indicated in column (7) of the HMT. In this NPRM, PHMSA proposes to amend the text of IP15 and to add a new IP Code, IP22.

IP15

PHMSA proposes to amend the text of IP15 to clarify language pertaining to the authorized period of use of composite IBCs. Currently, IP15 states that for IBCs containing UN2031 with more than 55% nitric acid, rigid plastic IBCs and composite IBCs that have a rigid plastic inner receptacle are authorized for two years from the date of IBC manufacture. A change to a corresponding special provision was adopted in the 22nd revised edition of the UN Model Regulations to make clear that the authorized two-year period of use specifically refers to the duration of use of the inner receptacle of composite IBCs and not to the outer framework. The intent of this requirement is to limit the inner receptacle for composite IBCs to the two-year period of use when used for this specific corrosive material, rather than requiring that the outer framework be inspected as often. The entire composite IBC remains subject to the five-year inspection interval, prescribed in § 180.352. This change in the UN Model Regulations was in response to mistranslations of the UN Model Regulations, which led to inconsistent maintenance of composite IBCs. While PHMSA is not aware of any issues surrounding the language in IP15, PHMSA expects that making this editorial change will ensure that international users are not confused by the text of the HMR, and this clarification will enhance safe transport of hazardous materials in such IBCs.

IP22

As discussed earlier, PHMSA proposes to add a new IP code, IP22, for the new entry ''UN 3550, Cobalt dihydroxide powder, *containing not less than 10% respirable particles*.'' This special provision would authorize the transport of Cobalt dihydroxide powder, a Division 6.1 solid, in flexible IBCs that are equipped with siftproof liners that would prevent any egress of dust during transport. This hazardous material was recently classified as a solid with a toxic-by-inhalation hazard. Prior to this Division 6.1 classification, cobalt dihydroxide had been transported as ''UN3077, Environmentally hazardous substance, solid, n.o.s., Class 9'' in unlined flexible IBCs. However, this reclassification posed a problem for shippers because flexible IBCs are not authorized for Division 6.1 toxic solids. In response to the recent EU GHS changes, many shippers stopped using

unlined flexible IBCs and began using lined 13H3 or 13H4 flexible IBCs to prevent the release of dust.[15] Additionally, the industry also developed a new design type flexible IBC with an improved liner to prevent egress of dust. This new design type 13H3 flexible IBC has been tested and approved to PG I by international competent authorities. Consequently, to address the packaging problem shippers faced as a result of new classification criteria, the UNSCOE created a special provision that would allow this material to be transported in lined siftproof packagings. This decision was based on the forty-year record of safe transport in this material in PG III packagings, as well as the additional level of sift-proofness provided by the new design track record of the new siftproof packagings. PHMSA agrees with the UNSCOE's determination that siftproof flexible IBCs are appropriate packagings for this material and expects that this special provision will avoid unnecessary disruptions in the transport of this essential raw material while still ensuring safe transport of this material. The lack of a UN entry for this specific combination of physical and hazardous attributes—solid and toxic-by-inhalation—led to the development of this new UN entry by the UNSCOE. More specifically, UN3550 was created for cobalt dihydroxide to resolve the packaging and transport problem faced by shippers because of the new Division 6.1 classification. Consequently, based on the record of safe transport by multi-modal means in flexible IBCs, with no recorded accidents, incidents, or health issues as UN3077, the UNSCOE's resolution of this packaging conflict was to develop a new UN number, assigning appropriate packing provisions and creating a special packaging condition which permits the use of flexible IBCs.

*C. Part 173*

Section 173.4b

Section 173.4b specifies the hazard criteria and packaging requirements to qualify for the de minimis exception—*i.e.,* exceptions from certain HMR requirements for very minor amounts of hazardous material. For non-infectious biological specimens that contain minor amounts of preservatives that are a hazardous material, PHMSA proposes to add a reference to formaldehyde solution in paragraphs (b)(1)(i) and (b)(1)(ii) to clarify that the conditions for packing of the specimens applies to formaldehyde solution too. Currently, paragraph (b) excepts non-infectious biological specimens, such as those of mammals, birds, amphibians, reptiles, fish, insects, and other invertebrates, containing small quantities of chemical preservatives like ethanol or formaldehyde solution from the HMR, provided certain conditions are met. For example, paragraph (b)(1) provides instruction for when alcohol or an alcohol solution is used, such as when a specimen is placed in a plastic bag, that any free liquid in the bag must not exceed 30 mL. The ICAO Technical Instructions include a similar instruction, yet during a review of the ICAO Technical Instructions, the ICAO DGP noted that the exception does not address when formaldehyde solutions are used as preservatives for specimens; thus, there was no specified limit on the amount of free liquid formaldehyde solution that may be in a packaging. Consequently, the 2023–2024 ICAO Technical Instructions include an amendment to the de minimis provisions to specify limits for formaldehyde solutions. PHMSA agrees with this clarifying amendment and expects that adopting a similar change will enhance safety by removing uncertainty about whether the quantity limits also apply formaldehyde solutions.

Section 173.21

Section 173.21 describes situations in which offering for transport or transportation of certain materials or packages is forbidden. Examples of such forbidden shipments include materials designated as ''Forbidden'' in Column (3) of the HMT; electrical devices that are likely to generate sparks and/or a dangerous amount of heat; and materials that are likely to decompose or polymerize and generate dangerous quantities of heat or gas during decomposition or polymerization. This last group of materials is addressed in paragraph (f) of this section, which outlines the conditions under which materials which are likely to decompose or polymerize unless stabilized or inhibited in some manner (*e.g.,* with temperature controls or chemical stabilization) are authorized for transport.

PHMSA proposes to lower the temperature threshold at which transport of certain materials in portable tanks require temperature control. Specifically, this amendment would lower this threshold temperature for a material which is likely to decompose with a self-accelerated decomposition temperature (SADT) or polymerize with a self-accelerated polymerization temperature (SAPT) from 50 °C (122 °F) to 45 °C (113 °F) when transported in portable tanks. This means that if adopted, portable tanks containing materials likely to decompose or polymerize at temperatures greater than 45 °C will not be required to be stabilized or inhibited by temperature control and otherwise be forbidden from transport. In an earlier rulemaking, HM–215N, PHMSA gave notice that at that time, it would not adopt reductions in temperature thresholds for shipments in portable tanks and maintained a 50 °C (122 °F) threshold for requiring temperature control to allow for additional time to conduct research on the impacts of such a change and to allow additional time to fully consider the issue. However, PHMSA-sponsored research, which was completed in February 2021 by APT Research, Inc. (APT),[16] has informed our proposals in this NPRM. That research aimed to gather more information concerning temperature control of polymerizing substances in portable tanks and testing requirements for these substances intended to be transported in portable tanks or intermediate bulk containers (IBCs), as these two areas of safety controls in the HMR differed from those adopted in the international consensus standards and regulations. The report following research conducted by APT noted that ''relaxing the temperature control requirements as proposed by HM–215N is assessed to be an appropriate approach since it will harmonize U.S. regulations with international requirements and no additional hazards were identified for any common polymers during transport. Polymers in industry with SAPTs approaching 45 °C or 50 °C were found to be uncommon.'' PHMSA agrees with this assessment and is proposing to lower this temperature threshold at which temperature control is required for portable tanks containing a material which is likely to decompose with a SADT or polymerize with a SAPT from 50 °C (122 °F) or less to 45 °C (113 °F) or less. Although the APT research focused on polymerizing materials, PHMSA believes decomposing materials to behave similarly and has opted to apply the changed to both material types. PHMSA believes this proposed amendment will help facilitate international transportation of these goods and while maintaining the high standard of safety in the HMR for transportation of decomposing and polymerizing materials. To that end, PHMSA also proposes to amend the table in paragraph (f)(1) to accommodate

[15] *https://unece.org/DAM/trans/doc/2019/dgac10c3/UN-SCETDG-56-INF19e.pdf.*

[16] Report can be accessed in Docket No. PHMSA–2021–0092 on *www.regulations.gov.*

the specific temperature controls applicable to decomposing and polymerizing substances transported in portable tanks. This proposed amendment would align the HMR with temperature thresholds for substances with SADTs and SAPTs transported in portable tanks with those found in the UN Model Regulations and the IMDG Code. Further, based on this change specific to use of portable tanks, PHMSA would revise the table in paragraph (f)(1) to include packaging type as a factor in determining the criteria for control temperatures and emergency temperatures. Lastly, PHMSA proposes to amend paragraph (f) to provide a reference to the lower threshold of 45 °C (113 °F) for portable tanks and include a reference to proposed language concerning organic peroxides that require temperature control. Paragraph (f)(2) would be revised to (f)(2)(i)–(iii) to indicate general temperature control requirements for organic peroxides by type. These requirements are consistent with the UN Model Regulations and ensure that appropriate temperature control provisions are applied to organic peroxides not specifically listed in the Organic Peroxide Table in § 173.225.

Additionally, to fully adopt these proposed changes, PHMSA proposes to remove the phaseout language currently found in (f)(1)(i), which states that the provisions concerning polymerizing substances in paragraph (f) will be effective until January 2, 2023. Finally, based on results of the research, PHMSA proposes to maintain the current defining criteria for polymerizing substances, in § 173.124, that a polymerizing substance must successfully pass the UN Test Series E at the ''None'' or ''Low'' level, or achieve equivalent criteria using an alternative test method with the approval of the Associate Administrator, prior to selection of an appropriate portable tank or IBC. While this rulemaking action is being completed through the final rule stage, PHMSA directs stakeholders to review the enforcement discretion notice available on the PHMSA website [17] and in this rulemaking docket for the continued movement of these materials in accordance with regulations in effect prior to January 2, 2023.

Section 173.27

Section 173.27 outlines general requirements for transportation by aircraft, including requirements and limitations for hazardous materials transported in limited quantities. Currently, the provisions for combination packagings in paragraph (f)(2) specify that materials or articles not authorized as a limited quantity for transportation by aircraft include all PG I materials; self-reactive flammable solids in Division 4.1; spontaneously combustible materials in Division 4.2; and liquids that are dangerous when wet in Division 4.3. The ICAO Technical Instructions included similar language for Division 4.1 materials by allowing non-self-reactive Division 4.1 materials assigned to PG II or PG III to be transported as limited quantities. However, the ICAO DGP identified a conflict with limited quantity provisions in the ICAO Technical Instructions and the limited quantity provisions in the UN Model Regulations pertaining to four Division 4.1 materials, assigned PG II: ''UN 2555, Nitrocellulose with water with not less than 25 percent water by mass''; ''UN 2556, Nitrocellulose with alcohol with not less than 25 percent alcohol by mass, and with not more than 12.6 percent nitrogen, by dry mass''; ''UN 2557, Nitrocellulose, with not more than 12.6 percent nitrogen, by dry mass mixture with or without plasticizer, with or without pigment''; and ''UN 2907, Isosorbide dinitrate mixture with not less than 60 percent lactose, mannose, starch or calcium hydrogen phosphate.'' Despite not being defined as self-reactive, the UN Model Regulations have never included these specific Division 4.1 flammable solid materials for transport as limited quantities. The ICAO Technical Instructions were amended for consistency with the UN Model Regulations to clearly indicate that the transport of these four PG II materials in Division 4.1 are not authorized for transportation by aircraft as limited quantities. PHMSA proposes to add language in § 173.27(f)(2)(i)(D) to explicitly include the UN identification numbers for these materials, indicating that these materials may not be transported as limited quantities by aircraft. PHMSA expects that this change will add an additional level of safety by correcting this packaging provision, which has been inconsistent with those in place for materials that pose similar hazards.

Section 173.124

Section 173.124 outlines defining criteria for Divisions 4.1 (Flammable solid), 4.2 (Spontaneously combustible), and 4.3 (Dangerous when wet material). In an earlier rulemaking, PHMSA placed phaseout dates on the HMR provisions concerning transport provisions for polymerizing substances to allow time for the completion of research on various topics concerning their transport and to gather and review empirical evidence concerning the appropriate transport provisions for polymerizing substances. In line with other amendments proposed in this NPRM for the transport of polymerizing substances, PHMSA is proposing to remove paragraph (a)(4)(iv), which is the phaseout date of January 2, 2023. The result of this proposed amendment will be to remove the phaseout date and keep the existing requirements—as outlined in paragraph (a)(4)—effective beyond the January 2, 2023, date.

Section 173.137

Section 173.137 prescribes the requirements for assigning a packing group to Class 8 (corrosive) materials. PHMSA proposes to authorize the use of an additional test method, Test No. 439, *In Vitro* Skin Irritation: Reconstructed Human Epidermis Test Method'' as well as editorial changes to this section to provide clarity regarding the use of the authorized OECD Guidelines for the Testing of Chemicals.

Currently, the HMR requires offerors to classify Class 8 materials and assign a packing group based on tests performed in accordance with various OECD Guidelines for the Testing of Chemicals (TG), including a skin corrosion test (*in vivo*) and various *in vitro* testing guidelines that do not involve animal testing. Data obtained from the currently authorized test guidelines is the only data acceptable for classification and assignment of a packing group. Specifically for PG I, II, or III determinations, the HMR authorize the use of OECD Guidelines for the Testing of Chemicals, Test No. 435, ''*In Vitro* Membrane Barrier Test Method for Skin Corrosion'' and Test No. 404, ''Acute Dermal Irritation/Corrosion'' (an *in vivo* test method). The HMR also authorize the use of OECD Test No. 430 ''*In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance Test (TER)'' and Test No. 431, ''*In Vitro* Skin Corrosion: Reconstructed Human Epidermis (RHE) Test Method'', however the scope of what these tests can determine is limited. For that reason, Test No. 430 is authorized for use only to determine whether a material is corrosive or not; materials that are determined to be corrosive using this test require additional testing using Test Nos. 435 or 404 or assignment to the most conservative packing group, PG I. Similarly, Test No. 431 may also be used to determine whether or not a material is corrosive,

[17] *https://www.phmsa.dot.gov/regulatory-compliance/phmsa-guidance/phmsa-notice-enforcement-policy-regarding-international.*

however while this can identify when a corrosive must be assigned PG I, it cannot differentiate between PG II and III materials. Consistent with the UN Model Regulations, when this method does not clearly distinguish between PG II or PG III, the HMR allow the material to be transported as PGII without further in vivo testing. Consistent with changes made to the 22nd revised edition of the UN Model Regulations, PHMSA proposes to authorize an additional TG, OECD Test No. 439, ''*In Vitro* Skin Irritation: Reconstructed Human Epidermis Test Method'', as an authorized test, which may be used to exclude a material from classification as a corrosive material. Test No. 439 was adopted in the UN Model Regulations because it provides another means of testing, without the use of live animals, that can easily identify materials as non-corrosive. However, while Test No. 439 may be used for the hazard identification of irritant chemicals, it is limited in that it simply allows materials to be identified as either corrosive or non-corrosive to skin. Because this test method only identifies the material as corrosive or not, the UN Model Regulations added an additional provision requiring that materials, which are tested using Test No. 439 and indicate corrosivity, must be assigned to the most conservative PG (*i.e.,* PG I), unless additional tests are performed to provide more specific data that can be used to assign a less conservative PG. The addition of Test No. 439 as an authorized test method will provide greater flexibility for shippers to classify, package, and transport corrosive material, while maintaining the HMR safety standard for transport of corrosive materials.

With regard to the editorial changes in this section, PHMSA proposes to amend the text of this section to provide clarity regarding the authorized OECD Testing of Chemicals. Additionally, PHMSA proposes to amend the last paragraph of the introductory text, which currently states that assignment to packing groups I through III must be made based on data obtained from tests conducted in accordance with OECD Guideline Number 404 or Number 435, to remove the reference to Test No. 435. Since its update in 2015, the criteria for packing group assignments in Test No. 435 are no longer the same as the criteria for Test Guideline 404. PHMSA expects that these amendments will enhance safety by providing clarity regarding the proper testing and assignment of packing groups and promote efficiency by streamlining the assignment of packing groups.

Section 173.167

Section 173.167 contains the packaging instructions and exceptions for ID8000 consumer commodities. The ID8000 entry was added to the HMR in final rule HM–215K,[18] with the intent of aligning the HMR with the ICAO Technical Instructions for the air transportation of limited quantities of consumer commodity material. Based on inquiries from shippers and carriers, PHMSA understands that confusion exists regarding the requirements for hazard communication and ability to withstand pressure differential for packages of ID8000, consumer commodity material when moved by modes other than air. In 2012 and 2017, PHMSA issued letters of interpretation regarding the applicability and hazard communication requirements for ID8000 shipments.[19] Both of these letters of interpretation recognized that ID8000 shipments are inherently ''limited quantity'' and provided the opinion that for transportation by highway, rail, and vessel, ID8000 packages could be marked with the standard marking found in § 172.315(a)(1) (*i.e.,* without the ''Y''). In 2022, PHMSA received a petition for rulemaking, designated P–1762,[20] from the Council on the Safe Transportation of Hazardous Articles (COSTHA) relating to ID8000.

In consideration of P–1762 and consistent with these letters of interpretation regarding the requirements for ID8000 shipments, PHMSA proposes to revise the requirements in § 173.167 for ID8000, consumer commodity material. The intent of this proposed revision is to clearly address requirements for all modes of transportation, while continuing to recognize that the history and intent of the ID8000, consumer commodity, entry is closely tied to the ICAO Technical Instructions and air transportation.

First, PHMSA proposes editorial revisions to the title of the section and introductory language in paragraph (a). PHMSA proposes to rename the section ''ID8000 consumer commodities'' to distinguish this section from the historical ''ORM–D, consumer commodity'' HMT entry and an exception that ceased to be effective on December 31, 2020. PHMSA purposely phased out the ''ORM–D, consumer commodity'' classification and description to remove the dual system of shipping certain limited quantities domestically and internationally, as it was a source of confusion.

PHMSA acknowledges that there may be circumstances where persons need to transport ID8000 packages between locations—*e.g.,* to a warehouse for consolidation, etc.—without needing or using air transportation. Therefore, PHMSA recognizes the need to not only accommodate that portion of transport but also provide assurances that any ID8000 package is appropriately prepared for air transportation, regardless of whether air transportation is actually used. PHMSA also proposes to clarify that ID8000 material is inherently a limited quantity, by adding the phrase ''limited quantity'' to the § 173.167(a) introductory text. Finally, PHMSA proposes to remove the phrase ''when offered for transportation by aircraft'' from the introductory language in paragraph (a) and to restructure the existing first sentence of the section into two separate statements. This revision is intended to clarify that the materials and quantities listed in this section may be transported by all modes and to clarify that only the materials listed in paragraph (a) are eligible to be transported as ''ID8000, consumer commodity.''

More significantly, PHMSA proposes to revise the structure of the section by moving the two requirements in the currently effective language of paragraph (b)—applicable only to air transportation—to new subparagraphs (6) and (7) of paragraph (a). This would have the effect of making all packages of ID8000 material subject to the limited quantity marking requirements of § 172.315(b) to include the ''Y'' limited quantity marking, and other markings required by part 172 subpart D, including the ID number marking and PSN. This revision would also have the effect of requiring compliance with the § 173.27(c) pressure differential requirement for transportation by all modes. The intent of this proposed revision is two-fold:

1. Provide clarity to shippers on the hazard communication and pressure differential requirements for all shipments of ID8000, consumer commodity packages.

2. Ensure that ID8000, consumer commodity packages—wherever they are in the transportation stream—meet the requirements for air transportation.

As proposed, ID8000 packages would continue to be provided exceptions from shipping papers and labels when transported by highway and rail. PHMSA proposes to provide a labeling exception for ID8000 packages transported by vessel, which aligns with the labeling exception provided to

[18] 76 FR 3307 (Jan. 19, 2011).

[19] Ref. No. 11–0090 (May 3. 2012); Ref. No. 16–0075 (Jan. 9, 2016).

[20] *https://www.regulations.gov/document/PHMSA-2022-0007-0001.*

limited quantity packages transported by vessel. PHMSA seeks comment on this proposed revision to the hazard communication and pressure differential packaging requirements for ID8000, consumer commodity packages.

In addition to the revisions to § 173.167 requested in P–1762 discussed above, COSTHA submitted petition P–1761 [21] and additional requests in P–1762 that PHMSA is not proposing to adopt into the HMR. Specifically, in P–1762, COSTHA requested that PHMSA add a reference to § 173.167 in the individual sections that outline exceptions sections for Class 3, PG II and III (§ 173.150), UN3175 (§ 173.151), Division 6.1 PG III (§ 173.153), UN3077, UN3082, UN3334 and UN3335 (§ 173.155), and Class 2 non-toxic aerosols (§ 173.306). PHMSA does not propose to adopt this portion of P–1762. ID8000 is a specialized exception, designed only for a small subset of materials, and the materials are subject to stringent packaging requirements. We believe that adding a reference to § 173.167 to the exception sections listed above will create confusion for shippers by referencing an exception that most may not be able to adequately meet. All the materials and quantities authorized in § 173.167 may be transported as limited quantities by all modes. For the vast majority of hazardous material shippers who offer these materials in these small quantities, utilizing the limited quantity exception is the most appropriate and simplest option. PHMSA requests comment on this determination not to adopt this portion of P–1762.

Separately, in P–1761, COSTHA petitioned PHMSA to add a reference to the limited quantity marking section (§ 172.315) to the limited quantity packaging instructions in §§ 173.150, 173.151, 173.152, 173.153, 173.154, and 173.155. PHMSA does not propose to adopt the revision proposed in P–1761. Limited quantity shipments must be marked in accordance with § 172.315 (*see* § 172.315(a) and (b)). This longstanding requirement is clearly written in the HMR and PHMSA does not believe that any modification of the HMR is warranted. If shippers, carriers, or other entities involved in the transportation of hazardous materials are uncertain what marking requirements apply to a limited quantity shipment, that deficiency is best remedied through the proper implementation of a training program. PHMSA requests comment on this determination not to adopt P–1761.

[21] *https://www.regulations.gov/document/PHMSA-2022-0006-0001.*

Section 173.185

Section 173.185 prescribes requirements for the transportation of lithium cells and batteries. PHMSA proposes numerous changes to this section as follows.

*Paragraph (a) classification revisions:* Paragraph (a) provides general classification provisions, which include requirements for manufacturers and subsequent distributers of lithium cells and batteries to provide others in the supply chain a test summary of the battery, which contains information regarding the cells and batteries. PHMSA proposes to amend paragraph (a)(3) to except button cell batteries installed in equipment (including circuit boards) from these test summary requirements. This proposed amendment would give shippers of traditionally less regulated products, such as wrist watches and key fobs, an exception from the need to maintain a test summary. Currently, as provided in § 173.185(c)(2) and (c)(3), button cell batteries are excepted from the lithium battery marking requirements and the packing requirement to use a strong, rigid outer package, provided the battery is sufficiently protected by the equipment in which it is contained. For this reason, PHMSA finds that this proposed amendment maintains the safety standard for the transportation of lithium batteries consistent with the § 173.185(c) exceptions for smaller cells or batteries. Further, PHMSA proposes to make an editorial amendment by deleting the onset date of this requirement, January 1, 2022, as this date has passed, and paragraph (a)(3) now applies generally.

Additionally, PHMSA proposes to add a new paragraph (a)(5) to require marking the outer casing of lithium ion batteries with the Watt-hour (Wh) rating. This is consistent with the provisions for smaller cells or batteries in § 173.185(c)(1)(i), which require that ''each lithium ion battery subject to this provision must be marked with the Watt-hour rating on the outside case.'' PHMSA added this provision to the HMR in HM–224F.[22] While the requirement was added to the HMR for smaller cells or batteries (as a condition for use of an exception), no similar provision was added for other lithium ion cells and batteries (*i.e.,* those not offered in accordance with, or eligible for, the paragraph (c) exceptions). However, upon review, PHMSA noted that the international regulations generally require the marking of the Wh rating on the outside of the casing. Specifically, this is required in accordance with Special Provision 348 of the UN Model Regulations, Special Provision 188 of the IMDG Code, Section IA.2 of Packing Instruction 965 (for UN3480), and Section I.2 of Packing Instruction 966 (for UN3481) and 967 (for UN3481) of the ICAO Technical Instructions. PHMSA expects that this amendment will improve safety as the marking of the Wh rating on the outer casing of a lithium ion cell or battery assists a shipper in better understanding the energy capacity of the cell or battery, and thus, ensures compliance with hazard communication and packing provisions associated with Wh limitations.

[22] 79 FR 46011 (Aug. 6, 2014).

*Paragraph (b) packaging revisions:* Section 173.185(b)(3) contains packaging provisions for lithium cells or batteries packed with equipment. Specifically, paragraph (b)(3)(iii) provides two authorized packaging configurations for lithium cells and batteries packed with equipment. Specifically, it permits lithium cells and batteries, when packed with equipment, to be placed in: (1) inner packagings that completely enclose the cell or battery, then placed in an outer packaging; or (2) inner packagings that completely enclose the cell or battery, then placed with equipment in a package that meets the PG II performance requirements as specified in paragraph § 173.185(b)(3)(ii). The intent of the first option provided in paragraph (b)(3)(iii)(A) is to permit packing only the cells or batteries in a UN specification packaging and then to place this packaging with the equipment, for which the batteries are intended, in a non-UN specification outer packaging. The intent for the second option provided in paragraph (b)(3)(iii)(B) is to pack both the cells/batteries and the equipment in a UN specification outer packaging. In a working paper submitted at the ICAO 2020 Working Group Meeting, it was noted that the actual text for the two options was not clear. Specifically, paragraph (b)(3)(iii)(A) does not clearly state that the specification packaging containing the cells or batteries is then packed with the equipment into a non-specification outer packaging. Consistent with the clarifying revision in the ICAO Technical Instructions, and to align more closely with the text in packing instruction P903 of the UN Model Regulations, PHMSA proposes to revise paragraph (b)(3)(iii)(A) by clearly indicating that the cells or batteries must be placed in a specification package of a type that meets PG II performance requirements and then

placed together with the equipment in a strong, rigid outer non-specification packaging. For additional clarity, PHMSA also proposes to revise paragraph (b)(3)(iii)(B) by replacing the text ''package'' with the phrase ''packaging of a type'' when referring to the specification package meeting the PG II performance requirements.

PHMSA also proposes to add a new paragraph (b)(3)(iii)(C) to include a limitation for the number of batteries in the package, when transported by air. This is consistent with the provisions for smaller cells or batteries found in § 173.185(c)(4)(vi), which currently requires that for smaller cells or batteries contained in or packed with equipment and shipped by aircraft, the number allowed in each package is limited to the number required to power the piece of equipment, plus two spare sets. The original provision limiting the number in each packaging was added in HM–224F but did not apply to fully regulated shipments.

However, PHMSA notes that the limitation on the number of cells or batteries allowed in a package should apply to fully regulated shipments of lithium batteries packed with equipment, consistent with Section I.2 of Packing Instruction 966 (for UN3481) and Packing Instruction 969 (for UN3091) of the ICAO Technical Instructions. PHMSA did not intend to limit the scope of this requirement to just smaller cells or batteries, as a condition for the exception from full regulation under paragraph (c), as this packaging requirement is intended to limit the hazard of lithium battery shipments in air transportation. Limiting the number of batteries allowed to be packaged with equipment reduces hazard risks and increases safety.

Section 173.185(b)(4) contains packaging provisions for lithium cells or batteries contained in equipment. Consistent with the ICAO Technical Instructions, PHMSA proposes to add a new paragraph (b)(4)(iv) clarifying that for transportation by aircraft, when multiple pieces of equipment are packed in the same outer packaging, each piece of equipment must be packed to prevent contact with other equipment. This change is necessary because existing provisions in paragraph (b) could be interpreted to only apply to an outer packaging containing a single piece of equipment; however, an outer packaging may contain multiple pieces of equipment. This provision would more clearly communicate that for multiple pieces of equipment containing lithium cells or batteries in the same outer packaging, the equipment must be packed to prevent damage due to contact between the pieces of equipment.

*Paragraph (c) exceptions for smaller cells or batteries revisions:* Paragraph (c)(3) specifies hazard communication requirements pertaining to the use of the lithium battery mark. Currently, the heading of paragraph (c)(3) is titled ''hazard communication''; however, PHMSA proposes to amend this heading to read ''lithium battery mark.'' In general, hazard communication refers to various documentation and communication requirements, including but not limited to marking. PHMSA expects that this change will provide clarity by referring to the specific requirement for hazard communication stipulated in this paragraph. PHMSA proposes to remove the telephone number requirement from the lithium battery mark. The intended use of the telephone number and its effectiveness was discussed by the UNSCOE. Examples pointing to its ineffectiveness include differences in time zones and languages between the origin and destination of a shipment or intermediate transport point, and a lack of clarity on the expected capability of the person responding to a telephone call. The requirement to include a ''telephone number for additional information'' was originally introduced in the 15th revised edition of the UN Model Regulations. It was envisioned that the telephone number would be for the consignor or other responsible individual who could provide further information (*e.g.,* appropriate corrective actions should something be wrong with the package) beyond the minimal information required to be indicated on the package. At that time, there was minimal hazard communication and less awareness than is currently provided for in the UN Model Regulations. The consignor information can now be readily obtained through other means such as a bill of lading, shipping labels, or other paperwork thereby rendering the telephone number requirement as a piece of information on the lithium battery mark effectively redundant. The resulting consensus based on both the discussion and experience with transport of small lithium batteries was that the telephone number adds little value and removing the telephone number requirement from the mark would not reduce the effectiveness of the mark and therefore, not impact safety of transportation. Specifically, PHMSA proposes to revise the lithium battery mark by removing the double asterisk from the example figure and the corresponding requirement in paragraph (c)(3)(i)(C) to replace the double asterisk with the telephone number. PHMSA proposes a transition period authorizing continued use of the current lithium battery mark until December 31, 2026.

Section 173.185(c) provides exceptions for smaller cells or batteries. Paragraph (c)(4) contains provisions for exceptions for smaller lithium cells and batteries offered by air transportation. PHMSA proposes to remove the exceptions applicable to small lithium cells and batteries when they are not packed with, or contained in, equipment. This change was also implemented on January 1, 2022, by the International Air Transport Association (IATA) and member airlines will no longer accept packages of lithium batteries prepared in accordance with Section II of Packing Instructions 965 and 968 of the ICAO Technical Instructions. These exceptions in § 173.185(c)(4), had been developed to facilitate the global transport of small lithium cells and batteries. However, these exceptions removed many of the regulatory safeguards that provide for the safe transport of lithium batteries, including requirements for air operators to perform an acceptance check, information to be provided to the pilot-in-command, and package hazard communication. Furthermore, the exceptions for small lithium cells and batteries limit the ability of air operators to conduct the necessary safety risk assessments. The reduced hazard communication also increases the risk of small lithium cells and battery packages restricted to transport on cargo aircraft only being inadvertently loaded on a passenger aircraft. This proposed removal of these exceptions would increase the visibility of these shipments to operators who could perform an acceptance check to ensure proper packaging and hazard communication and ensure the information regarding the number and location of packages containing lithium batteries will be provided to the pilot-in-command. The proposed changes do not apply to the exceptions for small lithium cells and batteries packed with, or contained in, equipment. Specifically, PHMSA proposes to remove the following provisions:

- Paragraph (c)(4)(i), including Table 1 regarding the number and net quantity of lithium batteries.
- In paragraph (c)(4)(ii), the first sentence with reference to (c)(4).
- Paragraph (c)(4)(iii), regarding limitation of one package per consignment.
- Paragraph (c)(4)(v), regarding offering packages and overpacks to an

operator separately from cargo not subject to the HMR.

• Paragraph (c)(4)(viii), regarding packing cells and batteries with other hazardous materials in the same package or overpack.

As a consequence, the remaining provisions in paragraph (c)(4) applicable to lithium cells or batteries packed with, or contained in, equipment would be reorganized and renumbered. The paragraph (c)(4) introductory text would be revised to read ''Air Transportation. Smaller Lithium cell or batteries packed with, or contained in, equipment.'' Further, consistent with the ICAO Technical Instructions, paragraph (c)(4)(ii), concerning overpacks, would be revised to add a packing instruction that when placed into an overpack, packages must be secured within the overpack, and the intended function of each package must not be impaired by the overpack. The general provisions for overpacks in Part 5; 1.1 of the ICAO Technical Instructions require that packages must be secured within the overpack, and that the intended function of the package must not be impaired by the overpack. However, with the current construction of the provisions for small batteries in Packing Instructions 966, 967, 969, and 970, the general Part 5 overpack provisions do not apply, which could lead to packages being unsecured or even damaged by being unrestrained within an overpack. Therefore, these overpack provisions from Part 5 were added to the respective packing instructions to ensure protection against damage of the packages and their contents. These changes are consistent with the elimination of ''Section II'' from Packing Instructions 965 and 968 in the ICAO Technical Instructions. These proposed amendments maintain the level of safety (*i.e.,* hazard communication clarifications and revisions to lithium battery requirements for consistency). All the proposed amendments are expected to maintain the HMR's high safety standard. Safety benefits will also be derived from improved compliance related to consistency amongst domestic and international regulations. PHMSA solicits comment on the amendments proposed in this NPRM pertaining to need, benefits and costs; impact on safety and the environment; impact on environmental justice and equity; and any other relevant information.

Section 173.185(c)(5), corresponding to Section IB in ICAO Technical Instructions Packing Instructions 965 and 968, provides an exception from specification packing requirements for smaller lithium cells and batteries, not exceeding the size prescribed in paragraph (c)(1) and subject to certain quantity limits. PHMSA proposes to revise the paragraph (c)(5) introductory text to ''Air Transportation. Smaller lithium cell and batteries.'' Combined with the revision of the (c)(4) introductory text, this will assist users of this section by identifying the subparagraphs in paragraph (c) containing additional air transport provisions for lithium batteries, packed with, or contained in, equipment, and those only applicable to lithium cells and batteries. PHMSA proposes to revise paragraph (c)(5) by requiring packages to be capable of withstanding a three-meter stack test for a duration of 24 hours. Because lithium cells and batteries offered in accordance with paragraph (c)(5) (which corresponds with IB of Packing Instructions 965 and 968 of the ICAO Technical Instructions) are excepted from the specification package requirements, they are not presently subject to a stack test. However, the general requirements for limited quantity packages by air in § 173.27(f)(2)(vi), which are also excepted from specification packaging requirements, do require that each package be capable of withstanding a three-meter stack test for a duration of 24 hours. In considering the packaging standards between limited quantity packages and those for smaller lithium cells and batteries, it was agreed by the DGP that packages must be capable of withstanding a stack test, in parallel with the requirement for limited quantity packages. PHMSA agrees with introducing a stack test as a preventative safety measure against potential damage to lithium battery packages from stacking of packages and proposes to include a stack test requirement in paragraph (c)(5).

Lastly, consistent with corresponding revisions to international standards, PHMSA is proposing editorial revisions in paragraphs (b)(5), (e)(5), (e)(6), and (e)(7), where references to ''battery assemblies'' are removed and replaced with the phrase ''cells and batteries,'' as used throughout the section. Paragraph 173.185(a)(1) requires each lithium cell or battery to be of the type proven to meet the criteria in part III, sub-section 38.3 of the UN Manual of Tests and Criteria. The 38.3.2.3 definition for ''battery'' states that:

> ''. . . Units that are commonly referred to as ''battery packs,'' ''modules'' or ''battery assemblies'' having the primary function of providing a source of power to another piece of equipment are, for the purposes of the Model Regulations and this Manual, treated as batteries.''

Use of ''battery assemblies'' may be a source of confusion, as the reader may understand it to have a separate meaning from ''battery,'' yet it is not specifically defined in the HMR. Further, based on the requirement above to comply with the UN Manual of Tests and Criteria and its associated meaning of ''battery assemblies,'' PHMSA considers that the use of the term ''battery assemblies'' is redundant with the term ''battery'' in the context of these transport requirements and proposes to revise the text to reduce confusion of the provisions in these paragraphs, regarding applicability to the assembly or to the cells and batteries contained within an assembly. PHMSA expects that the proposed changes to § 173.185 will provide clarity, thus enhancing the safety standard in the HMR for transportation of lithium batteries.

Section 173.224

Section 173.224 establishes packaging and control and emergency temperatures for self-reactive materials. The Self-Reactive Materials Table in paragraph (b) of this section specifies self-reactive materials authorized for transportation without first being approved for transportation by the Associate Administrator for Hazardous Materials Safety and requirements for transporting these materials. As a result of new self-reactive materials formulations becoming commercially available, the 22nd revised edition of the UN Model Regulations includes updates to the list of specified self-reactive materials authorized for transportation without prior approval. To maintain consistency with the UN Model Regulations, PHMSA proposes to update the Self-Reactive Materials Table by adding a new entry for ''(7-Methoxy-5-methyl-benzothiophen-2-yl) boronic acid''. PHMSA also proposes to correct the name of one of the listed self-reactive substances on the self-reactive substances table. Currently, ''2-(N,N-Methylaminoethylcarbonyl)-4-(3,4-dimethyl-phenylsulphonyl)benzene diazonium zinc chloride'' is listed, however this formulation name should be ''2-(N,N-Methylaminoethylcarbonyl)-4-(3,4-dimethylphenylsulphonyl) benzenediazonium hydrogen sulphate''. While reviewing the self-reactive table in the UN Model Regulations and ICAO Technical Instructions, PHMSA discovered that ''2-(N,N-Methylaminoethylcarbonyl)-4-(3,4-dimethyl-phenylsulphonyl)benzene diazonium zinc chloride'' does not appear in any other international regulations but that ''2-(N,N-

Methylaminoethylcarbonyl)-4-(3,4-dimethylphenylsulphonyl) benzenediazonium hydrogen sulphate'' does and includes identical packaging provisions. PHMSA does not believe that there is any formulation called ''2-(N,N-Methylaminoethylcarbonyl)-4-(3,4-dimethyl-phenylsulphonyl)benzene diazonium zinc chloride'' that exists and that this entry as it appears is the result of an editorial error in which two individual formulation names were inadvertently combined. Therefore, PHMSA proposes to correct the name associated with this formulation by removing the suffix ''benzene diazonium zinc chloride'' and replacing it with ''benzenediazonium hydrogen sulphate.'' PHMSA requests comment regarding this change, specifically regarding whether the deletion of ''2-(N,N-Methylaminoethylcarbonyl)-4-(3,4-dimethyl-phenylsulphonyl)benzene diazonium zinc chloride'' should be reconsidered.

In addition, PHMSA proposes assigning a new ''Note 6'' to this entry among the list of notes following the table. ''Note 6'' would provide concentration limits of water and organic impurities for this new self-reactive material. PHMSA expects that adding provisions for the transport of (7-Methoxy-5-methyl-benzothiophen-2-yl) boronic acid formulations will facilitate its transport while maintaining the HMR's safe standard for transportation of self-reactive hazardous materials.

PHMSA also proposes to revise § 173.224(b)(4). In a previous final rule, HM–215O, PHMSA revised § 173.224 to authorize self-reactive materials to be transported and packed in accordance with packing method OP8 where transport in IBCs or portable tanks is permitted in accordance with § 173.225, provided that the control and emergency temperatures specified in the instructions are complied with. This change allowed materials that are authorized in bulk packagings to also be transported in appropriate non-bulk packagings. PHMSA proposes to make an editorial correction to a reference to the formulations listed in § 173.225. In the course of adding this provision, PHMSA incorrectly directed users to the Organic Peroxide IBC Table by referencing 173.225(f) however the table is found in 173.225(e); therefore, PHSMA proposes to correct that sentence to refer to 173.225(e).

Section 173.225

Section 173.225 prescribes packaging requirements and other provisions for organic peroxides. As a result of new peroxide formulations becoming commercially available, the 22nd revised edition of the UN Model Regulations includes updates to the list of identified organic peroxides, which provides for formulations of these materials that are authorized for transportation without prior approval. To maintain consistency with the UN Model Regulations, PHMSA proposes to update the Organic Peroxide Table in § 173.225(c) by adding new entries for ''tert-Butylperoxy isopropylcarbonate,'' ''tert-hexyl peroxypivalate,'' and ''acetyl acetone peroxide,'' and identifying them as ''UN3105, Organic peroxide type D, liquid''; ''UN3117, Organic peroxide type E, liquid, temperature controlled''; and ''UN3107, Organic peroxide type E, liquid,'' respectively. Additionally, PHMSA proposes to add a ''Note 32'' following the table, in association with the new entry for ''acetyl acetone peroxide,'' to indicate that the active oxygen concentration for this formulation is limited to concentrations of 4.15% active oxygen or less. PHMSA also proposes to revise the Organic Peroxide Portable Tank Table in paragraph (g) to maintain alignment with the 22nd revised edition of UN Model Regulations by adding new formulation ''tert-Butyl hydroperoxide, not more than 56% with diluent type B,'' identified by ''UN3109, Organic peroxide type F, liquid.'' This amendment would also include the addition of ''Note 2'' following the table to specify that diluent type B is tert-Butyl alcohol. PHMSA expects that adding provisions for the transport of these newly available peroxide formulations will facilitate transportation of these materials, while maintaining the HMR's safety standard for transportation of organic peroxide hazardous materials.

Section 173.232

Section 173.232 outlines the packaging requirements for articles containing hazardous materials. For the purposes of this section, an ''article'' means machinery, apparatus, or other device that contains one or more hazardous materials—or residues thereof—that are an integral element of the article, necessary for its functioning, and that cannot be removed for the purpose of transport. Currently, these articles are forbidden from transport on passenger and cargo aircraft, as specified in column (9) of the HMT. However, the 2023–2024 ICAO Technical Instructions include new provisions permitting the transport of certain articles containing hazardous materials aboard passenger and cargo aircraft. These new provisions allow articles described and classified as ''UN3548, Articles containing miscellaneous dangerous goods, n.o.s., 9'' or ''UN 3538, Articles containing non-flammable, non-toxic gas, n.o.s., 2.2'' to be transported by cargo and passenger aircraft under certain conditions. PHMSA proposes to make changes consistent with those provisions by adding two new packaging provisions in § 173.232, in addition to the new special provisions A224 and A225 discussed above in Section-by-Section Review of NPRM Proposals for § 172.102. Specifically, PHMSA proposes to specify in paragraph (h) that air transport is permitted for UN3548 articles containing less than 5 L or 5 kg of environmentally hazardous substances when all other conditions of § 173.232 are met. In a new paragraph (i), the same requirements are proposed for articles transported under UN3538, which: (1) do not have an existing proper shipping name; (2) contain only gases of Division 2.2 without a subsidiary hazard, except for refrigerated liquefied gases and other gases that are forbidden for transport on passenger aircraft, where the quantity of the Division 2.2 gas exceeds the quantity limits for UN 3363, as prescribed in § 173.222; (3) the quantity of gas in the article does not exceed 75 kg when transported by passenger aircraft or 150 kg when transported by cargo aircraft; and (4) gas containing receptacles within the article must meet the requirements of Part 173 and Part 175, as appropriate., or meet a national or regionally recognized pressure receptacle standard.

Additionally, both packaging provisions would also permit the transport of these articles, containing lithium cells or batteries, provided that the batteries meet the requirements specified in § 173.185. The aim of these new provisions is to facilitate the transport of large articles containing environmentally hazardous substances, such as aircraft landing gear struts filled with hydraulic fluid and large articles containing a non-flammable, non-toxic gas, such as new types of magnetic resonance imaging (MRI) scanners, which often contain compressed helium, as well as lithium cells or batteries. As a participant on the Dangerous Goods Panel, PHMSA expects that the proposed packaging provisions provide an appropriate level of safety to allow these items to be transported by air and are appropriate for incorporation in the HMR.

Section 173.301b

Section 173.301b outlines additional general requirements when shipping gases in UN pressure receptacles (*e.g.,* cylinders). The 22nd revised edition of

the UN Model Regulations updated references of several authorized standards for ensuring proper valve protection. In order to maintain the current safety standard of the HMR for valve protection and harmonization with the requirements for UN pressure receptacles, PHMSA proposes to also update these references. Currently, paragraph (c)(1) requires that quick release cylinder valves for specification and type testing must conform to the requirements in ISO 17871:2015(E), ''Gas cylinders—Quick-release cylinder valves—Specification and type testing.'' ISO 17871, in conjunction with ISO 10297 and ISO 14246, specifies design, type testing, marking, manufacturing tests, and examination requirements for quick-release cylinder valves, intended to be fitted to refillable transportable gas cylinders and pressure drums and tubes used to transport compressed or liquefied gases or extinguishing agents charged with compressed gases to be used for fire-extinguishing, explosion protection, and rescue applications. As part of its regular review of its standards, ISO updated and published the second edition of ISO 17871 as ISO 17871:2020(E). PHMSA proposes to revise the valve requirements in this paragraph to require quick release cylinder valves for specification and type testing to conform to ISO 17871:2020(E). After December 31, 2026, conformance with ISO 17871:2015(E) will no longer be authorized in the UN Model Regulations; therefore, for consistency, PHMSA also proposes to add a phaseout date of December 31, 2026, for continued conformance with ISO 17871:2015(E). The second edition of this standard broadens the scope to include quick release valves for pressure drums and tubes and specifically excludes the use of quick-release valves with flammable gases. Other notable changes include the addition of the valve burst test pressure, the deletion of the flame impingement test, and the deletion of the internal leak tightness test at −40 °C for quick-release cylinder valves, used only for fixed firefighting systems installed in buildings. PHMSA expects that updating the requirements for conformance of UN pressure receptacles with this document will maintain the HMR safety standard for these packagings and facilitate compliance with valve requirements domestically and internationally by aligning the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations. PHMSA reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations.

PHMSA also proposes to revise paragraph (c)(2), which requires UN pressure receptacles to have their valves protected from damage to prevent unintentional release of the contents of the receptacles. Various methods on how to achieve damage protection are provided, including equipping the container with a valve cap or guard that conforms to ISO 11117:2008, ''Gas cylinders—Valve protection caps and guards—Design, construction and tests'' and the Technical Corrigendum 1, a complementary document to the standard. As part of its regular review of its existing standards, in 2019, ISO published an updated version of this standard, 11117:2019, which was adopted in the 22nd revised edition of the UN Model Regulations as a permitted conformance standard for valve protection. This document updates the 2008 version, currently authorized in paragraphs (c)(2)(ii) and (c)(2)(iii). In accordance with the UN Model Regulations, PHMSA also proposes to authorize the continued use of ISO 11117:2008, in conjunction with the Technical Corrigendum, until December 31, 2026. Similarly, for metal hydride storage systems, damage protection of the valve must be provided in accordance with ISO 16111:2008, ''Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride.'' As part of its regular review of its existing standards, in 2018, ISO published an updated version of this standard, which was adopted in the 22nd revised edition of the UN Model Regulations as a permitted conformance standard for valve protection. Therefore, to maintain alignment with the UN Model Regulations' requirements for UN metal hydride storage systems, PHMSA proposes to update the required standard for protection of valves to ISO 16111:2018 and include a phaseout date of December 31, 2026, for continued use of valve guards conforming to valve protection standards in ISO 16111:2008. PHMSA has reviewed the updated ISO standards as part of its regular participation in the review of amendments proposed for the UN Model Regulations and has determined use of the update ISO 16111 will maintain the HMR safety standard for protection of valves used in UN metal hydride storage systems.

Paragraph (d) requires that when the use of a valve is prescribed, the valve must conform to the requirements in ISO 11118:2015(E), ''*Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods.*'' ISO 11118:2015 specifies minimum requirements for the material, design, inspections, construction and workmanship, manufacturing processes, and tests at manufacture of non-refillable metallic gas cylinders of welded, brazed, or seamless construction for compressed and liquefied gases including the requirements for their non-refillable sealing devices and their methods of testing. For consistency with the UN Model Regulations, PHMSA proposes to revise the valve conformance requirements to include a reference to the 2019 amendment of ISO 11118, specifically, ISO 11118:2015/Amd 1:2019, which ISO published as a supplement to ISO 11118:2015(E). This supplement corrects the references and numerous typographical errors. The amendment also includes updates to the marking requirements in the normative Annex A, which includes clarifications, corrections, and new testing requirements. Additionally, paragraph (d) currently indicates that the manufacture of valves to ISO 13340:2001(E) is authorized until December 31, 2020. Since this date has passed, PHMSA proposes to remove reference to this expired authorization.

Updating references to these documents would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to the design and construction of UN pressure drums. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use.

Lastly, paragraph (f) of this section requires that for the transportation of hydrogen bearing gases, a steel UN pressure receptacle bearing an ''H'' mark must be used. The ''H'' marking indicates that the receptacle is compatible with hydrogen embrittling gases. However, some hydrogen bearing gases may also be transported in composite pressure receptacles with steel liners as provided in § 173.311. Therefore, PHMSA proposes to amend § 173.301b(f) to clarify that these compatibility provisions apply to steel UN cylinders as well as composite pressure receptacles that include steel liners. PHMSA expects that this amendment will add an additional level of safety by ensuring that suitability of materials is considered when shippers opt to use composite cylinders for the transport of hydrogen bearing gases.

Section 173.302c

Section 173.302c outlines additional requirements for the shipment of

adsorbed gases in UN pressure receptacles. Currently paragraph (k) requires that filling of UN pressure receptacles with adsorbed gases be performed in accordance with Annex A of ISO 11513:2011, ''*Gas cylinders—Refillable welded steel cylinders containing materials for sub-atmospheric gas packaging (excluding acetylene)—Design, construction, testing, use and periodic inspection.*'' As part of its periodic review and updates of standards, ISO has developed an updated second edition (published in 2019). The updated ISO 11513 standard was adopted in the 22nd revised edition of the UN Model Regulations for use for cylinders filled with adsorbed gases. Similarly, PHMSA proposes to require use of Annex A of ISO 11513:2019. Specifically, this amendment would require the use of the 2019 standard and provide a phaseout date for continued use of the ISO 11513:2011 until December 31, 2024. Updating references to this document would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to the shipment of adsorbed gases in UN pressure receptacles. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use.

Section 173.311

Section 173.311 specifies requirements for transportable UN metal hydride storage systems (UN3468) that are comprised of pressure receptacles not exceeding 150 L (40 gallons) in water capacity and having a maximum developed pressure not exceeding 25 MPa (145 psi). Currently, the HMR requires that these metal hydride storage systems be designed, constructed, initially inspected, and tested in accordance with ISO 16111:2008, ''Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride.'' However, the 22nd revised edition of the UN Model Regulations updated references to this standard to authorize the use of the updated 2018 version of ISO 16111, while allowing the 2008 version to remain authorized for use until December 31, 2026. Therefore, for consistency with the requirements for UN metal hydride storage systems, PHMSA proposes to adopt changes made in the 22nd revised edition of the UN Model Regulations to authorize the use of ISO 16111:2018 and add a phaseout date of December 31, 2026, for continued use of ISO 16111:2008. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and has determined the updated edition of ISO 16111 will maintain the HMR safety standards for the design, construction, initial inspection, and testing of UN metal hydride storage systems.

*D. Part 175*

Section 175.1

Section 175.1 outlines the purpose, scope, and applicability of the Part 175 requirements for the transport of hazardous materials by aircraft. Specifically, these requirements are in addition to other requirements contained in the HMR. The aircraft-level risk presented by hazardous materials depends on factors, such as the total quantity and type, potential interactions, and existing risk mitigation measures. When accepting hazardous materials for transportation by aircraft, aircraft operators (*i.e.,* air carriers) must also comply with Federal Aviation Administration (FAA) Safety Management System (SMS) requirements in 14 CFR part 5—Safety Management Systems, that impacts how operators comply with requirements of the HMR.

PHMSA proposes to add a new paragraph (e) to the HMR that includes a reference that directs operators to the FAA's requirements to have an SMS in place, in accordance with 14 CFR part 121. Safety risk management is the process within the SMS composed of describing the system, identifying the hazards, and analyzing, assessing, and controlling risk. According to 14 CFR part 5, certain aircraft operators are certificated, in accordance with 14 CFR part 121, to the appropriate SMS requirements and a note referencing guidance for performing a safety risk assessment. This action will not introduce new regulatory burden, as these SMS requirements have been in place for several years. However, PHMSA expects that adding a reference to these requirements in the HMR will provide additional clarity for aircraft operators, with respect to the applicability of SMS to the acceptance and transport of hazardous materials at the aircraft level. Finally, PHMSA notes that FAA Advisory Circular (AC) 120–121 [23] provides information relating to the risk assessments and potential mitigation strategies to items in the aircraft cargo compartment. When using this document, aircraft operators should refer to requisite ICAO documents, check the FAA websites for additional information on cargo safety and mitigations relating to fire events, and consider safety enhancements developed and promoted by industry groups.

Section 175.10

Section 175.10 specifies the conditions under which passengers, crew members, or an operator may carry hazardous materials aboard an aircraft. Consistent with revisions to the ICAO Technical Instructions, PHMSA proposes revisions in paragraphs (a)(15) and (a)(17) applicable to the carriage of wheelchairs or other mobility aids powered by batteries. Specifically, in paragraphs (a)(15)(v), (a)(15)(vi) and (a)(17)(v), which currently require that the battery be securely attached to the wheelchair or mobility aid or be removed and packed appropriately, PHMSA proposes to add the supplemental requirements that the battery is adequately protected against damage by the design of the wheelchair or mobility aid. The proposed revisions will enhance the safe carriage of these battery-powered items aboard passenger aircraft by requiring combined measures of protection against damage and securement of batteries or otherwise removed and packed appropriately. Furthermore, the proposed revisions will assist passengers traveling with battery-powered wheelchairs or mobility aids by providing better clarity on the required safety measures. Additionally, PHMSA proposes to revise introductory text to paragraphs (a)(14) and (a)(26) to specifically state that each lithium battery must be of a type which meets the requirements of UN Manual of Tests and Criteria, Part III, Subsection 38.3. Currently this requirement is outlined in every other subparagraph under paragraph (a) pertaining to lithium batteries but was inadvertently omitted in prior rulemakings for paragraphs (a)(14) and (a)(26). Therefore, for clarity and consistency with the ICAO Technical Instructions, PHMSA proposes this editorial change, and expects that it will improve safety by ensuring that it is understood that all batteries transported under the provisions of that paragraph are subject to UN testing.

PHMSA also proposes to revise paragraph (a)(18) regarding the carriage of portable electronic devices (*e.g.,* watches, cell phones, etc.). Currently, the HMR allows these devices to be carried both in carry-on baggage and checked baggage. However, this paragraph stipulates that for lithium battery-powered devices carried in

[23] *https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_120-121.pdf.*

checked baggage, the devices must be completely switched off (*i.e.,* not in sleep or hibernation mode). The requirement to turn off battery powered devices was added in the ICAO Technical Instructions and the HMR as a result of temporary security restrictions that prohibited the carriage of large portable electronic devices in the cabin on certain flights. In addition to the restriction of electronic devices in the aircraft cabin, a requirement to turn off all devices powered by lithium batteries when placed in checked baggage was added to prevent risks from overheating in those devices that might remain active when not powered off (*e.g.,* laptops). This requirement to turn devices off was applied to all devices powered by batteries or cells, regardless of their size and level of risk, primarily to simplify the regulations and facilitate its implementation. However, in light of the need for passengers to carry active devices powered by small cells in checked baggage (*e.g.,* small tracking devices), PHMSA proposes to provide some conditional relief from this requirement for passengers and crew by applying the provision to switch off the device to only those devices powered by lithium metal batteries exceeding 0.3 grams lithium content or lithium ion batteries exceeding 2.7 Wh. This is consistent with paragraph (a)(26) which allows baggage equipped with lithium batteries to be carried as checked baggage if the batteries do not exceed 0.3 grams of lithium content or 2.7 Wh, respectively. Based on similar battery size criteria in paragraph (a)(26), PHMSA does not expect a reduction in safety of transporting lithium battery-powered devices aboard passenger aircraft under the proposed exception. Moreover, small lithium battery-powered devices are not known or expected to create heat in the same manner as portable electronic devices powered by much larger batteries. PHMSA expects that this amendment will avoid unnecessary operational challenges for States, operators, and the travelling public without compromising safety.

Additionally, PHMSA proposes to add clarification in paragraph (a) that the most appropriate exception from this section shall be selected when hazardous materials are carried by aircraft passengers or crewmembers. For example, paragraph (a)(19) specifies conditions for battery-powered smoking devices such that a person cannot opt to follow the more generalized portable electronic device conditions of paragraph (a)(18). PHMSA expects that this clarification will support the safe transport of excepted hazardous materials by ensuring that they will be transported in a manner that is most appropriate for the hazard they may pose.

Finally, PHMSA proposes to make a clarifying amendment to paragraph (a)(26) regarding baggage equipped with lithium batteries. Oftentimes, the baggage has built-in features that cannot be turned off and the intent of paragraph (a)(26) is the devices are not required to be turned off when the baggage is checked. Therefore, PHMSA proposes to clarify paragraph (a)(26) to state plainly that, under the conditions allowing baggage to be checked without removing the batteries, electronic features of the baggage do not have to be switched off.

Section 175.33

Section 175.33 establishes requirements for shipping papers and for the notification of the pilot-in-command when hazardous materials are transported by aircraft. Consistent with the proposed removal of the exceptions applicable to small lithium cells and batteries, as discussed in the Section-by-Section Review discussion of changes in § 173.185(c), PHMSA proposes to revise paragraph (a)(13)(iii) to remove reference to UN3480, lithium ion batteries and UN3090 lithium metal batteries. Currently, paragraph (a)(13)(iii) conditionally excepts certain lithium batteries [24] that are prepared in accordance with the paragraph § 173.185(c) exceptions for smaller cells and batteries from the requirement to be included with the information to be provided to the pilot-in-command. Since smaller lithium cells and batteries that are not packed with or contained in equipment are no longer provided relief from hazard communication requirements, such as shipping papers, PHMSA proposes a conforming change to this section to also require the inclusion of lithium cells and batteries as part of the information provided to the pilot-in-command. This revision will maintain the HMR standard of hazard communication for transportation of lithium cells and batteries by air.

*E. Part 178*

Section 178.37

Section 178.37 outlines the construction requirements for DOT specification 3AA and 3AAX seamless steel cylinders. As summarized in the Section IV. Section-by-Section Review discussion of changes to § 171.7, PHMSA proposes to incorporate by reference the revised third edition (published in 2019) of ISO 9809–1, ''Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 1: Quenched and tempered steel cylinders and tubes with tensile strength less than 1100 *Mpa.*'' Currently, ISO 9809–1 is referenced in § 178.37 as an approved methodology by which to perform bend tests, instead of the required flattening test specified in paragraph (j). As currently written, paragraph (j) does not specify which edition is authorized, yet multiple editions are incorporated by reference in § 171.7. PHMSA aims to make the requirement clearer by proposing to authorize use of the most current version of ISO 9809–1 only. PHMSA reviewed the 2019 version and concludes that the bend test provisions in the standard remain a suitable alternative for the flattening test provisions of paragraph (j). This clarification will improve compliance with the appropriate version of ISO 9809–1 and ensure an appropriate level of safety.

Section 178.71

Section 178.71 prescribes specifications for UN pressure receptacles. Several updates to referenced standards pertaining to the design, construction, and maintenance of UN pressure receptacles were added in the 22nd revised edition of the UN Model Regulations. To maintain consistency with the UN Model Regulations, PHMSA proposes similar updates to those ISO standards incorporated by reference in this section.

Paragraph (f) outlines required conformance to ISO design and construction standards, as applicable, for UN refillable welded cylinders and UN pressure drums in addition to the general requirements of the section. ISO 21172–1:2015, ''*Gas cylinders—Welded steel pressure drums up to 3,000 litres capacity for the transport of gases—Design and constructionmdash;Part 1: Capacities up to 1,000 litres*'' is currently included in paragraph (f)(4) and specifies the minimum requirements for the material, design, fabrication, construction and workmanship, inspection, and testing at manufacture of refillable welded steel pressure drums of volumes up to 1,000 L (264 gallons). The 22nd revised edition of the UN Model Regulations includes an amendment to ISO 21172:2015—ISO 21172–1:2015/Amd1:2018, ''*Gas cylinders—Welded*

[24] UN3480, Lithium ion batteries, UN3481, Lithium ion batteries, contained in equipment, UN3090, Lithium metal battery including lithium alloy batteries, and UN3091, Lithium metal batteries packed with/contained in equipment.

*steel pressure drums up to 3,000 litres capacity for the transport of gases—Design and construction—Part 1: Capacities up to 1,000 litres—Amendment 1.*'' ISO 21172–1:2015/Amd1:2018 is a short supplemental amendment to be used in conjunction with ISO 21172–1:2015. It removes the restriction on use of UN pressure drums for transportation of corrosive materials. In addition to adding a reference for use of this supplemental document, the UN Model Regulations added a phase out date of manufacture of December 31, 2026, until which ISO 21172–1:2015 UN pressure drums may continue to be manufactured without the supplement. Similarly, PHMSA proposes to require conformance of UN pressure drums with ISO 21172 used in combination with the supplemental amendment, and adding a phaseout date of December 31, 2026, for continued manufacture of UN pressure drums in conformance with ISO 21172–1:2015 without the supplemental amendment.

Additionally, PHMSA proposes to revise paragraphs (g), (k), and (n) which outline the design and construction requirements for UN refillable seamless steel cylinders, UN acetylene cylinders, and UN cylinders for the transportation of adsorbed gases, respectively. Currently this section requires that these UN cylinders conform to the second edition (published in 2010) of one or more of following ISO standards:

(1) ISO 9809–1:2010 ''*Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1,100 MPa.*'';

(2) ISO 9809–2, ''*Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 2: Quenched and tempered steel cylinders with tensile strength greater than or equal to 1,100 MPa.*''.

(3) ISO 9809–3, ''*Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 3: Normalized steel cylinders.*''

This series of ISO standards specifies minimum requirements for the material, design, construction and workmanship, manufacturing processes, examination, and testing at time of manufacture for refillable seamless steel gas cylinders and tubes with water capacities up to and including 450 L (119 gallons). PHMSA proposes to modify the design and construction requirements for UN cylinders by authorizing the use of the revised third edition of ISO 9809, Parts 1 through 3. Additionally, PHMSA proposes to add a phaseout date of December 31, 2026, for continued design, construction, and testing of UN cylinders conforming to the second edition. Finally, PHMSA proposes to remove reference to the first edition of these standards as the authorized date (December 31, 2018) for continued manufacture in accordance with this edition has expired. PHMSA has reviewed these updated standards as part of its regular participation in the review of amendments proposed for the UN Model Regulations and expects their required use will maintain the HMR safety standard for manufacture of UN cylinders.

Paragraph (i) outlines required conformance to ISO design and construction standards for UN non-refillable metal cylinders. PHMSA proposes to remove reference to ISO 11118:1999 and add a reference to a supplemental amendment, ISO 11118:2015/Amd 1:2019. Current paragraph (i) requires, in addition to the general requirements of the section, conformance with ISO 11118:2015, ''*Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods.*'' ISO 11118:2015 specifies minimum requirements for the material, design, inspections, construction, workmanship, manufacturing processes, and tests for manufacture of non-refillable metallic gas cylinders of welded, brazed, or seamless construction for compressed and liquefied gases including the requirements for their non-refillable sealing devices and their methods of testing. PHMSA proposes to revise the valve conformance requirements to include a reference to the 2019 supplemental amendment (ISO 11118:2015/Amd 1:2019), which ISO published to be used in conjunction with an ISO 11118:2015. Additionally, PHMSA proposes to add an end date of December 31, 2026, to the authorization to use ISO 11118:2015 when not used in conjunction with the supplemental 2019 amendment, ISO 11118:2015 +Amd.1:2019. This supplemental amendment corrects the identity of referenced clauses and corrects numerous typographical errors. PHMSA has reviewed this supplemental amendment as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with the use of these two documents.

Paragraph (m) outlines required conformance to ISO standards for the design and construction requirements of UN metal hydride storage systems. Currently this paragraph requires that metal hydride storage systems conform to ISO 16111:2008, ''*Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride,*'' in addition to the general requirements of this section. As part of its regular review of its existing standards, in 2018 ISO published an updated version of this standard, which was adopted in the 22nd revised edition of the UN Model Regulations. In addition to permitting construction in accordance with ISO 16111:2018, the 22nd revised edition of the UN Model Regulations added a December 31, 2026, phaseout date for the continued construction of UN metal hydride storage systems conforming to ISO 16111:2008. Therefore, to maintain alignment with the UN Model Regulations, PHMSA proposes to add the same phaseout date of December 31, 2026.

Paragraph (n) prescribes the design and construction requirements for UN cylinders for the transportation of adsorbed gases. In addition to updating reference for required conformance with ISO 9809–1:2019 as discussed above, PHMSA also proposes to require conformance to an updated version of ISO 11513, ''*Gas cylinders—Refillable welded steel cylinders containing materials for sub-atmospheric gas packaging (excluding acetylene)—Design, construction, testing, use and periodic inspection.*'' ISO 11513 specifies minimum requirements for the material, design, construction, workmanship, examination and testing at manufacture of refillable welded steel cylinders for the sub-atmospheric pressure storage of liquefied and compressed gases. The second edition has updated packing instructions and allows the use of ultrasonic testing as a nondestructive method for inspection of the cylinders. Currently the HMR require that UN cylinders that are used for the transportation of adsorbed gases conform to either ISO 9809–1:2010 or ISO 11513:2011. PHMSA proposes to require conformance with the updated ISO 11513:2019 in addition to the option of the updated ISO 9809–1:2019 edition. PHMSA also proposes to add a phaseout date of December 31, 2026, to allow UN cylinders to continue to be built in conformance with ISO 11513:2011.

Updating reference to this standard would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations, pertaining to the design and construction of UN cylinders used for the transportation of adsorbed gases. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and expects that the required use will maintain the HMR

safety standard for the manufacture of UN cylinders.

Section 178.75

Section 178.75 prescribes specifications for multiple-element gas containers (MEGCs), which are assemblies of UN cylinders, tubes, or bundles of cylinders interconnected by a manifold and assembled within a framework. PHMSA proposes to revise paragraph (d)(3) which outlines the general design and construction requirements for MEGCs. Currently this paragraph requires that each pressure receptacle of a MEGC be of the same design type, seamless steel, and constructed and tested according to one of five ISO standards including the second editions of:

(1) ISO 9809–1 ''Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1100 MPa.'';

(2) ISO 9809–2, ''Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 2: Quenched and tempered steel cylinders with tensile strength greater than or equal to 1100 MPa.''; and

(3) ISO 9809–3, ''Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 3: Normalized steel cylinders.''

This series of ISO standards specify minimum requirements for the material, design, construction, workmanship, manufacturing processes, examination, and testing at time of manufacture for refillable seamless steel gas cylinders and tubes with water capacities up to and including 450 L (119 gallons). The standards were updated and revised, as discussed in the Section IV. Section-by-Section Review discussion of § 171.7 changes. PHMSA proposes to authorize the use of the third edition of ISO 9809, Parts 1 through 3, and to add a phaseout date of December 31, 2026, for continued manufacture of pressure receptacles using the second edition. Finally, PHMSA proposes to remove reference to the first edition of these standards, as the authorization date (December 31, 2018) for continued manufacture in accordance with this edition has expired. Authorizing the use of these updated references to this document would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations, pertaining to the design and construction of pressure vessels, including MEGCs, while maintaining the HMR safety standard for use of MEGCs.

Section 178.609

Section 178.609 provides test requirements for packagings intended for transport of infectious substances. PHMSA proposes an editorial change in paragraph (d) to clarify the drop testing requirements for these packagings. In rule HM–215P,[25] PHMSA made editorial changes in paragraph (g) to clarify the performance requirements for packagings intended to also contain dry ice consistent with changes to the 21st revised edition of UN Model Regulations. However, some additional editorial changes regarding the drop test requirements for these packagings were later added to the UN Model Regulations that were not reflected in HM–215P. Therefore, in this NPRM, PHMSA proposes to make additional editorial corrections to this section pertaining to the drop test requirements in paragraph (d). Currently, paragraph (d)(2) states that where the samples are in the shape of a drum, three samples must be dropped, in three different orientations. However, during the course of the finalization of these changes in the UN Model Regulations, an additional precision was made regarding the word ''chime,'' which was removed from these testing requirements and replaced with the word ''edge.'' The wording was changed so as not to specify which direction the package should be dropped. PHMSA does not consider this change to be technical, but editorial, with the intent of conveying the testing protocol, as it was designed, more clearly. For that reason, PHMSA expects this change to maintain the current level of safety for packagings intended to contain infectious substances. This change would simply result in a packaging being tested in line with the design of the original packaging test method.

Section 178.706

Section 178.706 prescribes construction standards for rigid plastic IBCs. PHMSA proposes to revise paragraph (c)(3) to allow the use of recycled plastic (*i.e.,* used material) in the construction of rigid plastic IBCs with the approval of the Associate Administrator consistent with a similar change adopted in the 22nd revised edition of the UN Model Regulations and international standards. PHMSA proposes including a slight variation from the international provision by requiring prior approval by the Associate Administrator for use of recycled plastics in the construction of rigid plastic IBCs. This approach is consistent with current requirements for the construction of plastic drums and jerricans in § 178.509(b)(1) that restrict use of ''used material'' unless approved by the Associate Administrator. The UN Model Regulations incorporate quality assurance program requirements that require recognition by a governing body. By requiring approval of the Associate Administrator, PHMSA is able to maintain oversight of procedures, such as batch testing, that manufacturers will use to ensure the quality of recycled plastics used in the construction of rigid plastic IBCs. This proposed action will facilitate environmentally friendly processes in the construction of rigid plastic IBCs while maintaining the high safety standards in the production of these packagings for use in transportation of hazardous materials.

Section 178.707

Section 178.707 prescribes construction standards for composite IBCs. PHMSA proposes to revise paragraph (c)(3)(iii) to allow the use of recycled plastic (*i.e.,* used material) in the construction of inner receptacles of composite IBCs, with the approval of the Associate Administrator, consistent with a similar change adopted in the 22nd revised edition of the UN Model Regulations and the model international standards. PHMSA is including a slight variation from the international provision by requiring prior approval by the Associate Administrator to use recycled plastics in the construction of inner plastic receptacles of composite IBCs. This approach is consistent with current requirements for construction of plastic drums and jerricans in § 178.509(b)(1), which restrict use of ''used material,'' unless approved by the Associate Administrator. The UN Model Regulations incorporate quality assurance program requirements that require recognition by a governing body. By requiring approval of the Associate Administrator, PHMSA is able to maintain oversight of procedures, such as batch testing, that manufacturers will use to ensure the quality of recycled plastics used in the construction of inner plastic receptacles of composite IBCs. This proposed action will facilitate environmentally friendly processes in the construction of composite IBCs while maintaining the high safety standards in the production of these packagings for use in transportation of hazardous materials.

*F. Part 180*

Section 180.207

Section 180.207 outlines the requirements for requalification of UN

[25] 87 FR 44944 (July 26, 2022).

pressure receptacles. The 22nd revised edition of the UN Model Regulations includes numerous updates to referenced standards for inspection and maintenance of UN pressure receptacles. PHMSA proposes similar amendments in the HMR to maintain consistency with the UN Model Regulations. To that end, PHMSA proposes to revise paragraph (d), which specifies the requalification procedures and conformance standards for specific procedures. Specifically, paragraph (d)(3) currently requires that dissolved acetylene UN cylinders be requalified in accordance with ISO 10462:2013, ''Gas cylinders—Acetylene cylinders—Periodic inspection and maintenance. ISO 10462:2013 specifies requirements for the periodic inspection and maintenance of acetylene cylinders. It applies to acetylene cylinders with and without solvent and with a maximum nominal water capacity of 150 L. As part of a periodic review of its standards, the ISO reviewed this standard, and in June 2019 published a short supplemental amendment, ISO 10462:2013/Amd 1:2019. The supplemental document provides amendments that simplify the marking of rejected cylinders to render them unserviceable. This supplemental document is intended for use in conjunction with ISO 10462:2013 for the periodic inspection and maintenance of dissolved acetylene UN cylinders. As such, PHMSA proposes to add a reference to ISO 10462:2013/Amd 1:2019 in § 180.207(d)(3) where ISO 10462:2013 is currently required, and add a phaseout date of December 31, 2024, for authorized use of ISO 10462:2013 without the supplemental amendment.

PHMSA also proposes to revise paragraph (d)(5) which requires that UN cylinders used for adsorbed gases be inspected and tested in accordance with § 173.302c and ISO 11513:2011. ISO 11513 specifies minimum requirements for the material, design, construction, workmanship, examination and testing at manufacture of refillable welded steel cylinders for the sub-atmospheric pressure storage of liquefied and compressed gases. The 22nd revised edition of the UN Model Regulations updated references to ISO 11513 to authorize the use of the second edition, ISO 11513:2019. This second edition has been updated to amend packing instructions and remove the prohibition on the use of ultrasonic testing during periodic inspection. PHMSA proposes authorizing the use of ISO 11513:2019 and adding a sunset date of December 31, 2024, until which the current edition of ISO 11513 may continue to be used.

Lastly, PHMSA proposes to add paragraph (d)(8) to reference ISO 23088:2020, ''Gas cylinders—Periodic inspection and testing of welded steel pressure drums—Capacities up to 1,000 L,'' to provide a requalification standard for UN pressure drums because requalification procedures may differ for pressure drums versus other UN pressure receptacles. The ISO 23088:2020 standard complements the design and construction standard ISO 21172–1, ''Gas cylinders—Welded steel pressure drums up to 3,000 *litre* capacity for the transport of gases—Design and construction—Part 1: Capacities up to 1,000 *litres*'', referenced in § 178.71 for UN pressure drums. ISO 21172–1:2015 was added in the HMR in rule HM–215O. PHMSA expects that incorporating by reference a safety standard for requalification will reduce business costs and environmental effects by allowing existing UN pressure drums to be reintroduced into service for continued use for an extended period of time.

These revisions would align the HMR with changes adopted in the 22nd revised edition of the UN Model Regulations pertaining to industry consensus standards for requalification and maintenance procedures for UN pressure receptacles. PHMSA has reviewed this edition as part of its regular participation in the review of amendments proposed for the UN Model Regulations and does not expect any degradation of safety standards in association with its use. PHMSA expects that these amendments will enhance safety by providing cylinder and pressure drum users with the necessary guidelines for the continued use of UN pressure receptacles.

## VI. Regulatory Analyses and Notices

### *A. Statutory/Legal Authority for This Rulemaking*

This NPRM is published under the authority of Federal Hazardous Materials Transportation Law. Section 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. Additionally, 49 U.S.C. 5120 authorizes the Secretary to consult with interested international authorities to ensure that, to the extent practicable, regulations governing the transportation of hazardous materials in commerce are consistent with the standards adopted by international authorities. The Secretary has delegated the authority granted in the Federal Hazardous Materials Transportation Law to the PHMSA Administrator at 49 CFR 1.97(b).

### *B. Executive Order 12866 and DOT Regulatory Policies and Procedures*

Executive Order 12866 (''Regulatory Planning and Review'') [26] requires agencies to regulate in the ''most cost-effective manner,'' to make a ''reasoned determination that the benefits of the intended regulation justify its costs,'' and to develop regulations that ''impose the least burden on society.'' Similarly, DOT Order 2100.6A (''Policies and Procedures for Rulemakings'') requires that PHMSA rulemaking actions include ''an assessment of the potential benefits, costs, and other important impacts of the regulatory action,'' and (to the extent practicable) the benefits, costs, and any significant distributional impacts, including any environmental impacts.

Executive Order 12866 and DOT Order 2100.6A require that PHMSA submit ''significant regulatory actions'' to the Office of Management and Budget (OMB) for review. This rulemaking is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not formally reviewed by OMB. This rulemaking is also not considered a significant rule under DOT Order 2100.6A.

The following is a brief summary of costs, savings, and net benefits of some of the amendments proposed in this notice. PHMSA has developed a more detailed analysis of these costs and benefits in the preliminary regulatory impact analysis (PRIA), a copy of which has been placed in the docket. PHMSA seeks public comment on its proposed revisions to the HMR and the preliminary cost and benefit analyses in the PRIA.

PHMSA proposes to amend the HMR to maintain alignment with international regulations and standards, thereby maintaining the high safety standard currently achieved under the HMR, facilitating the safe transportation of, and aligning HMR requirements with, anticipated increases in the volume of lithium batteries transported by interstate commerce from electrification of the transportation and other economic sectors. PHMSA examined the likely impacts of finalizing and implementing the provisions proposed in the NPRM in order to assess the benefits and costs of these amendments. This analysis allowed PHMSA to quantitatively assess the material effects of four of the

[26] 58 FR 51735 (Oct. 4, 1993).

proposed amendments in the rulemaking. The effects of six remaining proposed amendments are not quantified but are assessed qualitatively.

PHMSA estimates that the net annualized quantified net cost savings of this rulemaking, using a 7% discount rate, are between $5.5 million and $13.2 million per year. The following table presents a summary of the monetized impacts that these proposed changes may have upon codification.

SUMMARY OF NET REGULATORY COST SAVINGS, DISCOUNT RATE = 7%, 2022–2031
[millions, 2021$]

| Rule amendment | 10 Year costs | | 10 Year cost savings | | 10 Year net cost savings | | Annual costs | | Annual cost savings | | Annual net cost savings | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Low | High | Low | High | Low | High | Low | High | Low | High | Low | High |
| 1: Incorporation by reference | $8 | $8 | $0 | $0 | $(8) | $(8) | $1 | $1 | $0 | $0 | $(1) | $(1) |
| 2: HMT additions | 0.1 | 0.1 | 0 | 0 | (0.1) | (0.1) | 0.01 | 0.01 | 0 | 0 | (0.01) | (0.01) |
| 3: Self-reactive materials and organic peroxides | 0 | 0 | 0.01 | 0.03 | 0.01 | 0.03 | 0 | 0 | 0.001 | 0.005 | 0.001 | 0.005 |
| 5: Lithium battery changes | 4 | 7 | 54 | 105 | 47 | 101 | 0.5 | 1 | 8 | 15 | 7 | 14 |
| Total | 12.1 | 15.0 | 53.9 | 104.8 | 38.9 | 92.8 | 1.7 | 2.1 | 7.7 | 14.9 | 5.5 | 13.2 |

**Note:** Values in red in net cost savings columns indicate *costs.* Low net cost savings for each amendment are determined by subtracting the highest costs from the lowest cost savings. High net cost savings are determined by subtracting the lowest costs from the highest cost savings.

The safety and environmental benefits of the proposed rule have not been quantified. However, PHMSA expects the proposed amendments would help to improve public safety and reduce the risk of environmental harm by maintaining consistency between these international regulations and the HMR. Harmonization of the HMR with international consensus standards as proposed could reduce delays and interruptions of hazardous materials during transportation, thereby lowering GHG emissions and safety risks to communities (including minority, low income, underserved, and other disadvantaged populations and communities) in the vicinity of interim storage sites and transportation arteries and hubs.

*C. Executive Order 13132*

PHMSA analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism'')[27] and the Presidential memorandum (''Preemption'') that was published in the **Federal Register** on May 22, 2009.[28] Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

The rulemaking may preempt state, local, and Native American tribe requirements, but does not propose any regulation that has substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. The Federal Hazardous Materials Transportation Law contains an express preemption provision at 49 U.S.C. 5125(b) that preempts state, local, and tribal requirements on certain covered subjects, unless the non-federal requirements are ''substantively the same'' as the federal requirements, including the following:

(1) The designation, description, and classification of hazardous material;

(2) The packing, repacking, handling, labeling, marking, and placarding of hazardous material;

(3) The preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents;

(4) The written notification, recording, and reporting of the unintentional release in transportation of hazardous material; and

(5) The design, manufacture, fabrication, inspection, marking, maintenance, recondition, repair, or testing of a packaging or container represented, marked, certified, or sold as qualified for use in transporting hazardous material in commerce.

This proposed rule addresses covered subject items (1), (2), (3), (4), and (5) above and would preempt state, local, and tribal requirements not meeting the ''substantively the same'' standard. In this instance, the preemptive effect of the proposed rule is limited to the minimum level necessary to achieve the objectives of the hazardous materials transportation law under which the final rule is promulgated. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

*D. Executive Order 13175*

PHMSA analyzed this rulemaking in accordance with the principles and criteria contained in Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments'')[29] and DOT Order 5301.1 (''Department of Transportation Policies, Programs, and Procedures Affecting American Indians, Alaska Natives, and Tribes''). Executive Order 13175 and DOT Order 5301.1 require DOT Operating Administrations to assure meaningful and timely input from Native American tribal government representatives in the development of rules that significantly or uniquely affect tribal communities by imposing ''substantial direct compliance costs'' or ''substantial direct effects'' on such communities or the relationship and distribution of power between the federal government and Native American tribes.

PHMSA assessed the impact of the rulemaking and preliminarily determined that it would not significantly or uniquely affect tribal communities or Native American tribal governments. The changes to the HMR proposed in this NPRM are facially neutral and would have broad, national scope; PHMSA, therefore, expects this rulemaking to not significantly or uniquely affect tribal communities, much less impose substantial compliance costs on Native American tribal governments or mandate tribal action. And because PHMSA expects the rulemaking would not adversely affect the safe transportation of hazardous materials generally, PHMSA does not expect it would entail disproportionately high adverse risks for tribal communities. For these reasons, PHMSA does not expect the funding and consultation requirements of Executive Order 13175 and DOT Order 5301.1 to apply. However, PHMSA solicits comment from Native American tribal governments and communities on potential impacts of the proposed rulemaking.

[27] 64 FR 43255 (Aug. 10, 1999).

[28] 74 FR 24693 (May 22, 2009).

[29] 65 FR 67249 (Nov. 9, 2000).

*E. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires agencies to review proposed regulations to assess their impact on small entities, unless the agency head certifies that a proposed rulemaking will not have a significant economic impact on a substantial number of small entities, including small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The Regulatory Flexibility Act directs agencies to establish exceptions and differing compliance standards for small businesses, where possible to do so and still meet the objectives of applicable regulatory statutes. Executive Order 13272 (''Proper Consideration of Small Entities in Agency Rulemaking'') [30] requires agencies to establish procedures and policies to promote compliance with the Regulatory Flexibility Act and to ''thoroughly review draft rules to assess and take appropriate account of the potential impact'' of the rules on small businesses, governmental jurisdictions, and small organizations. The DOT posts its implementing guidance on a dedicated web page.[31]

This proposed rulemaking has been developed in accordance with Executive Order 13272 and with DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts of draft rules on small entities are properly considered. This proposed rule facilitates the transportation of hazardous materials in international commerce by providing consistency with international standards. It applies to offerors and carriers of hazardous materials, some of whom are small entities, such as chemical manufacturers, users, and suppliers, packaging manufacturers, distributors, and training companies. As discussed at length in the PRIA found in the rulemaking docket, the amendments in this proposed rule should result in net cost savings that would ease the regulatory compliance burden for those and other entities engaged in domestic and international commerce, including trans-border shipments within North America. Additionally, the changes proposed in this NPRM would relieve U.S. companies, including small entities competing in foreign markets, from the burden of complying with a dual system of regulations. Therefore, PHMSA expects that these amendments will not, if adopted, have a significant economic impact on a substantial number of small entities. However, PHMSA solicits comments on the anticipated economic impacts to small entities.

*F. Paperwork Reduction Act*

Under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. Pursuant to 44 U.S.C. 3506(c)(2)(B) and 5 CFR 1320.8(d), PHMSA must provide interested members of the public and affected agencies with an opportunity to comment on information collection and recordkeeping requests.

PHMSA has analyzed this NPRM in accordance with the Paperwork Reduction Act. PHMSA currently accounts for shipping paper burdens under OMB Control Number 2137–0034, ''Hazardous Materials Shipping Papers and Emergency Response Information.'' PHMSA proposes some amendments that may impact OMB Control Number 2137–0034, such as the requirement to indicate the use of Special Provisions A54 on the shipping papers, however PHMSA expects the overall impact to annual paperwork burden is negligible in relation to the number of burden hours currently associated with this information collection. While PHMSA expects this proposal to reduce the burden associated with this information collection, PHMSA anticipates the reduction is negligible in relation to the total burden hours associated with special permit applications.

Additionally, PHMSA is revising § 173.185(c)(4) to require that shippers and carriers of small lithium batteries not contained in equipment have shipping papers and perform NOPIC checks when transported by air. PHMSA estimates that 45 domestic airlines transporting 4,044 shipments of affected lithium batteries may be affected by this provision. PHMSA estimates a burden increase of 16 minutes per shipment, or 64,704 minutes (1,078 hours) in the first year. PHMSA estimates the increased burden for this information collection as follows:

*OMB Control No. 2137–0034:* Hazardous Materials Shipping Papers & Emergency Response Information
*Annual increase in number of respondents:* 45.
*Annual increase in number of responses:* 4,044.
*Annual increase in burden hours:* 1,078.
*Increase in Annual Burden Cost:* $0.

PHMSA accounts for the burden from approval applications in OMB Control Number 2137–0557, ''Approvals for Hazardous Materials.'' PHMSA also proposes to add new entries to the § 173.224 Self Reactives Table and § 173.225 Organic Peroxide Table, which PHMSA expects estimates would decrease the number of annual approval applicants. However, PHMSA expects that these proposed changes are negligible to the overall impact of the total burden, in relation to the number of burden hours associated with this information collection. Based on estimates provided in the PRIA, PHMSA estimates that this proposal would reduce the number of approvals by one annually. PHMSA estimates the reduction in this information collection as follows:

*OMB Control No. 2137–0057:* Approvals for Hazardous Materials
*Decrease in Annual Number of Respondents:* 1
*Decrease in Annual Responses:* 1
*Decrease in Annual Burden Hours:* 4.75
*Decrease in Annual Burden Cost:* $0

PHMSA requests comments on the information collection and recordkeeping burdens associated with developing, implementing, and maintaining the proposed requirements in this NPRM. Address written comments to the DOT Docket Operations Office identified in the **ADDRESSES** section of this rulemaking. PHMSA must receive comments regarding information collection burdens prior to the close of the comment period identified in the **DATES** section of this rulemaking. Requests for a copy of this information collection should be directed to Steven Andrews, Standards and Rulemaking Division (PHH–10), Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. If these proposed requirements are adopted in a final rule, PHMSA will submit the revised information collection and recordkeeping requirements to OMB for approval.

*G. Unfunded Mandates Reform Act of 1995*

The Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501, *et seq.*) requires agencies to assess the effects of federal regulatory actions on state, local, and tribal governments, and the private sector. For any NPRM or final rule that includes a federal mandate that may result in the expenditure by state, local, and tribal governments, or by the

[30] 67 FR 53461 (Aug. 16, 2002).

[31] DOT, ''Rulemaking Requirements Related to Small Entities,'' *www.transportation.gov/regulations/rulemaking-requirements-concerning-small-entities.*

private sector, of $100 million or more in 1996 dollars in any given year, the agency must prepare, amongst other things, a written statement that qualitatively and quantitatively assesses the costs and benefits of the federal mandate.

As explained in the PRIA, this proposed rulemaking does not impose unfunded mandates under the UMRA. It is not expected to result in costs of $100 million or more in 1996 dollars to either state, local, or tribal governments, or to the private sector, in any one year. A copy of the PRIA is available for review in the docket.

*H. Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321, *et seq.*), requires that federal agencies analyze proposed actions to determine if the action would have a significant impact on the human environment. The Council on Environmental Quality implementing regulations (40 CFR, parts 1500–1508) require federal agencies to conduct an environmental review considering (1) the need for the action, (2) alternatives to the action, (3) probable environmental impacts of the action and alternatives, and (4) the agencies and persons consulted during the consideration process. DOT Order 5610.1C (''Procedures for Considering Environmental Impacts'') establishes departmental procedures for evaluation of environmental impacts under NEPA and its implementing regulations. This Environmental Assessment incorporates by reference the analysis discussing safety impacts that is included in the preamble language above.

1. Purpose and Need

This NPRM would amend the HMR to maintain alignment with international consensus standards by incorporating into the HMR various amendments, including changes to proper shipping names, hazard classes, packing groups, special provisions, packaging authorizations, air transport quantity limitations, and vessel stowage requirements. PHMSA notes that the amendments proposed in this NPRM are intended to result in cost savings and reduced regulatory burden for shippers engaged in domestic and international commerce, including trans-border shipments within North America. Absent adoption of the amendments proposed in the NPRM, U.S. companies—including numerous small entities competing in foreign markets—may be at an economic disadvantage because of their need to comply with a dual system of regulations. Further, among the HMR amendments introduced in this rulemaking are those aligning HMR requirements with anticipated increases in the volume of lithium batteries transported in interstate commerce, from electrification of the transportation and other economic sectors.

As explained at greater length above in the preamble of this NPRM and in the PRIA (each of which is incorporated by reference in this discussion of the environmental impacts of the Proposed Action Alternative), PHMSA expects that the adoption of the regulatory amendments proposed in this NPRM would maintain the high safety standard currently achieved under the HMR. PHMSA has evaluated the safety of each of the amendments proposed in this NPRM on its own merit, as well as the aggregate impact on transportation safety from adoption of those amendments.

2. Alternatives

In proposing this rulemaking, PHMSA is considering the following alternatives:

No Action Alternative

If PHMSA were to select the No Action Alternative, current regulations would remain in place and no provisions would be amended or added.

Proposed Action Alternative

This alternative is the current proposal as it appears in this NPRM, applying to transport of hazardous materials by various transport modes (highway, rail, vessel, and aircraft). The proposed amendments included in this alternative are more fully discussed in the preamble and regulatory text sections of this NPRM.

3. Reasonably Foreseeable Environmental Impacts of the Alternatives

No Action Alternative

If PHMSA were to select the No Action Alternative, the HMR would remain unchanged, and no provisions would be amended or added. However, any economic benefits gained through harmonization of the HMR with updated international consensus standards (including, but not limited to, the 22nd revised edition of the UN Model Regulations, the 2023–2024 ICAO Technical Instructions and amendment 41–22 of the IMDG Code) governing shipping of hazardous materials would not be realized.

Additionally, the No Action Alternative would not adopt enhanced and clarified regulatory requirements expected to maintain the high level of safety in transportation of hazardous materials provided by the HMR. As explained in the preamble to the NPRM, consistency between the HMR and current international standards can enhance safety by (1) ensuring that the HMR is informed by the latest best practices and lessons learned; (2) improving understanding of, and compliance with, pertinent requirements; (3) enabling consistent emergency response procedures in the event of a hazardous materials incident; and (4) facilitating the smooth flow of hazardous materials from their points of origin to their points of destination, thereby avoiding risks to the public and the environment from release of hazardous materials from delays or interruptions in the transportation of those materials. PHMSA would not capture those benefits if it were to pass on incorporating updated international standards into the HMR under the No Action Alternative.

PHMSA expects that the No Action Alternative could have a modest impact on GHG emissions. Because PHMSA expects that the differences between the HMR and international standards for transportation of hazardous materials could result in transportation delays or interruptions, PHMSA anticipates that there could be modestly higher GHG emissions from some combination of (1) transfer of delayed hazardous materials to and from interim storage, (2) return of improperly shipped materials to their point of origin, and (3) reshipment of returned materials. PHMSA notes that it is unable to quantify such GHG emissions because of the difficulty in identifying the precise quantity or characteristics of such interim storage or returns/re-shipments. PHMSA also submits that, as explained at greater length in Section IV.J., to the extent that there are any delays arising from inconsistencies between the HMR and recently updated international standards, there could also be adverse impacts from the No Action Alternative for minority populations, low-income populations, or other underserved and other disadvantaged communities.

Proposed Action Alternative

As explained further in the discussions in each of the No Action Alternative above, the preamble, and the PRIA, PHMSA anticipates the changes proposed under the Proposed Action Alternative will maintain the high safety standards currently achieved under the HMR. Harmonization of the HMR with updated international consensus standards is also expected to capture economic efficiencies gained from avoiding shipping delays and compliance costs associated with having

to comply with divergent U.S. and international regulatory regimes for transportation of hazardous materials. Further, PHMSA expects revision of the HMR as proposed in the NPRM will accommodate safe transportation of emerging technologies (in particular components of lithium battery technologies) and facilitate safe shipment of hazardous materials.

PHMSA expects that the Proposed Action Alternative could realize modest reductions in GHG emissions. Because PHMSA expects that the differences between the HMR and international standards for transportation of hazardous materials could result in delays or interruptions, PHMSA anticipates that the No Action Alternative could result in modestly higher GHG emissions from some combination of (1) transfer of delayed hazardous materials to and from interim storage, (2) return of improperly shipped materials to their point of origin, or (3) reshipment of returned materials. The Proposed Action Alternative avoids those risks resulting from divergence of the HMR from updated international standards. PHMSA notes, however, that it is unable to quantify any GHG emissions benefits because of the difficulty in identifying the precise quantity or characteristics of such interim storage or returns/re-shipments. Lastly, PHMSA also submits that, as explained at greater length in Section IV.J., the Proposed Action Alternative would avoid any delayed or interrupted shipments arising from the divergence of the HMR from updated international standards under the No Action Alternative that could result in adverse impacts for minority populations, low-income populations, or other underserved and other disadvantaged communities.

4. Agencies Consulted

PHMSA has coordinated with FAA, FMCSA, FRA, and USCG in the development of this proposed rule. PHMSA solicits, and will consider, comments on the NPRM's potential impacts on the human environment submitted by members of the public, state, and local governments, tribal communities, and industry.

5. Proposed Finding of No Significant Impact

PHMSA expects the adoption of the Proposed Action Alternative's regulatory amendments will maintain the HMR's current high level of safety for shipments of hazardous materials transported by highway, rail, aircraft, and vessel, and as such finds the HMR amendments in the NPRM would have no significant impact on the human environment. PHMSA expects that the Proposed Action Alternative will avoid adverse safety, environmental justice, and GHG emissions impacts of the No Action Alternative. Furthermore, based on PHMSA's analysis of these provisions described above, PHMSA proposes to find that codification and implementation of this rule would not result in a significant impact to the human environment.

PHMSA welcomes any views, data, or information related to environmental impacts that may result from NPRM's proposed requirements, the No Action Alternative, and other viable alternatives and their environmental impacts.

*I. Environmental Justice*

DOT Order 5610.2C (Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'') and Executive Orders 12898 (''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations''),[32] 13985 (''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government''),[33] 13990 (''Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis''),[34] and 14008 (''Tackling the Climate Crisis at Home and Abroad'') [35] require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects of their programs, policies, and activities on minority populations, low-income populations, and other underserved and disadvantaged communities.

PHMSA has evaluated this proposed rule under the above Executive Orders and DOT Order 5610.2C. PHMSA does not expect the proposed rule, if finalized, to cause disproportionately high and adverse human health and environmental effects on minority, low-income, underserved, and other disadvantaged populations and communities. The rulemaking is facially neutral and national in scope; it is neither directed toward a particular population, region, or community, nor is it expected to adversely impact any particular population, region, or community. And because PHMSA expects the rulemaking would not adversely affect the safe transportation of hazardous materials generally, PHMSA does not expect that the proposed revisions would entail disproportionately high adverse risks for minority populations, low-income populations, or other underserved and other disadvantaged communities.

PHMSA submits that the proposed rulemaking could in fact reduce risks to minority populations, low-income populations, or other underserved and other disadvantaged communities. Because the proposed HMR amendments could avoid the release of hazardous materials and reduce the frequency of delays and returned/resubmitted shipments of hazardous materials resulting from conflict between the current HMR and updated international standards, the proposed rule could reduce risks to populations and communities—including any minority, low-income, underserved and other disadvantaged populations and communities—in the vicinity of interim storage sites and transportation arteries and hubs. Additionally, as explained in the above discussion of NEPA, PHMSA expects that its proposed HMR amendments will yield modest GHG emissions reductions, thereby reducing the risks posed by anthropogenic climate change to minority, low-income, underserved, and other disadvantaged populations and communities.

PHMSA solicits comment from minority, low-income, underserved, and other disadvantaged populations and communities on potential impacts of the proposed rulemaking.

*J. Privacy Act*

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit and including any personal information that the commenter includes, in the system of records notice. DOT's complete Privacy Act Statement is in the **Federal Register** published on April 11, 2000,[36] or on DOT's website at *http://www.dot.gov/privacy*.

*K. Executive Order 13609 and International Trade Analysis*

Executive Order 13609 (''Promoting International Regulatory Cooperation'') [37] requires that agencies consider whether the impacts associated with significant variations between domestic and international regulatory

[32] 59 FR 7629 (Feb. 11, 1994).

[33] 86 FR 7009 (Jan. 20, 2021).

[34] 86 FR 7037 (Jan. 20, 2021).

[35] 86 FR 7619 (Feb. 1, 2021).

[36] 65 FR 19477 (Apr. 11, 2000).

[37] 77 FR 26413 (May 4, 2012).

approaches are unnecessary or may impair the ability of American business to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, international regulatory cooperation can identify approaches that are at least as protective as those that are or would be adopted in the absence of such cooperation. International regulatory cooperation can also reduce, eliminate, or prevent unnecessary differences in regulatory requirements.

Similarly, the Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465) (as amended, the Trade Agreements Act), prohibits agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to the Trade Agreements Act, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

PHMSA participates in the establishment of international standards to protect the safety of the American public, and it has assessed the effects of the proposed rule to ensure that it does not cause unnecessary obstacles to foreign trade. In fact, the proposed rule is expected to facilitate international trade by harmonizing U.S. and international requirements for the transportation of hazardous materials so as to reduce regulatory burdens and minimize delays arising from having to comply with divergent regulatory requirements. Accordingly, this rulemaking is consistent with Executive Order 13609 and PHMSA's obligations under the Trade Agreements Act.

*L. National Technology Transfer and Advancement Act*

The National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) directs federal agencies to use voluntary consensus standards in their regulatory activities, unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specification of materials, test methods, or performance requirements) that are developed or adopted by voluntary consensus standard bodies. This rulemaking involves multiple voluntary consensus standards, which are discussed at length in the discussion on § 171.7. *See* Section 171.7 of the Section-by-Section Review for further details.

*M. Executive Order 13211*

Executive Order 13211 (''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'') [38] requires federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' Executive Order 13211 defines a ''significant energy action'' as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy (including a shortfall in supply, price increases, and increased use of foreign supplies); or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action.

This proposed rule is not a significant action under Executive Order 12866, nor is it expected to have an annual effect on the economy of $100 million. Further, this action is not expected to have a significant adverse effect on the supply, distribution, or use of energy in the United States. The Administrator of OIRA has not designated the proposed rule as a significant energy action. For additional discussion of the anticipated economic impact of this rulemaking, please review the PRIA posted in the rulemaking docket.

**List of Subjects**

*49 CFR Part 171*

Exports, Hazardous materials transportation, Hazardous waste, Imports, Incorporation by reference, Reporting and recordkeeping requirements.

*49 CFR Part 172*

Education, Hazardous materials transportation, Hazardous waste, Incorporation by reference, Labeling, Markings, Packaging and containers, Reporting and recordkeeping requirements.

*49 CFR Part 173*

Hazardous materials transportation, Incorporation by reference, Packaging and containers, Radioactive materials, Reporting and recordkeeping requirements.

*49 CFR Part 175*

Air carriers, Hazardous materials transportation, Incorporation by reference, Radioactive materials, Reporting and recordkeeping requirements.

*49 CFR Part 176*

Cargo vessels, Hazardous materials transportation, Incorporation by reference, Maritime carriers, Radioactive materials, Reporting and recordkeeping requirements.

*49 CFR Part 178*

Hazardous materials transportation, Incorporation by reference, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

*49 CFR Part 180*

Hazardous materials transportation, Incorporation by reference, Motor carriers, Motor vehicle safety, Packaging and containers, Reporting and recordkeeping requirements.

In consideration of the foregoing, PHMSA proposes to amend 49 CFR chapter I as follows:

## PART 171—GENERAL INFORMATION, REGULATIONS, AND DEFINITIONS

■ 1. The authority citation for part 171 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; Pub. L. 101–410 section 4; Pub. L. 104–134, section 31001; Pub. L. 114–74 section 4 (28 U.S.C. 2461 note); 49 CFR 1.81 and 1.97.

■ 2. In § 171.7:
■ a. Revise paragraphs (t)(1), (v)(2); and (w)(32) through (81);
■ b. Add paragraphs (w)(82) through (92); and
■ c. Revise paragraphs (aa)(3) and (dd)(1) through (4).

The revisions and additions read as follows:

**§ 171.7 Reference material.**

* * * * *

(t) * * *

(1) ICAO Doc 9284 Technical Instructions for the Safe Transport of Dangerous Goods by Air (ICAO Technical Instructions), 2023–2024 Edition, copyright 2021; into §§ 171.8; 171.22 through 171.24; 172.101; 172.202; 172.401; 172.407; 172.512; 172.519; 172.602; 173.56; 173.320; 175.10, 175.33; 178.3.

* * * * *

(v) * * *

(2) International Maritime Dangerous Goods Code (IMDG Code), Incorporating

[38] 66 FR 28355 (May 22, 2001).

Amendment 41–22 (English Edition), Volumes 1 and 2, 2022 Edition; into §§ 171.22; 171.23; 171.25; 172.101; 172.202; 172.203; 172.401; 172.407; 172.502; 172.519; 172.602; 173.21; 173.56; 176.2; 176.5; 176.11; 176.27; 176.30; 176.83; 176.84; 176.140; 176.720; 176.906; 178.3; 178.274.

(w) * * *

(32) ISO 9809–1:2019(E), Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 1: Quenched and tempered steel cylinders and tubes with tensile strength less than 1100 Mpa, Third Edition, 2019–08–01; into §§ 178.37; 178.71; 178.75.

(33) ISO 9809–2:2000(E): Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 2: Quenched and tempered steel cylinders with tensile strength greater than or equal to 1 100 MPa., First edition, June 2000; into §§ 178.71; 178.75.

(34) ISO 9809–2:2010(E): Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 2: Quenched and tempered steel cylinders with tensile strength greater than or equal to 1100 MPa., Second edition, 2010–04–15; into §§ 178.71; 178.75.

(35) ISO 9809–2:2019(E): Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 2: Quenched and tempered steel cylinders and tubes with tensile strength greater than or equal to 1100 MPa, Third edition, 2019–08; into §§ 178.71; 178.75.

(36) ISO 9809–3:2000(E): Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 3: Normalized steel cylinders, First edition, December 2000; into §§ 178.71; 178.75.

(37) ISO 9809–3:2010(E): Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 3: Normalized steel cylinders, Second edition, 2010–04–15; into §§ 178.71; 178.75.

(38) ISO 9809–3:2019(E), Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 3: Normalized steel cylinders and tubes, Third edition, 2018–08; into §§ 178.71; 178.75.

(39) ISO 9809–4:2014(E), Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 4: Stainless steel cylinders with an Rm value of less than 1 100 MPa, First edition, 2014–07–15; into §§ 178.71; 178.75.

(40) ISO 9978:1992(E)—Radiation protection—Sealed radioactive sources—Leakage test methods. First Edition, (February 15, 1992); into § 173.469.

(41) ISO 10156:2017(E), Gas cylinders—Gases and gas mixtures—Determination of fire potential and oxidizing ability for the selection of cylinder valve outlets, Fourth edition, 2017–07; into § 173.115.

(42) ISO 10297:1999(E), Gas cylinders—Refillable gas cylinder valves—Specification and type testing, First Edition, 1995–05–01; into §§ 173.301b; 178.71.

(43) ISO 10297:2006(E), Transportable gas cylinders—Cylinder valves—Specification and type testing, Second Edition, 2006–01–15; into §§ 173.301b; 178.71.

(44) ISO 10297:2014(E), Gas cylinders—Cylinder valves—Specification and type testing, Third Edition, 2014–07–15; into §§ 173.301b; 178.71.

(45) ISO 10297:2014/Amd 1:2017(E), Gas cylinders—Cylinder valves—Specification and type testing—Amendment 1: Pressure drums and tubes, Third Edition, 2017–03; into §§ 173.301b; 178.71.

(46) ISO 10461:2005(E), Gas cylinders—Seamless aluminum-alloy gas cylinders—Periodic inspection and testing, Second Edition, 2005–02–15 and Amendment 1, 2006–07–15; into § 180.207.

(47) ISO 10462:2013(E), Gas cylinders—Acetylene cylinders—Periodic inspection and maintenance, Third Edition, 2013–12–15; into § 180.207.

(48) ISO 10462:2013/Amd 1:2019(E), ''Gas cylinders—Acetylene cylinders—Periodic inspection and maintenance—Amendment 1, Third Edition, 2019–06; into § 180.207.

(49) ISO 10692–2:2001(E), Gas cylinders—Gas cylinder valve connections for use in the micro-electronics industry—Part 2: Specification and type testing for valve to cylinder connections, First Edition, 2001–08–01; into §§ 173.40; 173.302c.

(50) ISO 11114–1:2012(E), Gas cylinders—Compatibility of cylinder and valve materials with gas contents—Part 1: Metallic materials, Second edition, 2012–03–15; into §§ 172.102; 173.301b; 178.71.

(51) ISO 11114–1:2012/Amd 1:2017(E), Gas cylinders—Compatibility of cylinder and valve materials with gas contents—Part 1: Metallic materials—Amendment 1, Second Edition, 2017–01; into §§ 172.102, 173.301b, 178.71.

(52) ISO 11114–2:2013(E), Gas cylinders—Compatibility of cylinder and valve materials with gas contents—Part 2: Non-metallic materials, Second edition, 2013–04; into §§ 173.301b; 178.71.

(53) ISO 11117:1998(E): Gas cylinders—Valve protection caps and valve guards for industrial and medical gas cylinders—Design, construction and tests, First edition, 1998–08–01; into § 173.301b.

(54) ISO 11117:2008(E): Gas cylinders—Valve protection caps and valve guards—Design, construction and tests, Second edition, 2008–09–01; into § 173.301b.

(55) ISO 11117:2008/Cor.1:2009(E): Gas cylinders—Valve protection caps and valve guards—Design, construction and tests, Technical Corrigendum 1, 2009–05–01; into § 173.301b.

(56) ISO 11117:2019(E), ''Gas cylinders—Valve protection caps and guards—Design, construction and tests, 2019–11–01; into § 173.301b.

(57) ISO 11118(E), Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods, First edition, October 1999; into § 178.71.

(58) ISO 11118:2015(E), Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods, Second edition, 2015–09–15; into §§ 173.301b; 178.71.

(59) ISO 11118:2015/Amd 1:2019(E), Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods—Amendment 1, Second edition, 2019–10; into §§ 173.301b; 178.71.

(60) ISO 11119–1(E), Gas cylinders—Gas cylinders of composite construction—Specification and test methods—Part 1: Hoop-wrapped composite gas cylinders, First edition, May 2002, into § 178.71.

(61) ISO 11119–1:2012(E), Gas cylinders—Refillable composite gas cylinders and tubes—Design, construction and testing—Part 1: Hoop wrapped fibre reinforced composite gas cylinders and tubes up to 450 L, Second edition, 2012–08–01; into §§ 178.71; 178.75.

(62) ISO 11119–2(E), Gas cylinders—Gas cylinders of composite construction—Specification and test methods—Part 2: Fully wrapped fibre reinforced composite gas cylinders with load-sharing metal liners, First edition, May 2002; into § 178.71.

(63) ISO 11119–2:2012(E), Gas cylinders—Refillable composite gas cylinders and tubes—Design, construction and testing—Part 2: Fully wrapped fibre reinforced composite gas cylinders and tubes up to 450 l with load-sharing metal liners, Second edition, 2012–07–15; into §§ 178.71; 178.75.

(64) ISO 11119–2:2012/Amd.1:2014(E), Gas cylinders—

Refillable composite gas cylinders and tubes—Design, construction and testing—Part 2: Fully wrapped fibre reinforced composite gas cylinders and tubes up to 450 l with load-sharing metal liners, Amendment 1, 2014–08–15; into §§ 178.71; 178.75.

(65) ISO 11119–3(E), Gas cylinders of composite construction—Specification and test methods—Part 3: Fully wrapped fibre reinforced composite gas cylinders with non-load-sharing metallic or non-metallic liners, First edition, September 2002; into § 178.71.

(66) ISO 11119–3:2013(E), Gas cylinders—Refillable composite gas cylinders and tubes—Design, construction and testing—Part 3: Fully wrapped fibre reinforced composite gas cylinders and tubes up to 450 l with non-load-sharing metallic or non-metallic liners, Second edition, 2013–04–15; into §§ 178.71; 178.75.

(67) ISO 11119–4:2016(E), Gas cylinders—Refillable composite gas cylinders—Design, construction and testing—Part 4: Fully wrapped fibre reinforced composite gas cylinders up to 150 l with load-sharing welded metallic liners, First Edition, 2016–02–15; into § 178.71; 178.75.

(68) ISO 11120(E), Gas cylinders—Refillable seamless steel tubes of water capacity between 150 l and 3000 l—Design, construction and testing, First edition, 1999–03; into §§ 178.71; 178.75.

(69) ISO 11120:2015(E), Gas cylinders—Refillable seamless steel tubes of water capacity between 150 l and 3000 l—Design, construction and testing, Second Edition, 2015–02–01; into §§ 178.71; 178.75.

(70) ISO 11513:2011(E), Gas cylinders—Refillable welded steel cylinders containing materials for sub-atmospheric gas packaging (excluding acetylene)—Design, construction, testing, use and periodic inspection, First edition, 2011–09–12; into §§ 173.302c; 178.71; 180.207.

(71) ISO 11513:2019(E), Gas cylinders—Refillable welded steel cylinders containing materials for sub-atmospheric gas packaging (excluding acetylene)—Design, construction, testing, use and periodic inspection, Second edition, 2019–09; into §§ 173.302c; 178.71; 180.207.

(72) ISO 11621(E), Gas cylinders—Procedures for change of gas service, First edition, April 1997; into §§ 173.302, 173.336, 173.337.

(73) ISO 11623(E), Transportable gas cylinders—Periodic inspection and testing of composite gas cylinders, First edition, March 2002; into § 180.207.

(74) ISO 11623:2015 (E), Gas cylinders—Composite construction—Periodic inspection and testing, Second edition, 2015–12–01; into § 180.207.

(75) ISO 13340:2001(E), Transportable gas cylinders—Cylinder valves for non-refillable cylinders—Specification and prototype testing, First edition, 2004–04–01; into § 178.71.

(76) ISO 13736:2008(E), Determination of flash point—Abel closed-cup method, Second Edition, 2008–09–15; into § 173.120.

(77) ISO 14246:2014(E), Gas cylinders—Cylinder valves—Manufacturing tests and examination, Second Edition, 2014–06–15; into § 178.71.

(78) ISO 14246:2014/Amd 1:2017(E), Gas cylinders—Cylinder valves—Manufacturing tests and examinations—Amendment 1, Second Edition, 2017–06; into § 178.71.

(79) ISO 16111:2008(E), Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride, First Edition, 2008–11–15; into §§ 173.301b; 173.311; 178.71.

(80) ISO 16111:2018(E), Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride, Second Edition, 2018–08; into §§ 173.301b; 173.311; 178.71.

(81) ISO 16148:2016(E), Gas cylinders—Refillable seamless steel gas cylinders and tubes—Acoustic emission examination (AT) and follow-up ultrasonic examination (UT) for periodic inspection and testing, Second Edition, 2016–04–15; into § 180.207.

(82) ISO 17871:2015(E), Gas cylinders—Quick-release cylinder valves—Specification and type testing, First Edition, 2015–08–15; into § 173.301b.

(83) ISO 17871:2020(E), Gas cylinders—Quick-release cylinder valves—Specification and type testing, Second Edition, 2020–07; into § 173.301b.

(84) ISO 17879: 2017(E), Gas cylinders—Self-closing cylinder valves—Specification and type testing, First Edition, 2017–07; into §§ 173.301b; 178.71.

(85) ISO 18172–1:2007(E), Gas cylinders—Refillable welded stainless steel cylinders—Part 1: Test pressure 6 MPa and below, First Edition, 2007–03–01; into § 178.71.

(86) ISO 20475:2018(E), Gas cylinders—Cylinder bundles—Periodic inspection and testing, First Edition, 2018–02; into § 180.207.

(87) ISO 20703:2006(E), Gas cylinders—Refillable welded aluminum-alloy cylinders—Design, construction and testing, First Edition, 2006–05–01; into § 178.71.

(88) ISO 21172–1:2015(E), Gas cylinders—Welded steel pressure drums up to 3,000 litres capacity for the transport of gases—Design and construction—Part 1: Capacities up to 1,000 litres, First edition, 2015–04–01; into § 178.71.

(89) ISO 21172–1:2015/Amd 1:2018(E), Gas cylinders—Welded steel pressure drums up to 3,000 litres capacity for the transport of gases—Design and construction—Part 1: Capacities up to 1,000 litres—Amendment 1, First Edition, 2018–11–01; into § 178.71.

(90) ISO 22434:2006(E), Transportable gas cylinders—Inspection and maintenance of cylinder valves, First Edition, 2006–09–01; into § 180.207.

(91) ISO 23088:2020, Gas cylinders—Periodic inspection and testing of welded steel pressure drums—Capacities up to 1,000 l, First Edition, 2020–02; into § 180.207.

(92) ISO/TR 11364:2012(E), Gas cylinders—Compilation of national and international valve stem/gas cylinder neck threads and their identification and marking system, First Edition, 2012–12–01; into § 178.71.

* * * * *

(aa) * * *

(3) Test No. 439: *In Vitro* Skin Irritation: Reconstructed Human Epidermis (RHE) Test Method, OECD Guidelines for the Testing of Chemicals, 29 July 2015; into § 173.137.

* * * * *

(dd) * * *

(1) UN Recommendations on the Transport of Dangerous Goods, Model Regulations (UN Recommendations), 22nd revised edition, (2021); into §§ 171.8; 171.12; 172.202; 172.401; 172.407; 172.502; 172.519; 173.22; 173.24; 173.24b; 173.40; 173.56; 173.192; 173.302b; 173.304b; 178.75; 178.274 as follows:

(i) Volume I, ST/SG/AC.10/1/Rev.22 (Vol. I).

(ii) Volume II, ST/SG/AC.10/1/Rev.22 (Vol. II).

(2) Manual of Tests and Criteria; into §§ 171.24, 172.102; 173.21; 173.56; 173.57; 173.58; 173.60; 173.115; 173.124; 173.125; 173.127; 173.128; 173.137; 173.185; 173.220; 173.221; 173.224; 173.225; 173.232; part 173, appendix H; 175.10; 176.905; 178.274 as follows:

(i) Seventh revised edition (2019).

(ii) Seventh revised edition, Amendment 1 (2021).

(3) Globally Harmonized System of Classification and Labelling of Chemicals (GHS), 9th revised edition, ST/SG/AC.10/30/Rev.9 (2021); into § 172.401.

(4) Agreement concerning the International Carriage of Dangerous

Goods by Road (ADR), copyright 2020; into § 171.23 as follows:

(i) Volume I, ECE/TRANS/300 (Vol. I).

(ii) Volume II, ECE/TRANS/300 (Vol. II).

(iii) Corrigendum, ECE/TRANS/300 (Corr. 1).

* * * * *

■ 3. In § 171.12, revise paragraph (a)(4)(iii) to read as follows:

**§ 171.12 North American Shipments.**

* * * * *

(a) * * *

(4) * * *

(iii) Authorized CRC, BTC, CTC or TC specification cylinders that correspond with a DOT specification cylinder are as follows:

| TC | DOT (some or all of these specifications may instead be marked with the prefix ICC) | CTC (some or all of these specifications may instead be marked with the prefix BTC or CRC) |
|---|---|---|
| TC–3AM | DOT–3A [ICC–3] | CTC–3A. |
| TC–3AAM | DOT–3AA | CTC–3AA |
| TC–3ANM | DOT–3BN | CTC–3BN. |
| TC–3EM | DOT–3E | CTC–3E. |
| TC–3HTM | DOT–3HT | CTC–3HT. |
| TC–3ALM | DOT–3AL | CTC–3AL. |
| | DOT–3B | CTC–3B. |
| TC–3AXM | DOT–3AX | CTC–3AX. |
| TC–3AAXM | DOT–3AAX | CTC–3AAX. |
| | DOT–3A480X | CTC–3A480X. |
| TC–3TM | DOT–3T | |
| TC–4AAM33 | DOT–4AA480 | CTC–4AA480. |
| TC–4BM | DOT–4B | CTC–4B. |
| TC–4BM17ET | DOT–4B240ET | CTC–4B240ET. |
| TC–4BAM | DOT–4BA | CTC–4BA. |
| TC–4BWM | DOT–4BW | CTC–4BW. |
| TC–4DM | DOT–4D | CTC–4D. |
| TC–4DAM | DOT–4DA | CTC–4DA. |
| TC–4DSM | DOT–4DS | CTC–4DS. |
| TC–4EM | DOT–4E | CTC–4E. |
| TC–39M | DOT–39 | CTC–39. |
| TC–4LM | DOT–4L | CTC–4L. |
| TC–8WM | DOT–8 | CTC–8. |
| TC8–WAM | DOT–8AL | CTC–8AL. |

* * * * *

■ 4. In § 171.23, revise paragraph (a)(3) to read as follows:

**§ 171.23 Requirements for specific materials and packagings transported under the ICAO Technical Instructions, IMDG Code, Transport Canada TDG Regulations, or the IAEA Regulations.**

(a) * * *

(3) *Pi-marked cylinders.* Cylinders with a water capacity not exceeding 150 L and that are marked with a pi mark, in accordance with the European Directive 2010/35/EU (IBR, see § 171.7), on transportable pressure equipment (TPED), and that comply with the requirements of Packing Instruction P200 or P208 and 6.2 of the Agreement Concerning the International Carriage of Dangerous Goods by Road (ADR) (IBR, see § 171.7), concerning pressure relief device use, test period, filling ratios, test pressure, maximum working pressure, and material compatibility for the lading contained or gas being filled, are authorized as follows:

(i) Filled cylinders imported for intermediate storage, transport to point of use, discharge, and export without further filling; and

(ii) Cylinders imported or domestically sourced for the purpose of filling, intermediate storage, and export.

(iii) The bill of lading or other shipping paper must identify the cylinder and include the following certification: ''This cylinder (These cylinders) conform(s) to the requirements for pi-marked cylinders found in § 171.23(a)(3).''

* * * * *

■ 5. In § 171.25:

■ a. Revise paragraphs (c)(3) and (4); and

■ b. Add paragraph (c)(5).

To read as follows:

**§ 171.25 Conditions and requirements for bulk packagings.**

* * * * *

(c) * * *

(3) Except as specified in this subpart, for a material poisonous (toxic) by inhalation, the T Codes specified in Column 13 of the Dangerous Goods List in the IMDG Code may be applied to the transportation of those materials in IM, IMO, and DOT Specification 51 portable tanks, when these portable tanks are authorized in accordance with the requirements of this subchapter;

(4) No person may offer an IM or UN portable tank containing liquid hazardous materials of Class 3, PG I or II, or PG III with a flash point less than 100 °F (38 °C); Division 5.1, PG I or II; or Division 6.1, PG I or II, for unloading while it remains on a transport vehicle with the motive power unit attached, unless it conforms to the requirements in § 177.834(o) of this subchapter; and

(5) No person may offer a UN fiber-reinforced plastic portable tank meeting the provisions of Chapter 6.10 of the IMDG Code (IBR, see § 171.7), except for transportation falling within the single port area criteria in paragraph (d) of this section.

* * * * *

## PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, TRAINING REQUIREMENTS, AND SECURITY PLANS

■ 6. The authority citation for part 172 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81, 1.96, and 1.97.

■ 7. In 172.101:
■ a. Revise paragraph (c)(12)(ii); and
■ b. In the Hazardous Materials Table, amend by removing the entries under ''[REMOVE]'' by adding the entries under ''[ADD]'' and by revising entries under ''[REVISE]'' in the appropriate alphabetical sequence.

The additions and revisions read as follows:

**§ 172.101 Purpose and use of the hazardous materials table.**

(c) * * *

(12) * * *

(ii) *Generic or n.o.s. descriptions.* If an appropriate technical name is not shown in the Table, selection of a proper shipping name shall be made from the generic or n.o.s. descriptions corresponding to the specific hazard class, packing group, hazard zone, or subsidiary hazard, if any, for the material. The name that most appropriately describes the material shall be used, *e.g.,* an alcohol not listed by its technical name in the Table shall be described as ''Alcohol, n.o.s.'' rather than ''Flammable liquid, n.o.s.'' Some mixtures may be more appropriately described according to their application, such as ''Coating solution'' or ''Extracts, liquid, for flavor or aroma,'' rather than by an n.o.s. entry, such as ''Flammable liquid, n.o.s.'' It should be noted, however, that an n.o.s. description as a proper shipping name may not provide sufficient information for shipping papers and package markings. Under the provisions of subparts C and D of this part, the technical name of one or more constituents which makes the product a hazardous material may be required in association with the proper shipping name.

* * * * *

BILLING CODE 4910–60–P

| | | | | | | | (8) | | | (9) | | (10) | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | Packaging (§ 173.***) | | | Quantity limitations (see §§ 173.27 and 175.75) | | Vessel stowage | |
| Symbols | Hazardous materials descriptions and proper shipping names | Hazard class or division | Identification Numbers | PG | Label Codes | Special Provisions (§ 172.102) | Exceptions (8A) | Non-bulk (8B) | Bulk (8C) | Passenger aircraft/rail (9A) | Cargo aircraft only (9B) | Location (10A) | Other (10B) |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) | | | | | | | |
| | **[REMOVE]** | | | | | | | | | | | | |
| | * | | * | | * | | * | | * | | * | | * |
| G | Desensitized explosives, solid, n.o.s. | 4.1 | UN3380 | I | 4.1 | 164, 197 | None | 211 | None | Forbidden | Forbidden | D | 28, 36 |
| | * | | * | | * | | * | | * | | * | | * |
| | Ethyl bromide | 6.1 | UN1891 | II | 6.1 | IB2, IP8, T7, TP2, TP13 | 153 | 202 | 243 | 5 L | 60 L | B | 40, 85 |
| | * | | | | | | | | | | | | |
| | Extracts, aromatic, liquid | 3 | UN1169 | II | 3 | 149, IB2, T4, TP1, TP8 | 150 | 202 | 242 | 5 L | 60 L | B | |
| | Extracts, aromatic, liquid | 3 | UN1169 | III | 3 | B1, IB3, T2, TP1 | 150 | 203 | 242 | 60 L | 220 L | A | |
| | Extracts, flavoring, liquid | 3 | UN1197 | II | 3 | 149, IB2, T4, TP1, TP8 | 150 | 202 | 242 | 5 L | 60 L | B | |
| | Extracts, flavoring, liquid | 3 | UN1197 | III | 3 | B1, IB3, T2, TP1 | 150 | 203 | 242 | 60 L | 220 L | A | |
| | * | | * | | * | | * | | * | | * | | * |
| | Hypochlorite solutions | 8 | UN1791 | II | 8 | 148, A7, B2, B15, IB2, IP5, N34, T7, TP2, TP24 | 154 | 202 | 242 | 1 L | 30 L | B | 26, 53, 58 |
| | * | | * | | * | | * | | * | | * | | * |
| | **[ADD]** | | | | | | | | | | | | |
| | * | | * | | * | | * | | * | | * | | * |
| G | Desensitized explosive, solid, n.o.s. | 4.1 | UN3380 | I | 4.1 | 164, 197 | None | 211 | None | Forbidden | Forbidden | D | 28, 36 |
| | * | | * | | * | | * | | * | | * | | * |
| | Cobalt dihydroxide powder, *containing not less than10% respirable particles* | 6.1 | UN3550 | I | 6.1 | IP22, TP33 | None | 211 | 242 | 5 kg | 50 kg | A | |
| | * | | * | | * | | * | | * | | * | | * |
| | Ethyl bromide | 3 | UN1891 | II | 3, 6.1 | IB2, IP8, T7, TP2, TP13 | 150 | 202 | 243 | 1 L | 60 L | B | 40, 85 |

| | * | | * | | * | | * | | | | * | | * |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Extracts, liquid, *for flavor or aroma* | 3 | UN1197 | II | 3 | 149, IB2, T4, TP1, TP8 | 150 | 202 | 242 | 5 L | 60 L | B | |
| | Extracts, liquid, *for flavor or aroma* | 3 | UN1197 | III | 3 | B1, IB3, T2, TP1 | 150 | 203 | 242 | 60 L | 220 L | A | |
| | * | | | | | | * | | | | | | |
| | * | | * | | * | | * | | * | | * | | * |
| | Hypochlorite solutions | 8 | UN1791 | II | 8 | 148, A7, B2, B15, IB2, IP5, N34, T7, TP2, TP24 | 154 | 202 | 242 | 1 L | 30 L | B | 26 |
| | * | | * | | * | | * | | * | | * | | * |
| | **[REVISE]** | | | | | | | | | | | | |
| | * | | * | | * | | * | | * | | * | | * |
| | * | | * | | * | | * | | * | | * | | * |
| G | Articles containing miscellaneous dangerous goods, n.o.s | 9 | UN3548 | | | 391, A224 | None | 232 | 232 | Forbidden | Forbidden | A | |
| | Articles containing non-flammable, non-toxic gas, n.o.s | 2.2 | UN3538 | | 2.2 | 391, A225 | None | 232 | 232 | Forbidden | Forbidden | A | |
| | * | | * | | * | | * | | * | | * | | * |
| | Batteries, wet, filled with acid, *electric storage* | 8 | UN2794 | | 8 | A51 | 159 | 159 | 159 | 30 kg | 400 kg | A | 53, 58, 146 |
| | Batteries, wet, filled with alkali, electric storage | 8 | UN2795 | | 8 | A51 | 159 | 159 | 159 | 30 kg | 400 kg | A | 52, 146 |
| | * | | * | | * | | * | | * | | * | | * |
| | Butylene *see also* Petroleum gases, liquefied | 2.1 | UN1012 | | 2.1 | 19, 398, T50 | 306 | 304 | 314, 315 | Forbidden | 150 kg | E | 40 |
| | * | | * | | * | | * | | * | | * | | * |
| | Batteries, containing sodium | 4.3 | UN3292 | | 4.3 | | 189 | 189 | 189 | Forbidden | 400 kg | A | 13, 148 |
| | * | | * | | * | | * | | * | | * | | * |
| G | Corrosive liquids, toxic, n.o.s. | 8 | UN2922 | I | 8, 6.1 | A4, A7, B10, T14, TP2, TP13, TP27 | None | 201 | 243 | 0.5 L | 2.5 L | B | 40 |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| G | Corrosive solids, toxic, n.o.s. | 8 | UN2923 | I | 8, 6.1 | A5, IB7, T6, TP33 | None | 211 | 242 | 1 kg | 25 kg | B | 40 |
| | * | | * | | * | | * | | * | | * | | * |
| | Detonators, *electronic programmable for blasting* | 1.4B | UN0512 | | 1.4B | 148 | 63(f), 63(g) | 62 | None | Forbidden | 75 kg | 05 | 25 |
| | Nitrocellulose with alcohol *with not less than 25 percent alcohol by mass, and with not more than 12.6 percent nitrogen, by dry mass* | 4.1 | UN2556 | II | 4.1 | W31 | None | 212 | None | 1 kg | 15 kg | D | 12, 25, 28, 36 |
| | Nitrocellulose, *with not more than 12.6 percent nitrogen, by dry mass* mixture with *or* without plasticizer, with *or* without pigment | 4.1 | UN2557 | II | 4.1 | 44, W31 | None | 212 | None | 1 kg | 15 kg | D | 28, 36 |
| | Nitrocellulose with water *with not less than 25 percent water, by mass* | 4.1 | UN2555 | II | 4.1 | W31 | None | 212 | None | 15 kg | 50 kg | E | 28, 36 |
| | | | | | | | | | | | | | |
| G | Water-reactive liquid, corrosive, n.o.s. | 4.3 | UN3129 | I | 4.3, 8 | T14, TP2, TP7, TP13 | None | 201 | 243 | Forbidden | 1 L | D | 13,148 |
| G | | | | II | 4.3, 8 | IB1, T11, TP2, TP7 | 151 | 202 | 243 | 1 L | 5 L | E | 13, 85, 148 |
| G | | | | III | 4.3, 8 | IB2, T7, TP2, TP7 | 151 | 203 | 242 | 5 L | 60 L | E | 13, 85, 148 |
| | * | | | * | | | * | | | * | | | * |
| G | Water-reactive liquid, n.o.s. | 4.3 | UN3148 | I | 4.3 | T13, TP2, TP7, W31 | None | 201 | 244 | Forbidden | 1 L | E | 13, 40, 148 |
| G | | | | II | 4.3 | T13, TP2, TP7, W31 | 151 | 201 | 244 | Forbidden | 1 L | E | 13, 40, 148 |
| G | | | | III | 4.3 | IB2, T7, TP2, TP7, W31 | 151 | 203 | 242 | 5 L | 60 L | E | 13, 40, 148 |
| | * | | * | | * | | * | | * | | * | | * |
| | | | | | | | | | | | | | |

**BILLING CODE 4910–60–C**

* * * * *

■ 8. In § 172.102 paragraph (c)(1):

■ a. Revise special provisions 78, 156, 387;

■ b. Add special provisions 396, 398;

■ c. Remove and reserve special provision 421;

■ d. Add special provision 441;

■ e. Revise special provision A54 and;

■ f. Add special provisions A224, A225, IP15, IP22 in numerical order.

The additions and revisions read as follows:

**§ 172.102 Special provisions.**

* * * * *

(c) * * *

(1) * * *

78 Mixtures of nitrogen and oxygen containing not less than 19.5% and not more than 23.5% oxygen by volume may be transported under this entry when no other oxidizing gases are present. A Division 5.1 subsidiary hazard label is not required for any concentrations within this limit. Compressed air containing greater than 23.5% oxygen by volume must be shipped using the description ''Compressed gas, oxidizing, n.o.s., UN3156.''

* * * * *

156 Asbestos that is immersed or fixed in a natural or artificial binder material, such as cement, plastic, asphalt, resins, or mineral ore, or contained in manufactured products, is not subject to the requirements of this subchapter, except that when transported by air, an indication of compliance with this special provision must be provided by including the words ''not restricted'' on a shipping paper, such as an air waybill accompanying the shipment.

* * * * *

387 When materials are stabilized by temperature control, the provisions of § 173.21(f) of this subchapter apply. When chemical stabilization is employed, the person offering the material for transport shall ensure that the level of stabilization is sufficient to prevent the material as packaged from dangerous polymerization at 50 °C (122 °F). If chemical stabilization becomes ineffective at lower temperatures within the anticipated duration of transport, temperature control is required and is forbidden by aircraft. In making this determination factors to be taken into consideration include, but are not limited to, the capacity and geometry of the packaging and the effect of any insulation present; the temperature of the material when offered for transport; the duration of the journey and the ambient temperature conditions typically encountered in the journey (considering also the season of year); the effectiveness and other properties of the stabilizer employed; applicable operational controls imposed by regulation (*e.g.,* requirements to protect from sources of heat, including other cargo carried at a temperature above ambient); and any other relevant factors.

* * * * *

396 Large and robust articles may be transported with connected gas cylinders with the valves open regardless of § 173.24(b)(1), provided:

a. the gas cylinders contain nitrogen of UN 1066 or compressed gas of UN 1956 or compressed air of UN1002;

b. the gas cylinders are connected to the article through pressure regulators and fixed piping in such a way that the pressure of the gas (gauge pressure) in the article does not exceed 35 kPa (0.35 bar);

c. the gas cylinders are properly secured so that they cannot shift in relation to the article and are fitted with strong and pressure resistant hoses and pipes;

d. the gas cylinders, pressure regulators, piping, and other components are protected from damage and impacts during transport by wooden crates or other suitable means;

e. the shipping paper must include the following statement: ''Transport in accordance with special provision 396.''; and

f. cargo transport units containing articles transported with cylinders with open valves containing a gas presenting a risk of asphyxiation are well ventilated.

* * * * *

398 This entry applies to 1-butylene, cis-2-butylene and trans-2-butylene, and mixtures of butylenes. For isobutylene, see UN 1055.

* * * * *

421 [Reserved]

441 Mixtures of fluorine and nitrogen with a fluorine concentration below 35% by volume may be filled in pressure receptacles up to a maximum allowable working pressure for which the partial pressure of fluorine does not exceed 31 bar (abs.).

*Working pressure* (bar)$<31/\chi\phi-1$, in which xf = fluorine concentration in % by volume/100.

Mixtures of fluorine and inert gases with a fluorine concentration below 35% by volume may be filled in pressure receptacles up to a maximum allowable working pressure for which the partial pressure of fluorine does not exceed 31 bar (abs.), additionally taking the coefficient of nitrogen equivalency in accordance with ISO 10156:2017 into account when calculating the partial pressure.

*Working pressure* (bar)$<31\chi\phi(\chi\phi+K\kappa\times\chi\kappa)-1$, in which xf = fluorine concentration in % by volume/100; Kk = coefficient of equivalency of an inert gas relative to nitrogen (coefficient of nitrogen equivalency); xk = inert gas concentration in % by volume/100;

$K\kappa$ = coefficient of equivalency of an inert gas relative to nitrogen (coefficient of nitrogen equivalency);

$\chi\kappa$ = inert gas concentration in % by volume/100.

However, the working pressure for mixtures of fluorine and inert gases shall not exceed 200 bar. The minimum test pressure of pressure receptacles for mixtures of fluorine and inert gases equals 1.5 times the working pressure or 200 bar, with the greater value to be applied.

* * * * *

A54 Irrespective of the quantity limits in Column 9B of the § 172.101 table, a lithium battery, including a lithium battery packed with, or contained in, equipment that otherwise meets the applicable requirements of § 173.185, may have a mass exceeding 35 kg if approved by the Associate Administrator prior to shipment in accordance with this special provision must be noted on the shipping papers.

* * * * *

A224 UN3548, Articles containing miscellaneous dangerous goods, n.o.s. may be transported on passenger and cargo aircraft, irrespective of the indication of ''forbidden'' in Columns (9A) and (9B) of the Hazardous Materials Table, provided: (a) the only dangerous good contained in the article is an environmentally hazardous substance, or lithium cells or batteries that comply with § 173.185; (b) the articles are packed in accordance with § 173.232; and (c) reference to Special Provision A224 is made on the shipping paper.

* * * * *

A225 UN3538, Articles containing non-flammable, non-toxic gas, n.o.s. may be transported on passenger and cargo aircraft irrespective of the indication of ''forbidden'' in Columns (9A) and (9B) of the Hazardous Materials Table, provided: (a) the only dangerous good contained in the article is a Division 2.2 gas without a subsidiary hazard, but excluding refrigerated liquefied gases and gases forbidden for transport on passenger aircraft, or lithium cells or batteries that comply with § 173.185; (b) the articles are packed in accordance with § 173.232 and limited to a maximum net quantity of gas of 75 kg by passenger aircraft and 150 kg by cargo aircraft; and (c) reference to Special Provision A225 is made on the shipping paper.

* * * * *

IP15 For UN2031 with more than 55% nitric acid, the permitted use of rigid plastic IBCs, and the inner receptacle of composite IBCs with rigid plastics, shall be two years from their date of manufacture.

* * * * *

IP22 UN3550 may be transported in flexible IBCs (13H3 or 13H4) with siftproof liners to prevent any egress of dust during transport.

* * * * *

## PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

■ 9. The authority citation for part 173 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81, 1.96, and 1.97.

■ 10. In § 173.4b, revise paragraph (b)(1) to read as follows:

**§ 173.4b De minimis exceptions.**

* * * * *

(b) * * *

(1) The specimens are:

(i) Wrapped in a paper towel or cheesecloth moistened with alcohol, an alcohol solution, or a formaldehyde solution and placed in a plastic bag that is heat-sealed. Any free liquid in the bag must not exceed 30 mL; or

(ii) Placed in vials or other rigid containers with no more than 30 mL of alcohol, an alcohol solution, or a formaldehyde solution. The containers are placed in a plastic bag that is heat-sealed;

* * * * *

■ 11. In § 173.21 revise paragraphs (f) introductory text, (f)(1), and (f)(2) to read as follows:

**§ 173.21 Forbidden materials and packages.**

* * * * *

(f) A package containing a material which is likely to decompose with a self-accelerated decomposition temperature (SADT) or polymerize with a self-accelerated polymerization temperature (SAPT) of 50 °C (122 °F) or less, or 45 °C (113 °F) or less when offered for transportation in portable tanks, with an evolution of a dangerous quantity of heat or gas when decomposing or polymerizing, unless the material is stabilized or inhibited in a manner to preclude such evolution. For organic peroxides see paragraph (f)(2) of this section. The SADT and SAPT may be determined by any of the test methods described in Part II of the UN Manual of Tests and Criteria (IBR, *see* § 171.7 of this subchapter).

(1) A package meeting the criteria of paragraph (f) of this section may be required to be shipped under controlled temperature conditions. The control temperature and emergency temperature for a package shall be as specified in Table 1 in this paragraph based upon the SADT or SAPT of the material. The control temperature is the temperature above which a package of the material may not be offered for transportation or transported. The emergency temperature is the temperature at which, due to imminent danger, emergency measures must be initiated.

TABLE 1 TO PARAGRAPH (f)(1)—DERIVATION OF CONTROL AND EMERGENCY TEMPERATURE

| Type of receptacle | SADT/SAPT [1] | Control temperatures | Emergency temperature |
|---|---|---|---|
| Single packagings and IBCs. | SADT/SAPT ≤20 °C (68 °F) | 20 °C (36 °F) below SADT/SAPT | 10 °C (18 °F) below SADT/SAPT. |
| Single packagings and IBCs. | 20 °C (68 °F) <SADT/SAPT ≤35 °C (95 °F). | 15 °C (27 °F) below SADT/SAPT | 10 °C (18 °F) below SADT/SAPT. |
| Single packagings and IBCs. | 35 °C (95 °F) <SADT/SAPT ≤50 °C (122 °F). | 10 °C (18 °F) below SADT/SAPT | 5 °C (9 °F) below SADT/SAPT. |
| Single packagings and IBCs. | 50 °C (122 °F) <SADT/SAPT | (2) | (2) |
| Portable tanks | SADT/SAPT ≤45 °C (113 °F) | 10 °C (18 °F) below SADT/SAPT | 5 °C (9 °F) below SADT/SAPT. |
| Portable tanks | 45 °C (113 °F) <SADT/SAPT | (2) | (2) |

[1] Self-accelerating decomposition temperature or Self-accelerating polymerization temperature.
[2] Temperature control not required.

(2) For hazardous materials listed in the Self-Reactive Materials Table in § 173.224(b), control and emergency temperatures, where required, are shown in Columns 5 and 6, respectively. For hazardous materials listed in the Organic Peroxide Table in § 173.225, control and emergency temperatures, where required, are shown in Columns 7a and 7b of the table, respectively. In addition, the following organic peroxides shall be subjected to temperature control during transport:

(i) Organic peroxides type B and C with a SADT ≤50 °C;

(ii) Organic peroxides type D showing a medium effect when heated under confinement, as determined by test series E in Part II of the UN Manual of Tests and Criteria (IBR, *see* § 171.7 of this subchapter), with a SADT ≤50 °C or showing a low or no effect when heated under confinement with a SADT ≤ 45 °C; and

(iii) Organic peroxides types E and F with a SADT ≤45 °C.

* * * * *

12. In § 173.27, revise paragraph (f)(2)(i)(D) to read as follows:

**§ 173.27 General requirements for transportation by aircraft.**

* * * * *

(f) * * *

(2) * * *

(i) * * *

(D) Divisions 4.1 (self-reactive and UN2555, UN2556, UN2557, UN2907), 4.2 (spontaneously combustible) (primary or subsidiary risk), and 4.3 (dangerous when wet) (liquids);

* * * * *

**§ 173.124 [Amended]**

■ 13. In § 173.124, remove paragraph (a)(4)(iv).

■ 14. In § 173.137, revise the introductory text to read as follows:

**§ 173.137 Class 8—Assignment of packing group.**

The packing group of a Class 8 material is indicated in Column 5 of the table to § 172.101(of this subchapter). When the table to § 172.101 provides more than one packing group for a Class 8 material, the packing group must be determined using data obtained from tests conducted in accordance with the OECD Guidelines for the Testing of Chemicals, Test No. 435, ''*In Vitro* Membrane Barrier Test Method for Skin Corrosion'' (IBR, *see* § 171.7 of this subchapter), or Test No. 404, ''Acute Dermal Irritation/Corrosion'' (IBR, *see* § 171.7 of this subchapter). Alternatively, a substance or mixture may be considered not corrosive to human skin for the purposes of this

subchapter following testing in accordance with OECD Guideline for the Testing of Chemicals Test No. 430, ''*In Vitro* Skin Corrosion: Transcutaneous Electrical Resistance test (TER)'' (IBR, *see* § 171.7 of this subchapter), Test No. 431, ''*In Vitro* Skin Corrosion: Reconstructed Human Epidermis (RHE) Test Method'' (IBR, *see* § 171.7 of this subchapter), or Test No. 439, ''*In Vitro* Skin Irritation: Reconstructed Human Epidermis Test Method'' (IBR, *see* § 171.7 of this subchapter). However, if the substance or mixture is determined to be corrosive in accordance with Test No. 430 or Test No. 439, the material may be assigned to Packing Group I or must be further tested using Test No. 435 or Test No. 404 to determine the packaging group assignment. If the results of Test No. 431 indicate that the substance or mixture is corrosive, but the test method does not clearly distinguish between assignment of Packing Groups II and III, the material must be assigned to Packing Group II unless further testing is performed. The packing group assignment using data obtained from tests conducted in accordance with OECD Guideline Test No. 404 must be as follows:

* * * * *

■ 15. Revise § 173.167 to read as follows:

**§ 173.167 ID8000 consumer commodities.**

Packages prepared under the requirements of this section may be offered for transportation and transported by all modes.

(a) *Applicability.* This section applies to limited quantities of ''consumer commodity'' material (see § 171.8 of this subchapter). Materials eligible for transportation in accordance with this section are articles or substances of Class 2 (non-toxic aerosols only), Class 3 (Packing Group II and III only), Division 6.1 (Packing Group III only), UN3077, UN3082, UN3175, UN3334, and UN3335, provided such materials do not have a subsidiary risk and are authorized aboard a passenger-carrying aircraft. The outer packaging for consumer commodities is not subject to the specification packaging requirements of this subchapter. Except as indicated in § 173.24(i), each completed package must conform to §§ 173.24 and 173.24a of this subchapter. Additionally, except for the pressure differential requirements in § 173.27(c), the requirements of § 173.27 do not apply to packages prepared in accordance with this section. As applicable, the following apply:

(1) *Inner and outer packaging quantity limits.*

(i) Non-toxic aerosols, as defined in § 171.8 of this subchapter and constructed in accordance with § 173.306 of this part, in non-refillable, non-metal containers not exceeding 120 mL (4 fluid ounces) each, or in non-refillable metal containers not exceeding 820 mL (28 fluid ounces) each, except that flammable aerosols may not exceed 500 mL (16.9 fluid ounces) each;

(ii) Liquids, in inner packagings not exceeding 500 mL (16.9 fluid ounces) each. Liquids must not completely fill an inner packaging at 55 °C;

(iii) Solids, in inner packagings not exceeding 500 g (1.0 pounds) each; or

(iv) Any combination thereof not to exceed 30 kg (66 pounds) gross weight as prepared for shipment.

(2) *Closures.* Friction-type closures must be secured by positive means. The body and closure of any packaging must be constructed so as to be able to adequately resist the effects of temperature and vibration occurring in conditions normally incident to air transportation. The closure device must be so designed that it is unlikely that it can be incorrectly or incompletely closed.

(3) *Absorbent material.* Inner packagings must be tightly packaged in strong outer packagings. Absorbent and cushioning material must not react dangerously with the contents of inner packagings. For glass or earthenware inner packagings containing liquids of Class 3 or Division 6.1, sufficient absorbent material must be provided to absorb the entire contents of the largest inner packaging contained in the outer packaging. Absorbent material is not required if the glass or earthenware inner packagings are sufficiently protected as packaged for transport that it is unlikely a failure would occur and, if a failure did occur, that it would be unlikely that the contents would leak from the outer packaging.

(4) *Drop test capability.* Breakable inner packagings (*e.g.,* glass, earthenware, or brittle plastic) must be packaged to prevent failure under conditions normally incident to transport. Packages of consumer commodities, as prepared for transport, must be capable of withstanding a 1.2 meter drop on solid concrete in the position most likely to cause damage. In order to pass the test, the outer packaging must not exhibit any damage liable to affect safety during transport and there must be no leakage from the inner packaging(s).

(5) *Stack test capability.* Packages of consumer commodities must be capable of withstanding, without failure or leakage of any inner packaging and without any significant reduction in effectiveness, a force applied to the top surface, for a duration of 24 hours, equivalent to the total weight of identical packages if stacked to a height of 3.0 meters (including the test sample).

(6) *Hazard communication.* Packages prepared under the requirements of this section are to be marked as a limited quantity, in accordance with § 172.315(b), and labeled as a Class 9 article or substance, as appropriate, in accordance with subpart E of part 172 of this subchapter; and

(7) *Pressure differential capability.* Except for UN3082, inner packagings intended to contain liquids must be capable of meeting the pressure differential requirements (75 kPa) prescribed in § 173.27(c) of this part. The capability of a packaging to withstand an internal pressure without leakage that produces the specified pressure differential should be determined by successfully testing design samples or prototypes.

(b) Highway, rail, and vessel hazard communication exceptions. Packages prepared in accordance with the requirements of this section:

(1) are excepted from labeling when transported by highway, rail, and vessel; and

(2) are excepted from shipping papers when transported by highway and rail.

* * * * *

■ 16. In § 173.185:

■ a. Revise paragraph (a)(3) introductory text;

■ b. Add paragraph (a)(5),

■ c. Revise paragraphs (b)(3)(iii)(A) and (B);

■ d. Add paragraph (b)(3)(iii)(C);

■ e. Revise paragraphs (b)(4)(ii) (iii)

■ f. Add paragraph (b)(4)(iv);

■ g. Revise paragraphs (b)(5), (c)(3) through (5), and (e)(5) through (7).

The amendments read as follows:

**§ 173.185 Lithium cell and batteries.**

* * * * *

(a) * * *

(3) Each manufacturer and subsequent distributor of lithium cells or batteries, except for button cells installed in equipment (including circuit boards), manufactured on or after January 1, 2008, must make a test summary available. The test summary must include the following elements:

* * * * *

(5) Beginning [EFFECTIVE DATE OF FINAL RULE], each lithium ion battery must be marked with the Watt-hour rating on the outside case.

* * * * *

(b) * * *

(3) * * *

(iii) * * *

(A) Be placed in inner packagings that completely enclose the cell or battery, then placed in a packaging of a type that meets the Packing Group II performance requirements as specified in paragraph (b)(3)(ii) of this section, and then placed with the equipment in a strong, rigid outer packaging; or

(B) Be placed in inner packagings that completely enclose the cell or battery, then placed with the equipment in a packaging of a type that meets the Packing Group II performance requirements as specified in paragraph (b)(3)(ii) of this section.

(C) For transportation by aircraft, the number of cells or batteries in each package is limited to the minimum number required to power the piece of equipment, plus two spare sets. A set of cells or batteries is the number of individual cells or batteries that are required to power each piece of equipment.

(4) * * *

(ii) Equipment must be secured to prevent damage caused by shifting within the outer packaging and be packed so as to prevent accidental operation during transport;

(iii) Any spare lithium cells or batteries packed with the equipment must be packaged in accordance with paragraph (b)(3) of this section; and

(iv) For transportation by aircraft, where multiple pieces of equipment are packed in the same outer packaging, each piece of equipment must be packed to prevent contact with other equipment.

(5) Lithium cells or batteries that weigh 12 kg (26.5 pounds) or more and have a strong, impact-resistant outer casing, may be packed in strong outer packagings; in protective enclosures (for example, in fully enclosed or wooden slatted crates); or on pallets or other handling devices, instead of packages meeting the UN performance packaging requirements in paragraphs (b)(3)(ii) and (b)(3)(iii) of this section. Cells and batteries must be secured to prevent inadvertent shifting, and the terminals may not support the weight of other superimposed elements. Cells and batteries packaged in accordance with this paragraph may be transported by cargo aircraft if approved by the Associate Administrator.

* * * * *

(c) * * *

(3) *Lithium battery mark.* Each package must display the lithium battery mark except when a package contains button cell batteries installed in equipment (including circuit boards), or no more than four lithium cells or two lithium batteries contained in equipment, where there are not more than two packages in the consignment.

(i) The mark must indicate the UN number: ''UN3090'' for lithium metal cells or batteries, or ''UN3480'' for lithium ion cells or batteries. Where the lithium cells or batteries are contained in, or packed with, equipment, the UN number ''UN3091'' or ''UN3481,'' as appropriate, must be indicated. Where a package contains lithium cells or batteries assigned to different UN numbers, all applicable UN numbers must be indicated on one or more marks. The package must be of such size that there is adequate space to affix the mark on one side without the mark being folded.

Figure 1 to paragraph (c)(3)(i) introductory text


(A) The mark must be in the form of a rectangle or a square with hatched edging. The mark must be not less than 100 mm (3.9 inches) wide by 100 mm (3.9 inches) high, and the minimum width of the hatching must be 5 mm (0.2 inches), except marks of 100 mm (3.9 inches) wide by 70 mm (2.8 inches) high may be used on a package containing lithium batteries when the package is too small for the larger mark;

(B) The symbols and letters must be black on white or visible contrasting background and the hatching must be red;

(C) The ''*'' must be replaced by the appropriate UN number(s); and

(D) Where dimensions are not specified, all features shall be in approximate proportion to those shown.

(ii) The lithium battery mark, in conformance with the requirements of this paragraph, in effect on [DATE

PRIOR TO THE EFFECTIVE DATE OF THE FINAL RULE], may continue to be used until December 31, 2026.

(iii) When packages are placed in an overpack, the lithium battery mark shall either be clearly visible through the overpack or be reproduced on the outside of the overpack, and the overpack shall be marked with the word ''OVERPACK.'' The lettering of the ''OVERPACK'' mark shall be at least 12 mm (0.47 inches) high.

(4) *Air transportation for smaller lithium cells or batteries packed with, or contained in, equipment.*

(i) The number of cells or batteries in each package is limited to the minimum number required to power the piece of equipment, plus two spare sets, and the total net quantity (mass) of the lithium cells or batteries in the completed package must not exceed 5 kg. A set of cells or batteries is the number of individual cells or batteries that are required to power each piece of equipment.

(ii) When packages are placed in an overpack, the packages must be secured within the overpack, and the intended function of each package must not be impaired by the overpack.

(iii) Each shipment with packages required to display the paragraph (c)(3)(i) lithium battery mark must include an indication on the air waybill of compliance with this paragraph (c)(4) (or the applicable ICAO Technical Instructions Packing Instruction), when an air waybill is used.

(iv) Each person who prepares a package for transport containing lithium cells or batteries, packed with, or contained in, equipment in accordance with the conditions and limitations of this paragraph (c)(4), must receive instruction on these conditions and limitations, corresponding to their functions.

(5) *Air transportation for smaller lithium cells and batteries.*

(i) A package prepared in accordance with the size limits in paragraph (c)(1) is subject to all applicable requirements of this subchapter, except that a package containing no more than 2.5 kg lithium metal cells or batteries, or 10 kg lithium ion cells or batteries, is not subject to the UN performance packaging requirements in paragraph (b)(3)(ii) of this section, when the package displays both the lithium battery mark in paragraph (c)(3)(i) and the Class 9 Lithium Battery label specified in § 172.447 of this subchapter. This paragraph does not apply to batteries or cells packed with, or contained in, equipment.

(ii) Each package must be capable of withstanding, without damage to the cells or batteries contained therein and without any reduction of effectiveness, a force applied to the top surface equivalent to the total weight of identical packages stacked to a height of 3 (including the test sample) for a duration of 24 hours.

* * * * *

(e) * * *

(5) Lithium batteries, including lithium batteries contained in equipment, that weigh 12 kg (26.5 pounds) or more and have a strong, impact-resistant outer casing, may be packed in strong outer packagings, in protective enclosures (for example, in fully enclosed or wooden slatted crates), or on pallets or other handling devices, instead of packages meeting the UN performance packaging requirements in paragraphs (b)(3)(ii) and (iii) of this section. The cell or battery must be secured to prevent inadvertent shifting, and the terminals may not support the weight of other superimposed elements;

(6) Irrespective of the limit specified in Column (9B) of the § 172.101 Hazardous Materials Table, the cell or battery prepared for transport in accordance with this paragraph may have a mass exceeding 35 kg gross weight when transported by cargo aircraft;

(7) Cells or batteries packaged in accordance with this paragraph are not permitted for transportation by passenger-carrying aircraft, and may be transported by cargo aircraft only if approved by the Associate Administrator prior to transportation; and

* * * * *

■ 17. In § 173.224,

■ a. Revise paragraph (b)(4);

■ b. Designate the table immediately following paragraph (b) as table 1 to paragraph (b); and

■ c. Revise newly-designated table 1 to paragraph (b).

The revisions read as follows:

**§ 173.224 Packaging and control and emergency temperatures for self-reactive materials.**

* * * * *

(b) * * *

(4) *Packing method.* Column 4 specifies the highest packing method which is authorized for the self-reactive material. A packing method corresponding to a smaller package size may be used, but a packing method corresponding to a larger package size may not be used. The Table of Packing Methods in § 173.225(d) defines the packing methods. Bulk packagings for Type F self-reactive substances are authorized by § 173.225(f) for IBCs and § 173.225(h) for bulk packagings other than IBCs. The formulations not listed in this section but listed in § 173.225(e) for IBCs and in § 173.225(g) for portable tanks may also be transported packed in accordance with packing method OP8, with the same control and emergency temperatures, if applicable. Additional bulk packagings are authorized if approved by the Associate Administrator.

* * * * *

TABLE 1 TO PARAGRAPH (b)—SELF-REACTIVE MATERIALS TABLE

| Self-reactive substance | Identification No. | Concentration—(%) | Packing method | Control temperature—(°C) | Emergency temperature | Notes |
|---|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| Acetone-pyrogallol copolymer 2-diazo-1-naphthol-5-sulphonate | 3228 | 100 | OP8 | | | |
| Azodicarbonamide formulation type B, temperature controlled | 3232 | <100 | OP5 | | | 1 |
| Azodicarbonamide formulation type C | 3224 | <100 | OP6 | | | |
| Azodicarbonamide formulation type C, temperature controlled | 3234 | <100 | OP6 | | | 1 |
| Azodicarbonamide formulation type D | 3226 | <100 | OP7 | | | |
| Azodicarbonamide formulation type D, temperature controlled | 3236 | <100 | OP7 | | | 1 |
| 2,2′-Azodi(2,4-dimethyl-4-methoxyvaleronitrile) | 3236 | 100 | OP7 | −5 | + 5 | |

TABLE 1 TO PARAGRAPH (b)—SELF-REACTIVE MATERIALS TABLE—Continued

| Self-reactive substance | Identification No. | Concentration—(%) | Packing method | Control temperature—(°C) | Emergency temperature | Notes |
|---|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 2,2′-Azodi(2,4-dimethylvaleronitrile) | 3236 | 100 | OP7 | + 10 | + 15 | |
| 2,2′-Azodi(ethyl 2-methylpropionate) | 3235 | 100 | OP7 | + 20 | + 25 | |
| 1,1-Azodi(hexahydrobenzonitrile) | 3226 | 100 | OP7 | | | |
| 2,2-Azodi(isobutyronitrile) | 3234 | 100 | OP6 | + 40 | + 45 | |
| 2,2′-Azodi(isobutyronitrile) as a water-based paste | 3224 | ≤50 | OP6 | | | |
| 2,2-Azodi(2-methylbutyronitrile) | 3236 | 100 | OP7 | + 35 | + 40 | |
| Benzene-1,3-disulphonylhydrazide, as a paste | 3226 | 52 | OP7 | | | |
| Benzene sulphohydrazide | 3226 | 100 | OP7 | | | |
| 4-(Benzyl(ethyl)amino)-3-ethoxybenzenediazonium zinc chloride | 3226 | 100 | OP7 | | | |
| 4-(Benzyl(methyl)amino)-3-ethoxybenzenediazonium zinc chloride | 3236 | 100 | OP7 | + 40 | + 45 | |
| 3-Chloro-4-diethylaminobenzenediazonium zinc chloride | 3226 | 100 | OP7 | | | |
| 2-Diazo-1-Naphthol sulphonic acid ester mixture | 3226 | <100 | OP7 | | | 4 |
| 2-Diazo-1-Naphthol-4-sulphonyl chloride | 3222 | 100 | OP5 | | | |
| 2-Diazo-1-Naphthol-5-sulphonyl chloride | 3222 | 100 | OP5 | | | |
| 2,5-Dibutoxy-4-(4-morpholinyl)-Benzenediazonium, tetrachlorozincate (2:1) | 3228 | 100 | OP8 | | | |
| 2,5-Diethoxy-4-morpholinobenzenediazonium zinc chloride | 3236 | 67–100 | OP7 | + 35 | + 40 | |
| 2,5-Diethoxy-4-morpholinobenzenediazonium zinc chloride | 3236 | 66 | OP7 | + 40 | + 45 | |
| 2,5-Diethoxy-4-morpholinobenzenediazonium tetrafluoroborate | 3236 | 100 | OP7 | + 30 | + 35 | |
| 2,5-Diethoxy-4-(phenylsulphonyl)benzenediazonium zinc chloride | 3236 | 67 | OP7 | + 40 | + 45 | |
| 2,5-Diethoxy-4-(4-morpholinyl)-benzenediazonium sulphate | 3226 | 100 | OP7 | | | |
| Diethylene glycol bis(allyl carbonate) + Diisopropylperoxydicarbonate | 3237 | ≥88 + ≤12 | OP8 | − 10 | 0 | |
| 2,5-Dimethoxy-4-(4-methylphenylsulphony)benzenediazonium zinc chloride | 3236 | 79 | OP7 | + 40 | + 45 | |
| 4-Dimethylamino-6-(2-dimethylaminoethoxy)toluene-2-diazonium zinc chloride | 3236 | 100 | OP7 | + 40 | + 45 | |
| 4-(Dimethylamino)-benzenediazonium trichlorozincate (− 1) | 3228 | 100 | OP8 | | | |
| N,N′-Dinitroso-N, N′-dimethyl-terephthalamide, as a paste | 3224 | 72 | OP6 | | | |
| N,N′-Dinitrosopentamethylenetetramine | 3224 | 82 | OP6 | | | 2 |
| Diphenyloxide-4,4′-disulphohydrazide | 3226 | 100 | OP7 | | | |
| Diphenyloxide-4,4′-disulphonylhydrazide | 3226 | 100 | OP7 | | | |
| 4-Dipropylaminobenzenediazonium zinc chloride | 3226 | 100 | OP7 | | | |
| 2-(N,N-Ethoxycarbonylphenylamino)-3-methoxy-4-(N-methyl-N-cyclohexylamino)benzenediazonium zinc chloride | 3236 | 63–92 | OP7 | + 40 | + 45 | |
| 2-(N,N-Ethoxycarbonylphenylamino)-3-methoxy-4-(N-methyl-N-cyclohexylamino)benzenediazonium zinc chloride | 3236 | 62 | OP7 | + 35 | + 40 | |
| N-Formyl-2-(nitromethylene)-1,3-perhydrothiazine | 3236 | 100 | OP7 | + 45 | + 50 | |
| 2-(2-Hydroxyethoxy)-1-(pyrrolidin-1-yl)benzene-4-diazonium zinc chloride | 3236 | 100 | OP7 | + 45 | + 50 | |
| 3-(2-Hydroxyethoxy)-4-(pyrrolidin-1-yl)benzenediazonium zinc chloride | 3236 | 100 | OP7 | + 40 | + 45 | |

TABLE 1 TO PARAGRAPH (b)—SELF-REACTIVE MATERIALS TABLE—Continued

| Self-reactive substance | Identification No. | Concentration—(%) | Packing method | Control temperature—(°C) | Emergency temperature | Notes |
|---|---|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| 7-Methoxy-5-methyl-benzothiophen-2-yl boronic acid" | 3230 | 88–100 | | | | 6 |
| 2-(N,N-Methylaminoethylcarbonyl)-4-(3,4-dimethyl-phenylsulphonyl) benzenediazonium hydrogen sulphate | 3236 | 96 | OP7 | + 45 | + 50 | |
| 4-Methylbenzenesulphonylhydrazide | 3226 | 100 | OP7 | | | |
| 3-Methyl-4-(pyrrolidin-1-yl)benzenediazonium tetrafluoroborate | 3234 | 95 | OP6 | + 45 | + 50 | |
| 4-Nitrosophenol | 3236 | 100 | OP7 | + 35 | + 40 | |
| Phosphorothioic acid, O-[(cyanophenyl methylene) azanyl] O,O-diethyl ester | 3227 | 82–91 (Z isomer) | OP8 | | | 5 |
| Self-reactive liquid, sample | 3223 | | OP2 | | | 3 |
| Self-reactive liquid, sample, temperature control | 3233 | | OP2 | | | 3 |
| Self-reactive solid, sample | 3224 | | OP2 | | | 3 |
| Self-reactive solid, sample, temperature control | 3234 | | OP2 | | | 3 |
| Sodium 2-diazo-1-naphthol-4-sulphonate | 3226 | 100 | OP7 | | | |
| Sodium 2-diazo-1-naphthol-5-sulphonate | 3226 | 100 | OP7 | | | |
| Tetramine palladium (II) nitrate | 3234 | 100 | OP6 | + 30 | + 35 | |

**Notes:** 1. The emergency and control temperatures must be determined in accordance with § 173.21(f).
2. With a compatible diluent having a boiling point of not less than 150 °C.
3. Samples may only be offered for transportation under the provisions of paragraph (c)(3) of this section.
4. This entry applies to mixtures of esters of 2-diazo-1-naphthol-4-sulphonic acid and 2-diazo-1-naphthol-5-sulphonic acid.

5. This entry applies to the technical mixture in n-butanol within the specified concentration limits of the (Z) isomer.

6. The technical compound with the specified concentration limits may contain up to 12% water and up to 1% organic impurities.

* * * * *

■ 18. In § 173.225:

■ a. Revise table 1 to paragraph (c);

■ b. Designate the tables immediately following paragraph (d) and immediately following paragraph (g) as table 2 to paragraph (d) and table 4 to paragraph (g), respectively; and

■ c. Revise newly-designated table 4 to paragraph (g).

**§ 173.225 Packaging requirements and other provisions for organic peroxides.**

* * * * *

(c) * * *

TABLE 1 TO PARAGRAPH (c): ORGANIC PEROXIDE TABLE

| Technical name | ID No. | Concentration (mass %) | Diluent (mass %) | | | Water (mass %) | Packing method | Temperature (°C) | | Notes |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | A | B | I | | | Control | Emergency | |
| (1) | (2) | (3) | (4a) | (4b) | (4c) | (5) | (6) | (7a) | (7b) | (8) |
| Acetyl acetone peroxide | UN3105 | ≤42 | ≥48 | | | ≥8 | OP7 | | | 2 |
| Acetyl acetone peroxide | UN3107 | ≤35 | | | | ≥8 | OP8 | | | 32 |
| Acetyl acetone peroxide [as a paste] | UN3106 | ≤32 | | | | | OP7 | | | 21 |
| Acetyl cyclohexanesulfonyl peroxide | UN3112 | ≤82 | | | | ≥12 | OP4 | −10 | 0 | |
| Acetyl cyclohexanesulfonyl peroxide | UN3115 | ≤32 | | ≥68 | | | OP7 | −10 | 0 | |
| tert-Amyl hydroperoxide | UN3107 | ≤88 | ≥6 | | | ≥6 | OP8 | | | |
| tert-Amyl peroxyacetate | UN3105 | ≤62 | ≥38 | | | | OP7 | | | |
| tert-Amyl peroxybenzoate | UN3103 | ≤100 | | | | | OP5 | | | |
| tert-Amyl peroxy-2-ethylhexanoate | UN3115 | ≤100 | | | | | OP7 | 20 | 25 | |
| tert-Amyl peroxy-2-ethylhexyl carbonate | UN3105 | ≤100 | | | | | OP7 | | | |
| tert-Amyl peroxy isopropyl carbonate | UN3103 | ≤77 | ≥23 | | | | OP5 | | | |
| tert-Amyl peroxyneodecanoate | UN3115 | ≤77 | | ≥23 | | | OP7 | 0 | 10 | |
| tert-Amyl peroxyneodecanoate | UN3119 | ≤47 | ≥53 | | | | OP8 | 0 | 10 | |
| tert-Amyl peroxypivalate | UN3113 | ≤77 | | ≥23 | | | OP5 | 10 | 15 | |
| tert-Amyl peroxypivalate | UN3119 | ≤32 | ≥68 | | | | OP8 | 10 | 15 | |
| tert-Amyl peroxy-3,5,5-trimethylhexanoate. | UN3105 | ≤100 | | | | | OP7 | | | |
| tert-Butyl cumyl peroxide | UN3109 | >42–100 | | | | | OP8 | | | 9 |
| tert-Butyl cumyl peroxide | UN3108 | ≤52 | | | ≥48 | | OP8 | | | 9 |
| n-Butyl-4,4-di-(tert-butylperoxy)valerate | UN3103 | >52–100 | | | | | OP5 | | | |
| n-Butyl-4,4-di-(tert-butylperoxy)valerate | UN3108 | ≤52 | | | ≥48 | | OP8 | | | |
| tert-Butyl hydroperoxide | UN3103 | >79–90 | | | | ≥10 | OP5 | | | 13 |
| tert-Butyl hydroperoxide | UN3105 | ≤80 | ≥20 | | | | OP7 | | | 4, 13 |
| tert-Butyl hydroperoxide | UN3107 | ≤79 | | | | >14 | OP8 | | | 13, 16 |
| tert-Butyl hydroperoxide | UN3109 | ≤72 | | | | ≥28 | OP8 | | | 13 |

TABLE 1 TO PARAGRAPH (c): ORGANIC PEROXIDE TABLE—Continued

| Technical name | ID No. | Concentration (mass %) | Diluent (mass %) | | | Water (mass %) | Packing method | Temperature (°C) | | Notes |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | A | B | I | | | Control | Emergency | |
| (1) | (2) | (3) | (4a) | (4b) | (4c) | (5) | (6) | (7a) | (7b) | (8) |
| tert-Butyl hydroperoxide [and] Di-tert-butylperoxide. | UN3103 | <82 + >9 | ..... | ..... | ..... | ≥7 | OP5 | ..... | ..... | 13 |
| tert-Butyl monoperoxymaleate | UN3102 | >52–100 | ..... | ..... | ..... | ..... | OP5 | ..... | ..... | ..... |
| tert-Butyl monoperoxymaleate | UN3103 | ≤52 | ≥48 | ..... | ..... | ..... | OP6 | ..... | ..... | ..... |
| tert-Butyl monoperoxymaleate | UN3108 | ≤52 | ..... | ..... | ≥48 | ..... | OP8 | ..... | ..... | ..... |
| tert-Butyl monoperoxymaleate [as a paste]. | UN3108 | ≤52 | ..... | ..... | ..... | ..... | OP8 | ..... | ..... | ..... |
| tert-Butyl peroxyacetate | UN3101 | >52–77 | ≥23 | ..... | ..... | ..... | OP5 | ..... | ..... | ..... |
| tert-Butyl peroxyacetate | UN3103 | >32–52 | ≥48 | ..... | ..... | ..... | OP6 | ..... | ..... | ..... |
| tert-Butyl peroxyacetate | UN3109 | ≤32 | ..... | ≥68 | ..... | ..... | OP8 | ..... | ..... | ..... |
| tert-Butyl peroxybenzoate | UN3103 | >77–100 | ..... | ..... | ..... | ..... | OP5 | ..... | ..... | ..... |
| tert-Butyl peroxybenzoate | UN3105 | >52–77 | ≥23 | ..... | ..... | ..... | OP7 | ..... | ..... | 1 |
| tert-Butyl peroxybenzoate | UN3106 | ≤52 | ..... | ..... | ≥48 | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxybenzoate | UN3109 | ≤32 | ≥68 | ..... | ..... | ..... | OP8 | ..... | ..... | ..... |
| tert-Butyl peroxybutyl fumarate | UN3105 | ≤52 | ≥48 | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxycrotonate | UN3105 | ≤77 | ≥23 | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxydiethylacetate | UN3113 | ≤100 | ..... | ..... | ..... | ..... | OP5 | 20 | 25 | ..... |
| tert-Butyl peroxy-2-ethylhexanoate | UN3113 | >52–100 | ..... | ..... | ..... | ..... | OP6 | 20 | 25 | ..... |
| tert-Butyl peroxy-2-ethylhexanoate | UN3117 | >32–52 | ..... | ≥48 | ..... | ..... | OP8 | 30 | 35 | ..... |
| tert-Butyl peroxy-2-ethylhexanoate | UN3118 | ≤52 | ..... | ..... | ≥48 | ..... | OP8 | 20 | 25 | ..... |
| tert-Butyl peroxy-2-ethylhexanoate | UN3119 | ≤32 | ..... | ≥68 | ..... | ..... | OP8 | 40 | 45 | ..... |
| tert-Butyl peroxy-2-ethylhexanoate [and] 2,2-di-(tert-Butylperoxy)butane. | UN3106 | ≤12 + ≤14 | ≥14 | ..... | ≥60 | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxy-2-ethylhexanoate [and] 2,2-di-(tert-Butylperoxy)butane. | UN3115 | ≤31 + ≤36 | ..... | ≥33 | ..... | ..... | OP7 | 35 | 40 | ..... |
| tert-Butyl peroxy-2-ethylhexylcarbonate | UN3105 | ≤100 | ..... | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxyisobutyrate | UN3111 | >52–77 | ..... | ≥23 | ..... | ..... | OP5 | 15 | 20 | ..... |
| tert-Butyl peroxyisobutyrate | UN3115 | ≤52 | ..... | ≥48 | ..... | ..... | OP7 | 15 | 20 | ..... |
| tert-Butylperoxy isopropylcarbonate | UN3103 | ≤77 | ≥23 | ..... | ..... | ..... | OP5 | ..... | ..... | ..... |
| tert-Butylperoxy isopropylcarbonate | UN3105 | ≤62 | ..... | ≥ 38 | ..... | ..... | OP7 | ..... | ..... | ..... |
| 1-(2-tert-Butylperoxy isopropyl)-3-isopropenylbenzene. | UN3105 | ≤77 | ≥23 | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| 1-(2-tert-Butylperoxy isopropyl)-3-isopropenylbenzene. | UN3108 | ≤42 | ..... | ..... | ≥58 | ..... | OP8 | ..... | ..... | ..... |
| tert-Butyl peroxy-2-methylbenzoate | UN3103 | ≤100 | ..... | ..... | ..... | ..... | OP5 | ..... | ..... | ..... |
| tert-Butyl peroxyneodecanoate | UN3115 | >77–100 | ..... | ..... | ..... | ..... | OP7 | −5 | 5 | ..... |
| tert-Butyl peroxyneodecanoate | UN3115 | ≤77 | ..... | ≥23 | ..... | ..... | OP7 | 0 | 10 | ..... |
| tert-Butyl peroxyneodecanoate [as a stable dispersion in water]. | UN3119 | ≤52 | ..... | ..... | ..... | ..... | OP8 | 0 | 10 | ..... |
| tert-Butyl peroxyneodecanoate [as a stable dispersion in water (frozen)]. | UN3118 | ≤42 | ..... | ..... | ..... | ..... | OP8 | 0 | 10 | ..... |
| tert-Butyl peroxyneodecanoate | UN3119 | ≤32 | ≥68 | ..... | ..... | ..... | OP8 | 0 | 10 | ..... |
| tert-Butyl peroxyneoheptanoate | UN3115 | ≤77 | ≥23 | ..... | ..... | ..... | OP7 | 0 | 10 | ..... |
| tert-Butyl peroxyneoheptanoate [as a stable dispersion in water]. | UN3117 | ≤42 | ..... | ..... | ..... | ..... | OP8 | 0 | 10 | ..... |
| tert-Butyl peroxypivalate | UN3113 | >67–77 | ≥23 | ..... | ..... | ..... | OP5 | 0 | 10 | ..... |
| tert-Butyl peroxypivalate | UN3115 | >27–67 | ..... | ≥33 | ..... | ..... | OP7 | 0 | 10 | ..... |
| tert-Butyl peroxypivalate | UN3119 | ≤27 | ..... | ≥73 | ..... | ..... | OP8 | 30 | 35 | ..... |
| tert-Butylperoxy stearylcarbonate | UN3106 | ≤100 | ..... | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxy-3,5,5-trimethylhexanoate. | UN3105 | >37–100 | ..... | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxy-3,5,5-trimethlyhexanoate. | UN3106 | ≤42 | ..... | ..... | ≥58 | ..... | OP7 | ..... | ..... | ..... |
| tert-Butyl peroxy-3,5,5-trimethylhexanoate. | UN3109 | ≤37 | ..... | ≥63 | ..... | ..... | OP8 | ..... | ..... | ..... |
| 3-Chloroperoxybenzoic acid | UN3102 | >57–86 | ..... | ..... | ≥14 | ..... | OP1 | ..... | ..... | ..... |
| 3-Chloroperoxybenzoic acid | UN3106 | ≤57 | ..... | ..... | ≥3 | ≥40 | OP7 | ..... | ..... | ..... |
| 3-Chloroperoxybenzoic acid | UN3106 | ≤77 | ..... | ..... | ≥6 | ≥17 | OP7 | ..... | ..... | ..... |
| Cumyl hydroperoxide | UN3107 | >90–98 | ≤10 | ..... | ..... | ..... | OP8 | ..... | ..... | 13 |
| Cumyl hydroperoxide | UN3109 | ≤90 | ≥10 | ..... | ..... | ..... | OP8 | ..... | ..... | 13, 15 |
| Cumyl peroxyneodecanoate | UN3115 | ≤87 | ≥13 | ..... | ..... | ..... | OP7 | −10 | 0 | ..... |
| Cumyl peroxyneodecanoate | UN3115 | ≤77 | ..... | ≥23 | ..... | ..... | OP7 | −10 | 0 | ..... |
| Cumyl peroxyneodecanoate [as a stable dispersion in water]. | UN3119 | ≤52 | ..... | ..... | ..... | ..... | OP8 | −10 | 0 | ..... |
| Cumyl peroxyneoheptanoate | UN3115 | ≤77 | ≥23 | ..... | ..... | ..... | OP7 | −10 | 0 | ..... |
| Cumyl peroxypivalate | UN3115 | ≤77 | ..... | ≥23 | ..... | ..... | OP7 | −5 | 5 | ..... |
| Cyclohexanone peroxide(s) | UN3104 | ≤91 | ..... | ..... | ..... | ≥9 | OP6 | ..... | ..... | 13 |
| Cyclohexanone peroxide(s) | UN3105 | ≤72 | ≥28 | ..... | ..... | ..... | OP7 | ..... | ..... | 5 |
| Cyclohexanone peroxide(s) [as a paste] | UN3106 | ≤72 | ..... | ..... | ..... | ..... | OP7 | ..... | ..... | 5, 21 |
| Cyclohexanone peroxide(s) | Exempt | ≤32 | ..... | >68 | ..... | ..... | Exempt | ..... | ..... | 29 |
| Diacetone alcohol peroxides | UN3115 | ≤57 | ..... | ≥26 | ..... | ≥8 | OP7 | 40 | 45 | 5 |
| Diacetyl peroxide | UN3115 | ≤27 | ..... | ≥73 | ..... | ..... | OP7 | 20 | 25 | 8,13 |
| Di-tert-amyl peroxide | UN3107 | ≤100 | ..... | ..... | ..... | ..... | OP8 | ..... | ..... | ..... |
| ([3R- (3R, 5aS, 6S, 8aS, 9R, 10R, 12S, 12aR**)]-Decahydro-10-methoxy-3, 6, 9-trimethyl-3, 12-epoxy-12H-pyrano [4, 3- j]-1, 2-benzodioxepin). | UN3106 | ≤100 | ..... | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |
| 2,2-Di-(tert-amylperoxy)-butane | UN3105 | ≤57 | ≥43 | ..... | ..... | ..... | OP7 | ..... | ..... | ..... |

TABLE 1 TO PARAGRAPH (c): ORGANIC PEROXIDE TABLE—Continued

| Technical name | ID No. | Concentration (mass %) | Diluent (mass %) | | | Water (mass %) | Packing method | Temperature (°C) | | Notes |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | A | B | I | | | Control | Emergency | |
| (1) | (2) | (3) | (4a) | (4b) | (4c) | (5) | (6) | (7a) | (7b) | (8) |
| 1,1-Di-(tert-amylperoxy)cyclohexane | UN3103 | ≤82 | ≥18 | | | | OP6 | | | |
| Dibenzoyl peroxide | UN3102 | >52–100 | | | ≤48 | | OP2 | | | 3 |
| Dibenzoyl peroxide | UN3102 | >77–94 | | | | ≥6 | OP4 | | | 3 |
| Dibenzoyl peroxide | UN3104 | ≤77 | | | | ≥23 | OP6 | | | |
| Dibenzoyl peroxide | UN3106 | ≤62 | | | ≥28 | ≥10 | OP7 | | | |
| Dibenzoyl peroxide [as a paste] | UN3106 | >52–62 | | | | | OP7 | | | 21 |
| Dibenzoyl peroxide | UN3106 | >35–52 | | | ≥48 | | OP7 | | | |
| Dibenzoyl peroxide | UN3107 | >36–42 | ≥18 | | | ≤40 | OP8 | | | |
| Dibenzoyl peroxide [as a paste] | UN3108 | ≤56.5 | | | | ≥15 | OP8 | | | |
| Dibenzoyl peroxide [as a paste] | UN3108 | ≤52 | | | | | OP8 | | | 21 |
| Dibenzoyl peroxide [as a stable dispersion in water]. | UN3109 | ≤42 | | | | | OP8 | | | |
| Dibenzoyl peroxide | Exempt | ≤35 | | | ≥65 | | Exempt | | | 29 |
| Di-(4-tert-butylcyclohexyl)peroxydicarbonate. | UN3114 | ≤100 | | | | | OP6 | 30 | 35 | |
| Di-(4-tert-butylcyclohexyl)peroxydicarbonate [as a stable dispersion in water]. | UN3119 | ≤42 | | | | | OP8 | 30 | 35 | |
| Di-(4-tert-butylcyclohexyl)peroxydicarbonate [as a paste]. | UN3118 | ≤42 | | | | | OP8 | 35 | 40 | |
| Di-tert-butyl peroxide | UN3107 | >52–100 | | | | | OP8 | | | |
| Di-tert-butyl peroxide | UN3109 | ≤52 | | ≥48 | | | OP8 | | | 24 |
| Di-tert-butyl peroxyazelate | UN3105 | ≤52 | ≥48 | | | | OP7 | | | |
| 2,2-Di-(tert-butylperoxy)butane | UN3103 | ≤52 | ≥48 | | | | OP6 | | | |
| 1,6-Di-(tert-butylperoxycarbonyloxy)hexane. | UN3103 | ≤72 | ≥28 | | | | OP5 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3101 | >80–100 | | | | | OP5 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3103 | >52–80 | ≥20 | | | | OP5 | | | |
| 1,1-Di-(tert-butylperoxy)-cyclohexane | UN3103 | ≤72 | | ≥28 | | | OP5 | | | 30 |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3105 | >42–52 | ≥48 | | | | OP7 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3106 | ≤42 | ≥13 | | ≥45 | | OP7 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3107 | ≤27 | ≥25 | | | | OP8 | | | 22 |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3109 | ≤42 | ≥58 | | | | OP8 | | | |
| 1,1-Di-(tert-Butylperoxy)cyclohexane | UN3109 | ≤37 | ≥63 | | | | OP8 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3109 | ≤25 | ≥25 | ≥50 | | | OP8 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane | UN3109 | ≤13 | ≥13 | ≥74 | | | OP8 | | | |
| 1,1-Di-(tert-butylperoxy)cyclohexane + tert-Butyl peroxy-2-ethylhexanoate. | UN3105 | ≤43+≤16 | ≥41 | | | | OP7 | | | |
| Di-n-butyl peroxydicarbonate | UN3115 | >27–52 | | ≥48 | | | OP7 | −15 | −5 | |
| Di-n-butyl peroxydicarbonate | UN3117 | ≤27 | | ≥73 | | | OP8 | −10 | 0 | |
| Di-n-butyl peroxydicarbonate [as a stable dispersion in water (frozen)]. | UN3118 | ≤42 | | | | | OP8 | −15 | −5 | |
| Di-sec-butyl peroxydicarbonate | UN3113 | >52–100 | | | | | OP4 | −20 | −10 | 6 |
| Di-sec-butyl peroxydicarbonate | UN3115 | ≤52 | | ≥48 | | | OP7 | −15 | −5 | |
| Di-(tert-butylperoxyisopropyl) benzene(s). | UN3106 | >42–100 | | | ≤57 | | OP7 | | | 1, 9 |
| Di-(tert-butylperoxyisopropyl) benzene(s). | Exempt | ≤42 | | | ≥58 | | Exempt | | | |
| Di-(tert-butylperoxy)phthalate | UN3105 | >42–52 | ≥48 | | | | OP7 | | | |
| Di-(tert-butylperoxy)phthalate [as a paste]. | UN3106 | ≤52 | | | | | OP7 | | | 21 |
| Di-(tert-butylperoxy)phthalate | UN3107 | ≤42 | ≥58 | | | | OP8 | | | |
| 2,2-Di-(tert-butylperoxy)propane | UN3105 | ≤52 | ≥48 | | | | OP7 | | | |
| 2,2-Di-(tert-butylperoxy)propane | UN3106 | ≤42 | ≥13 | | ≥45 | | OP7 | | | |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3101 | >90–100 | | | | | OP5 | | | |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3103 | >57–90 | ≥10 | | | | OP5 | | | |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3103 | ≤77 | | ≥23 | | | OP5 | | | |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3103 | ≤90 | | ≥10 | | | OP5 | | | 30 |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3110 | ≤57 | | | ≥43 | | OP8 | | | |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3107 | ≤57 | ≥43 | | | | OP8 | | | |
| 1,1-Di-(tert-butylperoxy)-3,3,5-trimethylcyclohexane. | UN3107 | ≤32 | ≥26 | ≥42 | | | OP8 | | | |
| Dicetyl peroxydicarbonate | UN3120 | ≤100 | | | | | OP8 | 30 | 35 | |
| Dicetyl peroxydicarbonate [as a stable dispersion in water]. | UN3119 | ≤42 | | | | | OP8 | 30 | 35 | |
| Di-4-chlorobenzoyl peroxide | UN3102 | ≤77 | | | | ≥23 | OP5 | | | |
| Di-4-chlorobenzoyl peroxide | Exempt | ≤32 | | | ≥68 | | Exempt | | | 29 |
| Di-2,4-dichlorobenzoyl peroxide [as a paste]. | UN3118 | ≤52 | | | | | OP8 | 20 | 25 | |
| Di-4-chlorobenzoyl peroxide [as a paste] | UN3106 | ≤52 | | | | | OP7 | | | 21 |
| Dicumyl peroxide | UN3110 | >52–100 | | | ≤48 | | OP8 | | | 9 |

TABLE 1 TO PARAGRAPH (c): ORGANIC PEROXIDE TABLE—Continued

| Technical name | ID No. | Concentration (mass %) | Diluent (mass %) | | | Water (mass %) | Packing method | Temperature (°C) | | Notes |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | A | B | I | | | Control | Emergency | |
| (1) | (2) | (3) | (4a) | (4b) | (4c) | (5) | (6) | (7a) | (7b) | (8) |
| Dicumyl peroxide | Exempt | ≤52 | | | ≥48 | | Exempt | | | 29 |
| Dicyclohexyl peroxydicarbonate | UN3112 | >91–100 | | | | | OP3 | 10 | 15 | |
| Dicyclohexyl peroxydicarbonate | UN3114 | ≤91 | | | | ≥9 | OP5 | 10 | 15 | |
| Dicyclohexyl peroxydicarbonate [as a stable dispersion in water]. | UN3119 | ≤42 | | | | | OP8 | 15 | 20 | |
| Didecanoyl peroxide | UN3114 | ≤100 | | | | | OP6 | 30 | 35 | |
| 2,2-Di-(4,4-di(tert-butylperoxy)cyclohexyl)propane. | UN3106 | ≤42 | | | ≥58 | | OP7 | | | |
| 2,2-Di-(4,4-di(tert-butylperoxy)cyclohexyl)propane. | UN3107 | ≤22 | | ≥78 | | | OP8 | | | |
| Di-2,4-dichlorobenzoyl peroxide | UN3102 | ≤77 | | | | ≥23 | OP5 | | | |
| Di-2,4-dichlorobenzoyl peroxide [as a paste with silicone oil]. | UN3106 | ≤52 | | | | | OP7 | | | |
| Di-(2-ethoxyethyl) peroxydicarbonate | UN3115 | ≤52 | | ≥48 | | | OP7 | −10 | 0 | |
| Di-(2-ethylhexyl) peroxydicarbonate | UN3113 | >77–100 | | | | | OP5 | −20 | −10 | |
| Di-(2-ethylhexyl) peroxydicarbonate | UN3115 | ≤77 | | ≥23 | | | OP7 | −15 | −5 | |
| Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water]. | UN3119 | ≤62 | | | | | OP8 | −15 | −5 | |
| Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water]. | UN3119 | ≤52 | | | | | OP8 | −15 | −5 | |
| Di-(2-ethylhexyl) peroxydicarbonate [as a stable dispersion in water (frozen)]. | UN3120 | ≤52 | | | | | OP8 | −15 | −5 | |
| 2,2-Dihydroperoxypropane | UN3102 | ≤27 | | | ≥73 | | OP5 | | | |
| Di-(1-hydroxycyclohexyl)peroxide | UN3106 | ≤100 | | | | | OP7 | | | |
| Diisobutyryl peroxide | UN3111 | >32–52 | | ≥48 | | | OP5 | −20 | −10 | |
| Diisobutyryl peroxide [as a stable dispersion in water]. | UN3119 | ≤42 | | | | | OP8 | −20 | −10 | |
| Diisobutyryl peroxide | UN3115 | ≤32 | | ≥68 | | | OP7 | −20 | −10 | |
| Diisopropylbenzene dihydroperoxide | UN3106 | ≤82 | ≥5 | | | ≥5 | OP7 | | | 17 |
| Diisopropyl peroxydicarbonate | UN3112 | >52–100 | | | | | OP2 | −15 | −5 | |
| Diisopropyl peroxydicarbonate | UN3115 | ≤52 | | ≥48 | | | OP7 | −20 | −10 | |
| Diisopropyl peroxydicarbonate | UN3115 | ≤32 | ≥68 | | | | OP7 | −15 | −5 | |
| Dilauroyl peroxide | UN3106 | ≤100 | | | | | OP7 | | | |
| Dilauroyl peroxide [as a stable dispersion in water]. | UN3109 | ≤42 | | | | | OP8 | | | |
| Di-(3-methoxybutyl) peroxydicarbonate | UN3115 | ≤52 | | ≥48 | | | OP7 | −5 | 5 | |
| Di-(2-methylbenzoyl)peroxide | UN3112 | ≤87 | | | | ≥13 | OP5 | 30 | 35 | |
| Di-(4-methylbenzoyl)peroxide [as a paste with silicone oil]. | UN3106 | ≤52 | | | | | OP7 | | | |
| Di-(3-methylbenzoyl) peroxide + Benzoyl (3-methylbenzoyl) peroxide + Dibenzoyl peroxide. | UN3115 | ≤20 + ≤18 + ≤4 | | ≥58 | | | OP7 | 35 | 40 | |
| 2,5-Dimethyl-2,5-di-(benzoylperoxy)hexane. | UN3102 | >82–100 | | | | | OP5 | | | |
| 2,5-Dimethyl-2,5-di-(benzoylperoxy)hexane. | UN3106 | ≤82 | | | ≥18 | | OP7 | | | |
| 2,5-Dimethyl-2,5-di-(benzoylperoxy)hexane. | UN3104 | ≤82 | | | | ≥18 | OP5 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane. | UN3103 | >90–100 | | | | | OP5 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane. | UN3105 | >52–90 | ≥10 | | | | OP7 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane. | UN3108 | ≤77 | | | ≥23 | | OP8 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane. | UN3109 | ≤52 | ≥48 | | | | OP8 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexane [as a paste]. | UN3108 | ≤47 | | | | | OP8 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexyne-3. | UN3101 | >86–100 | | | | | OP5 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexyne-3. | UN3103 | >52–86 | ≥14 | | | | OP5 | | | |
| 2,5-Dimethyl-2,5-di-(tert-butylperoxy)hexyne-3. | UN3106 | ≤52 | | | ≥48 | | OP7 | | | |
| 2,5-Dimethyl-2,5-di-(2-ethylhexanoylperoxy)hexane. | UN3113 | ≤100 | | | | | OP5 | 20 | 25 | |
| 2,5-Dimethyl-2,5-dihydroperoxyhexane | UN3104 | ≤82 | | | | ≥18 | OP6 | | | |
| 2,5-Dimethyl-2,5-di-(3,5,5-trimethylhexanoylperoxy)hexane. | UN3105 | ≤77 | ≥23 | | | | OP7 | | | |
| 1,1-Dimethyl-3-hydroxybutylperoxyneoheptanoate. | UN3117 | ≤52 | ≥48 | | | | OP8 | 0 | 10 | |
| Dimyristyl peroxydicarbonate | UN3116 | ≤100 | | | | | OP7 | 20 | 25 | |
| Dimyristyl peroxydicarbonate [as a stable dispersion in water]. | UN3119 | ≤42 | | | | | OP8 | 20 | 25 | |
| Di-(2-neodecanoylperoxyisopropyl)benzene. | UN3115 | ≤52 | ≥48 | | | | OP7 | −10 | 0 | |

TABLE 1 TO PARAGRAPH (c): ORGANIC PEROXIDE TABLE—Continued

| Technical name | ID No. | Concentration (mass %) | Diluent (mass %) | | | Water (mass %) | Packing method | Temperature (°C) | | Notes |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | A | B | I | | | Control | Emergency | |
| (1) | (2) | (3) | (4a) | (4b) | (4c) | (5) | (6) | (7a) | (7b) | (8) |
| Di-(2-neodecanoyl-peroxyisopropyl) benzene, as stable dispersion in water. | UN3119 | ≤42 | | | | | OP8 | −15 | −5 | |
| Di-n-nonanoyl peroxide | UN3116 | ≤100 | | | | | OP7 | 0 | 10 | |
| Di-n-octanoyl peroxide | UN3114 | ≤100 | | | | | OP5 | 10 | 15 | |
| Di-(2-phenoxyethyl)peroxydicarbonate | UN3102 | >85–100 | | | | | OP5 | | | |
| Di-(2-phenoxyethyl)peroxydicarbonate | UN3106 | ≤85 | | | | ≥15 | OP7 | | | |
| Dipropionyl peroxide | UN3117 | ≤27 | | ≥73 | | | OP8 | 15 | 20 | |
| Di-n-propyl peroxydicarbonate | UN3113 | ≤100 | | | | | OP3 | −25 | −15 | |
| Di-n-propyl peroxydicarbonate | UN3113 | ≤77 | | ≥23 | | | OP5 | −20 | −10 | |
| Disuccinic acid peroxide | UN3102 | >72–100 | | | | | OP4 | | | 18 |
| Disuccinic acid peroxide | UN3116 | ≤72 | | | | ≥28 | OP7 | 10 | 15 | |
| Di-(3,5,5-trimethylhexanoyl) peroxide | UN3115 | >52–82 | ≥18 | | | | OP7 | 0 | 10 | |
| Di-(3,5,5-trimethylhexanoyl)peroxide [as a stable dispersion in water]. | UN3119 | ≤52 | | | | | OP8 | 10 | 15 | |
| Di-(3,5,5-trimethylhexanoyl) peroxide | UN3119 | >38–52 | ≥48 | | | | OP8 | 10 | 15 | |
| Di-(3,5,5-trimethylhexanoyl)peroxide | UN3119 | ≤38 | ≥62 | | | | OP8 | 20 | 25 | |
| Ethyl 3,3-di-(tert-amylperoxy)butyrate | UN3105 | ≤67 | ≥33 | | | | OP7 | | | |
| Ethyl 3,3-di-(tert-butylperoxy)butyrate | UN3103 | >77–100 | | | | | OP5 | | | |
| Ethyl 3,3-di-(tert-butylperoxy)butyrate | UN3105 | ≤77 | ≥23 | | | | OP7 | | | |
| Ethyl 3,3-di-(tert-butylperoxy)butyrate | UN3106 | ≤52 | | | ≥48 | | OP7 | | | |
| 1-(2-ethylhexanoylperoxy)-1,3-Dimethylbutyl peroxypivalate. | UN3115 | ≤52 | ≥45 | ≥10 | | | OP7 | −20 | −10 | |
| tert-Hexyl peroxyneodecanoate | UN3115 | ≤71 | ≥29 | | | | OP7 | 0 | 10 | |
| tert-Hexyl peroxypivalate | UN3115 | ≤72 | | ≥28 | | | OP7 | 10 | 15 | |
| tert-Hexyl peroxypivalate | UN3117 | ≤52 as a stable dispersion in water | | | | | OP8 | +15 | +20 | |
| 3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate. | UN3115 | ≤77 | ≥23 | | | | OP7 | −5 | 5 | |
| 3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate [as a stable dispersion in water]. | UN3119 | ≤52 | | | | | OP8 | −5 | 5 | |
| 3-Hydroxy-1,1-dimethylbutyl peroxyneodecanoate. | UN3117 | ≤52 | ≥48 | | | | OP8 | −5 | 5 | |
| Isopropyl sec-butyl peroxydicarbonat + Di-sec-butyl peroxydicarbonate + Di-isopropyl peroxydicarbonate. | UN3111 | ≤52 + ≤28 + ≤22 | | | | | OP5 | −20 | −10 | |
| Isopropyl sec-butyl peroxydicarbonate + Di-sec-butyl peroxydicarbonate + Di-isopropyl peroxydicarbonate. | UN3115 | ≤32 + ≤15 −18 + ≤12 −15 | ≥38 | | | | OP7 | −20 | −10 | |
| Isopropylcumyl hydroperoxide | UN3109 | ≤72 | ≥28 | | | | OP8 | | | 13 |
| p-Menthyl hydroperoxide | UN3105 | >72–100 | | | | | OP7 | | | 13 |
| p-Menthyl hydroperoxide | UN3109 | ≤72 | ≥28 | | | | OP8 | | | |
| Methylcyclohexanone peroxide(s) | UN3115 | ≤67 | | ≥33 | | | OP7 | 35 | 40 | |
| Methyl ethyl ketone peroxide(s) | UN3101 | ≤52 | ≥48 | | | | OP5 | | | 5, 13 |
| Methyl ethyl ketone peroxide(s) | UN3105 | ≤45 | ≥55 | | | | OP7 | | | 5 |
| Methyl ethyl ketone peroxide(s) | UN3107 | ≤40 | ≥60 | | | | OP8 | | | 7 |
| Methyl isobutyl ketone peroxide(s) | UN3105 | ≤62 | ≥19 | | | | OP7 | | | 5, 23 |
| Methyl isopropyl ketone peroxide(s) | UN3109 | (See remark 31) | ≥70 | | | | OP8 | | | 31 |
| Organic peroxide, liquid, sample | UN3103 | | | | | | OP2 | | | 12 |
| Organic peroxide, liquid, sample, temperature controlled. | UN3113 | | | | | | OP2 | | | 12 |
| Organic peroxide, solid, sample | UN3104 | | | | | | OP2 | | | 12 |
| Organic peroxide, solid, sample, temperature controlled. | UN3114 | | | | | | OP2 | | | 12 |
| 3,3,5,7,7-Pentamethyl-1,2,4-Trioxepane | UN3107 | ≤100 | | | | | OP8 | | | |
| Peroxyacetic acid, type D, stabilized | UN3105 | ≤43 | | | | | OP7 | | | 13, 20 |
| Peroxyacetic acid, type E, stabilized | UN3107 | ≤43 | | | | | OP8 | | | 13, 20 |
| Peroxyacetic acid, type F, stabilized | UN3109 | ≤43 | | | | | OP8 | | | 13, 20, 28 |
| Peroxyacetic acid or peracetic acid [with not more than 7% hydrogen peroxide]. | UN3107 | ≤36 | | | | ≥15 | OP8 | | | 13, 20, 28 |
| Peroxyacetic acid or peracetic acid [with not more than 20% hydrogen peroxide]. | Exempt | ≤6 | | | | ≥60 | Exempt | | | 28 |
| Peroxyacetic acid or peracetic acid [with not more than 26% hydrogen peroxide]. | UN3109 | ≤17 | | | | | OP8 | | | 13, 20, 28 |
| Peroxylauric acid | UN3118 | ≤100 | | | | | OP8 | 35 | 40 | |
| 1-Phenylethyl hydroperoxide | UN3109 | ≤38 | | ≥62 | | | OP8 | | | |
| Pinanyl hydroperoxide | UN3105 | >56–100 | | | | | OP7 | | | 13 |
| Pinanyl hydroperoxide | UN3109 | ≤56 | ≥44 | | | | OP8 | | | |
| Polyether poly-tert-butylperoxycarbonate | UN3107 | ≤52 | | ≥48 | | | OP8 | | | |
| Tetrahydronaphthyl hydroperoxide | UN3106 | ≤100 | | | | | OP7 | | | |
| 1,1,3,3-Tetramethylbutyl hydroperoxide | UN3105 | ≤100 | | | | | OP7 | | | |

TABLE 1 TO PARAGRAPH (c): ORGANIC PEROXIDE TABLE—Continued

| Technical name | ID No. | Concentration (mass %) | Diluent (mass %) | | | Water (mass %) | Packing method | Temperature (°C) | | Notes |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | A | B | I | | | Control | Emergency | |
| (1) | (2) | (3) | (4a) | (4b) | (4c) | (5) | (6) | (7a) | (7b) | (8) |
| 1,1,3,3-Tetramethylbutyl peroxy-2-ethylhexanoate. | UN3115 | ≤100 | ..... | ..... | ..... | ..... | OP7 | 15 | 20 | ..... |
| 1,1,3,3-Tetramethylbutyl peroxyneodecanoate. | UN3115 | ≤72 | ..... | ≥28 | ..... | ..... | OP7 | -5 | 5 | ..... |
| 1,1,3,3-Tetramethylbutyl peroxyneodecanoate [as a stable dispersion in water]. | UN3119 | ≤52 | ..... | ..... | ..... | ..... | OP8 | −5 | 5 | ..... |
| 1,1,3,3-tetramethylbutyl peroxypivalate .. | UN3115 | ≤77 | ≥23 | ..... | ..... | ..... | OP7 | 0 | 10 | ..... |
| 3,6,9-Triethyl-3,6,9-trimethyl-1,4,7-triperoxonane. | UN3110 | ≤17 | ≥18 | ..... | ≥65 | ..... | OP8 | ..... | ..... | ..... |
| 3,6,9-Triethyl-3,6,9-trimethyl-1,4,7-triperoxonane. | UN3105 | ≤42 | ≥58 | ..... | ..... | ..... | OP7 | ..... | ..... | 26 |

**Notes:**
1. For domestic shipments, OP8 is authorized.
2. Available oxygen must be <4.7%.
3. For concentrations <80% OP5 is allowed. For concentrations of at least 80% but <85%, OP4 is allowed. For concentrations of at least 85%, maximum package size is OP2.
4. The diluent may be replaced by di-tert-butyl peroxide.
5. Available oxygen must be ≤9% with or without water.
6. For domestic shipments, OP5 is authorized.
7. Available oxygen must be ≤8.2% with or without water.
8. Only non-metallic packagings are authorized.
9. For domestic shipments this material may be transported under the provisions of paragraph (h)(3)(xii) of this section.
10. [Reserved]
11. [Reserved]
12. Samples may only be offered for transportation under the provisions of paragraph (b)(2) of this section.
13. ''Corrosive'' subsidiary risk label is required.
14. [Reserved]
15. No ''Corrosive'' subsidiary risk label is required for concentrations below 80%.
16. With <6% di-tert-butyl peroxide.
17. With ≤8% 1-isopropylhydroperoxy-4-isopropylhydroxybenzene.
18. Addition of water to this organic peroxide will decrease its thermal stability.
19. [Reserved]
20. Mixtures with hydrogen peroxide, water, and acid(s).
21. With diluent type A, with or without water.
22. With ≥36%% diluent type A by mass, and in addition ethylbenzene.
23. With ≥19% diluent type A by mass, and in addition methyl isobutyl ketone.
24. Diluent type B with boiling point >100 °C.
25. No ''Corrosive'' subsidiary risk label is required for concentrations below 56%.
26. Available oxygen must be ≤7.6%
27. Formulations derived from distillation of peroxyacetic acid originating from peroxyacetic acid in a concentration of not more than 41% with water, total active oxygen less than or equal to 9.5% (peroxyacetic acid plus hydrogen peroxide).
28. For the purposes of this section, the names ''Peroxyacetic acid'' and ''Peracetic acid'' are synonymous.
29. Not subject to the requirements of this subchapter for Division 5.2.
30. Diluent type B with boiling point >130 °C (266 °F).
31. Available oxygen ≤6.7%.
32. Active oxygen concentration ≤4.15%.

* * * * * (g) * * *

TABLE 4 TO PARAGRAPH (g): ORGANIC PEROXIDE PORTABLE TANK TABLE

| UN No. | Hazardous material | Minimum test pressure (bar) | Minimum shell thickness (mm-reference steel) See . . . | Bottom opening requirements See . . . | Pressure-relief requirements See . . . | Filling limits | Control temperature | Emergency temperature |
|---|---|---|---|---|---|---|---|---|
| 3109 ... | ORGANIC PEROXIDE,. TYPE F, LIQUID. | ..... | ..... | ..... | ..... | ..... | ..... | ..... |
| | * | * | * | * | * | * | * | |
| | tert-Butyl hydroperoxide, not more than 56% with diluent type B[2]. | 4 | § 178.274(d)(2) | § 178.275(d)(3) | § 178.275(g)(1) | Not more than 90% at 59 °F (15 °C). | ..... | ..... |
| | * | * | * | * | * | * | * | |

**Notes**
1. ''Corrosive'' subsidiary risk placard is required.
2. Diluent type B is tert-Butyl alcohol.

■ 19. In § 173.232, add paragraph (h) to read as follows:

**§ 173.232 Articles containing hazardous materials, n.o.s.**

* * * * *

(h) For transport by aircraft, the following additional requirements apply:

(i) Articles transported under UN3548, which do not have an existing proper shipping name, and which contain only environmentally hazardous substances where the quantity of the environmentally hazardous substance in the article exceeds 5 L or 5 kg, must be prepared for transport in accordance with this section for transport by air. In addition to the environmentally hazardous substances, the article may also contain lithium cells or batteries that comply with § 173.185(c)(4), as applicable.

(ii) Articles transported under UN3538, which do not have an existing proper shipping name, and which contain only gases of Division 2.2 without a subsidiary hazard, but excluding refrigerated liquefied gases and gases forbidden for transport on passenger aircraft, where the quantity of the Division 2.2 gas exceeds the quantity limits for UN 3363, as prescribed in § 173.222 must be prepared for transport in accordance with this section. Articles transported under this provision are limited to a maximum net quantity of gas of 75 kg by passenger aircraft and 150 kg by cargo aircraft. In addition to the Division 2.2 gas, the article may also contain lithium cells or batteries that comply with § 173.185(c)(4), as applicable.

■ 20. In § 173.301b, revise paragraphs (c)(1), (c)(2)(ii) through (iv), (d)(1), and (f) to read as follows:

**§ 173.301b Additional general requirements for shipment of UN pressure receptacles.**

* * * * *

(c) * * *

(1) When the use of a valve is prescribed, the valve must conform to the requirements in ISO 10297:2014(E) and ISO 10297:2014/Amd 1:2017 (IBR, see § 171.7 of this subchapter). Quick release cylinder valves for specification and type testing must conform to the requirements in ISO 17871:2020 or, until December 31, 2026, ISO 17871:2015(E) (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a quick release valve conforming to the requirements in ISO 17871:2015(E) (IBR, see § 171.7 of this subchapter) continues to be authorized for use.

(2) * * *

(ii) By equipping the UN pressure receptacle with a valve cap conforming to the requirements in ISO 11117:2019 (IBR, see § 171.7 of this subchapter). Until December 31, 2026, the UN pressure receptacle may continue to be equipped with a valve cap conforming to the requirements in ISO 11117:2008(E) and Technical Corrigendum 1 (IBR, see § 171.7 of this subchapter);

(iii) By protecting the valves with shrouds or guards conforming to the requirements in ISO 11117:2019 (IBR; see § 171.7 of this subchapter). Until December 31, 2026, the valves may continue to be protected by shrouds or guards conforming to the requirements in ISO 11117:2008 and Technical Corrigendum 1 (IBR; see § 171.7 of this subchapter). For metal hydride storage systems, by protecting the valves in accordance with the requirements in ISO 16111:2018(E) or, until December 31, 2026, in accordance with ISO 16111:2008(E) (IBR; see § 171.7 of this subchapter).

(iv) By using valves designed and constructed with sufficient inherent strength to withstand damage, in accordance with Annex B of ISO 10297:2014(E)/Amd. 1:2017 (IBR; see § 171.7 of this subchapter);

* * * * *

(d) *Non-refillable UN pressure receptacles.* (1) When the use of a valve is prescribed, the valve must conform to the requirements in ISO 11118:2015(E) and ISO 11118:2015/Amd 1:2019 until further notice. Conformance with ISO 11118:2015 without the supplemental amendment is authorized until December 31, 2026 (IBR, *see* § 171.7 of this subchapter).

* * * * *

(f) *Hydrogen bearing gases.* A steel UN pressure receptacle or a UN composite pressure receptacle with a steel liner bearing an ''H'' mark must be used for hydrogen bearing gases or other embrittling gases that have the potential of causing hydrogen embrittlement.

* * * * *

■ 21. In § 173.302c, revise paragraph (k) to read as follows:

**§ 173.302c Additional requirements for the shipment of adsorbed gases in UN pressure receptacles.**

* * * * *

(k) The filling procedure must be in accordance with Annex A of ISO 11513:2019 (IBR, see § 171.7 of this subchapter). Until December 31, 2026, filling may instead be in accordance with Annex A of ISO 11513:2011(E) (IBR, see § 171.7 of this subchapter).

* * * * *

■ 22. Revise § 173.311 to read as follows:

**§ 173.311 Metal Hydride Storage Systems.**

The following packing instruction is applicable to transportable UN Metal hydride storage systems (UN3468) with pressure receptacles not exceeding 150 liters (40 gallons) in water capacity and having a maximum developed pressure not exceeding 25 MPa. UN Metal hydride storage systems must be designed, constructed, initially inspected, and tested in accordance with ISO 16111:2018 (IBR, see § 171.7 of this subchapter), consistent with § 178.71(m) of this subchapter. Until December 31, 2026, UN Metal hydride storage systems may instead conform to ISO 16111:2008(E) (IBR, see § 171.7 of this subchapter). Steel pressure receptacles or composite pressure receptacles with steel liners must be marked in accordance with § 173.301b(f), which specifies that a steel UN pressure receptacle displaying an ''H'' mark must be used for hydrogen-bearing gases or other gases that may cause hydrogen embrittlement. Requalification intervals must be no more than every five years, as specified in § 180.207 of this subchapter, in accordance with the requalification procedures prescribed in ISO 16111:2018 or ISO 16111:2008.

* * * * *

## PART 175—CARRIAGE BY AIRCRAFT

■ 23. The authority citation for part 175 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.81 and 1.97.

■ 24. In § 175.1, add paragraph (e) to read as follows:

**§ 175.1 Purpose, scope, and applicability.**

* * * * *

(e) In addition to the requirements of this part, air carriers that are certificate holders authorized to conduct operations in accordance with 14 CFR part 121 are also required to have a Safety Management System meeting the conditions of 14 CFR part 5 and found to be acceptable to the Federal Aviation Administration (FAA).

■ 25. In § 175.10, revise paragraphs (a) introductory text, (a)(14) introductory text, (a)(15)(v)(A), (a)(15)(vi)(A), (a)(17)(ii)(C), (a)(18) introductory text, and (a)(26) introductory text to read as follows:

**§ 175.10 Exceptions for passengers, crewmembers, and air operators.**

* * * * *

(a) This subchapter does not apply to the following hazardous materials when

carried by aircraft passengers or crewmembers provided the requirements of §§ 171.15 and 171.16 of this subchapter (see paragraph (c) of this section) and the requirements of this section are met. The most appropriate description of the hazardous material item or article must be selected and the associated conditions for exception must be followed:

* * * * *

(14) Battery powered heat-producing devices (*e.g.,* battery-operated equipment such as diving lamps and soldering equipment) as checked or carry-on baggage and with the approval of the operator of the aircraft. The heating element, the battery, or other component (*e.g.,* fuse) must be isolated to prevent unintentional activation during transport. Any battery that is removed must be carried in accordance with the provisions for spare batteries in paragraph (a)(18) of this section. Each battery must be of a type which meets the requirements of each test in the UN Manual of Tests and Criteria, Part III, Subsection 38.3 (IBR, see § 171.7 of this subchapter), and each installed or spare lithium battery:

* * * * *

(15) * * *

(v) * * *

(A) Adequately protected against damage by design of the wheelchair or mobility aid and securely attached to the wheelchair or mobility aid; or

* * * * *

(vi) * * *

(A) Adequately protected against damage by design of the wheelchair or mobility aid and securely attached to the wheelchair or mobility aid; or

* * * * *

(17) * * *

(ii) * * *

(C) The battery is adequately protected against damage by design of the wheelchair or mobility aid and securely attached to the wheelchair or other mobility aid; and

* * * * *

(18) Except as provided in § 173.21 of this subchapter, portable electronic devices (*e.g.,* watches, calculating machines, cameras, cellular phones, laptop and notebook computers, camcorders, medical devices, etc.) that are not otherwise more appropriately described and subject to separate provisions in this section, containing dry cells or dry batteries (including lithium cells or batteries) and spare dry cells or batteries for these devices, when carried by passengers or crew members for personal use. Portable electronic devices powered by lithium batteries may be carried in either checked or carry-on baggage. When carried in checked baggage, portable electronic devices powered by lithium batteries must be completely switched off (*i.e.,* not in sleep or hibernation mode) and protected to prevent unintentional activation or damage, except portable electronic devices powered by lithium batteries with lithium content not exceeding 0.3 grams for lithium metal batteries and 2.7 Wh for lithium ion batteries are not required to be switched off. Spare lithium batteries must be carried in carry-on baggage only. Each installed or spare lithium battery must be of a type proven to meet the requirements of each test in the UN Manual of Tests and Criteria, Part III, Sub-section 38.3, and each spare lithium battery must be individually protected so as to prevent short circuits (*e.g.,* by placement in original retail packaging, by otherwise insulating terminals by taping over exposed terminals, or placing each battery in a separate plastic bag or protective pouch). In addition, each installed or spare lithium battery:

* * * * *

(26) Baggage equipped with lithium batteries must be carried as carry-on baggage unless the batteries are removed from the baggage. Batteries must be of a type which meets the requirements of each test in the UN Manual of Tests and Criteria, Part III, Subsection 38.3 (IBR, *see* § 171.7 of this subchapter). Additionally, removed batteries must be carried in accordance with the provision for spare batteries prescribed in paragraph (a)(18) of this section. Baggage equipped with lithium batteries may be carried as checked baggage and electronic features may remain active if the batteries do not exceed:

* * * * *

■ 26. In § 175.33, revise paragraph (a)(13)(iii) to read as follows:

**§ 175.33 Shipping paper and information to the pilot-in-command.**

(a) * * *

(13) * * *

(iii) UN3481 and UN3091 are not required to appear on the information provided to the pilot-in-command when prepared in accordance with § 173.185(c)(4).

* * * * *

## PART 178—SPECIFICATIONS FOR PACKAGINGS

■ 27. The authority citation for part 178 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 28. In § 178.37, revise paragraph (j) to read as follows:

**§ 178.37 Specification 3AA and 3AAX seamless steel cylinders.**

* * * * *

(j) Flattening test. A flattening test must be performed on one cylinder, taken at random out of each lot of 200 or fewer, by placing the cylinder between wedge shaped knife edges, having a 60-degree included angle, rounded to ½-inch radius. The longitudinal axis of the cylinder must be at a 90-degree angle to the knife edges during the test. For lots of 30 or fewer, flattening tests are authorized to be made on a ring at least eight (8) inches long, cut from each cylinder and subjected to the same heat treatment as the finished cylinder. Cylinders may be subjected to a bend test in lieu of the flattening test. Two bend test specimens must be taken in accordance with ISO 9809–1:2019(E) or ASTM E290 (IBR, see § 171.7 of this subchapter), and must be subjected to the bend test specified therein.

* * * * *

■ 29. In § 178.71, revise paragraphs (f)(4), (g), (i), (k)(1)(i) and (ii), (m), and (n) to read as follows:

**§ 178.71 Specifications for UN pressure receptacles.**

* * * * *

(f) * * *

(4) ISO 21172–1:2015(E) Gas cylinders—Welded steel pressure drums up to 3,000 litres capacity for the transport of gases—Design and construction—Part 1: Capacities up–to 1,000 litres (IBR, *see* § 171.7 of this subchapter) in combination with ISO 21172–1:2015/Amd 1:2018(E)—Gas Cylinders—Welded steel pressure drums up to 3,000 litres capacity for the transport of gases—Design and construction—Part 1: Capacities up–to 1,000 litres—Amendment 1 (IBR, *see* § 171.7 of this subchapter).Until December 31, 2026, the use of ISO 21172–1:2015 (IBR, see § 171.7 of this subchapter) without the supplemental amendment is authorized.

* * * * *

(g) *Design and construction requirements for UN refillable seamless steel cylinders.* In addition to the general requirements of this section, UN refillable seamless steel cylinders must conform to the following ISO standards, as applicable:

(1) ISO 9809–1:2019(E), Gas cylinders—Refillable seamless steel gas cylinders—Design, construction, and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1100 MPa (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a cylinder may instead conform to ISO

9809–1:2010(E) (IBR, see § 171.7 of this subchapter).

(2) ISO 9809–2:2019(E), Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 2: Quenched and tempered steel cylinders and tubes with tensile strength greater than or equal to 1100 MPa (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a cylinder may instead conform to ISO 9809–2:2010 (IBR, see § 171.7 of this subchapter).

(3) ISO 9809–3:2019(E), Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 3: Normalized steel cylinders and tubes. (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a cylinder may instead conform to ISO 9809–3:2010(E) (IBR, see § 171.7 of this subchapter).

(4) ISO 9809–4:2014(E), Gas cylinders—Refillable seamless steel gas cylinders—Design, construction and testing—Part 4: Stainless steel cylinders with an Rm value of less than 1 100 MPa (IBR, see § 171.7 of this subchapter).

* * * * *

(i) *Design and construction requirements for UN non-refillable metal cylinders.* In addition to the general requirements of this section, UN non-refillable metal cylinders must conform to ISO 11118:2015(E) Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods, in combination with ISO 11118:2015/Amd 1:2019 Gas cylinders—Non-refillable metallic gas cylinders—Specification and test methods—Amendment 1. (IBR, *see* § 171.7 of this subchapter). Until December 31, 2026, the use of ISO 11118:2015 (IBR, see § 171.7 of this subchapter) without the supplemental amendment is authorized.

* * * * *

(k) * * *

(1) * * *

(i) ISO 9809–1:2019(E) Gas cylinders—Refillable seamless steel gas cylinders—Design, construction, and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1100 MPa (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a cylinder may instead conform to ISO 9809–1:2010(E) (IBR, see § 171.7 of this subchapter).

(ii) ISO 9809–3:2019(E) Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 3: Normalized steel cylinders and tubes. (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a cylinder may instead conform to ISO 9809–3:2010(E) (IBR, see § 171.7 of this subchapter).

* * * * *

(m) *Design and construction requirements for UN metal hydride storage systems.* In addition to the general requirements of this section, metal hydride storage systems must conform to ISO 16111:2018(E) Transportable gas storage devices—Hydrogen absorbed in reversible metal hydride (IBR, *see* § 171.7 of this subchapter). Until December 31, 2026, UN metal hydride storage systems may instead conform to ISO 16111:2008 (IBR, *see* § 171.7 of this subchapter).

(n) *Design and construction requirements for UN cylinders for the transportation of adsorbed gases.* In addition to the general requirements of this section, UN cylinders for the transportation of adsorbed gases must conform to the following ISO standards, as applicable:

(1) ISO 11513:2019, Gas cylinders—Refillable welded steel cylinders containing materials for sub-atmospheric gas packaging (excluding acetylene)—Design, construction, testing, use and periodic inspection (IBR, *see* § 171.7 of this subchapter). Until December 31, 2026, UN cylinders may instead conform to ISO 11513:2011(E) (IBR, *see* § 171.7 of this subchapter).

(2) ISO 9809–1:2019(E): Gas cylinders—Refillable seamless steel gas cylinders—Design, construction, and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1100 MPa (IBR, *see* § 171.7 of this subchapter). Until December 31, 2026, UN cylinders may instead conform to ISO 9809–1:2010(E) (IBR, *see* § 171.7 of this subchapter.

* * * * *

■ 30. In § 178.75, revise paragraph (d)(3) introductory text and paragraph (d)(3)(i) through (iii) to read as follows:

**§ 178.75 Specifications for MEGCs.**

* * * * *

(d) * * *

(3) Each pressure receptacle of a MEGC must be of the same design type, seamless steel, or composite, and constructed and tested according to one of the following ISO standards:

(i) ISO 9809–1:2019(E), Gas cylinders—Refillable seamless steel gas cylinders—Design, construction, and testing—Part 1: Quenched and tempered steel cylinders with tensile strength less than 1100 MPa (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a pressure receptacle may instead conform to ISO 9809–1:2010(E) (IBR, see § 171.7 of this subchapter).

(ii) ISO 9809–2:2019(E), Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 2: Quenched and tempered steel cylinders and tubes with tensile strength greater than or equal to 1100 MPa (IBR, see § 171.7 of this subchapter). Until December 31, 2026, a pressure receptacle may instead conform to ISO 9809–2:2010(E) (IBR, see § 171.7 of this subchapter).

(iii) ISO 9809–3:2019(E), Gas cylinders—Design, construction and testing of refillable seamless steel gas cylinders and tubes—Part 3: Normalized steel cylinders and tubes. (IBR, see § 171.7 of this subchapter). Until December 31, 2026, pressure receptacle may instead conform to ISO 9809–3:2010(E) (IBR, see § 171.7 of this subchapter).

* * * * *

■ 31. In § 178.609, revise paragraph (d)(2) to read as follows:

**§ 178.609 Test requirements for packagings for infectious substances.**

* * * * *

(d) * * *

(2) Where the samples are in the shape of a drum or jerrican, three samples must be dropped, one in each of the following orientations:

(i) Diagonally on the top edge, with the center of gravity directly above the point of impact;

(ii) Diagonally on the base edge; and

(iii) Flat on the body or side.

* * * * *

■ 32. In § 178.706, revise paragraph (c)(3) to read as follows:

**§ 178.706 Standards for rigid plastic IBCs.**

* * * * *

(c) * * *

(3) No used material other than production residues or regrind from the same manufacturing process may be used in the manufacture of rigid plastic IBCs unless approved by the Associate Administrator.

* * * * *

■ 33. In § 178.707, revise paragraph (c)(3)(iii) to read as follows:

**§ 178.707 Standards for composite IBCs.**

* * * * *

(c) * * *

(3) * * *

(iii) No used material, other than production residues or regrind from the same manufacturing process, may be used in the manufacture of inner receptacles unless approved by the Associate Administrator.

* * * * *

## PART 180—CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS

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

**Authority:** 49 U.S.C. 5101–5128; 49 CFR 1.81 and 1.97.

■ 35. In § 180.207, revise paragraphs (d)(3) and (5), and add paragraph (d)(8) to read as follows:

### § 180.207 Requirements for requalification of UN pressure receptacles.

* * * * *

(d) * * *

(3) Dissolved acetylene UN cylinders: Each dissolved acetylene cylinder must be requalified in accordance with ISO 10462:2013(E)/Amd 1:2019 (IBR, see § 171.7 of this subchapter). However, a cylinder may continue to be requalified in accordance with ISO 10462:2013(E) (IBR, see § 171.7 of this subchapter) without the supplemental amendment until December 31, 2024. Further, a cylinder requalified in accordance with ISO 10462:2013(E) until December 31, 2018, may continue to be used until its next required requalification. The porous mass and the shell must be requalified no sooner than three (3) years, six (6) months, from the date of manufacture. Thereafter, subsequent requalifications of the porous mass and shell must be performed at least once every 10 years.

* * * * *

(5) UN cylinders for adsorbed gases: Each UN cylinder for adsorbed gases must be inspected and tested in accordance with § 173.302c of this subchapter and ISO 11513:2019(E) (IBR, see § 171.7 of this subchapter). However, a UN cylinder may continue to be requalified in accordance with ISO 11513:2011(E) (IBR, see § 171.7 of this subchapter) until December 31, 2024.

* * * * *

(8) UN pressure drums: UN pressure drums must be inspected and tested in accordance with ISO 23088:2020 (IBR, see § 171.7 of this subchapter).

* * * * *

Issued in Washington, DC, on March 31, 2023, under authority delegated in 49 CFR 1.97.

**William S. Schoonover,**

*Associate Administrator for Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.*

[FR Doc. 2023–07109 Filed 5–26–23; 8:45 am]

**BILLING CODE 4910–60–P**


# FEDERAL REGISTER

Vol. 88 Tuesday,
No. 103 May 30, 2023

Part III

## Department of Energy

10 CFR Parts 429 and 430
Energy Conservation Program: Energy Conservation Standards for Consumer Pool Heaters; Final Rule

**DEPARTMENT OF ENERGY**

**10 CFR Parts 429 and 430**

**[EERE–2021–BT–STD–0020]**

**RIN 1904–AD49**

## Energy Conservation Program: Energy Conservation Standards for Consumer Pool Heaters

**AGENCY:** Office of Energy Efficiency and Renewable Energy, Department of Energy.

**ACTION:** Final rule.

**SUMMARY:** The Energy Policy and Conservation Act, as amended (''EPCA''), prescribes energy conservation standards for various consumer products and certain commercial and industrial equipment, including consumer pool heaters. EPCA also requires the U.S. Department of Energy (''DOE'' or ''the Department'') to periodically determine whether more-stringent, standards would be technologically feasible and economically justified, and would result in significant energy savings. In this final rule, DOE is adopting new and amended energy conservation standards for consumer pool heaters. It has determined that the new and amended energy conservation standards for these products would result in significant conservation of energy, and are technologically feasible and economically justified.

**DATES:** The effective date of this rule is July 31, 2023. Compliance with the new and amended standards established for consumer pool heaters in this final rule is required on and after May 30, 2028.

**ADDRESSES:** The docket for this rulemaking, which includes **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials, is available for review at *www.regulations.gov.* All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

The docket web page can be found at *www.regulations.gov/docket/EERE-2021-BT-STD-0020.* The docket web page contains instructions on how to access all documents, including public comments, in the docket.

For further information on how to review the docket, contact the Appliance and Equipment Standards Program staff at (202) 287–1445 or by email: *ApplianceStandardsQuestions@ee.doe.gov.*

**FOR FURTHER INFORMATION CONTACT:**

Ms. Julia Hegarty, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–5B, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (240) 597–6737. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Mr. Nolan Brickwood, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–4498. Email: *Nolan.Brickwood@hq.doe.gov.*

**SUPPLEMENTARY INFORMATION:**

### Table of Contents

## I. Synopsis of the Final Rule

The Energy Policy and Conservation Act,[1] as amended, Public Law 94–163, (42 U.S.C. 6291–6317, as codified) (''EPCA''), authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of EPCA [2] established the Energy Conservation Program for Consumer Products Other Than Automobiles. (42 U.S.C. 6291–6309) These products include consumer pool heaters, the subject of this rulemaking.

Pursuant to EPCA, any new or amended energy conservation standard must be designed to achieve the maximum improvement in energy efficiency that DOE determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) Furthermore, the new or amended standard must result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B)) EPCA also provides that not later than 6 years after issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m))

In accordance with these and other statutory provisions discussed in this document, DOE is adopting amended energy conservation standards for gas-fired pool heaters and new energy conservation standards for electric pool heaters. The adopted new and amended standards are expressed in terms of the integrated thermal efficiency (''$TE_I$'') metric, which replaces the thermal efficiency (''TE'') metric for gas-fired pool heaters, and are shown in Table I.1. The $TE_I$ standards are expressed as a function of the active mode electrical input power (''PE'') in British thermal units per hour (''Btu/h'') for electric pool heaters and the gas input rating (''$Q_{IN}$'') in Btu/h for gas-fired pool heaters. These standards apply to all products listed in Table I.1 and manufactured in, or imported into, the United States starting on May 30, 2028.

**Table I.1 Energy Conservation Standards for Consumer Pool Heaters (Compliance Starting** May 30, 2028**)**

| Product Class | Integrated Thermal Efficiency $TE_I$* *(percent)* |
|---|---|
| Electric Pool Heater | $\frac{600(PE)}{PE + 1,619}$ |
| Gas-Fired Pool Heater | $\frac{84(Q_{IN} + 491)}{Q_{IN} + 2,536}$ |

* PE is the active electrical power for electric pool heaters, in Btu/h, and $Q_{IN}$ is the input capacity for gas-fired pool heaters, in Btu/h, as determined in accordance with the DOE test procedure at title 10 of the Code of Federal Regulations part 430, subpart B, appendix P.

*A. Benefits and Costs to Consumers*

Table I.2 summarizes DOE's evaluation of the economic impacts of the adopted standards on consumers of consumer pool heaters, as measured by the average life-cycle cost (''LCC'') savings and the simple payback period (''PBP'').[3] The average LCC savings are positive for electric pool heaters and

[1] All references to EPCA in this document refer to the statute as amended through the Energy Act of 2020, Public Law 116–260 (Dec. 27, 2020), which reflect the last statutory amendments that impact Parts A and A–1 of EPCA.

[2] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[3] The average LCC savings refer to consumers that are affected by a standard and are measured relative to the efficiency distribution in the no-new-standards case, which depicts the market in the compliance year in the absence of new or amended standards (see section IV.F.8 of this document). The simple PBP, which is designed to compare specific efficiency levels, is measured relative to the baseline product (see section IV.F.9 of this document).

gas-fired pool heaters, and the PBP is less than the average lifetime of electric pool heaters and gas-fired pool heaters, which is estimated to be 11.1 years (see section IV.F of this document).

TABLE I.2—IMPACTS OF ADOPTED ENERGY CONSERVATION STANDARDS ON CONSUMERS OF CONSUMER POOL HEATERS

| Product class | Average LCC savings (2021$) | Simple payback period (years) |
|---|---|---|
| Electric Pool Heaters | 1,130 | 0.5 |
| Gas-fired Pool Heaters | 80 | 2.3 |

DOE's analysis of the impacts of the adopted standards on consumers is described in section IV.F of this document.

*B. Impact on Manufacturers*

The industry net present value (''INPV'') is the sum of the discounted cash flows to the industry from the base year through the end of the analysis period (2023–2057). Using a real discount rate of 7.4 percent,[4] DOE estimates that the INPV for manufacturers of consumer pool heaters in the case without new and amended standards is $585.7 million in 2021 dollars. Under the adopted standards, DOE estimates the change in INPV to range from −6.4 percent to 0.3 percent, which is approximately −$37.3 million to $2.0 million. In order to bring products into compliance with the new and amended standards, it is estimated that industry will incur total conversion costs of $48.4 million.

DOE's analysis of the impacts of the adopted standards on manufacturers is described in sections IV.J and V.B.2 of this document.

*C. National Benefits and Costs*[5]

DOE's analyses indicate that the adopted energy conservation standards for consumer pool heaters will save a significant amount of energy. Relative to the case without new or amended standards, the lifetime energy savings for consumer pool heaters purchased in the 30-year period that begins in the anticipated year of compliance with the new or amended standards (2028–2057), amount to 0.70 quadrillion British thermal units (''Btu''), or quads.[6] This represents a savings of 2.9 percent relative to the energy use of these products in the case without new or amended standards (referred to as the ''no-new-standards case'').

The cumulative net present value (''NPV'') of total consumer benefits of the standards for consumer pool heaters ranges from $1.18 billion (at a 7-percent discount rate) to $3.00 billion (at a 3-percent discount rate). This NPV expresses the estimated total value of future operating-cost savings minus the estimated increased product and installation costs for consumer pool heaters purchased in 2028–2057.

In addition, the adopted standards for consumer pool heaters are projected to yield significant environmental benefits. DOE estimates that the standards will result in cumulative emission reductions (over the same period as for energy savings) of 29 million metric tons (''Mt'') [7] of carbon dioxide (''$CO_2$''), 6.0 thousand tons of sulfur dioxide (''$SO_2$''), 241 thousand tons of nitrogen oxides (''$NO_X$''), 284 thousand tons of methane (''$CH_4$''), 0.17 thousand tons of nitrous oxide (''$N_2O$''), and 0.04 tons of mercury (''Hg'').[8] The estimated cumulative reduction in $CO_2$ emissions through 2030 amounts to 0.57 Mt, which is equivalent to the emissions resulting from the annual electricity use of more than 0.1 million homes.

DOE estimates the value of climate benefits from a reduction in greenhouse gases (''GHG'') using four different estimates of the social cost of $CO_2$ (''SC–$CO_2$''), the social cost of methane (''SC–$CH_4$''), and the social cost of nitrous oxide (''SC–$N_2O$''). Together these represent the social cost of GHG (''SC–GHG'').[9] DOE used interim SC–GHG values developed by an Interagency Working Group on the Social Cost of Greenhouse Gases (''IWG'').[10] The derivation of these values is discussed in section IV.L of this document. For presentational purposes, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are estimated to be $1.5 billion. DOE does not have a single central SC–GHG point estimate and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates.

DOE estimated the monetary health benefits of $SO_2$ and $NO_X$ emissions reductions, using benefit per ton estimates from the scientific literature, as discussed in section IV.L of this document. DOE estimated the present value of the health benefits will be $0.9 billion using a 7-percent discount rate, and $2.3 billion using a 3-percent discount rate.[11] DOE is currently only monetizing (for $SO_2$ and $NO_X$) $PM_{2.5}$ precursor health benefits and (for $NO_X$) ozone precursor health benefits but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions.

Table I.3 summarizes the economic benefits and costs expected to result from the new and amended standards for consumer pool heaters. There are

[4] The discount rate was derived from industry financials from publicly traded companies and then modified according to feedback received during manufacturer interviews.

[5] All monetary values in this document are expressed in 2021 dollars.

[6] The quantity refers to full-fuel-cycle (''FFC'') energy savings. FFC energy savings includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and, thus, presents a more complete picture of the impacts of energy efficiency standards. For more information on the FFC metric, see section IV.H.1 of this document.

[7] A metric ton is equivalent to 1.1 short tons. Results for emissions other than $CO_2$ are presented in short tons.

[8] DOE calculated emissions reductions relative to the no-new-standards-case, which reflects key assumptions in the *Annual Energy Outlook 2022* (''*AEO2022*''). *AEO2022* represents current Federal and state legislation and final implementation of regulations as of the time of its preparation. See section IV.K of this document for further discussion of *AEO2022* assumptions that affect air pollutant emissions.

[9] To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG).

[10] *See* Interagency Working Group on Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide. Interim Estimates Under Executive Order 13990, Washington, DC, February 2021 (''February 2021 SC–GHG TSD''). *www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.*

[11] DOE estimates the economic value of these emissions reductions resulting from the adopted standards for the purpose of complying with the requirements of Executive Order 12866.

other important unquantified effects, including certain unquantified climate benefits, unquantified public health benefits from the reduction of toxic air pollutants and other emissions, unquantified energy security benefits, and distributional effects, among others.

TABLE I.3—SUMMARY OF MONETIZED BENEFITS AND COSTS OF ADOPTED ENERGY CONSERVATION STANDARDS FOR CONSUMER POOL HEATERS

| | Billion 2021$ |
|---|---|
| **3% discount rate** | |
| Consumer Operating Cost Savings | 4.3 |
| Climate Benefits* | 1.5 |
| Health Benefits** | 2.3 |
| Total Monetized Benefits† | 8.0 |
| Consumer Incremental Product Costs‡ | 1.3 |
| Net Monetized Benefits | 6.7 |
| **7% discount rate** | |
| Consumer Operating Cost Savings | 1.8 |
| Climate Benefits* (3% discount rate) | 1.5 |
| Health Benefits** | 0.9 |
| Total Monetized Benefits† | 4.2 |
| Consumer Incremental Product Costs‡ | 0.7 |
| Net Monetized Benefits | 3.5 |

**Note:** This table presents the costs and benefits associated with consumer pool heaters shipped in 2028–2057. These results include benefits to consumers which accrue after 2057 from the products shipped in 2028–2057.

* Climate benefits are calculated using four different estimates of the social cost of carbon (SC–$CO_2$), methane (SC–$CH_4$), and nitrous oxide (SC–$N_2O$) (model average at 2.5-percent, 3-percent, and 5-percent discount rates; 95th percentile at a 3-percent discount rate) (see section IV.L of this document). Together these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are shown, but DOE does not have a single central SC–GHG point estimate. To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG).

** Health benefits are calculated using benefit-per-ton values for $NO_X$ and $SO_2$. DOE is currently only monetizing (for $SO_2$ and $NO_X$) $PM_{2.5}$ precursor health benefits and (for $NO_X$) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. See section IV.L of this document for more details.

† Total and net benefits include those consumer, climate, and health benefits that can be quantified and monetized. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with a 3-percent discount rate, but DOE does not have a single central SC–GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates.

‡ Costs include incremental equipment costs as well as installation costs.

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The monetary values for the total annualized net benefits are (1) the reduced consumer operating costs, minus (2) the increase in product purchase prices and installation costs, plus (3) the monetized value of climate and health benefits of emission reductions, all annualized.[12]

The national operating cost savings are domestic private U.S. consumer monetary savings that occur as a result of purchasing the covered products and are measured for the lifetime of consumer pool heaters shipped in 2028–2057. The benefits associated with reduced emissions achieved as a result of the adopted standards are also calculated based on the lifetime of consumer pool heaters shipped in 2028–2057. Total benefits for both the 3-percent and 7-percent cases are presented using the average GHG social costs with 3-percent discount rate. Estimates of SC–GHG values are presented for all four discount rates in section IV.L.1 of this document.

Table I.4 presents the total estimated monetized benefits and costs associated with the adopted standards, expressed in terms of annualized values. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced $NO_X$ and $SO_2$ emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards adopted in this rule is $74.1 per year in increased equipment costs, while the estimated annual benefits are $208.0 million in reduced equipment operating costs, $88.3 million in monetized climate benefits, and $97.7 million in monetized health benefits. In this case, the net monetized benefit will amount to $319.8 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the standards is $75.3 million per year in increased equipment costs, while the estimated annual benefits are $252.7 million in reduced operating costs, $88.3 million in monetized climate benefits, and $133.1 million in monetized health benefits. In this case, the net monetized benefit will amount to $398.8 million per year.

[12] To convert the time-series of costs and benefits into annualized values, DOE calculated a present value in 2022, the year used for discounting the NPV of total consumer costs and savings. For the benefits, DOE calculated a present value associated with each year's shipments in the year in which the shipments occur (*e.g.,* 2020 or 2030), and then discounted the present value from each year to 2022. Using the present value, DOE then calculated the fixed annual payment over a 30-year period, starting in the compliance year, that yields the same present value.

TABLE I.4—ANNUALIZED BENEFITS AND COSTS OF ADOPTED STANDARDS FOR CONSUMER POOL HEATERS

| | Million 2021$/year | | |
|---|---|---|---|
| | Primary estimate | Low-net-benefits estimate | High-net-benefits estimate |
| **3% discount rate** | | | |
| Consumer Operating Cost Savings | 252.7 | 238.5 | 270.0 |
| Climate Benefits* | 88.3 | 85.3 | 91.2 |
| Health Benefits** | 133.1 | 128.8 | 137.6 |
| Total Monetized Benefits† | 474.1 | 452.6 | 498.7 |
| Consumer Incremental Product Costs‡ | 75.3 | 76.5 | 73.4 |
| Net Monetized Benefits | 398.8 | 376.1 | 425.4 |
| **7% discount rate** | | | |
| Consumer Operating Cost Savings | 208.0 | 197.5 | 220.3 |
| Climate Benefits* (3% discount rate) | 88.3 | 85.3 | 91.2 |
| Health Benefits** | 97.7 | 94.8 | 100.7 |
| Total Monetized Benefits† | 393.9 | 377.6 | 412.2 |
| Consumer Incremental Product Costs‡ | 74.1 | 74.6 | 73.2 |
| Net Monetized Benefits | 319.8 | 303.0 | 339.1 |

**Note:** This table presents the costs and benefits associated with products shipped in 2028–2057. These results include benefits to consumers which accrue after 2057 from the products shipped in 2028–2057. The Primary, Low Net Benefits, and High Net Benefits Estimates utilize projections of energy prices from the *AEO2022* Reference case, Low Economic Growth case, and High Economic Growth case, respectively. In addition, incremental equipment costs reflect a constant price in the Primary Estimate, an increasing rate in the Low Net Benefits Estimate, and a declining rate in the High Net Benefits Estimate. The methods used to derive projected price trends are explained in sections IV.F.1 and IV.F.4 of this document. Note that the Benefits and Costs may not sum to the Net Benefits due to rounding.

* Climate benefits are calculated using four different estimates of the global SC–GHG (see section IV.L of this document). For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are shown, but the Department does not have a single central SC–GHG point estimate, and it emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates. To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG).

** Health benefits are calculated using benefit-per-ton values for $NO_X$ and $SO_2$. DOE is currently only monetizing (for $SO_2$ and $NO_X$) $PM_{2.5}$ precursor health benefits and (for $NO_X$) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. *See* section IV.L of this document for more details.

† Total benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with a 3-percent discount rate, but the Department does not have a single central SC–GHG point estimate.

‡ Costs include incremental equipment costs as well as installation costs.

DOE's analysis of the national impacts of the adopted standards is described in sections IV.H, IV.K, and IV.L of this document.

*D. Conclusion*

DOE concludes that the standards adopted in this final rule represent the maximum improvement in energy efficiency that is technologically feasible and economically justified, and would result in the significant conservation of energy. Specifically, with regards to technological feasibility, products achieving these standard levels are already commercially available for all product classes covered by this proposal. As for economic justification, DOE's analysis shows that the benefits of the standards exceed, to a great extent, the burdens of the standards.

Using a 7-percent discount rate for consumer benefits and costs and $NO_X$ and $SO_2$ reduction benefits, and a 3-percent discount rate case for GHG social costs, the estimated cost of the standards for consumer pool heaters is $74.1 million per year in increased product costs, while the estimated annual benefits are $208.0 million in reduced product operating costs, $88.3 million in monetized climate benefits, and $97.7 million in monetized health benefits. The net monetized benefit amounts to $319.8 million per year.

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking.[13] For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis.

As previously mentioned, the standards are projected to result in estimated national energy savings of 0.70 quads FFC, the equivalent of the primary annual energy use of 7.5 million homes. In addition, they are projected to reduce $CO_2$ emissions by 29 Mt. Based on these findings, DOE has determined the energy savings from the standard levels adopted in this final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B). A more detailed discussion of the basis for these conclusions is contained in the remainder of this document and the accompanying technical support document (''TSD'').

## II. Introduction

The following section briefly discusses the statutory authority underlying this final rule, as well as some of the relevant historical background related to the establishment of standards for consumer pool heaters.

*A. Authority*

EPCA authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. Title III, Part B of

[13] Procedures, Interpretations, and Policies for Consideration in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 86 FR 70892, 70901 (Dec. 13, 2021).

EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles. These products include consumer pool heaters, the subject of this document. (42 U.S.C. 6292(a)(11)) EPCA prescribed energy conservation standards for these products (42 U.S.C. 6295(e)(2)), and directs DOE to conduct two cycles of rulemakings to determine whether to amend these standards. (42 U.S.C. 6295(e)(4)) EPCA further provides that, not later than 6 years after the issuance of any final rule establishing or amending a standard, DOE must publish either a notice of determination that standards for the product do not need to be amended, or a notice of proposed rulemaking (''NOPR'') including new proposed energy conservation standards (proceeding to a final rule, as appropriate). (42 U.S.C. 6295(m)(1))

The energy conservation program under EPCA, consists essentially of four parts: (1) testing, (2) labeling, (3) the establishment of Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of the EPCA specifically include definitions (42 U.S.C. 6291), test procedures (42 U.S.C. 6293), labeling provisions (42 U.S.C. 6294), energy conservation standards (42 U.S.C. 6295), and the authority to require information and reports from manufacturers (42 U.S.C. 6296).

Federal energy efficiency requirements for covered products established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)–(c)) DOE may, however, grant waivers of Federal preemption in limited instances for particular State laws or regulations, in accordance with the procedures and other provisions set forth under EPCA. (*See* 42 U.S.C. 6297(d))

Subject to certain criteria and conditions, DOE is required to develop test procedures to measure the energy efficiency, energy use, or estimated annual operating cost of each covered product. (42 U.S.C. 6295(o)(3)(A) and 42 U.S.C. 6295(r)) Manufacturers of covered products must use the prescribed DOE test procedure as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted under EPCA and when making representations to the public regarding the energy use or efficiency of those products. (42 U.S.C. 6293(c) and 6295(s)) Similarly, DOE must use these test procedures to determine whether the products comply with standards adopted pursuant to EPCA. (42 U.S.C. 6295(s)) The DOE test procedure for consumer pool heaters appears at title 10 of the Code of Federal Regulations (''CFR'') part 430, subpart B, appendix P (''appendix P'').

DOE must follow specific statutory criteria for prescribing new or amended standards for covered products, including consumer pool heaters. Any new or amended standard for a covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary of Energy determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A) Furthermore, DOE may not adopt any standard that would not result in the significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

Moreover, DOE may not prescribe a standard (1) for certain products, including consumer pool heaters, if no test procedure has been established for the product, or (2) if DOE determines by rule that the standard is not technologically feasible or economically justified. (42 U.S.C. 6295(o)(3)(A)–(B)) In deciding whether a proposed standard is economically justified, DOE must determine whether the benefits of the standard exceed its burdens. (42 U.S.C. 6295(o)(2)(B)(i)) DOE must make this determination after receiving comments on the proposed standard, and by considering, to the greatest extent practicable, the following seven statutory factors:

(1) The economic impact of the standard on manufacturers and consumers of the products subject to the standard;

(2) The savings in operating costs throughout the estimated average life of the covered products in the type (or class) compared to any increase in the price, initial charges, or maintenance expenses for the covered products that are likely to result from the standard;

(3) The total projected amount of energy (or as applicable, water) savings likely to result directly from the standard;

(4) Any lessening of the utility or the performance of the covered products likely to result from the standard;

(5) The impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the standard;

(6) The need for national energy and water conservation; and

(7) Other factors the Secretary of Energy (''Secretary'') considers relevant.

(42 U.S.C. 6295(o)(2)(B)(i)(I)–(VII))

Further, EPCA, as codified, establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the energy savings during the first year that the consumer will receive as a result of the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii))

EPCA also contains what is known as an ''anti-backsliding'' provision, which prevents the Secretary from prescribing any amended standard that either increases the maximum allowable energy use or decreases the minimum required energy efficiency of a covered product. (42 U.S.C. 6295(o)(1)) Also, the Secretary may not prescribe an amended or new standard if interested persons have established by a preponderance of the evidence that the standard is likely to result in the unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the United States. (42 U.S.C. 6295(o)(4))

Additionally, EPCA specifies requirements when promulgating an energy conservation standard for a covered product that has two or more subcategories. DOE must specify a different standard level for a type or class of products that has the same function or intended use if DOE determines that products within such group (A) consume a different kind of energy from that consumed by other covered products within such type (or class); or (B) have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard. (42 U.S.C. 6295(q)(1)) In determining whether a performance-related feature justifies a different standard for a group of products, DOE must consider such factors as the utility to the consumer of such a feature and other factors DOE deems appropriate. *Id.* Any rule prescribing such a standard must include an explanation of the basis on which such higher or lower level was established. (42 U.S.C. 6295(q)(2))

Finally, pursuant to the amendments contained in the Energy Independence and Security Act of 2007 (''EISA 2007''), Public Law 110–140, any final rule for new or amended energy conservation standards promulgated after July 1, 2010, is required to address standby mode and off mode energy use. (42 U.S.C. 6295(gg)(3)) Specifically, when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single

standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)) DOE's current test procedure for consumer pool heaters addresses standby mode and off mode energy use by use of the integrated thermal efficiency metric, as do the new and amended standards adopted in this final rule.

*B. Background*

1. Current Standards

The current energy conservation standard for gas-fired pool heaters is set forth in DOE's regulations at 10 CFR 430.32(k) and is repeated in Table II.1 of this document. The current energy conservation standard for gas-fired pool heaters is in terms of thermal efficiency ($E_t$), which measures only active mode efficiency. Electric pool heaters are a covered product under EPCA, but prior to this rulemaking there was no Federal energy conservation standard for this product class.

TABLE II.1—FEDERAL ENERGY CONSERVATION STANDARDS FOR CONSUMER POOL HEATERS

| Product class | Minimum thermal efficiency (percent) |
|---|---|
| Gas-Fired Pool Heaters ..... | 82 |

2. History of Standards Rulemaking for Consumer Pool Heaters

On April 16, 2010, DOE published a final rule in which it concluded the first round of rulemaking required under EPCA and established an amended energy conservation standard for consumer pool heaters. 75 FR 20112 (''April 2010 Final Rule'').[14] In relevant part, the April 2010 Final Rule amended the statutorily prescribed standards for gas-fired pool heaters with a compliance date of April 16, 2013, on and after which gas-fired pool heaters were required to achieve an $E_t$ of 82 percent.

On December 17, 2012, DOE published a final rule in the **Federal Register** that established a new efficiency metric, integrated thermal efficiency ($TE_I$), for gas-fired pool heaters. 77 FR 74559, 74565 (''December 2012 TP Final Rule''). The $TE_I$ metric built on the existing $E_t$ metric for measuring active mode energy efficiency, and accounts for the energy consumption during standby mode and off mode operation. DOE stated in the December 2012 TP Final Rule that for purposes of compliance with the energy conservation standard, the test procedure amendments related to standby mode and off mode (*i.e.,* integrated thermal efficiency) are not required until the compliance date of the next standards final rule, which addresses standby and off mode. 77 FR 74559, 74559.

On January 6, 2015, DOE published a final rule pertaining to its test procedures for direct heating equipment (''DHE'') and consumer pool heaters. 80 FR 792 (''January 2015 TP Final Rule''). In that final rule, DOE established test methods for measuring the integrated thermal efficiency of electric resistance and electric heat pump pool heaters. *Id.*

To evaluate whether to propose amendments to the energy conservation standard for consumer pool heaters, DOE issued a request for information (''RFI'') in the **Federal Register** on March 26, 2015. 80 FR 15922 (''March 2015 RFI''). Through the March 2015 RFI, DOE requested data and information pertaining to its planned technical and economic analyses for DHE and consumer pool heaters. Among other topics, the March 2015 RFI sought data and information pertaining to electric pool heaters. 80 FR 15922, 15924–15925. Although the March 2015 RFI and the previous energy conservation standards rulemaking (concluding with the April 2010 Final Rule) included both DHE and consumer pool heaters, DOE has elected to review its energy conservation standards for each of these products separately.[15]

DOE subsequently published a notice of data availability (''NODA'') in the **Federal Register** on October 26, 2015, which announced the availability of its analyses for electric pool heaters. 80 FR 65169 (''October 2015 NODA''). The purpose of the October 2015 NODA was to make publicly available the initial technical and economic analyses conducted for electric pool heaters, and present initial results of those analyses to seek further input from stakeholders. DOE did not propose new or amended standards for consumer pool heaters at that time. The initial TSD and accompanying analytical spreadsheets for the October 2015 NODA provided the analyses DOE undertook to examine the potential for establishing energy conservation standards for electric pool heaters and provided preliminary discussions in response to several issues raised by comments to the March 2015 RFI. The October 2015 NODA described the analytical methodology that DOE used, and each analysis DOE had performed.

Most recently, on April 15, 2022, DOE published a NOPR (''April 2022 NOPR'') for consumer pool heaters, in which DOE proposed new energy conservation standards for electric pool heaters and amended energy conservation standards for gas-fired pool heaters. 87 FR 22640. The new and amended standards proposed in the April 2022 NOPR were defined in terms of the $TE_I$ metric, adopted in the December 2012 TP Final Rule (for gas-fired pool heaters) and January 2015 TP Final Rule (for electric pool heaters). DOE received 11 comments in response to the April 2022 NOPR from interested parties which are listed in Table II.2.

TABLE II.2—INTERESTED PARTIES PROVIDING WRITTEN COMMENT IN RESPONSE TO THE APRIL 2022 NOPR

| Commenter(s) | Abbreviation | Comment No. in the docket | Commenter type |
|---|---|---|---|
| Air-Conditioning, Heating, and Refrigeration Institute; Pool & Hot Tub Alliance. | AHRI and PHTA ..... | 20 | Trade Association. |
| American Gas Association; American Public Gas Association | Gas Associations ..... | 15 | Utility Association. |
| Appliance Standards Awareness Project; American Council for an Energy-Efficient Economy; Natural Resources Defense Council; Northwest Energy Efficiency Alliance; National Consumer Law Center. | Joint Advocates ..... | 13 | Efficiency Organization. |
| Aqua Cal AutoPilot, Inc ..... | AquaCal ..... | 11 | Manufacturer. |
| Bradford White Corporation ..... | BWC ..... | 12 | Manufacturer. |
| Fluidra ..... | Fluidra ..... | 18 | Manufacturer. |

[14] A correction notice was published on April 27, 2010, correcting a reference to the compliance date for the energy conservation standard. 75 FR 21981.

[15] The rulemaking docket for DHE can be found at: *www.regulations.gov/#!docketDetail;D=EERE-2016-BT-STD-0007.*

TABLE II.2—INTERESTED PARTIES PROVIDING WRITTEN COMMENT IN RESPONSE TO THE APRIL 2022 NOPR—Continued

| Commenter(s) | Abbreviation | Comment No. in the docket | Commenter type |
|---|---|---|---|
| Hayward Holdings, Inc | Hayward | 17 | Manufacturer. |
| New York State Energy Research and Development Authority | NYSERDA | 10 | State Agency. |
| Pacific Gas and Electric Company; Southern California Edison; San Diego Gas & Electric Company. | CA IOUs | 16 | Utility Association. |
| Rheem Manufacturing Company | Rheem | 19 | Manufacturer. |
| Union of Concerned Scientists; Center for Climate and Energy Solutions; Montana Environmental Information Center; Institute for Policy Integrity, NYU School of Law; Sierra Club; Natural Resources Defense Council. | Environmental Advocates | 14 | Efficiency Organization. |

A parenthetical reference at the end of a comment quotation or paraphrase provides the location of the item in the public record.[16] To the extent that interested parties have provided written comments that are substantively consistent with any oral comments provided during the May 4, 2022, public meeting, DOE cites the written comments throughout this final rule. Any oral comments provided during the webinar that are not substantively addressed by written comments are summarized and cited separately throughout this final rule.

## III. General Discussion

DOE developed this final rule after considering oral and written comments, data, and information from interested parties that represent a variety of interests. The following discussion addresses issues raised by these commenters.

### *A. General Comments*

This section summarizes general comments received from interested parties regarding rulemaking timing and process.

The Gas Associations commented that DOE should adopt changes to its rulemaking process as outlined in a report by National Academies of Sciences, Engineering, and Medicine (''NASEM'') [17] for both test procedures and standards. (Gas Associations, No. 15 at p. 3) In response, the Department notes that the rulemaking process for standards of covered products and equipment are outlined at appendix A to subpart C of 10 CFR part 430 (''appendix A''), and DOE periodically examines and revises these provisions in separate rulemaking proceedings.

AHRI and PHTA suggested that the Department perform another round of manufacturer interviews to determine if the data sources and methodology used are still accurate to ensure DOE's analyses capture products and conditions that best represent the current state of the market. (AHRI and PHTA, No. 20 at p. 6) BWC urged DOE to utilize the most recently available data when conducting its analysis for this rulemaking, stating that many sources cited throughout the April 2022 NOPR are outdated and may provide an inaccurate picture of current market impacts for manufacturers of consumer pool heaters. BWC specifically noted that the Department cited information that was gathered during manufacturer interviews conducted in 2015. BWC asserted that several major events have transpired since that time, which have had significant consequences for pool heater manufacturers (including significant pricing increases for components and materials that are utilized in manufacturing). Thus, BWC also recommended that DOE re-interview product manufacturers and conduct additional research to obtain updated costing information before issuing a final rule. (BWC, No. 12 at pp. 1–2)

Throughout the rulemaking process, DOE seeks feedback and insight from interested parties to improve the information used in the analyses. During Phase III of the manufacturer impact analysis (''MIA'') (see section IV.J of this document and chapter 12 of the final rule TSD), DOE interviews manufacturers to gather information on the effects of new and amended energy conservation standards on revenues and finances, direct employment, capital assets, and industry competitiveness. DOE also verifies findings from its other analyses with manufacturers. The Phase III analysis for the April 2022 NOPR occurred several years prior to this final rule, and given this unique circumstance, the Department conducted additional interviews after the publication of the April 2022 NOPR in order to collect the most recent information, as stakeholders suggested. The analysis conducted for this final rule takes into account the most recent feedback from manufacturers and other interested parties.

### *B. Scope of Coverage*

This final rule covers those consumer products that meet the statutory and regulatory definition of ''pool heater,'' as codified at 10 CFR 430.2. (*see also* 42 U.S.C. 6291(25)) Consumer ''pool heaters'' are defined as an appliance designed for heating nonpotable water contained at atmospheric pressure, including heating water in swimming pools, spas, hot tubs and similar applications. 10 CFR 430.2. In this rulemaking, DOE has addressed comments requesting the Department to limit the scope of consumer pool heater regulations to products with capacities that are below a certain limit in order to distinguish these products from pool heaters that are commercial equipment. However, EPCA places no capacity limit on the pool heaters it covers under its definition of ''pool heater.'' (42 U.S.C. 6291(25)) Furthermore, EPCA covers pool heaters as a ''consumer product,'' (42 U.S.C. 6291(2), 42 U.S.C. 6292(a)(11)) and defines ''consumer product,'' in part, as an article that ''to any significant extent, is distributed in commerce for personal use or consumption by individuals.'' (42 U.S.C. 6291(1)) Standards established for pool heaters as a consumer product under EPCA therefore apply to any pool heater distributed to any significant extent as a consumer product for personal use or consumption by individuals, regardless of input capacity

[16] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop energy conservation standards for consumer pool heaters. (Docket No. EERE–2021–BT–STD–0020, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

[17] Although not specified, DOE interprets this comment to refer to the National Academies of Science, Engineering, and Medicine 2021 report entitled ''Review of Methods Used by the U.S. Department of Energy in Setting Appliance and Equipment Standards.'' Copies of the report are available at *nap.nationalacademies.org/catalog/25992/review-of-methods-used-by-the-us-department-of-energy-in-setting-appliance-and-equipment-standards* (last accessed on October 15, 2022).

and including consumer pool heater models that may also be installed in commercial applications.

In the April 2022 NOPR, DOE initially concluded that further delineation by adding an input capacity limit is not necessary. 87 FR 22640, 22653. DOE maintained its position initially stated in the April 2010 Final Rule that pool heaters marketed as commercial equipment contain additional design modifications related to safety requirements for installation in commercial buildings, including being designed to meet a high volume flow and are matched with a pump from the point of manufacture to accommodate the needs of commercial facilities, which allows manufacturers to distinguish those units from pool heaters distributed to any significant extent for residential use, regardless of input capacity. *Id.;* (*see also* 75 FR 20112, 20127–20128). Moreover, standards for gas-fired pool heaters regardless of size have been in place since 1990, and to place a capacity limit on standards now would result in backsliding for products over the capacity limit, which would be contrary to the anti-backsliding provision in EPCA. (42 U.S.C. 6295(o)(1))

In response to the April 2022 NOPR, several commenters requested that DOE further clarify the distinction between consumer pool heaters and pool heaters which do not meet the definition of a consumer product (*i.e.,* ''commercial pool heaters''). Hayward requested that DOE utilize a physical parameter to distinguish consumer pool heaters from commercial pool heaters because the proposals in the April 2022 NOPR may allow manufacturers to use marketing or branding in order to exclude products from the scope of the rule. (Hayward, No. 17 at p. 3) AHRI and PHTA suggested the following physical criteria could be used to determine whether a pool heater is not a consumer pool heater: uses a voltage above 277 volts, uses 3-phase current, is rated to Section IV of the American Society of Mechanical Engineers (''ASME'') Boiler and Pressure Vessel Code, is rated for 400,000 Btu/h or greater, and is designed and marketed as commercial equipment. (AHRI and PHTA, No. 20 at p. 3)

Rheem supported the product classes DOE analyzed for this consumer pool heater rulemaking and agreed with DOE's interpretation on coverage of standards for consumer products. Specifically, Rheem indicated that it differentiates consumer and commercial pool heaters through marketing materials as well as unique design aspects such as: high-volume flow, matching with a pump, ASME standards certification, and voltage/phase. (Rheem, No. 19 at p. 3)

Comments from Hayward, Rheem, AHRI, and PHTA state that there are certain physical characteristics of pool heaters which indicate they are not distributed in commerce for personal use or consumption by individuals. This is not inconsistent with DOE's position that consumer pool heaters as products can presently be sufficiently distinguished from ''commercial pool heaters.'' DOE notes, however, that EPCA places no limitation on the physical characteristics for a pool heater to qualify as a consumer product, (42 U.S.C. 6291(25)), and has concluded that explicitly specifying design criteria to define consumer pool heaters is unnecessary at this time.

When evaluating and establishing energy conservation standards, DOE divides covered products into product classes by the type of energy used or by capacity or other performance-related features that justify differing standards. In determining whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (42 U.S.C. 6295(q)(1))

As discussed in section IV.A.1 of this document, this final rule considered consumer gas-fired pool heaters, oil-fired pool heaters, electric pool heaters, and electric spa heaters. However, DOE is establishing standards for only two product classes in this rulemaking: gas-fired pool heaters and electric pool heaters. DOE may, in a future rulemaking addressing energy conservation standards for consumer pool heaters, analyze standards for oil-fired pool heaters and/or electric spa heaters, or consider setting differential standards for new product classes that may be considered.

NYSERDA supported DOE's effort to set standards for electric pool heaters for the first time and concurred that the proposed standards are cost effective and technologically feasible. (NYSERDA, No. 10 at p. 1) Hayward stated that electric resistance heaters should be included in the scope of the rule to achieve the power usage and efficiency goals for all pool heating systems. (Hayward, No. 17 at p. 2)

As discussed in section IV.C.1.a of this document, the baseline efficiency level that DOE selected for electric pool heaters is based on use of electric resistance elements. See section IV.A.1 of this document for discussion of the product classes analyzed in this final rule.

*C. Test Procedure*

EPCA sets forth generally applicable criteria and procedures for DOE's adoption and amendment of test procedures. (42 U.S.C. 6293) Manufacturers of covered products must use these test procedures to certify to DOE that their product complies with energy conservation standards and to quantify the efficiency of their product. DOE's current energy conservation standards for consumer pool heaters are expressed in terms of $E_t$. (*See* 10 CFR 430.32(k)(2).) DOE's test procedure for consumer pool heaters is found at appendix P.

As discussed in section II.A of this document, EISA 2007 amended EPCA to require DOE to amend its test procedures for covered consumer products generally to include measurement of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) The current test procedure established for fossil fuel-fired pool heaters determines an integrated thermal efficiency metric ($TE_I$), which accounts for energy consumption during active mode operation (sections 2.1.1, 3.1.1, and 4.1.1 of appendix P) and standby mode (sections 2.2, 3.2, and 4.2 of appendix P) and off mode operation (sections 2.3, 3.2, and 4.3 of appendix P), as required by EISA 2007. 77 FR 74559, 74572. *See also* 77 FR 74559, 74564–74565. The DOE test procedure for electric resistance and electric heat pump pool heaters determines the active mode energy use for electric resistance (sections 2.1.2, 3.1.2, and 4.1.2 of appendix P) and electric heat pump pool heaters (sections 2.1.3, 3.1.3, and 4.1.3 of appendix P). Standby mode and off mode energy use are also recorded using the same procedures used for fossil-fuel fired pool heaters (sections 2.2, 3.2, and 4.2 and 2.3, 3.2, and 4.3 of appendix P, respectively). The active mode, standby mode, and off mode energy use are then combined into the $TE_I$ metric (section 5 of appendix P).

In this document, DOE is establishing new and amended energy conservation standards for consumer pool heaters in terms of $TE_I$ to align with the metric in the current test procedure.

To the extent DOE is also making amendments to the test procedure, such amendments are limited to those necessary to accommodate the proposed definitions and the proposed product classes. As discussed further in sections III.G.1 and IV.A.1 of this document, DOE is amending appendix P to add definitions for ''active electrical power,'' ''input capacity,'' and ''output capacity;'' to add a calculation to

determine the output capacity for electric pool heaters; and to clarify the calculation of input capacity for fossil fuel-fired pool heaters. These amendments to appendix P would not impact test procedure conduct nor the measurements taken, but rather the new provisions use existing measurements to calculate the values necessary for comparing product efficiency to the proposed standards.

In response to the April 2022 NOPR, DOE received comments from stakeholders relating to the method of testing in the consumer pool heater test procedure. Specifically, AHRI and PHTA suggested that the Department use mass flow rate as an alternative calculation to using the mass of water in the test procedure, as the use of a mass flow meter would provide a significantly more accurate and repeatable data collection that would also allow for automation of the test procedure. AHRI and PHTA also encouraged DOE to update its references to the latest edition of ANSI Z21.56.[18] AHRI and PHTA noted that there are measurable increases in efficiency due to part-load operation when operating at colder ambient conditions that are not captured in the current rating test. (AHRI and PHTA, No. 20 at pp. 3–4) Similarly, Rheem suggested that DOE investigate part-load efficiency in the next test procedure rulemaking. (Rheem, No. 19 at p. 4)

DOE will consider these comments further in the next revision of its consumer pool heater test procedure.

### *D. Technological Feasibility*

#### 1. General

In each energy conservation standards rulemaking, DOE conducts a screening analysis based on information gathered on all current technology options and prototype designs that could improve the efficiency of the products or equipment that are the subject of the rulemaking. As the first step in such an analysis, DOE develops a list of technology options for consideration in consultation with manufacturers, design engineers, and other interested parties. DOE then determines which of those means for improving efficiency are technologically feasible. DOE considers technologies incorporated in commercially available products or in working prototypes to be technologically feasible. Sections 6(b)(3)(i) and 7(b)(1) of appendix A to 10 CFR part 430 subpart C (''appendix A'').

After DOE has determined that particular technology options are technologically feasible, it further evaluates each technology option in light of the following additional screening criteria: (1) practicability to manufacture, install, and service; (2) adverse impacts on product utility or availability; (3) adverse impacts on health or safety and (4) unique-pathway proprietary technologies. Section 7(b)(2)–(5) of appendix A. Section IV.B of this document discusses the results of the screening analysis for consumer pool heaters, particularly the designs DOE considered, those it screened out, and those that are the basis for the standards adopted in this rulemaking. For further details on the screening analysis for this rulemaking, see chapter 4 of the final rule TSD.

#### 2. Maximum Technologically Feasible Levels

When DOE adopts a new or amended standard for a type or class of covered product, it must determine the maximum improvement in energy efficiency or maximum reduction in energy use that is technologically feasible for such product. (42 U.S.C. 6295(p)(1)) Accordingly, in the engineering analysis, DOE determined the maximum technologically feasible (''max-tech'') improvements in energy efficiency for consumer pool heaters, using the design parameters for the most efficient products available on the market or in working prototypes. The max-tech levels that DOE determined for this rulemaking are described in section IV.C of this document and in chapter 5 of the final rule TSD.

### *E. Energy Savings*

#### 1. Determination of Savings

For each trial standard level (''TSL''), DOE projected energy savings from application of the TSL to consumer pool heaters purchased in the 30-year period that begins in the first full year of compliance with the new and amended standards (2028–2057).[19] The savings are measured over the entire lifetime of products purchased in the 30-year analysis period. DOE quantified the energy savings attributable to each TSL as the difference in energy consumption between each standards case and the no-new-standards case. The no-new-standards case represents a projection of energy consumption that reflects how the market for a product would likely evolve in the absence of new and amended energy conservation standards.

DOE used its national impact analysis (''NIA'') spreadsheet models to estimate national energy savings (''NES'') from potential new and amended standards for consumer pool heaters. The NIA spreadsheet model (described in section IV.H of this document) calculates energy savings in terms of site energy, which is the energy directly consumed by products at the locations where they are used. For electricity, DOE reports national energy savings in terms of primary energy savings, which is the savings in the energy that is used to generate and transmit the site electricity. For natural gas, the primary energy savings are considered to be equal to the site energy savings. DOE also calculates NES in terms of FFC energy savings. The FFC metric includes the energy consumed in extracting, processing, and transporting primary fuels (*i.e.,* coal, natural gas, petroleum fuels), and thus presents a more complete picture of the impacts of energy conservation standards.[20] DOE's approach is based on the calculation of an FFC multiplier for each of the energy types used by covered products or equipment. For more information on FFC energy savings, see section IV.H.2 of this document.

#### 2. Significance of Savings

To adopt any new or amended standards for a covered product, DOE must determine that such action would result in significant energy savings. (42 U.S.C. 6295(o)(3)(B))

The significance of energy savings offered by a new or amended energy conservation standard cannot be determined without knowledge of the specific circumstances surrounding a given rulemaking. For example, some covered products and equipment have most of their energy consumption occur during periods of peak energy demand. The impacts of these products on the energy infrastructure can be more pronounced than products with relatively constant demand. Accordingly, DOE evaluates the significance of energy savings on a case-by-case basis, taking into account the significance of cumulative FFC national energy savings, the cumulative FFC emissions reductions, and the need to confront the global climate crisis, among other factors.

The standard levels adopted in this final rule are projected to result in

[18] The most recent version of ANSI Z21.56 is ANSI Z21.56/CSA 4.7–2017, *Gas-Fired Pool Heaters.* Copies of the standard are available for purchase at: *webstore.ansi.org/Standards/CSA/ansiz21562017csa* (last accessed on October 15, 2022).

[19] DOE also presents a sensitivity analysis that considers impacts for products shipped in a 9-year period.

[20] The FFC metric is discussed in DOE's statement of policy and notice of policy amendment. 76 FR 51282 (Aug. 18, 2011), as amended at 77 FR 49701 (Aug. 17, 2012).

national energy savings of 0.70 quads, the equivalent of the electricity use of 7.5 million homes in one year. Based on the amount of FFC savings, the corresponding reduction in emissions, and the need to confront the global climate crisis, DOE has determined the energy savings from the standard levels adopted in this final rule are ''significant'' within the meaning of 42 U.S.C. 6295(o)(3)(B).

*F. Economic Justification*

1. Specific Criteria

As noted previously, EPCA provides seven factors to be evaluated in determining whether a potential energy conservation standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(I)(VII)) The following sections discuss how DOE has addressed each of those seven factors in this final rule.

a. Economic Impact on Manufacturers and Consumers

EPCA requires DOE to consider the economic impact of the standard on manufacturers and consumers of the product that would be subject to the standard. (42 U.S.C. 6295(o)(2)(B)(i)(I). In determining the impacts of potential amended standards on manufacturers, DOE conducts an MIA, as discussed in section IV.J of this document. DOE first uses an annual cash-flow approach to determine the quantitative impacts. This step includes both a short-term assessment—based on the cost and capital requirements during the period between when a regulation is issued and when entities must comply with the regulation—and a long-term assessment over a 30-year period. The industry-wide impacts analyzed include (1) INPV, which values the industry on the basis of expected future cash flows; (2) cash flows by year; (3) changes in revenue and income; and (4) other measures of impact, as appropriate. Second, DOE analyzes and reports the impacts on different types of manufacturers, including impacts on small manufacturers. Third, DOE considers the impact of standards on domestic manufacturer employment and manufacturing capacity, as well as the potential for standards to result in plant closures and loss of capital investment. Finally, DOE takes into account cumulative impacts of various DOE regulations and other regulatory requirements on manufacturers.

For individual consumers, measures of economic impact include the changes in LCC and PBP associated with new or amended standards. These measures are discussed further in the following section. For consumers in the aggregate, DOE also calculates the national net present value of the consumer costs and benefits expected to result from particular standards. DOE also evaluates the impacts of potential standards on identifiable subgroups of consumers that may be affected disproportionately by a standard.

b. Savings in Operating Costs Compared to Increase in Price (LCC and PBP)

EPCA requires DOE to consider the savings in operating costs throughout the estimated average life of the covered product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the covered product that are likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(II)) DOE conducts this comparison in its LCC and PBP analysis.

The LCC is the sum of the purchase price of a product (including its installation) and the operating cost (including energy, maintenance, and repair expenditures) discounted over the lifetime of the product. The LCC analysis requires a variety of inputs, such as product prices, product energy consumption, energy prices, maintenance and repair costs, product lifetime, and discount rates appropriate for consumers. To account for uncertainty and variability in specific inputs, such as product lifetime and discount rate, DOE uses a distribution of values, with probabilities attached to each value.

The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost due to a more-stringent standard by the change in annual operating cost for the year that standards are assumed to take effect.

For its LCC and PBP analysis, DOE assumes that consumers will purchase the covered products in the first full year of compliance with new or amended standards. The LCC savings for the considered efficiency levels are calculated relative to the case that reflects projected market trends in the absence of new or amended standards. DOE's LCC and PBP analysis is discussed in further detail in section IV.F of this document.

c. Energy Savings

Although significant conservation of energy is a separate statutory requirement for adopting an energy conservation standard, EPCA requires DOE, in determining the economic justification of a standard, to consider the total projected energy savings that are expected to result directly from the standard. (42 U.S.C. 6295(o)(2)(B)(i)(III)) As discussed in section IV.H of this document, DOE uses the NIA spreadsheet models to project national energy savings.

d. Lessening of Utility or Performance of Products

In establishing product classes, and in evaluating design options and the impact of potential standard levels, DOE evaluates potential standards that would not lessen the utility or performance of the considered products. (42 U.S.C. 6295(o)(2)(B)(i)(IV)) Based on data available to DOE, the standards adopted in this document will not reduce the utility or performance of the products under consideration in this rulemaking.

e. Impact of Any Lessening of Competition

EPCA directs DOE to consider the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from a standard. (42 U.S.C. 6295(o)(2)(B)(i)(V)) It also directs the Attorney General to determine the impact, if any, of any lessening of competition likely to result from a standard and to transmit such determination to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. (42 U.S.C. 6295(o)(2)(B)(ii)) To assist the Department of Justice (''DOJ'') in making such a determination, DOE transmitted copies of its proposed rule and the NOPR TSD to the Attorney General for review, with a request that the DOJ provide its determination on this issue. In its assessment letter responding to DOE, DOJ concluded that the proposed energy conservation standards for consumer pool heaters are unlikely to have a significant adverse impact on competition. DOE is publishing the Attorney General's assessment at the end of this final rule.

f. Need for National Energy Conservation

DOE also considers the need for national energy and water conservation in determining whether a new or amended standard is economically justified. (42 U.S.C. 6295(o)(2)(B)(i)(VI)) The energy savings from the adopted standards are likely to provide improvements to the security and reliability of the Nation's energy system. Reductions in the demand for electricity also may result in reduced costs for

maintaining the reliability of the Nation's electricity system. DOE conducts a utility impact analysis to estimate how standards may affect the Nation's needed power generation capacity, as discussed in section IV.M of this document.

DOE maintains that environmental and public health benefits associated with the more efficient use of energy are important to take into account when considering the need for national energy conservation. The adopted standards are likely to result in environmental benefits in the form of reduced emissions of air pollutants and GHGs associated with energy production and use. DOE conducts an emissions analysis to estimate how potential standards may affect these emissions, as discussed in section IV.K of this document; the estimated emissions impacts are reported in section V.B.6 of this document. DOE also estimates the economic value of emissions reductions resulting from the considered TSLs, as discussed in section IV.L of this document.

g. Other Factors

In determining whether an energy conservation standard is economically justified, DOE may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) To the extent DOE identifies any relevant information regarding economic justification that does not fit into the other categories described previously, DOE could consider such information under ''other factors.''

2. Rebuttable Presumption

As set forth in 42 U.S.C. 6295(o)(2)(B)(iii), EPCA creates a rebuttable presumption that an energy conservation standard is economically justified if the additional cost to the consumer of a product that meets the standard is less than three times the value of the first full year's energy savings resulting from the standard, as calculated under the applicable DOE test procedure. DOE's LCC and PBP analyses generate values used to calculate the effect potential amended energy conservation standards would have on the payback period for consumers. These analyses include, but are not limited to, the 3-year payback period contemplated under the rebuttable-presumption test. In addition, DOE routinely conducts an economic analysis that considers the full range of impacts to consumers, manufacturers, the Nation, and the environment, as required under 42 U.S.C. 6295(o)(2)(B)(i). The results of this analysis serve as the basis for DOE's evaluation of the economic justification for a potential standard level (thereby supporting or rebutting the results of any preliminary determination of economic justification). The rebuttable presumption payback calculation is discussed in section IV.F of this document.

*G. Other Topics*

1. Test Procedure Updates

This final rule establishes amended standards for gas-fired pool heaters and new standards for electric pool heaters in terms of $TE_I$. These standards are functions of the input capacity (''$Q_{IN}$'') for gas-fired pool heaters and the active electrical power (''PE'') for electric pool heaters. To provide clarity on how values would be determined for certification, DOE is adopting definitions for ''input capacity,'' ''active electrical power,'' and ''output capacity'' (''$Q_{OUT}$'') and identifying which measured variables in the test procedure represent these characteristics.

Given the dependency of $TE_I$ on $Q_{IN}$ and PE, in the April 2022 NOPR DOE proposed updates to the test procedure and product-specific enforcement provisions to ensure clarity in determination of these parameters. Specifically, DOE proposed to amend appendix P to:

- Use values measured during the active mode test described in Section 2.10.1 of ANSI.Z21.56–2006 (*i.e.,* heating value times correction factor times the quantity of fossil fuel used divided by the length of the test) to determine the input capacity of a fossil fuel-fired pool heater, as this calculation was not stated clearly within appendix P;
- Clarify that active electrical power is represented by the variable PE; and
- Provide a calculation for output capacity so that the product class for an electric pool heater can be appropriately determined.

87 FR 22640, 22651.

In response, Rheem suggested DOE add provisions to appendix P to describe how to appropriately calculate input capacity for gas-fired pool heaters at standard temperature and pressure conditions. (Rheem, No. 19 at p. 2) AHRI and PHTA provided similar feedback, requesting that DOE specify values for barometric pressure, as this value can vary depending on numerous factors including test location and environmental conditions. (AHRI and PHTA, No. 20 at p. 3)

Section 2.10.1 of ANSI Z21.56–2006, the industry test standard that is incorporated by reference into appendix P for gas-fired pool heaters, includes the use of a correction factor (''CF'') ''to correct observed gas volume to the conditions of pressure and temperature at which the heating value of the gas is specified [normally 30 inches mercury column (101.6 kPa) and 60 °F (15.5 °C)]''. As such, the standard temperature and pressure is already specified as 60 degrees Fahrenheit (''°F'') and 30 inches of mercury (''in. Hg'') for the calculation of $Q_{IN}$. If the laboratory barometric conditions do not match the standard pressure, as AHRI and PHTA suggested, section 2.10.1 of ANSI Z21.56–2006 requires the gas measurement to be mathematically corrected.

Rheem also requested that DOE clarify whether coefficient of performance (''COP'') representations in manufacturer literature may continue to be made at ambient conditions other than the ''High Air Temperature—Mid Humidity'' condition in AHRI Standard 1160. (Rheem, No. 19 at p. 10)

Section 3.1.3 of appendix P states that the test conditions for electric heat pump pool heaters shall be at the ''High Air Temperature—Mid Humidity (63% RH)'' level specified in section 6 of AHRI 1160–2009, the industry test standard that is incorporated by reference into appendix P for heat pump pool heaters. EPCA mandates that no manufacturer, distributor, retailer, and or private labeler may make any representation with respect to the energy use or efficiency of a covered product to which a test procedure is applicable unless such product has been tested in accordance with such test procedure and such representation fairly discloses the results of such testing. (42 U.S.C. 6293(c)(1)(A)–(B)) Therefore, although manufacturers may make representations of COP according to the test conditions in appendix P, manufacturers may not make representations for heat pump pool heaters at test conditions which are not included in appendix P.

Taking into consideration the feedback received on the necessary updates to the test procedure to accommodate the transition to $TE_I$-based standards, DOE is amending appendix P as proposed in the April 2022 NOPR to include new definitions and methods for determining for input capacity, active electrical power, and output capacity.

2. Enforcement Provisions

The Department codifies product-specific enforcement provisions at 10 CFR 429.134 to indicate how DOE would conduct certain aspects of assessment or enforcement testing on covered products and equipment.

In the April 2022 NOPR, DOE proposed that the input capacity or active electrical power (as applicable) for enforcement testing would be measured pursuant to appendix P and compared against the rated value certified by the manufacturer. If the measured input capacity or active electrical power (as applicable) is within ±2 percent of the certified value, then DOE would use the certified value when determining the applicable standard. The ±2 percent threshold was chosen because it is already used for commercial water heating equipment (*see* 10 CFR 429.134(n)) and it represents a reasonable range to account for manufacturing variations that may affect the input capacity. DOE proposed that, during enforcement testing for a gas-fired pool heater, if the measured input capacity is not within ±2 percent of the certified value, then DOE would follow these steps to attempt to bring the fuel input rate to within ±2 percent of the certified value. First, DOE would attempt to adjust the gas pressure in order to increase or decrease the input capacity as necessary. If the input capacity is still not within ±2 percent of the certified value, DOE would then attempt to modify the gas inlet orifice (*i.e.,* drill) if the unit is equipped with one. Finally, if these measures do not bring the input capacity to within ±2 percent of the certified value, DOE would use the mean measured input capacity (either for a single unit sample or the average for a multiple-unit sample) when determining the applicable standard for the basic model. 87 FR 22640, 22651.

In the April 2022 NOPR, DOE proposed that, for an electric pool heater, it would not take any steps to modify the unit to bring the active electrical power of the unit within the ±2 percent threshold. Rather, if the active electrical power is not within ±2 percent of the certified value, DOE would use the measured active electrical power (either for a single unit sample or the average for a multiple unit sample) when determining the applicable standard for the basic model. *Id.* at 87 FR 22652.

AHRI and PHTI commented that the Department's suggested ±2 percent threshold is appropriate for the certified value of input capacity or active electrical power for gas-fired pool heaters because adjustment of the valve should be allowed to achieve input rate. However, AHRI and PHTA recommended that DOE should apply the ±5 percent threshold that is specified in section 6.3 [21] of AHRI 1160 on the certified value of input capacity or active electrical power for electric pool heaters, and requested that the Department offer additional clarification for the proposed definition of ''certified.'' (AHRI and PHTA, No. 20 at pp. 2–3) Hayward similarly supported a ±2 percent threshold for gas-fired pool heaters, but believed that a ± 5 percent threshold would be appropriate for heat pump pool heaters due to variances in compressor performance. (Hayward, No. 17 at p. 3) Rheem supported the DOE proposal to add a ±2 percent threshold to its enforcement provisions at 10 CFR 429.134 regarding input capacity, which is required for gas-fired pool heaters. For electric products, Rheem stated there are no methods to easily adjust power, so while a threshold should be placed on active electrical power in the enforcement provisions, due to the inherent variability in active electrical power for electric pool heaters this threshold should be ±5 percent. (Rheem, No. 19 at p. 2)

DOE agrees with Rheem that electrical power cannot be readily adjusted on a pool heater the way gas input is designed to be adjusted for a field-installed unit, and thus, for electric pool heaters, inherent product variability is not able to be compensated for with in-field adjustments to energy input, as is possible for gas-fired pool heaters. For this reason, DOE concludes that a higher threshold for electrical power in the enforcement testing provisions for electrical pool heaters as compared to the input capacity threshold for gas-fired pool heaters is warranted. Section 6.3 of AHRI 1160–2006 states that measured test results for heating capacity and COP shall not be less than 95 percent of published ratings. Based on these considerations, DOE agrees that the ±5 percent threshold recommended by stakeholders is appropriate for enforcement testing of electric pool heaters. In this final rule, DOE is establishing product-specific enforcement provisions for consumer pool heaters which allow a ±2 percent threshold for gas-fired pool heaters and a ±5 percent threshold for electric pool heaters.

Rheem also recommended changing the title to 10 CFR 429.134(s)(2) to ''Verification of active electrical power for electric pool heaters.'' (Rheem, No. 19 at p. 2) DOE understands this to be a typographical correction to the title proposed in the April 2022 NOPR, which read, ''Verification of active electrical power for pool heaters.'' 87 FR 22640, 22716. Due to the additions of several product-specific enforcement provisions since the April 2022 NOPR, the enforcement provisions for pool heaters have been relocated to 10 CFR 429.134(dd). Because the title suggested by Rheem clarifies that the provision applies only to electric pool heaters and not all pool heaters, DOE is adopting the suggested title for 10 CFR 429.134(cc)(2).

3. Certification Requirements

In the April 2022 NOPR, DOE stated that if new and amended energy conservation standards were adopted in this rulemaking, the Department would review and revise the certification provisions accordingly to establish certification provisions for electric pool heaters and to allow for appropriate reporting of $TE_I$ values. DOE stated that it would consider such amendments in a separate rulemaking. 87 FR 22640, 22651.

In response, Rheem generally recommended DOE update the certification provisions at 10 CFR 429.24 to require certification of integrated thermal efficiency and either input capacity or active electrical power as necessary. (Rheem, No. 19 at p. 2) Rheem also requested that DOE add certification provisions which allow for the propane gas version of a basic model to be rated using the natural gas version if the propane gas input rate is within 10 percent of the natural gas input rate. (Rheem, No. 19 at p. 10)

DOE is considering these comments in a separate rulemaking addressing certification requirements for consumer pool heaters and other products and equipment. Interested parties may find this rulemaking at Docket No. EERE–2023–BT–CE–0001. Compliance with the energy conservation standards promulgated by this final rule must be demonstrated on and after May 30, 2028.

## IV. Methodology and Discussion of Related Comments

This section addresses the analyses DOE has performed for this final rule with regard to consumer pool heaters. Separate subsections address each component of DOE's analyses.

DOE used several analytical tools to estimate the impact of the standards considered in this document. The first tool is a spreadsheet that calculates the LCC savings and PBP of potential amended or new energy conservation standards. The national impacts analysis uses a second spreadsheet set that provides shipments projections and

[21] The commenters referenced section 6.2 of AHRI 1160, which specifies application ratings. DOE interprets this comment as intending to reference section 6.3 of AHRI 1160–2006, which specifies tolerances on heating capacity and COP.

calculates NES and NPV of total consumer costs and savings expected to result from potential energy conservation standards. DOE uses the third spreadsheet tool, the Government Regulatory Impact Model (''GRIM''), to assess manufacturer impacts of potential standards. These three spreadsheet tools are available on the DOE website for this rulemaking: *www.regulations.gov/docket/EERE-2021-BT-STD-0020.* Additionally, DOE used output from the latest version of the Energy Information Administration's (''EIA's'') *Annual Energy Outlook* (''*AEO*'') for the emissions and utility impact analyses.

*A. Market and Technology Assessment*

DOE develops information in the market and technology assessment that provides an overall picture of the market for the products concerned, including the purpose of the products, the industry structure, manufacturers, market characteristics, and technologies used in the products. This activity includes both quantitative and qualitative assessments, based primarily on publicly-available information. The subjects addressed in the market and technology assessment for this rulemaking include (1) a determination of the scope of the rulemaking and product classes, (2) manufacturers and industry structure, (3) existing efficiency programs, (4) shipments information, (5) market and industry trends, and (6) technologies or design options that could improve the energy efficiency of consumer pool heaters. The key findings of DOE's market assessment are summarized in the following sections. See chapter 3 of the final rule TSD for further discussion of the market and technology assessment.

1. Product Classes

When evaluating and establishing energy conservation standards, DOE may establish separate standards for a group of covered products (*i.e.,* establish a separate product class) if DOE determines that separate standards are justified based on the type of energy used, or if DOE determines that a product's capacity or other performance-related feature justifies a different standard. (42 U.S.C. 6295(q)) In making a determination whether a performance-related feature justifies a different standard, DOE must consider such factors as the utility of the feature to the consumer and other factors DOE determines are appropriate. (*Id.*)

Under EPCA, pool heaters are covered products. (42 U.S.C. 6292(a)(11)) EPCA defines ''pool heater'' as an appliance designed for heating nonpotable water contained at atmospheric pressure, including heating water in swimming pools, spas, hot tubs and similar applications. (42 U.S.C. 6291(25)) This includes electric pool heaters, gas-fired pool heaters, and oil-fired pool heaters. However, energy conservation standards have been previously established only for gas-fired pool heaters.[22] In this final rule, DOE establishes definitions for gas-fired pool heaters, electric pool heaters, electric spa heaters, and oil-fired pool heaters; establishes new energy conservation standards for electric pool heaters; and for gas-fired pool heaters, translates the existing standard from the $E_t$ metric to an equivalent level in terms of the $TE_I$ metric and amends the energy conservation standards. DOE has not analyzed potential standards for oil-fired pool heaters because they comprise a very small market share and such standards would result in very little energy savings. DOE also did not perform energy conservation standards analysis for electric spa heaters, as DOE was unable to identify technology options available to improve the efficiency of such products. Accordingly, DOE is not establishing standards for these products in this final rule.

As discussed in the April 2022 NOPR, some commenters responding to the March 2015 RFI suggested DOE consider atmospherically vented gas-fired pool heaters separately from fan-assisted gas-fired pool heaters or to consider condensing and non-condensing products separately. 87 FR 22640, 22653. As previously noted by DOE, the standard for gas-fired pool heaters proposed in the April 2022 NOPR, and adopted in this final rule, can be achieved by atmospherically vented and/or non-condensing gas-fired pool heaters.

In the March 2015 RFI, DOE sought comment on whether capacity or other performance related features that may affect efficiency would justify the establishment of consumer pool heater product classes that would be subject to different energy conservation standards. Specifically, DOE sought comment on whether heat pump technology was a viable design for applications which typically utilize electric resistance pool heaters. 80 FR 15922, 15925. As discussed in the April 2022 NOPR, some commenters recommended DOE create separate product classes for electric resistance and electric heat pump pool heaters, and others urged DOE to regulate both under one product class covering all electric pool heaters. 87 FR 22640, 22654. In the April 2022 NOPR, DOE noted that although heat pump pool heaters perform best when operating within an environment with high air temperature and high air humidity, they are nonetheless capable of operating effectively in cooler climates during the swimming season. Additionally, rare cases in which the ambient temperature is too low for the heat pump pool heater to work effectively could be accommodated through the incorporation of electric resistance backup elements. Therefore, DOE proposed to maintain a single product class for electric pool heaters. *Id.*

In response to the April 2022 NOPR, the Joint Advocates stated their support of a single product class for all electric pool heaters because electric resistance heaters provide no unique utility. (Joint Advocates, No. 13 at p. 1–2) The CA IOUs also agreed with DOE that separate product classes for electric resistance and electric heat pump pool heaters are not justified. (CA IOUs, No. 16 at p. 6) DOE received no other comments in response to the April 2022 NOPR on this issue and, for the reasons discussed, maintains a single product class for electric pool heaters in this final rule.

In the April 2022 NOPR, DOE proposed definitions for electric pool heaters (note that ''electric spa heater'' is defined later in this section), gas-fired pool heaters, and oil-fired pool heaters. 87 FR 22640, 22656. The proposed definitions were as follows:

*Electric pool heater* means a pool heater other than an electric spa heater that uses electricity as its primary energy source.

*Gas-fired pool heater* means a pool heater that uses gas as its primary energy source.

*Oil-fired pool heater* means a pool heater that uses oil as its primary energy source.

In response to the April 2022 NOPR, BWC agreed with DOE's proposal to clarify regulations by adding a definition for ''gas-fired pool heater'' at 10 CFR 430.2. (BWC, No. 12 at p. 2) AHRI and PHTA stated their general agreement with DOE's proposed definitions, but urged the Department to create separate definitions for electric heat pump and electric resistance pool heaters, and provided a recommended definition for electric heat pump pool heaters. (AHRI and PHTA, No. 20 at p. 4)

DOE acknowledges that there are differences in the components and operation of electric resistance pool heaters and electric heat pump pool heaters. However, because DOE is

[22] EPCA prescribed a minimum thermal efficiency of pool heaters and initially defined thermal efficiency of pool heaters only in the context of test conditions for gas-fired pool heaters. (*See* 42 U.S.C. 6295(e)(2) and 42 U.S.C. 6291(26))

maintaining one product class for all electric pool heaters, there is no need to distinguish between these two types of electric pool heaters. As such, DOE adopts the definitions above as proposed in the April 2022 NOPR.

The definition of an electric pool heater adopted by this final rule specifically excludes pool heaters meeting the definition of an ''electric spa heater''. In the April 2022 NOPR, DOE explained that lower capacity [23] electric heaters used to heat water in spas are a covered product by virtue of being within EPCA's definition of pool heater. 87 FR 22640, 22654–22656; (*see* 42 U.S.C. 6291(25).) In addition, DOE noted in the April 2022 NOPR that electric spa heaters are often incorporated into the construction of a self-contained spa or hot tub, resulting in the heater performing its major function (heating spa water) in an environment that would preclude the use of higher efficiency technologies (heat pump) and manufacturers instead rely on electric resistance heating elements. Therefore, DOE determined that heat pump technology is not a viable option for electric spa heaters designed for use within a self-contained portable electric spa because a heat pump cannot be readily incorporated into the construction of a spa or hot tub. However, DOE also determined that heat pump technology is a viable option for heating a spa or hot tub if the heater is separate from the construction of the hot tub or spa (*i.e.,* non-self-contained as defined in section 1 of ANSI/APSP/International Code Council Standard 6–2013, ''American National Standard for Residential Portable Spas and Swim Spas''). Therefore, in the April 2022 NOPR, DOE proposed to define ''electric spa heater'' as follows:

*Electric spa heater* means a pool heater that (1) uses electricity as its primary energy source; (2) has an output capacity (as measured according to appendix P to subpart B of part 430) of 11 kW or less; and (3) is designed to be installed within a portable electric spa.

87 FR 22640, 22656.

In the April 2022 NOPR, DOE also proposed a definition for ''portable electric spa,'' because at that time, DOE had not codified such a definition.

*Portable electric spa* means a self-contained, factory-built spa or hot tub in which all control, water heating and water circulating equipment is an integral part of the product. Self-contained spas may be permanently wired, or cord connected.

87 FR 22640, 22656.

Commenting in response to the April 2022 NOPR, the CA IOUs stated their agreement with DOE's decision to exclude electric spa heaters from this rulemaking due to differences in consumer utility, but suggested DOE modify the definition for electric spa heater by replacing the phrase ''to be installed'' with ''and marketed for use as an electric pool heater.'' The CA IOUs explained that ''designed and marketed'' means that the equipment is designed to fulfill the indicated application and, when distributed in commerce, is marketed for that application, with the designation on the packaging and any publicly available documents, citing a definition from 10 CFR 431.462 (related to DOE's regulations for commercial pumps). (CA IOUs, No. 16 at pp. 5–6)

Rheem recommended aligning the definitions for portable electric spas from the coverage determination for portable electric spas (Docket No. EERE–2022–BT–DET–0006) and the NOPR prior to the publication of either the final portable electric spa determination or consumer pool heaters standards final rule. (Rheem, No. 19 at p. 3) AHRI and PHTA sought clarification on whether swim spas are captured within the definition of portable electric spas. (AHRI and PHTA, No. 20 at p. 4)

On September 2, 2022, DOE published a final determination (''September 2022 Final Determination'') that established portable electric spas as a covered consumer product and included the following definition to be codified in 10 CFR 430.2:

*Portable electric spa* means a factory-built electric spa or hot tub, supplied with equipment for heating and circulating water at the time of sale or sold separately for subsequent attachment.

87 FR 54123, 54129.

This newly established definition is substantively the same as the one DOE proposed in the April 2022 NOPR and thus, DOE is not adopting any amendments to that definition in this final rule.

In response to the comment from AHRI and PHTA, DOE notes that swim spas are captured by the newly established definition for portable electric spa to the extent that they meet the description included in the definition. DOE also notes that portable electric spas are not within the scope of this rulemaking and will not be subject to the energy conservation standards adopted in this final rule. DOE appreciates the suggested definitional change for electric spa heaters from the CA IOUs but notes that the cited definition for commercial pumps is not relevant to consumer products, including electric spa heaters, a type of consumer pool heater. EPCA defines a consumer product, in relevant part, as any article of a type which, to any significant extent, is distributed in commerce for personal use or consumption by individuals; without regard to whether such article of such type is in fact distributed in commerce for personal use or consumption by an individual. (42 U.S.C. 6291(1)) As such, the design of an electric spa heater is sufficient to determine whether the product is a covered consumer product; coverage does not hinge on how the product is marketed. For this reason, DOE is not incorporating the language suggested by the CA IOUs in the definition of ''electric spa heater'' in this final rule.

Hayward suggested that DOE define pool heaters by technology (*e.g.,* gas-fired, air vapor compression heating/cooling, ground-source vapor compression heating/cooling, absorption heating/cooling, electric resistance) because different technology types correspond to different applications. (Hayward, No. 17 at pp. 3–4)

In response the suggestion from Hayward, DOE notes that EPCA provides that product classes shall be defined if the Secretary determines that covered products with the class consume a different kind of energy from that consumed by other covered products within such type (or class); or have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type (or class). (42 U.S.C. 6295(q)(1)) Accordingly, DOE is adopting separate definitions and analyzed different energy conservation standards for gas-fired and electric pool heaters, which consume different kinds of energy. However, among the technologies listed by Hayward that consume electricity, DOE was unable to identify, nor did Hayward suggest, a correlation between technology type and capacity or other performance-related feature that would constitute a ''feature'' under 42 U.S.C. 6295(q)(1). Therefore, DOE is declining to additionally define consumer pool heater products by technology type.

[23] In this case, ''lower-capacity'' means an input rating of less than 11 kW. DOE identified 11 kW as being a typical output capacity below which electric resistance heaters are integrated in spas based on its assessment of the market performed for the October 2015 NODA. 80 FR 65169. This threshold was also suggested by a commenter responding to the March 2015 RFI. 87 FR 22640, 22655.

In the April 2022 NOPR, DOE proposed a definition for output capacity along with equations for its calculation for electric pool and spa heaters to be incorporated in the consumer pool heaters test procedure at appendix P. The proposed calculation for output capacity for an electric pool or spa heater utilizes measurements already taken for other calculations in appendix P and therefore DOE would not consider the provision to result in any additional test procedure burden. 87 FR 22640, 22656. DOE proposed to define output capacity for electric pool and spa heaters as follows:

*Output capacity* for an electric pool or spa heater means the maximum rate at which energy is transferred to the water.

DOE proposed separate equations for the calculation of output capacity of an electric resistance pool heater and electric heat pump pool heater. 87 FR 22640, 22656. For electric pool heaters that rely on electric resistance heating elements, DOE proposed that the output capacity be calculated as:

$$Q_{OUT,ER} = k * W * (T_{mo} - T_{mi}) * (60/30)$$

where k is the specific heat of water, W is the mass of water collected during the test, $T_{mo}$ is the average outlet water temperature recorded during the primary test, $T_{mi}$ is the average inlet water temperature record during the primary test, all as defined in section 11.1 of ASHRAE 146, and (60/30) is the conversion factor to convert the output capacity measured during the 30-minute test to output capacity per hour.

DOE proposed that the output capacity of an electric pool heater that uses heat pump technology be calculated as:

$$Q_{OUT,HP} = k * W * (T_{ohp} - T_{ihp}) * (60/t_{HP})$$

where k is the specific heat of water, W is the mass of water collected during the test, $T_{ohp}$ is the average outlet water temperature during the standard rating test, $T_{ihp}$ is the average inlet water temperature during the standard rating test, all as defined in section 11.2 of ASHRAE 146, and $t_{HP}$ is the elapsed time of data recording during the thermal efficiency test on electric heat pump pool heater, as defined in section 9.1 of ASHRAE 146, in minutes. 87 FR 22640, 22656.

DOE did not receive any comments pertaining to the definition and calculations for output capacity proposed in the April 2022 NOPR and therefore will adopt them, as proposed, in this final rule.

In the April 2022 NOPR, DOE tentatively determined that the creation of a separate product class for heat pump pool heaters with cooling capability was not necessary, and requested comment on its assumption that electric pool heaters with cooling capabilities do not suffer diminished efficiency performance in heating mode. 87 FR 22640, 22655–22656.

Responding to the April 2022 NOPR, Hayward commented that heat pump pool heaters with heating and cooling need to have some efficiency offset to accommodate additional system components that affect efficiency in heating mode; the alternatives to heat pumps with cooling include evaporative coolers, which consume both energy and water, and are not currently regulated by DOE. (Hayward, No. 17 at p. 1) AHRI and PHTA stated that the efficiency and performance for a heat pump with cooling capabilities should be evaluated independently, as the pressure drop from the reversing valve could have negative impacts on overall performance compared to a similar model without cooling capabilities. (AHRI and PHTA, No. 20 at p. 3) Hayward commented that heat pump pool heaters that have both heating and cooling capabilities suffer diminished efficiency performance in heating mode due to pressure drops from the reversing valve and heat exchanger designs. Therefore, Hayward argued that the standards for heat pumps with heating and cooling should be lower than those for heating-only heat pumps. (Hayward, No. 17 at p. 3) Rheem stated that its heat pump pool heaters with cooling capability experience minimal effect on efficiency performance when in heating mode, but any difference is captured in performance ratings. (Rheem, No. 19 at p. 3)

DOE's market assessment performed for this rulemaking included both heating-only and heating- and cooling-capable consumer pool heaters. Of the models DOE identified, differences in COP are negligible between the heating- and cooling-capable pool heaters and the heating-only pool heaters. As such, DOE maintains that the creation of a separate product class for heat pump pool heaters with cooling capability is not warranted and does not establish one in this final rule.

2. Technology Options

In the April 2022 NOPR, DOE identified nine technology options for electric pool heaters and eight technology options for gas-fired pool heaters that would be expected to improve the efficiency as measured by DOE test procedure. 87 FR 22640, 22656–22657. Table IV.1 below lists all technology options identified.

TABLE IV.1—TECHNOLOGY OPTIONS IDENTIFIED FOR THE APRIL 2022 NOPR

| Technology option | Electric pool heater | Gas-fired pool heater |
|---|---|---|
| Insulation improvements | X | X |
| Control improvements | X | X |
| Heat pump technology | X | |
| Heat exchanger improvements | X | X |
| Compressor improvements | X | |
| Expansion valve improvements | X | |
| Fan improvements | X | |
| Condensing heat exchanger | | X |
| Electronic ignition systems | | X |
| Switch mode power supply | X | X |
| Seasonal off switch | X | X |
| Condensing pulse combination | | X |

In the April 2022 NOPR, DOE discussed comments it received from interested parties requesting the Department consider fan motor improvements as a technology option to improve efficiency at multiple load conditions. DOE noted that these improvements are unlikely to yield improvements because heat pump pool heaters operate at full capacity to satisfy the call for heat. Heat pump pool heaters on the market use permanent split capacitor (''PSC'') motors and do not currently utilize brushless permanent magnet (''BPM'') fan

motors.[24] Therefore, DOE has not been able to test products in order to determine the magnitude of efficiency improvement, if any, that could be expected due to the incorporation of BPM motors. The Department requested more information on this topic to determine whether there would be an efficiency improvement from replacing PSC motors with BPM motors. 87 FR 22640, 22660–22661.

Responding to the April 2022 NOPR, Fluidra stated it generally agreed with the technology options analyzed. (Fluidra, No. 18 at p. 2) Hayward suggested consideration of modulating heaters, as they can provide both improved efficiency and a better user experience, and recommended further analysis on average energy or part load energy consumption to provide credit for variable-capacity (modulating) pool heaters. (Hayward, No. 17 at pp. 4–5) Hayward added that variable-capacity heat pump pool heaters and gas-fired pool heaters, which would allow for efficiency calculations at part loads, should be considered for additional efficiency levels. Hayward also suggested that a variable-capacity heat pump pool heater would constitute a new max-tech electric pool heater efficiency level, and a variable-capacity gas-fired pool heater would fall between 84-percent and 95-percent thermal efficiency. (Hayward, No. 17 at p. 2) Conversely, AHRI and PHTA stated that their testing shows variable-speed fans have minimal impact on heat pump efficiency, and that the current efficiency metric does not benefit from variable-capacity equipment. In addition, these commenters noted that variable-capacity equipment will have higher standby mode and off mode losses. (AHRI and PHTA, No. 20 at p. 4)

Rheem stated that fan motor efficiency improvements will affect only the active mode testing in the current DOE test procedure. Rheem noted that the current DOE test procedure does not address part-load efficiency, which could be improved with fan motor efficiency (*e.g.,* switching from a PSC to a BPM fan motor). (Rheem, No. 19 at p. 4) Hayward claimed that while BPM fan motors may offer improved efficiency at reduced speed, the energy consumed by the fan motor is small compared to the energy consumed by the compressor motor. (Hayward, No. 17 at p. 4)

In order for a given technology to be considered a technology option by DOE for the purposes of evaluating potential new or amended energy conservation standards, the technology must be expected to improve the efficiency or energy consumption as measured by DOE test procedure. Appendix P does not capture part-load performance; therefore, DOE is unable to determine the efficiency impacts of modulating heaters or variable-capacity heat pumps for consumer pool heaters. Thus, DOE did not evaluate either of these technologies as a technology option for this final rule.

In response to the comment from Hayward, DOE acknowledges that the energy consumed by the fan motor is generally smaller than that of the compressor in an electric heat pump water heater. However, DOE agrees with Rheem that improvements in fan motor efficiency will improve the efficiency of a consumer pool heater as measured by appendix P and, therefore, continued to consider fan motor improvements as part of the general fan improvements technology option for this final rule. As discussed in section III.C of this document, DOE may consider comments related to part-load efficiency provisions in appendix P in its next test procedure rulemaking for consumer pool heaters.

In summary, DOE retains the same list of technology options from the April 2022 NOPR in this final rule. After considering all identified potential technology options for improving the efficiency of consumer pool heaters, DOE performed the screening analysis (see section IV.B of this document and chapter 4 of the final rule TSD) on these technologies to determine which were considered further in the final rule analysis.

### *B. Screening Analysis*

DOE uses the following four screening criteria to determine which technology options are suitable for further consideration in an energy conservation standards rulemaking:

(1) *Technological feasibility.* Technologies that are not incorporated in commercial products or in commercially viable, existing prototypes will not be considered further.

(2) *Practicability to manufacture, install, and service.* If it is determined that mass production of a technology in commercial products and reliable installation and servicing of the technology could not be achieved on the scale necessary to serve the relevant market at the time of the projected compliance date of the standard, then that technology will not be considered further.

(3) *Impacts on product utility.* If a technology is determined to have a significant adverse impact on the utility of the product to subgroups of consumers, or result in the unavailability of any covered product type with performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as products generally available in the United States at the time, it will not be considered further.

(4) *Safety of technologies.* If it is determined that a technology would have significant adverse impacts on health or safety, it will not be considered further.

(5) *Unique-pathway proprietary technologies.* If a technology has proprietary protection and represents a unique pathway to achieving a given efficiency level, it will not be considered further, due to the potential for monopolistic concerns. Sections 6(b)(3) and 7(b) of appendix A.

In sum, if DOE determines that a technology, or a combination of technologies, fails to meet one or more of the listed five criteria, it will be excluded from further consideration in the engineering analysis. The reasons for eliminating any technology are discussed in the following sections.

The subsequent sections describe DOE's evaluation of each technology option against the screening analysis criteria, and whether DOE determined that a technology option should be excluded (''screened out'') based on the screening criteria.

#### 1. Screened-Out Technologies

In the April 2022 NOPR, DOE proposed eliminating condensing pulse combustion from its analysis, having tentatively determined that this technology option is not technologically feasible and not practicable to manufacture, install, and service. DOE stated that, although condensing pulse combustion technology shows promising results in increasing efficiency, it has not yet penetrated the consumer pool heater market, and similar efficiencies are achievable with other technologies that have already been introduced on the market. 87 FR 22640, 22657. BWC agreed with screening out condensing pulse combustion technology. (BWC, No. 12 at p. 2) For the reasons stated, DOE screened out the condensing pulse combustion technology option in the final rule analysis. Although condensing pulse combustion technology shows promising results in increasing efficiency, it has not yet penetrated the consumer pool heater market, and similar efficiencies are achievable with

[24] The efficiency of PSC motors is highest at a single speed, with significant diminishing operation efficiency at other speeds, whereas BPM motors are capable of maintaining a high operating efficiency at multiple speeds.

other technologies that have already been introduced on the market.

2. Remaining Technologies

Through a review of each technology, DOE concludes that all of the other identified technologies listed in section IV.B.2 of this document met all five screening criteria to be examined further as design options in DOE's final rule analysis. In summary, DOE did not screen out the following technology options shown in Table IV.2:

TABLE IV.2—TECHNOLOGY OPTIONS THAT PASSED SCREENING CRITERIA

| Technology option | Electric pool heater | Gas-fired pool heater |
|---|---|---|
| Insulation improvements | ✓ | ✓ |
| Control improvements | ✓ | ✓ |
| Heat pump technology | ✓ | |
| Heat exchanger improvements | ✓ | ✓ |
| Expansion valve improvements | ✓ | |
| Fan improvements | ✓ | |
| Condensing heat exchanger | | ✓ |
| Electronic ignition systems | | ✓ |
| Switch mode power supply | ✓ | ✓ |
| Seasonal off switch | ✓ | ✓ |

BWC agreed that the technology options identified by DOE in Table IV.2 of the April 2022 NOPR (which are the same as those retained for this final rule) are comprehensive and appropriate in assessing gas-fired pool heaters, although many of the retained technologies are unlikely to lead to significant overall energy efficiency improvements for these consumer pool heaters. (BWC, No. 12 at p. 2)

DOE determined that these technology options are technologically feasible because they are being used or have previously been used in commercially-available products or working prototypes. DOE also found that all of the remaining technology options meet the other screening criteria (*i.e.,* practicable to manufacture, install, and service and do not result in adverse impacts on consumer utility, product availability, health, or safety). For additional details, see chapter 4 of the final rule TSD. DOE notes that the technology options which passed screening criteria do not in their entirety constitute the list of technologies which were analyzed as representative of the major design pathways to improving $TE_I$ values for consumer pool heaters; those ''design options'' are described in further detail in the engineering analysis (see section IV.C.1.b of this document).

*C. Engineering Analysis*

The purpose of the engineering analysis is to establish the relationship between the efficiency and cost of consumer pool heaters. There are two elements to consider in the engineering analysis; the selection of efficiency levels to analyze (*i.e.,* the ''efficiency analysis'') and the determination of product cost at each efficiency level (*i.e.,* the ''cost analysis''). In determining the performance of higher-efficiency products, DOE considers technologies and design option combinations not eliminated by the screening analysis. For each product class, DOE estimates the baseline cost, as well as the incremental cost for the product at efficiency levels above the baseline. The output of the engineering analysis is a set of cost-efficiency ''curves'' that are used in downstream analyses (*i.e.,* the LCC and PBP analyses and the NIA).

1. Efficiency Analysis

DOE typically uses one of two approaches to develop energy efficiency levels for the engineering analysis: (1) relying on observed efficiency levels in the market (*i.e.,* the efficiency-level approach), or (2) determining the incremental efficiency improvements associated with incorporating specific design options to a baseline model (*i.e.,* the design-option approach). Using the efficiency-level approach, the efficiency levels established for the analysis are determined based on the market distribution of existing products (in other words, based on the range of efficiencies and efficiency level ''clusters'' that already exist on the market). Using the design option approach, the efficiency levels established for the analysis are determined through detailed engineering calculations and/or computer simulations of the efficiency improvements from implementing specific design options that have been identified in the technology assessment. DOE may also rely on a combination of these two approaches. For example, the efficiency-level approach (based on actual products on the market) may be extended using the design option approach to interpolate to define ''gap fill'' levels (to bridge large gaps between other identified efficiency levels) and/or to extrapolate to the ''max-tech'' level (particularly in cases where the ''max-tech'' level exceeds the maximum efficiency level currently available on the market).

In this final rule, DOE relied on the efficiency-level approach. Efficiency levels for electric pool heaters were initially identified in the October 2015 NODA based on a review of products on the market and then revised in the April 2022 NOPR. DOE applied the same analytical approach for the efficiency analysis of gas-fired pool heaters in the April 2022 NOPR. 87 FR 22640, 22658.

As discussed in the April 2022 NOPR, the efficiency-level approach enabled DOE to identify incremental improvements in efficiency resulting from design options that consumer pool heater manufacturers already incorporate in commercially available models. 87 FR 22640, 22658. However, as of this final rule, manufacturers have not yet begun publishing ratings in terms of $TE_I$ because there are no standards or certification requirements for electric pool heaters, and requirements for gas-fired pool heaters are limited only to $E_t$ representations. Due to this lack of certified or otherwise publicly available $TE_I$ ratings, the Department's efficiency analysis included a process to convert existing $E_t$ ratings for gas-fired pool heaters and COP ratings for heat pump pool heaters to representative $TE_I$ values based on the calculation procedures found in section 5.1 of the appendix P test procedure. Typical values for active mode, standby mode, and off mode energy consumption were estimated based on test data and feedback from

manufacturers during confidential interviews. *Id.*

The $TE_I$ metric improves upon the $E_t$ metric by taking into account standby mode and off mode energy consumption, as discussed in section III.C of this document. The current standard for gas-fired pool heaters requires an $E_t$ of 82 percent for products of all capacities. Figure 3.2.24 of the April 2010 Final Rule TSD (''Distribution of Pool Heater Models by Input Capacity and Thermal Efficiency'') demonstrated that $E_t$ is not strongly dependent upon capacity. However, the transition to a regulated $TE_I$ metric has required additional consideration for how standby and off mode energy consumption may affect ratings for products of different capacities. From information collected throughout this rulemaking process, DOE has determined that standby and off mode energy consumption is not directly correlated to input capacity, $Q_{IN}$, for a gas-fired pool heater or active mode electrical energy consumption, PE, for an electric pool heater. As a result, consumer pool heaters with lower capacities cannot achieve the same $TE_I$ levels as products with higher capacities because the standby and off mode energy consumption is a more significant contribution to the overall energy consumption of lower-capacity products.

To account for this, in the April 2022 NOPR, DOE developed efficiency levels in which the $TE_I$ requirement is a function of the capacity of the unit. 87 FR 22640, 22659. In the engineering analysis for the April 2022 NOPR, the Department used several performance parameters measured in the appendix P test procedure as inputs to determining $TE_I$ efficiency levels for consumer pool heaters as a function of capacity. *Id.* at 87 FR 22658–22659.

In response to the April 2022 NOPR, Hayward argued that standards for heat pump and gas-fired pool heaters should be strictly focused on thermal efficiency and not include standby power. Hayward suggested that standby mode power could be considered in a future revision when these other requirements are more mature and understood. (Hayward, No. 17 at p. 2) Rheem stated the methodology used to estimate standby energy use was appropriate. Rheem also supported the use of the integrated thermal efficiency metric as it would allow manufacturers to make tradeoffs between active mode, standby mode, and off mode energy use regarding the overall efficiency and other features. (Rheem, No. 19 at p. 6) BWC agreed with the Department's estimates for standby mode and off mode power consumption for gas-fired pool heaters, as well as the assertion that this energy consumption accounts for a very small amount of the total overall annual energy use for such products, and will not increase with higher input products. (BWC, No. 12 at p. 3)

DOE notes first that EPCA requires that any final rule for new or amended energy conservation standards promulgated after July 1, 2010, must address standby mode and off mode energy use, (42 U.S.C. 6295(gg)(3)), in that when DOE adopts a standard for a covered product after that date, it must, if justified by the criteria for adoption of standards under EPCA (42 U.S.C. 6295(o)), incorporate standby mode and off mode energy use into a single standard, or, if that is not feasible, adopt a separate standard for such energy use for that product. (42 U.S.C. 6295(gg)(3)(A)–(B)). The $TE_I$ metric, which incorporates energy consumption in active mode, standby mode, and off mode and upon which potential new and amended energy conservation standards for consumer pool heaters were evaluated, has been established in the appendix P test procedure since July 6, 2015, as discussed in section III.C of this document, allowing ample time for manufacturers to assess products per this metric.

For this final rule, DOE revisited market energy efficiency distributions (see chapter 3 of the final rule TSD) and performed another round of manufacturer interviews (see section IV.J.3 of this document) to determine that the same efficiency levels from the April 2022 NOPR remain representative of the current consumer pool heater market. The following subsections detail the baseline, intermediate, and max-tech efficiency levels addressed in this final rule. Further discussion can be found in chapter 5 of the final rule TSD.

a. Baseline Efficiency

For each product class, DOE generally selects a baseline model as a reference point for each class, and measures changes resulting from potential energy conservation standards against the baseline. The baseline model in each product class represents the characteristics of a product typical of that class (*e.g.,* capacity, physical size). Generally, a baseline model is one that just meets current energy conservation standards, or, if no standards are in place, the baseline is typically the most common or least efficient unit on the market.

DOE uses the baseline model for comparison in several analyses, including the engineering analysis, LCC analysis, PBP analysis, and NIA. To determine energy savings that will results from a new or amended energy conservation standard, DOE compared energy use at each of the higher energy efficiency levels to the energy consumption of the baseline unit. Similarly, to determine the change sin price to the consumer that will result from an amended energy conservation standard, DOE compares the price of a baseline unit to the price of a unit at each higher efficiency level.

For gas-fired pool heaters, DOE analyzed a baseline efficiency level corresponding to a product which is minimally compliant with the current standard (82-percent $E_t$) and uses a standing pilot light. As discussed in the April 2022 NOPR, standing pilot lights operate when the product is not in use and contribute to fossil fuel energy use in standby mode, thereby resulting in lower $TE_I$ values than products with electronic ignition. 87 FR 22640, 22659. Table IV.3 depicts the baseline efficiency level for gas-fired pool heaters analyzed for the April 2022 NOPR (and, as discussed later, also analyzed in this final rule).

BILLING CODE 6450–01–P

**Table IV.3 Baseline Efficiency Level for Gas-Fired Pool Heaters**

| Efficiency Level | $E_t$ (percent) | $Q_{PR}$ (Btu/h) | $Q_{off,R}$ (Btu/h) | PE (W) | $P_{W,SB}$* (W) | $P_{W,OFF}$* (W) | $TE_I$** (percent) |
|---|---|---|---|---|---|---|---|
| EL 0 | 82 | 1,000 | 1,000 | 20 | 7.2 | 7.2 | $\frac{82(Q_{IN}+68)}{Q_{IN}+85{,}344}$ |

* Presented in terms of Btu/h in appendix P.

** Equation comprises input capacity $Q_{IN}$ and $E_t$ and values for $P_{W,SB}$, and $P_{W,OFF}$ at left and uses equation 5.4.3 in appendix P.

For electric pool heaters, DOE analyzed a baseline efficiency level corresponding to electric resistance heating, which was found to be the least efficient electric pool heater design on the market. Table IV.4 depicts the baseline efficiency level for electric pool heaters analyzed for the April 2022 NOPR and this final rule.

**Table IV.4 Baseline Efficiency Level for Electric Pool Heaters**

| Efficiency Level | $E_t$ (percent) | $P_{W,SB}$ (W)* | $P_{W,OFF}$ (W)* | $TE_I$** (percent) |
|---|---|---|---|---|
| EL 0 | 99 | 1.2 | 1.2 | $\frac{99\ PE}{PE+341}$ |

* Presented in terms of Btu/h in appendix P.

** Equation comprises active electrical power PE and values for $E_t$, $P_{W,SB}$, and $P_{W,OFF}$ at left and uses equation 5.4.3 in appendix P.

BWC believed that the baseline efficiency levels established in the April 2022 NOPR were appropriate based on the DOE test procedure for these products. (BWC, No. 12 at p. 2)

DOE did not receive any other comments specifically on the baseline efficiency levels proposed in the April 2022 NOPR. Comments relating to energy use in standby mode and off mode power, which factor into the baseline $TE_I$ equations, have been discussed previously in section IV.C.1 of this document. For the reasons described, DOE maintained these baseline efficiency levels for the final rule analysis.

Additional details on the selection of baseline models and the development of the baseline efficiency equations may be found in chapter 5 of the final rule TSD.

b. Higher Efficiency Levels

As part of DOE's analysis, the maximum available efficiency level is the highest efficiency unit currently available on the market. DOE also defines a ''max-tech'' efficiency level to represent the maximum possible efficiency for a given product. For consumer pool heaters, the max-tech efficiency levels are achieved by gas-fired pool heaters that utilize condensing technology and by electric pool heaters that utilize heat pump technology.

As discussed in section IV.C.1 of this document, efficiency levels for electric pool heaters were initially analyzed in the October 2015 NODA. DOE requested comment on these efficiency levels and reviewed stakeholder feedback in the April 2022 NOPR. In response to that feedback, DOE incorporated additional design options in the April 2022 NOPR to decrease the standby mode and off mode energy consumption at the max-tech levels and to further improve $TE_I$ values: transformer improvements, switch mode power supply, and a seasonal off switch. 87 FR 22640, 22660.

Between the baseline efficiency level and the max-tech efficiency level, DOE analyzed several intermediate higher efficiency levels for gas-fired pool heaters and electric pool heaters in the April 2022 NOPR. 87 FR 22640, 22659–22660. These efficiency levels, and corresponding major design options to achieve these efficiency levels, are shown in Table IV.5 through Table IV.8. As discussed in this section, the Department is using these efficiency levels and design options for this final rule analysis.

**Table IV.5 Efficiency Levels for Gas-Fired Pool Heaters**

| Efficiency Level | $E_t$ (percent) | $Q_{PR}$ (Btu/h) | $Q_{off,R}$ (Btu/h) | PE (W) | $P_{W,SB}$* (W) | $P_{W,OFF}$* (W) | $TE_I$† (percent) |
|---|---|---|---|---|---|---|---|
| EL 0 | 82 | 1,000 | 1,000 | 20 | 7.2 | 7.2 | $\frac{82(Q_{IN}+68)}{Q_{IN}+85{,}344}$ |
| EL 1 | 82 | 0 | 0 | 20 | 7.2 | 7.2 | $\frac{82(Q_{IN}+68)}{Q_{IN}+2{,}113}$ |
| EL 2 | 84 | 0 | 0 | 144 | 7.2 | 7.2 | $\frac{84(Q_{IN}+491)}{Q_{IN}+2{,}536}$ |
| EL 3** | 95 | 0 | 0 | 220 | 4.6** | 0** | $\frac{95(Q_{IN}+751)}{Q_{IN}+1{,}409}$ |

* Presented in terms of Btu/h in appendix P.
** The max-tech efficiency level includes standby mode and off mode technology options.
† Equation comprises values for $E_t$, $P_{W,SB}$, and $P_{W,OFF}$ at left and uses equation 5.4.3 in appendix P.

TABLE IV.6—DESIGN OPTIONS FOR GAS-FIRED POOL HEATERS

| Efficiency level | Technology |
|---|---|
| EL 0 | Standing Pilot + Cu or CuNi Finned Tube + Atmospheric. |
| EL 1 | Electronic Ignition + Cu or CuNi Finned Tube + Atmospheric. |
| EL 2 | Electronic Ignition + Cu or CuNi Finned Tube + Blower Driven Gas/Air Mix. |
| EL 3 | Condensing + CuNi and Cu Finned Tube + seasonal off switch + switch mode power supply. |

**Table IV.7 Efficiency Levels for Electric Pool Heaters**

| Efficiency Level | $E_t$ (percent) | $P_{W,SB}$* (W) | $P_{W,OFF}$* (W) | $TE_I$‡ (percent) |
|---|---|---|---|---|
| EL 0 | 99 | 1.2 | 1.2 | $\frac{99\ PE}{PE+341}$ |
| EL 1 | 410 | 5.7 | 5.7 | $\frac{410\ PE}{PE+1{,}619}$ |
| EL 2 | 520 | 5.7 | 5.7 | $\frac{520\ PE}{PE+1{,}619}$ |
| EL 3 | 580 | 5.7 | 5.7 | $\frac{580\ PE}{PE+1{,}619}$ |
| EL 4 | 600 | 5.7 | 5.7 | $\frac{600\ PE}{PE+1{,}619}$ |
| EL 5† | 610 | 3.1 | 0 | $\frac{610\ PE}{PE+443}$ |

* Presented in terms of Btu/h in appendix P.
† The max-tech efficiency level includes standby mode and off mode technology options.
‡ Equation comprises values for $E_t$, $P_{W,SB}$, and $P_{W,OFF}$ at left and uses equation 5.4.3 in appendix P.

BILLING CODE 6450–01–C

TABLE IV.8—DESIGN OPTIONS FOR ELECTRIC POOL HEATERS

| Efficiency level | Technology |
|---|---|
| EL 0 | Electric Resistance. |
| EL 1 | Heat Pump, twisted Titanium tube coil in concentric/counter flow PVC Pipe. |
| EL 2 | EL 1 + increased evaporator surface area. |
| EL 3 | EL 2 + increased evaporator surface area. |
| EL 4 | EL 3 + increased evaporator surface area. |
| EL 5 | EL4 + condenser coil length + seasonal off switch + switch mode power supply. |

The April 2022 NOPR requested comment on the proposed efficiency levels above the baseline and the typical technological changes associated with each efficiency level. 87 FR 22640, 22663.

In response, the Joint Advocates encouraged DOE to consider additional efficiency levels for both electric and gas-fired pool heaters that include designs employing seasonal off switches and switch mode power supplies. The Joint Advocates suggested that adding seasonal off switches would increase energy savings with minimal cost, and cited State regulations for heat pump pool heaters in California, Connecticut, and Florida which already require an off switch mounted on the pool heater that permits shutoff without adjusting the thermostat. The Joint Advocates commented that the proposed standard levels should be adjusted to include seasonal off switches and/or a switch mode power supply and that the analysis include the reduced standby mode and off mode energy consumption associated with the use of these technology options. (Joint Advocates, No. 13 at pp. 2–3) Similarly, the CA IOUs recommended that DOE consider incorporating the assumption that all consumer pool heaters are equipped with a seasonal off switch and updating the efficiency levels as appropriate. The CA IOUs indicated that heat pump pool heaters certified in the California Energy Commission's Modernized Appliance Efficiency Database System (''MAEDbS'') all have an on/off switch as California's Appliance Efficiency Regulations (Title 20) adopted this as a prescriptive design requirement for all consumer pool heaters sold in the state. CA IOUs suggested that the seasonal off switch would be a cost effective means for many models to reach the EL 4 level without needing to redesign for a higher COP. (CA IOUs, No. 16 at pp. 3–5)

AquaCal suggested that the proposed efficiency level for electric pool heaters was more stringent, in terms of relative level of technological advancement required, than that for gas-fired pool heaters. AquaCal recommended DOE should consider proposing efficiency levels that are more comparable, in terms of the relative level of technological advancement required, for electric and gas-fired pool heaters. (AquaCal, No. 11 at p. 1) However, as results have shown, the benefits and burdens for higher efficiency levels of gas-fired pool heaters are not equivalent to the benefits and burdens for higher efficiency levels of electric pool heaters, and DOE accounts for this when constructing TSLs.

Rheem generally supported the technology changes associated with each efficiency level. However, Rheem stated that the off-mode energy use may not actually be zero when there is a seasonal off switch, and the commenter recommended DOE either amend appendix P to require that any non-zero off mode energy use be measured or provide clarification on whether seasonal off switches with non-zero off mode energy use meet the definition of a seasonal off switch within appendix P. (Rheem, No. 19 at pp. 4–5)

Section 1.7 of appendix P defines ''off mode'' as the condition during the pool non-heating season in which the consumer pool heater is connected to the power source, and neither the main burner, nor the electric resistance elements, nor the heat pump is activated, and the seasonal off switch, if present, is in the ''off'' position. Section 1.8 defines ''seasonal off switch'' as a switch that results in different energy consumption in off mode as compared to standby mode. Thus, there is no requirement for a seasonal off switch to result in a measured energy consumption of zero in off mode in order to meet the definition in section 1.8 of appendix P. However, feedback from manufacturers and DOE's own testing has led the Department to conclude that 0 watts is a representative value for $P_{W,OFF}$ at max-tech because some seasonal off switches, including those analyzed for the max-tech level, are capable of reducing the electrical power consumption to 0 watts when in off mode.

DOE reviewed the regulations and building codes in California,[25] Connecticut,[26] Texas,[27] and Florida [28] to consider the requirements for seasonal off switches in these jurisdictions. From its research, the Department recognizes that these States do not have the same definition or usage for off switches as DOE provides in appendix P; the States and DOE are not defining the same type of switch despite similar terminology. Specifically, these States require the use of a ''readily accessible on-off switch'' which allows the unit to shut off the heater operation without adjusting the thermostat setting. These requirements do not specify that all power-consuming components of the pool heater are off—only the heater operation. Therefore, it is uncertain whether these State-required on-off switches would put the pool heater in a state where it would consume 0 watts of power. As noted, DOE defines ''seasonal off switch'' as a switch that results in different energy consumption in off mode as compared to standby mode, and this would typically cause the pool heater to consume 0 watts in the off mode. Additionally, DOE notes that California's regulations require such a switch only for heat pump pool heaters.

AHRI and PHTA stated that a unit disconnect is required in these installations, and this typically functions as the off switch. AHRI and PHTA opposed using seasonal off switches at lower efficiency levels in DOE's analysis. (AHRI and PHTA, No. 20 at p. 3)

[25] *See* California Code of Regulations at 20 CCR § 1605.3(g)(2), found online at: *govt.westlaw.com/calregs/Index?transitionType=Default&contextData=%28sc.Default%29* (last accessed on October 15, 2022).

[26] In the current, 2022 version of Connecticut building code, an emergency off switch is no longer required for pool heaters. Item 313.7, which used to address the emergency shutoff switch, has been deleted. *See* 2022 Connecticut State Building code at *portal.ct.gov/-/media/DAS/Office-of-State-Building-Inspector/2022-State-Codes/2022-CSBC-Final.pdf* (last accessed on October 15, 2022).

[27] See Texas Administrative Code § 265.197 at *texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=T&app=9&p_dir=N&p_rloc=202557&p_tloc=&p_ploc=1&pg=3&p_tac=&ti=25&pt=1&ch=265&rl=197* (last accessed on October 15, 2022).

[28] *See* 2020 Florida Building Code, Energy Conservation at C404.9.1, *codes.iccsafe.org/content/FLEC2020P1/chapter-4-ce-commercial-energy-efficiency* (last accessed on October 15, 2022).

As such, it is unclear whether manufacturers are responding to State mandates for ''readily accessible on-off switches'' by introducing seasonal off switches which meet DOE's definition in appendix P.

DOE agrees that seasonal off switches and switch mode power supplies can improve the $TE_I$ values of each efficiency level. However, DOE notes that the engineering analysis identifies the major design pathway manufacturers are expected to use to improve efficiency From discussions with manufacturers, DOE understands that improvements to heat exchangers and fans would likely be implemented first to achieve efficiencies above the baseline, before equipping consumer pool heaters with technologies to reduce standby mode and off mode energy consumption, because active mode energy consumption is significantly larger and would be prioritized when considering which design option to implement to achieve a target standard level. For this reason, DOE maintains its analysis from the April 2022 NOPR, which attributes the incorporation of seasonal off switches, switch mode power supply, and transformer improvements only at the max-tech efficiency level, after manufacturers have exhausted options to improve efficiency via heat exchanger upgrades.

Furthermore, the CA IOUs suggested increasing the max-tech efficiency level for electric pool heaters, given the presence of such products with AHRI-certified COP values that exceed the max-tech COP level analyzed in the April 2022 NOPR. (CA IOUs, No. 16 at pp. 4–5) In response to this, DOE notes that it evaluated the efficiencies of electric pool heaters on the basis of the $TE_I$ metric, and found that, based on expected values of standby and off mode power consumption, the max-tech efficiency level assessed in the NOPR is still representative of the maximum efficiency that has been demonstrated across a full range of capacities.

The Department also received comments regarding the efficiency levels chosen for analysis of gas-fired pool heaters. The Joint Advocates urged DOE to evaluate an efficiency level for gas pool heaters with an active mode thermal efficiency of 85 percent. The Joint Advocates claimed that there exist non-condensing gas-fired products from multiple manufacturers with 85-percent thermal efficiency at capacities ranging from 150,000 to 750,000 Btu/h, which can be found in DOE's Compliance Certification Database (''CCD'') and MAEDbS. (Joint Advocates, No. 13 at p. 2) AHRI and PHTA, by contrast, claimed that the current Efficiency Level 2 (''EL 2'') (corresponding to an active mode $E_t$ of 84 percent) for gas-fired pool heaters has the potential to condense, and that the Department should set the thermal efficiency at 83 percent.

AHRI and PHTA, along with the Gas Associations, encouraged DOE to adopt a standard based on a thermal efficiency of 83 percent to avoid venting re-configurations due to this potential condensing operation that could occur at the proposed standard that corresponds to 84-percent thermal efficiency. (AHRI and PHTA, No. 20 at pp. 2 and 5; Gas Associations, No. 15 at p. 2) Fluidra provided similar comments, indicating that 84-percent thermal efficiency is too close to the functional limit for non-condensing gas-fired pool heaters, and suggesting that the standard should be set at a level which corresponds to a thermal efficiency of 83 percent in order to ensure a margin of efficiency is used to prevent new products from operating in condensing mode when installed as a non-condensing product. They noted this approach would minimize disruption to consumers and industry by increasing the minimum thermal efficiency, while allowing adequate transition time for gas-fired pool heaters to reach EL 3 in the future. (Fluidra, No. 18 at pp. 1–2) At the NOPR public meeting, DOE also received comments that 84 percent is the threshold of condensing operation, and any thermal efficiency higher than 84 percent would inevitably result in condensation. (Pentair, Public Meeting Transcript, No. 9 at pp. 5–6)

In manufacturer interviews since the April 2022 NOPR, stakeholders have elaborated that at an 84-percent $E_t$ rating, in certain installation conditions condensate forms in venting as the flue gases exiting the heat exchanger are close to the dew point. Thus, while such a gas-fired pool heater would be considered ''non-condensing'' because the condensation does not occur in the heat exchanger, installation considerations would still include using the appropriate venting materials to handle possible condensation. Additionally, stakeholders indicated that, when a gas-fired pool heater is operating at an efficiency that is close to the condensing threshold, variations in ambient temperature and water inlet temperature can cause condensation to actually occur in the heat exchanger. While these fluctuations would improve the efficiency of the gas-fired pool heater as compared to its rating, the result may be corrosive damage to the heat exchanger, according to these manufacturers.

Given these considerations, DOE did not consider an efficiency level of 85-percent $E_t$ for gas-fired pool heaters, which was suggested by the Joint Advocates, because safety or installation concerns about near-condensing operation (brought up by manufacturers in response to the April 2022 NOPR) would potentially be exacerbated at 85-percent $E_t$. Additionally, upon its review of the CCD, DOE has found that only one model line from one manufacturer is available at 85-percent $E_t$, indicating that manufacturers do not generally produce gas-fired pool heaters at that efficiency. This would indicate that near-condensing operation concerns may hinder the production of 85-percent $E_t$ pool heaters.

Although several parties indicated that near-condensing operation is also an issue at 84-percent $E_t$, DOE's market assessment demonstrates that there are a large number of unique basic models of gas-fired pool heaters from six manufacturers available at 84-percent $E_t$. This shows that a significant portion of the market uses products at this efficiency level, and that the potential for condensation to disrupt system performance has apparently been adequately mitigated through appropriate product design and installation instructions for these products to maintain market share in the United States. For example, DOE observed that gas-fired pool heaters at 84-percent $E_t$ can be equipped with blowers that ensure positive vent pressure (for indoor installations) and may need to be installed with adequate means to discharge potential condensate. Most importantly, far more products exist at 84-percent $E_t$ than do at 83-percent $E_t$ [29]—hence, it would appear that the 84-percent $E_t$ efficiency level is feasible and generally more desirable to consumers than 83-percent $E_t$ since the market has already largely moved to 84-percent. For these reasons, DOE maintains a $TE_I$ level based on 84-percent $E_t$ in its efficiency analysis for gas-fired pool heaters.

Rheem and AHRI and PHTA stated that copper and cupronickel heat exchangers are not suitable for condensing operation because they are not resistant to the corrosion from condensate and thus should not be considered for EL 3. (Rheem, No. 19 at pp. 4–5; AHRI and PHTA, No. 20 at p. 5) In response, DOE notes that it observed condensing cupronickel-based pool heaters in its teardown analysis.

[29] As of October 2022, 51 unique basic models of gas-fired pool heaters were certified to DOE at 84% $E_t$, whereas only 10 unique basic models were rated at 83% $E_t$. See chapter 3 of the TSD for further details on the market assessment.

Therefore, DOE has determined that cupronickel is suitable for condensing operation, and the manufacturer production cost (''MPC'') for EL 3, as discussed in section IV.C.2.a of this document, reflects the use of this material.

Fluidra also commented that gas-fired pool heaters at EL 0 and EL 1, which were based on a model with 82-percent $E_t$ with and without a standing pilot light, respectively, have become less prevalent in the marketplace and that these efficiency levels would have minimal meaningful impact. (Fluidra, No. 18 at p. 2) However, DOE's market assessment reveals that, contrary to Fluidra's comment, 82-percent $E_t$ (the active mode thermal efficiency at EL 0 and EL 1) is the most commonly found thermal efficiency on the market for gas-fired pool heaters. Hence DOE analyzed gas-fired pool heaters with 82-percent $E_t$ (with and without standing pilot lights) for this final rule analysis.

Hayward suggested that DOE analyze additional efficiency levels for both gas-fired pool heaters and electric pool heaters with variable-capacity technologies (*i.e.,* modulating burners or inverter drives). Hayward stated that it believed that manufacturers will be deterred from developing modulating consumer pool heaters because the standby power consumption for inverter-driven heat pump pool heaters will be higher than that for single-capacity heat pump pool heaters. Hayward also indicated that standby power requirements could also deter development of demand-response technologies. Hayward claimed that variable-capacity heat pump pool heaters have significant efficiency improvements over single-capacity products. (Hayward, No. 17 at p. 4) However, as discussed in section IV.A.2 of this document, DOE has determined that modulating burners and inverter-driven (*i.e.,* variable-speed fan) heat pump designs would not provide substantial improvements to $TE_I$ as measured by the current appendix P test procedure, because the test conditions require consumer pool heaters to operate at full-load capacity. Thus, DOE did not analyze additional efficiency levels for these technologies.

AquaCal claimed that the EL 4 level chosen by DOE for electric pool heaters, while possible to achieve, only represents 10 percent of the existing market because of the price increase for products at that level of efficiency. (AquaCal, No. 11 at p. 1) EL 4 for electric pool heaters corresponds to a COP of 6.0 or an $E_t$ of 600 percent. This level was originally selected in the October 2015 NODA because many heat pump pool heaters are rated at COPs of 6.0. An efficiency level which approximately reflects the top 10 percent of the market is a useful point to have in the analysis, because it represents a market-available stringency which would result in significant energy savings. In this final rule analysis, DOE has determined that several manufacturers produce heat pump pool heaters which meet or exceed EL 4; therefore, DOE is maintaining this efficiency level in its analysis of electric pool heaters.

With respect to the description of technologies implemented at higher efficiency levels for electric pool heaters, AHRI and PHTA stated that the description for EL 1 is too specific for the heat exchanger and does not account for a wide variety of heat exchanger technologies on the market at this level. (AHRI and PHTA, No. 20 at p. 5)

In the initial October 2015 NODA engineering analysis, DOE associated straight titanium tube coils in submerged water tanks as the main heat exchanger type for achieving a $TE_I$ of 344 percent at EL 1. In response to this analysis, AHRI suggested that the design features assumed for EL 1 were mischaracterized, and DOE re-evaluated this efficiency level in the April 2022 NOPR. In the April 2022 NOPR, DOE had tentatively determined that electric pool heaters at EL 1 would have more similar designs to electric pool heaters at EL 2, and, as a result, DOE revised this efficiency level to reflect a twisted titanium tube concentric/counterflow heat exchanger. The $TE_I$ rating of this efficiency level was increased to 387 percent to correlate with the improvement in heat exchanger type from submerged coils. 87 FR 22640, 22664. See chapter 5 of the April 2022 NOPR TSD for additional information. As such, DOE is aware that products that perform at or near EL 1 may use either submerged coil or twisted tube concentric/counterflow heat exchangers. AHRI's previous comments, however, had indicated that a submerged coil design misrepresented this efficiency level.

DOE reiterates its assertion in the April 2022 NOPR that its association of specific technology options with efficiency levels is based on observed designs in commercially available products, and that the Department does not assume *a priori* that certain heat exchanger designs would result in specific efficiency levels. 87 FR 22640, 22664. DOE discussed technology options in manufacturer interviews conducted after the April 2022 NOPR and did not receive further feedback indicating that a twisted tube concentric/counterflow heat exchanger would not be representative of EL 1. Given that the majority of heat pump pool heaters utilize this style of heat exchanger (based on DOE's market review and teardowns of other efficiency levels), DOE is maintaining this technology option for EL 1 in this final rule analysis.

AHRI and PHTA stated that the descriptions for electric pool heaters at EL 2 to EL 4 are too simple, and that other designs must be implemented beyond increased evaporator surface area, such as increased condenser surface area. AHRI and PHTA requested more information from DOE regarding how the measured efficiency increases articulated in the different ELs were derived via the increased evaporator surface area and urged DOE to consider the impacts of reduced standby mode and off mode energy consumption. AHRI and PHTA also encouraged DOE to investigate the impact on efficiency levels due to the required change in refrigerants. (AHRI and PHTA, No. 20 at p. 5)

To clarify, efficiency increases for heat pump pool heaters were not numerically derived: DOE conducted teardown analyses on products which were rated at these efficiency levels and observed that the designs differed by evaporator surface area. This trend was verified through teardowns of multiple samples spanning a range of efficiencies. DOE did not observe condenser coil increases to contribute to intermediate efficiency levels across all manufacturers' designs. Specifically, several condenser coil lengths were observed for products meeting similar efficiencies, and vice-versa: similar condenser coil lengths were observed for products meeting different intermediate efficiencies. This would indicate that manufacturers did not rely on this design option to improve efficiency. The only case where DOE observed significant increases in condenser length and coil diameter was in the model representing the max-tech efficiency level. Thus, DOE determined that condenser coil improvements are necessary to achieve EL 5.

In response to AHRI and PHTA's request for DOE to consider the impact of standby mode and off mode energy consumption, DOE notes that its estimated typical standby mode and off mode energy consumption values for the engineering analysis do not mandate that manufacturers must meet these values in order to comply with potential standards. Because $TE_I$ is an integrated metric that combines active mode, standby mode, and off mode energy consumption, manufacturers may

design products to meet potential standards by implementing improvements to any combination of the three energy-consuming modes. The technology options in this efficiency analysis assess the most cost-effective design pathways to improvement efficiency based on market evidence.

With respect to changes in refrigerant, products torn down by DOE utilized R–410A refrigerant. While several low-GWP replacements for R–410A, such as R–441A, R–290, and R–32, are currently being developed and implemented in other refrigeration-based consumer products, that refrigerant changeover is being driven in part by regulations such as those in California. Consumer pool heaters are not subject to those regulations at this time and thus the consumer pool heater market has not yet experienced a similar shift to other refrigerants. Moreover, commenters did not provide any specifics for replacement refrigerants that DOE should consider during manufacturer interviews. As such, DOE assumes that manufacturers will opt to continue to use R–410A refrigerant as long as possible, and thereafter use drop-in replacements using an alternative refrigerant wherever feasible to limit product and capital conversion costs. Because these drop-in replacements have not been taken up by the consumer pool heater market at this time, it is uncertain what the MPC of an alternative refrigerant system would be, nor whether there would be efficiency impacts. Therefore, DOE maintained R–410A as the basis for heat pump pool heater efficiency levels and MPCs in this final rule.

Further details of the efficiency analysis are found in chapter 5 of the final rule TSD.

2. Cost Analysis

The cost analysis portion of the engineering analysis is conducted using one or a combination of cost approaches. The selection of cost approach depends on a suite of factors, including the availability and reliability of public information, characteristics of the regulated product, the availability and timeliness of purchasing the product on the market. The cost approaches are summarized as follows:

- *Physical teardowns:* Under this approach, DOE physically dismantles a commercially available product, component-by-component, to develop a detailed bill of materials for the product.
- *Catalog teardowns:* In lieu of physically deconstructing a product, DOE identifies each component using parts diagrams (available from manufacturer websites or appliance repair websites, for example) to develop the bill of materials for the product.
- *Price surveys:* If neither a physical nor catalog teardown is feasible (for example, for tightly integrated products such as fluorescent lamps, which are infeasible to disassemble and for which parts diagrams are unavailable) or cost-prohibitive and otherwise impractical (*e.g.,* large commercial boilers), DOE conducts price surveys using publicly available pricing data published on major online retailer websites and/or by soliciting prices from distributors and other commercial channels.

At the start of the engineering analysis, DOE identified the energy efficiency levels associated with consumer pool heaters on the market using data gathered in the market assessment. DOE also identified potential technologies and features that are typically incorporated into products at the baseline level and at the various efficiency levels analyzed above the baseline. Next, DOE selected products for a physical teardown analysis having characteristics of typical products on the market at the representative capacity and used these teardowns to verify technology options implemented at each efficiency level. DOE chose a representative size of 250,000 Btu/h input capacity for gas-fired pool heaters and 110,000 Btu/h output capacity for electric pool heaters. As explained in the April 2022 NOPR, DOE selected these representative capacities based on the number of available models on the market and by referencing a number of sources, including information collected for the market and technology assessment, as well as information obtained from product literature. DOE then sought feedback on the representative capacities during confidential manufacturer interviews. 87 FR 22640, 22664. DOE gathered information from performing a physical teardown to create detailed bills of materials (''BOMs''), which included all components and processes used to manufacture the products. The resulting BOMs provide the basis for the MPC estimates. MPCs are estimated spanning the full range of efficiencies from the baseline to the maximum technology available. For this rulemaking, DOE held interviews with manufacturers to gain insight into the consumer pool heater industry and to request feedback on the engineering analysis presented in the April 2022 NOPR. DOE used the information gathered from these interviews, along with the data obtained through teardown analysis and insights from public stakeholder comments, to refine its MPC estimates.

a. Manufacturer Production Costs

To assemble BOMs and to calculate the manufacturing costs for the different components in consumer pool heaters, DOE primarily relied upon physical teardowns. Using the data gathered from the physical teardowns, DOE characterized each component according to its weight, dimensions, material, quantity, and the manufacturing processes used to fabricate and assemble it. DOE also used catalog teardowns to supplement physical teardown data. For the catalog teardowns DOE examined published manufacturer catalogs and supplementary component data to estimate the major physical differences (such as dimensions, weight, design features) between a product that was physically disassembled and a similar product that was not.

The teardown analysis allowed DOE to identify the technologies that manufacturers typically incorporate into their products, along with the efficiency levels associated with each technology or combination of technologies. The BOMs from the teardown analysis were then used as inputs to calculate the MPC for each product that was torn down. These individual model MPCs take into account the cost of materials, fabrication, labor, overhead, depreciation, and all other aspects that make up a production facility.

Fluidra claimed that product pricing has gone up year over year since the initial 2015 analysis, and component shortages over the last few years have had a significant cost impact to both manufacturers and consumers due to decrease of supply and increase of demand. Fluidra stated that due to the smaller economy of scale for the consumer pool heater market, price breaks for volume are not as large as other heating, ventilation, and air-conditioning equipment. (Fluidra, No. 18 at p. 3)

DOE collected information on labor rates, tooling costs, raw material prices, and other factors as inputs to the cost estimates. For fabricated parts, the prices of raw metal materials [30] (*i.e.,* tube or sheet metal) are estimated using the average of the most recent 5-year period. The 5-year period for this final rule analysis captures metal prices from 2017–2022, and, therefore, the updated resulting MPCs in this final rule analysis reflect much of the material price increases that manufacturers have experienced in recent years (smoothed over this 5-year period). For purchased

[30] Prices are sourced from the American Metals Market, available online at *www.amm.com* (last accessed on October 15, 2022).

parts, DOE estimated the purchase price based on volume-variable price quotations and detailed discussions with manufacturers and component suppliers. The cost of transforming the intermediate materials into finished parts was estimated based on current industry pricing at the time of this final rule analysis.

The MPCs resulting from the teardowns were used to develop an industry average MPC for each efficiency level of each product class analyzed.

For gas-fired pool heaters, DOE's industry average MPCs reflect a weighted average of costs for gas-fired pool heaters which use different heat exchanger materials (*e.g.,* copper versus cupronickel). As discussed in the April 2022 NOPR, DOE surveyed the market and found the percentage of models at each efficiency level that currently utilize copper or cupronickel heat exchangers and assumed that, under an amended standard, the percentage would remain unchanged. DOE requested comment on this assumption. 87 FR 22640, 22664.

In response to the April 2022 NOPR, Hayward claimed that the fraction of cupronickel heat exchangers in the market would likely be reduced as a result of amended standards, but not to zero. (Hayward, No. 17 at p. 4) AHRI and PHTA, stated that amended standards would greatly reduce the number of products available on the market, and this would in turn drive a large number of redesigns requiring cupronickel heat exchangers. (AHRI and PHTA, No. 20 at p. 6)

Given the uncertainty in the outlook for copper versus cupronickel heat exchangers in an amended standards case scenario, DOE maintained its approach to assume that these fractions would remain the same as they are currently.

b. Manufacturer Selling Prices

To account for manufacturers' non-production costs and profit margin, DOE applies a multiplier (the manufacturer markup) to the MPC. The resulting manufacturer selling price (''MSP'') is the price at which the manufacturer distributes a unit into commerce. To meet new or amended energy conservation standards, manufacturers typically redesign their baseline products. These design changes typically increase MPCs relative to those of previous baseline MPCs. Depending on the competitive environment for these particular products, some or all of the increased production costs may be passed from manufacturers to retailers and eventually to customers in the form of higher purchase prices. As production costs increase, manufacturers may also incur additional overhead (*e.g.,* warranty costs).

The manufacturer markup has an important bearing on profitability. A high markup under a standards scenario suggests manufacturers can readily pass along the increased variable costs and some of the capital and product conversion costs (the one-time expenditures) to consumers. A low markup suggests that manufacturers will have greater difficulty recovering their investments, product conversion costs, and/or incremental MPCs.

In the April 2022 NOPR analysis, DOE used a manufacturer markup of 1.33 for gas-fired pool heaters and a manufacturer markup of 1.28 for electric pool heaters. DOE conducted interviews with manufacturers after the publication of the April 2022 NOPR, during which several manufacturers stated the estimated manufacturer markup for each product class of consumer pool heaters used in the NOPR analysis were lower than their manufacturer markup for those products. Based on these additional inputs, DOE revised its markup calculations for this final rule, increasing the gas-fired pool heater manufacturer markup from 1.33 used in the April 2022 NOPR analysis to 1.44 and increasing the electric pool heater manufacturer markup from 1.28 used in the April 2022 NOPR analysis to 1.39.

See chapter 12 of the final rule TSD for more details about the manufacturer markup calculation.

3. Cost-Efficiency Results

The results of the engineering analysis are reported as cost-efficiency data (or ''curves'') in the form of $TE_I$ (in percent) versus MPC (in 2021 dollars), which form the basis for subsequent analyses. DOE developed one curve for gas-fired pool heaters and one curve for electric pool heaters, and these curves reflect the MPCs developed for the representative capacities discussed in the previous section. See chapter 5 of the final rule TSD for additional detail on the engineering analysis.

TABLE IV.9—MANUFACTURER PRODUCTION COST FOR GAS-FIRED POOL HEATERS AT REPRESENTATIVE INPUT CAPACITY OF 250,000 Btu/h

| Efficiency level | $TE_I$ (percent) | MPC (2021$) | MSP (2021$) |
|---|---|---|---|
| EL 0 | 61.1 | $782 | $1,186 |
| EL 1 | 81.3 | 788 | 1,195 |
| EL 2 | 83.3 | 969 | 1,444 |
| EL 3 | 94.8 | 1,349 | 2,016 |

TABLE IV.10—MANUFACTURER PRODUCTION COST FOR ELECTRIC POOL HEATERS AT REPRESENTATIVE OUTPUT CAPACITY OF 110,000 Btu/h

| Efficiency level | $TE_I$ (percent) | MPC (2021$) | MSP (2021$) |
|---|---|---|---|
| EL 0 | 99 | $1,028 | $1,441 |
| EL 1 | 387 | 1,248 | 1,845 |
| EL 2 | 483 | 1,305 | 1,924 |
| EL 3 | 534 | 1,355 | 1,993 |
| EL 4 | 551 | 1,427 | 2,094 |
| EL 5 | 595 | 1,523 | 2,228 |

*D. Markups Analysis*

The markups analysis develops appropriate markups (*e.g.,* wholesaler and distributors, pool contractors, pool retailers, pool builders) in the distribution chain and sales taxes to convert the MSP estimates derived in the engineering analysis to consumer prices, which are then used in the LCC and PBP analysis and in the manufacturer impact analysis. At each step in the distribution channel, companies mark up the price of the product to cover business costs and profit margin.

For consumer pool heaters, the main parties in the distribution chain are: (1) manufacturers; (2) wholesalers or distributors; (3) pool contractors; (4) pool retailers; (5) buying groups; [31] and (6) pool builders. For each actor in the distribution chain except for manufacturers, DOE developed baseline and incremental markups. Baseline markups are applied to the price of products with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher-efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup and is designed to maintain similar per-unit operating profit before and after new or amended standards.[32]

For the NOPR, DOE characterized how pool products pass from the manufacturer to residential and commercial consumers [33] by gathering data from several sources including 2020 Pkdata report,[34] POOLCORP's 2020 Form 10–K,[35] PRNewswire,[36] PoolPro Magazine,[37] Aqua Magazine,[38] and Pool and Spa News [39] to determine the distribution channels and fraction of shipments going through each distribution channel. The distribution channels for replacement or new installation of a consumer pool heater for existing swimming pool or spa are characterized as follows: [40]

Manufacturer → Wholesaler → Pool Contractor → Consumer
Manufacturer → Wholesaler → Pool Retailer → Consumer
Manufacturer → Pool Retailer → Consumer
Manufacturer → Buying Group → Pool Contractor → Consumer

The distribution channels for installation of consumer pool heaters in a new swimming pool or spa are characterized as follows: [41]

Manufacturer → Wholesaler → Pool Builder → Consumer
Manufacturer → Buying Group → Pool Builder → Consumer

Lochinvar stated that the distribution channels for pool heaters sold for commercial applications are similar to those used in commercial packaged boiler and commercial water heater rulemakings. (Lochinvar, No. 2 at p. 2) Lochinvar did not provide specific fractions of shipments for each distribution channel. For the final rule analysis, DOE estimated that half of consumer pool heaters installed in commercial applications would use similar distribution channels to commercial packaged boilers and commercial water heaters (Manufacturer → Wholesaler → Mechanical Contractor → Consumer for replacements and new owners; and Manufacturer → Wholesaler → Mechanical Contractor → General Contractor → Consumer for new swimming pool construction),[42] while the remaining consumer pool heaters would have the distribution channels described previously.

Rheem and BWC stated that the distribution channels appear appropriate. Rheem also noted that the market share through each distribution channel may change from manufacturer to manufacturer. BWC noted that, however, in the residential distribution channel there are circumstances where a product passes from a retailer to a contractor before the consumer takes possession of the product and that, in the commercial distribution channel, there are scenarios where a wholesaler never takes ownership of the pool heater prior to it being installed. (Rheem, No. 19 at p. 5; BWC, No. 12 at p. 3) Additionally, AHRI and PHTA stated that the share of products moving through each channel is a constantly moving target. (AHRI and PHTA, No. 20 at p. 6)

In response to Rheem's and AHRI and PHTA comment, DOE uses PKdata to estimate the distribution channel market shares, which account for variability of the market shares for each manufacturer. In response to BWC comments, for this final rule DOE added a distribution channel to account for the cases when the product passes from a retailer to a contractor to customer, without involving a wholesaler. For commercial pool heater applications, DOE already takes into account ''national accounts'', where the wholesaler never takes ownership of the pool heater prior to it being installed. For the final rule, DOE updated its distribution channel market shares by using the latest PKdata available.[43] The latest data shows a growing market share for direct dealers and online retailers.

AHRI and PHTA noted that there would be a slight difference between the distribution channels for gas fired pool

[31] Buying groups are intermediaries between the pool heater manufacturers and contractors. A buying group is a coalition of companies within a shared category who leverage their collective purchasing power to negotiate price reductions from manufacturers.

[32] Because the projected price of standards-compliant products is typically higher than the price of baseline products, using the same markup for the incremental cost and the baseline cost would result in higher per-unit operating profit. While such an outcome is possible, DOE maintains that in markets that are reasonably competitive it is unlikely that standards would lead to a sustainable increase in profitability in the long run.

[33] DOE estimates that 6 percent of electric pool heaters and 13 percent of gas pool heaters will be shipped to commercial applications in 2028. *See* section IV.E.1 for further discussion.

[34] Pkdata, 2020 Residential and Commercial Swimming Pool, Hot Tub, and Pool Heater Customized Report for LBNL, October 15, 2020, available at: *www.pkdata.com/datapointstrade.html#/* (last accessed October 15, 2022).

[35] POOLCORP, 2020 Form 10–K, available at: *dd7pmep5szm19.cloudfront.net/603/0000945841-1-000022.pdf* (last accessed October 15, 2022).

[36] PRNewswire, United Aqua Group, one of the nation's largest organizations dedicated to the professional pool construction, service and retail industry, announces that POOLCORP® is no longer the preferred distributor for its swimming pool products or building materials, May 15, 2018, available at: *www.prnewswire.com/news-releases/united-aqua-group-one-of-the-nations-largest-organizations-dedicated-to-the-professional-pool-construction-service-and-retail-industry-announces-that-poolcorp-is-no-longer-the-preferred-distributor-for-its-swimming-pool-produ-300648220.html* (last accessed October 15, 2022).

[37] PoolPro, *Channel Choices,* PoolPro Magazine, March 5, 2018, available at: *poolpromag.com/channel-choices/* (last accessed October 15, 2022).

[38] Herman, E., *Distributors: The Middleman's Role,* Aqua Magazine, December 2017, available at: *aquamagazine.com/features/the-middleman-s-role.html* (last accessed October 15, 2022).

[39] Green, L., Forward Thinking: A Look at Distributor Sector in Pool, Spa Industry Distributors adapt with the times, Pool and Spa News, March 27, 2015, available at: *www.poolspanews.com/business/retail-management/forward-thinking-a-look-at-distributor-sector-in-pool-spa-industry_o* (last accessed October 15, 2022).

[40] Based on 2020 Pkdata, in residential pools and spas, DOE assumed that the consumer pool heater goes through the wholesaler 45 percent of the time, 10 percent of the time wholesaler to retailer, 40 percent of the time directly through the pool retailer, and 5 percent of the time through the buying group.

[41] Based on 2020 Pkdata, DOE estimated that about 40 percent of consumer pool heater installations in new pools are distributed through a wholesaler and about 60 percent are distributed through a buying group.

[42] Based on 2020 Pkdata, which showed a much larger fraction of pool heaters being sold through distributors (about 70 percent) and directly to end users (about 20 percent) in commercial applications compared to pool heaters in residential applications.

[43] Pkdata, 2022 Residential and Commercial Swimming Pool, Hot Tub, and Pool Heater Customized Report for LBNL, October 15, 2020, available at: *www.pkdata.com/datapointstrade.html#/* (last accessed October 15, 2022).

heaters and heat pump pool heaters, which is that heat pump heaters may not need to go through a buying group as they can be sold directly from manufacturer to a dealer. Given that AHRI and PHTA cannot provide data to support this, they stated they would support the sources that DOE utilized in the NOPR. (AHRI and PHTA, No. 20 at p. 6)

As stated previously, DOE uses the latest PKData data available to estimate the distribution channel market shares which is not disaggregated by gas-fired pool heaters and heat pump pool heaters. At this time, DOE does not have data to account for slight differences between the distribution channels for gas fired pool heaters and heat pump pool heaters.

DOE developed baseline and incremental markups for each actor in the distribution chain. Baseline markups are applied to the price of products with baseline efficiency, while incremental markups are applied to the difference in price between baseline and higher-efficiency models (the incremental cost increase). The incremental markup is typically less than the baseline markup and is designed to maintain similar per-unit operating profit before and after new or amended standards.[44]

To estimate average baseline and incremental markups, DOE relied on several sources, including: (1) form 10–K from U.S. Securities and Exchange Commission (''SEC'') for Pool Corp (pool wholesaler) [45] and for the Leslie's, Home Depot, Lowe's, Wal-Mart, and Costco (for pool retailers); (2) U.S. Census Bureau 2017 Annual Retail Trade Report for miscellaneous store retailers (NAICS 453) (for pool retailers),[46] (3) U.S. Census Bureau 2017 Economic Census data [47] on the residential and commercial building construction industry (for pool builder, pool contractor, and general and plumbing/mechanical contractors for commercial applications); and (4) the Heating, Air Conditioning & Refrigeration Distributors International (''HARDI'') 2013 Profit Report [48] (for wholesalers for commercial applications). DOE assumes that the markups for buying group is half of the value of pool wholesaler markups derived from Pool Corp's form 10–K. In addition, DOE used the 2005 Air Conditioning Contractors of America's (''ACCA'') Financial Analysis on the Heating, Ventilation, Air-Conditioning, and Refrigeration (''HVACR'') contracting industry [49] to disaggregate the mechanical contractor markups into replacement and new construction markets for consumer pool heaters used in commercial applications.

In addition to the markups, DOE obtained state and local taxes from data provided by the Sales Tax Clearinghouse.[50] These data represent weighted average taxes that include county and city rates. DOE derived shipment-weighted average tax values for each region considered in the analysis.

Chapter 6 of the final rule TSD provides details on DOE's development of markups for consumer pool heaters.

### *E. Energy Use Analysis*

The purpose of the energy use analysis is to determine the annual energy consumption of consumer pool heaters at different efficiencies in representative U.S. single-family homes, multi-family residences, and commercial buildings, and to assess the energy savings potential of increased consumer pool heaters efficiency. The energy use analysis estimates the range of energy use of consumer pool heaters in the field (*i.e.,* as they are actually used by consumers). The energy use analysis provides the basis for other analyses DOE performed, particularly assessments of the energy savings and the savings in consumer operating costs that could result from adoption of amended or new standards.

#### 1. Pool Heater Consumer Samples

DOE created individual consumer samples for seven pool heater market types: (1) pool heaters in single family homes that serve a swimming pool only (pool type 1); (2) pool heaters in single family homes that serve both a swimming pool and spa (pool type 2); (3) pool heaters in single family homes that serve a spa only (pool type 3); [51] (4) pool heaters in single-family community swimming pools or spas (pool type 4); (5) pool heaters in multi-family community swimming pools or spas (pool type 5); (6) pool heaters in indoor commercial swimming pools or spas (pool type 6); (7) pool heaters in outdoor commercial swimming pools or spas (pool type 7). DOE used the samples not only to determine pool heater annual energy consumption, but also as the basis for conducting the LCC and PBP analysis.

For the NOPR, DOE used the EIA's 2015 Residential Energy Consumption Survey (''RECS 2015'') to establish a sample of single family homes that use an electric or gas-fired pool heater in a swimming pool or spa or both.[52] RECS 2015 includes information such as the household or building owner demographics, fuel types used, months swimming pool used in the last year, energy consumption and expenditures, and other relevant data. For consumer pool heaters used in indoor swimming pools in commercial applications, DOE developed a sample using the 2012 Commercial Building Energy Consumption Survey (''CBECS 2012'').[53] CBECS 2012 does not provide data on community pools or outdoor swimming pools in commercial applications. To develop samples for consumer pool heaters in single or multi-family

[44] Because the projected price of standards-compliant products is typically higher than the price of baseline products, using the same markup for the incremental cost and the baseline cost would result in higher per-unit operating profit. While such an outcome is possible, DOE maintains that in markets that are reasonably competitive it is unlikely that standards would lead to a sustainable increase in profitability in the long run.

[45] U.S. Securities and Exchange Commission, *SEC 10–K Reports* (2017–2021), available at *www.sec.gov/* (last accessed October 15, 2022). Leslie's data was only available from 2018–2021.

[46] U.S. Census Bureau, *2017 Annual Retail Trade Report,* available at *www.census.gov/programs-surveys/arts.html* (last accessed October 15, 2022). Note that the 2017 Annual Retail Trade Report is the latest version of the report that includes detailed operating expenses data.

[47] U.S. Census Bureau, *2017 Economic Census Data.* available at *www.census.gov/programs-surveys/economic-census.html* (last accessed October 15, 2022). Note that the 2017 Economic Census Data is the latest version of this data.

[48] Heating, Air Conditioning & Refrigeration Distributors International (''HARDI''), *2013 HARDI Profit Report,* available at *hardinet.org/* (last accessed October 15, 2022). Note that the 2013 HARDI Profit Report is the latest version of the report.

[49] Air Conditioning Contractors of America (''ACCA''), *Financial Analysis for the HVACR Contracting Industry* (2005), available at *www.acca.org/store#/storefront* (last accessed October 15, 2022). Note that the 2005 Financial Analysis for the HVACR Contracting Industry is the latest version of the report and is only used to disaggregate the mechanical contractor markups into replacement and new construction markets.

[50] Sales Tax Clearinghouse Inc., *State Sales Tax Rates Along with Combined Average City and County Rates* (June 8, 2022), available at *thestc.com/STrates.stm* (last accessed October 15, 2022).

[51] For electric pool heater sample, DOE only considered a small fraction of large spas that require a pool heater large than 11 kW. For this final rule, the fraction of spas with an electric pool heater larger than 11 kW was determined based on 2022 Pkdata and DOE's shipments analysis.

[52] U.S. Department of Energy—Energy Information Administration. *2015 RECS Survey Data,* available at *www.eia.gov/consumption/residential/data/2015/* (last accessed October 15, 2022). RECS 2015 uses the term hot tub instead of spa. When a household has a pool heater and spa heater of the same fuel, RECS 2015 does not provide information about whether the pool heater is used for both. For the NOPR and Final Rule, DOE assumed that in this case, a single pool heater is used to heat both the pool and spa.

[53] U.S. Department of Energy—Energy Information Administration. *2012 CBECS Survey Data,* available at *www.eia.gov/consumption/commercial/data/2012/* (last accessed October 15, 2022).

community pools and/or spas, DOE used a combination of RECS 2015, U.S. Census 2017 American Home Survey Data, and the 2020 Pkdata.[54] To develop a sample for pool heaters in outdoor swimming pools in commercial applications, DOE used a combination of CBECS 2012 and the 2020 Pkdata.

BWC suggested that DOE utilize the CBECS 2018 and RECS 2020 to update its analysis for gas-fired pool heaters. (BWC, No. 12 at p. 2) AHRI and PHTA requested that DOE review and incorporate the latest RECS data as data from 2009 is not a valid basis for today's market. (AHRI and PHTA, No. 20 at pp. 8–9)

The energy consumption and expenditures data for RECS 2020 and CBECS 2018 were not yet available at the time the final rule analysis was performed. Only the housing characteristics data were available. As a result, DOE continued to rely on the RECS 2015 and CBECS 2012 energy consumption and expenditures data to develop its energy use analysis. For this final rule, DOE did use the RECS 2020 and CBECS 2018 stock and housing characteristics by state to update the sample weighting and shipments analysis. It also updated the sample weighting factors using the latest swimming pool and spa data from PKdata.

AHRI and PHTA also noted that the analysis does not consider second or vacation rental homes with pools and spas that utilize pool heaters that will operate only when the home is occupied. (AHRI and PHTA, No. 20 at pp. 6–7)

DOE notes that such homes are not part of RECS, which only considers occupied housing units. U.S. Census American Housing Survey (AHS) does include second or vacation rental homes. The 2015 AHS shows that there are about half a million such units which have swimming pools or spas. A fraction of these likely include a pool heater. DOE notes that a fairly large fraction of these units are rented out and likely have significant pool and spa usage, since this is seen as a valuable feature for these rentals.[55] DOE also believes that by using RECS data the LCC analysis does include homes with varying levels of pool and spa usage that on average likely covers similar usage patterns of many second or vacation rental homes.

Table IV.11 shows the estimated weights for the samples of electric pool heaters and gas-fired pool heaters by the seven pool heater market types. See chapter 7 of the final rule TSD for more details about the creation of the samples and the regional breakdowns.

TABLE IV.11—FRACTION OF ELECTRIC POOL HEATERS AND GAS-FIRED POOL HEATERS BY POOL HEATER MARKET

| Pool type ID | Description | Electric pool heaters (%) | Gas-fired pool heaters (%) |
|---|---|---|---|
| 1 | Single Family with Pool Heater Serving Swimming Pool Only | 65.9 | 40.3 |
| 2 | Single Family with Pool Heater Serving Swimming Pool + Spa | 19.0 | 26.4 |
| 3 | Single Family with Pool Heater Serving Spa Only | 8.8 | 20.4 |
| 4 | Community Pools or Spas (Single-Family) | 0.8 | 1.5 |
| 5 | Community Pools or Spas (Multi-Family) | 2.8 | 5.1 |
| 6 | Commercial Indoor Pools and Spas | 1.4 | 3.8 |
| 7 | Commercial Outdoor Pools and Spas | 1.3 | 2.5 |

2. Energy Use Estimation

For the NOPR, DOE's energy use analysis was based on all available data including RECS 2015,[56] CBECS 2012, a Consortium for Energy Efficiency (''CEE'') report,[57] a Brookhaven National Laboratory report,[58] and 2020 Pkdata. In particular, for consumer pool heaters in single family homes, DOE was able to use the energy use estimates provided in RECS 2015 to estimate the pool heater load for each sampled pool or spa. For consumer pool heaters in commercial buildings, DOE first calculated the pool heater load for each sampled consumer based on assumptions regarding the size of a typical pool, ambient conditions for different locations, length of the swimming pool season, and whether the pool has a cover.[59]

For each household or building with a consumer pool heater, DOE matched the pool heating load to the sampled swimming pool based on household or building geographical location and an assumption of whether the pool is covered or not. DOE then used the pool heating load together with the consumer pool heater output[60] to determine the burner operating hours. The electricity or fuel consumption in active mode was calculated by multiplying the burner operating hours by the input capacity.

For heat pump pool heaters, DOE accounted for the potential increase in pump electricity use due to longer operating hours of these products (see discussion). For heat pump pool heaters, to account for variations of output capacity, input capacity, and COPs observed in the field, DOE

[54] Pkdata. 2020 Residential and Commercial Swimming Pool, Hot tub, and Pool Heater Customized Report for LBNL, available at *www.pkdata.net/datapointstrade.html* (last accessed October 15, 2022).

[55] Li *et al.,* Market Shifts in the Sharing Economy: The Impact of Airbnb on Housing Rentals, available at *pubsonline.informs.org/doi/abs/10.1287/mnsc.2021.4288* (last accessed October 15, 2022); Money, This Summer's Hottest Moneymaker? Renting out Your Swimming Pool, available at *money.com/swimming-pool-rental-trend-tips/* (last accessed October 15, 2022); Bay Property Management Group, Pros and Cons of Renting a Property with a Pool: Is It Worth It?, available at *www.baymgmtgroup.com/blog/renting-a-property-with-a-pool/* (last accessed October 15, 2022); ALAGLAS Swimming Pools, Will a Swimming Pool Increase the Value of Your Rental Property?, available at *alaglaspools.com/will-a-swimming-pool-increase-the-value-of-rental-property/* (last accessed October 15, 2022).

[56] RECS 2015 provides separate estimates for electric spa heaters, natural gas pool heaters, and natural gas spa heaters in single family homes. However, RECS 2015 does not provide separate estimates for electric pool heater energy use and propane pool and spa heaters. Instead, RECS 2015 groups these pool heaters in the ''other devices and purposes not elsewhere classified.''

[57] Consortium for Energy Efficiency (CEE), CEESM High Efficiency Residential Swimming Pool Initiative, January 2013, available at *library.cee1.org/system/files/library/9986/CEE_Res_SwimmingPoolInitiative_01Jan2013_Corrected.pdf* (last accessed October 15, 2022).

[58] Brookhaven National Laboratory (BNL), *Performance Study of Swimming Pool Heaters,* January 2009, available at *www.bnl.gov/isd/documents/73878.pdf* (last accessed October 15, 2022).

[59] RECS 2015 estimates of the annual energy consumption from the household's energy bills using conditional demand analysis. RECS 2015 does not provide any energy use data for community pools with pool heaters and CBECS 2012 does not provide separate energy use estimates for pool heaters in other commercial applications.

[60] For heat pump pool heaters, pool heater output capacity is adjusted based on average outdoor conditions, since the rated output is measured at outdoor ambient conditions that are often different from actual field conditions. The adjustment is done based on coefficient of performance (COP) from heat pump pool heater data at different ambient conditions.

determined these values based on the geographical location of the sampled household. DOE assumed that 32 percent of pools with consumer pool heaters in commercial applications use a cover and 68 percent of pools with consumer pool heaters do not use a cover based on comments from NRDC in a CEC pool pumps rulemaking.[61] DOE assumes that a pool cover can save up to 50–70 percent of overall energy use.[62]

a. Consumer Pool Heater Operating Hours

Rheem stated that they appreciated DOE's efforts to adjust pool operating hours by geographical location using RECS data. Rheem recommended expanding this information by using heating degree days or a similar approach to more finely predict pool operating hours throughout the United States. (Rheem, No. 19 at p. 6) BWC expressed concerns about DOE conducting its analysis with the assumption that (gas-fired) pool heaters run approximately 190 hours per year. BWC stated that the figure is reliant on a number of installation-specific factors, including the size of the pool being heated, whether the pool is located indoors or outdoors, and the type of application the pool heater is installed in. BWC recommended that DOE utilize the most recently available data to learn more about where these products are often installed and to recalculate an average run time for each common installation for the purposes of this rulemaking. (BWC, No. 12 at p. 3) AHRI and PHTA stated that there are many factors that can cause a large variance in operating hours including geographic location and use preference. (AHRI and PHTA, No. 20 at p. 7) Hayward stated that there are many factors that come into play when determining pool heater hours of operation that can cause a large variance in hours including geographic location and use preference. (Hayward, No. 17 at p. 5)

DOE notes that the operating hours vary significantly based on several factors including geographic location (which accounts for ambient temperature conditions), consumer preference in terms of pool or spa usage (limited usage to year-round usage), installation location (indoor vs. outdoor pools), application (swimming pool only, spa only, swimming pool and spa using the pool heater), market segment (residential and commercial applications), and whether a pool cover is used, etc. Also, operating hours are driven by the output capacity of the pool heater. For this final rule analysis, DOE improved its sizing methodology to match PKdata swimming pool sizing data and assigned appropriate pool heater output capacity sizes for each assumed swimming pool and/or spa size. The NOPR analysis assigned only two sizes, one for residential (250 kBtu/h input capacity for gas-fired pool heaters and 110 kBtu/h output capacity for electric pool heaters) and one for commercial applications (500 kBtu/h input capacity for gas-fired pool heaters and 220 kBtu/h output capacity for electric pool heaters). The final rule analysis, expanded to all available model input capacities up to 2 MMBtu/hr for gas-fired pool heaters and 800 kBtu/h output capacity for heat pump pool heaters.

For residential applications, DOE's pool heating load calculations are based directly on the RECS 2015 energy use estimates, which show a significant variation between different household installations (see chapter 7 of the final rule TSD). To improve the energy usage by month DOE used typical pool heating load calculators for multiple locations around the country.[63] For commercial applications, DOE's energy use pool heating load calculations are based primarily on pool/spa usage (length of operating season), weather conditions, pool/spa installation location (indoor vs. outdoor pools), application type (swimming pool only, spa only, swimming pool and spa using the pool heater), and whether a pool/spa cover is used. For the final rule, DOE expanded the pool heating load model to include more locations with weather data. For heat pump pool heaters, DOE also considered that the output capacity varies by ambient air temperature conditions around the heat pump pool heater. In contrast, for electric resistance and gas-fired pool heaters, output is assumed to not vary with ambient temperature.

Rheem agreed with DOE's statement in section 7.3.3.3 of the TSD that burner operating hours in the field are much higher than assumed in the DOE test procedure which states (section 7.3.3.3) that electric pool heaters operate an estimated 353 hours per year but also stated that electric resistance and heat pump pool heaters have different annual operating hours. Rheem requested that electric resistance and heat pump pool heater hours of operation be separately provided. (Rheem, No. 19 at p. 6) Rheem and AHRI and PHTA both agreed that the heat pump pool heaters will have higher hours of operation than gas-fired pool heaters. (Rheem, No. 19 at p. 6, AHRI and PHTA, No. 20 at p. 7) Fluidra stated that the operating times for both electric and gas pool heaters vary widely based on geographical location, user preferences, and the difference in heating time between gas heaters and electric heaters and that, in general, heat pump pool heater run time hours are significantly higher than those of gas-fired pool heaters. (Fluidra, No. 18, p. 2)

For the final rule, DOE accounted for differences in operating hours for electric resistance, heat pump, and gas-fired pool heaters. As noted by stakeholders these differences account for geographical location, user preferences, and the difference in output capacity between electric and gas-fired pool heaters. In addition, DOE took into account differences between electric resistance vs. heat pump heaters. On average electric resistance pool heaters are used in installations with lower pool heating load compared to heat pump pool heaters (on average 9 MMBtu/yr for electric resistance vs. 15 MMBtu/yr for heat pump pool heaters). For heat pump pool heaters, DOE also considered that the output capacity varies by ambient air temperature conditions around the heat pump pool heater. In contrast, for electric resistance and gas-fired pool heaters, output is assumed to not vary with ambient temperature. See chapter 7 of the final rule TSD for more information and for disaggregated operating hours by pool heater type and application.

b. Heat Pump Pool Heater Energy Use

Rheem noted that many heat pump pool heaters can operate at various input rates depending on the ambient conditions and desired pool temperature. Rheem stated that DOE appears to have accounted for this somewhat in section 7.3.3.2 of the TSD by assigning an ambient condition to different geographical locations, however heating load can change between the various ambient conditions in the same geographical location within the same pool heating season. (Rheem, No. 19 at p. 6) AHRI and PHTA specifically requested information from the Department on how the outdoor air effects on heat pumps have been

[61] NRDC's Response to CEC's Invitation to Participate in the Development of Appliance Energy Efficiency Measures 2013 Appliance Efficiency Pre-Rulemaking on Appliance Efficiency Regulations: Docket Number 12–AAER–2F—Residential Pool Pumps and Motors (May 2013), available at *efiling.energy.ca.gov/GetDocument.aspx?tn=70721&DocumentContentId=8266* (last accessed October 15, 2022).

[62] U.S. Department of Energy, Energy Saver: Swimming Pool Covers, available at *www.energy.gov/energysaver/swimming-pool-covers* (last accessed October 15, 2022).

[63] Raypak, Residential Gas Heater Sizing, available at *apps.raypak.com/gas_sizing/Raypak_gas.php* (last accessed October 15, 2022).

represented in their EL calculations. (AHRI and PHTA, No. 20 at p. 6)

For the NOPR, DOE accounted for heat pump pool heater differences in performance due to ambient temperatures by using the ambient temperature data to determine heat pump pool heater COP field values based on the geographical location of the sampled household. 87 FR 22640, 22670 For example, for EL 2 the weighted COPs by region are 5.44 for the Hot Humid region, 5.20 for the Warm region, and 3.76 for the Cold region. For this final rule, DOE improved its methodology by adding additional weather location data by assigned weather stations to refine its approach by estimating monthly field adjusted average COP values using ambient temperatures (see chapter 7 of the final rule TSD for more details).

c. Modulating Equipment

Hayward stated that modulating heaters run considerably more hours (at lower capacity and higher efficiency) than their single speed counterparts. (Hayward, No. 17 at p. 5) Rheem added that conditions change throughout the pool heating season and part load or variable speed operation provides more control and allows the heat pump pool heater to adjust its output based on demand. (Rheem, No. 19 at p.4) Hayward recommended further analysis on average energy use or part load energy consumption to provide credit for dual or variable capacity products because at part load conditions, the efficiency of these units is improved significantly relative to single speed units (especially for heat pumps). Hayward stated that for modulating capacity appliances, the standby power should be reduced and the methodology should be reassessed to consider this new technology where the heater can be run longer at lower capacity (and higher efficiency). (Hayward, No. 17 at p. 5) AHRI and PHTA noted that operating hours can change for modulating units compared to single speed units. (AHRI and PHTA, No. 20 at p. 7)

DOE agrees that for certain applications modulating pool heaters could operate at increased operating hours, which would impact the electricity use and might increase the overall efficiency if the part load efficiency is greater than the full load efficiency. In contrast, longer operating hours could also lead to more electrical consumption if the pump and auxiliary equipment does not operate at a reduced wattage in the part-load or variable speed operation. DOE does not currently have test data and has not found any references to assess the part-load efficiency of modulating units (either heat pump or gas-fired equipment). DOE also notes that the current test procedure does not account for part-load efficiency. Overall, DOE at this time did not assess the energy use impact of modulating units compared to single speed units due to lack of data and uncertainty related to decreased or increased field fuel and electricity usage.

d. Consumer Pool Heater Standby and Off Mode Energy Use

Rheem stated that the methodology used to measure standby energy use is appropriate. Rheem also noted that there are currently ''seasonal off switches'' which reduce power consumption as compared to standby mode, but that do not reduce the electrical power consumption to zero. (Rheem, No. 19 at p. 6) BWC also stated that it agrees with the Department's estimate of off mode and standby mode power consumption for gas-fired pool heaters and that off mode and standby mode power consumption for these products will not increase in products with higher inputs. (BWC, No. 12 at p. 3) AHRI and PHTA stated that for heat pump pool heaters and gas-fired pool heaters the overall standby hours will be different and that the off mode hours are essentially identical. (AHRI and PHTA, No. 20 at p. 7)

DOE agrees with the stakeholders input regarding standby and off-mode and did not change its standby and off mode analysis for the final rule.

Chapter 7 of the final rule TSD provides details on DOE's energy use analysis for consumer pool heaters.

*F. Life-Cycle Cost and Payback Period Analysis*

DOE conducted LCC and PBP analyses to evaluate the economic impacts on individual consumers of potential energy conservation standards for consumer pool heaters. The effect of new or amended energy conservation standards on individual consumers usually involves a reduction in operating cost and an increase in purchase cost. DOE used the following two metrics to measure consumer impacts:

- The LCC is the total consumer expense of an appliance or product over the life of that product, consisting of total installed cost (manufacturer selling price, distribution chain markups, sales tax, and installation costs) plus operating costs (expenses for energy use, maintenance, and repair). To compute the operating costs, DOE discounts future operating costs to the time of purchase and sums them over the lifetime of the product.
- The PBP is the estimated amount of time (in years) it takes consumers to recover the increased purchase cost (including installation) of a more-efficient product through lower operating costs. DOE calculates the PBP by dividing the change in purchase cost at higher efficiency levels by the change in annual operating cost for the year that amended or new standards are assumed to take effect.

For any given efficiency level, DOE measures the change in LCC relative to the LCC in the no-new-standards case, which reflects the estimated efficiency distribution of consumer pool heaters in the absence of new or amended energy conservation standards. In contrast, the PBP for a given efficiency level is measured relative to the baseline product.

For each considered efficiency level in each product class, DOE calculated the LCC and PBP for a nationally representative set of consumers. As stated previously, DOE developed household samples primarily from the 2015 RECS and 2012 CBECS.[64] For each sample household, DOE determined the energy consumption for the consumer pool heaters and the appropriate energy price. By developing a representative sample of households, the analysis captured the variability in energy consumption and energy prices associated with the use of consumer pool heaters.

Inputs to the calculation of total installed cost include the cost of the product—which includes MPCs, manufacturer markups, retailer and distributor markups, and sales taxes—and installation costs. Inputs to the calculation of operating expenses include annual energy consumption, energy prices and price projections, repair and maintenance costs, product lifetimes, and discount rates. DOE created distributions of values for product lifetime, discount rates, and sales taxes, with probabilities attached to each value, to account for their uncertainty and variability.

The computer model DOE uses to calculate the LCC relies on a Monte Carlo simulation to incorporate uncertainty and variability into the analysis. The Monte Carlo simulations randomly sample input values from the probability distributions and consumer

[64] At the time of this analysis, only the housing characteristics data for 2020 RECS and CBECS 2018 were published by EIA. The energy consumption and expenditures data were not yet available. The 2015 RECS and CBECS 2012 data set remains the most recent full data released at the time of this analysis.

pool heaters user samples. For this rulemaking, the Monte Carlo approach is implemented in MS Excel together with the Crystal Ball™ add-on.[65] The model calculated the LCC for products at each efficiency level for 10,000 consumer pool heater installations per simulation run. The analytical results include a distribution of 10,000 data points showing the range of LCC savings for a given efficiency level relative to the no-new-standards case efficiency distribution. In performing an iteration of the Monte Carlo simulation for a given consumer, product efficiency is chosen based on its probability. If the chosen product efficiency is greater than or equal to the efficiency of the standard level under consideration, the LCC calculation reveals that a consumer is not impacted by the standard level. By accounting for consumers who already purchase more-efficient products, DOE avoids overstating the potential benefits from increasing product efficiency. DOE calculated the LCC and PBP for consumers of consumer pool heaters as if each were to purchase a new product in the first full year of required compliance with new or amended standards. New and amended standards apply to consumer pool heaters manufactured 5 years after the date on which any new or amended standard is published. (42 U.S.C. 6295(g)(10)(B)) Therefore, DOE used 2028 as the first full year of compliance with any amended standards for consumer pool heaters.

Table IV.12 summarizes the approach and data DOE used to derive inputs to the LCC and PBP calculations. The subsections that follow provide further discussion. Details of the spreadsheet model, and of all the inputs to the LCC and PBP analyses, are contained in chapter 8 of the final rule TSD and its appendices.

TABLE IV.12—SUMMARY OF INPUTS AND METHODS FOR THE LCC AND PBP ANALYSIS *

| Inputs | Source/method |
|---|---|
| Product Cost | Derived by multiplying MPCs by manufacturer and retailer markups and sales tax, as appropriate. Used historical data to derive a price scaling index to project product costs. |
| Installation Costs | Baseline installation cost determined with data from RS Means. Assumed no change with efficiency level. |
| Annual Energy Use | The total annual energy use multiplied by the hours per year. Average number of hours based on field data.<br>*Variability:* Based on the 2015 RECS and 2018 CBECS. |
| Energy Prices | *Natural Gas:* Based on EIA's Natural Gas Navigator data for 2021.<br>*Propane:* Based on EIA's SEDS for 2020.<br>*Electricity:* Based on EIA's Form 861 data for 2021.<br>*Variability:* Regional energy prices determined for each state and District of Columbia.<br>Marginal prices used for both natural gas and electricity. |
| Energy Price Trends | Based on *AEO2022* price projections. |
| Repair and Maintenance Costs | Based on 2021 RS Means data and other sources. Assumed variation in cost by efficiency. |
| Product Lifetime | *Average:* 11 years. |
| Discount Rates | Approach involves identifying all possible debt or asset classes that might be used to purchase the considered appliances, or might be affected indirectly. Primary data source was the Federal Reserve Board's Survey of Consumer Finances. |
| Compliance Date | 2028. |

* Not used for PBP calculation. References for the data sources mentioned in this table are provided in the sections following the table or in chapter 8 of the final rule TSD.

1. Product Cost

To calculate consumer product costs, DOE multiplied the MPCs developed in the engineering analysis by the markups described previously (along with sales taxes). DOE used different markups for baseline products and higher-efficiency products, because DOE applies an incremental markup to the increase in MSP associated with higher-efficiency products. Many 82-percent thermal efficiency (EL 0 and EL 1) gas-fired pool heaters without low-$NO_X$ burners are currently available that do not meet low-$NO_X$ criteria in California, Utah, and Texas.[66] Thus, for the NOPR, DOE included the additional cost of a low-$NO_X$ burner to all gas-fired pool heaters installed in certain California,[67] Utah,[68] or Texas [69] locations and applications. DOE assigned a fraction of installations outside these three regions the low-$NO_X$ burner cost adder since the models are so widespread.[70]

Rheem stated that low $NO_X$ pool heaters are marketed throughout the United States, but Rheem had no comment on the fraction of low $NO_X$ pool heaters sold outside California, Utah, or Texas. Rheem noted that certain regulations in California covering low $NO_X$ pool heaters are being amended and recommended that DOE account for these changes in the analysis. (Rheem, No. 19 at p. 6) AHRI and PHTA appreciated that the

[65] Crystal Ball™ is commercially-available software tool to facilitate the creation of these types of models by generating probability distributions and summarizing results within Excel, available at *www.oracle.com/technetwork/middleware/crystalball/overview/index.html* (last accessed October 15, 2022).

[66] Low-$NO_X$ gas-fired pool heaters account for 11 percent of gas-fired pool heaters at EL 0 and 59 percent of pool heaters at EL 1.

[67] Low-$NO_X$ gas-fired pool heaters with a rated heat input capacity less than or equal to 2,000,000 Btu/h Hour are required in South Coast Air Quality Management District (''SCAQMD'') and San Joaquin Valley Air Pollution Control District (''SJAPCD''). SCAQMD Rule 1146.2, available at *www.aqmd.gov/docs/default-source/rule-book/reg-xi/rule-1146-2.pdf;* SJAPCD Rule 4308, available at *www.valleyair.org/rules/currntrules/03-4308_CleanRule.pdf* (last accessed October 15, 2022). Low $NO_X$ gas-fired pool heaters with a rated heat input capacity 400,001 to 2,000,000 Btu/h are required in Bay Area Air Quality Management District (''BAAQMD''). Regulation 9, available at *www.baaqmd.gov/~/media/dotgov/files/rules/reg-9-rule-6-nitrogen-oxides-emissions-from-natural-gasfired-water-heaters/documents/rg0906.pdf?la=en* (last accessed October 15, 2022).

[68] Low-$NO_X$ gas-fired pool heaters with a rated heat input capacity less than 2,000,000 Btu/Hour. Utah Code 15A–6–102, available at *le.utah.gov/xcode/Title15A/Chapter6/15A-6-S102.html?v=C15A-6-S102_2017050920170509* (last accessed October 15, 2022).

[69] Low $NO_X$ gas-fired pool heater with a rated heat input capacity less than or equal to 2,000,000 Btu/h Hour are required (except for units installed in single-family residences, used exclusively to heat swimming pools and hot tubs). Texas Administrative Code, Control of Air Pollution from Nitrogen Compounds, available at *texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=30&pt=1&ch=117&sch=E&div=3&rl=Y* (last accessed October 15, 2022).

[70] Pires, K. *It's A Low-$NO_X$ Life.* AQUA. November 2008, available at *aquamagazine.com/it-s-a-low-nox-life.html* (last accessed October 15, 2022).

Department is including low-$NO_X$ equipment in their analysis. However, the added costs for low-$NO_X$ burners needs to be applied for the entire country and not just the specific states listed, as the majority of manufacturers no longer distribute gas-fired pool heaters that are not low-$NO_X$. (AHRI and PHTA, No. 20 at p. 7) Hayward expects that nearly all gas products in all regions will use low-$NO_X$ burners. (Hayward, No. 17 at p. 6)

For the final rule, DOE increased the fraction of installations outside California, Utah, and Texas that have a low-$NO_X$ burner cost adder, since the majority of manufacturers no longer distribute gas-fired pool heaters that are not low-NOx. By 2028, the analysis assumes that 88 percent of all gas-fired pool heaters have a low-$NO_X$ burner.

For the NOPR, DOE developed separate product price projections for baseline electric resistance pool heaters, heat pump pool heaters, and gas-fired pool heaters using shipment-weighted wholesaler listed prices from 2003–2019 from the 2020 Pkdata report.[71]

AHRI and PHTA recommended that DOE reevaluate the price trends based on the current economic and supply chain challenges. (AHRI and PHTA, No. 20 at p. 7) Fluidra stated that the equipment pricing goes up year over year since the 2015 analysis. They added that electronic component shortages and electrification codes have had a significant cost impact to both manufacturers and consumers due to decrease of supply and increase of demand. Fluidra noted that the economy of scale for the pool industry compared to space heating HVAC is significantly smaller, therefore pool equipment manufacturers do not see the same price breaks for volume as other industries. (Fluidra, No. 18, p. 3)

DOE updated its analysis using the latest PKdata, which shows that since 2015 prices have been going up slightly for electric resistance, heat pump, and gas-fired pool heaters. In contrast, between 2003 and 2014 prices of this equipment had been decreasing. Given that it is uncertain to project what the commodity prices and economic and supply chain challenges will be in the future, DOE decided to use a constant price assumption as the default price factor index to project future pool heater prices for the final rule. DOE performed a sensitivity analysis on price trend as detailed in appendix 8C of the final rule TSD. Further details about the development of the price trends can be found in chapter 8 and appendix 8C of the final rule TSD.

2. Installation Cost

Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE estimates all the installation costs associated with fitting a consumer pool heater in a new housing unit, as a replacement for an existing pool heater, or in an existing pool without a pool heater (new owners). This includes any additional costs, such as electric modifications that would be required to install equipment at various efficiency levels. Installation cost includes labor, overhead, and any miscellaneous materials and parts needed to install the product. DOE used data from RS Means 2022[72] to estimate the baseline installation cost for consumer pool heaters.

Rheem recommends installations be performed by a licensed professional and that the installation must be in accordance with local codes, or, in the absence of local codes, with the latest edition of the National Fuel Gas Code, ANSI Z223.1/NFPA54 and National Electrical Code, ANSI/NFPA 70, and for Canada, the latest edition of CAN/CSA–B149 Installation Codes, and Canadian Electrical Code, CSA C22.1 Part 1 and Part 2. (Rheem, No. 19 at p. 7)

DOE's analysis assumes that pool heater installations are performed by licensed professionals and DOE's labor costs are for the appropriate crew type based on RS Means data.

For electric pool heaters, DOE accounted for the increased cost of additional electrical requirements for new swimming pool and new owner installations. For new electric pool heater owners (including owners of new swimming pools and owners of existing swimming pools), DOE assumed that an electric resistance pool heater would have higher electrical connection installation costs in comparison to the electrical requirements for a heat pump pool heater. For replacements in outdoor swimming pools, DOE assumed that the installation costs would be the same for all efficiency levels because the old consumer pool heater already has adequate electrical service for the new pool heater. For replacements in indoor installations, DOE assumed that they are all electrical resistance and that replacement with a heat pump pool heater would add a significant cost to run water piping and an electrical connection to outside the building, where the heat pump pool heater will be installed.

Rheem stated that for gas-fired pool heaters it supports the proposed EL 2 to the extent it is applied to outdoor installations not requiring added venting systems. Rheem added that although 84% thermal efficiency is close to the condensing efficiency threshold, for outdoor installations it can be achieved without the risk of increased vent system corrosion. (Rheem, No. 19 at p. 4) Rheem stated that for gas fired heaters, there are different required clearances from combustible surfaces for indoor and outdoor installations and that for indoor installations, venting is required and increasing thermal efficiency too high poses a risk of increased vent corrosion due to condensation. In addition, Rheem stated that the venting system varies by installation configuration and climate. (Rheem, No. 19 at p. 7)

DOE's analysis for gas-fired pool heater installations does not include any added cost for a venting systems for EL2 and EL 3 for outdoor installations. For EL 0 and EL 1 with atmospheric venting, DOE added the cost of a draft hood for a fraction of outdoor installations in a high wind environment. For gas-fired pool heater installations (mainly for commercial applications), DOE took into account the added cost of venting for all gas-fired pool heaters, which varies by climate and installation configuration. See appendix 8D of the final rule TSD for more details.

Rheem stated that for heat pump pool heaters, installation must be at ≥3 feet from a gas heater, ≥60 inches of clearance above the heater, ≥12 inches from any wall, gutters above the heater to prevent roof runoff into the top of the unit, and redirection of lawn irrigation away from the unit and that Texas and Florida mandate the use of a minimum 3-inch-thick concrete pad, where the minimum edge distance to the unit is 6 inches. Further, if installing hurricane tie down brackets then the pad may need to be wider. (Rheem, No. 19 at p. 7) AHRI and PHTA stated that most electric pool heater installations are located in a space-constrained area (within 2 feet of an obstruction), which significantly increases the cost of installation. In many of these situations it is difficult to maintain enough clearance for the product itself without including the required clearance from obstructions for a heat pump to properly function. (AHRI and PHTA, No. 20 at p. 7) AHRI and PHTA noted that many

[71] Pkdata, 2020 Residential and Commercial Swimming Pool, Hot tub, and Pool Heater Customized Report for LBNL, October 15, 2020, available at: *www.pkdata.com/datapointstrade.html#/* (last accessed October 15, 2022).

[72] RS Means Company, Inc., *RS Means Residential Cost Data 2020* (2020), available at *www.rsmeans.com/* (last accessed October 15, 2022).

factors have changed since 2015 and there are numerous variables that need to be considered when determining installation costs for consumer pool heaters and DOE should update its estimates to account for significant cost increases where consumers will be required to replace an electric resistance pool heater in a constrained space with a heat pump water heater. (AHRI and PHTA, No. 20 at pp. 7–8) Hayward believed that space constraints are a primary value driver for resistance heaters and they expect that most resistance heaters are installed in locations that do not provide sufficient space for a heat pump. (Hayward, No. 17, p. 6) Fluidra stated that the consumers will likely not replace a space constrained electric resistance heater with a heat pump because the space and vent restrictions would be a significant problem. Fluidra added that heat pumps are optimized for outdoor installations and may not be effective when installed indoors, resulting in dramatically increased installation costs to convert and properly vent an indoor heat pump installation. (Fluidra, No. 18, p.3)

For the NOPR analysis, DOE included significant costs associated with space constraints for heat pump pool heaters installed to replace an electric resistance pool heater, including installing the heat pump pool heater far away (outdoors) from the current installation location. 87 FR 22640, 22674. In order to take into account stakeholder comments and regional code requirements, for this final rule, DOE refined its installation cost methodology to include additional costs associated with installing a heat pump pool heater as a replacement of an electric resistance pool heater, especially in space constrained installations. The additional costs account for the requirements such as clearance and concrete pads. On average the installation cost associated with installing a heat pump pool heater in a space constrained installation increased from $549 in the NOPR to $1,039 in the final rule. The fraction of installations assigned space constrained costs also increased from 15 percent to 20 percent. See appendix 8D of the final rule TSD for more details.

3. Annual Energy Consumption

For each sampled consumer pool heater installation, DOE determined the energy consumption for a consumer pool heaters at different efficiency levels using the approach described previously in section E.2 of this document.

a. Rebound Effect

Higher-efficiency consumer pool heaters reduce the operating costs for a consumer, which can lead to greater use of the consumer pool heater. A direct rebound effect occurs when a product that is made more efficient is used more intensively, such that the expected energy savings from the efficiency improvement may not fully materialize. At the same time, consumers benefit from increased utilization of products due to rebound. Overall consumer welfare (taking into account additional costs and benefits) is generally understood to increase from rebound. DOE did not find any data on the rebound effect that is specific to consumer pool heaters. In the April 2010 final rule, DOE estimated a rebound of 10 percent for pool heaters for the NIA, but did not include rebound in the LCC analysis. 75 FR 20112, 20165. Because of the uncertainty and lack of data specific to pool heaters necessary to generate a representative analysis, DOE does not include the rebound effect in the LCC analysis for this final rule. DOE does include the rebound effect in the NIA, for a conservative estimate of national energy savings (see section H.2).

4. Energy Prices

Because marginal energy price more accurately captures the incremental savings associated with a change in energy use from higher efficiency, it provides a better representation of incremental change in consumer costs than average energy prices. Therefore, DOE applied average energy prices for the energy use of the product purchased in the no-new-standards case, and marginal energy prices for the incremental change in energy use associated with the other efficiency levels considered.

DOE derived residential and commercial average monthly marginal electricity and natural gas prices by state using 2021 data from EIA [73] [74] and average monthly residential and commercial LPG prices for the various regions using 2020 data from EIA.[75] The methodology and data sources are described in detail in appendix 8E of the final rule TSD.

DOE's methodology allows energy prices to vary by sector, state, and season. In the analysis, variability in energy prices is chosen to be consistent with the way the consumer economic and energy use characteristics are defined in the LCC analysis. See chapter 8 of the final rule TSD for details.

To estimate energy prices in future years, DOE multiplied the 2021 energy prices by the projection of annual average price changes for each of the nine census divisions from the Reference case in *AEO 2022,* which has an end year of 2050.[76] DOE used simple extrapolations of the average annual growth rate in prices from 2045 to 2050 based on the methods used in the 2022 Life-Cycle Costing Manual for the Federal Energy Management Program (''FEMP'').[77]

Joint Advocates stated that DOE underestimated cost savings from higher efficiency gas pool heaters by underestimating the future gas prices. Joint Advocates stated that as the movement towards electrification grows and the efficiencies of gas appliances improve, both customer base and overall natural gas sales will likely decline over time. Joint Advocates pointed to a 2022 analysis conducted by the NRDC which estimated the impact of customer exits (*i.e.,* consumers who switch to electric appliances and disconnect from the gas system) on gas prices for the remaining customers and found that gas prices would exceed 600% of the AEO projections in the Pacific and Mid-Atlantic regions under multiple electrification scenarios, and noted these results were consistent with other studies finding the same dynamic. (Joint Advocates, No. 13 at pp 3–4)

DOE's analysis uses the latest AEO energy price scenarios, which take into account the dynamics of the entire energy system, to project future energy prices. While DOE notes that future switching away from gas appliances may affect natural gas prices, at the present these dynamics, and policy

[73] U.S. Department of Energy—Energy Information Administration, Form EIA–861M (formerly EIA–826) Database Monthly Electric Utility Sales and Revenue Data (1990–2021), available at *www.eia.gov/electricity/data/eia861m/* (last accessed October 15, 2022).

[74] U.S. Department of Energy—Energy Information Administration, Natural Gas Navigator (1990–2021), available at *www.eia.gov/dnav/ng/ng_pri_sum_dcu_nus_m.htm* (last accessed October 15, 2022).

[75] U.S. Department of Energy—Energy Information Administration, 2020 State Energy Consumption, Price, and Expenditure Estimates (SEDS) (2020), available at *www.eia.gov/state/seds/* (last accessed October 15, 2022).

[76] U.S. Department of Energy—Energy Information Administration. *Annual Energy Outlook 2022 with Projections to 2050.* Washington, DC. Available at *www.eia.gov/forecasts/aeo/* (last accessed October 15, 2022).

[77] Lavappa, Priya D. and J. D. Kneifel. Energy Price Indices and Discount Factors for Life-Cycle Cost Analysis—2022 Annual Supplement to NIST Handbook 135. National Institute of Standards and Technology (NIST). NISTIR 85–3273–37, available at *www.nist.gov/publications/energy-price-indices-and-discount-factors-life-cycle-cost-analysis-2022-annual* (last accessed October 15, 2022).

responses to address issues that arise, are too uncertain to be relied upon in its analysis. If these dynamics materialize and solidify, they will be reflected in the latest EIA data and AEO price forecasts. At this time, the AEO price forecasts remain the best available source of data regarding probable future energy prices. DOE notes that if future natural gas prices end up higher than DOE estimates due to electrification, the economic justification for the standards adopted for gas-fired pool heaters in this final rule would become stronger still.

AHRI and PHTA stated that DOE may want to consider that for equipment such as pool heaters, where they may only need to operate a few hours a day, many consumers will be able to heat their pools at ''off-peak'' electric rates that are much lower than the average rates cited by the Department. Therefore, the costs of heating pool water would be lower than those estimated by DOE, and the subsequent savings are lower by the same percentage. AHRI and PHTA stated that more consumers have smart electric meters that may not have been considered in the Department's approach and that the consumers with smart electric meters will be able to take advantage of time of use and other variable electric rates to lower their electric costs. (AHRI and PHTA, No. 20 at p. 8)

While DOE agrees that consumers could possibly take advantage of ''off-peak'' electric rates in some installation applications, in reality there are limited data showing how customers will use ''off-peak'' electric rates. ''Off-peak'' rates might not coincide with the actual usage of the pool and vary from utility to utility. For example, PG&E offers ''off-peak'' rates that are designed to coincide with the electricity produced by solar generators (outside of the 4–9 p.m. peak pricing),[78] while FPU has peak rates in the summer months (May 1–Sept. 30) between 12 p.m. to 6 p.m. Using ''off-peak'' rates would require some planning or additional controls in the pool heater as well as the ability to ''over heat'' the pool/spa so that it is at the appropriate temperature once in use. It is not apparent whether consumers would be able to or want to take advantage of these rates. Therefore, at this time DOE did not use ''off-peak'' rates in its analysis.

5. Maintenance and Repair Costs

Repair costs are associated with repairing or replacing product components that have failed in an appliance; maintenance costs are associated with maintaining the operation of the product. Typically, small incremental increases in product efficiency entail no, or only minor, changes in repair and maintenance costs compared to baseline efficiency products. DOE included additional repair costs for higher efficiency heat pump pool heaters and gas-fired pool heaters (including repair costs associated with electronic ignition, controls, and blowers for fan-assisted designs, compressor, evaporator fan) based on 2022 RS Means data.[79] DOE accounted for regional differences in labor costs by using RS Means regional cost factors.

AHRI and PHTA noted that the costs for repairs and parts have increased compared to the data used in this analysis, so the analysis should be updated. Additionally, AHRI and PHTA stated that DOE should consider a separate labor rate for the different pool heater applications when calculating maintenance and repair costs as well. They cited industry estimates as $90/hour—gas service and $120/hour—heat pump service. (AHRI and PHTA, No. 20 at pp. 8–9)

DOE's analysis uses RS Means labor rates that vary by state, but does not assign a different labor rate for the maintenance and repair costs for a gas-fired pool heater compared to a heat pump pool heater.

AHRI and PHTA stated that pool heating equipment is more likely to be repaired then replaced. AHRI and PHTA agreed with the DOE's repair and maintenance approach, specifically, that higher efficiency gas-fired pool heaters are more expensive to maintain—condensation neutralization adds costs, they are more complex and more likely to have technical issues and the heat pumps cost more to service and repair as they require technicians with refrigeration certification—therefore costs are higher as this work takes more time and an increased level of expertise. (AHRI and PHTA, No. 20 at pp. 8–9) BWC also noted that condensing gas-fired pool heaters will be more difficult and more expensive to maintain since these products are more complex, which makes them more likely to experience technical issues. (BWC, No. 12 at p. 4) Rheem supported the AHRI and PHTA comment on this topic. (Rheem, No. 19 at p.8)

DOE maintained its repair and maintenance cost methodology for the final rule. The methodology and data sources are described in detail in appendix 8F of the final rule TSD.

6. Product Lifetime

For the NOPR analysis, DOE used lifetime estimates from historical shipments data and pool heater stock data from RECS 1987–2015 and 2020 Pkdata. 87 FR 22640, 22676 This data allowed DOE to develop a survival function, which provides a distribution of lifetime ranging from 1 to 30 years with a mean value of 11 years. DOE assumes that the distribution of lifetimes accounts for the impact of the pool water quality on the life of the product, the level of maintenance of a consumer pool heater, and the fraction of consumers winterizing the consumer pool heater.

AHRI and PHTA supported the use of RECS and Pkdata to calculate lifetime estimates, but suggested that DOE should also consider regional impacts to lifetime estimates, since not including these regional impacts could mean that the lifetime is potentially over inflated compared to the real lifetime for these units. In addition, AHRI and PHTA stated that improper winterization of a heat pump could shorten the life of a heat pump. (AHRI and PHTA, No. 20 at p. 9) Rheem supported the AHRI and PHTA's comments on regional impacts to lifetime estimates. Rheem found that lower efficiency (legacy) units typically have a longer life than higher efficiency units, and noted that consumers who don't perform routine maintenance, especially winterization, will see lower lifetimes. (Rheem, No. 19 at p. 8) BWC generally agreed with DOE's lifetime average of 11 years for gas-fired pool heaters that are identified as representative models and recommended that DOE utilize most recently available data to learn more about common applications for these products and recalculate average product lifetimes for each common installation type. (BWC, No. 12 at p. 4) For the final rule, DOE updated its methodology to include the latest data including RECS 2020, CBECS 2018, and shipment and other data from 2022 PKdata. This resulted in the same average lifetime value of 11 years.

Appendix 8G of the final rule of the TSD includes a sensitivity analysis of higher and lower lifetime estimates as well as a table of consumer pool heater lifetime estimates from published literature and manufacturer input.

[78] PG&E, Time-of-Use, available at *www.pge.com/en_US/residential/rate-plans/rate-plan-options/time-of-use-base-plan/tou-everyday.page* (last accessed October 15, 2022).

[79] RS Means Company, Inc., *RS Means Facilities Repair and Maintenance 2022* (2022), available at *www.rsmeans.com/* (last accessed October 15, 2022).

7. Discount Rates

In the calculation of LCC, DOE applies discount rates appropriate to households to estimate the present value of future operating cost savings. DOE estimated a distribution of discount rates for consumer pool heaters based on the opportunity cost of consumer funds.

DOE applies weighted average discount rates calculated from consumer debt and asset data, rather than marginal or implicit discount rates.[80] The LCC analysis estimates net present value over the lifetime of the product, so the appropriate discount rate will reflect the general opportunity cost of household funds, taking this time scale into account. Given the long time horizon modeled in the LCC, the application of a marginal interest rate associated with an initial source of funds is inaccurate. Regardless of the method of purchase, consumers are expected to continue to rebalance their debt and asset holdings over the LCC analysis period, based on the restrictions consumers face in their debt payment requirements and the relative size of the interest rates available on debts and assets. DOE estimates the aggregate impact of this rebalancing using the historical distribution of debts and assets.

To establish residential discount rates for the LCC analysis, DOE identified all relevant household debt or asset classes in order to approximate a consumer's opportunity cost of funds related to appliance energy cost savings. It estimated the average percentage shares of the various types of debt and equity by household income group using data from the Federal Reserve Board's triennial Survey of Consumer Finances[81] (''SCF'') starting in 1995 and ending in 2019. Using the SCF and other sources, DOE developed a distribution of rates for each type of debt and asset by income group to represent the rates that may apply in the year in which amended standards would take effect. DOE assigned each sample household a specific discount rate drawn from one of the distributions.

To establish commercial discount rates for the fraction of instances where businesses are using consumer pool heaters, DOE estimated the weighted-average cost of capital using data from Damodaran Online.[82] The weighted-average cost of capital is commonly used to estimate the present value of cash flows to be derived from a typical company project or investment. Most companies use both debt and equity capital to fund investments, so their cost of capital is the weighted average of the cost to the firm of equity and debt financing. DOE estimated the cost of equity using the capital asset pricing model, which assumes that the cost of equity for a particular company is proportional to the systematic risk faced by that company.

The average rate across all types of household debt and equity and income groups and commercial building business activity types, weighted by the shares of each type, is 3.9 percent for electric and gas-fired pool heaters. See chapter 8 of the final rule TSD for further details on the development of consumer discount rates.

8. Energy Efficiency Distribution in the No-New-Standards Case

To accurately estimate the share of consumers that would be affected by a potential energy conservation standard at a particular efficiency level, DOE's LCC analysis considered the projected distribution (market shares) of product efficiencies under the no-new-standards case (*i.e.,* the case without amended or new energy conservation standards).

To estimate the energy efficiency distribution of consumer pool heaters for 2021 and the compliance year, DOE used the 2022 AHRI Directory of Certified Product Performance,[83] CEC's 2022 Modernized Appliance Efficiency Database System (''MAEDbS''),[84] [85] and DOE's 2021 Compliance Certification Management System (''CCMS'')[86] as well as manufacturer product literature.

The fraction of heat pump pool heaters was adjusted to take into account codes in Florida[87] and California[88] that require higher efficiency heat pump pool heaters. The region and market-specific fraction of electric resistance pool heaters was determined for each region and consumer pool heater market. For example, DOE assumed that warmer areas of the country such as Florida, which are better suited for heat pump installations, have a lower fraction of electric resistance installations (pool type 1, 2, 4, 5, and 7; see section IV.E.1 of this document), while large spas (pool type 3) have a larger fraction of electric resistance installations, and all indoor installations (pool type 6) were estimated to be electric resistance pool heaters. Based on input from manufacturer interviews for the NOPR, DOE adjusted its fraction of electric resistance pool heaters in 2021, as shown in Table IV.13, by assuming a larger growth in heat pump pool heater shipments compared to electric resistance pool heater shipments and an overall lower total fraction of electric resistance pool heaters. The fraction of heat pump pool heaters was also adjusted to take into account standards in Connecticut that require higher efficiency heat pump pool heaters,[89] in

[80] The implicit discount rate is inferred from a consumer purchase decision between two otherwise identical goods with different first cost and operating cost. It is the interest rate that equates the increment of first cost to the difference in net present value of lifetime operating cost, incorporating the influence of several factors: transaction costs; risk premiums and response to uncertainty; time preferences; interest rates at which a consumer is able to borrow or lend. The implicit discount rate is not appropriate for the LCC analysis because it reflects a range of factors that influence consumer purchase decisions, rather than the opportunity cost of the funds that are used in purchases.

[81] Board of Governors of the Federal Reserve System. *Survey of Consumer Finances.* 1995, 1998, 2001, 2004, 2007, 2010, 2013, 2016, and 2019, available at *www.federalreserve.gov/econres/scfindex.htm* (last accessed October 15, 2022).

[82] Damodaran Online, *Data Page: Costs of Capital by Industry Sector,* (2021), available at *pages.stern.nyu.edu/~adamodar/* (last accessed October 15, 2022).

[83] AHRI. *Directory of Certified Heat Pump Pool Heater Models.* October 9, 2021, available at *www.ahridirectory.org* (last accessed October 15, 2022).

[84] CEC. Modernized Appliance Efficiency Database System. October 9, 2021, available at *cacertappliances.energy.ca.gov/Pages/Search/AdvancedSearch.aspx* (last accessed October 15, 2022).

[85] CEC. Modernized Appliance Efficiency Database System. October 9, 2021, available at *cacertappliances.energy.ca.gov/Pages/Search/AdvancedSearch.aspx* (last accessed October 15, 2022).

[86] DOE. Compliance Certification Management System. October 9, 2021, available at *www.regulations.doe.gov/certification-data/* (last accessed October 15, 2022).

[87] 2017 Florida Energy & Conservation Code Chapter 4 section R403.10.5 states: ''Heat pump pool heaters shall have a minimum COP of 4.0 when tested in accordance with AHRI 1160, Table 2, Standard Rating Conditions-Low Air Temperature.'' State of Florida. Energy & Conservation Code, Chapter 4, available at *codes.iccsafe.org/content/FEC2017/chapter-4-re-residential-energy-efficiency?site_type=public* (last accessed October 15, 2022).

[88] California Title 20 Section 1605.3 (g)(3) states: ''For heat pump pool heaters manufactured on or after March 1, 2003, the average of the coefficient of performance (COP) at Standard Temperature Rating and the coefficient of performance (COP) at Low Temperature Rating shall be not less than 3.5.'' California Energy Commission. California Code of Regulations: Title 20. Public Utilities and Energy, Division 2. State Energy Resources Conservation and Development Commission, Chapter 4. Energy Conservation, Article 4. Appliance Efficiency Regulations (Refs & Annos), 1605.3. State Standards for Non-Federally-Regulated Appliances available at *govt.westlaw.com/calregs/Document/IEEDE2D64EF7B4F168C0E85379828A8C2?viewType=FullText&origination Context=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)* (last accessed October 15, 2022).

[89] Connecticut's Regulations and Procedures for Establishing Energy Efficiency Standards for Certain Appliances and Products Section 16a–48–4(S)(4) states: ''Heat pump pool heaters shall have a coefficient of performance (COP) of not less than 3.5

Continued

addition to standards in California and Florida. To extrapolate from 2021 to 2028, DOE assumed different growth rates for the electric resistance and heat pump pool heater shipments. These assumptions resulted in an 8.8 percent overall market share for electric resistance pool heaters in 2028. See chapter 8 of the final rule TSD for further information on the derivation of the efficiency distributions.

TABLE IV.13—MARKET SHARE OF ELECTRIC RESISTANCE POOL HEATERS BY CONSUMER POOL HEATER MARKET AND REGION IN 2028

| Consumer pool heater market type * and region | Electric resistance pool heater market share (%) | | Sample weight of pool heater market (%) |
|---|---|---|---|
| | 2021 | 2028 | |
| Pool Type = 1 and 2, 4, 5, 7 (in Florida) | 1.9 | 1.6 | 53.7 |
| Pool Type = 1 and 2, 4, 5, 7 (in California, Connecticut) | 3.8 | 3.2 | 6.3 |
| Pool Type = 1 and 2, 4, 5, 7 (in Rest of Country) | 7.5 | 6.3 | 29.8 |
| Pool Type = 3 (in Florida) | 18.8 | 15.8 | 0.8 |
| Pool Type = 3 (in California, Connecticut) | 37.5 | 31.7 | 1.1 |
| Pool Type = 3 (in Rest of Country) | 75.0 | 63.4 | 6.8 |
| Pool Type = 6 | 87.5 | 73.9 | 1.4 |
| Overall Electric Resistance Market Share | 9.2 | 8.8 | ..... |

* Consumer Pool Heater Market Types are described in Table IV.11.

During manufacturer interviews for the NOPR, DOE received input that consumer pool heaters with standing pilot only represented about 4 percent of gas-fired pool heater shipments. In addition, DOE accounted for the ban on pilot lights in gas-fired pool heaters in California,[90] Connecticut,[91] Florida,[92] and New York.[93]

The estimated market shares in the no-new-standards case for consumer pool heaters used for the final rule are shown in Table IV.14 and Table IV.15. See chapter 8 of the final rule TSD for further information on the derivation of the efficiency distributions.

TABLE IV.14—EFFICIENCY DISTRIBUTION IN THE NO-NEW-STANDARDS CASE FOR ELECTRIC POOL HEATERS IN 2028

| Efficiency level | Representative $TE_l$ (%) | National market share (%) |
|---|---|---|
| EL 0 | 99 | 8.8 |
| EL 1 | 387 | 10.4 |
| EL 2 | 483 | 59.2 |
| EL 3 | 534 | 9.4 |
| EL 4 | 551 | 9.3 |
| EL 5 | 595 | 3.0 |

TABLE IV.15—EFFICIENCY DISTRIBUTION IN THE NO-NEW-STANDARDS CASE FOR GAS-FIRED POOL HEATERS IN 2028

| Efficiency level | Representative $TE_l$ (%) | National market share (%) |
|---|---|---|
| EL 0 | 61.1 | 4.1 |
| EL 1 | 81.3 | 46.1 |
| EL 2 | 83.3 | 41.1 |
| EL 3 | 94.8 | 8.6 |

at standard temperature rating and at low temperature rating.'' State of Connecticut. Title 16a—Planning and Energy Policy. 2015, available at *eregulations.ct.gov/eRegsPortal/Browse/RCSA/Title_16aSubtitle_16a-48Section_16a-48-4/* (last accessed October 15, 2022).

[90] California Title 20 Section 1605.3 (g)(1) states: ''Energy Design Standard for Natural Gas Pool Heaters. Natural gas pool heaters shall not be equipped with constant burning pilots.'' California Energy Commission. California Code of Regulations: Title 20. Public Utilities and Energy, Division 2. State Energy Resources Conservation and Development Commission, Chapter 4. Energy Conservation, Article 4. Appliance Efficiency Regulations (Refs & Annos), 1605.3. State Standards for Non-Federally-Regulated Appliances available at *govt.westlaw.com/calregs/Document/IEEDE2D64EF7B4F168C0E85379828A8C2?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)* (last accessed October 15, 2022).

[91] Connecticut's Regulations and Procedures for Establishing Energy Efficiency Standards for Certain Appliances and Products Section 16a–48–4 (S) (2) states: ''Natural gas pool heaters shall not be equipped with a constantly burning pilot light.'' State of Connecticut. Title 16a—Planning and Energy Policy. 2015, available at *eregulations.ct.gov/eRegsPortal/Browse/RCSA/Title_16aSubtitle_16a-48Section_16a-48-4/* (last accessed October 15, 2022).

[92] 2017 Florida Energy & Conservation Code Chapter 4 section R403.10.4 states: ''Pool heaters fired by natural or LP gas shall not have continuously burning pilot lights.'' State of Florida. Energy & Conservation Code, Chapter 4, available at *codes.iccsafe.org/content/FEC2017/chapter-4-re-residential-energy-efficiency?site_type=public* (last accessed October 15, 2022).

[93] 2020 Energy Conservation Construction Code of New York State Chapter 4 section R403.10.1 states: ''Gas-fired heaters shall not be equipped with continuously burning ignition pilots.'' State of New York, available at *codes.iccsafe.org/content/NYSECC2020P1* (last accessed October 15, 2022).

The LCC Monte Carlo simulations draw from the efficiency distributions and randomly assign an efficiency to the consumer pool heater purchased by each sample household or building in the no-new-standards case. The resulting percent shares within the sample match the market shares in the efficiency distributions.

While DOE acknowledges that economic factors may play a role when consumers, commercial building owners, or builders decide on what type of pool heater to install, assignment of pool heater efficiency for a given installation, based solely on economic measures such as life-cycle cost or simple payback period most likely would not fully and accurately reflect actual real-world installations. There are a number of market failures discussed in the economics literature that illustrate how purchasing decisions with respect to energy efficiency are unlikely to be perfectly correlated with energy use, as described below. DOE maintains that the method of assignment, which is in part random, is a reasonable approach, one that simulates behavior in the pool heater market, where market failures and other consumer preferences result in purchasing decisions not being perfectly aligned with economic interests, more realistically than relying only on apparent cost-effectiveness criteria derived from the limited information in CBECS or RECS. DOE further emphasizes that its approach does not assume that all purchasers of pool heaters make economically irrational decisions (*i.e.,* the lack of a correlation is not the same as a negative correlation). As part of the random assignment, some homes or buildings with large pool heater usage will be assigned higher efficiency pool heaters, and some homes or buildings with particularly low pool heater usage will be assigned baseline pool heaters, which aligns with the available data. By using this approach, DOE acknowledges the variety of market failures and other consumer behaviors present in the pool heater market. This approach minimizes any bias in the analysis by using random assignment, as opposed to assuming certain market conditions that are unsupported given the available evidence.

First, consumers are motivated by more than simple financial trade-offs. There are consumers who are willing to pay a premium for more energy-efficient products because they are environmentally conscious.[94] There are also several behavioral factors that can influence the purchasing decisions of complicated multi-attribute products, such as pool heaters. For example, consumers (or decision makers in an organization) are highly influenced by choice architecture, defined as the framing of the decision, the surrounding circumstances of the purchase, the alternatives available, and how they are presented for any given choice scenario.[95] The same consumer or decision maker may make different choices depending on the characteristics of the decision context (*e.g.,* the timing of the purchase, competing demands for funds), which have nothing to do with the characteristics of the alternatives themselves or their prices. Consumers or decision makers also face a variety of other behavioral phenomena including loss aversion, sensitivity to information salience, and other forms of bounded rationality.[96] Thaler, who won the Nobel Prize in Economics in 2017 for his contributions to behavioral economics, and Sunstein point out that these behavioral factors are strongest when the decisions are complex and infrequent, when feedback on the decision is muted and slow, and when there is a high degree of information asymmetry.[97] These characteristics describe almost all purchasing situations of appliances and equipment, including pool heaters. The installation of a new or replacement pool heater is done infrequently, as evidenced by the mean lifetime for pool heaters. Additionally, it would take at least one full pool heating season for any impacts on operating costs to be fully apparent. Further, if the purchaser of the pool heater is not the entity paying the energy costs (*e.g.,* a building owner and tenant), there may be little to no feedback on the purchase. Additionally, there are systematic market failures that are likely to contribute further complexity to how products are chosen by consumers, as explained in the following paragraphs.

The first of these market failures is the split-incentive or principal-agent problem. The principal-agent problem is a market failure that results when the consumer that purchases the equipment does not internalize all of the costs associated with operating the equipment. Instead, the user of the product, who has no control over the purchase decision, pays the operating costs. There is a high likelihood of split incentive problems in the case of rental properties where the landlord makes the choice of what pool heater to install, whereas the renter is responsible for paying energy bills. In new construction, builders influence the type of water heater used in many homes but do not pay operating costs. Finally, contractors install a large share of pool heaters in replacement situations, and they can exert a high degree of influence over the type of pool heater purchased.

In addition to the split-incentive problem, there are other market failures that are likely to affect the choice of pool heater efficiency made by consumers. For example, emergency replacements of pool heaters are strongly biased toward like-for-like replacement (*i.e.,* replacing the non-functioning equipment with a similar or identical product). The consideration of alternative product options is far more likely for planned replacements and installations in new construction.

Additionally, Davis and Metcalf[98] conducted an experiment demonstrating that the nature of the information available to consumers from EnergyGuide labels posted on air conditioning equipment results in an inefficient allocation of energy efficiency across households with different usage levels. Their findings indicate that households are likely to make decisions regarding the efficiency of the climate control equipment of their homes that do not result in the highest net present value for their specific usage pattern (*i.e.,* their decision is based on imperfect information and, therefore, is not necessarily optimal). This effect is likely to translate to pool heaters as well, whose efficiency rating, while visible to consumers at the time of purchase, is similar information to that found on an EnergyGuide label.

[94] Ward, D.O., Clark, C.D., Jensen, K.L., Yen, S.T., & Russell, C.S. (2011): ''Factors influencing willingness-to pay for the ENERGY STAR® label,'' *Energy Policy, 39*(3), 1450–1458. (Available at: *www.sciencedirect.com/science/article/abs/pii/S0301421510009171*) (Last accessed Feb. 15, 2022).

[95] Thaler, R.H., Sunstein, C.R., and Balz, J.P. (2014). ''Choice Architecture'' in *The Behavioral Foundations of Public Policy,* Eldar Shafir (ed).

[96] Thaler, R.H., and Bernartzi, S. (2004). ''Save More Tomorrow: Using Behavioral Economics in Increase Employee Savings,'' *Journal of Political Economy* 112(1), S164–S187. *See also* Klemick, H., *et al.* (2015) ''Heavy-Duty Trucking and the Energy Efficiency Paradox: Evidence from Focus Groups and Interviews,'' *Transportation Research Part A: Policy & Practice,* 77, 154–166. (providing evidence that loss aversion and other market failures can affect otherwise profit-maximizing firms).

[97] Thaler, R.H., and Sunstein, C.R. (2008). Nudge: Improving Decisions on Health, Wealth, and Happiness. New Haven, CT: Yale University Press.

[98] Davis, L.W., and G.E. Metcalf (2016): ''Does better information lead to better choices? Evidence from energy-efficiency labels,'' *Journal of the Association of Environmental and Resource Economists,* 3(3), 589–625. (Available at: *www.journals.uchicago.edu/doi/full/10.1086/686252*) (Last accessed November 1, 2022).

In part because of the way information is presented, and in part because of the way consumers process information, there is also a market failure consisting of a systematic bias in the perception of equipment energy usage, which can affect consumer choices. Attari et al.[99] show that consumers tend to underestimate the energy use of large energy-intensive appliances and equipment (such as a pool heater), but overestimate the energy use of small appliances. Therefore, it is likely that consumers systematically underestimate the energy use associated with a pool heater, resulting in less cost-effective pool heater purchases.

These market failures affect a sizeable share of the consumer population. A study by Houde [100] indicates that there is a significant subset of consumers that appear to purchase appliances or equipment without taking into account their energy efficiency and operating costs at all.

There are market failures relevant to consumer pool heaters installed in commercial or community applications as well. It is often assumed that because commercial or community customers are businesses or organizations that have trained or experienced individuals making decisions regarding investments in cost-saving measures, some of the commonly observed market failures present in the general population of residential customers should not be as prevalent in a commercial setting. However, there are many characteristics of organizational structure and historic circumstance in commercial settings that can lead to underinvestment in energy efficiency.

First, a recognized problem in commercial settings is the principal-agent problem, where the building owner (or building developer) selects the equipment and the tenant (or subsequent building owner) pays for energy costs.[101] [102] Indeed, more than a quarter of commercial buildings in the CBECS 2012 sample are occupied at least in part by a tenant, not the building owner (indicating that, in DOE's experience, the building owner likely is not responsible for paying energy costs). There are other similar misaligned incentives embedded in the organizational structure within a given firm or business that can impact the choice of a pool heater. For example, if one department or individual within an organization is responsible for capital expenditures (and therefore equipment selection) while a separate department or individual is responsible for paying the energy bills, a market failure similar to the principal-agent problem can result.[103] Additionally, managers may have other responsibilities and often have other incentives besides operating cost minimization, such as satisfying shareholder expectations, which can sometimes be focused on short-term returns.[104] Decision-making related to commercial buildings is highly complex and involves gathering information from and for a variety of different market actors. It is common to see conflicting goals across various actors within the same organization as well as information asymmetries between market actors in the energy efficiency context in commercial building construction.[105]

Second, the nature of the organizational structure and design can influence priorities for capital budgeting, resulting in choices that do not necessarily maximize profitability.[106] Even factors as simple as unmotivated staff or lack of priority-setting and/or a lack of a long-term energy strategy can have a sizable effect on the likelihood that an energy efficient investment will be undertaken.[107] U.S. tax rules for commercial buildings may incentivize lower capital expenditures, since capital costs must be depreciated over many years, whereas operating costs can be fully deducted from taxable income or passed through directly to building tenants.[108]

Third, there are asymmetric information and other potential market failures in financial markets in general, which can affect decisions by firms with regard to their choice among alternative investment options, with energy efficiency being one such option.[109]

---

[99] Attari, S.Z., M.L. DeKay, C.I. Davidson, and W. Bruine de Bruin (2010): ''Public perceptions of energy consumption and savings.'' *Proceedings of the National Academy of Sciences* 107(37), 16054–16059 (Available at: *www.pnas.org/content/107/37/16054*) (Last accessed November 1, 2022).

[100] Houde, S. (2018): ''How Consumers Respond to Environmental Certification and the Value of Energy Information,'' *The RAND Journal of Economics,* 49 (2), 453–477 (Available at: *onlinelibrary.wiley.com/doi/full/10.1111/1756-2171.12231*) (Last accessed November 1, 2022).

[101] Vernon, D., and Meier, A. (2012). ''Identification and quantification of principal-agent problems affecting energy efficiency investments and use decisions in the trucking industry,'' *Energy Policy,* 49, 266–273.

[102] Blum, H. and Sathaye, J. (2010). ''Quantitative Analysis of the Principal-Agent Problem in Commercial Buildings in the U.S.: Focus on Central Space Heating and Cooling,'' Lawrence Berkeley National Laboratory, LBNL–3557E. (Available at: *escholarship.org/uc/item/6p1525mg*) (Last accessed November 1, 2022).

[103] Prindle, B., Sathaye, J., Murtishaw, S., Crossley, D., Watt, G., Hughes, J., and de Visser, E. (2007). ''Quantifying the effects of market failures in the end-use of energy,'' Final Draft Report Prepared for International Energy Agency. (Available from International Energy Agency, Head of Publications Service, 9 rue de la Federation, 75739 Paris, Cedex 15 France).

[104] Bushee, B.J. (1998). ''The influence of institutional investors on myopic R&D investment behavior,'' *Accounting Review,* 305–333. DeCanio, S.J. (1993). ''Barriers Within Firms to Energy Efficient Investments,'' *Energy Policy,* 21(9), 906–914. (explaining the connection between short-termism and underinvestment in energy efficiency).

[105] International Energy Agency (IEA). (2007). Mind the Gap: Quantifying Principal-Agent Problems in Energy Efficiency. OECD Pub. (Available at: *www.iea.org/reports/mind-the-gap*) (Last accessed November 1, 2022)

[106] DeCanio, S.J. (1994). ''Agency and control problems in US corporations: the case of energy-efficient investment projects,'' *Journal of the Economics of Business,* 1(1), 105–124.

Stole, L.A., and Zwiebel, J. (1996). ''Organizational design and technology choice under intrafirm bargaining,'' *The American Economic Review,* 195–222.

[107] Rohdin, P., and Thollander, P. (2006). ''Barriers to and driving forces for energy efficiency in the non-energy intensive manufacturing industry in Sweden,'' *Energy,* 31(12), 1836–1844.

Takahashi, M and Asano, H (2007). ''Energy Use Affected by Principal-Agent Problem in Japanese Commercial Office Space Leasing,'' In *Quantifying the Effects of Market Failures in the End-Use of Energy.* American Council for an Energy-Efficient Economy. February 2007.

Visser, E and Harmelink, M (2007). ''The Case of Energy Use in Commercial Offices in the Netherlands,'' In *Quantifying the Effects of Market Failures in the End-Use of Energy.* American Council for an Energy-Efficient Economy. February 2007.

Bjorndalen, J. and Bugge, J. (2007). ''Market Barriers Related to Commercial Office Space Leasing in Norway,'' In *Quantifying the Effects of Market Failures in the End-Use of Energy.* American Council for an Energy-Efficient Economy. February 2007.

Schleich, J. (2009). ''Barriers to energy efficiency: A comparison across the German commercial and services sector,'' *Ecological Economics,* 68(7), 2150–2159.

Muthulingam, S., *et al.* (2013). ''Energy Efficiency in Small and Medium-Sized Manufacturing Firms,'' *Manufacturing & Service Operations Management,* 15(4), 596–612. (Finding that manager inattention contributed to the non-adoption of energy efficiency initiatives).

Boyd, G.A., Curtis, E.M. (2014). ''Evidence of an 'energy management gap' in US manufacturing: Spillovers from firm management practices to energy efficiency,'' *Journal of Environmental Economics and Management,* 68(3), 463–479.

[108] Lovins, A. (1992). Energy-Efficient Buildings: Institutional Barriers and Opportunities. (Available at: *rmi.org/insight/energy-efficient-buildings-institutional-barriers-and-opportunities/*) (Last accessed November 1, 2022).

[109] Fazzari,, S.M., Hubbard, R.G., Petersen, B.C., Blinder, A.S., and Poterba, J.M. (1988). ''Financing constraints and corporate investment,'' *Brookings Papers on Economic Activity,* 1988(1), 141–206.

Cummings, J.G., Hassett, K.A., Hubbard, R.G., Hall, R.E., and Caballero, R.J. (1994). ''A reconsideration of investment behavior using tax reforms as natural experiments,'' *Brookings Papers on Economic Activity,* 1994(2), 1–74.

DeCanio, S.J., and Watkins, W.E. (1998). ''Investment in energy efficiency: do the characteristics of firms matter?'' *Review of Economics and Statistics,* 80(1), 95–107.

Hubbard R.G. and Kashyap A. (1992). ''Internal Net Worth and the Investment Process: An Application to U.S. Agriculture,'' *Journal of Political Economy,* 100, 506–534.

Asymmetric information in financial markets is particularly pronounced with regard to energy efficiency investments.[110] There is a dearth of information about risk and volatility related to energy efficiency investments, and energy efficiency investment metrics may not be as visible to investment managers,[111] which can bias firms towards more certain or familiar options. This market failure results not because the returns from energy efficiency as an investment are inherently riskier, but because information about the risk itself tends not to be available in the same way it is for other types of investment, like stocks or bonds. In some cases energy efficiency is not a formal investment category used by financial managers, and if there is a formal category for energy efficiency within the investment portfolio options assessed by financial managers, they are seen as weakly strategic and not seen as likely to increase competitive advantage.[112] This information asymmetry extends to commercial investors, lenders, and real-estate financing, which is biased against new and perhaps unfamiliar technology (even though it may be economically beneficial).[113] Another market failure known as the first-mover disadvantage can exacerbate this bias against adopting new technologies, as the successful integration of new technology in a particular context by one actor generates information about cost-savings, and other actors in the market can then benefit from that information by following suit; yet because the first to adopt a new technology bears the risk but cannot keep to themselves all the informational benefits, firms may inefficiently underinvest in new technologies.[114]

In sum, the commercial sector faces many market failures that can result in an under-investment in energy efficiency. This means that discount rates implied by hurdle rates [115] and required payback periods of many firms are higher than the appropriate cost of capital for the investment.[116] The preceding arguments for the existence of market failures in the commercial sector is corroborated by empirical evidence. One study in particular showed evidence of substantial gains in energy efficiency that could have been achieved without negative repercussions on profitability, but the investments had not been undertaken by firms.[117] The study found that multiple organizational and institutional factors caused firms to require shorter payback periods and higher returns than the cost of capital for alternative investments of similar risk. Another study demonstrated similar results with firms requiring very short payback periods of 1–2 years in order to adopt energy-saving projects, implying hurdle rates of 50 to 100 percent, despite the potential economic benefits.[118] A number of other case studies similarly demonstrate the existence of market failures preventing the adoption of energy-efficient technologies in a variety of commercial sectors around the world, including office buildings,[119] supermarkets,[120] and the electric motor market.[121]

The existence of market failures in the residential and commercial sectors is well supported by the economics literature and by a number of case studies. If DOE developed an efficiency distribution that assigned pool heater efficiency in the no-new-standards case solely according to energy use or economic considerations such as life-cycle cost or payback period, the resulting distribution of efficiencies within the building sample would not reflect any of the market failures or behavioral factors above. DOE thus concludes such a distribution would not be representative of the pool heater market. Further, even if a specific household/building/organization is not subject to the market failures above, the purchasing decision of pool heater efficiency can be highly complex and influenced by a number of factors not captured by the building characteristics available in the RECS or CBECS samples. These factors can lead to households or building owners choosing a pool heater efficiency that deviates from the efficiency predicted using only energy use or economic considerations such as life-cycle cost or payback period (as calculated using the information from RECS 2015 or CBECS 2012).

Responding to the April 2022 NOPR, Fluidra suggested that, for gas-fired pool heaters in 2028, the market share for EL2 should be significantly higher than that for EL1, adding that the new market share significantly favors EL2 gas-fire pool heaters. Fluidra also suggested that the EL0 market share for gas-fired pool heaters should be zero, stating that this level would not comply with the existing minimum efficiency requirement of 82 percent thermal efficiency. (Fluidra, No. 18 at p. 3).

In response, DOE notes that EL0 is defined as products which minimally comply with the existing thermal efficiency standards and include a standing pilot ignition system (see section IV.C.1.a for details), and therefore, in a no-new-standards case, these products would continue to be sold in the market. DOE assumed that the market share of EL 0 would decrease over time, compared to the 8 percent market share assumed in the 2010 Heating Products Final Rule based on manufacturer input. DOE does not currently have shipments data by efficiency to distinguish between EL 1 and EL 2, but based on available model data, the market shares appear to be similar. These model data informed the efficiency distribution used in the analysis.

[110] Mills, E., Kromer, S., Weiss, G., and Mathew, P.A. (2006). ''From volatility to value: analysing and managing financial and performance risk in energy savings projects,'' *Energy Policy,* 34(2), 188–199.

Jollands, N., Waide, P., Ellis, M., Onoda, T., Laustsen, J., Tanaka, K., and Meier, A. (2010). ''The 25 IEA energy efficiency policy recommendations to the G8 Gleneagles Plan of Action,'' *Energy Policy,* 38(11), 6409–6418.

[111] Reed, J.H., Johnson, K., Riggert, J., and Oh, A.D. (2004). ''Who plays and who decides: The structure and operation of the commercial building market,'' U.S. Department of Energy Office of Building Technology, State and Community Programs. (Available at: *www1.eere.energy.gov/buildings/publications/pdfs/commercial_initiative/who_plays_who_decides.pdf*) (Last accessed November 1, 2022).

[112] Cooremans, C. (2012). ''Investment in energy efficiency: do the characteristics of investments matter?'' *Energy Efficiency,* 5(4), 497–518.

[113] Lovins 1992, op. cit. The Atmospheric Fund. (2017). Money on the table: Why investors miss out on the energy efficiency market. (Available at: *taf.ca/publications/money-table-investors-energy-efficiency-market/*) (Last accessed November 1, 2022).

[114] Blumstein, C. and Taylor, M. (2013). Rethinking the Energy-Efficiency Gap: Producers, Intermediaries, and Innovation. Energy Institute at Haas Working Paper 243. (Available at: *haas.berkeley.edu/wp-content/uploads/WP243.pdf*) (Last accessed November 1, 2022).

[115] A hurdle rate is the minimum rate of return on a project or investment required by an organization or investor. It is determined by assessing capital costs, operating costs, and an estimate of risks and opportunities.

[116] DeCanio 1994, op. cit.

[117] DeCanio, S.J. (1998). ''The Efficiency Paradox: Bureaucratic and Organizational Barriers to Profitable Energy-Saving Investments,'' *Energy Policy,* 26(5), 441–454.

[118] Andersen, S.T., and Newell, R.G. (2004). ''Information programs for technology adoption: the case of energy-efficiency audits,'' *Resource and Energy Economics,* 26, 27–50.

[119] Prindle 2007, op. cit. Howarth, R.B., Haddad, B.M., and Paton, B. (2000). ''The economics of energy efficiency: insights from voluntary participation programs,'' *Energy Policy,* 28, 477–486.

[120] Klemick, H., Kopits, E., Wolverton, A. (2017). ''Potential Barriers to Improving Energy Efficiency in Commercial Buildings: The Case of Supermarket Refrigeration,'' *Journal of Benefit-Cost Analysis,* 8(1), 115–145.

[121] de Almeida, E.L.F. (1998). ''Energy efficiency and the limits of market forces: The example of the electric motor market in France'', *Energy Policy,* 26(8), 643–653. Xenergy, Inc. (1998). United States Industrial Electric Motor Systems Market Opportunity Assessment. (Available at: *www.energy.gov/sites/default/files/2014/04/f15/mtrmkt.pdf*) (Last accessed January 20, 2022).

9. Payback Period Analysis

The payback period is the amount of time (expressed in years) it takes the consumer to recover the additional installed cost of more-efficient products, compared to baseline products, through energy cost savings. Payback periods that exceed the life of the product mean that the increased total installed cost is not recovered in reduced operating expenses.

The inputs to the PBP calculation for each efficiency level are the change in total installed cost of the product and the change in the first-year annual operating expenditures relative to the baseline. DOE refers to this as a ''simple PBP'' because it does not consider changes over time in operating cost savings. The PBP calculation uses the same inputs as the LCC analysis when deriving first-year operating costs.

As noted previously, EPCA establishes a rebuttable presumption that a standard is economically justified if the Secretary finds that the additional cost to the consumer of purchasing a product complying with an energy conservation standard level will be less than three times the value of the first full year's energy savings resulting from the standard, as calculated under the applicable test procedure. (42 U.S.C. 6295(o)(2)(B)(iii)) For each considered efficiency level, DOE determined the value of the first year's energy savings by calculating the energy savings in accordance with the applicable DOE test procedure, and multiplying those savings by the average energy price projection for the year in which compliance with the new and amended standards would be required.

*G. Shipments Analysis*

DOE uses projections of annual product shipments to calculate the national impacts of potential amended or new energy conservation standards on energy use, NPV, and future manufacturer cash flows.[122] The shipments model takes an accounting approach, tracking market shares of each product class and the vintage of units in the stock. Stock accounting uses product shipments as inputs to estimate the age distribution of in-service product stocks for all years. The age distribution of in-service product stocks is a key input to calculations of both the NES and NPV, because operating costs for any year depend on the age distribution of the stock.

For the NOPR, DOE estimated consumer pool heater shipments by projecting shipments in three market segments: (1) replacements; (2) new swimming pool owners; and (3) new owners with an existing swimming pool that did not previously have a pool heater (both in residential and commercial applications),[123] as follows:

(1) To project consumer pool heater replacement shipments in the residential and commercial sectors, DOE developed retirement functions for consumer pool heaters from the lifetime estimates (see section IV.F.6 of this document) and applied them to the existing products in the stock. DOE estimated the existing stock of products using estimated historical shipments [124] [125] [126] [127] and the survival function for consumer pool heaters from the lifetime estimates. DOE took into account replacement rate of retired (failed) consumer pool heaters.

(2) To project shipments to the new swimming pool and spa market in the residential and commercial sector, DOE utilized projected new swimming pool (inground and above ground) installations and saturation rates. DOE estimated projected new swimming pool (inground and above ground) installations based on 2016 Pkdata,[128] and 2020 Pkdata [129] and projected saturation rates based on saturation data from 2020 Pkdata and 1990–2015 RECS data.[130]

(3) To project shipments to new owners in existing swimming pools that did not previously have a consumer pool heater in the residential sector, DOE estimated that a small fraction of existing swimming pools would add a consumer pool heater.[131]

AHRI and PHTA supported the fact that DOE updated its analysis based on 2015 feedback that resulted in a lower average annual growth and acknowledged that many unknown factors exist that could impact this projection. (AHRI and PHTA, No. 20 at p. 9)

For the final rule, DOE kept the same methodology for projecting shipments and updated its shipments estimates based on the latest data available, including 2022 Pkdata,[132] RECS 2020 and CBECS 2018 data. The 2022 PKData also included estimated 2003–2021 inground pool heater shipments, which were used to calibrate DOE's shipments model. See chapter 9 of the final rule TSD for details.

Because the standards-case projections take into account the increase in purchase price and the decrease in operating costs caused by amended standards, projected shipments for a standards case typically deviate from those for the no-new-standards case. Because purchase price tends to have a larger impact than operating cost on appliance purchase decisions, standards-case projections typically show a decrease in product shipments relative to the no-new-standards case.

Rheem generally supported the relative price elasticity approach and agrees that an increase in energy conservation standards will result in a reduction of shipments for a period, as compared to the no new standards case. (Rheem, No. 19 at p. 8) In response, DOE maintained its approach to estimate the impact of the considered standards on consumer pool heater shipments. Appendix 10C of the final rule TSD describes this analysis, which includes a sensitivity analysis.

BWC suggested that the Department consider ongoing building electrification efforts in cities and states

[122] DOE uses data on manufacturer shipments as a proxy for national sales, as aggregate data on sales are lacking. In general, one would expect a close correspondence between shipments and sales.

[123] DOE assumed in the October 2015 NODA that new owners also account for potential switching between gas and electric pool heater products.

[124] DOE had limited historical shipments data for electric pool heaters, so DOE ''backcasted'' the shipments model (*i.e.,* applied the shipments model to years prior to 2015) to estimate historical shipments.

[125] U.S. Department of Energy-Office of Codes and Standards, Technical Support Document: Energy Efficiency Standards for Consumer Products: Room Air Conditioners, Water Heaters, Direct Heating Equipment, Mobile Home Furnaces, Kitchen Ranges and Ovens, Pool Heaters, Fluorescent Lamp Ballasts & Television Sets, 1993. Washington, DC Vol. 1 of 3. Report No. DOE/EE–0009.

[126] Association of Pool & Spa Professionals (APSP). 2003–2009 Gas-fired Pool Heater Shipments Data (Comment #135 for 2010 Heating Products Final Rule), available at *www.regulations.gov/document/EERE-2006-STD-0129-0135* (last accessed October 15, 2022).

[127] 2016 Pkdata provided estimated combined historical shipments for electric and gas-fired pool heaters used in commercial applications from 2010–2015.

[128] Pkdata. 2016 Residential and Commercial Swimming Pool, Hot tub, and Pool Heater Customized Report for LBNL, June 21, 2016, available at *www.pkdata.com/datapointstrade.html#/* (last accessed October 15, 2022).

[129] Pkdata. 2020 Residential Swimming Pool, Hot tub, and Pool Heater Customized Report for LBNL, October 15, 2020, available at *www.pkdata.com/datapointstrade.html#/* (last accessed October 15, 2022).

[130] U.S. EIA. 1990, 1993, 1997, 2001, 2005, 2009, and 2015 RECS Survey Data, available at *www.eia.gov/consumption/residential/* (last accessed October 15, 2022).

[131] Number of existing swimming pools without an electric or gas pool heater was based on 1990–2015 RECS data.

[132] Pkdata. 2022 Residential Swimming Pool, Hot tub, and Pool Heater Customized Report for LBNL, October 1, 2022, available at *www.pkdata.com/datapointstrade.html#/* (last accessed October 15, 2022).

throughout the country related to assumptions for gas-fired pool heaters. (BWC, No. 12 at p. 4) Rheem recommended DOE fully evaluate the impact of standards on fuel switching. Rheem noted that DOE stated in section 9.5.1 of the TSD that they did not consider the potential impact of consumers opting to switch from an electric to gas or gas to electric pool heater, suggesting that installation issues associated with a fuel change would limit switching. Rheem agreed that adding a propane tank (and associated supply service) or an electrical panel upgrade would limit fuel switching, but extending the gas line and accounting for venting would not prevent a consumer to switch from electric resistance to gas in installations where gas is already available. (Rheem, No. 19 at p. 7–8) AHRI and PHTA had concerns with EL4 for electric pool heaters, as the proposed standards would increase the consumer purchase cost, reduce overall sales, lengthen payback periods, and incentivize fuel switching to gas-fired pool heaters due to the price increase for electric pool heaters. (AHRI and PHTA, No. 20 at p. 5) Joint Advocates supported DOE's conclusion that the potential for fuel switching as a result of the proposed standard levels is limited because, as DOE explained, the costs associated with switching from an electric pool heater to a gas pool heater (*e.g.,* having to extend a gas line) would likely limit switching, and heat pump pool heaters already make up more than 90 percent of the electric pool heater market. (Joint Advocates, No. 13 at p. 3)

DOE agrees with Joint Advocates that the costs associated with switching from an electric pool heater to a gas-fired pool heater (such as extending the gas line, adding a propane tank, or accounting for venting) would tend to limit such switching. However, it also agrees with Rheem that extending the gas line and accounting for venting would not prevent a consumer to switch from electric resistance to gas in installations where gas is already available. DOE also agrees that ongoing electrification efforts could impact the decision to switch from gas, but has limited data on the potential fraction of shipments that might switch from gas-fired pool heaters to electric pool heaters in the no-new amended standards case.

For the final rule analysis, assumptions regarding future policies encouraging electrification of households and electric pool heating were speculative at the time of analysis, so such policies were not incorporated into the shipments projection. DOE agrees that ongoing electrification policies at the Federal, State, and local level are likely to encourage installation of electric pool heaters in new homes and adoption of electric pool heaters in homes that currently use gas-fired pool heaters. However, there are many uncertainties about the timing and impact of these policies that make it difficult to fully account for their likely impact on gas and electric pool heater market shares in the time frame for this analysis (*i.e.,* 2028 through 2057). Nonetheless, DOE has modified some of its projections to attempt to account for impacts that seem most likely in the relevant time frame. For example, DOE accounted for the 2022 update to Title 24 in California [133] and for the decision of the California Public Utilities Commission to entirely eliminate ratepayer subsidies for the extension of new gas lines beginning in July 2023. Together, these policies are reasonably expected to lead to the phase-out of gas-fired pool heaters in new single-family homes in California. The California Air Resources Board has also adopted a 2022 State Strategy for the State Implementation Plan that would effectively ban sales of new gas-fired pool heaters beginning in 2030.[134] However, because a final decision on an implementing rule would not happen until 2025, DOE did not include this policy in its analysis for the final rule. The assumptions are described in chapter 9 and appendix 9A of the final rule TSD.

DOE acknowledges that these and other electrification policies may result in a larger decrease in shipments of gas-fired water heaters than projected in this final rule, especially if stronger policies are adopted in coming years. However, this would occur in the no-new-standards case, and thus would only reduce the energy savings estimated to result from this proposed rule. For example, if incentives and rebates shifted 5 percent of shipments in the no-new-amended standards case from gas-fired pool heaters to heat pump pool heaters, then the energy savings estimated for gas-fired pool heaters that would result from this proposed rule would decline by approximately 5 percent. The estimated consumer impacts are likely to be similar, however, except that the percentage of consumers with no impact at a given efficiency level would increase. However, at this time the impact of many of these policies remains too uncertain to be included in the shipments analysis.

*H. National Impact Analysis*

The NIA assesses the national energy savings (''NES'') and the NPV from a national perspective of total consumer costs and savings that would be expected to result from new or amended standards at specific efficiency levels.[135] (''Consumer'' in this context refers to consumers of the product being regulated.) DOE calculates the NES and NPV for the potential standard levels considered based on projections of annual product shipments, along with the annual energy consumption and total installed cost data from the energy use and LCC analyses.[136] For the present analysis, DOE projected the energy savings, operating cost savings, product costs, and NPV of consumer benefits over the lifetime of consumer pool heaters sold from 2028 through 2057.

DOE evaluates the impacts of new or amended standards by comparing a case without such standards with standards-case projections. The no-new-standards case characterizes energy use and consumer costs for each product class in the absence of new or amended energy conservation standards. For this projection, DOE considers historical trends in efficiency and various forces that are likely to affect the mix of efficiencies over time. DOE compares the no-new-standards case with projections characterizing the market for each product class if DOE adopted new or amended standards at specific energy efficiency levels (*i.e.,* the TSLs or standards cases) for that class. For the standards cases, DOE considers how a given standard would likely affect the market shares of products with efficiencies greater than the standard.

DOE uses a spreadsheet model to calculate the energy savings and the national consumer costs and savings from each TSL. Interested parties can review DOE's analyses by changing various input quantities within the spreadsheet. The NIA spreadsheet model uses typical values (as opposed to probability distributions) as inputs.

Table IV.16 summarizes the inputs and methods DOE used for the NIA

[133] The 2022 update includes heat pumps as a performance standard baseline for water or space heating in single-family homes, and space heating in multi-family homes. Builders will need to either include one high-efficiency heat pump in new constructions or subject those buildings to more stringent energy efficiency standards.

[134] *https://ww2.arb.ca.gov/resources/documents/2022-state-strategy-state-implementation-plan-2022-state-sip-strategy#:~:text=The%202022%20State%20SIP%20Strategy,all%20nonattainment%20areas%20across%20California.*

[135] The NIA accounts for impacts in the 50 states and U.S. territories.

[136] For the NIA, DOE adjusts the installed cost data from the LCC analysis to exclude sales tax, which is a transfer.

analysis for the final rule. Discussion of these inputs and methods follows the table. See chapter 10 of the final rule TSD for further details.

TABLE IV.16—SUMMARY OF INPUTS AND METHODS FOR THE NATIONAL IMPACT ANALYSIS

| Inputs | Method |
|---|---|
| Shipments | Annual shipments from shipments model. |
| Compliance Date of Standard | 2028. |
| Efficiency Trends | *No-new-standards case:* Based on historical data. *Standards cases:* Roll-up in the compliance year and then DOE estimated growth in shipment-weighted efficiency in all the standards cases, except max-tech. |
| Annual Energy Consumption per Unit | Annual weighted-average values are a function of energy use at each TSL. |
| Total Installed Cost per Unit | Annual weighted-average values are a function of cost at each TSL. Incorporates projection of future product prices based on historical data. |
| Annual Energy Cost per Unit | Annual weighted-average values as a function of the annual energy consumption per unit and energy prices. |
| Repair and Maintenance Cost per Unit | Annual values do not change with efficiency level. |
| Energy Price Trends | *AEO2022* projections (to 2050) and extrapolation thereafter. |
| Energy Site-to-Primary and FFC Conversion | A time-series conversion factor based on *AEO2022.* |
| Discount Rate | Three and seven percent. |
| Present Year | 2022. |

1. Product Efficiency Trends

A key component of the NIA is the trend in energy efficiency projected for the no-new-standards case and each of the standards cases. Section IV.F.8 of this document describes how DOE developed an energy efficiency distribution for the no-new-standards case (which yields a shipment-weighted average efficiency) for each of the considered product classes for the year of anticipated compliance with an amended or new standard. To project the trend in efficiency absent amended standards for consumer pool heaters over the entire shipments projection period, DOE used available historical shipments data and manufacturer input. The approach is further described in chapter 10 of the final rule TSD.

For the standards cases, DOE used a ''roll-up'' scenario to establish the shipment-weighted efficiency for the year that standards are assumed to become effective (2028). In this scenario, the market shares of products in the no-new-standards case that do not meet the standard under consideration would ''roll up'' to meet the new standard level, and the market share of products above the standard would remain unchanged.

To develop no-new standards case efficiency trends after 2020, DOE assumed an annual decreasing trend of negative 2 percent in the market share for the minimum efficiency levels (EL 0) for both electric and gas-fired pool heaters. This resulted in a market share for EL 0 of 8 percent in 2028 and 4 percent in 2057 for electric pool heaters and 4 percent in 2028 and 2 percent in 2057 for gas-fired pool heaters.

2. National Energy Savings

The national energy savings analysis involves a comparison of national energy consumption of the considered products between each potential standards case (''TSL'') and the case with no new or amended energy conservation standards. DOE calculated the national energy consumption by multiplying the number of units (stock) of each product (by vintage or age) by the unit energy consumption (also by vintage). DOE calculated annual NES based on the difference in national energy consumption for the no-new-standards case and for each higher efficiency standard case. DOE estimated energy consumption and savings based on site energy and converted the electricity consumption and savings to primary energy (*i.e.,* the energy consumed by power plants to generate site electricity) using annual conversion factors derived from *AEO2022.* Cumulative energy savings are the sum of the NES for each year over the timeframe of the analysis.

Use of higher-efficiency products is sometimes associated with a direct rebound effect, which refers to an increase in utilization of the product due to the increase in efficiency. For the NOPR, DOE did not include the rebound effect in the NPV analysis. 87 FR 22640, 22681. DOE did not find any data on the rebound effect specific to consumer pool heaters. DOE applied a rebound effect of 10 percent for consumer pool heaters used in residential applications, based on studies of other residential products, and 0 percent for consumer pool heaters used in commercial applications (see section IV.F.3.a of this document for more details). The calculated NES at each efficiency level is therefore reduced by 10 percent in residential applications. For the final rule analysis, DOE included the rebound effect in the NPV analysis by accounting for the additional net benefit from increased consumer pool heaters usage, as described in section IV.H.3 of this document.

Rheem agreed that there could be some rebound effect if energy conservation standards are increased. While it is unlikely that a consumer would increase the temperature of their pool, it is possible that a consumer will be less diligent with shutting off pool heating between periods of pool usage during the heating season. (Rheem, No. 19 at p.7) BWC agreed with DOE's estimate that there will be very little, if any, rebound effect for these products installed in commercial applications. (BWC, No. 12 at p. 4) AHRI and PHTA did not believe the approach of using other residential products to determine the rebound effect is appropriate for pool heating because consumers who choose to install pool heating will use them the same regardless of product efficiency. (AHRI and PHTA, No. 20 at p. 8) They stated that they did not believe there is a rebound effect for pool heaters. *Id.*

DOE continued to incorporate a rebound effect in order to have a conservative estimate of the potential energy savings from an energy conservation standard on pool heaters. DOE notes that an estimated rebound of 10 percent is modest and comparable to several other residential end uses, which typically range from 0 to 15 percent. While the inclusion of the rebound effect at the energy savings level reduces energy savings and the inclusion in the net present value analysis increases the net present value,

overall the exclusion of the rebound effect would not be sufficient to change DOE's conclusion regarding economic justification.

In 2011, in response to the recommendations of a committee on ''Point-of-Use and Full-Fuel-Cycle Measurement Approaches to Energy Efficiency Standards'' appointed by the National Academy of Sciences, DOE announced its intention to use FFC measures of energy use and greenhouse gas and other emissions in the national impact analyses and emissions analyses included in future energy conservation standards rulemakings. 76 FR 51281 (Aug. 18, 2011). After evaluating the approaches discussed in the August 18, 2011 notice, DOE published a statement of amended policy in which DOE explained its determination that EIA's National Energy Modeling System (''NEMS'') is the most appropriate tool for its FFC analysis and its intention to use NEMS for that purpose. 77 FR 49701 (Aug. 17, 2012). NEMS is a public domain, multi-sector, partial equilibrium model of the U.S. energy sector [137] that EIA uses to prepare its *Annual Energy Outlook.* The FFC factors incorporate losses in production and delivery in the case of natural gas (including fugitive emissions) and additional energy used to produce and deliver the various fuels used by power plants. The approach used for deriving FFC measures of energy use and emissions is described in appendix 10B of the final rule TSD.

3. Net Present Value Analysis

The inputs for determining the NPV of the total costs and benefits experienced by consumers are (1) total annual installed cost, (2) total annual operating costs (energy costs and repair and maintenance costs), and (3) a discount factor to calculate the present value of costs and savings. DOE calculates net savings each year as the difference between the no-new-standards case and each standards case in terms of total savings in operating costs versus total increases in installed costs. DOE calculates operating cost savings over the lifetime of each product shipped during the projection period.

As discussed in section IV.F.1 of this document, DOE developed consumer pool heaters price trends based on 2022 PKData. DOE applied the same constant trend to project prices for each product class at each considered efficiency level. DOE's projection of product prices is described in appendix 10C of the final rule TSD.

To evaluate the effect of uncertainty regarding the price trend estimates, DOE investigated the impact of different product price projections on the consumer NPV for the considered TSLs for consumer pool heaters. In addition to the default price trend, DOE considered two product price sensitivity cases: (1) a declining price trend case based on 2003–2014 price data and (2) an increasing price trend case based on 2015–2021 data. The derivation of these price trends and the results of these sensitivity cases are described in appendix 10C of the final rule TSD.

The operating cost savings are the sum of the differences in energy cost savings, maintenance, and repair costs. The maintenance and repair costs derivation is described in section IV.F.5 of this document. The energy cost savings are calculated using the estimated energy savings in each year and the projected price of the appropriate form of energy. To estimate energy prices in future years, DOE multiplied the average regional energy prices by the projection of annual national-average residential energy price changes in the Reference case from *AEO2022,* which has an end year of 2050. To estimate price trends after 2050, DOE used the average of annual growth rates in prices from 2045 through 2050.[138] As part of the NIA, DOE also analyzed scenarios that used inputs from variants of the *AEO2022* Reference case that have lower and higher economic growth. Those cases have lower and higher energy price trends compared to the Reference case. NIA results based on these cases are presented in appendix 10C of the final rule TSD.

In considering the consumer welfare gained due to the direct rebound effect, DOE accounted for change in consumer surplus attributed to additional heating from the purchase of a more efficient unit. Overall consumer welfare is generally understood to be enhanced from rebound. The net consumer impact of the rebound effect is included in the calculation of operating cost savings in the consumer NPV results. See appendix 10F of the final rule TSD for details on DOE's treatment of the monetary valuation of the rebound effect.

In calculating the NPV, DOE multiplies the net savings in future years by a discount factor to determine their present value. For this final rule, DOE estimated the NPV of consumer benefits using both a 3-percent and a 7-percent real discount rate. DOE uses these discount rates in accordance with guidance provided by the Office of Management and Budget (''OMB'') to Federal agencies on the development of regulatory analysis.[139] The discount rates for the determination of NPV are in contrast to the discount rates used in the LCC analysis, which are designed to reflect a consumer's perspective. The 7-percent real value is an estimate of the average before-tax rate of return to private capital in the U.S. economy. The 3-percent real value represents the ''social rate of time preference,'' which is the rate at which society discounts future consumption flows to their present value.

*I. Consumer Subgroup Analysis*

In analyzing the potential impact of new or amended energy conservation standards on consumers, DOE evaluates the impact on identifiable subgroups of consumers that may be disproportionately affected by a new or amended national standard. The purpose of a subgroup analysis is to determine the extent of any such disproportional impacts. DOE evaluates impacts on particular subgroups of consumers by analyzing the LCC impacts and PBP for those particular consumers from alternative standard levels. For this final rule, DOE analyzed the impacts of the considered standard levels on two subgroups: (1) senior-only and (2) small business. The analysis used subsets of the RECS 2015 sample composed of households and CBECS 2012 sample composed of commercial buildings that meet the criteria for the considered subgroups. DOE used the LCC and PBP spreadsheet model to estimate the impacts of the considered efficiency levels on these subgroups. Chapter 11 in the final rule TSD describes the consumer subgroup analysis.

*J. Manufacturer Impact Analysis*

1. Overview

DOE performed an MIA to estimate the financial impacts of new and amended energy conservation standards on manufacturers of consumer pool heaters and to estimate the potential

[137] For more information on NEMS, refer to *The National Energy Modeling System: An Overview 2009,* DOE/EIA–0581(2009), October 2009. Available at *www.eia.gov/forecasts/aeo/index.cfm* (last accessed October 15, 2022).

[138] Lavappa, Priya D. and J.D. Kneifel. Energy Price Indices and Discount Factors for Life-Cycle Cost Analysis—2022 Annual Supplement to NIST Handbook 135. National Institute of Standards and Technology (NIST). NISTIR 85–3273–37, available at *www.nist.gov/publications/energy-price-indices-and-discount-factors-life-cycle-cost-analysis-2022-annual* (last accessed October 15, 2022).

[139] United States Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. Section E. Available at *www.whitehouse.gov/omb/memoranda/m03-21.html* (last accessed October 15, 2022).

impacts of such standards on employment and manufacturing capacity. The MIA has both quantitative and qualitative aspects and includes analyses of projected industry cash flows, the INPV, investments in research and development (''R&D'') and manufacturing capital, and domestic manufacturing employment. Additionally, the MIA seeks to determine how new and amended energy conservation standards might affect domestic manufacturing employment, capacity, and competition, as well as how standards contribute to overall regulatory burden. Finally, the MIA serves to identify any disproportionate impacts on manufacturer subgroups, including small business manufacturers.

The quantitative part of the MIA primarily relies on the Government Regulatory Impact Model (''GRIM''), an industry cash flow model with inputs specific to this rulemaking. The key GRIM inputs include data on the industry cost structure, unit production costs, product shipments, manufacturer markups, and investments in R&D and manufacturing capital required to produce compliant products. The key GRIM outputs are the INPV, which is the sum of industry annual cash flows over the analysis period, discounted using the industry-weighted average cost of capital, and the impact to domestic manufacturing employment. The model uses standard accounting principles to estimate the impacts of more-stringent energy conservation standards on a given industry by comparing changes in INPV and domestic manufacturing employment between a no-new-standards case and the various standards cases (*i.e.,* TSLs). To capture the uncertainty relating to manufacturer pricing strategies following new and amended standards, the GRIM estimates a range of possible impacts under different manufacturer markup scenarios.

The qualitative part of the MIA addresses manufacturer characteristics and market trends. Specifically, the MIA considers such factors as a potential standard's impact on manufacturing capacity, competition within the industry, the cumulative impact of other DOE and non-DOE regulations, and impacts on manufacturer subgroups. The complete MIA is outlined in chapter 12 of the final rule TSD.

DOE conducted the MIA for this rulemaking in three phases. In Phase 1 of the MIA, DOE prepared a profile of the consumer pool heaters manufacturing industry based on the market and technology assessment, preliminary manufacturer interviews, and publicly available information. This included a top-down analysis of consumer pool heaters manufacturers that DOE used to derive preliminary financial inputs for the GRIM (*e.g.,* revenues; materials, labor, overhead, and depreciation expenses; selling, general, and administrative expenses (''SG&A''); and R&D expenses). DOE also used public sources of information to further calibrate its initial characterization of the consumer pool heaters manufacturing industry, including company filings of form 10–K from the SEC,[140] corporate annual reports, the U.S. Census Bureau's ''Economic Census,'' [141] and reports from D&B Hoovers.[142]

In Phase 2 of the MIA, DOE prepared a framework industry cash-flow analysis to quantify the potential impacts of new and amended energy conservation standards. The GRIM uses several factors to determine a series of annual cash flows starting with the announcement of the standard and extending over a 30-year period following the compliance date of the standard. These factors include annual expected revenues, costs of sales, SG&A and R&D expenses, taxes, and capital expenditures. In general, energy conservation standards can affect manufacturer cash flow in three distinct ways: (1) creating a need for increased investment, (2) raising production costs per unit, and (3) altering revenue due to higher per-unit prices and changes in sales volumes.

In addition, during Phase 2, DOE developed interview guides to distribute to manufacturers of consumer pool heaters in order to develop other key GRIM inputs, including product and capital conversion costs, and to gather additional information on the anticipated effects of energy conservation standards on revenues, direct employment, capital assets, industry competitiveness, and subgroup impacts.

In Phase 3 of the MIA, DOE conducted structured, detailed interviews with representative manufacturers. During these interviews, DOE discussed engineering, manufacturing, procurement, and financial topics to validate assumptions used in the GRIM and to identify key issues or concerns. See section IV.J.3 of this document for a description of the key issues raised by manufacturers during the interviews. As part of Phase 3, DOE also evaluated subgroups of manufacturers that may be disproportionately impacted by new and amended standards or that may not be accurately represented by the average cost assumptions used to develop the industry cash flow analysis. Such manufacturer subgroups may include small business manufacturers, low-volume manufacturers (''LVMs''), niche players, and/or manufacturers exhibiting a cost structure that largely differs from the industry average. DOE identified one subgroup for a separate impact analysis: small business manufacturers. The small business subgroup is discussed in section VI.B, ''Review under the Regulatory Flexibility Act'' and in chapter 12 of the final rule TSD.

2. Government Regulatory Impact Model and Key Inputs

DOE uses the GRIM to quantify the changes in cash flow due to new and amended standards that result in a higher or lower industry value. The GRIM uses a standard, annual discounted cash-flow analysis that incorporates manufacturer costs, manufacturer markups, shipments, and industry financial information as inputs. The GRIM models changes in costs, distribution of shipments, investments, and manufacturer margins that could result from new and amended energy conservation standard. The GRIM spreadsheet uses the inputs to arrive at a series of annual cash flows, beginning in 2023 (the base year of the analysis) and continuing to 2057. DOE calculated INPVs by summing the stream of annual discounted cash flows during this period. For manufacturers of consumer pool heaters, DOE used a real discount rate of 7.4 percent, which was derived from industry financials and then modified according to feedback received during manufacturer interviews.

The GRIM calculates cash flows using standard accounting principles and compares changes in INPV between the no-new-standards case and each standards case. The difference in INPV between the no-new-standards case and a standards case represents the financial impact of the new and amended energy conservation standards on manufacturers. As discussed previously, DOE developed critical GRIM inputs using a number of sources, including publicly available data, results of the engineering analysis, and information gathered from industry stakeholders during the course of manufacturer interviews. The GRIM results are presented in section V.B.2 of this document. Additional details about the

[140] See online at *www.sec.gov/edgar.shtml* (Last accessed on October 17, 2022).

[141] See online at *www.census.gov/programs-surveys/asm/data/tables.html* (Last accessed on October 17, 2022).

[142] See online at *app.avention.com* (Last accessed on October 17, 2022).

GRIM, the discount rate, and other financial parameters can be found in chapter 12 of the final rule TSD.

a. Manufacturer Production Costs

Manufacturing more efficient products is typically more expensive than manufacturing baseline products due to the use of more complex components, which are typically more costly than baseline components. The changes in the MPCs of covered products can affect the revenues, gross margins, and cash flow of the industry.

In the MIA, DOE used the MPCs calculated in the engineering analysis, as described in section IV.C of this document. DOE used information from its teardown analysis, described in section IV.C.3 of this document to disaggregate the MPCs into material, labor, depreciation, and overhead costs. To calculate the MPCs for products above the baseline, DOE added incremental material, labor, depreciation, and overhead costs from the engineering cost-efficiency curves to the baseline MPCs. These cost breakdowns were validated with manufacturers during manufacturer interviews.

For a complete description of the MPCs, see chapter 5 of the final rule TSD.

b. Shipments Projections

The GRIM estimates manufacturer revenues based on total unit shipment projections and the distribution of those shipments by efficiency level. Changes in sales volumes and efficiency mix over time can significantly affect manufacturer finances. For this analysis, the GRIM uses the NIA's annual shipment projections derived from the shipments analysis from 2023 (the base year) to 2057 (the end year of the analysis period). See chapter 9 of the final rule TSD for additional details.

c. Product and Capital Conversion Costs

New and amended energy conservation standards could cause manufacturers to incur conversion costs to bring their production facilities and product designs into compliance. DOE evaluated the level of conversion-related expenditures that would be needed to comply with each considered efficiency level in each product class. For the MIA, DOE classified these conversion costs into two major groups: (1) product conversion costs; and (2) capital conversion costs. Product conversion costs are investments in research, development, testing, marketing, and other non-capitalized costs necessary to make product designs comply with new and amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled.

To evaluate the level of capital conversion costs manufacturers would likely incur to comply with new and amended energy conservation standards, DOE used data gathered from manufacturer interviews as well as information derived from the product teardown analysis and engineering model. In developing its conversion cost estimates, DOE conservatively assumed manufacturers would redesign all noncompliant consumer gas-fired and heat pump pool heaters to comply with new and amended energy conservation standards (electric resistance pool heaters are discussed further in this section). Manufacturers could choose to drop some models that do not meet the levels prescribed by new and amended standards. Therefore, total product and capital conversion costs may be lower than the estimates calculated as part of this analysis.

In response to the April 2022 NOPR, several interested parties commented on the conversion cost estimates used in the April 2022 NOPR analysis. BWC stated that DOE underestimated the amount of time and resources required to meet compliance of the proposed consumer pool heater standards and test procedures. (BWC, No. 12 at pp. 4–5) Fluidra stated they could provide information regarding industry capital and product conversion costs of compliance associated with the analyzed energy conservation standards for consumer pool heaters evaluated in this NOPR only in a confidential manufacturer interview. (Fluidra, No. 18 at p. 4) Rheem also stated that they are willing to discuss DOE's conversion cost analysis with DOE's consultant during a confidential meeting. (Rheem, No. 19 at p. 9) AquaCal also claimed that the EL 4 proposed by DOE for electric consumer pool heaters would have a major impact on the heat pump pool heater industry from cost to engineer and produce. (AquaCal, No. 11 at p. 1)

After the April 2022 NOPR was published, DOE interviewed several manufacturers to discuss specific conversion costs their companies would likely incur at each efficiency level. BWC stated that the DOE significantly underestimated the burden that manufacturers would face to redesign products. They claimed that redesigning gas-fired consumer pool heaters to meet the EL 2 levels would require more time and resources than the 18 months of engineering time per model that DOE estimated in the April 2022 NOPR analysis. As this would require modifications to input rates and heat exchanger designs, and product testing, all of which would require more than 18 months of engineering time. BWC also stated that manufacturers would need to conduct a variety of testing including combustion, emissions, and certification testing in addition to redesigning non-compliant models. (BWC, No. 12 at pp. 2–3)

DOE updated the conversion cost estimates for this final rule analysis based on these comments and the confidential manufacturer interviews conducted after the publication of the April 2022 NOPR.

Product conversion costs are calculated on a per model basis and are primarily driven by engineering R&D costs and testing costs. R&D costs include engineering time necessary to redesign non-compliant consumer pool heater models. DOE assumed that manufacturers would discontinue all their electric resistance consumer pool heater models for any standard level above baseline for electric consumer pool heaters, because electric resistance consumer pool heaters use different technologies and designs than heat pump consumer pool heaters. Consequently, no redesign costs are assigned to the redesign of electric resistance consumer pool heater models.

For heat pump consumer pool heaters, all design options include growing the size of the evaporator. DOE assumed that the per model redesign effort, for electric heat pump consumer pool heaters, is the same to redesign a product to meet EL 2 and EL 3 but would require more engineering design time to redesign a product to meet EL 4 and EL 5. However, the number of models that would be required to be redesigned would vary for each EL required by the analyzed standard. In the April 2022 NOPR analysis, DOE estimated six months of engineering time per model for electric heat pump consumer pool heaters to meet all analyzed ELs. 87 FR 22640, 22684–22685. However, based on confidential interviews with manufacturers conducted after the publication of the April 2022 NOPR, manufacturers stated that there would be a higher per model redesign effort to meet standards at EL 4 and EL 5, compared to meeting standards at EL 2 or EL 3. Manufacturers stated that more complicated engineering designs would be required to be used at EL 4 and EL 5 as well as tighter manufacturing tolerances that would require more engineering time. Therefore, DOE increased the engineering effort for electric heat pump

consumer pool heaters to meet EL 4 and EL 5. For this final rule, DOE estimated a redesign effort of six months of engineering time per model for electric heat pump consumer pool heaters to meet EL 2 and EL 3 (the same estimate used in the April 2022 NOPR), and 12 months of engineering time per model to meet EL 4 and EL 5 (based on feedback provided during confidential manufacturer interviews).

For gas-fired consumer pool heaters, DOE estimated that the redesign effort varies for each efficiency level. The design option analyzed at EL 1 replaces the standing pilot with an electronic ignition system. This entails a component swap and requires the addition of a sparker. DOE estimates a total of two months of engineering time per model to redesign a model with a standing pilot to an electronic ignition. The design option analyzed at EL 2 incorporates a blower. Product conversion costs involve the selection, qualification, and safety testing of the blower. In the April 2022 NOPR analysis DOE estimated 18 months of engineering time per model to meet EL 2, and 24 months of engineering time per model to meet EL 3 for gas-fired consumer pool heaters. 87 FR 22640, 22685. However, based on confidential interviews with manufacturer conducted after the publication of the April 2022 NOPR, DOE increased the engineering effort for gas-fired consumer pool heaters to meet EL 2 and EL 3. Manufacturers stated that at EL 2 there would be a much smaller margin between the standards required at EL 2 and efficiencies at which gas-fired pool heater will condense. Therefore, there will be a significant engineering effort to ensure both product reliability and compliance at EL 2. Therefore, in this Final Rule analysis, DOE estimated a redesign effort of 24 months of engineering time to redesign a gas-fired consumer pool heater model to meet EL 2 (per model). The design option analyzed at max-tech level incorporates condensing technology, which requires a significant amount of redesign to fine tune the gas-fired consumer pool heater such that it can accommodate condensate. Manufacturers stated that they will have to change the material for most of their heat exchangers, which would require substantially more resources than estimated in the April 2022 NOPR analysis. Therefore, in this Final Rule analysis, DOE estimated a redesign effort of 48 months of engineering time to redesign a gas-fired consumer pool heater model to meet EL 3 (per model). Based on this additional, and more recent, information provided during manufacturers interviews DOE increased the estimated per model conversion costs for gas-fired consumer pool heaters at EL 2 and EL 3.

In addition to these redesign costs, DOE estimated a variety of testing costs including certification testing, verification testing, and combustion and emissions testing (for gas-fired consumer pool heaters). DOE estimated that gas-fired consumer pool heaters would require approximately 100 hours of testing to meet EL 1; 1,200 hours of testing to meet EL 2; and 3,500 hours of testing to meet EL 3 for each model that would need to be redesigned due to energy conservation standards. These testing costs include engineers, lab technicians, and all other employees involved in the testing process. For electric heat pump consumer pool heaters DOE estimated testing costs would be approximately $6,500 per model for all efficiency levels analyzed that would need to be redesigned due to energy conservation standards.

Capital conversion costs are estimated on a per manufacturer basis. DOE developed a list of manufacturers of gas-fired, heat pump, and electric resistance consumer pool heaters using manufacturer's websites and public databases such as AHRI,[143] DOE's publicly available CCD,[144] and CEC's MAEDbS.[145] For gas-fired consumer pool heaters, capital conversion costs would not be required at EL 1, since manufacturers would likely meet this EL by switching the ignition system from a standing pilot to electronic ignition. This is a component swap and likely would not require any capital investments. At EL 2, DOE estimated each manufacturer making gas-fired consumer pool heaters would be required to invest approximately $1 million per manufacturer to incorporate the blower that would likely be needed to meet this EL. At EL 3, manufacturers would likely be required to use condensing technology to meet this EL. This would require larger investments from manufacturers to necessitate major changes to tooling to make condensing heat exchangers as well as changes to injection molding machinery to accommodate larger cabinet sizes. At EL 2, DOE estimated each manufacturer making gas-fired consumer pool heaters would be required to invest approximately $4 million per manufacturer to incorporate condensing technology for all gas-fired consumer pool heater models manufactured. This $4 million investment per manufacturer would be in addition to the $1 million required to achieve EL 2.

For electric heat pump consumer pool heaters, DOE estimated that a manufacturer that makes their own heat exchangers would be required to make approximately $2.5 million in capital investments (per manufacturer) to meet EL 3 and above. For a manufacturer that does not make their own heat exchangers, would be required to make approximately $130,000 in tooling costs to be able to incorporate a larger heat exchanger into their products.

Lastly, for this final rule analysis DOE updated the model database of consumer pool heaters from the database that was used in the NOPR analysis, to reflect all consumer pool heater models that are currently available on the market. DOE used the most recent data available from DOE's CCD, CEC's MAEDbS, and AHRI's certification database for this final rule analysis. DOE identified a total of 79 unique basic models for gas-fired consumer pool heaters, 190 unique basic models for electric heat pump consumer pool heaters, and 20 unique basic models for electric resistance consumer pool heaters. These unique basic model counts, along with their estimated ELs, were used when estimating the total industry product and capital conversion costs used in this final rule analysis.

DOE assumed all conversion costs will occur between the year of publication of the final rule and the year by which manufacturers must comply with new and amended energy conservation standards. Additionally, for the final rule analysis DOE updated the conversion cost estimates from 2020 dollars into 2021 dollars.

The conversion cost estimates used in the GRIM can be found in Table IV.17 and in section IV.J.2.c of this document. For additional information on the estimated capital and product conversion costs, see chapter 12 of the final rule TSD.

[143] See *www.ahridirectory.org* (Last accessed on October 10, 2022).

[144] See *www.regulations.doe.gov/certification-data* (Last accessed on October 10, 2022).

[145] See *cacertappliances.energy.ca.gov/Pages/Search/AdvancedSearch.aspx* (Last accessed on October 10, 2022).

TABLE IV.17—INDUSTRY PRODUCT AND CAPITAL CONVERSION COSTS PER EFFICIENCY LEVEL

| | Units | Product class | Efficiency level | | | | |
|---|---|---|---|---|---|---|---|
| | | | EL 1 | EL 2 | EL 3 | EL 4 | EL 5 |
| Product Conversion Costs | *2021$ millions* | Gas-Fired | $0.1 | $14.1 | $63.1 | ..... | ..... |
| | | Electric | 1.2 | 2.6 | 9.0 | $19.9 | $24.8 |
| Capital Conversion Costs | *2021$ millions* | Gas-Fired | 0.0 | 5.0 | 29.0 | ..... | ..... |
| | | Electric | 0.0 | 0.8 | 9.5 | 9.5 | 9.5 |

d. Stranded Assets

In addition to capital and product conversion costs, new and amended energy conservation standards could create stranded assets (*i.e.,* tooling and equipment that would have been used for a longer time if the energy conservation standard had not made them obsolete). In the compliance year, manufacturers write down the remaining undepreciated book value of existing tooling and equipment rendered obsolete by new and amended energy conservation standards.

DOE assumed that manufacturers discontinue all electric resistance consumer pool heaters for any electric consumer pool heater standard established above baseline. Manufacturers of electric resistance consumer pool heaters typically purchase components from vendors and assemble them in-house. These manufacturers do not own capital equipment or machinery and therefore stranded assets are limited for electric resistance consumer pool heater manufacturers.

In response to the NOPR, AHRI and PHTA stated they have no information at this time to suggest that the estimates provided for stranded assets are inaccurate. (AHRI and PHTA, No. 20 at p. 9) Rheem stated that it was willing to discuss DOE's stranded asset analysis with DOE's consultant during a confidential meeting. (Rheem, No. 19 at p. 9)

For the final rule analysis DOE converted the April 2022 NOPR stranded asset estimates from 2020$ into 2021$. DOE did not make any other updates to these stranded asset estimates.

e. Manufacturer Markup Scenarios

MSPs include direct manufacturing production costs (*i.e.,* labor, materials, and overhead estimated in DOE's MPCs) and all non-production costs (*i.e.,* SG&A, R&D, and interest), along with profit. To calculate the MSPs in the GRIM, DOE applied non-production cost markups to the MPCs estimated in the engineering analysis for each product class and efficiency level. Modifying these markups in the standards case yields different sets of impacts on manufacturers.

In the April 2022 NOPR analysis DOE used a manufacturer markup of 1.33 for gas-fired consumer pool heaters and a manufacturer markup of 1.28 for electric consumer pool heaters. 87 FR 22640, 22686. AHRI and PHTA encouraged DOE to conduct additional manufacturer interviews to ensure it captures products and conditions that best represent the current state of markups. (AHRI and PHTA, No. 20 at p. 6) As stated previously, DOE conducted interviews with manufacturers after the publication of the April 2022 NOPR. During these manufacturer interviews, several manufacturers stated the estimated manufacturer markups for each product class of consumer pool heaters used in the April 2022 NOPR analysis were lower than their manufacturer markups for those products. To address this, DOE revisited all publicly traded consumer pool heater manufacturer's financial statements for the past 5 years. For this time frame, all publicly traded consumer pool heater manufacturers had a corporate-level manufacturer markups greater than 1.33 (the highest manufacturer markup used in the April 2022 NOPR analysis) and during manufacturer interviews conducted after the publication of the April 2022 NOPR, all manufacturers stated that the manufacturer markups used in the April 2022 NOPR analysis should be increased. DOE recognizes that corporate-level manufacturer markups can significantly vary by products (for manufacturers that manufacture multiple products). However, DOE revised the manufacturer markups for this final rule analysis, based on the public corporate-level data and the confidential product-specific data provided by manufacturers during manufacturer interviews. DOE increased the gas-fired consumer pool heater manufacturer markup from 1.33 used in the April 2022 NOPR analysis to 1.44 and increased the electric consumer pool heater manufacturer markup from 1.28 used in the April 2022 NOPR analysis to 1.39 for this final rule analysis.

For the MIA, DOE modeled two standards-case markup scenarios to represent uncertainty regarding the potential impacts on prices and profitability for manufacturers following the implementation of new and amended energy conservation standards: (1) a preservation of gross margin scenario; and (2) a preservation of operating profit scenario. These scenarios lead to different manufacturer margins that, when applied to the MPCs, result in varying revenue and cash flow impacts.

Under the preservation of gross margin scenario, DOE applied a single uniform ''gross margin'' across all efficiency levels, which assumes that manufacturers would be able to maintain the same amount of profit as a percentage of revenues at all efficiency levels within a product class. As MPCs increase with efficiency, this scenario implies that the absolute dollar markup will increase as well. Therefore, DOE assumes that this scenario represents the upper bound to industry profitability under energy conservation standards.

Under the preservation of operating profit scenario, DOE modeled a situation in which manufacturers are not able to increase per-unit operating profit in proportion to increases in MPCs. Under this scenario, as the MPCs increase, manufacturers are generally required to reduce the manufacturer markup to maintain a cost competitive offering in the market. Therefore, gross margin (as a percentage) shrinks in the standards cases. This manufacturer markup scenario represents the lower bound to industry profitability under new and amended energy conservation standards.

A comparison of industry financial impacts under the two manufacturer markup scenarios is presented in section V.B.2.a of this document.

3. Manufacturer Interviews

DOE conducted interviews with manufacturers following the October 2015 NODA, which was used to conduct parts of the April 2022 NOPR analysis. Additionally, DOE conducted interviews with manufacturers

following the publication of the April 2022 NOPR. Both of these rounds of manufacturer interviews informed the final rule analysis. In these interviews, DOE asked manufacturers to describe their major concerns with new and amended consumer pool heater energy conservation standards. During manufacturers interviews conducted prior to the publication of the April 2022 NOPR, manufacturers identified three major areas of concern: (1) use of integrated thermal efficiency metric for electric consumer pool heaters; (2) cost and complexity of installing condensing gas-fired consumer pool heaters; and (3) impact on profitability. These concerns were discussed in the April 2022 NOPR (*see* 87 FR 22640, 22686).

Additionally, manufacturers identified two areas of concern regarding the April 2022 NOPR analysis during manufacturer interviews conducted after the publication of the April 2022 NOPR: (1) analyzed MPCs, MSPs, and manufacturer markups being low and needing to reflect the latest economic status; and (2) conversion costs estimated in the April 2022 NOPR analysis being too low.

Manufacturer interviews are conducted under non-disclosure agreements (''NDAs''), so DOE does not document these discussions in the same way that it does public comments in the comment summaries and DOE's responses throughout the rest of this document.

a. Manufacturer Product Costs, Manufacturer Selling Prices, and Manufacturer Markups

Manufacturers stated that there have been increases in costs of shipping, materials, and labor due to disruptions in the global supply chains, inflation, and other factors related to COVID–19 since the analysis was conducted for the April 2022 NOPR. Manufacturers urged DOE to update specific costs to be more reflective of the current market conditions. Additionally, manufacturers stated that the manufacturer markups used in the April 2022 NOPR were smaller than the manufacturer markups in the current consumer pool heater market. As discussed in section IV.C.2 of this document, DOE increased the MPCs used in this final rule analysis to better reflect the current market conditions consumer pool heater manufacturers are facing. Additionally, as discussed in section IV.J.2.e of this document, DOE increased the manufacturer markups used in this final rule analysis to better represent the current consumer pool heater market.

b. Conversion Costs

Manufacturers stated that DOE underestimated the conversion costs that manufacturers would incur for both gas-fired and electric consumer pool heater manufacturers that were estimated in the April 2022 NOPR. Manufacturers claimed that, in addition to underestimating the redesign costs, DOE also did not accurately account for the additional combustion, emissions, and other safety testing that manufacturers would have to conduct if they had to redesign a gas-fired consumer pool heater model. As discussed in section IV.J.2.c of this document, DOE increased the estimated conversion costs used in this final rule analysis and included additional testing costs associated with redesigning gas-fired consumer pool heater models.

*K. Emissions Analysis*

The emissions analysis consists of two components. The first component estimates the effect of potential energy conservation standards on power sector and site (where applicable) combustion emissions of $CO_2$, $NO_X$, $SO_2$, and Hg. The second component estimates the impacts of potential standards on emissions of two additional greenhouse gases, $CH_4$ and $N_2O$, as well as the reductions in emissions of other gases due to ''upstream'' activities in the fuel production chain. These upstream activities comprise extraction, processing, and transporting fuels to the site of combustion.

The analysis of electric power sector emissions of $CO_2$, $NO_X$, $SO_2$, and Hg uses emissions intended to represent the marginal impacts of the change in electricity consumption associated with amended or new standards. The methodology is based on results published for the *AEO,* including a set of side cases that implement a variety of efficiency-related policies. The methodology is described in appendix 13A in the final rule TSD. The analysis presented in this rulemaking uses projections from *AEO2022.* Power sector emissions of $CH_4$ and $N_2O$ from fuel combustion are estimated using Emission Factors for Greenhouse Gas Inventories published by the Environmental Protection Agency (EPA).[146]

The on-site operation of consumer pool heaters involves combustion of fossil fuels and results in emissions of $CO_2$, $NO_X$, $SO_2$, $CH_4$, and $N_2O$ where these products are used. Site emissions of these gases were estimated using Emission Factors for Greenhouse Gas Inventories and, for $NO_X$ and $SO_2$, emissions intensity factors from an EPA publication.[147]

FFC upstream emissions, which include emissions from fuel combustion during extraction, processing, and transportation of fuels, and ''fugitive'' emissions (direct leakage to the atmosphere) of $CH_4$ and $CO_2$, are estimated based on the methodology described in chapter 15 of the final rule TSD.

The emissions intensity factors are expressed in terms of physical units per MWh or MMBtu of site energy savings. For power sector emissions, specific emissions intensity factors are calculated by sector and end use. Total emissions reductions are estimated using the energy savings calculated in the national impact analysis.

AHRI and PHTA noted that the proposed EL for electric pool heaters requires the use of heat pump technology. Therefore, DOE should consider refrigerant leaks in its emissions analysis. (AHRI and PHTA, No. 20 at pp. 910)

In response, given that the vast majority of the electric pool heater market is already at efficiency levels using heat pumps, any analysis including refrigerant leaks would not alter the economic justification for the rule. DOE also notes that refrigerant leaks are not captured within the scope of DOE's emissions analysis, which focuses on power plant emissions and emissions from site combustion.

1. Air Quality Regulations Incorporated in DOE's Analysis

DOE's no-new-standards case for the electric power sector reflects the *AEO,* which incorporates the projected impacts of existing air quality regulations on emissions. *AEO2022* generally represents current legislation and environmental regulations, including recent government actions, that were in place at the time of preparation of *AEO2022,* including the emissions control programs discussed in the following paragraphs.[148]

$SO_2$ emissions from affected electric generating units (''EGUs'') are subject to

[146] Available at *www.epa.gov/sites/production/files/2021-04/documents/emission-factors_apr2021.pdf* (last accessed October 15, 2022).

[147] U.S. Environmental Protection Agency. External Combustion Sources. In *Compilation of Air Pollutant Emission Factors.* AP–42. Fifth Edition. Volume I: Stationary Point and Area Sources. Chapter 1. Available at *www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors#Proposed/* (last accessed October 15, 2022).

[148] For further information, *see* the Assumptions to *AEO2022* report that sets forth the major assumptions used to generate the projections in the Annual Energy Outlook. Available at *www.eia.gov/outlooks/aeo/assumptions/* (last accessed October 15, 2022).

nationwide and regional emissions cap-and-trade programs. Title IV of the Clean Air Act sets an annual emissions cap on $SO_2$ for affected EGUs in the 48 contiguous States and the District of Columbia (''DC''). (42 U.S.C. 7651 *et seq.*) $SO_2$ emissions from numerous States in the eastern half of the United States are also limited under the Cross-State Air Pollution Rule (''CSAPR''). 76 FR 48208 (Aug. 8, 2011). CSAPR requires these States to reduce certain emissions, including annual $SO_2$ emissions, and went into effect as of January 1, 2015.[149] *AEO2022* incorporates implementation of CSAPR, including the update to the CSAPR ozone season program emission budgets and target dates issued in 2016. 81 FR 74504 (Oct. 26, 2016). Compliance with CSAPR is flexible among EGUs and is enforced through the use of tradable emissions allowances. Under existing EPA regulations, for states subject to $SO_2$ emissions limits under CSAPR, any excess $SO_2$ emissions allowances resulting from the lower electricity demand caused by the adoption of an efficiency standard could be used to permit offsetting increases in $SO_2$ emissions by another regulated EGU.

However, beginning in 2016, $SO_2$ emissions began to fall as a result of the Mercury and Air Toxics Standards (''MATS'') for power plants. 77 FR 9304 (Feb. 16, 2012). The final rule establishes power plant emission standards for mercury, acid gases, and non-mercury metallic toxic pollutants. In order to continue operating, coal plants must have either flue gas desulfurization or dry sorbent injection systems installed. Both technologies, which are used to reduce acid gas emissions, also reduce $SO_2$ emissions. Because of the emissions reductions under the MATS, it is unlikely that excess $SO_2$ emissions allowances resulting from the lower electricity demand would be needed or used to permit offsetting increases in $SO_2$ emissions by another regulated EGU. Therefore, energy conservation standards that decrease electricity generation will generally reduce $SO_2$ emissions. DOE estimated $SO_2$ emissions reduction using emissions factors based on *AEO2022.*

CSAPR also established limits on $NO_X$ emissions for numerous States in the eastern half of the United States. Energy conservation standards would have little effect on $NO_X$ emissions in those States covered by CSAPR emissions limits if excess $NO_X$ emissions allowances resulting from the lower electricity demand could be used to permit offsetting increases in $NO_X$ emissions from other EGUs. In such case, $NO_X$ emissions would remain near the limit even if electricity generation goes down. Depending on the configuration of the power sector in the different regions and the need for allowances, however, $NO_X$ emissions might not remain at the limit in the case of lower electricity demand. That would mean that standards might reduce $NO_X$ emissions in covered States. Despite this possibility, DOE has chosen to be conservative in its analysis and has maintained the assumption that standards will not reduce $NO_X$ emissions in States covered by CSAPR. Standards would be expected to reduce $NO_X$ emissions in the States not covered by CSAPR. DOE used *AEO2022* data to derive $NO_X$ emissions factors for the group of States not covered by CSAPR.

The MATS limit mercury emissions from power plants, but they do not include emissions caps and, as such, DOE's energy conservation standards would be expected to slightly reduce Hg emissions. DOE estimated mercury emissions reduction using emissions factors based on *AEO2022,* which incorporates the MATS.

### *L. Monetizing Emissions Impacts*

As part of the development of this final rule, for the purpose of complying with the requirements of Executive Order 12866, DOE considered the estimated monetary benefits from the reduced emissions of $CO_2$, $CH_4$, $N_2O$, $NO_X$, and $SO_2$ that are expected to result from each of the TSLs considered. In order to make this calculation analogous to the calculation of the NPV of consumer benefit, DOE considered the reduced emissions expected to result over the lifetime of products shipped in the projection period for each TSL. This section summarizes the basis for the values used for monetizing the emissions benefits and presents the values considered in this final rule.

To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG). On social cost of emissions, Environmental Advocates suggested that DOE strengthen its economic and policy justifications, such as by explicitly concluding that the theory and evidence for international reciprocity justify a focus on the full global values and consider including a discussion of domestic-only estimates. Environmental Advocates stated that DOE should consider conducting sensitivity analysis using a sounder domestic-only estimate as a backstop and should explicitly conclude that the rule is cost-benefit justified even using a domestic-only valuation that may still undercount climate benefits—and that the rule is easily cost-benefit justified even without counting any climate benefits. Environmental Advocates stated that DOE should continue to use of the interim SC–GHG values in its rulemakings as conservative estimates. (Environmental Advocates, No. 14 at p. 2)

#### 1. Monetization of Greenhouse Gas Emissions

DOE estimates the monetized benefits of the reductions in emissions of $CO_2$, $CH_4$, and $N_2O$ by using a measure of the SC of each pollutant (*e.g.,* SC–$CO_2$). These estimates represent the monetary value of the net harm to society associated with a marginal increase in emissions of these pollutants in a given year, or the benefit of avoiding that increase. These estimates are intended to include (but are not limited to) climate-change-related changes in net agricultural productivity, human health, property damages from increased flood risk, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services.

DOE exercises its own judgment in presenting monetized climate benefits as recommended by applicable Executive orders, and DOE would reach the same conclusion presented in this proposed rulemaking in the absence of the social cost of greenhouse gases. That is, the social costs of greenhouse gases, whether measured using the February 2021 interim estimates presented by the Interagency Working Group on the Social Cost of Greenhouse Gases or by another means, did not affect the rule ultimately proposed by DOE.

DOE estimated the global social benefits of $CO_2$, $CH_4$, and $N_2O$ reductions (*i.e.,* SC–GHGs) using the estimates presented in the Technical Support Document: Social Cost of

[149] CSAPR requires states to address annual emissions of $SO_2$ and $NO_X$, precursors to the formation of fine particulate matter (''$PM_{2.5}$'') pollution, in order to address the interstate transport of pollution with respect to the 1997 and 2006 $PM_{2.5}$ National Ambient Air Quality Standards (''NAAQS''). CSAPR also requires certain states to address the ozone season (May-September) emissions of $NO_X$, a precursor to the formation of ozone pollution, in order to address the interstate transport of ozone pollution with respect to the 1997 ozone NAAQS. 76 FR 48208 (Aug. 8, 2011). EPA subsequently issued a supplemental rule that included an additional five states in the CSAPR ozone season program; 76 FR 80760 (Dec. 27, 2011) (Supplemental Rule), and EPA issued the CSAPR Update for the 2008 ozone NAAQS. 81 FR 74504 (Oct. 26, 2016).

Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990, published in February 2021 by the IWG. The SC–GHGs is the monetary value of the net harm to society associated with a marginal increase in emissions in a given year, or the benefit of avoiding that increase. In principle, SC–GHGs includes the value of all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk and natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services. The SC–GHGs therefore, reflects the societal value of reducing emissions of the gas in question by one metric ton. The SC–GHGs is the theoretically appropriate value to use in conducting benefit-cost analyses of policies that affect $CO_2$, $N_2O$ and CH4 emissions. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees that the interim SC–GHG estimates represent the most appropriate estimate of the SC–GHG until revised estimates have been developed reflecting the latest, peer-reviewed science.

The SC–GHGs estimates presented here were developed over many years, using transparent process, peer-reviewed methodologies, the best science available at the time of that process, and with input from the public. Specifically, in 2009, the IWG, that included the DOE and other executive branch agencies and offices was established to ensure that agencies were using the best available science and to promote consistency in the social cost of carbon ($SC–CO_2$) values used across agencies. The IWG published $SC–CO_2$ estimates in 2010 that were developed from an ensemble of three widely cited integrated assessment models (IAMs) that estimate global climate damages using highly aggregated representations of climate processes and the global economy combined into a single modeling framework. The three IAMs were run using a common set of input assumptions in each model for future population, economic, and $CO_2$ emissions growth, as well as equilibrium climate sensitivity—a measure of the globally averaged temperature response to increased atmospheric $CO_2$ concentrations. These estimates were updated in 2013 based on new versions of each IAM. In August 2016 the IWG published estimates of the social cost of methane ($SC–CH_4$) and nitrous oxide ($SC–N_2O$) using methodologies that are consistent with the methodology underlying the $SC–CO_2$ estimates. The modeling approach that extends the IWG $SC–CO_2$ methodology to non-$CO_2$ GHGs has undergone multiple stages of peer review. The $SC–CH_4$ and $SC–N_2O$ estimates were developed by Marten *et al.*[150] and underwent a standard double-blind peer review process prior to journal publication.

In 2015, as part of the response to public comments received to a 2013 solicitation for comments on the $SC–CO_2$ estimates, the IWG announced a National Academies of Sciences, Engineering, and Medicine review of the $SC–CO_2$ estimates to offer advice on how to approach future updates to ensure that the estimates continue to reflect the best available science and methodologies. In January 2017, the National Academies released their final report, Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide, and recommended specific criteria for future updates to the $SC–CO_2$ estimates, a modeling framework to satisfy the specified criteria, and both near-term updates and longer-term research needs pertaining to various components of the estimation process (National Academies, 2017).[151] Shortly thereafter, in March 2017, President Trump issued Executive Order 13783, which disbanded the IWG, withdrew the previous TSDs, and directed agencies to ensure $SC–CO_2$ estimates used in regulatory analyses are consistent with the guidance contained in OMB's Circular A–4, ''including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates'' (E.O. 13783, Section 5(c)). Benefit-cost analyses following E.O. 13783 used SC–GHG estimates that attempted to focus on the U.S.-specific share of climate change damages as estimated by the models and were calculated using two discount rates recommended by Circular A–4, 3 percent and 7 percent. All other methodological decisions and model versions used in SC–GHG calculations remained the same as those used by the IWG in 2010 and 2013, respectively.

On January 20, 2021, President Biden issued Executive Order 13990, which re-established the IWG and directed it to ensure that the U.S. Government's estimates of the social cost of carbon and other greenhouse gases reflect the best available science and the recommendations of the National Academies (2017). The IWG was tasked with first reviewing the SC–GHG estimates currently used in Federal analyses and publishing interim estimates within 30 days of the E.O. that reflect the full impact of GHG emissions, including by taking global damages into account. The interim SC–GHG estimates published in February 2021 are used here to estimate the climate benefits for this proposed rulemaking. The E.O. instructs the IWG to update the interim SC–GHG estimates by January 2022, taking into consideration the advice of the National Academies of Science, Engineering, and Medicine as reported in Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide (2017) and other recent scientific literature. The February 2021 SC–GHG TSD provides a complete discussion of the IWG's initial review conducted under E.O. 13990. In particular, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to reflect the full impact of GHG emissions in multiple ways.

First, the IWG found that the SC–GHG estimates used under E.O. 13783 fail to fully capture many climate impacts that affect the welfare of U.S. citizens and residents, and those impacts are better reflected by global measures of the SC–GHG. Examples of omitted effects from the E.O. 13783 estimates include direct effects on U.S. citizens, assets, and investments located abroad, supply chains, U.S. military assets and interests abroad, and tourism, and spillover pathways such as economic and political destabilization and global migration that can lead to adverse impacts on U.S. national security, public health, and humanitarian concerns. In addition, assessing the benefits of U.S. GHG mitigation activities requires consideration of how those actions may affect mitigation activities by other countries, as those international mitigation actions will provide a benefit to U.S. citizens and residents by mitigating climate impacts that affect U.S. citizens and residents. A wide range of scientific and economic experts have emphasized the issue of reciprocity as support for considering global damages of GHG emissions. If the United States does not consider impacts on other countries, it is difficult to convince other countries to consider the impacts of their emissions on the United States. The only way to achieve an

[150] Marten, A.L., E.A. Kopits, C.W. Griffiths, S.C. Newbold, and A. Wolverton. Incremental $CH_4$ and $N_2O$ mitigation benefits consistent with the U.S. Government's $SC–CO_2$ estimates. *Climate Policy.* 2015. 15(2): pp. 272–298.

[151] National Academies of Sciences, Engineering, and Medicine. *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide.* 2017. The National Academies Press: Washington, DC.

efficient allocation of resources for emissions reduction on a global basis—and so benefit the U.S. and its citizens—is for all countries to base their policies on global estimates of damages. As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with this assessment and, therefore, in this proposed rule DOE centers attention on a global measure of SC–GHG. This approach is the same as that taken in DOE regulatory analyses from 2012 through 2016. A robust estimate of climate damages that accrue only to U.S. citizens and residents does not currently exist in the literature. As explained in the February 2021 TSD, existing estimates are both incomplete and an underestimate of total damages that accrue to the citizens and residents of the U.S. because they do not fully capture the regional interactions and spillovers previously discussed, nor do they include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature. As noted in the February 2021 SC–GHG TSD, the IWG will continue to review developments in the literature, including more robust methodologies for estimating a U.S.-specific SC–GHG value, and explore ways to better inform the public of the full range of carbon impacts. As a member of the IWG, DOE will continue to follow developments in the literature pertaining to this issue.

Second, the IWG found that the use of the social rate of return on capital (7 percent under current OMB Circular A–4 guidance) to discount the future benefits of reducing GHG emissions inappropriately underestimates the impacts of climate change for the purposes of estimating the SC–GHG. Consistent with the findings of the National Academies (2017) and the economic literature, the IWG continued to conclude that the consumption rate of interest is the theoretically appropriate discount rate in an intergenerational context,[152] and recommended that discount rate uncertainty and relevant aspects of intergenerational ethical considerations be accounted for in selecting future discount rates.

Furthermore, the damage estimates developed for use in the SC–GHG are estimated in consumption-equivalent terms, and so an application of OMB Circular A–4's guidance for regulatory analysis would then use the consumption discount rate to calculate the SC–GHG. DOE agrees with this assessment and will continue to follow developments in the literature pertaining to this issue. DOE also notes that while OMB Circular A–4, as published in 2003, recommends using 3% and 7% discount rates as ''default'' values, Circular A–4 also reminds agencies that ''different regulations may call for different emphases in the analysis, depending on the nature and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to the key assumptions.'' On discounting, Circular A–4 recognizes that ''special ethical considerations arise when comparing benefits and costs across generations,'' and Circular A–4 acknowledges that analyses may appropriately ''discount future costs and consumption benefits . . . at a lower rate than for intragenerational analysis.'' In the 2015 Response to Comments on the Social Cost of Carbon for Regulatory Impact Analysis, OMB, DOE, and the other IWG members recognized that ''Circular A–4 is a living document'' and ''the use of 7 percent is not considered appropriate for intergenerational discounting. There is wide support for this view in the academic literature, and it is recognized in Circular A–4 itself.'' Thus, DOE concludes that a 7% discount rate is not appropriate to apply to value the social cost of greenhouse gases in the analysis presented in this analysis.

To calculate the present and annualized values of climate benefits, DOE uses the same discount rate as the rate used to discount the value of damages from future GHG emissions, for internal consistency. That approach to discounting follows the same approach that the February 2021 TSD recommends ''to ensure internal consistency—*i.e.,* future damages from climate change using the SC–GHG at 2.5 percent should be discounted to the base year of the analysis using the same 2.5 percent rate.'' DOE has also consulted the National Academies' 2017 recommendations on how SC–GHG estimates can ''be combined in RIAs with other cost and benefits estimates that may use different discount rates.'' The National Academies reviewed several options, including ''presenting all discount rate combinations of other costs and benefits with [SC–GHG] estimates.''

Environmental Advocates suggested that DOE consider including additional justification for adopting the range of discount rates endorsed by the Working Group and appropriately deciding not to apply a 7% capital-based discount rate to climate impacts. Environmental Advocates stated that DOE should provide additional justification for combining climate effects discounted at an appropriate consumption-based rate with other costs and benefits discounted at a capital-based rate. Environmental Advocates stated that DOE should also argue that it is appropriate generally to focus its analysis of this rule on consumption-based rates given that most costs and benefits are projected to fall to consumption rather than to capital investments. Environmental Advocates suggested that DOE consider providing additional sensitivity analysis using discount rates of 2% or lower for climate impacts. (Environmental Advocates, No. 14 at p. 2)

DOE notes that it presents its results using four different discount rates for the SC–GHG, combined with consumer impacts at both 3 and 7 percent, in section V.B.8. For presentational purposes, DOE uses the climate benefits associated with the average SC–GHG at a 3-percent discount rate when summarizing national impacts. DOE does not have a single central SC–GHG point estimate and it emphasizes the importance and value of considering the benefits calculated using all four SC–GHG estimates.

As a member of the IWG involved in the development of the February 2021 SC–GHG TSD, DOE agrees with the above assessment and will continue to follow developments in the literature pertaining to this issue. While the IWG works to assess how best to incorporate the latest, peer reviewed science to develop an updated set of SC–GHG estimates, it set the interim estimates to be the most recent estimates developed by the IWG prior to the group being disbanded in 2017. The estimates rely on the same models and harmonized

[152] Interagency Working Group on Social Cost of Carbon. Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866. 2010. United States Government. Available at *www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf* (last accessed October 15, 2022); Interagency Working Group on Social Cost of Carbon. Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866. 2013. Available at *www.federalregister.gov/documents/2013/11/26/2013-28242/technical-support-document-technical-update-of-the-social-cost-of-carbon-for-regulatory-impact* (last accessed October 15, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Technical Support Document: Technical Update on the Social Cost of Carbon for Regulatory Impact Analysis-Under Executive Order 12866. August 2016. Available at *www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf* (last accessed October 15, 2022); Interagency Working Group on Social Cost of Greenhouse Gases, United States Government. Addendum to Technical Support Document on Social Cost of Carbon for Regulatory Impact Analysis under Executive Order 12866: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide. August 2016. Available at *www.epa.gov/sites/default/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf* (last accessed October 15, 2022).

inputs and are calculated using a range of discount rates. As explained in the February 2021 SC–GHG TSD, the IWG has recommended that agencies revert to the same set of four values drawn from the SC–GHG distributions based on three discount rates as were used in regulatory analyses between 2010 and 2016 and were subject to public comment. For each discount rate, the IWG combined the distributions across models and socioeconomic emissions scenarios (applying equal weight to each) and then selected a set of four values recommended for use in benefit-cost analyses: an average value resulting from the model runs for each of three discount rates (2.5 percent, 3 percent, and 5 percent), plus a fourth value, selected as the 95th percentile of estimates based on a 3 percent discount rate. The fourth value was included to provide information on potentially higher-than-expected economic impacts from climate change. As explained in the February 2021 SC–GHG TSD, and DOE agrees, this update reflects the immediate need to have an operational SC–GHG for use in regulatory benefit-cost analyses and other applications that was developed using a transparent process, peer-reviewed methodologies, and the science available at the time of that process. Those estimates were subject to public comment in the context of dozens of proposed rulemakings as well as in a dedicated public comment period in 2013.

There are a number of limitations and uncertainties associated with the SC–GHG estimates. First, the current scientific and economic understanding of discounting approaches suggests discount rates appropriate for intergenerational analysis in the context of climate change are likely to be less than 3 percent, near 2 percent or lower.[153] Second, the IAMs used to produce these interim estimates do not include all of the important physical, ecological, and economic impacts of climate change recognized in the climate change literature and the science underlying their ''damage functions''—*i.e.,* the core parts of the IAMs that map global mean temperature changes and other physical impacts of climate change into economic (both market and nonmarket) damages—lags behind the most recent research. For example, limitations include the incomplete treatment of catastrophic and non-catastrophic impacts in the integrated assessment models, their incomplete treatment of adaptation and technological change, the incomplete way in which inter-regional and intersectoral linkages are modeled, uncertainty in the extrapolation of damages to high temperatures, and inadequate representation of the relationship between the discount rate and uncertainty in economic growth over long time horizons. Likewise, the socioeconomic and emissions scenarios used as inputs to the models do not reflect new information from the last decade of scenario generation or the full range of projections. The modeling limitations do not all work in the same direction in terms of their influence on the SC–$CO_2$ estimates. However, as discussed in the February 2021 TSD, the IWG has recommended that, taken together, the limitations suggest that the interim SC–GHG estimates used in this final rule likely underestimate the damages from GHG emissions. DOE concurs with this assessment.

DOE's derivations of the SC–$CO_2$, SC–$N_2O$, and SC–$CH_4$ values used for this final rule are discussed in the following sections, and the results of DOE's analyses estimating the benefits of the reductions in emissions of these GHGs are presented in section V.B.6 of this document.

a. Social Cost of Carbon

The SC–$CO_2$ values used for this final rule were based on the values developed for the IWG's February 2021 TSD. Table IV.18 shows the updated sets of SC–$CO_2$ estimates from the IWG's TSD in 5-year increments from 2020 to 2050. The full set of annual values that DOE used is presented in appendix 14–A of the final rule TSD. For purposes of capturing the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate to include all four sets of SC–$CO_2$ values, as recommended by the IWG.[154]

TABLE IV.18—ANNUAL SC–$CO_2$ VALUES FROM 2021 INTERAGENCY UPDATE, 2020–2050

[2020$ per metric ton $CO_2$]

| Year | Discount rate and statistic | | | |
|---|---|---|---|---|
| | 5% Average | 3% Average | 2.5% Average | 3% 95th percentile |
| 2020 | 14 | 51 | 76 | 152 |
| 2025 | 17 | 56 | 83 | 169 |
| 2030 | 19 | 62 | 89 | 187 |
| 2035 | 22 | 67 | 96 | 206 |
| 2040 | 25 | 73 | 103 | 225 |
| 2045 | 28 | 79 | 110 | 242 |
| 2050 | 32 | 85 | 116 | 260 |

For 2051 to 2070, DOE used SC–$CO_2$ estimates published by EPA, adjusted to 2020$.[155] These estimates are based on methods, assumptions, and parameters identical to the 2020–2050 estimates published by the IWG. DOE expects additional climate benefits to accrue for any longer-life consumer pool heaters after 2070, but a lack of available SC–$CO_2$ estimates for emissions years beyond 2070 prevents DOE from monetizing these potential benefits in this analysis.

DOE multiplied the $CO_2$ emissions reduction estimated for each year by the SC–$CO_2$ value for that year in each of the four cases. DOE adjusted the values to 2021$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic

[153] Interagency Working Group on Social Cost of Greenhouse Gases (IWG). 2021. Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990. February. United States Government. Available at: *www.whitehouse.gov/briefing-room/blog/2021/02/26/a-return-to-science-evidence-based-estimates-of-the-benefits-of-reducing-climate-pollution/* (last accessed October 15, 2022).

[154] For example, the February 2021 TSD discusses how the understanding of discounting approaches suggests that discount rates appropriate for intergenerational analysis in the context of climate change may be lower than 3 percent.

[155] *See* EPA, Revised 2023 and Later Model Year Light-Duty Vehicle GHG Emissions Standards: Regulatory Impact Analysis, Washington, DC, December 2021. Available at *www.epa.gov/system/files/documents/2021-12/420r21028.pdf* (last accessed October 15, 2022).

Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the four cases using the specific discount rate that had been used to obtain the SC–$CO_2$ values in each case.

b. Social Cost of Methane and Nitrous Oxide

The SC–$CH_4$ and SC–$N_2O$ values used for this final rule were based on the values developed for the February 2021 TSD. Table IV.19 shows the updated sets of SC–$CH_4$ and SC–$N_2O$ estimates from the latest interagency update in 5-year increments from 2020 to 2050. The full set of annual values used is presented in appendix 14–A of the final rule TSD. To capture the uncertainties involved in regulatory impact analysis, DOE has determined it is appropriate to include all four sets of SC–$CH_4$ and SC–$N_2O$ values, as recommended by the IWG. DOE derived values after 2050 using the approach described above for the SC–$CO_2$.

TABLE IV.19—ANNUAL SC–$CH_4$ AND SC–$N_2O$ VALUES FROM 2021 INTERAGENCY UPDATE, 2020–2050

[2020$ per metric ton]

| Year | SC–$CH_4$ discount rate and statistic | | | | SC–$N_2O$ discount rate and statistic | | | |
|---|---|---|---|---|---|---|---|---|
| | 5% Average | 3% Average | 2.5% Average | 3% 95th percentile | 5% Average | 3% Average | 2.5% Average | 3% 95th percentile |
| 2020 | 670 | 1,500 | 2,000 | 3,900 | 5,800 | 18,000 | 27,000 | 48,000 |
| 2025 | 800 | 1,700 | 2,200 | 4,500 | 6,800 | 21,000 | 30,000 | 54,000 |
| 2030 | 940 | 2,000 | 2,500 | 5,200 | 7,800 | 23,000 | 33,000 | 60,000 |
| 2035 | 1,100 | 2,200 | 2,800 | 6,000 | 9,000 | 25,000 | 36,000 | 67,000 |
| 2040 | 1,300 | 2,500 | 3,100 | 6,700 | 10,000 | 28,000 | 39,000 | 74,000 |
| 2045 | 1,500 | 2,800 | 3,500 | 7,500 | 12,000 | 30,000 | 42,000 | 81,000 |
| 2050 | 1,700 | 3,100 | 3,800 | 8,200 | 13,000 | 33,000 | 45,000 | 88,000 |

DOE multiplied the $CH_4$ and $N_2O$ emissions reduction estimated for each year by the SC–$CH_4$ and SC–$N_2O$ estimates for that year in each of the cases. DOE adjusted the values to 2021$ using the implicit price deflator for gross domestic product (''GDP'') from the Bureau of Economic Analysis. To calculate a present value of the stream of monetary values, DOE discounted the values in each of the cases using the specific discount rate that had been used to obtain the SC–$CH_4$ and SC–$N_2O$ estimates in each case.

2. Monetization of Other Emissions Impacts

For the final rule, DOE estimated the monetized value of $NO_X$ and $SO_2$ emissions reductions from electricity generation using benefit per ton estimates for that sector from the EPA's Benefits Mapping and Analysis Program.[156] DOE used EPA's values for $PM_{2.5}$-related benefits associated with $NO_X$ and $SO_2$ and for ozone-related benefits associated with $NO_X$ for 2025 and 2030, and 2040, calculated with discount rates of 3 percent and 7 percent. DOE used linear interpolation to define values for the years not given in the 2025 to 2040 range; for years beyond 2040 the values are held constant. DOE derived values specific to the sector for consumer pool heaters using a method described in appendix 14B of the final rule TSD.

DOE also estimated the monetized value of $NO_X$ and $SO_2$ emissions reductions from site use of natural gas in PRODUCT using benefit per ton estimates from the EPA's Benefits Mapping and Analysis Program. Although none of the sectors covered by EPA refers specifically to residential and commercial buildings, the sector called ''area sources'' would be a reasonable proxy for residential and commercial buildings.[157] The EPA document provides high and low estimates for 2025 and 2030 at 3- and 7-percent discount rates.[158] DOE used the same linear interpolation and extrapolation as it did with the values for electricity generation.

DOE multiplied the site emissions reduction (in tons) in each year by the associated $/ton values, and then discounted each series using discount rates of 3 percent and 7 percent as appropriate.

*M. Utility Impact Analysis*

The utility impact analysis estimates the changes in installed electrical capacity and generation projected to result for each considered TSL. The analysis is based on published output from the NEMS associated with *AEO2022.* NEMS produces the *AEO* Reference case, as well as a number of side cases that estimate the economy-wide impacts of changes to energy supply and demand. For the current analysis, impacts are quantified by comparing the levels of electricity sector generation, installed capacity, fuel consumption and emissions in the *AEO2022* Reference case and various side cases. Details of the methodology are provided in the appendices to chapters 13 and 15 of the final rule TSD.

The output of this analysis is a set of time-dependent coefficients that capture the change in electricity generation, primary fuel consumption, installed capacity and power sector emissions due to a unit reduction in demand for a given end use. These coefficients are multiplied by the stream of electricity savings calculated in the NIA to provide estimates of selected utility impacts of potential new or amended energy conservation standards.

The utility analysis also estimates the impact on gas utilities in terms of projected changes in natural gas deliveries to consumers for each TSL.

*N. Employment Impact Analysis*

DOE considers employment impacts in the domestic economy as one factor in selecting a standard. Employment impacts from new or amended energy conservation standards include both direct and indirect impacts. Direct employment impacts are any changes in the number of employees of manufacturers of the products subject to

[156] Estimating the Benefit per Ton of Reducing $PM_{2.5}$ Precursors from 21 Sectors. *www.epa.gov/benmap/estimating-benefit-ton-reducing-pm25-precursors-21-sectors.*

[157] ''Area sources'' represents all emission sources for which states do not have exact (point) locations in their emissions inventories. Because exact locations would tend to be associated with larger sources, ''area sources'' would be fairly representative of small dispersed sources like homes and businesses.

[158] ''Area sources'' are a category in the 2018 document from EPA, but are not used in the 2021 document cited previously. See: *www.epa.gov/sites/default/files/2018-02/documents/sourceapportionmentbpttsd_2018.pdf* (last accessed October 15, 2022).

standards, their suppliers, and related service firms. The MIA addresses those impacts. Indirect employment impacts are changes in national employment that occur due to the shift in expenditures and capital investment caused by the purchase and operation of more-efficient appliances. Indirect employment impacts from standards consist of the net jobs created or eliminated in the national economy, other than in the manufacturing sector being regulated, caused by (1) reduced spending by consumers on energy, (2) reduced spending on new energy supply by the utility industry, (3) increased consumer spending on the products to which the new standards apply and other goods and services, and (4) the effects of those three factors throughout the economy.

One method for assessing the possible effects on the demand for labor of such shifts in economic activity is to compare sector employment statistics developed by the Labor Department's Bureau of Labor Statistics (''BLS''). BLS regularly publishes its estimates of the number of jobs per million dollars of economic activity in different sectors of the economy, as well as the jobs created elsewhere in the economy by this same economic activity. Data from BLS indicate that expenditures in the utility sector generally create fewer jobs (both directly and indirectly) than expenditures in other sectors of the economy.[159] There are many reasons for these differences, including wage differences and the fact that the utility sector is more capital-intensive and less labor-intensive than other sectors. Energy conservation standards have the effect of reducing consumer utility bills. Because reduced consumer expenditures for energy likely lead to increased expenditures in other sectors of the economy, the general effect of efficiency standards is to shift economic activity from a less labor-intensive sector (*i.e.,* the utility sector) to more labor-intensive sectors (*e.g.,* the retail and service sectors). Thus, the BLS data suggest that net national employment may increase due to shifts in economic activity resulting from energy conservation standards.

DOE estimated indirect national employment impacts for the standard levels considered in this final rule using an input/output model of the U.S. economy called Impact of Sector Energy Technologies version 4 (''ImSET'').[160] ImSET is a special-purpose version of the ''U.S. Benchmark National Input-Output'' (''I–O'') model, which was designed to estimate the national employment and income effects of energy-saving technologies. The ImSET software includes a computer-based I–O model having structural coefficients that characterize economic flows among 187 sectors most relevant to industrial, commercial, and residential building energy use.

DOE notes that ImSET is not a general equilibrium forecasting model, and that the uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Because ImSET does not incorporate price changes, the employment effects predicted by ImSET may over-estimate actual job impacts over the long run for this rule. Therefore, DOE used ImSET only to generate results for near-term timeframes (2028–2033), where these uncertainties are reduced. For more details on the employment impact analysis, see chapter 16 of the final rule TSD.

## V. Analytical Results and Conclusions

The following section addresses the results from DOE's analyses with respect to the considered energy conservation standards for consumer pool heaters. It addresses the TSLs examined by DOE, the projected impacts of each of these levels if adopted as energy conservation standards for consumer pool heaters, and the standards levels that DOE is adopting in this final rule. Additional details regarding DOE's analyses are contained in the final rule TSD supporting this document.

### *A. Trial Standard Levels*

In general, DOE typically evaluates potential amended standards for products and equipment by grouping individual efficiency levels for each class into TSLs. Use of TSLs allows DOE to identify and consider manufacturer cost interactions between the product classes, to the extent that there are such interactions, and market cross elasticity from consumer purchasing decisions that may change when different standard levels are set.

In the analysis conducted for this final rule, DOE analyzed the benefits and burdens of six TSLs for consumer pool heaters. DOE developed TSLs that combine efficiency levels for each analyzed product class. DOE presents the results for the TSLs in this document, while the results for all efficiency levels that DOE analyzed are in the final rule TSD.

Table V.1 presents the TSLs and the corresponding efficiency levels that DOE has identified for potential amended energy conservation standards for consumer pool heaters.

TSL 6 represents the maximum technologically feasible (''max-tech'') energy efficiency for all product classes. TSL 5 represents efficiency levels below max-tech for both electric and gas-fired pool heaters and represents the maximum energy savings excluding max-tech efficiency levels. A much greater fraction of gas-fired pool heater consumers experience a net cost compared to electric pool heater consumers at TSL 5. Therefore, TSL 4 is constructed with the same efficiency level for electric pool heaters (*i.e.,* EL 4) but reduces the efficiency level for gas-fired pool heaters (*i.e.,* EL 1). Finally, because EL 1 is the lowest analyzed efficiency level above baseline, TSLs 3, 2, and 1 are also constructed with EL 1 for gas-fired pool heaters as opposed to analyzing a no-new-standards case for this product class. TSLs 3, 2, and 1 consist of the remaining efficiency levels for electric pool heaters.

TABLE V.1—TRIAL STANDARD LEVELS FOR CONSUMER POOL HEATERS

| Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| | Efficiency Level and Representative $TE_I$ | | | | | |
| Electric Pool Heaters | 1 (387%) | 2 (483%) | 3 (534%) | 4 (551%) | 4 (551%) | 5 (595%) |

[159] *See* U.S. Department of Commerce–Bureau of Economic Analysis. *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (''RIMS II'').* 1997. U.S. Government Printing Office: Washington, DC. Available at *www.bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf* (last accessed October 15, 2022).

[160] Livingston, O.V., S.R. Bender, M.J. Scott, and R.W. Schultz. *ImSET 4.0: Impact of Sector Energy Technologies Model Description and User's Guide.* 2015. Pacific Northwest National Laboratory: Richland, WA. PNNL–24563.

TABLE V.1—TRIAL STANDARD LEVELS FOR CONSUMER POOL HEATERS—Continued

| Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| | Efficiency Level and Representative $TE_i$ | | | | | |
| Gas-fired Pool Heaters | 1 (81.3%) | 1 (81.3%) | 1 (81.3%) | 1 (81.3%) | 2 (83.3%) | 3 (94.8%) |

*B. Economic Justification and Energy Savings*

1. Economic Impacts on Individual Consumers

DOE analyzed the economic impacts on consumer pool heaters consumers by looking at the effects that potential new and amended standards at each TSL would have on the LCC and PBP. DOE also examined the impacts of potential standards on selected consumer subgroups. These analyses are discussed in the following sections.

a. Life-Cycle Cost and Payback Period

In general, higher-efficiency products affect consumers in two ways: (1) purchase price increases and (2) annual operating costs decrease. Inputs used for calculating the LCC and PBP include total installed costs (*i.e.,* product price plus installation costs), and operating costs (*i.e.,* annual energy use, energy prices, energy price trends, repair costs, and maintenance costs). The LCC calculation also uses product lifetime and a discount rate. Chapter 8 of the final rule TSD provides detailed information on the LCC and PBP analyses.

Table V.2 through Table V.5 show the LCC and PBP results for the TSLs considered for each product class. In the first of each pair of tables, the simple payback is measured relative to the baseline product. In the second table, the impacts are measured relative to the efficiency distribution in the in the no-new-standards case in the compliance year (see section IV.F.8 of this document). Because some consumers purchase products with higher efficiency in the no-new-standards case, the average savings are less than the difference between the average LCC of the baseline product and the average LCC at each TSL. The savings refer only to consumers who are affected by a standard at a given TSL. Those who already purchase a product with efficiency at or above a given TSL are not affected. Consumers for whom the LCC increases at a given TSL experience a net cost.

TABLE V.2—AVERAGE LCC AND PBP RESULTS FOR ELECTRIC POOL HEATERS

| TSL | Representative $TE_i$ *(%)* | Average costs (2021$) | | | | Simple payback (years) | Average lifetime (years) |
|---|---|---|---|---|---|---|---|
| | | Installed cost | First year's operating cost | Lifetime operating cost | LCC | | |
| 1 | 342 | 4,117 | 556 | 4,771 | 8,888 | 0.3 | 11.2 |
| 2 | 483 | 4,226 | 460 | 3,968 | 8,193 | 0.4 | 11.2 |
| 3 | 534 | 4,326 | 420 | 3,637 | 7,963 | 0.4 | 11.2 |
| 4,5 | 551 | 4,472 | 406 | 3,521 | 7,993 | 0.5 | 11.2 |
| 6 | 595 (Max Tech) | 4,666 | 392 | 3,404 | 8,070 | 0.6 | 11.2 |

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.3—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR ELECTRIC POOL HEATERS

| TSL | Representative $TE_i$ (%) | Life-cycle cost savings | |
|---|---|---|---|
| | | Average LCC savings * (2021$) | Percent of consumers that experience net cost (%) |
| 1 | 342 | 8,090 | 1.1 |
| 2 | 483 | 4,403 | 2.3 |
| 3 | 534 | 1,302 | 22.4 |
| 4,5 | 551 | 1,130 | 45.3 |
| 6 | 595 (Max Tech) | 946 | 62.9 |

* The savings represent the average LCC for affected consumers.

TABLE V.4—AVERAGE LCC AND PBP RESULTS FOR GAS-FIRED POOL HEATERS

| TSL | Representative $TE_i$ (%) | Average costs (2021$) | | | | Simple payback (years) | Average lifetime (years) |
|---|---|---|---|---|---|---|---|
| | | Installed cost | First year's operating cost | Lifetime operating cost | LCC | | |
| 1,2,3,4 | 81.3 | 3,479 | 1,819 | 15,462 | 18,940 | 0.2 | 11.2 |
| 5 | 83.3 | 3,723 | 1,785 | 15,182 | 18,906 | 2.3 | 11.2 |

TABLE V.4—AVERAGE LCC AND PBP RESULTS FOR GAS-FIRED POOL HEATERS—Continued

| TSL | Representative $TE_i$ (%) | Average costs (2021$) | | | | Simple payback (years) | Average lifetime (years) |
|---|---|---|---|---|---|---|---|
| | | Installed cost | First year's operating cost | Lifetime operating cost | LCC | | |
| 6 | 94.7(Max Tech) | 4,655 | 1,617 | 13,805 | 18,460 | 4.2 | 11.2 |

**Note:** The results for each TSL are calculated assuming that all consumers use products at that efficiency level.

TABLE V.5—AVERAGE LCC SAVINGS RELATIVE TO THE NO-NEW-STANDARDS CASE FOR GAS-FIRED POOL HEATERS

| TSL | Representative $TE_i$ (%) | Life-cycle cost savings | |
|---|---|---|---|
| | | Average LCC savings* (2021$) | Percent of consumers that experience net cost (%) |
| 1,2,3,4 | 81.3 | 783 | 0.2 |
| 5 | 83.3 | 80 | 39.1 |
| 6 | 94.7 (Max Tech) | 497 | 72.6 |

*The savings represent the average LCC for affected consumers.

b. Consumer Subgroup Analysis

In the consumer subgroup analysis, DOE estimated the impact of the considered TSLs on senior-only households and small businesses. Table V.6 and Table V.7 compare the average LCC savings and PBP at each efficiency level for the consumer subgroups with similar metrics for the entire consumer sample for Electric Pool Heaters and Gas-fired Pool Heaters. In most cases, the average LCC savings and PBP for senior-only households and small business at the considered efficiency levels are not substantially different from the average for all households. Chapter 11 of the final rule TSD presents the complete LCC and PBP results for the subgroups.

TABLE V.6—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS; ELECTRIC POOL HEATERS

| | Senior-only households | Small business | All households |
|---|---|---|---|
| **Average LCC Savings (2021$)** | | | |
| 1 | 3,560 | 19,451 | 8,090 |
| 2 | 1,635 | 19,457 | 4,403 |
| 3 | 309 | 11,380 | 1,302 |
| 4,5 | 176 | 11,087 | 1,130 |
| 6 | 19 | 10,469 | 946 |
| **Payback Period (years)** | | | |
| 1 | 0.6 | 0.3 | 0.3 |
| 2 | 0.7 | 0.3 | 0.4 |
| 3 | 0.8 | 0.3 | 0.4 |
| 4,5 | 1.0 | 0.3 | 0.5 |
| 6 | 1.2 | 0.4 | 0.6 |
| **Consumers with Net Benefit (%)** | | | |
| 1 | 4% | 41% | 8% |
| 2 | 9% | 43% | 17% |
| 3 | 45% | 78% | 56% |
| 4,5 | 31% | 77% | 42% |
| 6 | 19% | 72% | 34% |
| **Consumers with Net Cost (%)** | | | |
| 1 | 1% | 6% | 1% |
| 2 | 3% | 6% | 2% |
| 3 | 34% | 10% | 22% |
| 4,5 | 57% | 15% | 45% |
| 6 | 78% | 27% | 63% |

TABLE V.7—COMPARISON OF LCC SAVINGS AND PBP FOR CONSUMER SUBGROUPS AND ALL HOUSEHOLDS; GAS-FIRED POOL HEATERS

| | Senior-only households | Small business | All households |
|---|---|---|---|
| **Average LCC Savings (2021$)** | | | |
| 1,2,3,4 | 752 | 151 | 783 |
| 5 | (132) | 821 | 80 |
| 6 | (788) | 5,572 | 497 |
| **Payback Period (years)** | | | |
| 1,2,3,4 | 0.1 | 0.6 | 0.2 |
| 5 | 2.7 | 2.1 | 2.3 |
| 6 | 9.7 | 1.3 | 4.2 |
| **Consumers with Net Benefit (%)** | | | |
| 1,2,3,4 | 5% | 1% | 4% |
| 5 | 5% | 34% | 11% |
| 6 | 3% | 71% | 19% |
| **Consumers with Net Cost (%)** | | | |
| 1,2,3,4 | 0% | 0% | 0% |
| 5 | 49% | 13% | 39% |
| 6 | 89% | 19% | 73% |

c. Rebuttable Presumption Payback

As discussed in section III.F.2 of this document, EPCA establishes a rebuttable presumption that an energy conservation standard is economically justified if the increased purchase cost for a product that meets the standard is less than three times the value of the first-year energy savings resulting from the standard. In calculating a rebuttable presumption payback period for each of the considered TSLs, DOE used discrete values, and, as required by EPCA, based the energy use calculation on the DOE test procedures for consumer pool heaters. In contrast, the PBPs presented in section V.B.1.a of this document were calculated using distributions that reflect the range of energy use in the field.

Table V.8 presents the rebuttable-presumption payback periods for the considered TSLs for consumer pool heaters. While DOE examined the rebuttable-presumption criterion, it considered whether the standard levels considered for this rule are economically justified through a more detailed analysis of the economic impacts of those levels, pursuant to 42 U.S.C. 6295(o)(2)(B)(i), that considers the full range of impacts to the consumer, manufacturer, Nation, and environment. The results of that analysis serve as the basis for DOE to definitively evaluate the economic justification for a potential standard level, thereby supporting or rebutting the results of any preliminary determination of economic justification.

TABLE V.8—REBUTTABLE-PRESUMPTION PAYBACK PERIODS

| TSL | Electric pool heaters | Gas-fired pool heaters |
|---|---|---|
| 1 | 1.36 | 0.12 |
| 2 | 1.59 | 0.12 |
| 3 | 1.83 | 0.12 |
| 4 | 2.22 | 0.12 |
| 5 | 2.22 | 2.24 |
| 6 | 2.72 | 7.57 |

2. Economic Impacts on Manufacturers

DOE performed an MIA to estimate the impact of new and amended energy conservation standards on manufacturers of consumer pool heaters. The next section describes the expected impacts on manufacturers at each considered TSL. Chapter 12 of the final rule TSD explains the analysis in further detail.

a. Industry Cash Flow Analysis Results

In this section, DOE provides GRIM results from the analysis, which examines changes in the industry that would result from new and amended energy conservation standards. The following tables summarize the estimated financial impacts (represented by changes in INPV) of potential new and amended energy conservation standards on manufacturers of consumer pool heaters, as well as the conversion costs that DOE estimates manufacturers of consumer pool heaters would incur at each TSL.

As discussed in section IV.J.2.e of this document, DOE modeled two manufacturer markup scenarios to evaluate a range of cash flow impacts on the consumer pool heater industry: (1) the preservation of gross margin scenario and (2) the preservation of operating profit scenario. DOE considered the preservation of gross margin scenario by applying a ''gross margin percentage'' for each product class across all efficiency levels. As MPCs increase with efficiency, this scenario implies that the absolute dollar markup will increase. DOE assumed a manufacturer markup of 1.44 for gas-fired consumer pool heaters and 1.39 for electric consumer pool heaters. This manufacturer markup is consistent with the one DOE assumed in the engineering analysis and the no-new-standards case of the GRIM. Because this scenario assumes that a manufacturer's absolute dollar markup would increase as MPCs increase in the standards cases, it represents the upper-bound to industry profitability under potential new and amended energy conservation standards.

The preservation of operating profit scenario reflects manufacturers' concerns about their inability to maintain margins as MPCs increase to reach more-stringent efficiency levels. In this scenario, while manufacturers make the necessary investments required to convert their facilities to produce compliant products, operating profit remains the same in absolute

dollars, but decreases as a percentage of revenue.

Each of the modeled manufacturer markup scenarios results in a unique set of cash-flows and corresponding industry values at each TSL. In the following discussion, the INPV results refer to the difference in industry value between the no-new-standards case and each standards case resulting from the sum of discounted cash-flows from 2023 through 2057. To provide perspective on the short-run cash-flow impact, DOE includes in the discussion of results a comparison of free cash flow between the no-new-standards case and the standards case at each TSL in the year before new and amended standards are required.

Table V.9 and Table V.10 show the MIA results for both product classes at each TSL using the manufacturer markup scenarios previously described.

TABLE V.9—MANUFACTURER IMPACT ANALYSIS FOR CONSUMER POOL HEATERS UNDER THE PRESERVATION OF GROSS MARGIN SCENARIO

| | Units | No-new-standards case | Trial standard level * | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | 1 | 2 | 3 | 4 | 5 | 6 |
| INPV | *2021$ millions* | 585.7 | 585.2 | 584.5 | 577.0 | 575.0 | 587.7 | 631.6 |
| Change in INPV | *2021$ millions* | | (0.6) | (1.2) | (8.7) | (10.7) | 2.0 | 45.9 |
| | % | | (0.1) | (0.2) | (1.5) | (1.8) | 0.3 | 7.8 |
| Product Conversion Costs | *2021$ millions* | | 1.3 | 2.6 | 9.1 | 20.0 | 34.0 | 88.0 |
| Capital Conversion Costs | *2021$ millions* | | | 0.8 | 9.5 | 9.5 | 14.5 | 38.5 |
| Total Investment Required | *2021$ millions* | | 1.3 | 3.4 | 18.6 | 29.4 | 48.4 | 126.4 |

* Numbers in parentheses indicate a negative number. Numbers may not sum exactly due to rounding.

TABLE V.10—MANUFACTURER IMPACT ANALYSIS FOR CONSUMER POOL HEATERS UNDER THE PRESERVATION OF OPERATING PROFIT SCENARIO

| | Units | No-new-standards case | Trial standard level * | | | | | |
|---|---|---|---|---|---|---|---|---|
| | | | 1 | 2 | 3 | 4 | 5 | 6 |
| INPV | *2021$ millions* | 585.7 | 583.6 | 581.9 | 570.8 | 563.0 | 548.4 | 482.7 |
| Change in INPV | *2021$ millions* | | (2.2) | (3.9) | (15.0) | (22.8) | (37.3) | (103.0) |
| | % | | (0.4) | (0.7) | (2.6) | (3.9) | (6.4) | (17.6) |
| Product Conversion Costs | *2021$ millions* | | 1.3 | 2.6 | 9.1 | 20.0 | 34.0 | 88.0 |
| Capital Conversion Costs | *2021$ millions* | | | 0.8 | 9.5 | 9.5 | 14.5 | 38.5 |
| Total Investment Required | *2021$ millions* | | 1.3 | 3.4 | 18.6 | 29.4 | 48.4 | 126.4 |

* Numbers in parentheses indicate a negative number. Numbers may not sum exactly due to rounding.

At TSL 1, DOE estimates that impacts on INPV will range from −$2.2 million to −$0.6 million, or a change in INPV of −0.4 to −0.1 percent. At TSL 1, industry free cash-flow is $50.5 million, which is a decrease of approximately $0.5 million compared to the no-new-standards case value of $51.0 million in 2027, the year leading up to the adopted standards.

TSL 1 would set the energy conservation standard for both gas-fired consumer pool heaters and electric consumer pool heaters at EL 1. DOE estimates that 96 percent of gas-fired consumer pool heater shipments and 92 percent of electric consumer pool heater shipments already meet or exceed the efficiency levels analyzed at TSL 1. Gas-fired consumer pool heater manufacturers would likely need to redesign any models with a standing pilot light. DOE assumed this would require approximately two months of engineering time per model, which would cost manufacturers approximately $0.1 million. Electric heat pump consumer pool heater manufacturers would incur approximately $1.2 million in product conversion costs primarily to test all compliant electric consumer pool heater models to demonstrate compliance with standards at TSL 1. DOE estimates consumer pool heater manufacturers will incur minimal to no capital conversion costs at TSL 1.

Furthermore, no electric resistance pool heaters meet or exceed the electric consumer pool heater efficiency level analyzed at TSL 1 or above. DOE estimates manufacturers will not incur conversion costs for electric resistance pool heaters, because of the expectation that these consumer pool heater products will be discontinued, as described in section IV.J.2.c of this document.

At TSL 1, the shipment-weighted average MPC for all consumer pool heaters increases by 0.5 percent relative to the no-new-standards case shipment-weighted average MPC for all consumer pool heaters in 2028. In the preservation of gross margin scenario, manufacturers are able to fully pass on this slight cost increase to consumers. The slight increase in shipment-weighted average MPC for consumer pool heaters is slightly outweighed by the $1.3 million in conversion costs, causing a slightly negative change in INPV at TSL 1 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, manufacturers earn the same per-unit operating profit as would be earned in the no-new-standards case, but manufacturers do not earn additional profit from their investments. In this scenario, the 0.5 percent shipment-weighted average MPC increase results in a reduction in the manufacturer margin after the compliance year. This reduction in the manufacturer margin and the $1.3 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 1 under the preservation of operating profit scenario.

At TSL 2, DOE estimates that impacts on INPV will range from −$3.9 million to −$1.2 million, or a change in INPV of −0.7 percent to −0.2 percent. At TSL 2, industry free cash-flow is $49.7 million, which is a decrease of approximately $1.3 million compared to the no-new-standards case value of

$51.0 million in 2027, the year leading up to the adopted standards.

TSL 2 would set the energy conservation standard at EL 1 for gas-fired consumer pool heaters and at EL 2 for electric consumer pool heaters. DOE estimates that 96 percent of gas-fired consumer pool heater shipments and 81 percent of electric consumer pool heater shipments already meet or exceed the efficiency levels analyzed at TSL 2. Gas-fired consumer pool heater manufacturers would likely need to redesign any models with a standing pilot light. DOE assumed this would cost manufacturers approximately $0.1 million. To bring non-compliant electric heat pump consumer pool heaters into compliance and to test all electric heat pump consumer pool heaters to demonstrate compliance with standards at TSL 2, electric heat pump consumer pool heater manufacturers would incur approximately $2.6 million in product conversion costs and $0.8 million in capital conversion costs at TSL 2.

At TSL 2, the shipment-weighted average MPC for all consumer pool heaters increases by 0.8 percent relative to the no-new-standards case shipment-weighted average MPC for all consumer pool heaters in 2028. In the preservation of gross margin scenario, the slight increase in shipment-weighted average MPC for consumer pool heaters is slightly outweighed by the $3.4 million in conversion costs, causing a slightly negative change in INPV at TSL 2 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 0.8 percent shipment-weighted average MPC increase results in a reduction in the manufacturer margin after the compliance year. This reduction in the manufacturer margin and the $3.4 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 2 under the preservation of operating profit scenario.

At TSL 3, DOE estimates that impacts on INPV will range from −$15.0 million to −$8.7 million, or a change in INPV of −2.6 percent to −1.5 percent. At TSL 3, industry free cash-flow is $43.5 million, which is a decrease of approximately $7.5 million compared to the no-new-standards case value of $51.0 million in 2027, the year leading up to the adopted standards.

TSL 3 would set the energy conservation standard at EL 1 for gas-fired consumer pool heaters and at EL 3 for electric consumer pool heaters. DOE estimates that 96 percent of gas-fired consumer pool heater shipments and 22 percent of electric consumer pool heater shipments already meet or exceed the efficiency levels analyzed at TSL 3. Gas-fired consumer pool heater manufacturers would likely need to redesign any models with a standing pilot light. DOE assumed this would cost manufacturers approximately $0.1 million. To bring non-compliant electric heat pump consumer pool heaters into compliance and to test all electric heat pump consumer pool heaters to demonstrate compliance with standards at TSL 3, electric heat pump consumer pool heater manufacturers would incur approximately $9.0 million in product conversion costs and $9.5 million in capital conversion costs at TSL 3.

At TSL 3, the shipment-weighted average MPC for all consumer pool heaters increases by 1.9 percent relative to the no-new-standards case shipment-weighted average MPC for all consumer pool heaters in 2028. In the preservation of gross margin scenario, the increase in shipment-weighted average MPC for consumer pool heaters is outweighed by the $18.6 million in conversion costs, causing a slightly negative change in INPV at TSL 3 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 1.9 percent shipment-weighted average MPC increase results in a reduction in the manufacturer margin after the compliance year. This reduction in the manufacturer margin and the $18.6 million in conversion costs incurred by manufacturers cause a slightly negative change in INPV at TSL 3 under the preservation of operating profit scenario.

At TSL 4, DOE estimates that impacts on INPV will range from −$22.8 million to −$10.7 million, or a change in INPV of −3.9 percent to −1.8 percent. At TSL 4, industry free cash-flow is $39.6 million, which is a decrease of approximately $11.4 million compared to the no-new-standards case value of $51.0 million in 2027, the year leading up to the adopted standards.

TSL 4 would set the energy conservation standard at EL 1 for gas-fired consumer pool heaters and at EL 4 for electric consumer pool heaters. DOE estimates that 96 percent of gas-fired consumer pool heaters and 12 percent of electric consumer pool heaters meet or exceed the efficiency levels analyzed at TSL 4. Gas-fired consumer pool heater manufacturers would likely need to redesign any models with a standing pilot light. DOE assumed this would cost manufacturers approximately $0.1 million. To bring non-compliant electric heat pump consumer pool heaters into compliance and to test all electric heat pump consumer pool heaters to demonstrate compliance with standards at TSL 4, electric heat pump consumer pool heater manufacturers would incur approximately $19.9 million in product conversion costs and $9.5 million in capital conversion costs at TSL 4.

At TSL 4, the shipment-weighted average MPC for all consumer pool heaters increases by 3.6 percent relative to the no-new-standards case shipment-weighted average MPC for all consumer pool heaters in 2028. In the preservation of gross margin scenario, the increase in shipment-weighted average MPC for consumer pool heaters is outweighed by the $29.4 million in conversion costs, causing a slightly negative change in INPV at TSL 4 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 3.6 percent shipment-weighted average MPC increase results in a reduction in the manufacturer margin after the compliance year. This reduction in the manufacturer margin and the $29.4 million in conversion costs incurred by manufacturers causing a slightly negative change in INPV at TSL 4 under the preservation of operating profit scenario.

At TSL 5, DOE estimates that impacts on INPV will range from −$37.3 million to $2.0 million, or a change in INPV of −6.4 percent to 0.3 percent. At TSL 5, industry free cash-flow is $32.4 million, which is a decrease of approximately $18.6 million compared to the no-new-standards case value of $51.0 million in 2027, the year leading up to the adopted standards.

TSL 5 would set the energy conservation standard at EL 2 for gas-fired consumer pool heaters and at EL 4 for electric consumer pool heaters. DOE estimates that 50 percent of gas-fired consumer pool heaters and 12 percent of electric consumer pool heaters meet or exceed the efficiency levels analyzed at TSL 5. Gas-fired consumer pool heater manufacturers would likely need to incorporate a blower for gas-fired pool heaters. DOE assumed this would cost manufacturers approximately $14.1 million in product conversion costs and $5.0 million in capital conversion costs. To bring non-compliant electric heat pump consumer pool heaters into compliance and to test all electric heat pump consumer pool heaters to demonstrate compliance with standards at TSL 5, electric heat pump consumer pool heater manufacturers would incur approximately $19.9 million in product conversion costs and $9.5 million in capital conversion costs at TSL 5.

At TSL 5, the shipment-weighted average MPC for all consumer pool heaters increases by 10.0 percent relative to the no-new-standards case shipment-weighted average MPC for all consumer pool heaters in 2028. In the preservation of gross margin scenario, the increase in shipment-weighted average MPC for consumer pool heaters outweighs the $48.4 million in conversion costs, causing a slightly positive change in INPV at TSL 5 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 10.0 percent shipment-weighted average MPC increase results in a reduction in the manufacturer margin after the compliance year. This reduction in manufacturer margin and the $48.4 million in conversion costs incurred by manufacturers cause a moderately negative change in INPV at TSL 5 under the preservation of operating profit scenario.

At TSL 6, DOE estimates that impacts on INPV will range from −$103.0 million to $45.9 million, or a change in INPV of −17.6 percent to 7.8 percent. At TSL 6, industry free cash-flow is $2.4 million, which is a decrease of approximately $48.6 million compared to the no-new-standards case value of $51.0 million in 2027, the year leading up to the adopted standards.

TSL 6 would set the energy conservation standard at EL 3 for gas-fired consumer pool heaters and at EL 5 for electric consumer pool heaters. This represents max-tech for both product classes. DOE estimates 9 percent of gas-fired consumer pool heaters and 3 percent of electric consumer pool heaters meet the efficiency levels analyzed at TSL 6. Gas-fired consumer pool heater manufacturers would likely need to incorporate condensing technology and electrical upgrades for standby mode and off mode power consumption for all gas-fired pool heaters. DOE assumed this would cost manufacturers approximately $63.1 million in product conversion costs and $29.0 million in capital conversion costs. To bring non-compliant electric heat pump consumer pool heaters into compliance and to test all electric heat pump consumer pool heaters to demonstrate compliance with standards at TSL 6, electric heat pump consumer pool heater manufacturers would likely need to incorporate heat pump component improvements and electrical upgrades for standby mode and off mode power consumption for all electric pool heaters. DOE assumed this would incur approximately $24.8 million in product conversion costs and $9.5 million in capital conversion costs at TSL 6.

At TSL 6, the shipment-weighted average MPC for all consumer pool heaters significantly increases by 37.0 percent relative to the no-new-standards case shipment-weighted average MPC for all consumer pool heaters in 2028. In the preservation of gross margin scenario, the large increase in shipment-weighted average MPC for consumer pool heaters outweighs the $126.4 million in conversion costs, causing a moderately positive change in INPV at TSL 6 under the preservation of gross margin scenario.

Under the preservation of operating profit scenario, the 37.0 percent shipment-weighted average MPC increase results in a significant reduction in the manufacturer margin after the compliance year. This large reduction in manufacturer margin and the significant $126.4 million in conversion costs incurred by manufacturers cause a moderately negative change in INPV at TSL 6 under the preservation of operating profit scenario.

b. Direct Impacts on Employment

To quantitatively assess the potential impacts of new and amended energy conservation standards on direct employment in the consumer pool heaters industry, DOE used the GRIM to estimate the domestic labor expenditures and number of direct employees in the no-new-standards case and in each of the standards cases during the analysis period.

Production employees are those who are directly involved in fabricating and assembling products within an original equipment manufacturer facility. Workers performing services that are closely associated with production operations, such as materials handling tasks using forklifts, are included as production labor, as well as line supervisors.

DOE used the GRIM to calculate the number of production employees from labor expenditures. DOE used statistical data from the U.S. Census Bureau's 2019 Annual Survey of Manufacturers (''ASM'') and the results of the engineering analysis to calculate industry-wide labor expenditures. Labor expenditures related to product manufacturing depend on the labor intensity of the product, the sales volume, and an assumption that wages remain fixed in real terms over time. The total labor expenditures in the GRIM were then converted to domestic production employment levels by dividing production labor expenditures by the annual payment per production worker.

Non-production employees account for those workers that are not directly engaged in the manufacturing of the covered product. This could include sales, human resources, engineering, and management. DOE estimated non-production employment levels by multiplying the number of consumer pool heater production workers by a scaling factor. The scaling factor is calculated by taking the ratio of the total number of employees, and the total production workers associated with the industry North American Industry Classification System (''NAICS'') code 333414, which covers consumer pool heater manufacturing.

Using the GRIM, DOE estimates that there would be 875 domestic production workers, and 505 non-production workers for consumer pool heaters in 2028 in the absence of new and amended energy conservation standards. Table V.11 shows the range of the impacts of energy conservation standards on U.S. production on consumer pool heaters.

TABLE V.11—TOTAL NUMBER OF DOMESTIC CONSUMER POOL HEATER PRODUCTION WORKERS IN 2028

| | No-new-standards case | Trial standard level * | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| Domestic Production Workers in 2028 .... | 875 | 870 | 870 | 873 | 871 | 869 | 1,074 |
| Domestic Non-Production Workers in 2028 ..... | 505 | 502 | 502 | 504 | 503 | 501 | 620 |
| Total Direct Employment in 2028 ..... | 1,380 | 1,372 | 1,372 | 1,377 | 1,374 | 1,370 | 1,694 |

TABLE V.11—TOTAL NUMBER OF DOMESTIC CONSUMER POOL HEATER PRODUCTION WORKERS IN 2028—Continued

| | No-new-standards case | Trial standard level * | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| Potential Changes in Total Direct Employment in 2028 | ..... | (32)–(8) | (32)–(8) | (32)–(3) | (32)–(6) | (32)–(10) | (371)–314 |

* Numbers in parentheses indicate a negative number. Numbers may not sum exactly due to rounding.

The direct employment impacts shown in Table V.11 represent the potential changes in direct employment that could result following the compliance date for consumer pool heaters. Employment could increase or decrease due to the labor content of the various products being manufactured domestically that meet the analyzed standards or if manufacturers decided to move production facilities abroad because of the new and amended standards. At one end of the range, DOE assumes that all manufacturers continue to manufacture the same scope of the products domestically after new and amended standards are required. However, since the labor content of consumer pool heaters varies by efficiency level, this can either result in an increase or decrease in domestic employment, even if all domestic product remains in the U.S.[161] The other end of the range assumes that some domestic manufacturing either is eliminated or moves abroad due to the analyzed new and amended standards. DOE assumes that for electric consumer pool heaters, only the electric resistance consumer pool heater employees would be impacted at all TSLs analyzed. DOE estimates there would be approximately 32 domestic production and non-production employees manufacturing electric resistance consumer pool heaters in 2028. Therefore, DOE assumes that for all TSLs analyzed, there would be a reduction in 32 domestic employees due to electric resistance consumer pool heaters no longer being manufactured domestically. For gas-fired consumer pool heaters, DOE assumes there would not be any impact to domestic production until TSL 6, max-tech. At this TSL, DOE assumes that up to half of all domestic gas-fired consumer pool heater production could move abroad due to the new and amended standards at TSL 6. TSL 6 would most likely require manufacturers of gas-fired consumer pool heaters to use condensing technology and implement electrical component upgrades. Based on information from manufacturer interviews, this would require a significant investment to replace or re-tool existing production equipment. Some manufacturers of gas-fired consumer pool heaters could explore moving existing domestic production facilities abroad if the majority of the existing gas-fired consumer pool heater production equipment would need to be replaced or significantly re-tooled. DOE estimated there would be approximately 678 domestic production workers manufacturing gas-fired pool heaters in 2028. Therefore, DOE estimates that if standards were set at TSL 6, max-tech, there could be a loss of up to 371 domestic production employees responsible for manufacturing consumer pool heaters.[162] Additional detail on the analysis of direct employment can be found in chapter 12 of the final rule TSD.

c. Impacts on Manufacturing Capacity

DOE identified potential manufacturing production capacity constraints at max-tech for both gas-fired consumer pool heaters and electric consumer pool heaters. There are 18 consumer pool heater manufacturers that manufacture electric consumer pool heaters covered by this rulemaking. Only three electric consumer pool heater manufacturers currently offer models that meet the efficiency level required at max-tech for electric consumer pool heaters, and each of these three electric consumer pool heater manufacturers only offer a single model that meets the efficiency level required at max-tech for electric consumer pool heaters. All other electric consumer pool heater models offered by electric consumer pool heater manufacturers do not meet the efficiency level required at max-tech for electric pool heaters covered by this rulemaking.

There are six consumer pool heater manufacturers that manufacture gas-fired consumer pool heaters covered by this rulemaking. Only one gas-fired consumer pool heater manufacturer currently offers a model that meet the efficiency level required at max-tech for gas-fired pool heaters. All other gas-fired consumer pool heater models offered by gas-fired consumer pool heater manufacturers do not meet the efficiency level required at max-tech for gas-fired pool heaters covered by this rulemaking.

At max-tech (for both gas-fired consumer pool heaters and electric consumer pool heaters), most consumer pool heater manufacturers would therefore be required to redesign every consumer pool heater model covered by this rulemaking. It is unclear if most manufacturers would have the engineering capacity to complete the necessary redesigns (required to meet energy conservation standards at max-tech) within the 5-year compliance period. If some manufacturers require more than 5 years to redesign all their covered consumer pool heater models, they will likely prioritize redesigns based on sales volume. There is risk that some consumer pool heater models will become either temporarily or permanently unavailable after the compliance date.

DOE did not identify any significant manufacturing production capacity constraints for the design options below max-tech that were being evaluated for this final rule. All gas-fired consumer pool heater manufacturers offer products that meet the EL below max-tech for gas-fired pool heaters, and more than half of the electric consumer pool heater manufacturers offer products that meet the EL below max-tech for electric consumer pool heaters. The design options below max-tech evaluated for this final rule are readily available as products that are on the market currently. The materials used to manufacture models at all ELs below max-tech are widely available on the market. As a result, DOE does not anticipate that the industry will likely experience any capacity constraints directly resulting from energy conservation standards at any of the ELs that are below max-tech.

[161] TSL 6 is estimated to have an increase in domestic employment, while TSL 1 through TSL 5, are estimated to have a reduction in domestic employment, assuming all production remains in the U.S.

[162] 339 domestic production employees, manufacturing gas-fired consumer pool heaters, and 32 domestic production and non-production employees manufacturing electric resistance consumer pool heaters.

d. Impacts on Subgroups of Manufacturers

As discussed in section IV.J.1 of this document, using average cost assumptions to develop an industry cash-flow estimate may not be adequate for assessing differential impacts among manufacturer subgroups. Small manufacturers, niche manufacturers, and manufacturers exhibiting a cost structure substantially different from the industry average could be affected disproportionately. DOE used the results of the industry characterization to group manufacturers exhibiting similar characteristics. Consequently, DOE identified small business manufacturers as a subgroup for a separate impact analysis.

For the small business subgroup analysis, DOE applied the small business size standards published by the Small Business Administration (''SBA'') to determine whether a company is considered a small business. The size standards are codified at 13 CFR part 121. To be categorized as a small business under NAICS code 333414, ''heating equipment (except warm air furnaces) manufacturing,'' a consumer pool heater manufacturer and its affiliates may employ a maximum of 500 employees. The 500-employee threshold includes all employees in a business's parent company and any other subsidiaries. Based on this classification, DOE identified six potential manufacturers that qualify as domestic small businesses.

All six small businesses manufacture electric consumer pool heaters and none of them manufacture gas-fired consumer pool heaters. Therefore, only new standards set for electric consumer pool heaters would impact any of the small businesses. Five of the six small businesses exclusively manufacture electric heat pump consumer pool heaters, while the other small business exclusively manufacturers electric resistance consumer pool heaters.

The small business subgroup analysis is discussed in more detail in chapter 12 of the final rule TSD. DOE examines the potential impacts on small business manufacturers in section VI.B of this document.

e. Cumulative Regulatory Burden

One aspect of assessing manufacturer burden involves looking at the cumulative impact of multiple DOE standards and the regulatory actions of other Federal agencies and States that affect the manufacturers of a covered product or equipment. While any one regulation may not impose a significant burden on manufacturers, the combined effects of several existing or impending regulations may have serious consequences for some manufacturers, groups of manufacturers, or an entire industry. Multiple regulations affecting the same manufacturer can strain profits and lead companies to abandon product lines or markets with lower expected future returns than competing products. For these reasons, DOE conducts an analysis of cumulative regulatory burden as part of its rulemakings pertaining to appliance efficiency.

BWC commented that a large amount regulatory burden will be placed on their company and other consumer pool heater manufacturers since DOE has multiple rulemaking cycles happening for other products manufactured by consumer pool heater manufacturers concurrently, including residential water heaters, commercial water heaters, and residential boilers, in addition to this consumer pool heater rulemaking. BWC claims that all of these amended standards, along with DOE underestimating the amount of time and resources required to meet compliance of the proposed consumer pool heater standards and test procedures will place an overwhelming regulatory burden on these manufacturers and the market. (BWC, No. 12 at pp. 4–5)

Rheem indicated it would experience a high degree of cumulative regulatory burden because almost all of the products and equipment it manufactures are subject to ongoing DOE rulemakings. Rheem stated that it expects compliance with new and amended standards for consumer pool heaters to require significant product redesign and reset of production facilities between 2026 and 2029. Thus, Rheem urged DOE to take steps to alleviate cumulative regulatory burden, for instance, considering the AIM Act phasedown of high GWP refrigerants. (Rheem, No. 19 at pp. 9–10)

Fluidra provided a list of applicable codes and standards for pool heaters that represent a cumulative regulatory burden to manufacturers including: ANSI/CSA—Gas Appliance Standard; UL Electrical Standard; California Energy Commission; Florida Energy Code; DOE Federal Efficiency; ASME; AHRI; ASHRAE; NSF; and FCC/IC. (Fluidra, No. 18 at p. 4)

DOE evaluates product-specific regulations that will take effect approximately 3 years before or after the estimated 2028 compliance date of any new and amended energy conservation standards for consumer pool heaters. This information is presented in Table V.12.

TABLE V.12—COMPLIANCE DATES AND EXPECTED CONVERSION EXPENSES OF FEDERAL ENERGY CONSERVATION STANDARDS AFFECTING CONSUMER POOL HEATER MANUFACTURERS

| Federal energy conservation standard | Number of manufacturers * | Number of manufacturers affected from this rule ** | Approx. standards year | Industry conversion costs (millions) | Industry conversion costs/product revenue *** (%) |
|---|---|---|---|---|---|
| Portable Air Conditioners 85 FR 1378 (Jan. 10, 2020) | 11 | 2 | 2025 | $320.9 (2015$) | 6.7 |
| Room Air Conditioners ‡ | 8 | 1 | 2026 | $24.8 (2021$) | 0.4 |
| Commercial Water Heating Equipment † 87 FR 30610 (May 19, 2022) | 14 | 3 | 2026 | $34.6 (2020$) | 4.7 |
| Consumer Furnaces (non-weatherized gas & mobile home) † 87 FR 40590 (July 7, 2022 | 15 | 1 | 2029 | $150.6 (2020$) | 1.4 |

* This column presents the total number of manufacturers identified in the energy conservation standard rule contributing to cumulative regulatory burden.

** This column presents the number of manufacturers producing consumer pool heaters that are also listed as manufacturers in the listed energy conservation standard contributing to cumulative regulatory burden.

*** This column presents industry conversion costs as a percentage of product revenue during the conversion period. Industry conversion costs are the upfront investments manufacturers must make to sell compliant products/equipment. The revenue used for this calculation is the revenue from just the covered product/equipment associated with each row. The conversion period is the time frame over which conversion costs are made and lasts from the publication year of the final rule to the compliance year of the energy conservation standard. The conversion period typically ranges from 3 to 5 years, depending on the rulemaking.

† Indicates a NOPR publication. Values may change on publication of a final rule.

‡ At the time of issuance of this consumer pool heaters rulemaking, the rulemaking has been issued and is pending publication in the **Federal Register**. Once published, the room air conditioners final rule will be available at: *www.regulations.gov/docket/EERE-2014-BT-STD-0059.*

In addition to the rulemaking listed in Table V.12 DOE has ongoing rulemakings for other products or equipment that consumer pool heater manufacturers produce, including consumer furnaces (oil, electric, and weatherized gas); [163] consumer boilers; [164] consumer furnace fans; [165] consumer water heaters; [166] and dedicated-purpose pool pumps.[167] However, none of these rulemakings have published a NOPR or final rule to be able to estimate the size of the expected conversion costs manufacturers of these products or equipment must make.

3. National Impact Analysis

This section presents DOE's estimates of the national energy savings and the NPV of consumer benefits that would result from each of the TSLs considered as potential amended standards.

a. Significance of Energy Savings

To estimate the energy savings attributable to potential new and amended standards for consumer pool heaters, DOE compared their energy consumption under the no-new-standards case to their anticipated energy consumption under each TSL. The savings are measured over the entire lifetime of products purchased in the 30-year period that begins in the year of anticipated compliance with amended standards (2028–2057). Table V.13 presents DOE's projections of the national energy savings for each TSL considered for consumer pool heaters. The savings were calculated using the approach described in section IV.H of this document.

TABLE V.13—CUMULATIVE NATIONAL ENERGY SAVINGS FOR CONSUMER POOL HEATERS; 30 YEARS OF SHIPMENTS

[2028–2057]

| Energy savings | Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| | | (quads *) | | | | | |
| Primary energy | Electric Pool Heaters | 0.22 | 0.28 | 0.38 | 0.41 | 0.41 | 0.46 |
| | Gas-fired Pool Heaters | 0.02 | 0.02 | 0.02 | 0.02 | 0.25 | 2.34 |
| | Total | 0.24 | 0.29 | 0.39 | 0.43 | 0.66 | 2.80 |
| FFC energy | Electric Pool Heaters | 0.23 | 0.29 | 0.39 | 0.43 | 0.43 | 0.47 |
| | Gas-fired Pool Heaters | 0.02 | 0.02 | 0.02 | 0.02 | 0.27 | 2.60 |
| | Total | 0.25 | 0.31 | 0.41 | 0.45 | 0.70 | 3.07 |

* quads = quadrillion British thermal units.
Note numbers may not add to totals, due to rounding.

OMB Circular A–4 [168] requires agencies to present analytical results, including separate schedules of the monetized benefits and costs that show the type and timing of benefits and costs. Circular A–4 also directs agencies to consider the variability of key elements underlying the estimates of benefits and costs. For this rulemaking, DOE undertook a sensitivity analysis using 9 years, rather than 30 years, of product shipments. The choice of a 9-year period is a proxy for the timeline in EPCA for the review of certain energy conservation standards and potential revision of and compliance with such revised standards.[169] The review timeframe established in EPCA is generally not synchronized with the product lifetime, product manufacturing cycles, or other factors specific to consumer pool heaters. Thus, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology. The NES sensitivity analysis results based on a 9-year analytical period are presented in Table V.14. The impacts are counted over the lifetime of consumer pool heaters purchased in 2028–2036.

[163] *www.regulations.gov/docket/EERE-2021-BT-STD-0031.*

[164] *www.regulations.gov/docket/EERE-2019-BT-STD-0036.*

[165] *www.regulations.gov/docket/EERE-2021-BT-STD-0029.*

[166] *www.regulations.gov/docket/EERE-2017-BT-STD-0019.*

[167] *www.regulations.gov/docket/EERE-2022-BT-STD-0001.*

[168] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *www.whitehouse.gov/omb/circulars_a004_a-4/* (last accessed October 15, 2022).

[169] Section 325(m) of EPCA requires DOE to review its standards at least once every 6 years, and requires, for certain products, a 3-year period after any new standard is promulgated before compliance is required, except that in no case may any new standards be required within 6 years of the compliance date of the previous standards. While adding a 6-year review to the 3-year compliance period adds up to 9 years, DOE notes that it may undertake reviews at any time within the 6-year period and that the 3-year compliance date may yield to the 6-year backstop. A 9-year analysis period may not be appropriate given the variability that occurs in the timing of standards reviews and the fact that for some products, the compliance period is 5 years rather than 3 years.

TABLE V.14—CUMULATIVE NATIONAL ENERGY SAVINGS FOR CONSUMER POOL HEATERS; 9 YEARS OF SHIPMENTS
[2028–2036]

| Energy savings | Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| | | (quads*) | | | | | |
| Primary energy | Electric Pool Heaters | 0.07 | 0.09 | 0.11 | 0.12 | 0.12 | 0.13 |
| | Gas-fired Pool Heaters | 0.01 | 0.01 | 0.01 | 0.01 | 0.07 | 0.62 |
| | Total | 0.08 | 0.09 | 0.12 | 0.13 | 0.19 | 0.76 |
| FFC energy | Electric Pool Heaters | 0.07 | 0.09 | 0.12 | 0.13 | 0.13 | 0.14 |
| | Gas-fired Pool Heaters | 0.01 | 0.01 | 0.01 | 0.01 | 0.07 | 0.69 |
| | Total | 0.08 | 0.10 | 0.12 | 0.14 | 0.20 | 0.83 |

*quads = quadrillion British thermal units.
Note numbers may not add to totals, due to rounding.

b. Net Present Value of Consumer Costs and Benefits

DOE estimated the cumulative NPV of the total costs and savings for consumers that would result from the TSLs considered for consumer pool heaters. In accordance with OMB's guidelines on regulatory analysis,[170] DOE calculated NPV using both a 7-percent and a 3-percent real discount rate. Table V.15 shows the consumer NPV results with impacts counted over the lifetime of products purchased in 2028–2057.

TABLE V.15—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR CONSUMER POOL HEATERS; 30 YEARS OF SHIPMENTS
[2028–2057]

| Discount rate | Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| | | (billion 2021$) | | | | | |
| 7 percent | Electric Pool Heaters | 0.64 | 0.78 | 0.99 | 0.96 | 0.96 | 0.87 |
| | Gas-fired Pool Heaters | 0.05 | 0.05 | 0.05 | 0.05 | 0.23 | 2.66 |
| | Total | 0.70 | 0.84 | 1.04 | 1.01 | 1.18 | 3.53 |
| 3 percent | Electric Pool Heaters | 1.48 | 1.82 | 2.33 | 2.32 | 2.32 | 2.20 |
| | Gas-fired Pool Heaters | 0.12 | 0.12 | 0.12 | 0.12 | 0.68 | 7.41 |
| | Total | 1.60 | 1.93 | 2.45 | 2.44 | 3.00 | 9.60 |

Parentheses indicate negative (-) values.
Note numbers may not add to totals, due to rounding.

The NPV results based on the aforementioned 9-year analytical period are presented in Table V.16. The impacts are counted over the lifetime of products purchased in 2028–2036. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

TABLE V.16—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR CONSUMER POOL HEATERS; 9 YEARS OF SHIPMENTS
[2028–2036]

| Discount rate | Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| | | (billion 2020$) | | | | | |
| 7 percent | Electric Pool Heaters | 0.35 | 0.43 | 0.52 | 0.51 | 0.51 | 0.47 |
| | Gas-fired Pool Heaters | 0.03 | 0.03 | 0.03 | 0.03 | 0.10 | 1.23 |
| | Total | 0.38 | 0.45 | 0.55 | 0.54 | 0.62 | 1.69 |

[170] U.S. Office of Management and Budget. *Circular A–4: Regulatory Analysis.* September 17, 2003. *www.whitehouse.gov/omb/circulars_a004_a-4/* (last accessed October 15, 2022).

TABLE V.16—CUMULATIVE NET PRESENT VALUE OF CONSUMER BENEFITS FOR CONSUMER POOL HEATERS; 9 YEARS OF SHIPMENTS—Continued

[2028–2036]

| Discount rate | Product class | Trial standard level | | | | | |
|---|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 | 6 |
| | | (billion 2020$) | | | | | |
| 3 percent | Electric Pool Heaters | 0.63 | 0.76 | 0.94 | 0.94 | 0.94 | 0.90 |
| | Gas-fired Pool Heaters | 0.05 | 0.05 | 0.05 | 0.05 | 0.23 | 2.52 |
| | Total | 0.68 | 0.81 | 1.00 | 0.99 | 1.17 | 3.42 |

Parentheses indicate negative (−) values.
Note numbers may not add to totals, due to rounding.

The previous results reflect the use of a default trend to estimate the change in price for consumer pool heaters over the analysis period (see section IV.F.1 of this document). DOE also conducted a sensitivity analysis that considered one scenario with an increasing rate of price change than the reference case and one scenario with a decreasing rate of price change compared to the reference case. The results of these alternative cases are presented in appendix 10C of the final rule TSD. In the decreasing-price case, the NPV of consumer benefits is higher than in the default case. In the increasing-price case, the NPV of consumer benefits is lower than in the default case.

c. Indirect Impacts on Employment

DOE estimates that amended energy conservation standards for consumer pool heaters will reduce energy expenditures for consumers of those products, with the resulting net savings being redirected to other forms of economic activity. These expected shifts in spending and economic activity could affect the demand for labor. As described in section IV.N of this document, DOE used an input/output model of the U.S. economy to estimate indirect employment impacts of the TSLs that DOE considered. There are uncertainties involved in projecting employment impacts, especially changes in the later years of the analysis. Therefore, DOE generated results for near-term timeframes (2028–2033), where these uncertainties are reduced.

The results suggest that the adopted standards are likely to have a negligible impact on the net demand for labor in the economy. The net change in jobs is so small that it would be imperceptible in national labor statistics and might be offset by other, unanticipated effects on employment. Chapter 16 of the final rule TSD presents detailed results regarding anticipated indirect employment impacts.

4. Impact on Utility or Performance of Products

As discussed in section IV.C.1.b of this document, DOE has concluded that the standards adopted in this final rule will not lessen the utility or performance of the consumer pool heaters under consideration in this rulemaking. Manufacturers of these products currently offer units that meet or exceed the adopted standards.

5. Impact of Any Lessening of Competition

DOE considered any lessening of competition that would be likely to result from new or amended standards. As discussed in section III.F.1.e of this document, EPCA directs the Attorney General of the United States (''Attorney General'') to determine the impact, if any, of any lessening of competition likely to result from a proposed standard and to transmit such determination in writing to the Secretary within 60 days of the publication of a proposed rule, together with an analysis of the nature and extent of the impact. To assist the Attorney General in making this determination, DOE provided the Department of Justice (''DOJ'') with copies of the NOPR and the TSD for review. In its assessment letter responding to DOE, DOJ concluded that the proposed energy conservation standards for consumer pool heaters are unlikely to have a significant adverse impact on competition. DOE is publishing the Attorney General's assessment at the end of this final rule.

6. Need of the Nation To Conserve Energy

Enhanced energy efficiency, where economically justified, improves the Nation's energy security, strengthens the economy, and reduces the environmental impacts (costs) of energy production. Reduced electricity demand due to energy conservation standards is also likely to reduce the cost of maintaining the reliability of the electricity system, particularly during peak-load periods. Chapter 15 in the final rule TSD presents the estimated impacts on electricity generating capacity, relative to the no-new-standards case, for the TSLs that DOE considered in this rulemaking.

Energy conservation resulting from potential energy conservation standards for consumer pool heaters is expected to yield environmental benefits in the form of reduced emissions of certain air pollutants and greenhouse gases. Table V.17 provides DOE's estimate of cumulative emissions reductions expected to result from the TSLs considered in this rulemaking. The emissions were calculated using the multipliers discussed in section IV.K of this document. DOE reports annual emissions reductions for each TSL in chapter 13 of the final rule TSD.

The NPV results based on the aforementioned 9-year analytical period are presented in. The impacts are counted over the lifetime of products purchased in 2028–2036. As mentioned previously, such results are presented for informational purposes only and are not indicative of any change in DOE's analytical methodology or decision criteria.

TABLE V.17—CUMULATIVE EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057

| | Trial standard level | | | | | |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| **Site and Power Sector Emissions** | | | | | | |
| $CO_2$ (*million metric tons*) | 7.9 | 9.6 | 12.7 | 13.9 | 26.1 | 138.1 |
| $CH_4$ (*thousand tons*) | 0.5 | 0.7 | 0.9 | 1.0 | 1.2 | 3.7 |
| $N_2O$ (*thousand tons*) | 0.1 | 0.1 | 0.1 | 0.1 | 0.2 | 0.4 |
| $NO_X$ (*thousand tons*) | 13.0 | 13.8 | 15.4 | 16.0 | 198.0 | 217.5 |
| $SO_2$ (*thousand tons*) | 3.2 | 3.9 | 5.4 | 5.9 | 5.9 | 7.4 |
| Hg (*tons*) | 0.02 | 0.03 | 0.03 | 0.04 | 0.04 | 0.04 |
| **Upstream Emissions** | | | | | | |
| $CO_2$ (*million metric tons*) | 0.7 | 0.8 | 1.1 | 1.2 | 2.8 | 17.4 |
| $CH_4$ (*thousand tons*) | 65.9 | 78.3 | 101.3 | 110.4 | 283.1 | 1,836.5 |
| $N_2O$ (*thousand tons*) | 0.003 | 0.004 | 0.005 | 0.01 | 0.01 | 0.03 |
| $NO_X$ (*thousand tons*) | 10.4 | 12.4 | 16.0 | 17.5 | 42.8 | 271.0 |
| $SO_2$ (*thousand tons*) | 0.04 | 0.05 | 0.1 | 0.1 | 0.1 | 0.2 |
| Hg (*tons*) | 0.0001 | 0.0001 | 0.0001 | 0.0001 | 0.0001 | 0.0002 |
| **Total FFC Emissions** | | | | | | |
| $CO_2$ (*million metric tons*) | 8.6 | 10.4 | 13.7 | 15.0 | 28.9 | 155.5 |
| $CH_4$ (*thousand tons*) | 66.4 | 78.9 | 102.2 | 111.4 | 284.4 | 1840.2 |
| $N_2O$ (*thousand tons*) | 0.1 | 0.1 | 0.1 | 0.1 | 0.2 | 0.4 |
| $NO_X$ (*thousand tons*) | 23.4 | 26.2 | 31.4 | 33.5 | 240.8 | 488.5 |
| $SO_2$ (*thousand tons*) | 3.2 | 4.0 | 5.4 | 6.0 | 6.0 | 7.6 |
| Hg (*tons*) | 0.02 | 0.03 | 0.03 | 0.04 | 0.04 | 0.04 |

As part of the analysis for this rule, DOE estimated monetary benefits likely to result from the reduced emissions of $CO_2$ that DOE estimated for each of the considered TSLs for consumer pool heaters. Section IV.L of this document discusses the estimated SC–$CO_2$ values that DOE used. Table V.18 presents the value of $CO_2$ emissions reduction at each TSL for each of the SC–$CO_2$ cases. The time-series of annual values is presented for the selected TSL in chapter 14 of the final rule TSD.

TABLE V.18—PRESENT VALUE OF $CO_2$ EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057

| TSL | SC–$CO_2$ case discount rate and statistics | | | |
|---|---|---|---|---|
| | 5% Average | 3% Average | 2.5% Average | 3% 95th percentile |
| | (million 2021$) | | | |
| 1 | 79.0 | 342.4 | 536.7 | 1,040.6 |
| 2 | 94.8 | 411.6 | 645.4 | 1,250.8 |
| 3 | 123.9 | 539.6 | 846.9 | 1,639.4 |
| 4 | 135.5 | 590.5 | 926.9 | 1,793.9 |
| 5 | 258.6 | 1,132.9 | 1,780.9 | 3,440.3 |
| 6 | 1,381.0 | 6,079.2 | 9,568.7 | 18,454.8 |

As discussed in section IV.L.2 of this document, DOE estimated the climate benefits likely to result from the reduced emissions of methane and $N_2O$ that DOE estimated for each of the considered TSLs for consumer pool heaters. Table V.19 presents the value of the $CH_4$ emissions reduction at each TSL, and Table V.20 presents the value of the $N_2O$ emissions reduction at each TSL. The time-series of annual values is presented for the selected TSL in chapter 14 of the final rule TSD.

TABLE V.19—PRESENT VALUE OF METHANE EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057

| TSL | SC–$CH_4$ case discount rate and statistics (million 2021$) | | | |
|---|---|---|---|---|
| | 5% Average | 3% Average | 2.5% Average | 3% 95th percentile |
| | (million 2021$) | | | |
| 1 | 27.9 | 83.8 | 117.2 | 221.7 |

TABLE V.19—PRESENT VALUE OF METHANE EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057—Continued

| TSL | SC–$CH_4$ case discount rate and statistics (million 2021$) | | | |
|---|---|---|---|---|
| | 5% Average | 3% Average | 2.5% Average | 3% 95th percentile |
| | (million 2021$) | | | |
| 2 | 33.0 | 99.3 | 139.0 | 262.9 |
| 3 | 42.4 | 128.1 | 179.4 | 338.9 |
| 4 | 46.1 | 139.6 | 195.5 | 369.2 |
| 5 | 117.3 | 356.9 | 500.4 | 943.4 |
| 6 | 758.0 | 2,312.0 | 3,243.5 | 6,108.7 |

TABLE V.20—PRESENT VALUE OF NITROUS OXIDE EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057

| TSL | SC–$N_2O$ case discount rate and statistics (million 2021$) | | | |
|---|---|---|---|---|
| | 5% (average) | 3% (average) | 2.5% (average) | 3% (95th percentile) |
| | (million 2021$) | | | |
| 1 | 0.3 | 1.1 | 1.7 | 2.9 |
| 2 | 0.3 | 1.3 | 2.1 | 3.6 |
| 3 | 0.4 | 1.8 | 2.8 | 4.8 |
| 4 | 0.5 | 2.0 | 3.1 | 5.3 |
| 5 | 0.6 | 2.4 | 3.7 | 6.3 |
| 6 | 1.5 | 6.2 | 9.6 | 16.4 |

DOE is well aware that scientific and economic knowledge about the contribution of $CO_2$ and other GHG emissions to changes in the future global climate and the potential resulting damages to the global and U.S. economy continues to evolve rapidly. DOE, together with other Federal agencies, will continue to review methodologies for estimating the monetary value of reductions in $CO_2$ and other GHG emissions. This ongoing review will consider the comments on this subject that are part of the public record for this and other rulemakings, as well as other methodological assumptions and issues. DOE notes, however, that the adopted standards would be economically justified even without inclusion of monetized benefits of reduced GHG emissions.

DOE also estimated the monetary value of the economic benefits associated with $NO_X$ and $SO_2$ emissions reductions anticipated to result from the considered TSLs for consumer pool heaters. The dollar-per-ton values that DOE used are discussed in section IV.L of this document. Table V.21 presents the present value for $NO_X$ emissions reduction for each TSL calculated using 7-percent and 3-percent discount rates, and Table V.22 presents similar results for $SO_2$ emissions reductions. The results in these tables reflect application of EPA's low dollar-per-ton values, which DOE used to be conservative. The time-series of annual values is presented for the selected TSL in chapter 14 of the final rule TSD.

TABLE V.21—PRESENT VALUE OF $NO_X$ EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057

| TSL | 7% Discount rate | 3% Discount rate |
|---|---|---|
| | million 2021$ | |
| 1 | 215.8 | 546.0 |
| 2 | 256.6 | 652.6 |
| 3 | 330.8 | 848.9 |
| 4 | 360.4 | 927.1 |
| 5 | 740.8 | 1,939.0 |
| 6 | 4,191.7 | 11,116.6 |

TABLE V.22—PRESENT VALUE OF $SO_2$ EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057

| TSL | 7% Discount rate | 3% Discount rate |
|---|---|---|
| | million 2021$ | |
| 1 | 69.7 | 171.9 |
| 2 | 85.1 | 211.4 |
| 3 | 113.4 | 284.9 |
| 4 | 124.7 | 314.0 |
| 5 | 123.9 | 312.1 |

TABLE V.22—PRESENT VALUE OF $SO_2$ EMISSIONS REDUCTION FOR CONSUMER POOL HEATERS SHIPPED IN 2028–2057—Continued

| TSL | 7% Discount rate | 3% Discount rate |
|---|---|---|
| | million 2021$ | |
| 6 | 151.3 | 383.3 |

DOE has not considered the monetary benefits of the reduction of Hg for this final rule. Not all the public health and environmental benefits from the reduction of greenhouse gases, $NO_X$, and $SO_2$ are captured in the values above, and additional unquantified benefits from the reductions of those pollutants as well as from the reduction of Hg, direct PM, and other co-pollutants may be significant.

7. Other Factors

The Secretary of Energy, in determining whether a standard is economically justified, may consider any other factors that the Secretary deems to be relevant. (42 U.S.C. 6295(o)(2)(B)(i)(VII)) No other factors were considered in this analysis.

8. Summary of Economic Impacts

Table V.23 presents the NPV values that result from adding the estimates of the economic benefits resulting from

reduced GHG and $NO_X$ and $SO_2$ emissions to the NPV of consumer benefits calculated for each TSL considered in this rulemaking. The consumer benefits are domestic U.S. monetary savings that occur as a result of purchasing the covered products, and are measured for the lifetime of products shipped in 2028–2057. The climate benefits associated with reduced GHG emissions resulting from the adopted standards are global benefits, and are also calculated based on the lifetime of consumer pool heaters shipped in 2028–2057.

TABLE V.23—CONSUMER NPV COMBINED WITH PRESENT VALUE OF CLIMATE BENEFITS AND HEALTH BENEFITS

| Category | TSL 1 | TSL 2 | TSL 3 | TSL 4 | TSL 5 | TSL 6 |
|---|---|---|---|---|---|---|
| **Using 3% discount rate for Consumer NPV and Health Benefits (billion 2021$)** | | | | | | |
| 5% Average SC–GHG case | 2.4 | 2.9 | 3.7 | 3.9 | 5.6 | 23.3 |
| 3% Average SC–GHG case | 2.7 | 3.3 | 4.3 | 4.4 | 6.7 | 29.5 |
| 2.5% Average SC–GHG case | 3.0 | 3.6 | 4.6 | 4.8 | 7.5 | 34.0 |
| 3% 95th percentile SC–GHG case | 3.6 | 4.3 | 5.6 | 5.8 | 9.6 | 45.7 |
| **Using 7% discount rate for Consumer NPV and Health Benefits (billion 2021$)** | | | | | | |
| 5% Average SC–GHG case | 1.1 | 1.3 | 1.6 | 1.7 | 2.4 | 10.0 |
| 3% Average SC–GHG case | 1.4 | 1.7 | 2.2 | 2.2 | 3.5 | 16.3 |
| 2.5% Average SC–GHG case | 1.6 | 2.0 | 2.5 | 2.6 | 4.3 | 20.7 |
| 3% 95th percentile SC–GHG case | 2.2 | 2.7 | 3.5 | 3.7 | 6.4 | 32.5 |

*C. Conclusion*

When considering new or amended energy conservation standards, the standards that DOE adopts for any type (or class) of covered product must be designed to achieve the maximum improvement in energy efficiency that the Secretary determines is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A)) In determining whether a standard is economically justified, the Secretary must determine whether the benefits of the standard exceed its burdens by, to the greatest extent practicable, considering the seven statutory factors discussed previously. (42 U.S.C. 6295(o)(2)(B)(i)) The new or amended standard must also result in significant conservation of energy. (42 U.S.C. 6295(o)(3)(B))

For this final rule, DOE considered the impacts of new and amended standards for consumer pool heaters at each TSL, beginning with the maximum technologically feasible level, to determine whether that level was economically justified. Where the max-tech level was not justified, DOE then considered the next most efficient level and undertook the same evaluation until it reached the highest efficiency level that is both technologically feasible and economically justified and saves a significant amount of energy.

To aid the reader as DOE discusses the benefits and/or burdens of each TSL, tables in this section present a summary of the results of DOE's quantitative analysis for each TSL. In addition to the quantitative results presented in the tables, DOE also considers other burdens and benefits that affect economic justification. These include the impacts on identifiable subgroups of consumers who may be disproportionately affected by a national standard and impacts on employment.

DOE also notes that the economics literature provides a wide-ranging discussion of how consumers trade off upfront costs and energy savings in the absence of government intervention. Much of this literature attempts to explain why consumers appear to undervalue energy efficiency improvements. There is evidence that consumers undervalue future energy savings as a result of (1) a lack of information; (2) a lack of sufficient salience of the long-term or aggregate benefits; (3) a lack of sufficient savings to warrant delaying or altering purchases; (4) excessive focus on the short term, in the form of inconsistent weighting of future energy cost savings relative to available returns on other investments; (5) computational or other difficulties associated with the evaluation of relevant tradeoffs; and (6) a divergence in incentives (for example, between renters and owners, or builders and purchasers). Having less than perfect foresight and a high degree of uncertainty about the future, consumers may trade off these types of investments at a higher than expected rate between current consumption and uncertain future energy cost savings.

In DOE's current regulatory analysis, potential changes in the benefits and costs of a regulation due to changes in consumer purchase decisions are included in two ways. First, if consumers forego the purchase of a product in the standards case, this decreases sales for product manufacturers, and the impact on manufacturers attributed to lost revenue is included in the MIA. Second, DOE accounts for energy savings attributable only to products actually used by consumers in the standards case; if a standard decreases the number of products purchased by consumers, this decreases the potential energy savings from an energy conservation standard. DOE provides estimates of shipments and changes in the volume of product purchases in chapter 9 of the final rule TSD. However, DOE's current analysis does not explicitly control for heterogeneity in consumer preferences, preferences across subcategories of products or specific features, or consumer price sensitivity variation according to household income.[171]

While DOE is not prepared at present to provide a fuller quantifiable framework for estimating the benefits and costs of changes in consumer purchase decisions due to an energy conservation standard, DOE is committed to developing a framework that can support empirical quantitative tools for improved assessment of the consumer welfare impacts of appliance standards. DOE has posted a paper that discusses the issue of consumer welfare impacts of appliance energy conservation standards, and potential enhancements to the methodology by which these impacts are defined and estimated in the regulatory process.[172] DOE welcomes comments on how to more fully assess the potential impact of

[171] P.C. Reiss and M.W. White. Household Electricity Demand, Revisited. *Review of Economic Studies.* 2005. 72(3): pp. 853–883. doi: *10.1111/0034-6527.00354.*

[172] Sanstad, A.H. *Notes on the Economics of Household Energy Consumption and Technology Choice.* 2010. Lawrence Berkeley National Laboratory. *www1.eere.energy.gov/buildings/appliance_standards/pdfs/consumer_ee_theory.pdf* (last accessed October 15, 2022).

energy conservation standards on consumer choice and how to quantify this impact in its regulatory analysis in future rulemakings.

1. Benefits and Burdens of TSLs Considered for Consumer Pool Heaters Standards

Table V.24 and Table V.25 summarize the quantitative impacts estimated for each TSL for consumer pool heaters. The national impacts are measured over the lifetime of consumer pool heaters purchased in the 30-year period that begins in the anticipated year of compliance with amended standards (2028–2057). The energy savings, emissions reductions, and value of emissions reductions refer to full-fuel-cycle results. DOE is presenting monetized benefits in accordance with the applicable Executive orders and DOE would reach the same conclusion presented in this notice in the absence of the social cost of greenhouse gases, including the Interim Estimates presented by the Interagency Working Group. The efficiency levels contained in each TSL are described in section V.A of this document.

TABLE V.24—SUMMARY OF ANALYTICAL RESULTS FOR CONSUMER POOL HEATERS TSLS: NATIONAL IMPACTS

| Category | TSL 1 | TSL 2 | TSL 3 | TSL 4 | TSL 5 | TSL 6 |
|---|---|---|---|---|---|---|
| **Cumulative FFC National Energy Savings** | | | | | | |
| Quads | 0.25 | 0.31 | 0.41 | 0.45 | 0.70 | 3.07 |
| **Cumulative FFC Emissions Reduction** | | | | | | |
| $CO_2$ (*million metric tons*) | 8.6 | 10.4 | 13.7 | 15.0 | 28.9 | 155.5 |
| $CH_4$ (*thousand tons*) | 66.4 | 78.9 | 102.2 | 111.4 | 284.4 | 1,840.2 |
| $N_2O$ (*thousand tons*) | 0.1 | 0.1 | 0.1 | 0.1 | 0.2 | 0.4 |
| $NO_X$ (*thousand tons*) | 23.4 | 26.2 | 31.4 | 33.5 | 240.8 | 488.5 |
| $SO_2$ (*thousand tons*) | 3.2 | 4.0 | 5.4 | 6.0 | 6.0 | 7.6 |
| Hg (*tons*) | 0.02 | 0.03 | 0.03 | 0.04 | 0.04 | 0.04 |
| **Present Value of Monetized Benefits and Costs (3% discount rate, billion 2021$)** | | | | | | |
| Consumer Operating Cost Savings | 1.7 | 2.1 | 2.8 | 3.1 | 4.3 | 15.7 |
| Climate Benefits * | 0.4 | 0.5 | 0.7 | 0.7 | 1.5 | 8.4 |
| Health Benefits ** | 0.7 | 0.9 | 1.1 | 1.2 | 2.3 | 11.5 |
| Total Benefits † | 2.9 | 3.5 | 4.6 | 5.0 | 8.0 | 35.6 |
| Consumer Incremental Product Costs ‡ | 0.1 | 0.2 | 0.3 | 0.6 | 1.3 | 6.1 |
| Consumer Net Benefits | 1.6 | 1.9 | 2.4 | 2.4 | 3.0 | 9.6 |
| Total Net Benefits | 2.7 | 3.3 | 4.3 | 4.4 | 6.7 | 29.5 |
| **Present Value of Monetized Benefits and Costs (7% discount rate, billion 2021$)** | | | | | | |
| Consumer Operating Cost Savings | 0.8 | 0.9 | 1.2 | 1.3 | 1.8 | 6.7 |
| Climate Benefits * | 0.4 | 0.5 | 0.7 | 0.7 | 1.5 | 8.4 |
| Health Benefits ** | 0.3 | 0.3 | 0.4 | 0.5 | 0.9 | 4.3 |
| Total Benefits † | 1.5 | 1.8 | 2.3 | 2.5 | 4.2 | 19.4 |
| Consumer Incremental Product Costs ‡ | 0.1 | 0.1 | 0.2 | 0.3 | 0.7 | 3.1 |
| Consumer Net Benefits | 0.7 | 0.8 | 1.0 | 1.0 | 1.2 | 3.5 |
| Total Net Benefits | 1.4 | 1.7 | 2.2 | 2.2 | 3.5 | 16.3 |

**Note:** This table presents the costs and benefits associated with pool heaters shipped in 2028–2057. These results include benefits to consumers which accrue after 2057 from the products shipped in 2028–2057.

* Climate benefits are calculated using four different estimates of the SC–$CO_2$, SC–$CH_4$ and SC–$N_2O$. Together, these represent the global SC–GHG. For presentational purposes of this table, the climate benefits associated with the average SC–GHG at a 3-percent discount rate are shown, but the Department does not have a single central SC–GHG point estimate. To monetize the benefits of reducing GHG emissions this analysis uses the interim estimates presented in the *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates Under Executive Order 13990* published in February 2021 by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG).

** Health benefits are calculated using benefit-per-ton values for $NO_X$ and $SO_2$. DOE is currently only monetizing (for $NO_X$ and $SO_2$) $PM_{2.5}$ precursor health benefits and (for $NO_X$) ozone precursor health benefits, but will continue to assess the ability to monetize other effects such as health benefits from reductions in direct $PM_{2.5}$ emissions. The health benefits are presented at real discount rates of 3 and 7 percent. See section IV.L of this document for more details.

† Total and net benefits include consumer, climate, and health benefits. For presentation purposes, total and net benefits for both the 3-percent and 7-percent cases are presented using the average SC–GHG with 3-percent discount rate, but the Department does not have a single central SC–GHG point estimate. DOE emphasizes the importance and value of considering the benefits calculated using all four sets of SC–GHG estimates.

‡ Costs include incremental equipment costs as well as installation costs.

TABLE V.25—SUMMARY OF ANALYTICAL RESULTS FOR CONSUMER POOL HEATERS TSLS: MANUFACTURER AND CONSUMER IMPACTS

| Category | TSL 1 | TSL 2 | TSL 3 | TSL 4 | TSL 5 | TSL 6 |
|---|---|---|---|---|---|---|
| **Manufacturer Impacts** | | | | | | |
| Industry NPV (million 2021$) (No-new-standards case INPV = 585.7) | 583.6–585.2 | 581.9–584.5 | 570.8–577.0 | 563.0–575.0 | 548.4–587.7 | 482.7–631.6 |
| Industry NPV (% change) | (0.4)–(0.1) | (0.7)–(0.2) | (2.6)–(1.5) | (3.9)–(1.8) | (6.4)–0.3 | (17.6)–7.8 |

TABLE V.25—SUMMARY OF ANALYTICAL RESULTS FOR CONSUMER POOL HEATERS TSLS: MANUFACTURER AND CONSUMER IMPACTS—Continued

| Category | TSL 1 | TSL 2 | TSL 3 | TSL 4 | TSL 5 | TSL 6 |
|---|---|---|---|---|---|---|
| **Consumer Average LCC Savings (2021$)** | | | | | | |
| Electric Pool Heaters | 8,090 | 4,403 | 1,302 | 1,130 | 1,130 | 946 |
| Gas-fired Pool Heaters | 783 | 783 | 783 | 783 | 80 | 497 |
| Shipment-Weighted Average * | 8,090 | 4,403 | 1,302 | 1,276 | 748 | 728 |
| **Consumer Simple PBP (years)** | | | | | | |
| Electric Pool Heaters | 0.3 | 0.4 | 0.4 | 0.5 | 0.5 | 0.6 |
| Gas-fired Pool Heaters | 0.2 | 0.2 | 0.2 | 0.2 | 2.3 | 4.2 |
| Shipment-Weighted Average * | 0.3 | 0.4 | 0.4 | 0.2 | 1.8 | 3.2 |
| **Percent of Consumers that Experience a Net Cost** | | | | | | |
| Electric Pool Heaters | 1.1 | 2.3 | 22.4 | 45.3 | 45.3 | 62.9 |
| Gas-fired Pool Heaters | 0.2 | 0.2 | 0.2 | 0.2 | 39.1 | 72.6 |
| Shipment-Weighted Average * | 0.3 | 0.7 | 6.6 | 6.8 | 40.9 | 69.8 |

Parentheses indicate negative (-) values.
* Weighted by shares of each product class in total projected shipments in 2028.

DOE first considered TSL 6, which represents the max-tech efficiency levels for all product classes. Approximately 3.0 percent of electric pool heaters and 8.6 percent of gas-fired pool heaters are estimated to meet these levels in 2028 (as shown in Table IV.14 and Table IV.15). The max-tech efficiency levels are achieved using the most efficient heat pump technology for electric pool heaters and condensing technology for gas-fired pool heaters (as well as electrical upgrades to reduce the standby mode and off mode power consumption of electric pool heaters and gas-fired pool heaters). TSL 6 would save an estimated 3.07 quads of energy, an amount DOE considers significant. Under TSL 6, the NPV of consumer benefit would be $3.5 billion using a discount rate of 7 percent, and $9.6 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 6 are 156 Mt of $CO_2$, 7.6 thousand tons of $SO_2$, 489 thousand tons of $NO_X$, 0.04 tons of Hg, 1,840 thousand tons of $CH_4$, and 0.4 thousand tons of $N_2O$. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 6 is $8.4 billion. The estimated monetary value of the health benefits from reduced $SO_2$ and $NO_X$ emissions at TSL 6 is $4.3 billion using a 7-percent discount rate and $11.5 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced $SO_2$ and $NO_X$ emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 6 is $16.3 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 6 is $29.5 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At TSL 6, the average LCC impact is a savings of $946 for electric pool heaters and $497 for gas-fired pool heaters. The simple payback period is 0.6 years for electric pool heaters and 4.2 years for gas-fired pool heaters. The fraction of consumers experiencing a net LCC cost is 62.9 percent for electric pool heaters and 72.6 percent for gas-fired pool heaters. This is driven largely by variation in hours of use across consumer subgroups.

At TSL 6, the projected change in INPV ranges from a decrease of $103.0 million to an increase of $45.9 million, which corresponds to a decrease of 17.6 percent and an increase of 7.8 percent, respectively. DOE estimates that industry must invest $126.4 million to comply with standards set at TSL 6. DOE estimates that approximately 8.6 percent of gas-fired consumer pool heater shipments and 3.0 percent of electric consumer pool heater shipments would meet the efficiency levels analyzed at TSL 6.

There are 18 consumer pool heater manufacturers that manufacture electric consumer pool heaters covered by this rulemaking. Only three electric consumer pool heater manufacturers currently offer a model that meets the efficiency level required at TSL 6 for electric consumer pool heaters. All other electric consumer pool heater models offered by consumer pool heater manufacturers do not meet the efficiency level required at TSL 6 for electric pool heaters covered by this rulemaking.

There are six consumer pool heater manufacturers that manufacture gas-fired consumer pool heaters covered by this rulemaking. One gas-fired consumer pool heater manufacturer currently offers one model that meets the efficiency level required at TSL 6 for gas-fired pool heaters. All other gas-fired consumer pool heater models offered by the other five gas-fired consumer pool heater manufacturers do not meet the efficiency level required at TSL 6 for gas-fired pool heaters covered by this rulemaking.

At TSL 6, most consumer pool heater manufacturers would be required to redesign every consumer pool heater model covered by this rulemaking. It is unclear if most manufacturers would have the engineering capacity to complete the necessary redesigns within the 5-year compliance period. If manufacturers require more than 5 years to redesign all their covered consumer pool heater models, they will likely prioritize redesigns based on sales volume.

The Secretary concludes that at TSL 6 for consumer pool heaters, the benefits of energy savings, positive NPV of consumer benefits, emission reductions, and the estimated monetary value of the emissions reductions would be outweighed by the economic burden on a high percentage of consumers, and the impacts on manufacturers, including the large conversion costs, profit margin

impacts that could result in a large reduction in INPV, and the lack of manufacturers currently offering products meeting the efficiency levels required at this TSL, including most small businesses. A majority of electric pool heater consumers (62.9 percent) and gas-fired pool heater consumers (72.6 percent) would experience a net cost due to the increases in purchase costs. Only three consumer pool heater manufacturers offer models that meet the efficiency level required at TSL 6 for electric consumer pool heaters covered by this rulemaking, and only one consumer pool heater manufacturer offers models that meet the efficiency level required at TSL 6 for gas-fired consumer pool heaters covered by this rulemaking. Due to the limited amount of engineering resources each manufacturer has, it is unclear if most manufacturers will be able to redesign their entire product offerings of consumer pool heaters covered by this rulemaking in the 5-year compliance period. Lastly, only two small businesses offer consumer pool heater models that meet the efficiency levels required at TSL 6. No other small businesses offer any consumer pool heater models that meet the efficiency levels required at TSL 6. Consequently, the Secretary has concluded that TSL 6 is not economically justified.

DOE then considered TSL 5, which represents efficiency level 4 for electric consumer pool heaters and efficiency level 2 for gas-fired consumer pool heaters. Approximately 12.3 percent of electric pool heaters and 49.7 percent of gas-fired pool heaters are estimated to meet these levels in 2028 (as shown in Table IV.14 and Table IV.15). For electric pool heaters, this level utilizes heat pump technology. For gas-fired pool heaters, the level utilizes electronic ignition and blower driven gas/air mix (as shown in Table IV.6). TSL 5 would save an estimated 0.70 quads of energy, an amount DOE considers significant. Under TSL 5, the NPV of consumer benefit would be $1.2 billion using a discount rate of 7 percent, and $3.0 billion using a discount rate of 3 percent.

The cumulative emissions reductions at TSL 5 are 29 Mt of $CO_2$, 6.0 thousand tons of $SO_2$, 489 thousand tons of $NO_X$, 0.03 tons of Hg, 284 thousand tons of $CH_4$, and 0.4 thousand tons of $N_2O$. The estimated monetary value of the climate benefits from reduced GHG emissions (associated with the average SC–GHG at a 3-percent discount rate) at TSL 5 is $1.5 billion. The estimated monetary value of the health benefits from reduced $SO_2$ and $NO_X$ emissions at TSL 5 is $0.9 billion using a 7-percent discount rate and $2.3 billion using a 3-percent discount rate.

Using a 7-percent discount rate for consumer benefits and costs, health benefits from reduced $SO_2$ and $NO_X$ emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated total NPV at TSL 5 is $3.5 billion. Using a 3-percent discount rate for all benefits and costs, the estimated total NPV at TSL 5 is $6.7 billion. The estimated total NPV is provided for additional information, however DOE primarily relies upon the NPV of consumer benefits when determining whether a proposed standard level is economically justified.

At TSL 5, the average LCC impact is a savings of $1,130 for electric pool heaters and $80 for gas-fired pool heaters. The simple payback period is 0.5 years for electric pool heaters and 2.3 years for gas-fired pool heaters. The fraction of consumers experiencing a net LCC cost is 45.3 percent for electric pool heaters and 39.1 percent for gas-fired pool heaters.

At TSL 5, the projected change in INPV ranges from a decrease of $37.3 million to an increase of $2.0 million, which correspond to a decrease of 6.4 percent and an increase of 0.3 percent, respectively. DOE estimates that industry must invest $48.4 million to comply with standards set at TSL 5. DOE estimates that approximately 49.7 percent of gas-fired consumer pool heater shipments and 12.3 percent of electric consumer pool heater shipments would meet or exceed the efficiency levels analyzed at TSL 5. All 6 gas-fired consumer pool heater manufacturers and 10 of the 18 electric consumer pool heater manufacturers currently offer models that meet or exceed the efficiency levels required at TSL 5.

After considering the analysis and weighing the benefits and burdens, the Secretary has concluded that at a standard set at TSL 5 for consumer pool heaters would be economically justified. At this TSL, the average LCC savings for both electric and gas-fired pool heater consumers are positive. The FFC national energy savings are significant, and the NPV of consumer benefits is positive using both a 3-percent and 7-percent discount rate. Notably, the benefits to consumers outweigh the cost to manufacturers. At TSL 5, the NPV of consumer benefits, even measured at the more conservative discount rate of 7 percent, is over 32 times higher than the maximum estimated manufacturers' loss in INPV. The standard levels at TSL 5 are economically justified even without weighing the estimated monetary value of emissions reductions, representing $1.5 billion in climate benefits (associated with the average SC–GHG at a 3-percent discount rate), and $0.9 billion (using a 3-percent discount rate) or $2.3 billion (using a 7-percent discount rate) in health benefits.

Accordingly, the Secretary has concluded that TSL 5 would offer the maximum improvement in efficiency that is technologically feasible and economically justified and would result in the significant conservation of energy.

As stated, DOE conducts the walk-down analysis to determine the TSL that represents the maximum improvement in energy efficiency that is technologically feasible and economically justified as required under EPCA. The walk-down is not a comparative analysis, as a comparative analysis would result in the maximization of net benefits instead of the maximum improvement in energy efficiency that is technologically feasible and economically justified, which would be contrary to the statute. 86 FR 70892, 70908. Although DOE has not conducted a comparative analysis to select the new and amended energy conservation standards, DOE notes that, as compared to TSL 6, TSL 5 has higher average LCC savings for consumers of electric pool heaters, significantly smaller percentages of consumers of electric pool heaters and gas-fired pool heaters experiencing a net cost, a lower maximum decrease in INPV, and lower manufacturer conversion costs.

Although results are presented here in terms of TSLs, DOE analyzed and evaluated all possible ELs for each product class in its analysis. For both gas-fired pool heaters and electric pool heaters, TSL 5 is comprised of the highest efficiency level below max-tech. Therefore, DOE below considers the max-tech efficiency levels for both gas-fired pool heaters and electric pool heaters.

For gas-fired pool heaters, the max-tech efficiency level results in a large percentage of consumers that experience a net LCC cost due to the increases in purchase costs. While the average LCC would be positive, this is due to a small segment of consumers receiving the bulk of the benefits. Additionally, there would be a significant impact to manufacturers at EL 3, as most gas-fired pool heater manufacturers would be required to redesign every gas-fired pool heater model covered by this rulemaking. Most of the costs to manufacturers at TSL 6 is driven by the increased cost to gas-fired pool heater manufacturers, as indicated in the analysis in Section V.2. of this document. It is unclear if most

manufacturers would have the engineering capacity to complete the necessary redesigns within the 5-year compliance period.

For electric pool heaters the max-tech efficiency level is currently only achieved by three of the 18 manufacturers, resulting in large conversion costs and potentially significant reductions in INPV. The max-tech efficiency level also results in a large percentage of consumers that experience a net LCC cost due to the increases in purchase costs.

Additionally, at the max-tech efficiency levels for both electric pool heaters and gas-fired pool heaters there is a substantial risk of manufacturers being unable to offer a competitive range of equipment across the range of input capacities currently available. The benefits of max-tech efficiency levels for electric pool heaters and gas-fired pool heaters do not outweigh the negative impacts to consumers and manufacturers. Therefore, DOE has concluded that the max-tech efficiency levels are not justified. The ELs one level below max-tech, representing the finalized standard levels in TSL 5, significantly reduce the number of consumers experiencing a net cost and reduce the potential decrease in INPV and conversion costs to the point where DOE has concluded these levels are economically justified, as discussed for TSL 5 in the preceding paragraphs.

Therefore, based on the previous considerations, DOE adopts the energy conservation standards for consumer pool heaters at TSL 5. The amended energy conservation standards for consumer pool heaters, which are expressed as $TE_I$, are shown in Table V.26.

DOE understands that pool heater use can vary widely depending on a number of factors, including climate, size of the pool, whether it serves as a commercial facility, and annual usage. As the annual usage increases, the economics of purchasing more-efficient pool heaters improve. For example, for high-usage pool heaters such as those serving recreation centers or indoor pool facilities that are operated year round, condensing pool heaters would provide higher than average utility bill savings as compared to the increase in first cost to purchase the more-efficient equipment. While DOE is not adopting a standard requiring condensing technology for gas-fired pool heaters in this final rule, DOE believes there is merit to voluntary programs and education campaigns highlighting the value of these more-efficient options for high-use pool heater operations, in terms of both the net cost savings available for such consumers and the public benefits flowing from the energy savings. DOE encourages trade associations and other groups representing consumers likely to have relatively higher annual usage of their pool heaters—such as hotels and other lodging facilities, gymnasiums and spas, community pools, and schools—to communicate with their members about the private and public benefits of considering more-efficient options and also to engage, to the extent appropriate, with manufacturers and distributors to discuss the market interest in more-efficient options. Outside the context of this final rule, DOE will consider whether it can facilitate further consumer education about these products. Related to these efforts, DOE may explore additional information collection such as notices of data availability (NODAs) or requests for information (RFIs) to further inform TSL analyses regarding hours of use assumptions and price elasticity variations across consumer subgroups. This information may be helpful both in improving underlying analyses including regarding distributional impacts in future ECS, and may also improve the effectiveness of agency outreach regarding voluntary adoption for high-use consumers of appliances.

**Table V.26 Amended Energy Conservation Standards for Consumer Pool Heaters**

| Product Class | Integrated Thermal Efficiency $TE_I$† (*percent*) |
|---|---|
| Electric Pool Heater | $\frac{600PE}{PE + 1{,}619}$ |
| Gas-Fired Pool Heater | $\frac{84(Q_{IN} + 491)}{Q_{IN} + 2{,}536}$ |

†PE is the active electrical power for consumer pool heaters and $Q_{IN}$ is the input capacity as determined in accordance with the DOE test procedure in appendix P.

2. Annualized Benefits and Costs of the Adopted Standards

The benefits and costs of the adopted standards can also be expressed in terms of annualized values. The annualized net benefit is (1) the annualized national economic value (expressed in 2021$) of the benefits from operating products that meet the adopted standards (consisting primarily of operating cost savings from using less energy), minus increases in product purchase costs, and (2) the annualized monetary value of the climate and health benefits.

Table V.27 shows the annualized values for consumer pool heaters under TSL 5, expressed in 2021$. The results under the primary estimate are as follows.

Using a 7-percent discount rate for consumer benefits and costs and health benefits from reduced $NO_X$ and $SO_2$ emissions, and the 3-percent discount rate case for climate benefits from reduced GHG emissions, the estimated cost of the standards adopted in this rule is $74.1 per year in increased equipment costs, while the estimated annual benefits are $208.0 million in reduced equipment operating costs, $88.3 million in climate benefits, and $97.7 million in health benefits. In this case, the net benefit will amount to $319.8 million per year.

Using a 3-percent discount rate for all benefits and costs, the estimated cost of the standards is $75.3 million per year in increased equipment costs, while the estimated annual benefits are $252.7 million in reduced operating costs, $88.3 million in climate benefits, and $133.1 million in health benefits. In this case, the net benefit will amount to $398.8 million per year.

TABLE V.27—ANNUALIZED MONETIZED BENEFITS AND COSTS OF ADOPTED STANDARDS (TSL 5) FOR CONSUMER POOL HEATERS

| | Million 2021$/year | | |
|---|---|---|---|
| | Primary estimate | Low-net-benefits estimate | High-net-benefits estimate |
| **3% discount rate** | | | |
| Consumer Operating Cost Savings | 252.7 | 238.5 | 270.0 |
| Climate Benefits* | 88.3 | 85.3 | 91.2 |
| Health Benefits** | 133.1 | 128.8 | 137.6 |
| Total Benefits† | 474.1 | 452.6 | 498.7 |
| Consumer Incremental Product Costs‡ | 75.3 | 76.5 | 73.4 |
| Net Monetized Benefits | 398.8 | 376.1 | 425.4 |
| **7% discount rate** | | | |
| Consumer Operating Cost Savings | 208.0 | 197.5 | 220.3 |
| Climate Benefits* (3% discount rate) | 88.3 | 85.3 | 91.2 |
| Health Benefits** | 97.7 | 94.8 | 100.7 |
| Total Benefits† | 393.9 | 377.6 | 412.2 |
| Consumer Incremental Product Costs‡ | 74.1 | 74.6 | 73.2 |
| Net Monetized Benefits | 319.8 | 303.0 | 339.1 |

## VI. Procedural Issues and Regulatory Review

### *A. Review Under Executive Orders 12866 and 13563*

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, 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 specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (''OIRA'') in the Office of Management and Budget (''OMB'') has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. For the reasons stated in this preamble, this final regulatory action is consistent with these principles.

Section 6(a) of E.O. 12866 also requires agencies to submit ''significant regulatory actions'' to OIRA for review. OIRA has determined that this final regulatory action constitutes a ''significant regulatory action'' within the scope of section 3(f)(1) of E.O. 12866. Accordingly, pursuant to section 6(a)(3)(C) of E.O. 12866, DOE has provided to OIRA an assessment, including the underlying analysis, of benefits and costs anticipated from the final regulatory action, together with, to the extent feasible, a quantification of those costs; and an assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, and an explanation why the planned regulatory action is preferable to the identified potential alternatives. These assessments are summarized in this preamble and further detail can be found in the technical support document for this rulemaking.

### *B. Review Under the Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (''IRFA'') and a final regulatory flexibility analysis (''FRFA'') for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (*www.energy.gov/gc/office-general-counsel*). DOE has prepared the following FRFA for the products that are the subject of this rulemaking.

For manufacturers of consumer pool heaters, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to

determine whether any small entities would be subject to the requirements of the rule. (*See* 13 CFR part 121.) The size standards are listed by North American Industry Classification System (''NAICS'') code and industry description and are available at *www.sba.gov/document/support-table-size-standards.* Manufacturing of consumer pool heaters is classified under NAICS 333414, ''Heating Equipment (except Warm Air Furnaces) Manufacturing.'' The SBA sets a threshold of 500 employees or fewer for an entity to be considered as a small business for this category.

1. Description of Reasons Why Action Is Being Considered

DOE has undertaken this rulemaking pursuant to 42 U.S.C. 6295(e)(4)(B), which requires DOE to conduct a second round of amended standards rulemaking for consumer pool heaters. The Energy Policy and Conservation Act, as amended (EPCA), also requires that not later than six years after issuance of any final rule establishing or amending a standard, DOE must publish either a notice of the determination that standards for the product do not need to be amended, or a notice of proposed rulemaking including new proposed energy conservation standards. (42 U.S.C. 6295(m)(1)) This rulemaking is in accordance with DOE's obligations under EPCA.

2. Objectives of, and Legal Basis for, Rule

As discussed previously in section II, Title III, Part B of EPCA, sets forth a variety of provisions designed to improve energy efficiency and established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances and certain industrial and commercial equipment. The National Appliance Energy Conservation Act of 1987 (NAECA), Public Law 100–12, amended EPCA to establish energy conservation standards for residential pool heaters and set requirements to conduct two cycles of rulemaking to determine whether these standards should be amended. (42 U.S.C. 6295(e)(2) and (4)) The first of these two rulemakings, which amended standards for gas-fired pool heaters, concluded with the promulgation of a final rule on April 16, 2010. 75 FR 20112. (Codified at 10 CFR 430.32(k)). This rulemaking satisfies the statutory requirements under EPCA to conduct a second round of review of the pool heaters standard. (42 U.S.C. 6295(e)(4)(B)) This rulemaking is also in accordance the six-year review required under 42 U.S.C. 6295(m)(1).

3. Description on Estimated Number of Small Entities Regulated

For manufacturers of consumer pool heaters, the SBA has set a size threshold, which defines those entities classified as ''small businesses'' for the purposes of the statute. DOE used the SBA's small business size standards to determine whether any small entities would be subject to the requirements of this proposed rule. *See* 13 CFR part 121. The size standards are listed by NAICS code and industry description and are available at *www.sba.gov/document/support-table-size-standards.*

Manufacturing of consumer pool heaters is classified under NAICS code 333414, ''heating equipment (except warm air furnaces) manufacturing.'' The SBA sets a threshold of 500 employees or fewer for an entity to be considered as a small business for this category.

DOE reviewed the potential standard levels considered in this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. During its market survey, DOE used publicly available information to identify potential small manufacturers. DOE's research involved industry trade association membership directories (*e.g.,* AHRI), information from previous rulemakings, individual company websites, and market research tools (*e.g.,* D&B Hoover's reports) to create a list of companies that manufacture consumer pool heaters. DOE also asked stakeholders and industry representatives if they were aware of any additional small manufacturers during manufacturer interviews. DOE reviewed publicly available data and contacted various companies on its complete list of manufacturers to determine whether they met the SBA's definition of a small business manufacturer. DOE screened out companies that do not offer products impacted by this rulemaking, do not meet the definition of a ''small business,'' or are foreign owned and operated.

DOE identified 20 companies manufacturing consumer pool heaters covered by this rulemaking. Of these manufacturers, DOE identified six companies that meet SBA's definition of a small business. All six domestic small businesses only manufacture electric pool heaters. DOE did not identify any domestic small businesses that manufacture gas-fired pool heaters.

DOE was able to reach and discuss potential standards with two of the six small businesses. Additionally, DOE requested information about small businesses and potential impacts on small businesses while interviewing large manufacturers.

Gas-fired pool heaters account for most of the consumer pool heater market, with approximately 72 percent of all consumer pool heater units shipped annually. Within the electric consumer pool heater market, approximately 92 percent of shipments are heat pump pool heaters and only a small fraction of the shipments are electric resistance consumer pool heaters. (See chapter 9 of the final rule TSD for more information on the shipments analysis conducted for this rulemaking.) Although the electric consumer pool heater market is smaller than the gas-fired consumer pool heater market, it is also more fragmented. Whereas DOE identified six manufacturers of gas-fired consumer pool heaters, DOE identified 18 manufacturers of electric consumer pool heaters (four of the companies make both gas-fired and electric consumer pool heaters).

Four manufacturers dominate the market for electric pool heaters, three large manufacturers and one small business. The rest of the market is served by a combination of large and small businesses with market shares estimated to be in the single digits. Of these manufacturers, DOE identified six as domestic small businesses. All six domestic small businesses only manufacture electric pool heaters. Of those six, five only manufacture electric heat pump pool heaters. The other small business only manufactures electric resistance pool heaters. DOE did not identify any domestic small businesses that manufacture gas-fired pool heaters.

4. Description and Estimate of Compliance Requirements Including Differences in Cost, if Any, for Different Groups of Small Entities

As stated previously, DOE identified six small manufacturers of electric consumer pool heaters and no small manufacturers of gas-fired consumer pool heaters. Accordingly, this analysis of small business impacts focuses exclusively on the electric consumer pool heater industry.

This final rule adopts minimum energy conservation standards for electric consumer pool heaters at efficiency levels above those capable of being achieved by electric resistance pool heaters. Given that the designs of electric heat pump pool heaters and electric resistance pool heaters use different types of technology, DOE assumes manufacturers of electric resistance consumer pool heaters would

discontinue those electric resistance consumer pool heater models rather than redesign them as electric heat pump consumer pool heaters. As a result, expected impacts on manufacturers vary based on the type of electric consumer pool heaters they manufacture.

As described in section IV.J.2.c of this document, there are two types of conversion costs that small businesses could incur due to the adopted standard for electric consumer pool heaters: product conversion costs and capital conversion costs. Product conversion costs are investments in R&D, testing, marketing, and other non-capitalized costs necessary to make product designs comply with new and amended energy conservation standards. Capital conversion costs are investments in property, plant, and equipment necessary to adapt or change existing production facilities such that new compliant product designs can be fabricated and assembled. Manufacturers will only need to make these investments if they have products that do not meet the adopted energy conservation standards. Testing costs are costs manufacturers must make to test their electric consumer pool heaters in accordance with DOE's test procedure to demonstrate compliance with adopted energy conservation standards. Manufacturers must do this for all compliant electric consumer pool heaters that are in the scope of this rulemaking.

DOE estimates there are two small businesses that do not have any electric heat pump consumer pool heater models that would meet the adopted standard for electric consumer pool heaters. DOE applied the conversion cost methodology described in section IV.J.2.c of this document to calculate each small business's estimate product and capital conversion costs. To calculate product conversion costs, DOE estimated it would take 12 months of engineering time to redesign a single electric heat pump consumer pool heater model to meet the adopted standards for electric consumer pool heater (EL 4). DOE estimates that there are approximately 50 electric heat pump consumer pool heater unique basic models manufactured by small businesses that may need to be redesigned to comply with the adopted energy conservation standard for electric consumer pool heaters. To calculate capital conversion costs DOE estimates that most small businesses would need to make investments in tooling to accommodate electric heat pump consumer pool heater models with a larger evaporator. Small business conversion costs are presented in Table VI.1.

The five small businesses that manufacture electric heat pump consumer pool heaters would incur testing costs to demonstrate compliance in accordance with DOE's test procedure to the electric consumer pool heater energy conservation standard. Electric consumer pool heaters are currently not subject to a DOE energy conservation standard. This final rule establishes new energy conservation standards for electric consumer pool heaters. Therefore, all manufacturers, including small businesses, will have to test all electric consumer pool heaters that are subject to this rulemaking after the compliance date of the energy conservation standards established in this final rule. DOE estimates that small businesses manufacture approximately 65 unique basic models of electric heat pump consumer pool heaters. All 65 electric heat pump consumer pool heater models will need to be tested after the compliance date. DOE estimates a per model testing cost for these electric heat pump consumer pool heater models of approximately $6,500 per model. Small business conversion and testing costs are presented in Table VI.1.

TABLE VI.1—SMALL BUSINESS COSTS

| | Small business costs (2021$ millions) | Average cost per small business (2021$ millions) |
|---|---|---|
| Product Conversion Costs | 6.35 | 1.27 |
| Capital Conversion Costs | 0.65 | 0.13 |
| Testing Costs for Compliance | 0.42 | 0.08 |
| Total Small Business Costs | 7.42 | 1.48 |

DOE estimates the average small business will incur approximately $1.48 million per small business. DOE assumes that all consumer pool heater manufacturers would spread these costs over the five-year compliance timeframe, as compliance with the standards adopted in this final rule is required within five years after the publication of this document. Therefore, DOE assumes that the average consumer pool heater small business would incur on average $296,000 annually in each of the five years leading up to the compliance date for consumer pool heaters. Using publicly available data, DOE estimated the average annual revenue of the five small businesses that manufacturer electric heat pump consumer pool heaters to be $13.7 million. Table VI.2 compares these average small business costs to average annual revenue of small businesses.

TABLE VI.2—AVERAGE SMALL BUSINESS COSTS COMPARED TO ANNUAL REVENUE

| | Estimated compliance costs (2021$ millions) | Annual revenue (2021$ millions) | Compliance costs as a percent of annual revenue (%) | 5 Years of revenue (2021$ millions) | Compliance costs as a percent of 5 years of revenue (%) |
|---|---|---|---|---|---|
| Average Small Business | 1.48 | 13.7 | 10.8 | 68.5 | 2.2 |

Lastly, for the one small business that manufactures only electric resistance consumer pool heaters, based on public company literature, this small business manufactures approximately nine electric resistance consumer pool

heaters that would not be able to meet the adopted energy conservation standards for electric consumer pool heaters and therefore would no longer be allowed to sell these products in the United States. This small business also manufactures electric resistance spa heaters and commercial electric resistance heating products that would still be allowed to be sold in the United States, even after the compliance date of this final rule. This manufacturer's business and competitive position in the electric consumer pool heater market will be negatively impacted, since the adopted standards result in a minimum efficiency level that is not feasible for electric resistance pool heaters to achieve. This small business does not offer any compliant consumer pool heater products that could serve as a replacement product for the non-compliant electric resistance consumer pool heaters. However, this small business can still sell electric resistance spa heaters in the United States and will still be able to export electric resistance consumer pool heaters to other countries, including into Canada.

5. Duplication, Overlap, and Conflict with Other Rules and Regulations

DOE is not aware of any rules or regulations that duplicate, overlap, or conflict with the rule being considered here.

6. Significant Alternatives to the Rule

The discussion in the previous section analyzes impacts on small businesses that would result from the adopted standards, represented by TSL 5. In reviewing alternatives to the adopted standards, DOE examined energy conservation standards set at lower efficiency levels. While TSL 1, TSL 2, TSL 3, and TSL 4 would reduce the impacts on small business manufacturers, it would come at the expense of a reduction in energy savings. TSL 1 achieves 64 percent lower energy savings compared to the energy savings at TSL 5 and between 42 percent and 47 percent lower consumer NPV savings compared to the consumer NPV savings at TSL 5 (at a 3 percent discount rate and a 7 percent discount rate respectively); TSL 2 achieves 56 percent lower energy savings compared to the energy savings at TSL 5 and between 33 percent and 37 percent lower consumer NPV savings compared to the consumer NPV savings at TSL 5 (at a 3 percent discount rate and a 7 percent discount rate respectively); TSL 3 achieves 42 percent lower energy savings compared to the energy savings at TSL 5 and between 17 percent and 20 percent lower consumer NPV savings compared to the consumer NPV savings at TSL 5 (at a 3 percent discount rate and a 7 percent discount rate respectively); TSL 4 achieves 36 percent lower energy savings compared to the energy savings at TSL 5 and between 17 percent and 20 percent lower consumer NPV savings compared to the consumer NPV savings at TSL 5 (at a 3 percent discount rate and a 7 percent discount rate respectively).

Establishing standards at TSL 5 balances the benefits of the energy savings at TSL 5 with the potential burdens placed on consumer pool heaters manufacturers, including small business manufacturers. Accordingly, DOE is not adopting one of the other TSLs considered in the analysis, or the other policy alternatives examined as part of the regulatory impact analysis and included in chapter 17 of the final rule TSD.

Additional compliance flexibilities may be available through other means. EPCA provides that a manufacturer whose annual gross revenue from all of its operations does not exceed $8 million may apply for an exemption from all or part of an energy conservation standard for a period not longer than 24 months after the effective date of a final rule establishing the standard. (42 U.S.C. 6295(t)) Additionally, manufacturers subject to DOE's energy efficiency standards may apply to DOE's Office of Hearings and Appeals for exception relief under certain circumstances. Manufacturers should refer to 10 CFR part 430, subpart E, and 10 CFR part 1003 for additional details.

### *C. Review Under the Paperwork Reduction Act*

Manufacturers of consumer pool heaters must certify to DOE that their products comply with any applicable energy conservation standards. In certifying compliance, manufacturers must test their products according to the DOE test procedures for consumer pool heaters, including any amendments adopted for those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including consumer pool heaters. (*See* generally 10 CFR part 429). The collection-of-information requirement for the certification and recordkeeping is subject to review and approval by OMB under the Paperwork Reduction Act (''PRA''). This requirement has been approved by OMB under OMB control number 1910–1400. Public reporting burden for the certification is estimated to average 35 hours 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.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

### *D. Review Under the National Environmental Policy Act of 1969*

Pursuant to the National Environmental Policy Act of 1969 (''NEPA''), DOE has analyzed this rule in accordance with NEPA and DOE's NEPA implementing regulations (10 CFR part 1021). DOE has determined that this rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix B5.1 because it is a rulemaking that establishes energy conservation standards for consumer products or industrial equipment, none of the exceptions identified in appendix B5.1(b) apply, no extraordinary circumstances exist that require further environmental analysis, and it meets the requirements for application of a categorical exclusion. *See* 10 CFR 1021.410. Therefore, DOE has determined that promulgation of this rule is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

### *E. Review Under Executive Order 13132*

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations. 65 FR 13735. DOE has examined this rule and has determined that it would not have a substantial direct effect on the States,

on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this final rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA. (42 U.S.C. 6297) Therefore, no further action is required by Executive Order 13132.

*F. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, ''Civil Justice Reform,'' imposes on Federal agencies the general duty to adhere to the following requirements: (1) eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. 61 FR 4729 (Feb. 7, 1996). Regarding the review required by section 3(a), section 3(b) of E.O. 12988 specifically requires that executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any, (2) clearly specifies any effect on existing Federal law or regulation, (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction, (4) specifies the retroactive effect, if any, (5) adequately defines key terms, and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of E.O. 12988.

*G. Review Under the Unfunded Mandates Reform Act of 1995*

Title II of the Unfunded Mandates Reform Act of 1995 (''UMRA'') requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. Public Law 104–4, sec. 201 (codified at 2 U.S.C. 1531). For a regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *www.energy.gov/sites/prod/files/gcprod/documents/umra_97.pdf.*

DOE has concluded that this final rule may require expenditures of $100 million or more in any one year by the private sector. Such expenditures may include (1) investment in research and development and in capital expenditures by consumer pool heaters manufacturers in the years between the final rule and the compliance date for the new standards and (2) incremental additional expenditures by consumers to purchase higher-efficiency consumer pool heaters, starting at the compliance date for the applicable standard.

Section 202 of UMRA authorizes a Federal agency to respond to the content requirements of UMRA in any other statement or analysis that accompanies the final rule. (2 U.S.C. 1532(c)) The content requirements of section 202(b) of UMRA relevant to a private sector mandate substantially overlap the economic analysis requirements that apply under section 325(o) of EPCA and Executive Order 12866. This **SUPPLEMENTARY INFORMATION** section and the TSD for this final rule respond to those requirements.

Under section 205 of UMRA, the Department is obligated to identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a written statement under section 202 is required. (2 U.S.C. 1535(a)) DOE is required to select from those alternatives the most cost-effective and least burdensome alternative that achieves the objectives of the rule unless DOE publishes an explanation for doing otherwise, or the selection of such an alternative is inconsistent with law. As required by 42 U.S.C. 6295(e)(4)(B) and 42 U.S.C. 6295(m), this final rule establishes new and amended energy conservation standards for consumer pool heaters that are designed to achieve the maximum improvement in energy efficiency that DOE has determined to be both technologically feasible and economically justified, as required by 42 U.S.C. 6295(o)(2)(A) and 6295(o)(3)(B). A full discussion of the alternatives considered by DOE is presented in chapter 17 of the TSD for this final rule.

*H. Review Under the Treasury and General Government Appropriations Act, 1999*

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

*I. Review Under Executive Order 12630*

Pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

*J. Review Under the Treasury and General Government Appropriations Act, 2001*

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for Federal agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). Pursuant to OMB Memorandum M–19–15, Improving Implementation of the Information Quality Act (April 24, 2019), DOE published updated guidelines which are available at *www.energy.gov/sites/prod/files/2019/12/f70/DOE%20Final%20Updated%20IQA%20Guidelines%20Dec%202019.pdf.* DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

*K. Review Under Executive Order 13211*

E.O. 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of OIRA as a significant energy action. For any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that this regulatory action, which sets forth new and amended energy conservation standards for consumer pool heaters, is not a significant energy action because the standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on this final rule.

*L. Information Quality*

On December 16, 2004, OMB, in consultation with the Office of Science and Technology Policy (''OSTP''), issued its Final Information Quality Bulletin for Peer Review (''the Bulletin''). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the Bulletin is to enhance the quality and credibility of the Government's scientific information. Under the Bulletin, the energy conservation standards rulemaking analyses are ''influential scientific information,'' which the Bulletin defines as ''scientific information the agency reasonably can determine will have, or does have, a clear and substantial impact on important public policies or private sector decisions.'' 70 FR 2664, 2667.

In response to OMB's Bulletin, DOE conducted formal peer reviews of the energy conservation standards development process and the analyses that are typically used and prepared a report describing that peer review.[173] Generation of this report involved a rigorous, formal, and documented evaluation using objective criteria and qualified and independent reviewers to make a judgment as to the technical/scientific/business merit, the actual or anticipated results, and the productivity and management effectiveness of programs and/or projects. Because available data, models, and technological understanding have changed since 2007, DOE has engaged with the National Academy of Sciences to review DOE's analytical methodologies to ascertain whether modifications are needed to improve the Department's analyses. DOE is in the process of evaluating the resulting report.[174]

*M. Congressional Notification*

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that it has been determined that the rule is a ''major rule'' as defined by 5 U.S.C. 804(2).

The following standards included in this final rule were previously approved for incorporation by reference for the locations in which they appear in the regulatory text: ANSI Z21.56 and ASHRAE 146.

## VII. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

## List of Subjects

*10 CFR Part 429*

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Reporting and recordkeeping requirements.

*10 CFR Part 430*

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

[173] The 2007 ''Energy Conservation Standards Rulemaking Peer Review Report'' is available at the following website: *energy.gov/eere/buildings/downloads/energy-conservation-standards-rulemaking-peer-review-report-0* (last accessed October 17, 2022).

[174] The report is available at *www.nationalacademies.org/our-work/review-of-methods-for-setting-building-and-equipment-performance-standards.*

## Signing Authority

This document of the Department of Energy was signed on March 30, 2023, by Francisco Alejandro Moreno, Acting Assistant Secretary for Energy Efficiency and Renewable Energy, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on May 17, 2023.

**Treena V. Garrett,**

*Federal Register Liaison Officer, U.S. Department of Energy.*

For the reasons stated in the preamble, DOE amends parts 429 and 430 of chapter II, subchapter D, of title 10 of the Code of Federal Regulations, as set forth below:

## PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 2. Amend § 429.134 by adding paragraph (cc) to read as follows:

### § 429.134 Product-specific enforcement provisions.

* * * * *

(cc) *Pool heaters.* Beginning on May 30, 2028:

(1) *Verification of input capacity for gas-fired pool heaters.* The input capacity of each tested unit will be measured pursuant to the test requirements of § 430.23(p) of this subchapter. The results of the measurement(s) will be compared to the represented value of input capacity certified by the manufacturer for the basic model. The certified input capacity will be considered valid only if the measurement(s) (either the measured input capacity for a single unit sample or the average of the measured input capacity for a multiple unit sample) is within two percent of the certified input capacity.

(i) If the representative value of input capacity is found to be valid, the certified input capacity will serve as the basis for determination of the applicable standard and the mean measured input capacity will be used as the basis for calculation of the integrated thermal efficiency standard for the basic model.

(ii) If the representative value of input capacity is not within two percent of the certified input capacity, DOE will first attempt to increase or decrease the gas pressure within the range specified in manufacturer's installation and operation manual shipped with the gas-fired pool heater being tested to achieve the certified input capacity (within two percent). If the input capacity is still not within two percent of the certified input capacity, DOE will attempt to modify the gas inlet orifice. If the input capacity still is not within two percent of the certified input capacity, the mean measured input capacity (either for a single unit sample or the average for a multiple unit sample) determined from the tested units will serve as the basis for calculation of the integrated thermal efficiency standard for the basic model.

(2) *Verification of active electrical power for electric pool heaters.* The active electrical power of each tested unit will be measured pursuant to the test requirements of § 430.23 of this subchapter. The results of the measurement(s) will be compared to the represented value of active electrical power city certified by the manufacturer for the basic model. The certified active electrical power will be considered valid only if the measurement(s) (either the measured active electrical power for a single unit sample or the average of the measured active electrical power for a multiple unit sample) is within five percent of the certified active electrical power.

(i) If the representative value of active electrical power is found to be valid, the certified active electrical power will serve as the basis for determination of the applicable standard and the mean measured active electrical power will be used as the basis for calculation of the integrated thermal efficiency standard for the basic model.

(ii) If the representative value of active electrical power is not within five percent of the certified active electrical power, the mean measured active electrical power (either for a single unit sample or the average for a multiple unit sample) determined from the tested units will serve as the basis for calculation of the integrated thermal efficiency standard for the basic model.

## PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 3. The authority citation for part 430 continues to read as follows:

**Authority:** 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 4. Amend § 430.2 by adding in alphabetical order definitions for ''Electric pool heater'', ''Electric spa heater'', ''Gas-fired pool heater'', and ''Oil-fired pool heater'' to read as follows:

**§ 430.2 Definitions.**

* * * * *

*Electric pool heater* means a pool heater other than an electric spa heater that uses electricity as its primary energy source.

* * * * *

*Electric spa heater* means a pool heater that—

(1) Uses electricity as its primary energy source;

(2) Has an output capacity (as measured according to appendix P to subpart B of part 430) of 11 kW or less; and

(3) Is designed to be installed within a portable electric spa.

* * * * *

*Gas-fired pool heater* means a pool heater that uses gas as its primary energy source.

* * * * *

*Oil-fired pool heater* means a pool heater that uses oil as its primary energy source.

* * * * *

■ 5. Appendix P of subpart B of part 430 is amended by:

■ a. Revising the introductory note;

■ b. Revising sections 1., 5.2, and 5.3; and

■ c. Adding sections 5.5, 5.5.1, and 5.5.2;

The revisions and additions read as follows:

## Appendix P to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Pool Heaters

**Note:** On and after November 27, 2023, any representations made with respect to the energy use or efficiency of all pool heaters must be made in accordance with the results of testing pursuant to this appendix. Until November 27, 2023, manufacturers must test gas-fired pool heaters in accordance with this appendix, or appendix P as it appeared at 10 CFR part 430, subpart B revised as of January 1, 2021. Prior to November 27, 2023, if a manufacturer makes representations of standby mode and off mode energy consumption, then testing must also include the provisions of this appendix, or appendix P as it appeared at 10 CFR part 430, subpart B revised as of January 1, 2021, related to standby mode and off mode energy consumption.

1. *Definitions:*

*Active electrical power* means the maximum electrical power consumption in active mode for an electric pool heater.

*Active mode* means the condition during the pool heating season in which the pool heater is connected to the power source, and the main burner, electric resistance element, or heat pump is activated to heat pool water.

*Coefficient of performance (COP),* as applied to heat pump pool heaters, means the ratio of heat output in kW to the total power input in kW.

*Electric heat pump pool heater* means an appliance designed for heating nonpotable water and employing a compressor, water-cooled condenser, and outdoor air coil.

*Electric resistance pool heater* means an appliance designed for heating nonpotable water and employing electric resistance heating elements.

*Fossil fuel-fired pool heater* means an appliance designed for heating nonpotable water and employing gas or oil burners.

*Hybrid pool heater* means an appliance designed for heating nonpotable water and employing both a heat pump (compressor, water-cooled condenser, and outdoor air coil) and a fossil fueled burner as heating sources.

*Input capacity* means the maximum fuel input rate for a fossil fuel-fired pool heater.

*Off mode* means the condition during the pool non-heating season in which the pool heater is connected to the power source, and neither the main burner, nor the electric resistance elements, nor the heat pump is activated, and the seasonal off switch, if present, is in the ''off'' position.

*Output capacity* for an electric pool or spa heater means the maximum rate at which energy is transferred to the water.

*Seasonal off switch* means a switch that results in different energy consumption in off mode as compared to standby mode.

*Standby mode* means the condition during the pool heating season in which the pool heater is connected to the power source, and neither the main burner, nor the electric resistance elements, nor the heat pump is activated.

* * * * *

5.2 *Average annual fossil fuel energy for pool heaters.* For electric resistance and electric heat pump pool heaters, the average annual fuel energy for pool heaters, $E_F = 0$.

For fossil fuel-fired pool heaters, the average annual fuel energy for pool heaters, $E_F$, is defined as:

$$E_F = BOH\ Q_{IN} + (POH - BOH)\ Q_{PR} + (8760 - POH)\ Q_{off,R}$$

Where:

BOH = average number of burner operating hours = 104 h,

POH = average number of pool operating hours = 4,464 h,

$Q_{IN}$ = input capacity, in Btu/h, calculated as the quantity CF x Q x H in the equation for thermal efficiency in section 2.10.1 of ANSI Z21.56 (incorporated by reference; see § 430.3) and divided by 0.5 h (For electric resistance and electric heat pump pool heaters, $Q_{IN} = 0$.),

$Q_{PR}$ = average energy consumption rate of continuously operating pilot light, if employed, = ($Q_P$/1 h),
$Q_P$ = energy consumption of continuously operating pilot light, if employed, as measured in section 4.2 of this appendix, in Btu,
8760 = number of hours in one year,
$Q_{off,R}$ = average off mode fossil fuel energy consumption rate = $Q_{off}$/(1 h), and
$Q_{off}$ = off mode energy consumption as defined in section 4.3 of this appendix.

5.3 *Average annual electrical energy consumption for pool heaters.* The average annual electrical energy consumption for pool heaters, $E_{AE}$, is expressed in Btu and defined as:

(1) $E_{AE} = E_{AE,active} + E_{AE,standby,off}$
(2) $E_{AE,active}$ = BOH * PE
(3) $E_{AE,standby,off}$ = (POH − BOH) $P_{W,SB}$(Btu/h) + (8760 − POH) $P_{W,OFF}$(Btu/h)

where:

$E_{AE,active}$ = electrical consumption in the active mode,
$E_{AE,standby,off}$ = auxiliary electrical consumption in the standby mode and off mode,
PE = active electrical power, calculated as:
= $2E_c$, for fossil fuel-fired heaters tested according to section 2.10.1 of ANSI Z21.56 and for electric resistance pool heaters, in Btu/h,
= 3.412 $PE_{aux,rated}$, for fossil fuel-fired heaters tested according to section 2.10.2 of ANSI Z21.56, in Btu/h,
= $E_{c,HP}$ * (60/$t_{HP}$), for electric heat pump pool heaters, in Btu/h.
$E_c$ = electrical consumption in Btu per 30 min. This includes the electrical consumption (converted to Btus) of the pool heater and, if present, a recirculating pump during the 30-minute thermal efficiency test. The 30-minute thermal efficiency test is defined in section 2.10.1 of ANSI Z21.56 for fossil fuel-fired pool heaters and section 9.1.4 of ASHRAE 146 (incorporated by reference; see § 430.3) for electric resistance pool heaters. 2 = conversion factor to convert unit from per 30 min. to per h.
$PE_{aux,rated}$ = nameplate rating of auxiliary electrical equipment of heater, in Watts
$E_{c,HP}$ = electrical consumption of the electric heat pump pool heater (converted to equivalent unit of Btu), including the electrical energy to the recirculating pump if used, during the thermal efficiency test, as defined in section 9.1 of ASHRAE 146, in Btu.
$t_{HP}$ = elapsed time of data recording during the thermal efficiency test on electric heat pump pool heater, as defined in section 9.1 of ASHRAE 146, in minutes.
BOH = as defined in section 5.2 of this appendix,
POH = as defined in section 5.2 of this appendix,
$P_{W,SB}$ (Btu/h) = electrical energy consumption rate during standby mode expressed in Btu/h = 3.412 $P_{W,SB}$, Btu/h,
$P_{W,SB}$ = as defined in section 4.2 of this appendix,
$P_{W,OFF}$ (Btu/h) = electrical energy consumption rate during off mode expressed in Btu/h = 3.412 $P_{W,OFF}$, Btu/h, and
$P_{W,OFF}$ = as defined in section 4.3 of this appendix.

* * * * *

5.5 *Output capacity for electric pool heaters.*

5.5.1 Calculate the output capacity of an electric heat pump pool heater as:

$Q_{OUT,HP} = k * W * (T_{ohp} - T_{ihp}) * (60/t_{HP})$

where k is the specific heat of water, W is the mass of water collected during the test, $T_{ohp}$ is the average outlet water temperature during the standard rating test, $T_{ihp}$ is the average inlet water temperature during the standard rating test, all as defined in section 11.2 of ASHRAE 146, and $t_{HP}$ is the elapsed time in minutes of data recording during the thermal efficiency test on electric heat pump pool heater, as defined in section 9.1 of ASHRAE 146.

5.5.2 Calculate the output capacity of an electric resistance pool heater as:

$Q_{OUT,ER} = k * W * (T_{mo} - T_{mi}) * (60/30)$

where k is the specific heat of water, W is the mass of water collected during the test, $T_{mo}$ is the average outlet water temperature recorded during the primary test, and $T_{mi}$ is the average inlet water temperature record during the primary test, all as defined in section 11.1 of ASHRAE 146, and 60/30 is the conversion factor to convert unit from per 30 minutes to per hour.

■ 6. Amend § 430.32 by revising paragraph (k) to read as follows:

**§ 430.32 Energy and water conservation standards and their compliance dates.**

* * * * *

(k) *Pool heaters.* (1) Gas-fired pool heaters manufactured on and after April 16, 2013 and before May 30, 2028, shall have a thermal efficiency not less than 82%.

(2) Gas-fired pool heaters and electric pool heaters manufactured on and after May 30, 2028, shall have an integrated thermal efficiency not less than the following:

| Product Class | Integrated Thermal Efficiency (percent) |
|---|---|
| Gas-fired Pool Heater | $\frac{84(Q_{IN} + 491)}{Q_{IN} + 2{,}536}$ |
| Electric Pool Heater | $\frac{600PE}{PE + 1{,}619}$ |

where $Q_{IN}$ is the certified input capacity of a gas-fired pool heater basic model, in Btu/h, and PE is the certified active electrical power of an electric pool heater, in Btu/h.

* * * * *

**Note:** The following letter will not appear in the Code of Federal Regulations.

U.S. DEPARTMENT OF JUSTICE, Antitrust Division, RFK Main Justice Building, 950 Pennsylvania Avenue NW, Washington, DC 20530–0001, (202) 514–2401/(202) 616–2645 (Fax).

June 16, 2022

Ami Grace-Tardy, Assistant General Counsel for Legislation, Regulation and Energy Efficiency, 1000 Independence Ave. SW, U.S. Department of Energy, Washington, DC 20585.

Dear Assistant General Counsel Grace-Tardy:

I am responding to your April 15, 2022 letter seeking the views of the Attorney General about the potential impact on competition of proposed energy conservation standards for consumer pool heaters. Your request was submitted under Section 325(o)(2)(B)(i)(V) of the Energy Policy and Conservation Act, as amended (ECPA), 42 U.S.C. 6295(o)(2)(B)(i)(V), and 42 U.S.C. 6316(a), which requires the Attorney General to make a determination of the impact of any lessening of competition that is likely to result from the imposition of proposed energy conservation standards. The Attorney General's responsibility for responding to requests from other departments about the effect of a program on competition has been delegated to the Assistant Attorney General for the Antitrust Division in 28 CFR 0.40(g). The Assistant Attorney General for the Antitrust Division has

authorized me, as the Policy Director for the Antitrust Division, to provide the Antitrust Division's views regarding the potential impact on competition of proposed energy conservation standards on his behalf.

In conducting its analysis, the Antitrust Division examines whether a proposed standard may lessen competition, for example, by substantially limiting consumer choice or increasing industry concentration. A lessening of competition could result in higher prices to manufacturers and consumers. We have reviewed the proposed standards contained in the Notice of Proposed Rulemaking (87 FR 22640, April 15, 2022), and the related technical support documents. We also reviewed the transcript from the public meeting held on May 4, 2022 and reviewed public comments submitted by industry members in response to DOE's Request for Information and Notice of Data Availability in this matter.

Based on the information currently available, we do not believe that the proposed energy conservation standards for consumer pool heaters are likely to have a significant adverse impact on competition.

Sincerely,

David G.B. Lawrence,

*Director of Policy*

[FR Doc. 2023–10849 Filed 5–26–23; 8:45 am]

**BILLING CODE 6450–01–P**


# FEDERAL REGISTER

Vol. 88 Tuesday,
No. 103 May 30, 2023

Part IV

## Securities and Exchange Commission

17 CFR Part 240
Covered Clearing Agency Resilience and Recovery and Wind-Down Plans; Proposed Rule

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 240**

**[Release No. 34–97516; File No. S7–10–23]**

**RIN 3235–AN19**

## Covered Clearing Agency Resilience and Recovery and Wind-Down Plans

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission (''Commission'') is proposing to amend certain portions of the Covered Clearing Agency Standards under the Securities Exchange Act of 1934 (''Exchange Act'') to strengthen the existing rules regarding margin with respect to intraday margin and the use of substantive inputs to a covered clearing agency's risk-based margin system. The Commission is also proposing a new rule to establish requirements for the contents of a covered clearing agency's recovery and wind-down plan.

**DATES:** Comments should be received on or before July 17, 2023.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's internet comment form (*https://www.sec.gov/rules/submitcomments.htm*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–10–23 on the subject line.

*Paper Comments*

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–10–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (*https://www.sec.gov/rules/proposed.shtml*). Comments are also 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 a.m. and 3 p.m. Operating conditions may limit access to the Commission's Public Reference Room. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on our website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth L. Fitzgerald, Assistant Director, Jesse Capelle, Special Counsel, Office of Clearance and Settlement at (202) 551–5710, Division of Trading and Markets, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–7010.

**Table of Contents**



## I. Introduction

Section 17A of the Exchange Act directs the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of securities transactions and provides the Commission with the authority to regulate those entities critical to the clearance and settlement process.[1] The enactment of the Payment, Clearing, and Settlement Supervision Act (''Clearing Supervision Act'') in Title VIII of the Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') reaffirmed the importance of the national system for clearance and settlement.[2] Specifically, Congress found that the ''proper functioning of the financial markets is dependent upon safe and efficient arrangements for the clearing and settlement of payments, securities, and other financial transactions.'' [3]

In recognition of the importance of clearance and settlement to the securities markets, the Commission adopted 17 CFR 240.17Ad–22(e) (''Rule 17Ad–22(e)''), which sets forth standards for covered clearing agencies registered with the Commission.[4] These standards address all aspects of a covered clearing agency's operations, including financial risk management, operational risk, default management, governance, and participation requirements.[5] In this release, the Commission is proposing changes to augment and strengthen the requirements of these rules, referred to as the Covered Clearing Agency Standards, in three ways.[6]

[1] *See* 15 U.S.C. 78q–1(a)(2)(A).

[2] *See* 12 U.S.C. 5461–5472.

[3] *See* 12 U.S.C. 5461(a)(1).

[4] A covered clearing agency is a registered clearing agency that provides the services of a central counterparty or a central securities depository. 17 CFR 240.17Ad–22(a)(5).

[5] *See* section II.A *infra* (providing more information on the Covered Clearing Agency Standards).

[6] In addition, the Commission is proposing to amend the CFR section designation for 17 CFR 240.17Ad–22 to replace the uppercase letter with the corresponding lowercase letter. Accordingly, 17 CFR 240.17Ad–22 is proposed to be redesignated as 17 CFR 240.17ad–22.

First, the Commission is proposing changes with respect to the Covered Clearing Agency Standards regarding the intraday collection of margin set forth in 17 CFR 240.17Ad–22(e)(6)(ii) (''Rule 17Ad–22(e)(6)(ii)''). This proposal would build upon and strengthen the existing requirement that a covered clearing agency have policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, among other things, includes the authority and operational capacity to make intraday margin calls in defined circumstances. Specifically, the proposed amendments to this rule would require that the covered clearing agency have policies and procedures to establish a risk-based margin system that includes the authority and operational capacity to monitor intraday exposure on an ongoing basis and to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility.

Second, the proposal would amend and expand the requirements of 17 CFR 240.17Ad–22(e)(6)(iv) (''Rule 17Ad–22(e)(6)(iv)'') to provide that a covered clearing agency have policies and procedures that would apply in the event that the covered clearing agency relies on substantive inputs from third parties to calculate margin using a risk-based margin system and, specifically, when such inputs are not readily available or reliable. This proposal would require that the procedures used in such circumstances must include substantive inputs from an alternate source or, if it does not use an alternate source, the use of an alternate risk-based margin system that does not similarly rely on the unavailable or unreliable substantive inputs.

Finally, the Commission is proposing to prescribe requirements for the contents of a covered clearing agency's recovery and orderly wind-down plan (''RWP''). At the time that it adopted the Covered Clearing Agency Standards in 2016, the Commission required in 17 CFR 240.17Ad–22(e)(3)(ii) (''Rule 17Ad–27(e)(3)(ii)'') that a covered clearing agency's policies and procedures include an RWP, but the Commission declined to include requirements for the content of the RWP, stating that, given the nature of recovery and resolution planning, such plans are likely to closely reflect the specific characteristics of the covered clearing agency, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears.[7] The Commission continues to believe that an RWP should closely reflect the specific characteristics of the covered clearing agency. However, at this time, based on its supervisory experience considering the RWPs of the covered clearing agencies, the Commission believes that there are certain elements that must be included in each covered clearing agency's plan, to ensure that the plan is fit for purpose and provides sufficient identification of how a covered clearing agency would operate in a recovery and how it would achieve an orderly wind-down. Accordingly, the Commission is proposing a new rule at 17 CFR 240.17ad–26 (''Rule 17ad–26''), which would identify certain elements that a covered clearing agency would be required to include in an RWP and would also include definitions of recovery and orderly wind-down, which would identify the objective that these plans are designed to meet. As discussed further in sections III.B and IV.B *infra,* many of these elements are already contained in existing covered clearing agencies' RWPs, while other elements would be new to all or most of the existing RWPs. The Commission believes that the elements identified in new Rule 17ad–26 would accomplish three objectives. First, the rule would bolster existing plans by requiring certain new elements be included. Second, for the elements that are already contained in existing RWPs, the rule would codify these elements and ensure that the plans are required to continue to include these elements in their RWPs. Finally, the rule would ensure that the RWPs of any new covered clearing agencies would contain all of these elements.

However, with respect to changes to RWPs and to risk management rules more generally, the Commission would need to approve any proposed rule changes and, in filings for which an advance notice is required, not object to any such notice, as discussed further in section II.B *infra.* The Commission believes that this process should ensure that it is able to consider such changes and their consistency with the Exchange Act and the rules and regulations thereunder.

[7] Standards for Covered Clearing Agencies Adopting Release, Exchange Act Release No. 78961 (Sept. 28, 2016), 81 FR 70786, 70808–09 (Oct. 13, 2016) (''CCA Standards Adopting Release'').

## II. Regulatory Framework

### *A. The Covered Clearing Agency Standards*

In 1975, Congress added section 17A to the Exchange Act as part of the Securities Acts Amendments of 1975, which, as noted in section I *supra,* directed the Commission to facilitate the establishment of: (i) a national system for the prompt and accurate clearance and settlement of securities transactions (other than exempt securities which typically includes U.S. Treasury securities, except as discussed further below), and (ii) linked or coordinated facilities for clearance and settlement of securities transactions.[8] In so doing, Congress made several findings related to the importance of the clearance and settlement of securities transactions and the relationship of clearance and settlement of securities transactions to the protection of investors. Specifically, Congress found that the prompt and accurate clearance and settlement of securities transactions are necessary for the protection of investors and persons facilitating transactions by and acting on behalf of investors.[9] In facilitating the establishment of the national clearance and settlement system, the Commission must have due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents.[10]

The Commission's ability to achieve these goals is based upon the regulation of clearing agencies registered with the Commission.[11] Specifically, section 17A of the Exchange Act provides the Commission with authority to adopt rules as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act (including for the prompt and accurate clearance and settlement of securities transactions) and prohibits a clearing agency from engaging in any activity in

[8] *See* 15 U.S.C. 78q–1; Report of the Senate Committee on Banking, Housing & Urban Affairs, S. Rep. No. 94–75, at 4 (1975) (stating the Committee's belief that ''the banking and security industries must move quickly toward the establishment of a fully integrated national system for the prompt and accurate processing and settlement of securities transactions'').

[9] *See* 15 U.S.C. 78q–1(a)(1)(A); *see also* 15 U.S.C. 78q–1(B), (C), and (D) (setting forth additional findings related to the national system of clearance and settlement).

[10] *See* 15 U.S.C. 78q–1(a)(2)(A).

[11] Under the Exchange Act and the regulations thereunder, any entity performing the functions of a clearing agency must register with the Commission or seek an exemption from registration. 15 U.S.C. 78q–1(b)(1); *see also* 17 CFR 240.17Ad–22(a)(5) (defining covered clearing agency).

contravention of such rules and regulations.[12]

The Commission has exercised its broad authority to prescribe requirements for the prompt and accurate clearance and settlement of securities transactions and the safeguarding of securities and funds. Most recently, the Commission promulgated the Covered Clearing Agency Standards.[13] These standards require covered clearing agencies to establish, implement, maintain, and enforce written policies and procedures reasonably designed to, as applicable, meet certain minimum standards regarding, among other things, operations, governance, and risk management.[14]

One of the Covered Clearing Agency Standards concerns the maintaining of a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by the covered clearing agency.[15] As part of maintaining a sound risk management framework, a covered clearing agency is required to include plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.[16] At that time, the Commission stated that it understands that when a financial company becomes non-viable as a going concern or insolvent, recovery refers to actions taken that allow the financial company to sustain its critical operations and services; by contrast, resolution, or wind-down, refers to the transferring of a financial company's critical operations and services to an alternate entity.[17]

At the time of adoption of the Covered Clearing Agency Standards, the Commission declined to articulate requirements for all RWPs.[18] Rather, the Commission stated that, given the nature of recovery and resolution planning, such plans are likely to closely reflect the specific characteristics of the covered clearing agency, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears. While the Commission declined to articulate requirements, it did provide guidance for covered clearing agencies in developing RWPs. In the Covered Clearing Agency Standards Adopting Release, the Commission stated that a covered clearing agency generally should consider whether: (i) it can identify scenarios that may potentially prevent it from being able to provide its critical services as a going concern and assess the effectiveness of a full range of options for recovery or orderly wind-down; (ii) it has prepared appropriate plans for its recovery or orderly wind-down based on the results of that assessment; and (iii) it has provided relevant authorities with the information needed for purposes of recovery and resolution planning.[19] The Commission also stated in the CCA Standards Adopting Release that, with respect to recovery tools, a covered clearing agency generally should consider the following when developing its recovery tools: (i) whether the set of recovery tools comprehensively addresses how the covered clearing agency would continue to provide critical services in all relevant scenarios; (ii) the extent to which each tool is reliable, timely, and has a strong legal basis; (iii) whether the tools are transparent and designed to allow those who would bear losses and liquidity shortfalls to measure, manage, and control their potential losses and liquidity shortfalls; (iv) whether the tools create appropriate incentives for the covered clearing agency's owners, direct and indirect participants, and other relevant stakeholders; and (v) whether the tools are designed to minimize the negative impact on direct and indirect participants and the financial system more broadly.[20]

Relatedly, the Covered Clearing Agency Standards also address the financial resources necessary for a covered clearing agency's recovery or orderly wind-down. Specifically, 17 CFR 240.17Ad–22(e)(15) requires written policies and procedures reasonably designed to, among other things, hold sufficient liquid net assets funded by equity to cover potential general business losses so that the covered clearing agency can continue operations and services as a going concern if those losses materialize.[21] This requirement encompasses: (i) determining the amount of liquid net assets funded by equity based upon the covered clearing agency's general business risk profile and the length of time required to achieve a recovery or orderly wind-down, as appropriate, of its critical operations and services if such action is taken; (ii) holding liquid net assets funded by equity equal to the greater of either (x) six months of the covered clearing agency's current operating expenses, or (y) the amount determined by the board of directors to be sufficient to ensure a recovery or orderly wind-down of critical operations and services of the covered clearing agency, as contemplated by the RWPs established under current Rule 17Ad–22(e)(3)(ii),[22] and (iii) maintaining a viable plan, approved by the board of directors and updated at least annually, for raising additional equity should its equity fall close to or below the amount required under paragraph (ii).[23] With respect to the policies and procedures related to maintaining a viable plan for raising additional equity, the Commission stated that a viable plan generally should enable the covered clearing agency to hold sufficient liquid net assets to achieve recovery or orderly wind-down.[24]

Another of the Covered Clearing Agency Standards sets forth requirements for written policies and procedures reasonably designed to, among other things, establish a risk-based margin system to cover the covered clearing agency's credit

[12] *See* 15 U.S.C. 78q–1(d)(1); *see also* 15 U.S.C. 78q–1(b)(2) (referring to the Commission's ability to adopt rules with respect to the application of section 17A).

[13] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70839.

[14] *See generally* 17 CFR 240.17Ad–22(e). A covered clearing agency is a registered clearing agency that provides the services of a central counterparty or a central securities depository. 17 CFR 240.17Ad–22(a)(5).

[15] *See* 17 CFR 240.17Ad–22(e)(3).

[16] *See* 17 CFR 240.17Ad–22(e)(3)(ii).

[17] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70808 n.251. In this release, the Commission is proposing definitions of ''recovery'' and ''orderly wind-down'' that would apply to the RWPs addressed by this release. *See infra* section III.B.2.a.

[18] *Id.* at 70808.

[19] *Id.* at 70810. As discussed in section III.B *infra,* the Commission is proposing to codify elements in proposed Rule 17ad–26 that are consistent with this guidance, with the exception of the guidance related to ''resolution planning.'' With respect to the guidance related to providing relevant authorities with the information needed for purposes of recovery and resolution planning, the Commission continues to support and reiterates this prior guidance. *See infra* section III.B.2.

[20] *Id.* The Commission is also proposing to codify the first section of this guidance in proposed Rule 17ad–26(a)(5). *See* section III.B.2.c *infra.* With respect to the remaining items of this guidance, the Commission continues to support and reiterates this prior guidance in section III.B.2.d *infra.*

[21] 17 CFR 240.17Ad–22(e)(15).

[22] This amount shall be in addition to resources held to cover participant defaults or other risks covered under the credit risk standard in 17 CFR 240.17Ad–22(b)(3) or 17Ad–22(e)(4)(i) through (iii), as applicable, and the liquidity risk standard in 17 CFR 240.17Ad–22(e)(7)(i) and (ii), and it shall be of high quality and sufficiently liquid to allow the covered clearing agency to meet its current and projected operating expenses under a range of scenarios, including in adverse market conditions. 17 CFR 240.17Ad–22(e)(15)(ii)(A) and (B).

[23] 17 CFR 240.17Ad–22(e)(15)(i), (ii), and (iii).

[24] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70836.

exposures to its participants if the covered clearing agency provides central counterparty services.[25] At a minimum, such a system, among other things, must mark participant positions to market and collect margin, including variation margin or equivalent charges if relevant, at least daily and include the authority and operational capacity to make intraday margin calls in defined circumstances.[26] The Commission stated that defined circumstances would generally include margin calls on both a scheduled and unscheduled basis.[27]

In addition, a covered clearing agency's risk-based margin system has to use reliable sources of timely price data and use procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable.[28] The Commission stated that in selecting price data sources, a covered clearing agency generally should consider the ability of the provider to provide data in a variety of market conditions, including periods of market stress, and not select data sources based on their cost alone to ensure that such price data sources are reliable.[29]

*B. Statutory Requirements for Covered Clearing Agencies as Self-Regulatory Organizations*

A covered clearing agency is, by definition, a registered clearing agency, meaning that it is a self-regulatory organization (''SRO'') for purposes of the Exchange Act.[30] Therefore, as a SRO, a covered clearing agency is required to file with the Commission any proposed rule or proposed change in its rules, including additions or deletions from its rules.[31] The Commission has specified the format and process for filing such proposed rule changes in Form 19b–4, which is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder.[32]

The Commission publishes all proposed rule changes for comment.[33] Proposed rule changes are generally required to be approved by the Commission prior to going into effect; however, certain types of proposed rule changes take effect upon filing with the Commission.[34] When considering whether to approve or disapprove a proposed rule change, the Commission shall approve the proposed rule change if it finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the particular type of SRO.[35] The rule filing process provides transparency to market participants and the public about new initiatives and changes to governance, operations, and risk management at the clearing agency.

In addition, clearing agencies registered with the Commission are financial market utilities, as defined in section 803(6) of the Dodd-Frank Act.[36] A clearing agency that has been designated by the Financial Stability Oversight Council as systemically important or likely to become systemically important, and for which the Commission is the Supervisory Authority (''designated clearing agency''), is required to file 60-days advance notice with the Commission of changes to rules, procedures, and operations that could materially affect the nature or level of risk presented by the designated clearing agency (''advance notice'').[37] Such an advance notice also requires consultation with the Board of Governors of the Federal Reserve System (''Board of Governors'').[38] The Clearing Supervision Act authorizes the Commission to object to changes proposed in such an advance notice, which would prevent the clearing agency from implementing its proposed change(s).[39]

The covered clearing agencies' obligations as SROs and, as applicable, designated clearing agencies, are important when considering the types of changes that the Commission is proposing. If the covered clearing agency has to make changes to its rules to align with any of the proposed rules, if adopted, the covered clearing agency would be obligated to consider whether any proposed rule change and/or advance notice is necessary. For example, the Commission previously has stated that recovery and wind-down plans, and material changes thereto, would constitute a proposed rule change under section 19(b) of the Exchange Act and, for designated clearing agencies, an advance notice under the Clearing Supervision Act because such plans and material changes thereto would constitute changes to a stated policy, practice, or interpretation of the covered clearing agency and, for designated clearing agencies, a proposed change to its operations that could materially affect the nature or level of risk presented by the designated clearing agency.[40]

Indeed, covered clearing agencies have submitted RWPs, and material changes thereto, for public comment and Commission review pursuant to the proposed rule change and advance

[25] *See* 17 CFR 240.17Ad–22(e)(6).

[26] *See* 17 CFR 240.17Ad–22(e)(6)(ii).

[27] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70818.

[28] *See* 17 CFR 240.17Ad–22(e)(6)(iv).

[29] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70819.

[30] 17 CFR 240.17Ad–22(a)(5) (defining a covered clearing agency); 15 U.S.C. 78c(a)(26) (defining an SRO to include a registered clearing agency).

[31] An SRO must submit proposed rule changes to the Commission for review and approval pursuant to Rule 19b–4 under the Exchange Act. A stated policy, practice, or interpretation of an SRO, such as its written policies and procedures, would generally be deemed to be a proposed rule change. *See* 15 U.S.C. 78s(b)(1); 17 CFR 240.19b–4.

[32] *See* Form 19b–4, General Instruction B. The Form 19b–4 specifies the contents that must be included in a proposed rule change filing, including, among other items, a statement of purpose for the proposed rule change, which describes the reasons for adopting the proposed rule change, any problems the proposed rule change is intended to address, the manner in which the proposed rule change will operate to resolve those problems, the manner in which the proposed rule change will affect various persons (*e.g.,* brokers, dealers, issuers, and investors), and any significant problems known to the SRO that persons affected are likely to have in complying with the proposed rule change. *Id.* at Form 19b–4 Information section 3. The SRO must also include in its proposed rule change the complete text of the proposed rule. *Id.* at Form 19b–4 Information section 1. The SRO may request confidential treatment of any portion of its filing, *see* 17 CFR 240.24b–2, but it would still have to comply with the requirements of Form 19b–4 with respect to describing the contents of the proposed rule change for public comment.

[33] *See* 15 U.S.C. 78s(b)(1).

[34] *See* 15 U.S.C. 78s(b)(3)(A) (setting forth the types of proposed rule changes that take effect upon filing with the Commission). The Commission may temporarily suspend those rule changes within 60 days of filing and institute proceedings to determine whether to approve or disapprove the rule changes. 15 U.S.C. 78s(b)(3)(C).

[35] 15 U.S.C. 78s(b)(1)(C)(i). On the other hand, the Commission shall disapprove a proposed rule change if it cannot make such a finding. 15 U.S.C. 78s(b)(1)(C)(ii).

[36] *See* 12 U.S.C. 5462(6).

[37] The Dodd-Frank Act defines a ''designated clearing entity'' as a designated financial market utility that is either a derivatives clearing organization registered under section 5b of the Commodity Exchange Act (7 U.S.C. 7a–1) or a clearing agency registered with the Securities and Exchange Commission under section 17A of the Securities Exchange Act of 1934 (15 U.S.C. 78q–1). *See* 12 U.S.C. 5462(3). The Commission is the Supervisory Agency, as defined in 12 U.S.C. 5462(8), for four designated clearing agencies (the Depository Trust Company, the National Securities Clearing Corporation, the Fixed Income Clearing Corporation, and the Options Clearing Corporation). *See* 12 U.S.C. 5465(e)(1)(A). The Commission published a final rule concerning the filing of advance notices for designated clearing agencies in 2012. *See* 17 CFR 240.19b–4(n); Exchange Act Release No. 34–67286 (June 28, 2012), 77 FR 41602 (July 13, 2012).

[38] *See* 12 U.S.C. 5465(e)(1)(B).

[39] *See* 12 U.S.C. 5465(e)(1)(E) and (F).

[40] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70809.

notice processes, as appropriate.[41] The Commission continues to believe that such RWPs, and material changes thereto, would constitute a proposed rule change under section 19(b) of the Exchange Act and, for designated clearing agencies, an advance notice under the Clearing Supervision Act because such plans and material changes thereto would constitute changes to a stated policy, practice, or interpretation of the covered clearing agency and, for designated clearing agencies, a proposed change to its operations that could materially affect the nature or level of risk presented by the designated clearing agency.

*C. Title II of the Dodd-Frank Act*

Title II of the Dodd-Frank Act establishes a process for the appointment of the Federal Deposit Insurance Corporation (''FDIC'') as receiver of a failing financial company if, among other things, its failure would otherwise have serious adverse effects on financial stability in the United States.[42] This Title II authority would relate to covered clearing agencies, to the extent that they are determined, pursuant to the process described in this section, to be covered financial companies for purposes of the statute, meaning that the FDIC could be appointed as a receiver for a covered clearing agency.

Under this process, certain specified Federal regulatory authorities must recommend to the Secretary of the Treasury (the ''Secretary'') that the Secretary appoint the FDIC as receiver of the company. For most entities, including covered clearing agencies, the recommending agencies would be the Board of Governors and the FDIC.[43] Upon receipt of such recommendations, the Secretary must make certain determinations to implement Title II's orderly liquidation authority. Specifically, the Secretary shall take action to appoint the FDIC as receiver, if the Secretary (in consultation with the President) determines generally that, *inter alia,* the company is a financial company in default or in danger of default; the failure of the company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States; and no viable private sector alternative is available to prevent the default.[44]

Notably for this proposal, a covered clearing agency would be subject to this sort of orderly liquidation if two conditions are met. First, it must be considered to be a financial company, which includes any company that is incorporated or organized under any provision of Federal law or the laws of any State and is predominately engaged in activities that the Board of Governors has determined are financial in nature or incidental thereto.[45] Second, pursuant to the process described above, the Secretary would have to determine to implement an orderly liquidation authority.[46] If both those conditions occur, then the covered clearing agency would be considered a ''covered financial company.'' [47] In that case, the FDIC would serve as the receiver for the covered clearing agency.[48]

Once appointed as the resolution authority, the FDIC essentially ''steps into the shoes'' of the financial company and is able to use any powers and resources available to the financial company.[49] The FDIC as the resolution authority is responsible for the operations of the financial company, including, among other things, taking over the assets of and operating the financial company, collecting all obligations and money owed to the financial company, and performing all functions of the financial company in the financial company's name.[50] In addition, the FDIC shall liquidate and wind-up the financial company's affairs, including taking steps to realize upon the company's assets, as appropriate (*e.g.,* through the sale of assets or the transfer of assets to a bridge company).[51] A covered clearing agency's RWP would be helpful to the FDIC if it were to serve as the resolution authority for a covered clearing agency. Such a plan could provide insights, allowing the resolution authority (*i.e.,* the FDIC) to obtain an understanding of the covered clearing agency's critical services, how it provides such services, and how it would be able to continue providing such services in the event of a recovery or an orderly wind-down.

## III. Proposal

The Commission is proposing amendments to existing rules and an additional rule under section 17A of the Exchange Act. Specifically, the Commission is proposing to amend Rule 17Ad–22(e)(6)(ii) with respect to intraday margin, to require that a covered clearing agency's risk-based margin system monitors intraday exposures on an ongoing basis and includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility. Second, the Commission is proposing to amend Rule 17Ad–22(e)(6)(iv) with respect to the use of sources of information in a covered clearing agency's risk-based margin system, to require policies and procedures reasonably designed to have

[41] *See, e.g.,* Securities Exchange Act Release Nos. 91429 (Mar. 29, 2021), 86 FR 17421 (Apr. 2, 2021) (SR–DTC–2021–004); 83972 (Aug. 28, 2018), 83 FR 44964 (Sept. 4, 2018) (SR–DTC–2017–021); 83953 (Aug. 27, 2018), 83 FR 44381 (Aug. 30, 2018) (SR–DTC–2017–803); 91430 (Mar. 29, 2021), 86 FR 17432 (Apr. 2, 2021) (SR–FICC–2021–002); 83973 (Aug. 28, 2018), 83 FR 44942 (Sept. 4, 2018) (SR–FICC–2017–021); 83954 (Aug. 27, 2018), 83 FR 44361 (Aug. 30, 2018) (SR–FICC–2017–805); 94983 (May 25, 2022), 87 FR 33223 (June 1, 2022) (SR–ICC–2022–004); 91806 (May 10, 2021), 86 FR 26561 (May 14, 2021) (SR–ICC–2021–005) (''ICC 2021 Order''); 79750 (Jan. 6, 2017), 82 FR 3831 (Jan. 12, 2017) (SR–ICC–2016–013) (''ICC 2017 Notice and Order''); 86364 (July 12, 2019), 84 FR 34455 (July 18, 2019) (SR–ICEEU–2019–013) (''ICEEU 2019 Order''; 84498 (Oct. 29, 2018), 83 FR 55219 (Nov. 2, 2018) (SR–ICEEU–2018–014); 83651 (July 17, 2018), 83 FR 34891 (July 23, 2018) (SR–ICEEU–2017–016 and SR–ICEEU–2017–017); 88578 (Apr. 7, 2020), 85 FR 20561 (Apr. 13, 2020) (SR–LCH SA–2020–001); 87720 (Dec. 11, 2019), 84 FR 68989 (Dec. 11, 2019) (SR–LCH SA–2019–008); 83451 (June 15, 2018), 83 FR 28886 (June 21, 2018) (SR–LCH SA–2017–012 and SR–LCH SA–2017–013); 91428 (Mar. 29, 2021), 86 FR 17440 (Apr. 2, 2021) (SR–NSCC–2021–004); 83974 (Aug. 28, 2018), 83 FR 44988 (Sept. 4, 2018), (SR–NSCC–2017–017); 83955 (Aug. 27, 2018), 83 FR 44340 (Aug. 30, 2018) (SR–NSCC–2017–805); 90712 (Dec. 17, 2020), 85 FR 84050 (Dec. 23, 2020) (SR–OCC–2020–013); 90701 (Dec. 17, 2020), 85 FR 83662 (Dec. 22, 2020) (SR–OCC–2020–806); 83918 (Aug. 23, 2018), 83 FR 44091 (Aug. 29, 2018) (SR–OCC–2017–021); 83928 (Aug. 23, 2018), 83 FR 44109 (Aug. 29, 2018) (SR–OCC–2017–810).

[42] *See* 12 U.S.C. 5383.

[43] *See* 12 U.S.C. 5383(a)(1)(A). By contrast, if the entity is a broker or dealer, the recommending agencies would be the Board of Governors and the Commission. *See* 12 U.S.C. 5383(a)(1)(B).

[44] *See* 12 U.S.C. 5383(b).

[45] *See* 12 U.S.C. 5381(11)(A) and (B)(iii). Activities that are financial in nature include, but are not limited to, lending, exchanging, transferring, investing for others, or safeguarding money or securities. 12 U.S.C. 1843(k)(4).

[46] *See* 12 U.S.C. 5383(b).

[47] *See* 12 U.S.C. 5381(a)(8).

[48] Title II refers to the FDIC as the receiver in an orderly liquidation. More generally, the orderly liquidation process is often referred to as resolution. *See* Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 FR 76614, 76615 (Dec. 18, 2013) (referring generally to the orderly liquidation process as resolution). Existing guidance by standard-setting bodies generally refers to the governmental entity conducting a resolution as the resolution authority. *See, e.g.,* Financial Stability Board, Key Attributes of Effective Resolution Regimes, section 2.1 (2014). For purposes of this release, the Commission uses the more general term ''resolution authority'' to encompass the role of the FDIC as a receiver in an orderly liquidation.

[49] Specifically, the FDIC as receiver serves as the successor to the financial company, holding all rights, titles, powers, and privileges of the financial company and its assets, and of any stockholder, member, officer, or director of such company, and it takes title to the books, records, and assets of any previous receiver or other legal custodian of such covered financial company. *See* 12 U.S.C. 5390(a)(1)(A).

[50] 12 U.S.C. 5390(a)(1)(B).

[51] 12 U.S.C. 5390(a)(1)(D).

a covered clearing agency use reliable sources for both price data, as the current rule requires, and other substantive inputs to its risk-based margin system and to require that the covered clearing agency use procedures for when such inputs and price data are not available or reliable. Finally, the Commission is proposing new Rule 17ad–26 that would require a covered clearing agency to include nine specific elements in its RWP. Each of these proposed rules is discussed further below.

*A. Amendments Regarding Risk Management*

1. Proposed Changes to Rule 17Ad–22(e)(6)

The Commission is proposing to amend Rule 17Ad–22(e)(6)(ii) to strengthen its requirements: first, by further requiring that a covered clearing agency have policies and procedures reasonably designed to monitor intraday exposures on an ongoing basis; and second, by providing additional specificity to the circumstances in which a covered clearing agency should have policies and procedures to collect intraday margin. Specifically, as proposed, Rule 17ad–22(e)(6)(ii) would require a covered clearing agency that provides central counterparty services to establish, implement, maintain and enforce written policies and procedures reasonably designed to cover its credit exposures to its participants by establishing a risk-based margin system that, at a minimum, marks participant positions to market and collects margin, including variation margin or equivalent charges if relevant, at least daily, monitors intraday exposures on an ongoing basis, and includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility.

The Commission is also proposing to amend Rule 17Ad–22(e)(6)(iv) to strengthen its requirements: first, by expanding the scope of the rule to apply to both price data and other substantive inputs to a covered clearing agency's risk-based margin system; second, by further specifying the level to which the covered clearing agency's procedures must perform when price data or other substantive inputs are not available or reliable; and third, by providing that the procedures used when price data or other inputs are not available or reliable should include alternate sources or an alternate risk-based margin system.

2. Discussion

a. Amendments to Rule 17Ad–22(e)(6)(ii)

As discussed above, when considering the adoption of Rule 17Ad–22(e)(6)(ii) in 2014, the Commission stated that requiring covered clearing agencies to have the authority and operational capacity to make intraday margin calls in defined circumstances would ''benefit covered clearing agencies by covering settlement risk created by intraday price movements.'' [52] Thus, the current rule requires that covered clearing agencies have the authority and operational capacity to make intraday margin calls. Importantly, the Commission understands that the ''operational capacity'' to make intraday margin calls includes the ability to monitor intraday exposure; otherwise, it would be impossible for a covered clearing agency to make appropriate intraday margin calls if it were not monitoring its intraday exposure. Therefore, under the current rule, covered clearing agencies have some ability to monitor for intraday exposure and make intraday margin calls,[53] but there currently are no requirements to monitor for intraday exposure or regarding what frequency at which to monitor intraday exposures.

The Commission is now proposing to amend Rule 17Ad–22(e)(6)(ii) to incorporate a requirement of intraday monitoring and to require that such monitoring is done on an ongoing basis. The Commission continues to believe that it is essential that a covered clearing agency monitor its intraday exposure because the covered clearing agency faces a risk that its exposure to its participants can change rapidly as a result of intraday changes in prices, positions, or both. Moreover, the Commission believes that requiring that such monitoring occur on an ongoing basis will contribute to ensuring that the covered clearing agency is sufficiently informed and situated to take appropriate actions to manage any intraday exposure that arises.[54]

Therefore, the Commission is proposing to amend Rule 17Ad–22(e)(6)(ii) to require that a covered clearing agency's written policies and procedures be reasonably designed to ensure that such monitoring occurs on an ongoing basis.

The Commission is not prescribing a particular time period or frequency that would constitute an ongoing basis because the Commission believes that the covered clearing agency should be able to tailor its monitoring to the particular products cleared and markets served. The Commission believes that this requirement to monitor intraday exposure on an ongoing basis should allow flexibility to determine what monitoring frequency is appropriate to the particular market. For example, more frequent monitoring may be necessary for a covered clearing agency that operates in markets where intraday trading may be more prevalent or where intraday exposures may tend to be larger because of specific features, such as the settlement process. Being able to monitor, on an ongoing basis, any decrease in the margin coverage as compared to the changes in intraday credit exposures in its participants' portfolios should help the covered clearing agency ensure that it is able to collect margin sufficient to cover its participants' exposures. A covered clearing agency generally should consider whether its intraday monitoring considers how participants' exposures would affect all risks faced by the covered clearing agency, including those that may already be contemplated by variation margin, initial margin, or add-on charges.

Currently, Rule 17ad–22(e)(6)(ii) refers only to the covered clearing agency's ability to collect intraday margin ''in defined circumstances.'' The proposed amendment to Rule 17Ad–22(e)(6)(ii) would amend this to require covered clearing agencies to have policies and procedures to establish a risk-based margin system with the ability to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility. The Commission believes that this proposed requirement would build upon and expand the current rule's requirement that provides

[52] Standards for Covered Clearing Agencies Standards Proposing Release, Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 29507, 29529 (May 22, 2014) (''CCA Standards Proposing Release''). The Commission adopted Rule 17Ad–22(e)(6)(ii) in substantially the form it was proposed. *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70786.

[53] *See* section IV.B.4.a *infra.*

[54] *See* CPMI–IOSCO, Resilience of central counterparties (CCPs): Further guidance on the PFMI, paragraph 5.2.2 (July 2017), *available at* (discussing how a CCP addresses intraday exposure in its margin system and stating that ''a CCP faces the risk that its exposure to its participants can change rapidly as a result of intraday changes in prices, positions, or both; *ie* adverse price movements, as well as participants building larger positions through new trading (and settlement of maturing trades). For the purposes of addressing these and other forms of risk that may arise intraday, a CCP should address and monitor on an ongoing basis how such risks affect all components of its margin system, including initial margin, variation margin and add-on charges.'').

for the authority and operational capacity to make intraday margin calls in defined circumstances [55] by identifying particular instances in which a covered clearing agency needs to have policies and procedures to collect margin, such as the breach of specific risk thresholds or in times of elevated volatility, while continuing to provide flexibility to covered clearing agencies to make intraday margin calls as frequently as circumstances warrant. Moreover, as the Commission stated when adopting the Covered Clearing Agency Standards, this proposed amendment would continue to reflect that intraday margin calls should be able to be made on both a scheduled and unscheduled basis,[56] but would also provide more specificity as to what constitutes the appropriate scheduled and unscheduled bases.

The Commission believes that the proposed requirement for a covered clearing agency to have the authority and operational capacity to make intraday margin calls when the markets served display elevated volatility should ensure that the covered clearing agency develops policies and procedures to determine when it considers volatility to be elevated above typical levels, and potentially necessitating the collection of additional margin, in a manner specific to the products cleared and markets served. The Commission also believes that the proposed requirement for a covered clearing agency to have the authority and operational capacity to make intraday margin calls when specific risk thresholds are breached should ensure that the covered clearing agency considers *ex ante* the degree of exposure that necessitates additional margin to take into account new cleared positions and current market prices, in a manner specific to the products cleared and market served. Further, the Commission also believes that the requirement to specify thresholds that would trigger intraday margin calls, if breached, could improve participants' ability to understand when they may be subject to additional margin calls and, therefore, to be able to prepare accordingly to provide additional financial resources in anticipation of additional margin calls. In addition, specifying that a covered clearing agency should have the authority and operational capacity to make intraday margin calls in times of elevated volatility also makes clear to participants when they may be subject to additional margin calls and recognizes that intraday exposures may occur more frequently in volatile markets.

b. Amendments to Rule 17Ad–22(e)(6)(iv)

Currently, Rule 17Ad–22(e)(6)(iv) requires the establishment of a risk-based margin system that uses reliable sources of timely price data and uses procedures and sound valuation models for addressing circumstances in which pricing data are not readily available or reliable. When it proposed Rule 17Ad–22(e)(6)(iv), the Commission stated that a covered clearing agency should use reliable sources of timely price data because its margin system needs such data to operate with a high degree of accuracy and reliability, given the risks that the covered clearing agency's size, operation, and importance pose to the U.S. securities markets.[57] The Commission also recognized that, in some situations, price data may not be available or reliable, such as in instances where third party data providers experience lapses in service or where limited liquidity otherwise makes price discovery difficult, and that establishing appropriate procedures and sound valuation models is a useful step a covered clearing agency can take to help protect itself in such situations.[58]

Based on its experience with the Covered Clearing Agency Standards since their adoption in 2016, including its review and understanding of the covered clearing agencies' margin methodologies and, specifically, whether the methodologies rely on substantive inputs other than price data, the Commission believes that it is appropriate to expand the scope of this rule beyond price data to encompass other substantive inputs to a covered clearing agency's risk-based margin system.[59] As discussed in more detail in section IV.B.4.b *infra,* covered clearing agencies generally use risk-based margin systems to calculate margin. Covered clearing agencies' use of other substantive inputs, beyond price data (which is already addressed in current Rule 17Ad–22(e)(6)(iv)), from other entities as part of the risk-based margin system varies, and some do not rely on such substantive inputs. These types of inputs could include, for example, portfolio size, volatility, and sensitivity to various risk factors that are likely to influence security prices;[60] other examples of substantive inputs include duration and convexity, as well as the results of margin models run by third parties. Similarly, the procedures used when such substantive inputs are not available vary. The Commission believes that certain covered clearing agencies would need to develop additional procedures, or refine existing procedures, that would apply when the specific substantive inputs used by a covered clearing agency are not readily available or reliable, in order to ensure that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6).

In some instances, a covered clearing agency relies on third parties for these inputs. For similar reasons as the Commission discussed when proposing Rule 17Ad–22(e)(6)(iv), there is a need to use reliable sources for such inputs. The unavailability or unreliability of an input to a margin system, for example, if a third party provider does not perform, could potentially affect the covered clearing agency's ability to calculate margin. Currently, the Commission's rules do not address how a covered clearing agency plans for circumstances in which a substantive input to its risk-based margin system is not readily available or reliable. This proposed amendment to Rule 17ad–22(e)(6)(iv) would require that the covered clearing agency addresses such circumstances and develops appropriate procedures, for those covered clearing agencies that use such substantive inputs. Establishing procedures for when such substantive inputs from third parties are not available or reliable should, in turn, help ensure that the covered clearing agency can continue to calculate and collect margin commensurate with, the risks and particular attributes of each relevant product, portfolio, and market, as required under Rule 17Ad–22(e)(6)(i), in such circumstances.

The Commission is therefore proposing to amend Rule 17Ad–22(e)(6)(iv) to expand its scope beyond

[55] Currently, Rule 17Ad–22(e)(6)(ii) does not define what constitutes ''defined circumstances.''

[56] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70818.

[57] CCA Standards Proposing Release, *supra* note 52, 79 FR at 29529.

[58] *Id.*

[59] Despite some organizational changes to the rule to accommodate the proposal, Rule 17Ad–22(e)(6)(iv), as it relates to pricing data, is not being amended in this proposal, except with respect to the proposed new requirement to ensure that any procedures used when pricing data is not readily available or reliable must ensure that the covered clearing agency continues to meet its requirements under Rule 17Ad–22(e)(6). However, the Commission is proposing to standardize references to such data in the rule, which currently refers to both price and pricing data, to refer only to price data. The Commission previously used the two words interchangeably in Rule 17Ad–22(e)(6)(ii).

[60] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70855. Other portions of the Covered Clearing Agency Standards reference a model's inputs, along with parameters and assumptions, as part of a covered clearing agency's sensitivity analysis, which is required by current Rule 17Ad–22(e)(6)(vi).

price data to encompass other substantive inputs to its risk-based margin system and to impose requirements on a covered clearing agency to have procedures when such substantive inputs are not readily available or reliable. For purposes of this rule, the Commission believes that ''substantive'' refers to any inputs used by the covered clearing agency that are necessary for the risk-based margin system to calculate margin, and it is meant to distinguish from other potential inputs that may not be consequential to the calculation of margin, which would not be encompassed by this proposed rule. The Commission is not requiring that covered clearing agencies use such substantive inputs, but establishing requirements in the event that they do use such substantive inputs.

Further, the Commission is proposing to impose a new requirement that would further elaborate on the procedures necessary when price data is not available and that would also apply to substantive inputs to a covered clearing agency's risk-based margin system. Currently, the rule requires that the covered clearing agency use procedures and sound valuation models only when price data is not readily available or reliable. The proposed amendment would, with respect to both price data and other substantive inputs, require that such procedures should address circumstances in which price data *or* substantive inputs are not readily available or reliable, in order to ensure that the covered clearing agency be able to meet its requirements under Rule 17Ad–22(e)(6) and cover its credit exposures to its participants. The Commission believes that specifying the level to which these backup procedures should perform, that is, that the procedures should ensure that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6), should help ensure that covered clearing agencies adopt sufficiently robust procedures.

The Commission also proposes to further specify that the procedures for when the price data or substantive inputs are not readily available or reliable shall include the use of price data or substantive inputs from an alternate source or the use of an alternate risk-based margin system that does not similarly rely on the same unavailable or unreliable substantive input. With respect to the use of an alternate source, such an alternate source generally should meet the same level of reliability of the primary source, whether that alternate is sourced from an external provider or created internally. With respect to policies and procedures for the use of an alternate risk-based margin system if the covered clearing agency does not use an alternate source, this potential alternate risk-based margin system needs to be an alternate margin model that does not rely on the same data source that is unavailable or unreliable, to ensure that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6). Any alternative risk-based margin system would be subject to the requirements of 17 CFR 240.17Ad–22(e)(6)(vi) and (vii), with respect to monitoring, review, testing, and verification, and model validation.

With respect to both, a covered clearing agency generally should consider its reliance on any third party sources for purposes of its risk-based margin system and consider whether an alternate system or source of data or other inputs that is internal to the covered clearing agency, and does not rely upon any third party provider, would be appropriate, given the importance of calculating margin for a covered clearing agency to cover its exposure to its participants.[61]

3. Request for Comment

The Commission is requesting comment on all aspects of the proposed amendments to Rule 17Ad–22(e)(6). The Commission also solicits comment on the particular questions set forth below, and encourages commenters to submit any relevant data or analysis in connection with their answers.

1. Should Rule 17Ad–22(e)(6) be amended to require that covered clearing agencies have policies and procedures reasonably designed to monitor intraday exposures and to require that monitoring to occur on an ongoing basis? Do commenters have views on what constitutes an ongoing basis, and does it differ for products cleared or markets served by a covered clearing agency? For example, would an ongoing basis in the equity market be different than in the security-based swaps market?

2. Should Rule 17Ad–22(e)(6) be amended to require that covered clearing agencies have policies and procedures reasonably designed to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility?

3. Should the Commission prescribe particular risk thresholds for intraday margin calls? If so, what should those thresholds be and what is the basis for those thresholds, and should the threshold applicable to particular asset classes (*e.g.,* equities, fixed income, options, etc.) be determined jointly or separately?

4. Should the Commission identify additional circumstances that may warrant intraday margin calls beyond when the products cleared or markets served display elevated volatility? If so, what should those circumstances be?

5. Do commenters believe that certain participants of covered clearing agencies, including, for example, participants with less capital or using smaller settlement banks, could face operational challenges or pricing disadvantages, if proposed Rule 17Ad–22(e)(6)(ii) were to result in more frequent margin calls?

6. Should Rule 17Ad–22(e)(6)(iv) be amended to expand its scope to encompass other substantive inputs to a covered clearing agency's risk-based margin system? Should the Commission identify any particular types of substantive inputs or further specify what types of inputs should be included within the scope of the rule?

7. Should Rule 17Ad–22(e)(6)(iv) be amended to state that the procedures used when price data or other substantive inputs are not readily available or reliable should ensure that the covered clearing agency can continue to meet its obligations under Rule 17Ad–22(e)(6)?

8. Should Rule 17Ad–22(e)(6)(iv) be amended to further describe that the procedures used by a covered clearing agency when price data or other substantive inputs are not readily available or reliable shall include the use of price data or substantive inputs from an alternate source or the use of an alternate risk-based margin system?

9. Do commenters have views on whether the Commission should require that any alternate source should be independent of third party providers, that is, within the sole control of the covered clearing agency?

*B. Contents of Recovery and Wind-Down Plans*

1. Proposed Rule 17ad–26

Proposed Rule 17ad–26(a) would require that a covered clearing agency's recovery and wind-down plan, the existence of which is required in current Rule 17Ad–22(e)(3)(ii), shall: (1) identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of recovery

[61] 17 CFR 240.17Ad–22(e)(6).

and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down; (2) identify and describe any service providers upon which the covered clearing agency relies to provide its critical payment, clearing, and settlement services identified in paragraph (1), specify to what critical services such service providers are relevant, and address how the covered clearing agency would ensure that service providers would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan; (3) identify and describe scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including scenarios arising from uncovered credit losses, uncovered liquidity shortfalls, or general business losses; (4) identify and describe criteria that could trigger the implementation of the recovery and orderly wind-down plan and the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process; (5) identify and describe the rules, policies, procedures, and any other tools the covered clearing agency would use in a recovery or orderly wind-down; (6) address how the rules, policies, procedures, and any other tools or resources identified in paragraph (5) would ensure timely implementation of the recovery and orderly wind-down plans; (7) include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down; (8) include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate, amending the plans to address the results of the testing; and (9) include procedures for review of the plans by the board of directors at least every twelve months or following material changes to the system or environment in which the covered clearing agency operates that would significantly affect the viability or execution of the plans, with such review informed, as appropriate by the covered clearing agency's testing of the plans as required in the prior section of the proposed rule. Proposed Rule 17ad–26(b) would provide definitions of ''affiliate,'' ''recovery,'' ''orderly wind-down,'' and ''service provider'' for purposes of this rule.

2. Discussion

As discussed in section II.A *supra,* when the Commission adopted Rule 17Ad–22(e)(3)(ii), it did not establish requirements for specific elements to include in such RWPs. Since that time, however, the Commission has reviewed and approved RWPs for each of the seven covered clearing agencies, as well as periodic updates to those plans.[62] In so doing, the Commission has continued to develop its understanding of what are the essential elements of RWPs.[63]

In addition, the Commission has continued to participate in the development of guidance by international standard setting bodies in the areas of recovery and resolution of financial market infrastructures, which would include covered clearing agencies. The Committee on Payments and Market Infrastructure and the International Organization of Securities Commissions (together, ''CPMI–IOSCO'') published a report entitled *Recovery of financial market infrastructures,* which sets forth a policy statement on both the recovery planning process and the content of recovery plans.[64] With respect to resolution planning, the Financial Stability Board (''FSB'') published a policy statement regarding resolution and resolution planning for central counterparties.[65] To accommodate the development of effective RWPs while this guidance was being developed, and in recognition of the need to further develop an understanding of effective recovery and resolution strategies for different types of market infrastructure, the Commission extended the compliance date for Rule 17Ad–22(e)(3)(ii) to allow the affected clearing agencies to consider this emerging guidance before submitting their RWPs for review and approval.[66] Additional guidance has since followed, and work on the recovery and resolution of clearing agencies continues.[67]

Other U.S. authorities have established and had the opportunity to administer requirements for certain specific elements to be included in the RWPs of the financial market utilities they supervise. For example, Regulation HH, issued by the Board of Governors, was amended in 2014 to identify seven elements that must be addressed or be included in recovery and wind-down plans.[68] These elements are substantially similar to those proposed in Rule 17ad–26. Similarly, the CFTC's regulatory framework includes specific requirements for RWPs as applied to clearing entities within its authority.[69]

[62] *See infra* note 41.

[63] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70809.

[64] *See* CPMI–IOSCO, Recovery of financial market infrastructures (July 2017), *https://www.bis.org/cpmi/publ/d162.pdf* (''CPMI–IOSCO Recovery Guidance''). The guidance covers a number of topics: first, recovery planning, including the importance of recovery planning, the relationship between risk management, recovery, and resolution, the process of recovery planning, the content of recovery plans, and the role of the authorities in recovery; second, general considerations with respect to recovery tools, including risk categories and failure scenarios that may require the use of recovery tools, characteristics of recovery tools, and considerations for allocating losses and liquidity shortfalls; and third, specific recovery tools, including tools to allocate uncovered losses caused by participant default, tools to address uncovered liquidity shortfalls, tools to replenish financial resources, tools to re-establish a matched book following participant default, and tools to address losses not caused by participant default.

[65] *See* Guidance on CCP Resolution and Resolution Planning (July 5, 2017), *https://www.fsb.org/wp-content/uploads/P050717-1.pdf;* Guidance on Central Counterparty Resolution and Resolution Planning: Consultative Document (Feb. 1, 2017), *https://www.fsb.org/wp-content/uploads/Guidance-on-Central-Counterparty-Resolution-and-Resolution-Planning.pdf.*

[66] *See* Securities Exchange Act Release No. 80978 (Apr. 5, 2017), 82 FR 17300 (Apr. 10, 2017) (granting a temporary exemption to covered clearing agencies from compliance with Rule 17Ad–22(e)(3)(ii) among other requirements); *see also* Letter from Michael C. Bodson, President and Chief Executive Officer, DTCC (Feb. 15, 2017), *https://www.sec.gov/comments/s7-03-14/s70314-1594398-132354.pdf.*

[67] *See, e.g.,* FSB, CPMI–IOSCO, Central Counterparty Financial Resources for Recovery and Resolution (Mar. 10, 2022), *https://www.fsb.org/wp-content/uploads/P090322.pdf.*

[68] 12 CFR 234.3(a)(3)(iii); *see also* Final Rule, Financial Market Utilities, Docket No. R–1477 (Oct. 28, 2014), 79 FR 65543 (Nov. 5, 2014).

[69] *See* Derivatives Clearing Organizations and International Standards, 78 FR 72476 (Dec. 2, 2013) (adopting 17 CFR 39.39(b) and (c)). For example, 17 CFR 39.39(c)(1) states that the plans shall identify scenarios that may potentially prevent a derivatives clearing organization from being able to meet its obligations, provide its critical operations and services as a going concern, and assess the effectiveness of a full range of options for recovery or orderly wind-down. CFTC staff also released a memorandum with additional guidance for affected entities on the subjects and analysis that should be included in a viable RWP, as well as questions that affected entities should consider in evaluation tools for inclusion and designing proposed rule changes

Based on this supervisory experience, including its review and approval of the RWPs for the covered clearing agencies, the Commission believes it is now appropriate to specify elements for inclusion in a covered clearing agency's RWP by proposing Rule 17ad–26. The Commission has observed that the covered clearing agencies have, to a great degree, converged in terms of the types of elements that are included in each plan. As discussed in more detail in section IV.B.3 *infra* and in the discussion of each particular element below, the current RWPs contain or address many of the elements being proposed for inclusion, but the current plans do not contain all the elements that would be required under the proposed rule. Therefore, the Commission believes that codifying these nine elements, and the related definitions, will help ensure that RWPs continue to be effective at planning for and managing a range of recovery and orderly wind-down scenarios that could risk transmitting systemic risk through the U.S. securities markets and the broader financial system, by accomplishing three objectives. First, the rule would bolster existing plans by requiring certain new elements be included. Second, for the elements that are already contained in existing RWPs, the rule would codify these elements and ensure that the plans are required to continue to include these elements in their RWPs, and any future changes to the RWPs would be subject to Commission review for consistency with these requirements, as discussed in section II.B *supra.* Finally, the rule would ensure that the RWPs of any new covered clearing agencies would contain all of these elements.

When adopting the Covered Clearing Agency Standards, the Commission stated that a covered clearing agency generally should have policies and procedures to provide the relevant resolution authorities with information needed for the purposes of resolution planning, including its recovery and wind-down plan.[70] The Commission also explained that it works with the FDIC and other resolution authorities, as appropriate, to help ensure the development of effective resolution strategies for covered clearing agencies, and that providing the Commission and the FDIC information for resolution planning would promote the ongoing development of these resolution strategies.[71] The Commission continues to believe that this is the case, and that the ongoing development of these strategies will be further promoted by specifically requiring that RWPs contain certain elements and ensuring that RWPs address these specified elements.

The Commission believes that codifying these items as part of recovery and wind-down plans would help assist relevant resolution authorities develop and improve resolution plans for covered clearing agencies in resolution. For example, by ensuring that these items are included in RWPs, a resolution authority will have a more comprehensive understanding of what the covered clearing agencies' critical payment, clearing, and settlement services are, as well as what providers support such services, thereby allowing a resolution authority to connect, or ''map,'' the various providers to the critical services to ensure continuity of clearance and settlement by a covered clearing agency in resolution.

a. Proposed Definitions

The Commission believes that definitions of the terms ''recovery'' and ''orderly wind-down'' would provide covered clearing agencies, as well as market participants, a precise description of the meaning of these terms, which are not currently defined in the Commission's rules and are often used together, and somewhat interchangeably, by market participants. Further, these definitions would help covered clearing agencies understand the precise goal for which their RWPs should be reasonably designed to meet. The Commission believes that the RWPs generally should set forth the covered clearing agency's viable strategy for ensuring that they address how a covered clearing agency would achieve a recovery or orderly wind-down, using the tools and resources available under its rules and procedures.

Current Rule 17Ad–22(e)(3)(ii) and proposed Rule 17ad–26 both refer to plans for recovery *and* orderly wind-down, and, therefore, a covered clearing agency should prepare plans for both recovery and orderly wind-down. Providing separate definitions specifies that these are two distinct events, both of which a covered clearing agency should include in its recovery and wind-down planning. Simply including a plan for what a covered clearing agency would do in recovery is not sufficient, and a plan for one event does not serve as a substitute for the other. For example, there may be circumstances in which a covered clearing agency attempts to recover but the recovery effort eventually fails. As part of its planning, a covered clearing agency generally should identify and maintain the relevant supporting information necessary to support its RWP.

Moreover, because these definitions refer to actions of a covered clearing agency only, as opposed to any other entity, neither a recovery plan nor an orderly wind-down plan should be based on assumptions of government intervention or support.

Proposed Rule 17ad–26(b) would define ''recovery'' to mean the actions of a covered clearing agency, consistent with its rules, procedures, and other ex ante contractual arrangements, to address any uncovered loss, liquidity shortfall, or capital inadequacy, whether arising from participant default or other causes (such as business, operational, or other structural weaknesses), including actions to replenish any depleted prefunded financial resources and liquidity arrangements, as necessary to maintain the covered clearing agency's viability as a going concern and to continue its provision of critical services. The Commission believes that this proposed definition is generally consistent with its previous understanding of recovery, as set forth in the CCA Standards Adopting Release, in that this proposed definition also focuses on the actions of the covered clearing agency that are beyond its typical business operations and refers to situations in which the covered clearing agency's ability to serve as a going concern is in question, that is, it goes beyond the covered clearing agency's ''business as usual'' operations.[72]

Proposed Rule 17ad–26(b) would define ''orderly wind-down'' to mean the actions of a covered clearing agency to effect the permanent cessation, sale, or transfer of one or more of its critical services in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system. The Commission believes that this

to support the inclusion of particular tools in such plans. *See* Memorandum from Jeffrey M. Bandman, Acting Director, Division of Clearing and Risk, CFTC Letter No. 16–61 (July 21, 2016), *https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/16-61.pdf.*

[70] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70810.

[71] *Id.*

[72] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70808, n. 251 (when addressing comments regarding recovery and wind-down plans, stating the Commission's general understanding that: (i) when a financial company becomes non-viable as a going concern or insolvent, recovery refers to actions taken that allow the financial company to sustain its critical operations and services; (ii) resolution (or wind-down), by contrast, refers to the transferring of the financial company's critical operations and services to an alternate entity.).

definition would clarify that an orderly wind-down is distinct from a resolution in that orderly wind-down continues to rest within the control of the covered clearing agency while resolution would involve a governmental entity as the resolution authority, such as the FDIC as a receiver. The Commission further believes that this proposed definition would identify the specific goals of an orderly wind-down, in that the actions of a covered clearing agency should not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system, and that it would serve as a final and binding solution to whatever circumstance necessitated the wind-down, that is, not a temporary stopgap measure. This distinguishes an orderly wind-down from winding down the covered clearing agency as quickly as possible.

To be orderly, a wind-down generally should include a covered clearing agency providing notice to allow participants to transition to alternative arrangements in an orderly manner, as well as maintaining the operation of critical services. Moreover, for a wind-down involving the sale or transfer of all or a portion of the covered clearing agency to be orderly, the covered clearing agency generally should consider the separability of the parts of the covered clearing agency and whether there are certain portions of the covered clearing agency's business that could be sold or transferred as separate businesses.

b. Critical Services

Proposed Rule 17ad–26(a)(1) would require each covered clearing agency's RWP to identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down.

The Commission believes that, regardless of the products cleared or markets served, the necessary first step in effective recovery and wind-down planning must be identifying and describing the critical services that are provided to market participants, as required under this proposed rule. As stated above, market participants rely on the services of covered clearing agencies to facilitate payment, clearing, and settlement for the U.S. securities markets. The Commission believes that identifying and describing the critical services in an RWP should ensure that the covered clearing agency focuses its recovery and wind-down plans on its ability to continue to provide those services on an ongoing basis, even under stress. Covered clearing agencies already identify and describe their critical services in the existing RWPs, as well as the criteria used to determine what services are critical. However, covered clearing agencies generally do not provide specific information as to the staffing necessary to support a recovery or orderly wind-down.

When identifying what is a critical payment, clearing, or settlement service, the Commission believes that the covered clearing agency generally should consider the impact that any interruption to particular services would have on the covered clearing agency's participants and the smooth functioning of the markets that it serves, as well as whether the service is available from any substitute provider. In this proposed rule, the Commission believes that ''critical'' would refer to the importance of the service to the covered clearing agency's participants, and to the proper functioning of the markets that the covered clearing agency services. The inability of a covered clearing agency to provide these services would have implications with respect to financial stability. The failure to provide these critical services would likely have a material negative impact on participants or third parties, give rise to contagion, and undermine general confidence in the markets served.

The Commission believes that, after identifying the critical services, the next step of effective recovery and wind-down planning is to address how the covered clearing agency would continue to provide such critical services in the event of recovery and during an orderly wind-down, as required under proposed Rule 17ad–26(a)(1). This requirement should continue to ensure that a covered clearing agency has developed policies and procedures to continue providing its critical services in the event of a recovery or orderly wind-down. Further, by addressing how to continue providing such services, the recovery plan should also allow the covered clearing agency to evaluate how to ensure the orderly transfer of those services to a new or an existing entity as part of a wind-down, in the event that recovery is unsuccessful.

In addition, the Commission believes that the consideration of how the covered clearing agency would continue to provide its identified critical services must include the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down, in order to ensure that the necessary personnel are available to continue operating the covered clearing agency. The Commission believes that this aspect of the proposal generally should include identification of key business units and/or employees who may be necessary to implement and execute the critical services identified in the RWP. As part of this process, the covered clearing agency generally should consider how it would retain the services of any personnel who are essential to the execution of the plans, including whether they are or should be subject to employment agreements and an analysis of the terms of employment agreements (*e.g.,* whether such agreements would allow the employee to continue working in the event that ownership of the covered clearing agency were to transfer in the event of a recovery or orderly wind-down). In addition, the covered clearing agency generally may consider, as part of this process, any ''key person risk'' that exists within its organization and how it would address such risk in its RWP.

Finally, the Commission believes that this proposed requirement regarding the identification and description of critical services should also assist a resolution authority, as discussed in section II.C *supra,* with resolution planning. A key obligation of a resolution authority is to ensure the continued provision of an entity's critical services, to avoid harm to the broader market.[73] Understanding what those critical services are, and the covered clearing agency's strategy for ensuring that such critical services

[73] *See, e.g.,* Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy, 78 FR 76614, 76615 (Dec. 18, 2013) (''In resolving a failed or failing SIFI . . . the FDIC seeks to preserve financial stability by maintaining the critical services, operations and funding mechanisms conducted throughout the company's operating subsidiaries.''); 12 U.S.C. 5384(a) (stating that the purpose of the FDIC's orderly liquidation authority is to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard). *See also* Financial Stability Board, Key Attributes of Effective Resolution Regimes, Annex 1.1 (2014) (identifying as the objective of CCP resolution the pursuit of financial stability and ensuring the continuity of critical CCP functions in all jurisdictions where those functions are critical); Financial Stability Board, Guidance on Central Counterparty Resolution and Resolution Planning, section 1.2 (July 2017).

continue to be provided, therefore is essential for resolution planning.

i. Interaction With Other Commission Rules

The Commission acknowledges that there likely will be some connection between what a covered clearing agency identifies as its critical services for purposes of inclusion in its recovery and wind-down plan and what it identifies as Critical SCI systems for purposes of Regulation Systems Compliance Integrity (''Regulation SCI''). Regulation SCI is designed to strengthen the infrastructure of the U.S. securities markets, reduce the occurrence of systems issues in those markets, improve their resiliency when technological issues arise, and implement an updated and formalized regulatory framework, thereby helping to ensure more effective Commission oversight of such systems.[74] However, inclusion in a covered clearing agency's recovery plan as a critical service would have no impact on a covered clearing agency's obligations under Regulation SCI. This proposed rule is designed to improve and strengthen a covered clearing agency's recovery and wind-down plan, whereas Regulation SCI is focused on, among other things, strengthening the infrastructure of the U.S. securities markets and improving its resilience when technological issues arise.

The key market participants that are currently subject to Regulation SCI are called ''SCI entities'' and encompass certain SROs, including registered clearing agencies.[75] Regulation SCI is designed to apply to the automated systems important to the functioning of the U.S. securities markets and requires SCI entities to, among other things, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their key automated systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that such systems operate in accordance with the Exchange Act and the rules and regulations thereunder and the entities' rules and governing documents, as applicable.[76]

Regulation SCI applies to the systems of, or operated by or on behalf of, SCI entities, that directly support any one of six core securities market functions—trading, clearance and settlement, order routing, market data, market regulation, and market surveillance (''SCI systems'').[77] Regulation SCI also identifies a subset of SCI systems defined as ''Critical SCI systems,'' which are those systems whose functions are critical to the operation of the markets, including those that represent single points of failure, and are therefore subject to certain heightened requirements.[78] Specifically, Critical SCI systems means, any SCI systems of, or operated by or on behalf of, an SCI entity that directly support functionality relating to, among other things, clearance and settlement systems of clearing agencies.[79]

When discussing the inclusion of clearance and settlement systems of clearing agencies as a Critical SCI system, the Commission stated that the clearance and settlement of securities is fundamental to securities market activity.[80] The Commission identified a variety of services that clearing agencies perform to help ensure that trades settle on time and at the agreed upon terms, including comparing transaction information (or reporting to members the results of exchange comparison operations), calculating settlement obligations (including net settlement), collecting margin (such as initial and variation margin), and serving as a depository to hold securities as certificates or in dematerialized form to facilitate automated settlement.[81]

As stated above in section III.B.2.b, a covered clearing agency's critical services, for purposes of inclusion in an RWP, would encompass its critical payment, clearing, and settlement services. Thus, those services could be supported by the covered clearing agency's Critical SCI systems, as defined in Regulation SCI.

c. Identification of Service Providers

Proposed Rule 17ad–26(a)(2) would require each covered clearing agency's RWP to identify and describe any service providers upon which the covered clearing agency relies to provide its critical payment, clearing, and settlement services, identifying to what critical services such third parties are relevant, and address how the covered clearing agency would ensure that such service providers would continue to provide such critical services in the event of recovery and during an orderly wind-down. In addition, the Commission is proposing to define in proposed Rule 17ad–26(b) the term ''service provider'' as any person, including an affiliate or a third party, that is contractually obligated to the covered clearing agency in any way related to the provision of critical services, as identified by the covered clearing agency in proposed Rule 17ad–26(a)(1), discussed in section III.B.2.b *infra.* This definition includes both ''external'' third-party service providers, such as technology or data providers, and those ''internal'' service providers that may be affiliated with the covered clearing agency, such as when a covered clearing agency is part of a holding company and receives certain services pursuant to agreements with that holding company. The Commission also proposes to define ''affiliate'' in proposed Rule 17ad–26(b) to mean a person that directly or indirectly controls, is controlled by, or is under common control with the covered clearing agency. It would include a holding company that owns the covered clearing agency.

Based on its supervisory experience, the Commission has observed that covered clearing agencies have used services provided by service providers to help ensure the prompt and accurate clearance and settlement of securities transactions. Service providers may be affiliates or third party entities and can perform a wide variety of functions, such as providers of technology, data, or other services. For service providers that are necessary for the covered clearing agency to provide its core payment, clearing, and settlement services, the failure of the service provider to perform its obligations could pose significant operational risks and have substantial effects on the ability of the covered clearing agency to perform its risk management function and facilitate prompt and accurate clearance and settlement. In a recovery or orderly wind-down, the continued performance of a service provider of its function would remain essential.

The Commission is therefore proposing to require that an RWP specifically identify and describe such service providers, to ensure that the RWP considers what providers are necessary for the covered clearing agency to continue providing its critical services. This requirement would

[74] Securities Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252, 72253, 72256 (Dec. 5, 2014) (''Regulation SCI Adopting Release'').

[75] As stated above, *see* note 30, a covered clearing agency is a registered clearing agency and therefore is subject to Regulation SCI. *See* 17 CFR 242.1000 (defining SCI entity and SCI self-regulatory organization).

[76] *See* 17 CFR 242.1001.

[77] *See* 17 CFR.242.1000 (defining SCI systems).

[78] *See* 17 CFR 242.1000 (defining Critical SCI systems) and 1001(a)(2)(iv) (imposing heightened requirements); *see also* Regulation SCI Adopting Release, *supra* note 74, at 72277.

[79] 17 CFR 242.1000(a) (defining Critical SCI systems).

[80] Regulation SCI Adopting Release, *supra* note 74, at 72278.

[81] *Id.*

ensure that the covered clearing agency has identified which service providers relate to which critical services. This identification must include both affiliated service providers and non-affiliated service providers. The covered clearing agency also generally should consider whether there are any interdependencies or interconnections amongst its service providers, that is, whether a service provider supporting critical services also provides other, unrelated services to the covered clearing agency. Regardless of the nature of the service provider, it is essential that an RWP identify such providers to ensure that the covered clearing agency understands the relationships that it should maintain to continue providing its critical services.[82]

In addition, the Commission is proposing to require that an RWP address how the covered clearing agency would ensure that service providers could continue to perform in the event of a recovery or during an orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan. This requirement would ensure that the covered clearing agency has considered the nature of its contractual obligations with the identified service providers (such as contracts, arrangements, agreements, and licenses) and whether the service providers could be contractually obligated to perform in a recovery or orderly wind-down. Generally, this should include consideration of whether a service provider's contractual relationship with the covered clearing agency would be affected by a recovery or orderly wind-down.[83] Currently, the RWPs often identify some set of service providers, but the Commission believes that the identified sets may not, for all covered clearing agencies, be sufficient to align with this rule, if adopted, because the covered clearing agencies do not uniformly ensure that they have addressed all such service providers and instead identify some different subset thereof. Moreover, the RWPs generally do not address how the covered clearing agency would ensure that such service providers would continue to provide such critical services in the event of recovery and during an orderly wind-down, including consideration of the contractual obligations with such service providers.

More generally, the Commission believes that the requirement to identify and describe any critical service providers and address how the covered clearing agency would ensure that such service providers would be legally obligated to perform in a recovery or during an orderly wind-down should help regulatory planning in the event of a resolution. To create an actionable resolution plan that would allow a resolution authority to ensure the continued provision of the covered clearing agency's critical services and, accordingly, to avoid market interruption or any potential financial instability, the resolution authority would need to be able to identify the critical services, as well as the scope and nature of underlying service providers. Further, the requirement that the plan address the continued provision of services in the event of a recovery or during an orderly wind-down should also help a resolution authority, in that it should enable a better understanding of the terms and conditions of the relationship between the covered clearing agency and the service provider.

d. Scenarios

Having identified its critical services, proposed Rule 17ad–26(a)(3) would then require an RWP to identify and describe scenarios that may potentially prevent a covered clearing agency from being able to provide its critical services as a going concern, including scenarios arising from uncovered credit losses (as described in Rule 17Ad–22(e)(4)(viii)), uncovered liquidity shortfalls (as described in Rule 17Ad–22(e)(7)(viii)), and general business losses (as described in Rule 17Ad–22(e)(15)).[84] These scenarios are consistent with the current requirement in Rule 17Ad–22(e)(3)(ii). Identification and description of scenarios is essential to evaluating what is necessary to achieve a recovery of the clearing agency and, in the event that recovery fails, ensuring the orderly wind-down of the clearing agency and transfer of critical services to a new entity. Identifying the scenarios enables a covered clearing agency to make the reasonable and appropriate preparations to achieve a recovery or, in the event that recovery fails, avoid a disorderly wind-down arising from those scenarios that could transmit risk through the U.S. securities markets and the broader financial system.

Because the covered clearing agencies should contemplate the inability to provide services as a going concern, these scenarios would necessarily go beyond those contemplated in business as usual circumstances, business continuity planning, crisis management, or failure management. That is, unlike those types of scenarios, recovery and wind-down planning scenarios would involve shocks that could potentially

[82] The Commission proposed Rule 17Ad–25(i), which would establish policy and procedure requirements for clearing agency boards of directors to oversee relationships with service providers for critical services to, among other things, confirm and document that risks related to relationships with service providers for critical services are managed in a manner consistent with its risk management framework, review senior management's monitoring of relationships with service providers for critical services, and review and approve plans for entering into third-party relationships where the engagement entails being a service provider for critical services to the registered clearing agency. *See* Clearing Agency Governance and Conflicts of Interest Proposing Release, Exchange Act Release No. 34–95431 (Aug. 8, 2022), 87 FR 51812, 51836 (Aug. 23, 2022). In addition, the Commission proposed a new subparagraph (ix) under Rule 1001(a)(2) of Regulation SCI regarding third party provider management, which would require that SCI entities have a third party provider management program that includes: initial and periodic review of contracts with such third party providers for consistency with the SCI entity's obligations under Regulation SCI; and a risk-based assessment of each third party provider's criticality to the SCI entity, including analyses of third party provider concentration, of key dependencies if the third party provider's functionality, support, or service were to become unavailable or materially impaired, and of any potential security, including cybersecurity, risks posed. Proposing Release, Regulation Systems Compliance and Integrity, Exchange Act Release No. 97143 (Mar. 15, 2023), 88 FR 23146 (Apr. 14, 2023). Although this aspect of proposed rule 17ad–26 also relates to third party providers and/or service providers, the Commission does not believe that these proposed rules have any substantive overlap. This proposed rule would require that a covered clearing agency identify certain service providers for purposes of its recovery and wind-down plan. The Commission encourages commenters to review the proposals with respect to clearing agency governance and Regulation SCI to determine whether they might affect their comments on this proposing release. Further, the Commission recognizes that the CA Governance Proposal includes a proposed defined term for ''service providers for critical services,'' which would mean any person that is contractually obligated to the registered clearing agency for the purpose of supporting clearance and settlement functionality or any other purposes material to the business of the registered clearing agency. In this release, the Commission is proposing to define ''service provider'' as any person that is contractually obligated to the covered clearing agency in any way related to the provision of critical services, as identified by the covered clearing agency in proposed Rule 17ad–26(a)(1). *See* section III.B.a *supra.*

[83] For example, the covered clearing agency should consider whether its contractual relationships with such providers would transfer to a new entity in the event of the creation of a new entity or the sale or transfer of the business in an orderly wind-down.

[84] Rule 17Ad–22(e)(3)(ii) refers to identifies several specific bases for recovery and orderly wind-down that should be covered by the plans: credit losses, liquidity shortfalls, and losses from general business risk. Proposed rule 17ad–26(a)(3) would reference those same bases and include cross-references to where those bases are addressed in the Covered Clearing Agency Standards.

cause the covered clearing agency to become insolvent and cease operations.

When identifying scenarios, the covered clearing agency generally should consider the various risks to which it is exposed, which will vary across different covered clearing agencies serving different markets. The proposed rule would require that the covered clearing agency consider scenarios arising from uncovered credit losses, uncovered liquidity shortfalls, and general business losses. This set of scenarios would therefore include scenarios arising from the default of a participant and also those arising from events not related to a participant default, such as a general business loss. Other potential scenarios that are not related to a participant default could include the realization of investment or custody losses, the failure of a third party, such as a settlement bank, to perform a critical function for the covered clearing agency, or scenarios caused by an SCI event or other significant operational disruption, such as a significant cybersecurity incident. In addition, a covered clearing agency that is part of a larger organization may be exposed to risks arising from other entities within the organization. Put more generally, the identified scenarios take into account various risks to which the covered clearing agency is exposed that may potentially prevent the covered clearing agency from being able to provide its critical services, which will vary across different types of covered clearing agencies (*i.e.,* a central counterparty versus a central securities depository) and even across covered clearing agencies of the same type.

The Commission believes that the identified scenarios generally should be structured such that the underlying assumptions ensure that the scenarios are sufficiently severe, such that they would result in the need for a recovery or orderly wind-down. These scenarios generally should include both idiosyncratic and system-wide stress scenarios, taking into account the possibility of contagion in a stress event and of simultaneous crises in several significant markets. Although all covered clearing agencies generally consider at a high level what circumstances may cause them to enter recovery or wind-down (*e.g.,* whether a recovery or wind-down would arise from the default of a participant or from issues unrelated to a participant default), the RWPs do not all identify particular scenarios the covered clearing agencies have considered when developing the RWP or contain detailed analyses of each particular scenario.

Each scenario generally should be analyzed individually in the recovery plan, with the analysis including: a description of the scenario; the events that are likely to trigger the scenario; the covered clearing agency's process for monitoring such events; the market conditions, operational and financial issues, and other relevant circumstances that are likely to result from the scenario; the potential financial and operational impact of the scenario on the covered clearing agency and its participants, internal and external service providers, and relevant affiliated companies, both in an orderly and stressed market (*e.g.,* where markets are unavailable or there are limited solvent counterparties); and the specific steps that the covered clearing agency would expect to take if the scenario occurs or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant tools or use the relevant resources and to ensure that such implementation occurs in sufficient time to achieve the intended effect.

e. Triggers

Proposed Rule 17ad–26(a)(4) would require a covered clearing agency's RWP to identify and describe the criteria that would trigger the implementation of its RWP and the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process. Given that the implementation of a covered clearing agency's RWPs would most likely occur during a period of significant stress at the covered clearing agency or in the market in general, the Commission believes that the covered clearing agency needs to identify in advance what criteria could trigger implementation of its RWP. Such *ex ante* identification of potential triggers can help ensure that a covered clearing agency not only implements its plan pursuant to the established RWP but that, before it implements such plans, it is aware of the triggering events that may necessitate use of the RWP. Thoughtful consideration of triggers can help ensure that the steps taken in anticipation of a potential recovery or wind-down have been planned for and coordinated to minimize the onward transmission of risk to the U.S. financial system. Currently, covered clearing agencies identify triggers in their RWPs but differ with respect to how much they identify the specific monitoring or governance processes for such triggers.

The covered clearing agency generally should consider defining both quantitative and qualitative criteria that would trigger the implementation of part or all of the recovery plan or of an orderly wind-down plan. Moreover, the covered clearing agency generally should consider triggers that would be applicable in circumstances involving the default of its participant(s), as well as those that would be applicable in circumstances not related to the default of a participant or participants. When determining triggers, the covered clearing agency also generally should consider whether the likely timing of a triggering event in the identified scenarios would permit sufficient time for implementation of the RWP.

There may be circumstances in which the trigger is obvious. For example, when a participant of a covered clearing agency defaults, the recovery plan likely would be triggered when the covered clearing agency has exhausted its pre-funded financial resources, its qualifying liquid resources,[85] or any other liquidity arrangements that it has in place to deal with default-related shortfalls, or when it has become unlikely that the pre-funded financial resources and/or the liquidity arrangements will be sufficient. In other circumstances, the covered clearing agency may have to employ more judgment with respect to how to develop appropriate triggers. For example, a covered clearing agency may need to exercise judgment to determine an appropriate capital level to trigger activation of its RWP in the event of persistent or extraordinary capital losses from general business risks.

The identification of triggers does not mean that such triggers should be self-executing. Instead, the importance of identifying triggers lies in ensuring that a covered clearing agency considers and identifies *ex ante* when it would initiate its RWP. Therefore, the Commission believes that the RWP also must identify and describe the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process. Specifying the monitoring process would allow the covered clearing agency to ensure that it has reliable and appropriate processes to analyze the facts and circumstances related to the triggers identified in the RWP. Consistent with its obligations under Rule 17Ad–22(e)(3), the identification of the governance process generally should include clearly defining the responsibilities of board members, senior management, and business units, including with respect to

[85] *See* 17 CFR 240.17Ad–22(a)(14).

escalation within the covered clearing agency, and it also generally should specify whether and to what extent the covered clearing agency may exercise discretion in its monitoring and determination whether the triggering criteria have been met. The Commission believes that including the related governance in the RWP is important to allow the covered clearing agency to use the RWP in a crisis because the RWP would set forth clear and defined roles and avoid potential confusion at the time of the RWP's implementation.

f. Rules, Policies, Procedures, and Tools

Proposed Rule 17ad–26(a)(5) would require a covered clearing agency's RWP to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down. The Commission believes that describing the rules, policies, procedures, and any other tools or resources is essential to a covered clearing agency's RWP. The requirement to describe rules, policies, procedures, and any other tools or resources that may be used in advance for certain situations would provide some level of predictability in such a situation and avoid unexpected actions because it would allow participants to understand the potential of tools or resources that could be used, including whether any of the tools would require participant involvement or resources (such as a cash call).

Generally, the rules, policies, procedures, and any other tools or resources should address shortfalls arising in the stress scenarios identified by the covered clearing agency, whether caused by participant default or by some other event, that are not covered by pre-funded financial resources. They should also address situations where the covered clearing agency does not have sufficient qualifying liquid resources to meet its obligations on time. In addition, the tools should address other losses or liquidity shortfalls, including those arising from general business risks that may or may not develop more slowly than a sudden default or other event.

However, the Commission is not prescribing particular tools, such as tear-up or margin haircutting, that a covered clearing agency would be required to include in its RWP. The Commission believes that this proposed requirement preserves discretion for each covered clearing agency to consider the full range of available recovery tools and select those most appropriate for the circumstances of the covered clearing agency, including the products cleared and the markets served.[86] It would also allow a covered clearing agency to consider the ways in which its ownership structure (such as whether it is a subsidiary of a larger organization, owned by its participants, etc.) could impact its execution of its RWP or use of the tools set forth therein, including through the applicable governance arrangements or because of tools that rely on a parent or affiliated organization.

The current RWPs identify the tools and other resources that the covered clearing agency would use in a recovery or orderly wind-down. Certain of those tools, which may often be referred to as the covered clearing agency's default waterfall,[87] may involve the allocation of losses to its members or, potentially, to other shareholders or creditors of the covered clearing agency, among others, and covered clearing agencies are required to address such loss allocation under the Covered Clearing Agency Standards.[88] As part of their recovery and wind-down planning, the Commission believes that covered clearing agencies generally should consider their loss allocation policies in light of the scenarios identified in response to proposed Rule 17ad–26(a)(3), including the need for any additional tools or loss allocation processes to address different scenarios.

When identifying the tools and other resources that a covered clearing agency may include in a recovery or orderly wind-down plan, the Commission believes that the covered clearing agency generally should consider the following characteristics to evaluate the appropriateness of a tool or tools for a particular recovery scenario or an orderly wind-down, including the sequence in which the tools should be used. First, the set of tools should comprehensively address how the covered clearing agency would continue to provide critical services in all relevant scenarios. Second, the tools should be effective, meaning that they should be reliable, timely, and have a strong legal basis. Being effective generally should mean that the covered clearing agency has a high degree of confidence that it could employ the tool in all relevant circumstances, including a time of stress. Third, the tools generally should be transparent, so as to allow the covered clearing agency's participants and the broader market participants to understand how they would operate and allow those who would bear losses and liquidity shortfalls to measure, manage, and control their potential losses and liquidity shortfalls. Finally, the tools generally should take into account whether the tools create appropriate incentives for the covered clearing agency's owners, direct and indirect participants, and other relevant stakeholders, and they generally should seek to minimize the potential impact that the tools may have on participants and the financial system more broadly.

When analyzing the tools to be included in its RWP, a covered clearing agency generally should consider: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered clearing agency for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the covered clearing agency (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement the tools; (vii) the roles and responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; and (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly.

g. Timely Implementation

Proposed Rule 17ad–26(a)(6) would require a covered clearing agency's RWP to address how the rules, policies, procedures, and any other tools or resources identified in paragraph (5) would ensure timely implementation of the recovery and orderly wind-down plan. The Commission believes that this is an important element of a covered clearing agency's RWP, that is, to provide, in advance, a level of predictability as to how such measures would be implemented, which is important to participants as discussed in section III.B.e *infra,* and to ensure that the covered clearing agency has a

[86] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70809.

[87] *See* note 150 *infra.*

[88] *See* 17 CFR 240.17Ad–22(e)(4)(viii) (requiring that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to effectively identify, measure, monitor, and manage its credit exposures to participants and those arising from its payment, clearing, and settlement processes, including by addressing allocation of credit losses the covered clearing agency may face if its collateral and other resources are insufficient to fully cover its credit exposures).

strategy for use of the various tools set forth in the RWP recovery and orderly wind-down plans. As noted earlier, the implementation and use of a covered clearing agency's RWP will likely occur when the covered clearing agency itself, as well as the wider financial markets, are experiencing heightened levels of stress. Requiring that the covered clearing agency address in its RWP how its procedures to ensure timely implementation of an RWP increases the likelihood that actions taken will be predictable and orderly and will occur at an appropriate time to address the circumstances at hand. Currently, the Commission believes that the covered clearing agencies' RWPs address how the covered clearing agencies' procedures would be timely implemented, including by identifying the applicable governance and steps that would need to be taken to use particular tools and/or by discussing the order in which tools would be deployed. A covered clearing agency generally should consider whether its RWP provides for pre-determined escalation processes within the covered clearing agency's senior management and with its board of directors, to ensure careful and timely consideration of the appropriate next steps.

Timely implementation generally should mean that a covered clearing agency is able to deploy the tools identified in its plan as needed and when appropriate, for example, that it has identified the appropriate escalation and approval processes to use a particular tool or resource. In this sense, implementation does not refer to completion of the plan, but merely to putting the plan into practice.

h. Notification to the Commission

Proposed Rule 17ad–26(a)(7) would require a covered clearing agency's RWP to include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. The systemic risk concerns raised by a recovery or orderly wind-down of a covered clearing agency are significant, and while the Commission already maintains regular contact with each of the covered clearing agencies through its supervisory program, the Commission believes it is critical that notice of potential recovery and wind-down events be provided as soon as practicable.

Providing notice to the Commission can help ensure that the Commission has the opportunity to consider whether a covered clearing agency engages the recovery or wind-down event consistent with its established RWP and the requirements of Commission rules to help mitigate the potential onward transmission of systemic risk and ensure that a wind-down, if necessary, is orderly. This is particularly important with respect to covered clearing agencies which often serve as the sole provider of clearance and settlement services in a particular market and of which several are designated clearing agencies. Currently, many of the covered clearing agencies' RWPs reference notification to the Commission, but often lack detail on the procedures to ensure such notification.

Moreover, providing notice to the Commission would, in turn, help the Commission ensure that it has information that it can share with other relevant authorities, such as the resolution authority, regarding the potential need for resolution. This communication between the Commission and other regulators would be essential in the potential event of a recovery or wind-down so that the other regulators can consider appropriate actions that they may wish to take, such as if the FDIC is appointed as the resolution authority for a covered clearing agency, as discussed in section II.C *supra.* Given its supervisory role with respect to the covered clearing agencies, the Commission is uniquely situated both to obtain and effectively share and communicate this information to other regulatory authorities.

i. Testing

Proposed Rule 17aAd–26(a)(8) would also require that an RWP include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate, amending the plans to address the results of the testing. The Commission believes that it is important to require testing because including testing should help to ensure that the RWP will be effective in the event of an actual recovery or orderly wind-down. Currently, some covered clearing agencies do not provide for testing their RWPs or test them separately from any testing required under 17 CFR 240.17Ad–22(e)(13) (''Rule 17Ad–22(e)(13)''), while others do incorporate some testing requirements, with varying degrees of specificity about the frequency of and participants in such testing and how to incorporate the results of such testing into the RWPs.

The Commission believes that the testing under this proposed rule likely would be similar in nature to that required under Rule 17Ad–22(e)(13), in that it would simulate how the RWP would perform in crisis situations, including the participation of senior management and the board of directors. Such testing could involve examining how a covered clearing agency's procedures would work in practice, by applying them to a hypothetical scenario that would cause the covered clearing agency to use its RWP. Testing must involve the covered clearing agency's participants and, where practicable, other stakeholders. Such other stakeholders could include, for example, liquidity providers or settlement banks. By specifying that the participation of other stakeholders must occur where practicable, the Commission recognizes that a covered clearing agency may have limited ability to require said participation by all such stakeholders in all circumstances.

Including participants and other stakeholders in such testing should help to ensure that procedures will be practical and effective in the face of a recovery or orderly wind-down. In addition to the relevant employees, participants, and other stakeholders that would be involved in testing RWPs, a covered clearing agency may determine, as appropriate, to include members of its board of directors or similar governing body, and to invite linked clearing agencies, significant indirect participants, providers of credit facilities, and other service providers to participate. The Commission believes including participants and, where practicable, stakeholders in periodic testing is appropriate because a successful recovery or orderly wind-down will require coordination among these parties, particularly during periods of market stress.

The Commission believes that at least every twelve months is an appropriate time period for testing RWPs. Given that many other aspects of a covered clearing agency's risk management are required to be tested at least annually, many of which are likely to be related to or referenced in the covered clearing agency's RWP,[89] the Commission believes that this time period strikes an appropriate balance between the need to test RWPs and the desire to avoid imposing duplicative requirements. A covered clearing agency may choose to

[89] *See, e.g.,* 17 CFR 240.17Ad–22(e)(13)(iii) and (e)(3)(i).

conduct this testing and review of the RWP, to the extent practicable, as part of its annual testing and review of its participant default rules and procedures, in accordance with Rule 17Ad–22(e)(13), or as part of its business continuity testing.

The Commission believes that the RWPs should provide for reporting the results of the testing to the covered clearing agency's board of directors and senior management. This reporting would help ensure that the board of directors and senior management have an understanding of the testing. This understanding, in turn, would then inform senior management in considering whether the testing indicates the need for potential changes to an RWP. This understanding would also inform the board of directors in its review and approval of a covered clearing agency's RWP, which it would be required to do under proposed Rule 17ad–26(a)(9). Finally, the Commission believes that the RWPs should specify the procedures for, as appropriate, amending the plans to address the results of the testing. Such procedures would ensure that the covered clearing agency takes into account the results of the testing and incorporates it into the plan, as appropriate.

j. Periodic Review

Proposed Rule 17ad–26(a)(9) would require the board of directors of a covered clearing agency to review and approve its RWP at least every twelve months or following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans, with such review informed, as appropriate by the covered clearing agency's testing of the plans as required in the prior section of the proposal rule. Because the risks that a covered clearing agency faces and the markets it serves are ever evolving, it is important that a covered clearing agency's RWP accounts for the evolving nature of risks and markets. The Commission understands that covered clearing agencies with RWPs already engage in some level of ongoing review, and the Commission has reviewed changes to RWPs as proposed rule changes under section 19(b) of the Exchange Act.[90] The Commission believes that a covered clearing agency should perform the board of directors level review under proposed Rule 17ad–26 at least once every twelve months. Moreover, the Commission believes that a required review every twelve months represents an appropriate frequency to address any changes in the markets served and products cleared by a covered clearing agency. The Commission further believes that it is also important to revisit an RWP if there is a material change to the covered clearing agency's operations, to ensure that the RWP continues to address the risks that the covered clearing agency faces. The Commission has proposed requiring review and approval of a covered clearing agency's RWP by its board of directors because such requirement is important to ensure that the RWP is considered and addressed at the most senior levels of the governance framework of the covered clearing agency, consistent with the importance of the RWP.

Currently, the existing RWPs generally provide for review and approval by a covered clearing agency's board of directors, but not all the plans provide for a review every twelve months and some do not specifically reference the need to review following material changes to the covered clearing agency's operations. Therefore, the Commission believes that this proposed rule would strengthen the RWPs by ensuring review and approval by the board of directors every twelve months and review following material changes. It would also help ensure that the review and approval by the board of directors is informed, as appropriate, by the results of the covered clearing agency's testing discussed in section III.B.2.j *supra.* The Commission believes that any procedures adopted with respect to the review and approval conducted by the board of directors generally should provide for substantive consideration of the plan and whether it appropriately takes into account the specific characteristics of the covered clearing agency, including its ownership, organizational, and operational structures, as well as the size, systemic importance, global reach, and/or the risks inherent in the products it clears.

Moreover, in the event that a recovery or wind-down process is activated, the Commission believes that it likely would be appropriate to conduct an additional review by the board of directors immediately after the conclusion of the execution of the RWP, even if it is well before the next periodic review. In addition, a covered clearing agency generally should consider the extent to which any new policy statements from a standard setting body, such as CPMI–IOSCO, while not binding, might tend to support updating or revising existing RWPs to ensure that the clearing agency's approach to risk management, recovery, and wind-down are effective at maintaining the core functions of the covered clearing agencies in a recovery or resolution scenario and mitigating the potential for transmitting systemic risk through the financial system.

3. Request for Comment

The Commission requests comment on all aspects of proposed Rule 17ad–26. In particular, the Commission requests comment on the following specific topics:

10. Should the Commission adopt proposed Rule 17ad–26 to prescribe the contents of a covered clearing agency's recovery and wind-down plans?

11. Does proposed Rule 17ad–26 adequately identify and describe the elements that a covered clearing agency would be required to include in its RWP? If other elements should be included, please identify such elements and explain why they should be included. If certain elements should not be included, please identify such elements and explain why they should not be included.

12. Are there any other elements that should be included in a covered clearing agency's RWP to facilitate the planning processes of a resolution authority? If so, please identify such elements and explain how they should help facilitate resolution planning.

13. Should the Commission set more prescriptive requirements with respect to any of the elements of a covered clearing agency's RWP? If so, what should the Commission require, and why?

14. Are there other elements that a covered clearing agency should consider in its RWP that would better align the incentives of various stakeholders and hence facilitate a productive collaboration among them in a recovery and wind-down event?

15. As discussed above, in 2016, CFTC staff issued guidance with respect to the contents of recovery and wind-down planning.[91] Do commenters believe that there are any aspects of that guidance which should be codified in the Commission's proposed Rule 17ad–26? If so, please identify such aspects and explain why they should be included.

16. Should the Commission also require that a covered clearing agency's

[90] *See, e.g.,* Securities Exchange Act Releases No. 91429 (Mar. 29, 2021), 86 FR 17421 (Apr. 2, 2021) (SR–DTC–2021–004); 91430 (Mar. 29, 2021), 86 FR 17432 (Apr. 2, 2021) (SR–FICC–2021–002); 94983 (May 25, 2022), 87 FR 33223 (June 1, 2022) (SR–ICC–2022–004); ICEEU 2019 Order, *supra* note 41, 84 FR 34455; 88578 (Apr. 7, 2020), 85 FR 20561 (Apr. 13, 2020) (SR–LCH SA–2020–001); 91428 (Mar. 29, 2021), 86 FR 17440 (Apr. 2, 2021) (SR–NSCC–2021–004); 90712 (Dec. 17, 2020), 85 FR 84050 (Dec. 23, 2020) (SR–OCC–2020–013).

[91] *See* note 69 *supra.*

RWP set forth a viable strategy for its recovery and/or orderly wind-down, to ensure that a covered clearing agency take into account how the items included in the RWP fit together as a cohesive whole and that the RWP takes into account a covered clearing agency's unique characteristics and circumstances, including ownership and governance structures, effect on direct and indirect participants, membership base, markets served, the risks inherent in products cleared, and risk management needs. Would such a requirement be beneficial, or are these elements already captured by the proposed rule text?

17. With the additional requirements in proposed Rule 17ad–26, would a covered clearing agency retain an appropriate amount of discretion to consider the specific characteristics of the covered clearing agency when creating its RWP?

18. Do commenters agree with the proposed definition of ''service provider'', including the distinction between third parties and affiliates, and the proposed definition of ''affiliate''?

19. Do commenters agree that the RWP should identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down? Should the Commission further define ''staffing'' to specify that it refers to particular positions or offices within the covered clearing agency?

20. Do commenters agree that the RWP should identify and describe a covered clearing agency's critical service providers, specify to which services such service providers are relevant, and address how the covered clearing agency would ensure that such providers can be legally obligated to perform in the event of a recovery or orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan?

21. Do commenters agree that the proposed rule should require that the covered clearing agency identify the scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including uncovered credit losses (as described in paragraph (e)(4)(viii) of 17 CFR 240.17Ad–22), uncovered liquidity shortfalls (as described in paragraph (e)(7)(viii) of 17 CFR 240.17Ad–22), and general business losses (as described in paragraph (e)(15) of 17 CFR 240.17Ad–22)?

22. Should the Commission instead identify particular scenarios that a covered clearing agency has to address in its RWP? If so, should the Commission include any or all of the following scenarios: (i) credit losses or liquidity shortfalls created by single and multiple clearing member defaults; (ii) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (iii) settlement bank failure; (iv) custodian or depository bank failure; (v) losses resulting from investment risk; (vi) losses from poor business results; (vii) financial effects from cybersecurity events; (viii) fraud (internal, external, and/or actions of criminals or of public enemies); (ix) legal liabilities, including those not specific to the covered clearing agency's business as a covered clearing agency; (x) losses resulting from interconnections and interdependencies among the covered clearing agency and its parent, affiliates, and/or internal or external service providers; (xi) losses resulting from interconnections and interdependencies with other covered clearing agencies; and (xii) losses resulting from issues relating to services that are ancillary to the covered clearing agency's critical services? Should the Commission require consideration of scenarios involving multiple failures (*e.g.,* a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the covered clearing agency, are particularly relevant to its business? Does this set omit any potential additional scenarios?

23. With respect to scenarios, should the Commission also require that the RWP include an analysis that includes: (i) a description of the scenario; (ii) the events that are likely to trigger the scenario; (iii) the covered clearing agency's process for monitoring for such events; (iv) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (v) the potential financial and operational impact of the scenario on the covered clearing agency and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and (vi) the specific steps the covered clearing agency would expect to take when the scenario occurs, or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect?

24. Do commenters believe that the Commission should prescribe any particular tools that a covered clearing agency must include in its RWP, such as a cash call, gains-based haircutting, or full or partial tear-up? If so, please identify such tools and explain why they should be required.

25. Proposed Rule 17ad–26 would also require that the RWP identify triggers but does not prescribe a list of specific triggers. Should the Commission prescribe any particular triggers, whether qualitative or quantitative? For example, should the Commission require that a covered clearing agency should consider using the exhaustion of its prefunded resources as a trigger?

26. Should the Commission prescribe that a covered clearing agency's RWP also identify criteria that could show when recovery is successful and the covered clearing agency would return to normal operations?

27. With respect to the requirement to identify and describe the process that the covered clearing agency uses to monitor and determine whether the criteria that would trigger implementation of the RWP have been met, including the governance arrangements applicable to such process, should the Commission require that the description also include identification of any areas in which the covered clearing agency could exercise discretion?

28. Proposed Rule 17ad–26(a)(5) would require the covered clearing agency to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in the recovery and wind-down plan. Should the Commission also require that a covered clearing agency's RWP include any or all of the following: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered

clearing agency for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the covered clearing agency (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement the tools; (vii) the roles and responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; and (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly? Should the Commission require the covered clearing agency to estimate the potential size of the resources that the covered clearing agency would expect to receive from each tool?

29. Proposed Rule 17d–26 would require that the RWP address how the identified tools, procedures, or other resources would ensure timely implementation of the RWP. Do commenters agree with the need to ensure timely implementation? Should the Commission specify that timely implementation means that a covered clearing agency is able to deploy the tools identified in its plan as needed and when appropriate, for example, that it has identified the appropriate escalation and approval processes to use a particular tool or resource?

30. Proposed Rule 17ad–26(a)(7) would require procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. Should the Commission instead or additionally require that the procedures provide for informing the Commission when the triggers set forth in proposed Rule 17ad–26(a)(5) have been met? Should the Commission also require notification to the covered clearing agency's participants and/or other stakeholders in the event of recovery or orderly wind-down, or initiation of the RWP?

31. Should the Commission prescribe a particular form of notice for informing the Commission, consistent with the requirement in proposed Rule 17ad–26(a)(7)? For example, should the Commission require written notice, or would telephonic notice be sufficient?

32. Proposed Rule 17ad–26(a)(8) would require procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans and specifying the procedures for, as appropriate, amending the plans to address the results of the testing. Do commenters agree with this proposed requirement? Should the covered clearing agency be required to mandate that participants participate in testing? Similarly, should the covered clearing agency be required to mandate that other stakeholders participate in testing unless the covered clearing agency determines that it would be impracticable to do so? Should testing be less frequent? For example, should testing occur at least every 24 months?

33. Proposed Rule 17ad–26(a)(9) would require procedures for reviewing and approving a covered clearing agency's RWP by the board of directors at least every twelve months. Should the Commission impose a more, or less, frequent review cycle? And if so, why? Should the Commission require review and approval by the board of directors of an RWP following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans?

## IV. Economic Analysis

### *A. Introduction*

The Commission is sensitive to the economic consequences and effects of the proposed rule and amendments, including their benefits and costs.[92] The Commission acknowledges that, since many of these proposals could require a covered clearing agency to adopt new policies and procedures, the economic effects and consequences of these rules include those flowing from the substantive results of those new policies and procedures. Further, section 17A of the Exchange Act directs the Commission to have due regard for the public interest, the protection of investors, the safeguarding of securities and funds, and maintenance of fair competition among brokers and dealers, clearing agencies, and transfer agents when using its authority to facilitate the establishment of a national system for clearance and settlement of transactions in securities.[93]

This section addresses the likely economic effects of the proposed rule and amendments, including their anticipated and estimated benefits and costs and their likely effects on efficiency, competition, and capital formation. It is not feasible to quantify many of the benefits and costs. For example, risk management is an area of key concern for all clearing agency stakeholders. Perceptions of risk affect how clearing agencies are operated, and those operations, in turn, affect perceptions of risk. Any change to the policies and procedures about how clearing agencies act in times of crisis affects the behavior of clearing agencies and participants in complex ways not only during a crisis but also before the crisis, and those behavioral changes may affect the likelihood and severity of a crisis. While the Commission has attempted to quantify economic effects where possible, much of the discussion of economic effects is qualitative in nature. The Commission also discusses the potential economic effects of certain alternatives to the approaches recommended in this proposal.

### *B. Economic Baseline*

To consider the effect of the proposed rule and amendments, the Commission first explains the current state of affairs in the market (*i.e.,* the economic baseline). All of the potential benefits and costs from adopting the proposed rule and amendments are changes relative to the economic baseline. The economic baseline in this proposal considers: (1) the current market for covered clearing agency activities, including the number of covered clearing agencies, the distribution of participants across these clearing agencies, and the level of activity these clearing agencies process; (2) the current regulatory framework for covered clearing agencies; (3) the current recovery and wind-down plans of covered clearing agencies; and (4) the current risk-based margin systems of covered clearing agencies.

[92] Under section 3(f) of the Exchange Act, whenever the Commission engages in rulemaking under the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, it must consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). In addition, section 23(a)(2) of the Exchange Act prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. *See* 15 U.S.C. 78w(a)(2).

[93] *See supra* note 10.

1. Description of Market

Of the nine registered clearing agencies, seven are currently in operation.[94] Six provide central counterparty (''CCP'') services [95] and one provides central securities depository (''CSD'') services.[96] National Securities Clearing Corporation (''NSCC''), Fixed Income Clearing Corporation (''FICC''), and Depository Trust Company (''DTC'') are all covered clearing agencies that are subsidiaries of Depository Trust & Clearing Corporation (''DTCC''). NSCC offers clearance and settlement services for equities, corporate and municipal debt, American depositary receipts, exchange traded funds, and unit investment trusts. FICC's Mortgage-Backed Securities Division (''MBSD'') provides clearing, netting, and risk management services for trades in the mortgage-backed securities market. FICC's Government Securities Division (''GSD'') provides clearing, netting, and risk management services for trades in U.S. Government debt, including buy-sell transactions and repurchase agreement transactions. DTC provides end-of-day net settlement for clients, processes corporate actions, provides securities movements for NSCC's net settlements, and it provides settlement for institutional trades.

ICE Clear Credit LLC (''ICC'') and ICE Clear Europe Limited (''ICEEU'') are both covered clearing agencies for credit default swaps (''CDS''), and they are both subsidiaries of Intercontinental Exchange, Inc. (''ICE''). LCH SA is another covered clearing agency that offers clearing for CDS, and it is a France-based subsidiary of LCH Group Holdings Ltd, which, in turn, is majority owned by the London Stock Exchange Group plc. The seventh covered clearing agency, Options Clearing Corporation (''OCC''), offers clearing services for exchange-traded U.S. equity options.

Covered clearing agencies operate under one of two broad ownership models. In one model, the covered clearing agency is member-owned,[97] while in the other model, the covered clearing agency is publicly traded.[98]

Covered clearing agencies currently operate specialized clearing services and face limited competition in their markets. For each of the following asset classes, for example, there is only one covered clearing agency serving as a central counterparty: exchange-traded equity options (OCC), government securities (FICC), mortgage-backed securities (FICC), and equity securities (NSCC). There is also only one covered clearing agency providing central securities depository services (DTC). Covered clearing agency activities exhibit high barriers to entry and economies of scale.[99] These features of the existing markets, and the resulting concentration of clearing and settlement services within a handful of entities, inform the Commission's examination of the effects of the proposed rule and amendments on competition, efficiency, and capital formation, as discussed below. Table 1 summarizes the most recent data on the number of participants at each covered clearing agency.[100]

[94] There are two registered but inactive clearing agencies: Boston Stock Exchange Clearing Corporation (''BSECC'') and Stock Clearing Corporation of Philadelphia (''SCCP''). Neither has provided clearing services in well over a decade. *See* Self-Regulatory Organizations; The Boston Stock Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Articles of Organization and By-Laws, Exchange Act Release No. 63629 (Jan. 3, 2011), 76 FR 1473, 1474 (Jan. 3, 2011) (BSECC ''returned all clearing funds to its members by September 30, 2010, and [] no longer maintains clearing members or has any other clearing operations as of that date. [ ] BSECC [ ] maintain[s] its registration as a clearing agency with the Commission for possible active operations in the future.''); Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Suspension of Certain Provisions Due to Inactivity, Exchange Act Release No. 63268 (Nov. 8, 2010), 75 FR 69730, 69731 (Nov. 15, 2010) (SCCP ''returned all clearing fund deposits by September 30, 2009; [and] as of that date SCCP no longer maintains clearing members or has any other clearing operations. [] SCCP [] maintain[s] its registration as a clearing agency for possible active operations in the future.''). Because they do not provide clearing services, BSECC and SCCP are not included in the economic baseline or the consideration of benefits and costs.

[95] A CCP is a type of registered clearing agency that acts as the buyer to every seller and the seller to every buyer, providing a trade guaranty with respect to transactions submitted for clearing by the CCP's participants. *See* 17 CFR 240.17Ad–22(a)(2); Definition of ''Covered Clearing Agency'', Exchange Act Release No. 88616 (Apr. 9, 2020), 85 FR 28853, 28855 (May 14, 2020) (''CCA Definition Adopting Release''). A CCP may perform a variety of risk management functions to manage the market, credit, and liquidity risks associated with transactions submitted for clearing. For example, CCPs help manage the effects of a participant default by closing out the defaulting participant's open positions and using financial resources available to the CCP to absorb any losses. In this way, the CCP can prevent the onward transmission of financial risk. *See, e.g.,* Shortening the Securities Transaction Settlement Cycle, Exchange Act Release No. 94196 (Feb. 9, 2022), 87 FR 10436, 10448 (Feb. 24, 2022).

[96] A CSD is a type of registered clearing agency that acts as a depository for handling securities, whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible. Through use of a CSD, securities may be transferred, loaned, or pledged by bookkeeping entry without the physical delivery of certificates. A CSD also may permit or facilitate the settlement of securities transactions more generally. *See* 15 U.S.C. 78c(a)(23)(A); 17 CFR 240.17Ad–22(a)(3); CCA Definition Adopting Release, *supra* note 95, at 28856.

[97] *See, e.g.,* Exchange Act Release No. 52922 (Dec. 7, 2005), 70 FR 74070 (Dec. 14, 2005) (explaining that participants of DTC, FICC, and NSCC that make full use of the services of one or more of these clearing agency subsidiaries of DTCC are required to purchase DTCC common shares).

[98] OCC is owned by certain options exchanges. ICC and ICEEU are both subsidiaries of ICE (a publicly traded company). LCH SA is a subsidiary of LCH Group Holdings, Ltd., which is majority-owned by London Stock Exchange Group plc (a publicly traded company).

[99] *See* Alistair Milne, *Central Securities Depositories and Securities Clearing and Settlement: Business Practice and Public Policy Concerns, in* Analyzing the Economics of Financial Market Infrastructures 334, 335 (Martin Diehl, et al. eds., 2016) *available at https://doi.org/10.4018/978-1-4666-8745-5.ch017* (''Clearing and settlement operations have evolved over time to become remarkably complex. This complexity creates business challenges, especially for management of liquidity, which could potentially have systemic consequences for the wider financial system. This complexity may also increase the barriers to entry that can discourage competition in trade settlement and securities services.'').

[100] Data Membership requirements vary across the covered clearing agencies. For example, the self-clearing minimum net-capital requirement is $500 thousand for NSCC, while OCC's net capital requirement is $2.5 million. Multiple memberships by the same firm are much more common at NSCC than at the other covered clearing agencies.

TABLE 1 [a]—NUMBER OF PARTICIPANTS AT COVERED CLEARING AGENCIES IN MARCH 2023

| Covered clearing agency | Number of participants |
|---|---|
| *Subsidiaries of The Depository Trust & Clearing Corporation:* | |
| National Securities Clearing Corporation [b] | 3,931 |
| The Depository Trust Company [c] | 844 |
| Fixed Income Clearing Corporation (Government Securities Division) [d] | 213 |
| Fixed Income Clearing Corporation (Mortgage Backed Securities Division) [e] | 140 |
| *Subsidiaries of Intercontinental Exchange:* | |
| ICE Clear Credit [f] | 29 |
| ICE Clear Europe (CDS Participants Only) [g] | 29 |
| *Subsidiaries of LCH:* | |
| LCH SA (CDSClear Participants Only) [h] | 25 |
| The Options Clearing Corporation [i] | 188 |

[a] Participant statistics were taken from the websites of each of the listed clearing agencies in March 2023.
[b] *See* DTCC, *NSCC Member Directories, available at http://www.dtcc.com/client-center/nscc-directories*.
[c] DTCC, *DTC Member Directories, available at http://www.dtcc.com/client-center/dtc-directories*.
[d] DTCC, *FICC–GOV Member Directories, available at http://www.dtcc.com/client-center/ficc-gov-directories*.
[e] DTCC, *FICC–MBS Member Directories, available at http://www.dtcc.com/client-center/ficc-mbs-directories*.
[f] ICE, *ICE Clear Credit Participants, available at https://www.theice.com/clear-credit/participants*.
[g] ICE, *ICE Clear Europe Membership, available at https://www.theice.com/clear-europe/membership*.
[h] LCH, *LCH SA Membership, available at https://www.lch.com/membership/member-search*.
[i] OCC, *Member Directory, available at http://www.theocc.com/Company-Information/Member-Directory*.

Covered clearing agencies have become an essential part of the infrastructure of the U.S. securities markets due to their role as intermediaries. For example, in 2021 approximately $1.1 trillion (65%) of the notional amount of all single-name CDS transactions in the United States were centrally cleared.[101] The average daily value of equities trades cleared by NSCC in 2021 was $2.0 trillion; at FICC, the total net value of government securities transactions in 2021 was $1,419 trillion and the total net par value for mortgage backed securities in 2021 was $69 trillion; and DTC settled a total of $152 trillion of securities in 2021.[102] In addition, in 2022, OCC cleared 10.32 billion options contracts.[103]

Central clearing benefits the markets by significantly reducing participants' counterparty risk and through more efficient netting of margin requirements. Consequently, central clearing also benefits the financial system as a whole by increasing financial resilience and the ability to monitor and manage risk.[104] The role of a clearing agency in promoting resilience highlights its central importance in the functioning of markets.[105] If a CCP is unable to perform its risk management functions effectively, it can transmit risk throughout the financial system. Similarly, if a CSD is unable to perform its functions, market participants may be unable to settle their transactions, which may transmit risk throughout the financial system.

Disruption to a clearing agency's operations, or failure on the part of a clearing agency to meet its obligations, could serve as a source of contagion, resulting in significant costs not only to the clearing agency itself and its participants but also to other market participants and the broader U.S. financial system.[106] Absent proper risk management, a clearing agency failure could destabilize the financial system. As a result, proper management of the risks associated with central clearing helps ensure the stability of the U.S. securities markets and the broader U.S. financial system.[107]

[101] Data from DTCC's Trade Information Warehouse, compiled by Commission staff.

[102] *See* DTCC, *Annual Report* 9 (2021), *available at https://www.dtcc.com/~/media/files/downloads/about/annual-reports/DTCC-2021-Annual-Report*.

[103] *See* OCC, *Press Release* ''*OCC Clears Record-Setting 10.38 Billion Total Contracts in 2022* (Jan. 4, 2023), *available at https://www.theocc.com/newsroom/press-releases/2023/0103occclearsrecord setting1038billiontotalcontractsin2022*.

[104] *See* Darrell Duffie, *Still the World's Safe Haven? Redesigning the U.S. Treasury Market After the COVID–19 Crisis* 15 (Hutchins Center Working Paper, Paper No. 62, 2020), *available at https://www.brookings.edu/wp-content/uploads/2020/05/wp62_duffie_v2.pdf* (''Central clearing increases the transparency of settlement risk to regulators and market participants, and in particular allows the CCP to identify concentrated positions and crowded trades, adjusting margin requirements accordingly. Central clearing also improves market safety by lowering exposure to settlement failures . . . . As depicted, settlement failures rose less in March [2020] for [U.S. Treasury] trades that were centrally cleared by FICC than for all trades involving primary dealers. A possible explanation is that central clearing reduces 'daisy-chain' failures, which occur when firm A fails to deliver a security to firm B, causing firm B to fail to firm C, and so on.'').

[105] *See generally* Albert J. Menkveld & Guillaume Vuillemey, *The Economics of Central Clearing,* 13 Ann. Rev. Fin. Econ. 153 (2021).

[106] *See generally* Dietrich Domanski, Leonardo Gambacorta, & Cristina Picillo, *Central Clearing: Trends and Current Issues,* BIS Q. Rev. (Dec. 2015), *https://www.bis.org/publ/qtrpdf/r_qt1512g.pdf* (describing links between CCP financial risk management and systemic risk); Darrell Duffie, Ada Li, & Theo Lubke, *Policy Perspectives on OTC Derivatives Market Infrastructure* 9 (Fed. Res. Bank N.Y. Staff Rep., Paper No. 424, 2010), *available at http://www.newyorkfed.org/research/staff_reports/sr424.pdf* (''If a CCP is successful in clearing a large quantity of derivatives trades, the CCP is itself a systemically important financial institution. The failure of a CCP could suddenly expose many major market participants to losses. Any such failure, moreover, is likely to have been triggered by the failure of one or more large clearing agency participants, and therefore to occur during a period of extreme market fragility.''); Craig Pirrong, *The Inefficiency of Clearing Mandates* 11–14, 16–17, 24–26 (Policy Analysis Working Paper, Paper No. 655, 2010), *available at http://www.cato.org/pubs/pas/PA665.pdf* (stating, among other things, that ''CCPs are concentrated points of potential failure that can create their own systemic risks,'' that ''[a]t most, creation of CCPs changes the topology of the network of connections among firms, but it does not eliminate these connections,'' that clearing may lead speculators and hedgers to take larger positions, that a CCP's failure to effectively price counterparty risks may lead to moral hazard and adverse selection problems, that the main effect of clearing would be to ''redistribute losses consequent to a bankruptcy or run,'' and that clearing entities have failed or come under stress in the past, including in connection with the 1987 market break); *see* Glenn Hubbard et al., *Report of the Task Force on Financial Stability,* Brookings Inst., 96 (June 2021), *available at https://www.brookings.edu/wp-content/uploads/2021/06/financial-stability_report.pdf* (''In short, the systemic consequences from a failure of a major CCP, or worse, multiple CCPs, would be severe. Pervasive reforms of derivatives markets following 2008 are, in effect, unfinished business; the systemic risk of CCPs has been exacerbated and left unaddressed.''); Froukelien Wendt, *Central Counterparties: Addressing their Too Important to Fail Nature* (working paper Jan. 2015), *available at https://ssrn.com/abstract=2568596* (retrieved from SSRN Elsevier database) (assessing the potential channels for contagion arising from CCP interconnectedness); Manmohan Singh, *Making OTC Derivatives Safe—A Fresh Look* 5–11 (IMF Working Paper, Paper No. 11/66, 2011), *available at http://www.imf.org/external/pubs/ft/wp/2011/wp1166.pdf* (addressing factors that could lead central counterparties to be ''risk nodes'' that may threaten systemic disruption).

[107] *See* Paolo Saguato, *Financial Regulation, Corporate Governance, and the Hidden Costs of*

2. Overview of the Existing Regulatory Framework

The existing regulatory framework for clearing agencies registered with the Commission includes section 17A of the Exchange Act, the Dodd-Frank Act, and the related rules adopted by the Commission.[108]

Clearing agencies registered with the Commission may also be subject to other domestic or foreign regulation.[109] Specifically, clearing agencies operating in the U.S. may also be subject to regulation by the CFTC (as clearing agencies for futures or swaps) and the Board of Governors (as systemically important financial market utilities or state member banks).[110] Additionally, LCH SA is regulated by l'Autorité des marchés financiers, l'Autorité de Contrôle Prudentiel et de Résolution, and the Banque de France, and it is subject to European Market Infrastructure Regulation (EMIR).[111] ICEEU is regulated by the Bank of England, and it is subject to the UK's incorporation of EMIR into the UK framework.[112]

3. Current Recovery and Wind-Down Plans

As discussed in section II *supra,* each covered clearing agency, as part of a sound risk-management framework, is currently required to include plans for the recovery and orderly wind-down of the covered clearing agency necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses (such plans are referred to as RWPs).[113] The covered clearing agency may have one RWP or may maintain two separate documents, referring to one as the recovery plan and the other as the wind-down plan. Although the Commission did not include specific requirements for RWPs when the rule was adopted, the Commission did offer general guidance about what covered clearing agencies should consider when creating their RWPs.[114] The RWPs are subject to the rule filing requirement of Rule 19b–4, and all seven active covered clearing agencies have submitted their plans and subsequent revisions to the Commission for review, public comment, and approval.[115] Additionally, all of the covered clearing agencies have submitted confidential treatment requests with their RWPs pursuant to 17 CFR 240.24b–2. The Commission has also reviewed these confidential treatment requests and concluded that the redacted material could be withheld from the public under the Freedom of Information Act.[116] Due to the confidential treatment of the RWPs, the current release includes aggregated, anonymized analyses of the RWPs submitted to the Commission by the clearing agencies. Additionally, Form 19b–4, which is public, requires a description of the proposed rule change for public comment.[117] To the extent that information in the baseline has been drawn from public sources, such as the covered clearing agencies' SRO rule filings, we have included attribution accordingly. All seven active covered clearing agencies have approved RWPs in place, and the plans differ in, for example, length, style, emphasis, and specificity.

a. Critical Clearing and Settlement Services

Each RWP currently includes what the covered clearing agency has identified and described as its critical payment, clearing, and settlement services, as well as the criteria that the covered clearing agency employs to make such a determination as to what constitutes critical services.[118] Depending on their operations and the structure of their RWPs, covered clearing agencies currently identify between one and a dozen or more critical services in those RWPs. Currently, no covered clearing agency has analyses in its RWP regarding the staffing levels necessary to support the critical services that they list or how such staffing would continue in the event of a recovery operation or during an orderly wind-down.

b. Service Providers

Each RWP identifies and describes, to varying degrees, certain service providers, including both affiliates and third parties, upon which the associated covered clearing agency relies to provide its critical payment, clearing, and settlement services. Most plans do not explicitly link the identified service providers to the covered clearing agencies' critical services. Some of the RWPs state that they assume critical service providers will continue to perform in the event of a wind-down; at least one RWP states that it analyzes its contractual arrangements with respect to continuing to provide services during a recovery; [119] and at least one RWP

*Clearinghouses,* 82 Ohio St. L.J. 1071, 1074–75 (2021), *available at https://moritzlaw.osu.edu/sites/default/files/2022-03/18.%20Saguato_v82-6_1071-1140.pdf* (''[T]he decision to centralize risk in clearinghouses made them critical for the stability of the financial system, to the point that they are considered not only too-big-to-fail, but also too-important-to-fail institutions.'').

[108] *See supra* section II.

[109] *See supra* section III.D.2.

[110] *See* 12 U.S.C. 5472, 5469. Currently, ICC, ICEEU, LCH SA, and OCC are also regulated by the CFTC. DTC, FICC, NSCC, ICC, and OCC have been designated systemically important financial market utilities by the Financial Stability Oversight Council (*see infra* note 138 and the accompanying text). DTC is also a state member bank of the Federal Reserve System. The Board of Governors addresses certain recovery and wind-down plans in Regulation HH (*see supra* notes 68 and accompanying text), and the CFTC requires certain derivatives clearing organizations to maintain recovery and wind-down plans through Regulation 39.39(b) and subsequent guidance (*see supra* notes 69 and accompanying text).

[111] *See* LCH, *Company Structure, available at https://www.lch.com/about-us/structure-and-governance/company-structure.*

[112] *See* ICE, *ICEEU Regulation, available at https://www.theice.com/clear-europe/regulation; see also* https://www.fca.org.uk/markets/uk-emir.

[113] *See supra* note 16 and accompanying text.

[114] CCA Standards Adopting Release, *supra* note 7, 81 FR at 70810. *See also supra* section II.A (discussing the guidance).

[115] *See supra* section II generally, including note 32 on Form 19b–4 and note 41 for proposed rule changes.

[116] *See, e.g., https://www.sec.gov/rules/sro/nscc/2018/34-82430-ex5a.pdf* (as an example of the redacted filing materials posted for SR–NSCC–2017–017). *See also supra* notes 32 and 41 and accompanying text.

[117] *See supra* note 32.

[118] *See, e.g.,* Exchange Act Release Nos. 82462 (Jan. 2, 2018), 83 FR 884, 885 (Jan. 8, 2018) (SR–DTC–2017–021) (stating that the RWP provided a description of its services and the criteria to determine which services are considered critical) (''DTC 2017 Notice''); 82431 (Jan. 2, 2018), 83 FR 871, 872 (Jan. 8, 2018) (SR–FICC–2017–021) (stating that the RWP provided a description of its services and the criteria to determine which services are considered critical) (''FICC 2017 Notice''); ICC 2021 Order, supra note 41, 86 FR at 26561 (stating that the ICC recovery plan explains that ICC's sole critical operation is provides credit default swap clearing services); ICEEU 2019 Order, *supra* note 41, 84 FR at 34455 (stating that ICEEU identified its futures and option and credit default swap product clearing services, as well as its treasury and banking services, as critical services); 82316 (Dec. 13, 2017), 82 FR 60246, 60247 (Dec. 19, 2017) (SR–LCH SA–2017–012) (stating that LCH SA performed an assessment on identification of critical functions and shared services in accordance with Financial Stability Board guidance) (''LCH 2017 Notice''); 82430 (Jan. 2, 2018), 83 FR 841, 842 (Jan. 8, 2018) (SR–NSCC–2017–017) (stating that the RWP provided a description of its services and the criteria to determine which services are considered critical) (''NSCC 2017 Notice''); 82352 (Dec. 19, 2017), 82 FR 61072, 61074–75 (Dec. 26, 2017) (SR–OCC–2017–021) (stating that OCC's RWP identifies critical services and critical support functions) (''OCC 2017 Notice'').

[119] For example, OCC's plan discusses the critical vendors for each of the identified critical services, as well as the Critical Support Functions, as well as the critical external interconnections that OCC maintains with other FMUs, exchanges (including designated contract markets), clearing and settlement banks, custodian banks, letter of credit banks, clearing members and credit facility lenders, and the appendices to the plan identifies key vendors and service providers, as well as key agreements to be maintained. OCC 2017 Notice, *supra* note 118, 82 FR at 61075. ICC's plan categorizes its critical services by those that are provided to ICC by its parent company versus those that are provided by external third parties, and it also details the IT systems and applications critical to ICC's clearing operations, including those

Continued

states that it is reducing dependencies on third parties.

c. Scenarios

Each RWP generally identifies and describes certain scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern.[120] The RWPs differ in the number of scenarios identified and described as well as the extent of the specificity with which each scenario is discussed. For example, some RWPs present short qualitative analyses of member defaults, while others present long, detailed quantitative analyses of member defaults.

d. Criteria That Would Trigger Implementation

Each RWP identifies and describes criteria that would trigger the implementation of the recovery and orderly wind-down plan.[121] The RWPs differ in the number of identified triggering criterion and the detail in which they discuss each triggering criteria; there are also differences in the descriptions of the processes that covered clearing agencies use to monitor and determine whether the triggering criteria have been met, thus causing their RWPs to be activated.

e. Rules, Policies, Procedures, and Other Tools or Resources

Each RWP describes, to varying degrees, the rules, policies, procedures, and other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in the RWP.[122]

f. Procedures To Ensure Timely Implementation

Each RWP mentions, to varying degrees, mechanisms that would ensure timely implementation of the RWP.[123] Some of the RWPs include specific procedures to ensure timely implementation of a recovery and orderly wind-down plan after specific criteria have been triggered. One of the RWPs has taken steps to ensure timely completion of a recovery or orderly wind-down.

g. Procedures for Informing the Commission

Each RWP generally refers to informing the Commission about recovery or orderly wind-down activities, but the majority of RWPs do not include specific procedures for informing the Commission. Some of the RWPs state that they will inform the Commission *after* a recovery or wind-down has been initiated.

h. Testing

Three RWPs provide for annual plan testing but with varying degrees of specificity about the participants' involvement as well as the frequency of such testing. One such covered clearing agency specifically refers to sharing the results of the testing with the board of directors and another states that the RWP would be updated as appropriate as a result of the testing.[124] The remaining covered clearing agencies do not mention testing in their RWPs.

i. Plan Reviews

Each RWP provides for periodic plan reviews, typically annually or biennially.[125] Two RWPs provide for

provided by ICE, those provided by external third parties, and those that ICC itself provides. Further, the plan analyzes ICC's contractual arrangements in the context of continuing services under those contracts during recovery. ICC 2017 Notice and Order, *supra* note 41, 82 FR at 26561–62. In addition, NSCC's, FICC's, and DTC's plans identify external service providers for which the relationships are managed by a particular office within DTCC. *See, e.g.,* Securities Exchange Act Release Nos. 91428 (Mar. 29, 2021), 86 FR 17440, 17442 (Mar. 29, 2021) (SR–NSCC–2021–004) (''NSCC 2021 Notice''); 91430 (Mar. 29, 2021), 86 FR 17432, 17433–34 (Apr. 2, 2021) (SR–FICC–2021–002) (''FICC 2021 Notice''); 91429 (Mar. 29, 2021), 86 FR 17421, 17422 (Mar. 29, 2021) (SR–DTC–2021–004) (''DTC 2021 Notice'').

[120] For example, OCC's plan identifies and considers scenarios that may potentially prevent it from being able to provide its critical services as a going concern. *See* OCC 2017 Notice, *supra* note 118, 82 FR at 61073. ICC's plan describes potential stress scenarios that may prevent it from being able to meet obligations and provide services and the recovery tools available to it to address these stress scenarios. *See* Securities Exchange Act Release No. 91439 (Mar. 30, 2021), 86 FR 17649, 17650 (Apr. 5, 2021) (SR–ICC–2021–005) (''ICC 2021 Notice''). ICEEU's plans outlines a number of firm-specific and market-wide stress scenarios that, in its determination, may result in significant losses or liquidity shortfall, suspension or failure of its critical services and related functions and systems, and damage to other market infrastructure, with resulting uncertainty in the markets for which ICEEU clears. *See* Exchange Act Release No. 82496 (Jan. 12, 2018), 83 FR 2855 (Jan. 19, 2018) (SR–ICEEU–2017–016). LCH SA's plans categorizes potential stress scenarios in two ways as a result of either: (i) Clearing member defaults and (ii) non-clearing member events. *See* LCH 2017 Notice, *supra* note 118, 82 FR at 60248. In addition, each of the plans for NSCC, FICC, and DTC discuss, at a general level, scenarios in terms of uncovered losses or liquidity shortfalls that could result from the default of one or more of its members as well as losses that could arising from non-default events. *See, e.g.,* NSCC 2021 Notice, *supra* note 119, 86 FR at 17441; FICC 2021 Notice, *supra* note 119, 86 FR at 17433; DTC 2021 Notice, *supra* note 119, 86 FR 17421.

[121] *See* OCC 2017 Notice, *supra* note 118, 82 FR at 61079–80 (discussing OCC's identification of qualitative trigger events for both recovery and wind-down); 83 FR at 34183, 34221, and 44970 (stating the DTC, NSCC, and FICC have identified wind-down triggers and that a covered clearing agency would have entered ''recovery phase'' when it issues its first loss allocation round); ICC 2021 Order, supra note 41, 86 FR at 26562; 84 FR at 24455 (ICEEU).

[122] *See, e.g.,* 83 FR at 34220–21 (identifying NSCC's recovery tool characteristics); FICC 2017 Notice, *supra* note 118, 83 FR at 878 (identifying FICC's recovery tool characteristics); 83 FR at 44970 (identifying DTC's recovery tool characteristics); OCC 2017 Notice, *supra* note 118, 82 FR at 61075–80 (identifying OCC's enhanced risk management and recovery tools); ICC 2021 Order, supra note 41, 86 FR at 26562 (identifying ICC's recovery tools); 84 FR at 34456 (identifying key aspects of recovery tools for ICEEU); 83 FR at 28886–87 (describing LCH SA's tools).

[123] Each of the plans for NSCC, FICC, and DTC provides a description of the governance and process around management of a stress event along a ''Crisis Continuum'' timeline. *See, e.g.,* NSCC 2017 Notice, *supra* note 118, 83 FR at 842; FICC 2017 Notice, *supra* note 118, 83 FR at 872; DTC 2017 Notice, *supra* note 118, 83 FR at 886. OCC's recovery plan outlines an escalation process for the occurrence of a ''Recovery Trigger Event'' as well as provides general descriptions of how it would anticipate deploying its recovery tools in response to the six stress scenarios it identified. OCC 2017 Notice, *supra* note 118, 82 FR at 61079–80. The ICC recovery plan describes the governance arrangements that provide oversight and direction of the plan. *See* ICC 2021 Notice, *supra* note 120, 86 FR 17649. ICEEU revised its recovery plan to more clearly address decision-making during recovery in 2019. *See* Securities Exchange Act Release No. 85907 (May 21, 2019), 84 FR 24549 (May 28, 2019) (SR–ICEEU–2019–013) (''ICEEU 2019 Notice''). The LCH SA recovery plan identifies the groups and individuals within LCH SA that are responsible for the various aspects of plan. *See* LCH 2017 Notice, *supra* note 118, 82 FR at 60250.

[124] *See* ICC 2021 Order, supra note 41, 86 FR at 26562 (referencing testing its Recovery Plan at least annually, as part of its annual default management drills and providing the results of such testing, as well as any changes it recommends due to such testing, to the ICC Board and Risk Committee); ICCEU, 83 FR at 2857 (referencing testing elements of the Recovery Plan as part of normal operations and risk management procedures); LCH 2017 Notice, *supra* note 118, 82 FR at 60250 (referencing fire drills intended to simulate all aspects of a member default, including the auctioning of the defaulting members portfolio to non-defaulting members (where appropriate) and involving the participation of members and relevant functions within the LCH SA organization., with revisions to the recovery plan as appropriate in light of the testing).

[125] NSCC, FICC, and DTC review their respective RWPs biennially. *See* NSCC 2021 Notice, *supra* note 119, 86 FR at 17441; FICC 2021 Notice, *supra* note 119, 86 FR at 17433; DTC 2021 Notice, *supra* note 119, 86 FR at 17421. OCC conducts an annual review of its RWP. *See* Securities Exchange Act Release No. 90315 (Nov. 3, 2020), 85 FR 71384, 71385 (Nov. 9, 2020) (SR–OCC–2020–013); *see also* OCC 2017 Notice, *supra* note 118, 82 FR at 61080. ICC's RWP describes governance arrangements that provide for oversight and direction in respect to review and testing of the plans. *See* ICC 2021 Notice, *supra* note 120, 86 FR at 17651–52. The ICEEU recovery plan is subject to annual review and ad hoc reviews may be commissioned if the business materially changes. *See* Securities Exchange Act Release No. 83651 (Jul. 17, 2018), 83 FR 34891, 34893 (Jul. 23, 2018) (SR–ICEEU–2017–016 and SR–ICEEU–2017–017). In addition, ICEEU requires annual testing of the plan via a table-top exercise to ensure ICE Clear Europe staff's understanding of the plan and its implementation. *See* ICEEU 2019 Notice, *supra* note 123, 84 FR at 24550. LCH SA decided to review its wind-down plan on an annual basis or more frequently, if

non-scheduled reviews. In the existing plans, the boards of directors of the covered clearing agency are responsible for the review and approval of the RWPs, but the plans vary in whether they specify that such review will also occur after material changes to the covered clearing agency's operations or in light of the results of periodic testing of the RWPs.

4. Current Risk-Based Margin

As discussed in section III.A *supra,* Rule 17Ad-22(e)(6) requires covered clearing agencies that provide central counterparty services to establish written policies and procedures reasonably designed to cover its credit exposure to its participants by establishing a risk-based margin systems with certain characteristics. Intraday margining represents an important tool that covered clearing agencies use to manage risk exposures on a real-time basis, by virtue of allowing a quick response to volatility spikes that call for changes in collateral to cover actual and potential losses.

a. Monitoring Exposure and Intraday Margin Calls

Each covered clearing agency currently has some ability to monitor for intraday exposure and to make certain intraday margin calls. The frequency of intraday monitoring and margin calls varies across markets, and it is responsive to the risk characteristics of the underlying markets and participants. Participants are generally required to post margin within an hour of notification or at specified times pursuant to the covered clearing agency's rules and procedures. The current practice of covered clearing agencies is to release excess margin to participants only once a day at a pre-scheduled time.

For example, OCC revalues its participants' portfolios throughout the day to calculated updated account net asset value, and its rules provide it the authority to issue intraday margin calls. Its intraday calls are generally issued between 11 a.m. and 1:30 p.m. when unrealized losses of an account, based on its start-of-day positions, exceed 50% of the account's total margin.[126] NSCC's rules provide the authority to impose intraday mark-to-market charges, and it tracks intraday market price and position changes in 15-minute intervals. NSCC generally collects additional margin if the difference between the most recent mark-to-market price of a participant's net positions and the most recent observed market price exceeds a predetermined threshold, which is currently 80 percent of the participant's volatility charge and may be reduced if NSCC determines that a reduction of the threshold is appropriate to mitigate risk during volatile market conditions.[127]

FICC's GSD and FICC's MBSD have the authority to make intraday margin calls.[128] FICC monitors changes in pricing and positions frequently throughout the day, and it may collect intraday margin to cover the price movement from those participants with a significant exposure in an identified security or net portfolio and the market value of those positions.[129]

ICC also monitors each participant's intraday profit and loss to determine if its intraday exposure is covered by the margin on deposit, and it may issue margin calls to participants that are not sufficiently collateralized.[130] LCH SA also has the ability and authority to make intraday margin calls that are based on intraday positions and valuations.[131]

b. Reliable Sources of Timely Price Data and Other Substantive Inputs

Covered clearing agencies use price data as well as other data sources and other substantive inputs in their risk-based margin systems, which is expected given the substantive differences in the markets and participants they serve. Based on its supervisory experience, the Commission understands that all covered clearing agencies generally have policies and procedures in place to use a risk-based margin system that uses reliable sources of timely price data and includes procedures and sound valuation models for addressing circumstances in which price data are not readily available or reliable. The Commission also understands that if a covered clearing agency uses other substantive inputs, such as portfolio size, asset price volatility, duration, convexity, and outputs from external model vendors, which are not required by the Commission's rules, not all covered clearing agencies have policies and procedures for addressing circumstances in which those substantive inputs are not readily available or reliable so that the covered clearing agency can continue to meet its requirements under Rule 17Ad–22(e)(6).

The policies and procedures used when price data or other substantive inputs are not available vary from one RWP to another. For example, the largest component of margin at FICC's GSD is typically its ''VaR Charge.'' The VaR Charge is based on the potential price volatility of unsettled positions using a sensitivity-based Value-at-Risk (''VaR'') methodology over a ten-year historical look-back period. In addition, FICC's GSD also uses an alternative ''Margin Proxy'' calculation as a back-up VaR Charge calculation to the sensitivity approach in the event that FICC experiences a data disruption with the third-party vendor upon which FICC relies to produce the sensitivity-based VaR Charge.[132] FICC's MBSD relies upon a similar approach, that is, using a sensitivity-based VaR methodology as its primary model, which relies upon third-party data, as well as a Margin Proxy, and it also uses an additional alternative calculation referred to as the ''Minimum Margin Amount'' that also does not rely on external vendor data.[133]

required. *See* Securities Exchange Act Release No. 88297 (Feb. 27, 2020), 85 FR 12814 (Mar. 4, 2020) (SR–LCH SA–2020–001).

[126] *See* Options Clearing Corporation, Disclosure Framework at 52, *available at https://www.theocc.com/getmedia/4664dece-7172-42a5-8f55-5982f358b696/pfmi-disclosures.pdf,* and OCC Rule 609 (regarding intra-day margin calls).

[127] *See* NSCC Disclosure Framework at 58, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/NSCC_Disclosure_Framework.pdf* (''*NSCC Disclosure Framework*''), and NSCC Rules, Procedure XV (defining intraday mark-to-market charge).

[128] *See* FICC's GSD Rule 4, section 2a (regarding the intraday supplemental fund deposit); FICC's MBSD Rule 1 (defining intraday VaR and intraday mark-to-market charges) and Rule 4, section 2(b) (regarding the daily margin requirement) and section 3a (regarding the intraday requirements). In addition, FICC's GSD collects margin twice a day under its current rules, notwithstanding any additional intraday margin calls. *See* FICC's GSD Rules, schedule of timeframes.

[129] *See generally* note 128 *supra* and FICC Disclosure Framework at 65, *available at https://www.dtcc.com/-/media/Files/Downloads/legal/policy-and-compliance/FICC_Disclosure_Framework.pdf.*

[130] ICC Disclosure Framework at 22–23, *available at https://www.theice.com/publicdocs/clear_credit/ICEClearCredit_DisclosureFramework.pdf,* and ICC Rule 401.

[131] *See generally* LCH SA Disclosure Framework at 31, *available at https://www.lch.com/system/files/media_root/LCH%20SA%20-%20Comprehensive%20Disclosure%20as%20required%20by%20SEC%20Rule%2017Ad-22%28e%29%2823%29_2022%20Q32022.pdf,* and LCH CDS Clearing Procedures section 2.21 (describing ''extraordinary margin'' that LCH SA may require to cover the risk of price/spread fluctuations occurring on an intraday basis).

[132] *See generally* FICC Disclosure Framework at 62, Exchange Act Release No. 82779 (Feb. 26, 2018) (File No. SR–FICC–2018–801) (describing both the sensitivity-based VaR model that would use a third party vendor to supply security-level risk sensitivity data and relevant historical risk factor time series data and the use of the Margin Proxy in the event of a disruption at FICC's third-party vendor, as well as the procedures that would govern in the event that the vendor fails to deliver such data).

[133] *See, e.g.,* FICC Disclosure Framework at 64; 81 FR 95669 (Dec. 28, 2016) (describing both the sensitivity-based VaR model that would use a third

Continued

NSCC relies upon a parametric VaR model to determine the potential future exposure of a given portfolio based on historical price movements, using 153 days as the minimum sample period for the historical data. For certain securities, including fixed income securities, UITs, illiquid securities, securities that are amendable to statistical analysis only in a complex manner and securities that are less amenable to statistical analysis, a haircut-based volatility charge is applied in lieu of the VaR charge.[134]

*C. Consideration of Benefits and Costs as Well as the Effects on Efficiency, Competition, and Capital Formation*

The following discussion sets forth the potential economic effects stemming from adopting the proposed rule and amendments, including the effects on efficiency, competition, and capital formation.

The benefits and costs discussed in this subsection are relative to the economic baseline discussed previously, which includes the covered clearing agencies' current RWPs and their current risk-based margin practices. In some instances, the proposals reflect what the Commission understands to be current practices at many covered clearing agencies. To the extent that a covered clearing agency's current practices align with part of a proposed rule or amendment, the covered clearing agency, its participants, and the broader market would have already absorbed the benefits and costs of that part of the proposed rule and amendments and, therefore, might not experience any direct benefits or costs if the Commission adopts that part of the new rule or amendments. In this case, the Commission believes that imposing these requirements on covered clearing agencies that have largely implemented the proposals in this release would essentially codify these elements and ensure that the covered clearing agencies are required to continue to include these elements in their RWPs or risk-based margin systems. Additionally, the proposed rule and amendments would ensure that the RWPs and risk-based margin systems of any new covered clearing agency would be required to have RWPs that contain all of the proposed elements.

Disruptions in the operations at any of the covered clearing agencies would cause significant negative externalities in the markets they serve, which would likely spill over into other markets. These ripple effects would negatively affect numerous market participants, including investors. Because covered clearing agencies may not internalize the full cost of these externalities, their investments in their RWPs and risk-based margin systems might be suboptimal from a public welfare perspective. An important benefit of the proposed rule and amendments is that they require covered clearing agencies to maintain a higher investment than they might otherwise maintain.

The Commission recognizes that the existing rules allow a degree of discretion that would be reduced or eliminated by the proposals. Even if covered clearing agencies would not need to change their current practices significantly to align with the proposals, if adopted, they would incur indirect costs in terms of less discretion in the future. For example, a covered clearing agency that currently plans an annual review of its RWP would lose the ability to change to a biennial review in the future.

The costs discussed in this subsection would be borne by covered clearing agencies and their participants. For covered clearing agencies owned by participants, all of the costs will ultimately be passed on to participants because they are residual beneficiaries of the covered clearing agency. For covered clearing agencies not owned by participants, the level of pass-through would depend upon a number of factors, including the level of competition among clearing agencies. In both cases, the participants will likely pass through some of these costs to their customers, the level of which will depend on factors such as the customers' sensitivities to costs and the amount of competition between participants for customers. Generally, if a covered clearing agency does not face significant competition, it will have an incentive to absorb part of the cost increase. On the other hand, in the extreme case of a perfectly competitive market, there are no economic profits and price equals marginal costs so an increase in cost could be fully passed through to the customer.[135] If the Commission adopts the proposed rule and amendments, to the extent that a covered clearing agency's current practices are misaligned with a proposed rule or amendment, the covered clearing agency, as discussed in the remainder of this subsection, would need to modify its RWP or risk-based margin system in order to comply with the new standards. The resulting benefits and costs would increase with the amount of modifications. Because the Commission has previously stated that RWPs are rules for purposes of a covered clearing agency's SRO obligations, and because the covered clearing agencies already have filed such RWPs with the Commission for approval, any such modifications would be subject to Commission review and public comment pursuant to Rule 19b–4,[136] the costs of which are included in the cost estimates presented in this subsection. Similarly, the Commission considers changes to a covered clearing agency's risk-based margin system as part of the SRO rule filing process, making any such modifications also subject to Commission review and public comment pursuant to Rule 19b–4, the costs of which are included in the cost estimates presented in this subsection. Adopting the proposed rule and amendments could also cause a clearing agency to make different business decisions, such as capital expenditure decisions, that may not be subject to the same Commission review process.

1. Proposed Rule 17ad–26

Proposed Rule 17ad–26 sets forth nine elements that must be included in a covered clearing agency's RWP. The remainder of this subsection discusses each of these elements in turn, explaining how some would make RWPs more effective in guiding the covered clearing agencies during times of recovery or wind-down while others would help participants and regulators better understand how the covered clearing agencies will prepare for and respond to stress. The Commission believes that this proposed rule would reduce systemic risk to the extent that it reduces the risk of unsuccessful recoveries, disorderly wind-downs, and negative spillovers to other clearing

party vendor to supply security-level risk sensitivity data and relevant historical risk factor time series data and the use of the Margin Proxy in the event of a disruption at FICC's third-party vendor, as well as the procedures that would govern in the event that the vendor fails to deliver such data); Exchange Act Release No. 92145 (June 10, 2021), 86 FR 32079 (June 16, 2021) (File No. SR–FICC–2020–804) (describing the calculation of the Minimum Margin Amount).

[134] *See* NSCC Disclosure Framework, *supra* note 127, at 58–61.

[135] More specifically, the market clearing quantity of the good or service supplied will adjust and the extent of industry-wide cost pass-through in a perfectly competitive market depends on the elasticity of demand relative to supply. The more elastic is demand, and the less elastic is supply, the smaller the extent of pass-through, all else being equal. *See* RBB Economics, *Cost Pass-Through: Theory, Measurement and Potential Policy Implications,* 4 (Feb. 2014), *available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/320912/Cost_Pass-Through_Report.pdf.*

[136] *Supra* note 115.

agencies and to other markets.[137] These benefits are expected to increase with the amount of change each covered clearing agency makes to align itself with the rule. Proposed Rule 17ad–26 would require covered clearing agencies to modify their RWPs to the extent their RWPs do not already align with the proposed rule. The Commission anticipates that these changes may result in the covered clearing agencies being more aware of potential risks and the associated costs of certain factors under their control, which could, in turn, lead to the covered clearing agency making changes to certain business practices.

a. Critical Clearing and Settlement Services

Proposed Rule 17ad–26(a)(1) requires RWPs to identify and describe their critical payment, clearing, and settlement services and to address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down.

Covered clearing agencies play an important role as financial market utilities. By virtue of the unique services that they offer, the network effects under which they operate, and their specialization by asset class, any failure of the covered clearing agency to provide their critical services would have implications with respect to financial stability.[138] Policies and procedures that increase the resiliency of covered clearing agencies have, as a result, direct benefits on the stability of U.S. financial markets.

Each of the covered clearing agencies' RWPs currently identifies its critical services, as stated in the baseline analysis, but they differ in the degree to which they address continuation.

Markets in which the dominant covered clearing agencies are currently less comprehensive in addressing continuation in their RWPs are expected to benefit from this requirement because they would be required to work through and memorialize in their RWPs how the clearing agency would continue to provide its critical services in case of a recovery or during an orderly wind-down.

As mentioned in the economic baseline section, none of the covered clearing agencies currently identifies the staffing necessary to support critical services or provides in their RWPs analyses of how such staffing would continue in the event of a recovery and during an orderly wind-down. Because covered clearing agencies do not currently identify the staffing necessary to support critical services and how such staffing would continue during times of crisis, this new requirement likely would provide benefits to the market. Forward-looking analyses around issues such as potential staffing shortfalls and employment agreement terms that are robust regardless of the financial situation of the covered clearing agency should provide each covered clearing agency with additional certainty and clarity around the presence of key personnel that would deploy the RWPs and supervise their implementation.

Similarly, the current lack of these staffing analyses creates costs that covered clearing agencies would have to assume, in terms of both drafting the analyses and implementing the resulting conclusions from the analyses. For instance, a covered clearing agency may conclude when undertaking this analysis that key personnel could easily leave their organization in case of a recovery or wind-down scenario. In that case, the covered clearing agency may wish to incur the extra costs attendant to strengthening its employee agreements so that key employees remain at the covered clearing agency during a sale or transfer of one or more of its critical services to another entity or a receiver.

b. Service Providers

Proposed Rule 17ad–26(a)(2) requires RWPs to identify and describe any service providers upon which the covered clearing agency relies to provide the services identified in Rule 17ad–26(a)(1), specify to what services such service providers are relevant, and address how the covered clearing agency would ensure that such service providers would continue to perform in the event of a recovery and during an orderly wind-down. As stated in the baseline analysis, the RWPs differ in their degree of alignment with this proposed rule and the level of descriptiveness of service providers. The markets that likely would benefit the most from this proposed requirement are the ones in which the dominant covered clearing agencies' RWPs are currently the least comprehensive in identifying and describing the required service provides and identifying how those service providers will perform in the event of a recovery and during an orderly wind-down, as they would be better prepared to manage and negotiate with service providers to ensure their continued performance. Covered clearing agencies that make more changes in identifying the service providers and the critical services provided by each critical service provider likely will bring more benefits to the markets they serve by putting themselves in a better position to manage their service providers during a recovery or orderly wind-down.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. These alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP, including any contractual changes with the service providers.

c. Scenarios

Proposed Rule 17ad–26(a)(3) requires RWPs to identify and describe scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services as a going concern, including uncovered credit losses, uncovered liquidity shortfalls, and general business losses. As stated in the baseline analysis, each of the covered clearing agencies' RWPs currently identifies and describes, to varying degrees, certain relevant scenarios. The Commission believes that the more significant benefits of being required to identify these scenarios would accrue to those markets in which the dominant covered clearing agencies lack breadth and specificity in identifying and describing their scenarios. By better understanding the circumstances that could threaten their ability to provide their critical services, these covered clearing agencies can take steps to reduce the likelihood of these scenarios and, should they materialize, be better prepared to achieve a recovery or orderly wind-down.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that require changes, including those that need to be

[137] *See supra* note 106 and accompanying text.

[138] Five of the seven covered clearing agencies have been designated by the Financial Stability Oversight Council as Significantly Important Financial Market Utilities (''SIFMUs'') because the failure or disruption to the functioning of the financial market utility could create or increase the risk of significant liquidity or credit problems spreading among financial institutions or markets. *See Designations,* U.S. Dep't Treasury, *available at https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/designations.*

expanded to include additional scenarios, would be modest but would vary across covered clearing agencies because of differences in the markets and participants they serve.

d. Criteria That Would Trigger Implementation

Proposed Rule 17ad–26(a)(4) requires RWPs to identify and describe criteria that would trigger the implementation of the RWPs. As stated in the baseline analysis, each covered clearing agency's RWP identifies and describes, to varying degrees, criteria that would trigger the implementation of a recovery or orderly wind-down. The Commission believes that the largest benefits of this rule likely would accrue to the markets in which the dominant covered clearing agencies that currently have the least comprehensive RWPs in identifying and describing appropriate triggers. The *ex ante* identification and description of triggers should have the benefit of being a disciplining mechanism that signals when the covered clearing agency may act during periods of market stress.[139] The Commission further believes that the *ex ante* identification and description of triggers would lead covered clearing agencies to anticipate and prepare for market stress or other events that could lead to a recovery or wind-down.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP.

e. Rules, Policies, Procedures, and Other Tools or Resources

Proposed Rule 17ad–26(a)(5) requires RWPs to identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would use in a recovery or orderly wind-down to address the scenarios identified in the RWP. The Commission believes that the markets that likely would benefit the most from this requirement are the ones in which the dominant covered clearing agencies have the least comprehensive RWPs in describing how the rules, policies, procedures, tools and other resources would be used during a recovery or wind-down. Making these changes to their RWPs should enable the covered clearing agencies to more fully anticipate how future crises might impact their operations, which should enhance their ability to respond and accordingly decrease the expected costs borne by covered clearing agencies, the participants, and other stakeholders in future crises. For example, if a covered clearing agency determines that it needs a new rule to respond to a specific scenario and if that scenario ever materializes, the covered clearing agency should be better positioned to respond appropriately to it.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. Covered clearing agencies that determine that they need to include more responses, different resources, or better descriptions would incur more costs as they make appropriate revisions to their RWPs and their resources. The Commission believes that the costs to modify plans that require changes, including those that need to be expanded, would increase in the number of required changes such as the number of new rules the covered clearing agency is required to adopt.

f. Procedures To Ensure Timely Implementation

Proposed Rule 17ad–26(a)(6) requires RWPs to address how the rules, policies, procedures, and any other tools or resources identified in 17ad–26(a)(5) would ensure timely implementation of the RWP. As stated in the baseline analysis, each RWP mentions the concept of timeliness in either recovery or wind-down, but most RWPs do not list specific procedures to ensure timely implementation of itself. A key benefit of this rule is that covered clearing agencies will address in their RWPs how the RWP will be implemented in a timely manner when the need arises. The Commission believes that a timely start will increase the chance that the covered clearing agency is able to address the underlying problem in a timely manner and with lower costs to the various stakeholders. The benefits of this rule likely would accrue primarily to the markets in which the dominant covered clearing agencies add more or better rules, policies, procedures, tools, or other resources to ensure timely implementation of their RWPs.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that require changes, including those that need to be expanded to include additional rules, policies, procedures, or any other tool or resource would be modest because current RWPs already place some focus on timeliness as a desired feature.

g. Procedures for Informing the Commission

Proposed Rule 17ad–26(a)(7) requires RWPs to include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down. As stated in the baseline analysis, each RWP generally refers to informing the Commission, but not every plan includes specific procedures, and some plans include procedures for informing the Commission *after* initiating a recovery or orderly wind-down. Providing notice to the Commission may help ensure that the Commission has the opportunity to consider whether a covered clearing agency engages the recovery or wind-down event consistent with its established RWPs and the requirements of Commission rules to help mitigate the potential onward transmission of system risk and may help ensure that a wind-down, if necessary, is orderly. These benefits likely would accrue primarily to the markets in which the dominant covered clearing agencies currently do not have procedures in place for informing the Commission as soon as practicable.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that require changes, including those that need to be expanded to include additional procedures would be modest because current RWPs already place some focus on informing the Commission.

h. Testing

Proposed Rule 17ad–26(a)(8) requires RWPs to include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate,

[139] Ansgar Walther and Lucy White, *Rules Versus Discretion in Bank Resolution,* Banque de France (Mar. 25, 2016), *available at https://acpr.banque-france.fr/sites/default/files/medias/documents/waltherwhite.pdf* (''*[T]he optimal regulatory arrangement is a combination of rules and discretion: Discretion when public information is relatively benign, and rules when public information is more negative.*'').

amending the plans to address the results of the testing. As stated in the baseline analysis, only a few RWPs refer to plan testing. The Commission believes that the markets that likely would benefit the most from this requirement are those in which the dominant covered clearing agencies have the least comprehensive policies around testing in their RWPs because those covered clearing agencies would create procedures for more frequent testing, and those changes should help ensure that those RWPs remain current and take into account changing system and market conditions.

The Commission believes that the costs to start plan tests every twelve months will not be large for the four covered clearing agencies that do not mention plan testing in their RWPs because they might be able to leverage existing requirements around default management testing.[140] On a preliminary basis, the Commission believes that the corresponding testing costs for the covered clearing agencies' participants and, when practicable, other stakeholders likely will be moderate, in part because the covered clearing agencies are already required to include such entities in their default procedures testing under Rule 17Ad–22(e)(13). The costs for any subsequent RWP amendments likely will be small.

i. Plan Reviews

Proposed Rule 17ad–26(a)(9) requires RWPs to include procedures requiring review and approval by the board of directors of the plans at least every twelve months or following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans, with such review informed, as appropriate, by the covered clearing agency's testing of the plans. As stated in the baseline analysis, each RWP makes reference to periodic plan reviews, typically annually or biennially.

The Commission believes that the markets that likely would benefit the most from this requirement are those in which the dominant covered clearing agencies currently have the least comprehensive RWPs in addressing plan review because they would create more frequent procedures for review, and more frequent reviews, in turn, should help ensure that RWPs remain current and take into account any changes to the covered clearing agencies' operations.

Each covered clearing agency would incur costs to bring its RWP into alignment with the proposed rule. The alignment costs would depend on the extent of the enhancements the covered clearing agency makes to its RWP. The Commission believes that the costs to modify plans that have biennial reviews to replace them with annual reviews will be modest. The costs to review RWPs after material changes to the covered clearing agencies' operations will depend on the nature and number of material changes that result in new reviews.

j. Burden Estimate Associated With Proposed Rule 17ad–26

The Commission has estimated the initial and ongoing cost burden of adopting proposed rule 17ad–26. Accordingly, the Commission preliminarily believes that eight respondent clearing agencies would incur an aggregate one-time burden of approximately 960 hours (or 120 hours each) to review and update existing policies and procedures. The cost estimate associated with the initial burden is based on 20 hours for an assistant general counsel at $551 per hour; 50 hours for a compliance attorney at $432 per hour; 35 hours for a business risk analyst at $ 235 per hour; and 15 hours for a senior risk management specialist at $423 per hour. The initial burden for one covered clearing agency is $47,190, and it is $377,520 for all eight covered clearing agencies.

Proposed Rule 17ad–26 would also impose ongoing burdens on a respondent covered clearing agency. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the Commission's previous estimates for ongoing monitoring and compliance burdens with respect to existing 17 CFR 240.17Ad–22(e)(2) (''Rule 17Ad–22(e)(2)''),[141] the Commission preliminarily estimates that the ongoing activities required by proposed Rule 17ad–26 would impose an aggregate annual burden on respondent covered clearing agencies of 320 hours (40 hours for each covered clearing agency). The ongoing burden is based on 10 hours for an assistant general counsel at $551 per hour and 30 hours for a compliance attorney at $432 per hour, totaling $18,470 per covered clearing agency and $147,760 for all eight covered clearing agencies.[142]

2. Amendments to Rule 17Ad–22(e)(6)

Rule 17Ad–22(e)(6) requires covered clearing agencies that provide central counterparty services to establish a risk-based margin system to manage their credit exposures to their participants. The proposed amendment to Rule 17Ad–22(e)(6)(ii) will strengthen the requirements: (a) by requiring that covered clearing agencies monitor intraday risk exposures to their participants on an ongoing basis, and (b) by providing additional specificity to the circumstances in which covered clearing agencies should have policies and procedures in place to make intraday margin calls. The proposed amendment to Rule 17Ad–22(e)(6)(iv) will amend the requirements by ensuring covered clearing agencies can meet their Rule 17Ad–22(e)(6) obligations when their price data and substantive inputs are not available by including procedures to use price data or substantive inputs from an alternate source or to use an alternate risk-based margin system that does not similarly rely on the unavailable or unreliable substantive inputs.

a. Monitoring Exposure and Intraday Margin Calls

The ability to assess intraday margin calls is an important tool that covered clearing agencies have to manage their credit exposures to their participants. The proposed amendment to Rule 17Ad–22(e)(6)(ii) requires covered clearing agencies to monitor exposure on an ongoing basis and to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility, which would help reduce, but not eliminate, their credit exposure to their participants.

Each covered clearing agency would have to determine how to operationalize ''on an ongoing basis'' and ''as frequently as circumstances warrant'' given its own market and participants. Each covered clearing agency would also need to ensure that its systems are capable of monitoring exposure and making margin calls at those frequencies. As discussed in the baseline analysis, each covered clearing agency is already capable of monitoring exposure and collecting margin on an intraday basis; nevertheless, some covered clearing agencies might need to

[140] *See* 17 CFR 240.17Ad–22(e)(13).

[141] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 (discussing Rule 17Ad–22(e)(2)).

[142] All values were determined from SIFMA's October 2013 values (*see, Management and Professional Earnings in the Security Industry—2013* (Oct. 7, 2013) and adjusted to March 2023 values using the Bureau of Labor Statistics' CPI Inflation Calculator, *available at https://www.bls.gov/data/inflation_calculator.htm.*

make changes to align with the proposed amendment such as increasing the frequency of exposure monitoring and improving their information technology so they can process more frequent margin calls.

To the extent a covered clearing agency currently aligns with the proposed amendment it will not experience new benefits from its adoption. Nevertheless, the proposed amendment will have incremental benefits for the market because it will ensure that the covered clearing agencies continue to meet the standard of the proposed amendment that they are currently aligned with and that any new covered clearing agency that provides central counterparty services meets the same standard.

The Commission further believes that the costs to modify the risk-based margin systems that require changes would be modest because covered clearing agencies have already incurred the initial costs of building their risk management infrastructure, including the ability to make intraday margin calls based on some sort of intraday monitoring. Once those costs have been incurred and amortized, the variable costs of modifying the *frequency* of the monitoring, and any additional margin calls, are likely low.

To the extent that the proposed amendment results in covered clearing agencies making more unanticipated margin calls, participants may face increased liquidity-management costs. This may potentially result in procyclicality problems that exacerbate market stress: margin calls during periods of declining asset prices may cause participants to sell assets, putting further negative pressure on asset prices and the market that may spill over into other covered clearing agencies and their markets. This stress may be transmitted by participants that are members of more than one covered clearing agency when, for example, a margin call in one market makes a participant sell assets in a different market. The stress may also be transmitted by assets that are linked between markets, such as the link between option prices (OCC) and equity prices (NSCC). Various industry participants have expressed concerns that excessive intraday margin calls, especially unanticipated ones, have the potential to exacerbate liquidity issues for clearing members who would have to post new liquid collateral to the covered clearing agency with little notice.[143] On the other hand, such intraday margin calls reduce credit risk during periods of market stress.

b. Reliable Sources of Timely Price Data and Other Substantive Inputs

The Commission believes that every covered clearing agency has a risk-based margin system that largely aligns with the proposed amendment to Rule 17Ad–22(e)(6)(iv), with the exception of at least one covered clearing agency that likely would need to implement additional changes to its risk-based margin system to ensure that it could continue to meet its obligations under Rule 17Ad–22(e)(6) in the event of the unavailability of a substantive inputs from a third party. If that one covered clearing agency were to lose access to its price data or other inputs, it may be unable to perform its critical payment, clearing, and settlement services, and that, in turn, may force it into a wind-down, which may have negative implications for its participants and the broader financial system.

The incremental benefits of these proposed amendments beyond the baseline lie primarily in expanding the scope of this rule beyond price data and further specifying the nature of the procedures that a covered clearing agency uses in the event that such data or inputs are not readily available or reliable and in ensuring that any new covered clearing agency keeps that same standard of the proposed amendment. The Commission is unable to estimate the specific quantitative benefit of that covered clearing agency meeting the proposed amendment, but it believes that it is substantial because the proposed amendment reduces the risk that the covered clearing agency fails to provide its critical payment, clearing, and settlement services in future periods of high market stress. For example, the Options Clearing Corporation cleared a year-to-date average daily volume of 46.3 million contracts through March 2023, and DTCC reported that the average daily cleared broker-to-broker transactions was $2 trillion in 2021.[144] Assuming that a price data shortage happens by the end of a regular trading day, when there is increased activity in the financial markets,[145] even a one-hour price data feed malfunction could affect the normal processing of millions of options contracts and hundreds of billions of dollars of equity transactions.

Moreover, a price data shortage in one covered clearing agency that is closely interconnected to another covered clearing agency[146] could result in spill-over effects that spread to that other covered clearing agency, magnifying the effect of the initial price data shortage.

c. Burden Estimate Associated With Proposed Amendments to Rule 17Ad–22(e)(6)

Overall, the Commission preliminarily believes that the estimated burdens for the proposed amendment to Rule 17Ad–22(e)(6) may require a respondent covered clearing agency to make fairly substantial changes to its policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[147] the Commission preliminarily estimates that respondent covered clearing agencies would incur an aggregate one-time burden of approximately 903 hours (or 129 hours per covered clearing agency) to review existing policies and procedures and create new policies and procedures. The initial cost is based on 20 hours for an assistant general counsel at $551 per hour; 40 hours for a compliance attorney at $432 per hour; 12 hours for a computer operations manager at $521

[143] *Revisiting Procyclicality: The Impact of the COVID Crisis on CCP Margin Requirements,* Futures Indus. Ass'n (Oct. 2020), *available at https://www.fia.org/sites/default/files/2020-10/FIA_WP_Procyclicality_CCP%20Margin%20Requirements.pdf.*

[144] *See OCC Clears Over 1B Total Contracts in March 2023, Highest Month on Record and up 12.2% Year-Over-Year, supra* note 103 and *DTCC 2021 Annual Report, supra* note 100.

[145] Trading after the opening bell and right before the closing bell are usually the two busiest trading periods for both equities and equity options.

[146] For instance, OCC and NSCC have an information-sharing agreement to facilitate the settlement and delivery of physically-settled stock options cleared by OCC via NSCC. See Securities Exchange Act Release No. 37731 (September 26, 1996), 61 FR 51731 (October 3, 1996) (SR–OCC–96–04 and SRNSCC–96–11) (Order Approving Proposed Rule Change Related to an Amended and Restated Options Exercise Settlement Agreement Between the Options Clearing Corporation and the National Securities Clearing Corporation); Securities Exchange Act Release No. 43837 (January 12, 2001), 66 FR 6726 (January 22, 2001) (SR–OCC–00–12) (Order Granting Accelerated Approval of a Proposed Rule Change Relating to the Creation of a Program to Relieve Strains on Clearing Members' Liquidity in Connection With Exercise Settlements); and Securities Exchange Act Release No. 58988 (November 20, 2008), 73 FR 72098 (November 26, 2008) (SR–OCC–2008–18 and SR–NSCC–2008–09) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Changes Relating to Amendment No. 2 to the Third Amended and Restated Options Exercise Settlement Agreement).

[147] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 and 70895–97 (discussing Rules 17Ad–22(e)(2) and (13)). Although the proposed rule amendment is with respect to Rule 17Ad–22(e)(6), the Commission believes that these Rules present the best overall comparison to the current proposed rule amendment, in light of the nature of the changes needed to implement the proposal here and what was proposed in the Covered Clearing Agency Standards.

per hour; 20 hours for a senior programmer at $392 per hour; 25 hours for a senior risk management specialist at $423 per hour; and 12 hours for a senior business analyst at $324 per hour. In total, the initial burden is estimated to be $56,855 per covered clearing agency or $397,985 for all seven covered clearing agencies combined.

The proposed amendments to Rule 17Ad–22(e)(6) would also impose ongoing burdens on the covered clearing agencies. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[148] the Commission preliminarily estimates that the ongoing activities required by the proposed amendments to Rule 17Ad–22(e)(6) would impose an aggregate annual burden on covered clearing agencies of 595 hours (or 85 hours per covered clearing agency). The cost of the ongoing burden was estimated assuming 25 hours for a compliance attorney at $432 per hour; 40 hours for a business risk analyst at $235 per hour; and 20 hours for a senior risk management specialist at $423 per hour, totaling $30,660 per covered clearing agency or $214,620 for all seven covered clearing agencies combined.[149]

3. Efficiency, Competition, and Capital Formation

a. Efficiency

The Commission believes that the proposed rule and amendments, if adopted, may improve informational and productive efficiency in the market for cleared securities.

Covered clearing agencies current policies and procedures largely align with proposed Rule 17ad–26. Therefore, the Commission does not expect substantive efficiency changes due to the proposed new rule.

The proposed amendment to Rule 17Ad–22(e)(6)(ii) would benefit participants by providing increased specificity around the methods used by covered clearing agencies to assess intraday margin calls, thus enabling more efficient planning in the use of scarce margin funds.

The proposed amendment to Rule 17Ad–22(e)(6)(iv) would increase informational efficiency during periods when price data or other substantive inputs are not available. Calculating margin and managing and disseminating risk information are core competencies of all covered clearing agencies, and various stakeholders rely on those data outputs. By requiring secondary sources, the proposed amendment may mitigate the reduction in efficiency that would otherwise happen when primary sources fail at a covered clearing that does not have secondary sources. Having the ability to continue calculating margin and disseminating that information to participants even when primary data are not available will prevent informational efficiency to decrease when price data or other substantive inputs are not available.

b. Competition

As described in the baseline, covered clearing agencies are currently not subject to strong competitive pressures given high start-up costs, the network effects that are inherent in the clearing business, and their subsequent historical consolidation by market segments (options clearing for OCC, equities clearing for NSCC, fixed-income clearing for FICC, etc.). In terms of potential new entrants in the market for clearing and settlement services, the incremental costs of the proposed Rule 17ad–26 and the proposed amendment to Rule 17Ad–22(e)(6)(ii) are small and, therefore, unlikely to be noteworthy barriers to entry. The amendment to Rule 17Ad–22(e)(6)(iv) may have a modest effect on competition because they are start-up costs that a new competitor would have to assume to enter into the covered clearing agency market.

c. Capital Formation

The Commission expects the effects of the proposed rule and amendments on capital formation to be second-order because the proposal focuses on issues related to secondary market trading and not on issues related to primary market issuances. To the degree that market participants view equity and fixed-income covered clearing agencies as more reliable venues for risk transfer, they may increase their activity and therefore signal a demand for more capital-creating securities.

*D. Reasonable Alternatives to the Proposed Rule and Amendments*

1. Establish Precise Triggers for Implementation of RWPs Across Covered Clearing Agencies

Instead of requiring covered clearing agencies to identify and implement their own triggers to resolution and wind-down procedures, the Commission could adopt a more prescriptive approach and determine specific triggers that covered clearing agencies would be required to follow. For example, the Commission could specify that exhausting prefunded financial resources in the waterfall structure of a covered clearing agency would immediately trigger a recovery or wind-down procedure.[150] Alternatively, the Commission could require a trigger when unfunded commitments to the CCP are called upon and reach a specific dollar number.

This alternative would harmonize triggers across covered clearing agencies and would create a single standard that market participants could rely on, eliminating any confusion or ambiguity attendant to different triggers. Nevertheless, covered clearing agencies are active in different markets (equities, bonds, options, CDS, etc.), have different organizational structures, and focus on different risks. As an example, one of the OCC's focus areas is monitoring option sensitivities, and, as a result, its margin models and waterfall structure are responsive to that consideration while FICC, on the other hand, focuses on duration and convexity so its waterfall structure is more responsive to those risks. The Commission preliminarily believes that having this more prescriptive approach would be unresponsive to the characteristics of each market and could expose covered clearing agencies to

[148] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70893 and 70895–96 (discussing Rules 17Ad–22(e)(6) and (13)).

[149] All values were determined from SIFMA's October 2013 values (*see, Management and Professional Earnings in the Security Industry—2013* (Oct. 7, 2013) and adjusted to March 2023 values using the Bureau of Labor Statistics' CPI Inflation Calculator, *available at https://www.bls.gov/data/inflation_calculator.htm.*

[150] *See* John W. McPartland and Rebecca Lewis, *The Goldilocks Problem: How to Get Incentives and Default Waterfalls ''Just Right'',* 41 Econ. Persps. 1, 2 (Mar. 2017), *available at https://www.chicagofed.org/publications/economic-perspectives/2017/1-mcpartland-lewis* (''All CCPs have a default waterfall that provides financial resources for managing a clearing member default. The waterfall consists of both prefunded resources and unfunded obligations. When a clearing member defaults, the CCP must continue to meet defaulter's financial obligations, whose performance it guarantees, to the non-defaulting clearing members, attempt to find clearing members willing accept the defaulter's clients, and return to a matched book status by liquidating or auctioning off the defaulter's positions. If the CCP cannot find other clearing members willing to onboard the defaulter's clients, then the clients' positions must be liquidated in order to restore the CCP to a matched book status. The default waterfall provides funding to cover the cost of meeting the defaulter's obligations and liquidating the defaulter's positions, as well as, if necessary, those of its clients.'').

recovery or wind-down triggers that are not aligned with the actual risks.

2. Establish Specific Scenarios and Analyses

Instead of requiring covered clearing agencies to identify scenarios that may prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services, the Commission could adopt a more prescriptive approach and identify specific scenarios in new Rule 17ad–26 that each covered clearing agency must include in its RWP. For example, the Commission could identify the scenario of the default of the covered clearing agency's one or two largest participants and scenarios of specific business risks such as the default of a custodian bank or a significant cyber-attack.[151] The Commission could also require more detail regarding how each the covered clearing agency analyzes these scenarios.[152]

This alternative approach may reduce compliance costs by establishing the precise scope of the rule which could allow covered clearing agencies to tailor their RWPs to the enumerated requirements for identifying scenarios and analyses. In addition, including elements similar to those proscribed by other agencies that also regulate several covered clearing agencies could result in certain efficiencies and reduced costs for those covered clearing agencies. However, the Commission preliminarily believes that the proposed approach retains flexibility compared to this alternative by permitting the scenarios to vary across covered clearing agencies because the underlying risks vary across markets and participants. Because participants vary in size and economic significance across covered clearing agencies, scenarios invoking a pre-determined number of failures or fixed dollar amounts may have significantly different effects in one covered clearing agency than in another.

3. Establish Specific Rules, Policies, Procedures, Tools, and Resources

Instead of requiring covered clearing agencies to describes the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down to address the scenarios identified in their RWPs, the Commission could adopt a more prescriptive approach and identify in new Rule 17ad–26 the rules, policies, procedures, and any other tools or resources for all covered clearing agencies. The Commission could also require in Rule 17ad–26 more detail regarding how a covered clearing agency analyzes its rules, policies, procedures, tools, and resources.[153]

This alternative approach may reduce compliance costs by establishing the precise scope of the rule, which could allow covered clearing agencies to tailor their RWPs to the enumerated requirements for describing rules, policies, procedures, and other tools or resources. In addition, including elements similar to those proscribed by other agencies that also regulate several covered clearing agencies could result in certain efficiencies and reduced costs for those covered clearing agencies.[154]

However, the Commission preliminarily believes that it is better to permit the rules, policies, procedures, and any other tools or resources to vary across covered clearing agencies because the underlying risks and resources vary. For example, a covered clearing agency that clears products of longer duration may have a greater need for a tear-up tool that extinguishes a participant's positions in certain circumstances than a covered clearing agency that clears contracts with a relatively short settlement cycle. In addition, the overall volume of transactions settled by a covered clearing agency may affect the choice of its liquidity tools or resources, as the covered clearing agency would have to ensure that it had sufficient liquidity resources to complete settlement.

4. Require the Identification of Interconnections and Interdependencies

In addition to the requirements with respect to service providers set forth in proposed Rule 17ad–26(a)(2), the Commission could require that the covered clearing agency's RWP identify any financial or operational interconnections and interdependencies that the covered clearing agency has with other market participants. This would allow for consideration of the impact of the multiple roles and relationships that a single financial entity may have with respect to the covered clearing agency including affiliated entities and third parties (*e.g.,* a single entity that acts as both a clearing member and a settlement bank and a liquidity provider).[155]

The Commission preliminarily believes that it is better not to include this particular requirement. A covered clearing agency is already required to establish, implement, maintain, and enforce written policies and procedures reasonably designed to identify, monitor, and manage risks related to

[151] Additional such scenarios that could be enumerated in new Rule 17ad–26 could include any or all of the following scenarios: (A) credit losses or liquidity shortfalls created by single and multiple clearing member defaults; (B) liquidity shortfall created by a combination of clearing member default and a failure of a liquidity provider to perform; (C) settlement bank failure; (D) custodian or depository bank failure; (E) losses resulting from investment risk; (F) losses from poor business results; (G) financial effects from cybersecurity events; (H) fraud (internal, external, and/or actions of criminals or of public enemies); (I) legal liabilities, including those not specific to the covered clearing agency's business as a covered clearing agency; (J) losses resulting from interconnections and interdependencies among the covered clearing agency and its parent, affiliates, and/or internal or external service providers; (K) losses resulting from interconnections and interdependencies with other covered clearing agencies; and (L) losses resulting from issues relating to services that are ancillary to the covered clearing agency's critical services. It could also include scenarios involving multiple failures (*e.g.,* a member default occurring simultaneously, or nearly so, with a failure of a service provider) that, in the judgment of the covered clearing agency, are particularly relevant to its business.

[152] That is, the Commission could require in new Rule 17ad–26 that the RWP include an analysis that includes: (A) a description of the scenario; (B) the events that are likely to trigger the scenario; (C) the covered clearing agency's process for monitoring for such events; (D) the market conditions, operational and financial difficulties and other relevant circumstances that are likely to result from the scenario; (E) the potential financial and operational impact of the scenario on the covered clearing agency and on its clearing members, internal and external service providers and relevant affiliated companies, both in an orderly market and in a disorderly market; and (F) the specific steps the covered clearing agency would expect to take when the scenario occurs, or appears likely to occur, including, without limitation, any governance or other procedures that may be necessary to implement the relevant recovery tools and to ensure that such implementation occurs in sufficient time for the recovery tools to achieve their intended effect.

[153] For example, the Commission could require in new Rule 17ad–26 that the RWP include an analysis that includes: (i) a description of the tools that the covered clearing agency would expect to use in each scenario; (ii) the order in which each tool would be expected to be used; (iii) the time frame within which the tool would be used; (iv) the governance and approval processes and arrangements within the covered clearing agency for the use of each of the tools available, including the exercise of any available discretion; (v) the processes to obtain any approvals external to the covered clearing agency (including any regulatory approvals) that would be necessary to use each of the tools available, and the steps that might be taken if such approval is not obtained; (vi) the steps necessary to implement the tools; (vii) the roles and responsibilities of all parties, including non-defaulting participants; (viii) whether the tool is mandatory or voluntary; (ix) an assessment of the associated risks from the use of each tool to non-defaulting clearing members and their customers, linked financial market infrastructures, and the financial system more broadly; and (x), for wind-down, an assessment of the likelihood that the tool would result in orderly wind-down.

[154] *See supra* section IV.B.2, *supra* footnotes 68 and 69, and Request for Comments 15, 20–22, and 27.

[155] More specifically, a bank holding company structure may operate through a set of legal entities (*e.g.,* a broker-dealer/futures commission merchant separate from a bank separate from an information technology service provider), each of which has different relationships with the covered clearing agency.

any link the covered clearing agency establishes with one or more other clearing agencies, financial market utilities, or trading markets.[156] This requirement, in conjunction with the proposed requirement to identify and describe service providers for critical services and to specify to which critical service they relate, should accomplish the same general objective, making this reasonable alternative inferior to the proposed policy choice.

5. Establish a Specific Monitoring Frequency for Intraday Margin Calls

The proposed amendment to Rule 17Ad–22(e)(6)(ii) expressly incorporates the requirement of intraday monitoring to ensure that such monitoring is done on an ongoing basis. One reasonable alternative is to prescribe the necessary frequency of monitoring as opposed to ''on an ongoing basis''. For example, covered clearing agencies could be required to monitor exposure every 5 or 15 minutes.

The Commission preliminarily believes, however, that monitoring on an ongoing basis is preferable because a fixed, pre-specified monitoring frequency may not be responsive enough to risk differences that exist across the markets served by the covered clearing agencies or to volatility changes that may happen through time.

6. Adopt Only Certain Elements of Proposed Rule 17ad–26

Instead of adopting all nine elements of proposed Rule 17ad–26, the Commission could adopt a subset of the proposed elements. For example, the Commission could drop the proposed element to identify service providers or the proposed element to address how the covered clearing agency would ensure that the service providers would continue to perform in the event of a recovery and during and orderly wind-down. Alternatively, the Commission could drop the proposed element for plan review or the proposed element for plan testing.

The Commission preliminarily believes that it is better to adopt all nine elements of proposed Rule 17ad–26 because each element helps ensure that the plan is fit for purpose and provides sufficient identification of how a covered clearing agency would operate in a recovery and how it would handle an orderly wind-down.

7. Focus Intraday Margin Requirements on a Subset of Covered Clearing Agencies

As an alternative to implementing the proposed intraday margin amendments on a blanket basis, the Commission could adopt a more tailored approach that imposes the requirements only on a subset of covered clearing agencies that operate in certain markets such as those markets with the highest levels of activity [157] or those markets that have only one covered clearing agency.[158] A more tailored market-level risk-based approach would adjust to the size and systemic importance of each market, which would reduce the counter-factual compliance costs for the covered clearing agencies in the markets with less activity or with more than one available clearing agency.

However, the Commission preliminarily believes that the proposed amendments already include an appropriate adjustment for market-level risk insofar as they would require the covered clearing agencies to consider their own particular facts and circumstances when aligning with the proposed rules. For example, the proposed amendment to Rule 17Ad–22(e)(6)(ii) would require covered clearing agencies to have the operational capacity to make intraday margin calls ''as frequently as circumstances warrant,'' and that frequency is expected to vary across markets and through time.

*E. Request for Comment*

The Commission requests comment on all aspects of this initial economic analysis, including the potential benefits and costs, all effects on efficiency, competition (including any effects on barriers to entry), and capital formation, and reasonable alternatives to the proposed rule and amendments. We request and encourage any interested person to submit comments regarding the proposed rule and amendments, our analysis of the potential effects of the proposed rule and amendments, and other matters that may have an effect on the proposed rule and amendments. We request that commenters identify sources of data and information as well as provide data and information to assist us in analyzing the economic consequences of the proposed rule and amendments and each reasonable alternative. We are also interested in comments on the qualitative benefits and costs we have identified and any qualitative benefits and costs we may have overlooked, including those associated with each reasonable alternative. In addition, we are interested in comments on any other reasonable alternative, including any alternative that would distinguish covered clearing agencies based on certain factors, such as organizational structure or products cleared.

34. For covered clearing agencies that are currently able to calculate and collect intraday margin, how costly is it to start monitoring exposure on an ongoing basis, and how costly is it to make intraday margin calls as frequently as circumstances warrant?

35. How quickly are participants able to satisfy margin calls during periods of market calm? How quickly are participants able to satisfy margin calls during periods of market stress?

36. How much more costly is it for participants to satisfy margin calls in periods of market stress than in periods of markets calm? How does an increase of margin call frequency affect costs for participants in periods of market stress?

37. How much more costly is it for participants to satisfy margin calls that are unanticipated than those that are anticipated? To what extend do participants model when the covered clearing agency is likely to make margin calls? How will the proposed amendments affect participants' ability or incentive to model the timing of margin calls?

38. Should the length of time participants takes to satisfy a margin call influence the decision of the covered clearing agency to make a margin call? For example, should covered clearing agencies refrain from issuing a new margin call before the participants have responded to a prior margin call? Why or why not?

39. Do commenters believe that certain participants of covered clearing agencies, including, for example, participants with less capital or using smaller settlement banks, could face operational challenges or pricing disadvantages, if proposed Rule 17Ad–22(e)(ii) were to result in more frequent margin calls? If so, please explain those challenges and disadvantages.

40. How costly is it for covered clearing agencies to secure the use of

[156] 17 CFR 240.17Ad–22(e)(20).

[157] Activity could be measured in different ways, including the number or value of cleared transactions. Average daily settlement value is much higher in the equity market (NSCC) than it is in the fixed income market (FICC). *See* DTCC, *Annual Report* (2021), *available at https://www.dtcc.com/~/media/files/downloads/about/annual-reports/DTCC-2021-Annual-Report.*

[158] The following securities markets have only one central counterparty: exchange-traded equity options (OCC), government securities (FICC), mortgage-backed securities (FICC), and equity securities (NSCC). The market for central securities depository services has only one provider (DTC). The credit default swaps market is served by LCH SA, ICC, and ICEEU.

price data or substantive inputs from an alternate source? Must the data or substantive inputs subscription be purchased outright, or can the covered clearing agency, for a lower fee, purchase an option to use the data and substantive inputs only when its primary sources prove inadequate?

41. How costly is it for covered clearing agencies to secure the use of alternate risk-based margin systems? Would covered clearing agencies create their own alternate risk-based margin systems, or would they secure access to one from a third party, and, if so, at what cost?

42. Are our estimates of the costs to secure alternate data inputs reasonable? Why or why not?

43. Proposed Rule 17ad–26(a)(2) requires RWPs to address how the covered clearing agency would ensure that service providers would continue to perform in the event of a recovery and during an orderly wind-down. Would it be better for RWPs to address instead how the covered clearing agency would continue to provide its critical services in the event of the non-performance of one or more service providers? Why or why not?

44. How costly will it be for covered clearing agencies to test their plans as required in proposed Rule 17ad–26(a)(8)? What costs will be incurred by the participants and, when practicable, other stakeholders? Will any of these costs substantively vary based on whether or not the current RWP includes testing?

## V. Paperwork Reduction Act

The proposed amendments to Rule 17Ad–22(e)(6) and Proposed Rule 17ad–26 contain ''collection of information'' requirements within the PRA.[159] The Commission is submitting the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. The title of these information collections is ''Clearing Agency Standards for Operation and Governance'' (OMB Control No. 3235–0695). 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.

### *A. Proposed Amendment to Rule 17Ad–22(e)(6)*

Respondents under this Rule 17Ad–22(e)(6) are covered clearing agencies that provide central counterparty services, of which there are currently six. The Commission anticipates that one additional entity may seek to register as a clearing agency to provide CCP services in the next three years, and so for purposes of this proposal the Commission has assumed seven respondents.

The purpose of this collection of information is to enable a covered clearing agency to have the authority and operational capacity to monitor intraday exposures on an ongoing basis and to collect intraday margin in certain specified circumstances. The collection is mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[160]

The proposed amendments to Rule 17Ad–22(e)(6) would require a covered clearing agency to establish, implement, maintain, and enforce written policies and procedures. The proposed rule amendment contains similar provisions to existing covered clearing agency rules (*i.e.,* Rule 17Ad–22(e)(6)(ii) and (iv)), but would also impose additional requirements that do not appear in the existing Rule 17Ad–22. As a result, the Commission preliminarily believes that a respondent covered clearing agency would incur burdens of reviewing and updating existing policies and procedures to consider whether they comply with the proposed amendment to Rule 17Ad–22(e)(6) and, in some cases, may need to create new policies and procedures to comply with the proposed amendments to Rule 17Ad–22(e)(6). For example, a covered clearing agency likely would need to review its existing margin methodology and consider whether any additional changes are necessary to ensure that it can meet the strengthened requirements of the proposed rule.

The Commission preliminarily believes that the estimated PRA burdens for the proposed amendment to Rule 17Ad–22(e)(6) may require a respondent covered clearing agency to make fairly substantial changes to its policies and procedures. Based on the similar policies and procedures requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[161] the Commission preliminarily estimates that respondent covered clearing agencies would incur an aggregate one-time burden of approximately 903 hours to review existing policies and procedures and create new policies and procedures.[162]

The proposed amendments to Rule 17Ad–22(e)(6) would impose ongoing burdens on a respondent covered clearing agencies. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the similar reporting requirements and the corresponding burden estimates previously made by the Commission for several rules in the Covered Clearing Agency Standards where the Commission anticipated similar burdens,[163] the Commission preliminarily estimates that the ongoing activities required by the proposed amendments to Rule 17Ad–22(e)(6) would impose an aggregate annual burden on respondent covered clearing agencies of 560 hours.[164]

---

[159] *See* 44 U.S.C. 3501 *et seq.*

[160] *See, e.g.,* 5 U.S.C. 552. Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. *See* 5 U.S.C. 552(b)(8).

[161] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 and 70895–97 (discussing Rules 17Ad–22(e)(2) and (13)). Although the proposed rule amendment is with respect to Rule 17Ad–22(e)(6), the Commission believes that these Rules present the best overall comparison to the current proposed rule amendment, in light of the nature of the changes needed to implement the proposal here and what was proposed in the Covered Clearing Agency Standards.

[162] This figure was calculated as follows: (Assistant General Counsel for 20 hours) + (Compliance Attorney for 40 hours) + (Computer Operations Manager for 12 hours) + (Senior Programmer for 20 hours) + (Senior Risk Management Specialist for 25 hours) + (Senior Business Analyst for 12 hours) = 129 hours × 7 respondent clearing agencies = 903 hours.

[163] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70893 and 70895–96 (discussing Rules 17Ad–22(e)(6) and (13)).

[164] This figure was calculated as follows: (Compliance Attorney for 25 hours + Business Risk Analyst for 40 hours + Senior Risk Management Specialist for 20 hours) = 85 hours × 7 respondent clearing agencies = 560 hours.

| Name of information collection | Type of burden | Number of respondents | Initial burden per entity | Aggregate initial burden | Ongoing burden per entity | Aggregate ongoing burden |
|---|---|---|---|---|---|---|
| 17Ad–22(e)(6) | Recordkeeping | 7 | 129 | 903 | 85 | 595 |

*B. Proposed Rule 17Ad–26*

Respondents under proposed Rule 17ad–26 are covered clearing agencies, of which there is currently seven. The Commission anticipates that one additional entity may seek to register as a covered clearing agency in the next three years, and so for purposes of this proposal the Commission has assumed eight respondents.

The purpose of the collections under proposed Rule 17ad–26 is to ensure that covered clearing agencies include a set of particular items in the recovery and wind-down plans currently required under Rule 17Ad–22(e)(3)(ii). The collections are mandatory. To the extent that the Commission receives confidential information pursuant to this collection of information, such information would be kept confidential subject to the provisions of applicable law.[165]

Because of the existence of current Rule 17Ad–22(e)(3)(ii), which means that covered clearing agencies are already required to maintain RWPs, Proposed Rule 17ad–26 would impose on a covered clearing agency similar burdens as when, for example, Rule 17Ad–22(e)(2) was proposed and covered clearing agencies generally had governance arrangements in place at that time.[166] Based on the Commission's review and understanding of the covered clearing agencies' existing RWPs,[167] respondent covered clearing agencies generally have written rules, policies, and procedures similar to the requirements that would be imposed under the Proposed Rule 17ad–26. The PRA burden imposed by the proposed rule would therefore be minimal and would likely be limited to the review of current policies and procedures and updating existing policies and procedures where appropriate to ensure compliance with the proposed rule. Accordingly, the Commission preliminarily believes that respondent clearing agencies would incur an aggregate one-time burden of approximately 960 hours to review and update existing policies and procedures.[168]

Proposed Rule 17ad–26 would also impose ongoing burdens on a respondent covered clearing agency. The proposed rule would require ongoing monitoring and compliance activities with respect to the written policies and procedures created in response to the proposed rule. Based on the Commission's previous estimates for ongoing monitoring and compliance burdens with respect to existing Rule 17Ad–22(e)(2),[169] the Commission preliminarily estimates that the ongoing activities required by proposed Rule 17ad–26 would impose an aggregate annual burden on respondent covered clearing agencies of 40 hours.[170]

| Name of information collection | Type of burden | Number of respondents | Initial burden per entity | Aggregate initial burden | Ongoing burden per entity | Aggregate ongoing burden |
|---|---|---|---|---|---|---|
| 17ad–26 | Recordkeeping | 8 | 120 | 960 | 40 | 320 |

*C. Request for Comment*

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

45. Evaluate whether the proposed collections of information are necessary for the proper performance of the Commission's functions, including whether the information shall have practical utility;

46. Evaluate the accuracy of the Commission's estimates of the burdens of the proposed collections of information;

47. Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

48. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology; and

49. Evaluate whether the proposed rules and rule amendments would have any effects on any other collection of information not previously identified in this section.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–10–23. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–10–23 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

[165] *See, e.g.,* 5 U.S.C. 552 *et seq.* Exemption 4 of the Freedom of Information Act provides an exemption for trade secrets and commercial or financial information obtained from a person and privileged or confidential. *See* 5 U.S.C. 552(b)(4). Exemption 8 of the Freedom of Information Act provides an exemption for matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions. See 5 U.S.C. 552(b)(8).

[166] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 (discussing Rule 17Ad–22(e)(2)).

[167] *See supra,* note 41.

[168] This figure was calculated as follows: ((Assistant General Counsel for 20 hours) + (Compliance Attorney for 50 hours) + (Business Risk Analyst for 35 hours) + (Senior Risk Management Specialist for 15) = 120 hours × 8 respondent clearing agencies = 960 hours.

[169] *See* CCA Standards Adopting Release, *supra* note 7, 81 FR at 70892 (discussing Rule 17Ad–22(e)(2)).

[170] This figure was calculated as follows: ((Assistant General Counsel for 10 hours) + Compliance Attorney for 30 hours)) × 8 respondent clearing agencies = 320 hours.

## VI. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[171] a rule is ''major'' if it has resulted, or is likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers or individual industries; or significant adverse effects on competition, investment, or innovation. The Commission requests comment on whether the proposed rules and rule amendments would be a ''major'' rule for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, the Commission solicits comment and empirical data on: the potential effect on the U.S. economy on annual basis; any potential increase in costs or prices for consumer or individual industries; and any potential effect on competition, investment, or innovation.

## VII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') requires the Commission, in promulgating rules, to consider the impact of those rules on small entities.[172] Section 603(a) of the Administrative Procedure Act,[173] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on ''small entities.'' [174] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[175]

The proposed amendments to Rule 17Ad–22 and new Rule 17ad–26 would apply to covered clearing agencies, which would include registered clearing agencies that provide the services of a central counterparty or central securities depository.[176] For the purposes of Commission rulemaking and as applicable to the proposed amendments to Rule 17Ad–22 and the addition of proposed Rule 17ad–26, a small entity includes, when used with reference to a clearing agency, a clearing agency that (i) compared, cleared, and settled less than $500 million in securities transactions during the preceding fiscal year, (ii) had less than $200 million of funds and securities in its custody or control at all times during the preceding fiscal year (or at any time that it has been in business, if shorter), and (iii) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[177]

Based on the Commission's existing information about the clearing agencies currently registered with the Commission, the Commission preliminarily believes that such entities exceed the thresholds defining ''small entities'' set out above. While other clearing agencies may emerge and seek to register as clearing agencies, the Commission preliminarily does not believe that any such entities would be ''small entities'' as defined in Exchange Act Rule 0–10.[178] In any case, clearing agencies can only become subject to the new requirements under proposed Rule 17Ad–22(e) should they meet the definition of a covered clearing agency, as described above. Accordingly, the Commission preliminarily believes that any such registered clearing agencies will exceed the thresholds for ''small entities'' set forth in Exchange Act Rule 0–10.

For the reasons described above, the Commission certifies that the proposed amendments to Rules 17Ad–22 and proposed new Rule 17ad–26 would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. The Commission requests comment regarding this certification. The Commission requests that commenters describe the nature of any impact on small entities, including clearing agencies, and provide empirical data to support the extent of the impact.

## VIII. Statutory Authority

The Commission is proposing amendments to 17 CFR 240.17Ad–22 and proposing 17 CFR 240.17ad–26 under the Commission's rulemaking authority set forth in section 17A of the Exchange Act, 15 U.S.C. 78q–1 and Section 23(a), 15 U.S.C. 78w(a), and in Section 805 of the Clearing Supervision Act, 15 U.S.C. 5464.

[171] Public Law 104–121, Title II, 110 Stat. 857 (1996).

[172] *See* 5 U.S.C. 601 *et seq.*

[173] 5 U.S.C. 603(a).

[174] Section 601(b) of the RFA permits agencies to formulate their own definitions of ''small entities.'' *See* 5 U.S.C. 601(b). The Commission has adopted definitions for the term ''small entity'' for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10.

[175] *See* 5 U.S.C. 605(b).

[176] 17 CFR 240.17AD–22(a)(5).

[177] *See* 17 CFR 240.0–10(d).

[178] *See* 17 CFR 240.0–10(d). The Commission based this determination on its review of public sources of financial information about registered clearing agencies and lifecycle event service providers for OTC derivatives.

### List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

### Text of Amendments

In accordance with the foregoing, title 17, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, and the sectional authority for § 240.17Ad–22 is revised to read, as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.,* 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.17ad–22 is also issued under 12 U.S.C. 5461 *et seq.*

* * * * *

■ 2. Amend § 240.17Ad–22 by:

■ a. Redesignating § 240.17Ad–22 as § 240.17ad–22; and

■ b. Revising paragraphs (e)(6)(ii) and (iv) in newly redesignated § 240.17ad–22.

The revisions read as follows:

**§ 240.17ad–22 Standards for clearing agencies.**

* * * * *

(e) * * *

(6) * * *

(ii) Marks participant positions to market and collects margin, including variation margin or equivalent charges if relevant, at least daily, monitors intraday exposures on an ongoing basis, and includes the authority and operational capacity to make intraday margin calls as frequently as circumstances warrant, including when risk thresholds specified by the covered clearing agency are breached or when the products cleared or markets served display elevated volatility;

* * * * *

(iv) Uses reliable sources of timely price data and other substantive inputs, and uses procedures and, with respect to price data, sound valuation models, for addressing circumstances in which price data or other substantive inputs are not readily available or reliable to ensure that the covered clearing agency

can continue to meet its obligations under this section. Such procedures shall include the use of price data or substantive inputs from an alternate source or, if it does not use an alternate source, the use of an alternate risk-based margin system that does not similarly rely on the unavailable or unreliable substantive input;

* * * * *

■ 3. Section 240.17ad–26 is added to read as follows:

**§ 240.17ad–26 Covered Clearing Agency Recovery and Orderly Wind-Down Plans.**

(a) The plans for the recovery and orderly wind-down of the covered clearing agency referenced in 17 CFR 240.17ad–22(e)(3)(ii) shall:

(1) Identify and describe the covered clearing agency's critical payment, clearing, and settlement services and address how the covered clearing agency would continue to provide such critical services in the event of a recovery and during an orderly wind-down, including the identification of the staffing necessary to support such critical services and analysis of how such staffing would continue in the event of a recovery and during an orderly wind-down;

(2) Identify and describe any service providers upon which the covered clearing agency relies to provide the services identified in paragraph (a)(1) of this section, specify to what services such service providers are relevant, and address how the covered clearing agency would ensure that such service providers would continue to perform in the event of a recovery and during an orderly wind-down, including consideration of contractual obligations with such service providers and whether those obligations are subject to alteration or termination as a result of initiation of the recovery and orderly wind-down plan;

(3) Identify and describe scenarios that may potentially prevent the covered clearing agency from being able to provide its critical payment, clearing, and settlement services identified in paragraph (a)(1) of this section as a going concern, including uncovered credit losses (as described in paragraph (e)(4)(viii) of 17 CFR 240.17ad–22), uncovered liquidity shortfalls (as described in paragraph (e)(7)(viii) of 17 CFR 240.17ad–22), and general business losses (as described in paragraph (e)(15) of 17 CFR 240.17ad–22);

(4) Identify and describe criteria that would trigger the implementation of the recovery and orderly wind-down plans and the process that the covered clearing agency uses to monitor and determine whether the criteria have been met, including the governance arrangements applicable to such process;

(5) Identify and describe the rules, policies, procedures, and any other tools or resources the covered clearing agency would rely upon in a recovery or orderly wind-down;

(6) Address how the rules, policies, procedures, and any other tools or resources identified in paragraph (a)(5) of this section would ensure timely implementation of the recovery and orderly wind-down plan;

(7) Include procedures for informing the Commission as soon as practicable when the covered clearing agency is considering initiating a recovery or orderly wind-down;

(8) Include procedures for testing the covered clearing agency's ability to implement the recovery and wind-down plans at least every twelve months, including by requiring the covered clearing agency's participants and, when practicable, other stakeholders to participate in the testing of its plans, providing for reporting the results of the testing to the covered clearing agency's board of directors and senior management, and specifying the procedures for, as appropriate, amending the plans to address the results of the testing; and

(9) Include procedures requiring review and approval by the board of directors of the plans at least every twelve months or following material changes to the covered clearing agency's operations that would significantly affect the viability or execution of the plans, with such review informed, as appropriate by the covered clearing agency's testing of the plans.

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

*Affiliate* means a person that directly or indirectly controls, is controlled by, or is under common control with the covered clearing agency.

*Orderly wind-down* means the actions of a covered clearing agency to effect the permanent cessation, sale, or transfer of one or more of its critical services in a manner that would not increase the risk of significant liquidity, credit, or operational problems spreading among financial institutions or markets and thereby threaten the stability of the U.S. financial system.

*Recovery* means the actions of a covered clearing agency, consistent with its rules, procedures, and other ex ante contractual arrangements, to address any uncovered loss, liquidity shortfall, or capital inadequacy, whether arising from participant default or other causes (such as business, operational, or other structural weaknesses), including actions to replenish any depleted prefunded financial resources and liquidity arrangements, as necessary to maintain the covered clearing agency's viability as a going concern and to continue its provision of critical services.

*Service provider* means any person, including an affiliate or a third party, that is contractually obligated to the covered clearing agency in any way related to the provision of critical services, as identified by the covered clearing agency in 17 CFR 240.17ad–26(a)(1).

By the Commission.

Dated: May 17, 2023.

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

[FR Doc. 2023–10889 Filed 5–26–23; 8:45 am]

**BILLING CODE 8011–01–P**

# Reader Aids

**Federal Register**

Vol. 88, No. 103

Tuesday, May 30, 2023

## CUSTOMER SERVICE AND INFORMATION



### ELECTRONIC RESEARCH

#### World Wide Web

Full text of the daily Federal Register, CFR and other publications is located at: **www.govinfo.gov.**

Federal Register information and research tools, including Public Inspection List and electronic text are located at: **www.federalregister.gov.**

#### E-mail

**FEDREGTOC** (Daily Federal Register Table of Contents Electronic Mailing List) is an open e-mail service that provides subscribers with a digital form of the Federal Register Table of Contents. The digital form of the Federal Register Table of Contents includes HTML and PDF links to the full text of each document.

To join or leave, go to **https://public.govdelivery.com/accounts/USGPOOFR/subscriber/new**, enter your email address, then follow the instructions to join, leave, or manage your subscription.

**PENS** (Public Law Electronic Notification Service) is an e-mail service that notifies subscribers of recently enacted laws.

To subscribe, go to **http://listserv.gsa.gov/archives/publaws-l.html and select** *Join or leave the list (or change settings);* then follow the instructions.

**FEDREGTOC** and **PENS** are mailing lists only. We cannot respond to specific inquiries.

**Reference questions.** Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

## FEDERAL REGISTER PAGES AND DATE, MAY



## CFR PARTS AFFECTED DURING MAY

At the end of each month the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

52 .....27714, 32693, 33846
72.....27418
429.....30836
430.....26511, 32514
431 .....30508, 30836, 33968

**11 CFR**

110.....33816
201.....30215
204.....30216
265.....32621
Ch. X.....33545
1006.....26475
1026.....30598

**Proposed Rules:**

327.....32694
1026.....30388
1236.....28433

**13 CFR**

120.....32623
121.....28985
124.....28985
125.....28985
126.....28985
127.....28985

**14 CFR**

Ch. 1 .....30640
25 .....32090, 32951, 33548
39 .....29815, 31145, 31148, 31152, 31154, 31159, 31163, 31166, 31169, 31171, 31469, 31472, 31604, 32092, 32625, 32628, 32637, 32956, 33817, 33820, 33823, 34065, 34081
71 .....28985, 28986, 28987, 29537, 29538, 29819, 30217, 30219, 30220, 30221, 30639, 30893, 30895, 30896, 31474, 31607, 32094, 32634, 32636, 32637, 32638, 33826, 33828
91.....34437
95.....32095
97 .....30223, 30225, 32959, 32961
120.....27596
121.....34437
125.....34437
135.....34437

**Proposed Rules:**

21.....29554
25.....30262
29.....30680
39 .....27716, 27725, 27734, 27742, 27749, 27786, 27799, 29555, 30264, 30682, 30685, 30909, 30911, 30914, 32978, 32980, 33849, 33851, 34097
61.....32983, 33855
63.....32983
65.....32983
71 .....29557, 29559, 29562, 29563, 29565, 29566, 29568, 29569, 29571, 29573, 29575, 29577, 29579, 29580, 29849, 30266, 30687, 31658, 34457, 34459
91.....33855
107.....33855
135.....33855
141.....32983
1216.....27804

**15 CFR**

734.....33422
744.....32640
746.....33422
750.....33422

**Proposed Rules:**

30.....27815

**16 CFR**

1222.....29820
1261.....28403
1272.....30226

**Proposed Rules:**

453.....33011
1512.....33857
1632.....29582

**17 CFR**

249.....32963

**Proposed Rules:**

232.....28440, 29184
240 .....28440, 29184, 34708
242.....29184
249.....29184

**18 CFR**

35.....28348

**19 CFR**

Ch. I.....30033, 30035

**Proposed Rules:**

351.....29850

**20 CFR**

**Proposed Rules:**

404.....32145
416.....32145

**21 CFR**

1.....32104
101.....33550
131.....31608
510.....27693
516.....27693
520.....27693
522.....27693
524.....27693
526.....27693
529.....27693
556.....27693
558.....27693
1307.....30037

**Proposed Rules:**

73.....27818

**22 CFR**

22.....34084

**24 CFR**

5.....30442
92.....30442
93.....30442
200.....30442
570.....30442
574.....30442
576.....30442
578.....30442
882.....30442
884.....30442
886.....30442
902.....30442
965.....30442
982.....30442
983.....30442
985.....30442

**Proposed Rules:**

50.....30267
55.....30267
58.....30267
200.....30267

**26 CFR**

**Proposed Rules:**

1.....27819, 30058
52.....26512

**27 CFR**

**Proposed Rules:**

9.....27420

**28 CFR**

**Proposed Rules:**

16.....33013

**29 CFR**

2520.....31608

**Proposed Rules:**

1603.....32154

**30 CFR**

**Proposed Rules:**

902.....32158, 32160
917.....33016
926.....32161, 33018
934.....32163, 32165
938.....33020, 33021
948.....33025

**31 CFR**

544.....34443
558.....31610
560.....32105
578.....34443
583.....31475

**Proposed Rules:**

802.....29003

**32 CFR**

158.....26477

**Proposed Rules:**

236.....27832

**33 CFR**

3.....30898
100 .....30229, 30645, 31475, 32659
117.....28990, 30231
147.....27402
165 .....27407, 28408, 28991, 28992, 28993, 30648, 30650, 30900, 30902, 30904, 30906, 31174, 31175, 31622, 32106, 32108, 32110, 32660, 32966, 32968, 32972, 34085, 34087, 34446
386.....32661

**Proposed Rules:**

100.....30268
117 .....28442, 29005, 29007, 29584, 29586, 32709
147.....27839
149.....33026
165 .....26512, 27421, 28444, 32713, 33054
181.....26514

**34 CFR**

Ch. II.....27410
Ch. III.....33829

**Proposed Rules:**

Ch. II.....31196
300.....31659, 34100
600.....32300
668.....32300

**36 CFR**

7.....31624
1224.....28410
1225.....28410
1236.....28410

**Proposed Rules:**

251.....32166
1195.....33056

**37 CFR**

1.....34089

**Proposed Rules:**

1.....31209
11.....31209
41.....31209
42.....33063
222.....27845
235.....27845

**38 CFR**

17.....32974

**Proposed Rules:**

21.....33672

**39 CFR**

20.....32681
111.....32112, 32824

**Proposed Rules:**

20.....30689
111.....30068, 33066

**40 CFR**

52 .....29539, 29825, 29827, 30652, 32117, 32120, 32584, 32594, 33830, 34091, 34093, 34448, 34449
60.....29978, 34452
81.....32594
174.....29835
180 .....26495, 26498, 28427, 29541, 29835, 30043, 31476, 31625, 31629, 32125, 32133
271.....29839

**Proposed Rules:**

52 .....28918, 29591, 29596, 29598, 29616, 32167, 32715, 33555
60.....33240
63.....30917, 31856
78.....28918
82.....33722
85.....29184
86.....29184
97.....28918
98.....32852
131.....29496
147.....28450
180.....29010, 31667
230.....29496
233.....29496
257.....31982
271.....29878
600.....29184
720.....34100
721.....34100
723.....34100
725.....34100
751.....28284
1036.....29184
1037.....29184
1066.....29184

**41 CFR**

105–164.....32138

**Proposed Rules:**
51–2.....27848
51–3.....27848
51–5.....27848
300–2.....33067
302–6.....33067
302–17.....33067

**42 CFR**

12.....30037
410.....27413
**Proposed Rules:**
411.....26658
412.....26658
419.....26658
430.....28092
431.....27960
433.....34238
438.....27960, 28092, 34238
441.....27960
447.....27960, 34238
457.....28092
488.....26658
489.....26658
495.....26658

**45 CFR**

Ch. XVI.....32140
2556.....31178
**Proposed Rules:**
1100.....27848
2500.....27423

**46 CFR**

**Proposed Rules:**
2.....33026
10.....29013
11.....29013
12.....29013
13.....29013
15.....29013
16.....29013
25.....26514
28.....26514
30.....29013
31.....33026
32.....33026
34.....33026
35.....29013, 33026
39.....29013, 33026
56.....33026
76.....33026
77.....33026
95.....33026
96.....33026
105.....33026
107.....33026
108.....26514, 33026
109.....33026
115.....33026
116.....33026
117.....26514
118.....33026
132.....33026
133.....26514
141.....26514
147.....33026
159.....33026
160.....26514, 33026
161.....33026
162.....33026
163.....33026
164.....33026
167.....33026
169.....26514, 33026
180.....26514
181.....33026
195.....33026
199.....26514, 33026
502.....32141
503.....32141
520.....32141
530.....32141
535.....32141
540.....32141
550.....32141
555.....32141
560.....32141

**47 CFR**

1.....29544, 34453
15.....32682
27.....33550
54.....28993
74.....30654
**Proposed Rules:**
0.....29035
1.....29035
64.....27850, 29035
90.....26515

**48 CFR**

204.....33831
206.....33834
215.....33835
217.....33835
232.....33831
252.....33831, 33835
552.....32142, 34096

**49 CFR**

40.....27596
219.....27596
240.....27596
242.....27596
382.....27596
655.....27596
**Proposed Rules:**
171.....34568
172.....34568
173.....34568
175.....34568
178.....34568
180.....34568
191.....31890
192.....31890
193.....31890
216.....33858
231.....33858
238.....33858
1500.....33472
1530.....33472
1570.....33472
1572.....33472
1580.....33472
1582.....33472
1584.....33472

**50 CFR**

17.....28874, 30047, 30233, 33194
217.....31633
300.....30671, 30907
622.....27701, 29843, 32142, 32976, 33838
635.....28430, 30234, 33839, 34454
648.....26502, 27709, 31193
660.....29545, 30235
679.....27711
**Proposed Rules:**
17.....27427
217.....28656
223.....30690, 33075
224.....33075
300.....29043
600.....30934
622.....29048, 32717, 34460
635.....29050, 29617, 30699
648.....28456, 30938
660.....31214
679.....30272

## LIST OF PUBLIC LAWS

**Note:** No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

**Last List April 12, 2023**

## Public Laws Electronic Notification Service (PENS)

**PENS** is a free email notification service of newly enacted public laws. To subscribe, go to *https://portalguard.gsa.gov/—layouts/PG/register.aspx*.

**Note:** This service is strictly for email notification of new laws. The text of laws is not available through this service. **PENS** cannot respond to specific inquiries sent to this address.