FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Pages 39995–40676

OFFICE OF THE FEDERAL REGISTER

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NUCLEAR REGULATORY COMMISSION

10 CFR Parts 50 and 52

[NRC–2023–0028]

Regulatory Guide: Sizing Large Lead-Acid Storage Batteries

AGENCY: Nuclear Regulatory Commission.

ACTION: Final guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 2 to Regulatory Guide (RG) 1.212, ''Sizing Large Lead-Acid Storage Batteries''. This RG describes an approach that is acceptable to the staff of the NRC to meet regulatory requirements for sizing large lead-acid storage batteries for production and utilization facilities.

DATES: Revision 2 to RG 1.212 is available on June 21, 2023.

ADDRESSES: Please refer to Docket ID NRC–2023–0028 when contacting the NRC about the availability of information regarding this document. You may obtain publicly available information related to this document using any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0028. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

Revision 2 to RG 1.212 and the regulatory analysis may be found in ADAMS under Accession Nos. ML23118A344 and ML22307A144, respectively.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Michael Eudy, Office of Nuclear Regulatory Research, telephone: 301–415–3104; email: *Michael.Eudy@nrc.gov* and Liliana Ramadan, Office of Nuclear Reactor Regulation, telephone: 301–415–2463; email: *Liliana.Ramadan@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing a revision in the NRC's ''Regulatory Guide'' series. This series was developed to describe methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, to explain techniques that the staff uses in evaluating specific issues or postulated events, and to describe information that the staff needs in its review of applications for permits and licenses.

The proposed Revision 2 to RG 1.212 was issued with a temporary identification of Draft Regulatory Guide, (DG)–1418. This revision of the RG (Revision 2) endorses, with some limitations and a clarification, IEEE Std. 485–2020, ''IEEE Recommended Practice for Sizing Lead-Acid Batteries for Stationary Applications,'' and applies to production and utilization facilities licensed under parts 50 and 52 of title 10 of the *Code of Federal Regulations* (10 CFR) within the scope of this RG.

II. Additional Information

The NRC published a notice of the availability of DG–1418 in the **Federal Register** on March 6, 2023 (88 FR 13735) for a 30-day public comment period. The public comment period closed on April 5, 2023. Public comments on DG–1418 and the staff responses to the public comments are available in ADAMS under Accession No. ML23118A345.

As noted in the **Federal Register** on December 9, 2022 (87 FR 75671), this document is being published in the ''Rules'' section of the **Federal Register** to comply with publication requirements in 1 CFR chapter I.

III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting, Forward Fitting, and Issue Finality

Issuance of RG 1.212, Revision 2, does not constitute backfitting as defined in 10 CFR 50.109, ''Backfitting,'' and as described in NRC Management Directive (MD) 8.4, ''Management of Backfitting, Forward Fitting, Issue Finality, and Information Requests''; affect the issue finality of an approval issued under 10 CFR part 52; or constitute forward fitting as defined in MD 8.4 because, as explained in this RG, licensees are not required to comply with the positions set forth in this RG.

V. Submitting Suggestions for Improvement of Regulatory Guides

A member of the public may, at any time, submit suggestions to the NRC for improvement of existing RGs or for the development of new RGs. Suggestions can be submitted on the NRC's public website at *https://www.nrc.gov/reading-rm/doc-collections/reg-guides/contactus.html.* Suggestions will be considered in future updates and enhancements to the ''Regulatory Guide'' series.

Dated: June 15, 2023.

For the Nuclear Regulatory Commission.

Meraj Rahimi,

Chief, Regulatory Guide and Programs Management Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2023–13143 Filed 6–20–23; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0921; Project Identifier AD–2022–01430–T; Amendment 39–22471; AD 2023–12–13]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–05–04, which applied to all The Boeing Company Model 737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes, except for Model 737–200 and –200C series airplanes equipped with a certain flight control system. AD 2022–05–04 required revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate specific operating procedures for instrument landing system (ILS) approaches, speedbrake deployment, go-arounds, and missed approaches, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–05–04, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band base stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations and operating procedures sections of the existing AFM to incorporate specific operating procedures for ILS approaches, speedbrake deployment, go-arounds, and missed approaches, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0921; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–05–04, Amendment 39–21955 (87 FR 10299, February 24, 2022) (AD 2022–05–04). AD 2022–05–04 applied to all The Boeing Company (Boeing) Model 737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes, except for Model 737–200 and –200C series airplanes equipped with a certain flight control system. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27725). The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience 5G C-Band interference, and a determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged.

In the NPRM, the FAA proposed to retain the AFM revisions required by AD 2022–05–04 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM revisions with limitations requiring the same procedures for dispatch or release to airports, and approach, landing, and go-around on runways, at all airports for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed to allow the procedures at 5G CMAs as identified in an FAA Domestic Notice. The FAA proposed this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from seven commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for NPRM

Boeing, the Air Line Pilots Association, International (ALPA), and an individual supported the NPRM without change.

The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this AD.

Request To Clarify AD Issue Dates

Comment summary: FlyPersia Airlines commented that the issue dates referenced for AD 2022–23–12 and AD 2022–05–04 in the background section of the proposed AD are incorrect. The commenter stated that where ''The FAA issued AD 2022–23–12 (86 FR 69984, December 9, 2021)'' is stated, the correct date should be December 7, 2021; in same section where the proposed AD specifies ''AD 2022–05–04 (87 FR 10299, February 24, 2022),'' the commenter stated the correct date should be February 16, 2022.

FAA response: The dates quoted by the commenter are within the parenthetical citations for referencing documents published in the **Federal Register** by volume, page, and publication date. These dates represent the dates each AD published in the **Federal Register**. The December 7, 2021, and February 24, 2022, dates the commenter referenced are the issuance dates specified in the signature block at the end of each AD (*i.e.,* the dates on which the ADs were issued by the FAA). No change to this AD is necessary because the citation dates are the correct publication dates.

Request To Extend Compliance Time

Comment summary: Southwest Airlines and American Airlines expressed concern regarding the compliance time for the proposed actions and requested the FAA revise the AD to provide a minimum of 30 days from the effective date of the AD.

FAA response: The FAA understands the commenters' concerns and made every effort to publish this AD as soon as possible. After refraining from operating at their FCC-authorized levels for a year and a half, wireless companies are now able to operate at higher levels, yet still not at the levels authorized. Specifically, wireless companies expect to operate their networks in urban areas with minimal restrictions due to the completion of retrofits. Additionally, the FAA anticipates 19 additional telecommunication companies will begin transmitting in the C-Band after June 30, 2023. Although the FAA continues to work with the companies that intend to transmit in the 3.7–3.98–GHz band near 5G CMAs, the FAA has no agreement with those companies to provide the FAA with tower locations and other information necessary to support the current NOTAM/AMOC process. Therefore, the FAA will not be able to extend the June 30, 2023, date.

Effect of Winglets on Accomplishment of the Proposed Actions

Comment summary: Aviation Partners Boeing stated that installing winglets under supplemental type certificate (STC) STC01219SE and STC ST00830SE on applicable Boeing models does not affect accomplishment of the actions specified in the proposed AD.

FAA response: The FAA agrees. The FAA has not changed this AD in this regard.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available, the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. This interference can cause other airplane systems to not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–05–04, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 2,328 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained actions from AD 2022–05–04)	1 work-hour × $85 per hour [1] = $85	$0	$85	$197,880
New AFM revisions (new action)	1 work-hour × $85 per hour = $85 ..	0	85	[2] 197,880

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.

[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a Model 737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, or –900ER transport category airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2022–05–04, Amendment 39–21955 (87 FR 10299, February 24, 2022), and

■ b. Adding the following new AD:

2023–12–13 The Boeing Company: Amendment 39–22471; Docket No. FAA–2023–0921; Project Identifier AD–2022–01430–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–05–04, Amendment 39–21955 (87 FR 10299, February 24, 2022) (AD 2022–05–04).

(c) Applicability

This AD applies to all The Boeing Company 737–100, –200, –200C, –300, –400, –500, –600, –700, –700C, –800, –900, and –900ER series airplanes, certificated in any category, except for Model 737–200 and –200C series airplanes equipped with an SP–77 flight control system.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. The FAA is issuing this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

(f) Compliance

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

(g) Definitions

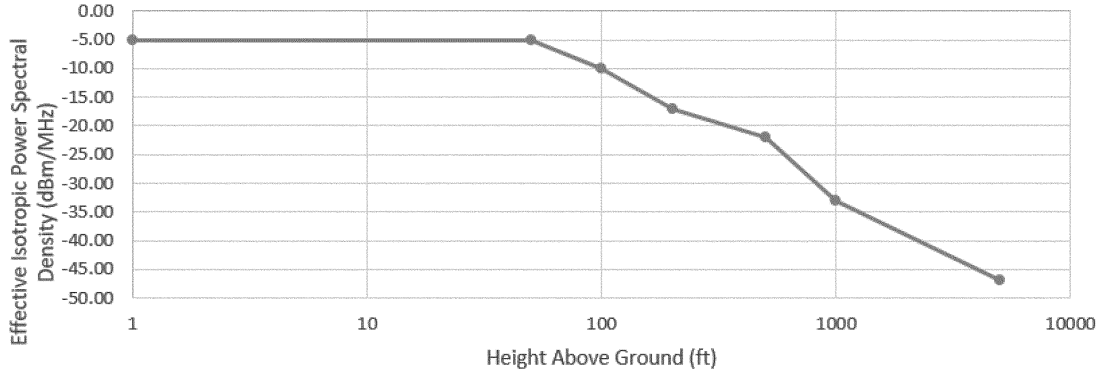
(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

BILLING CODE 4910–13–P

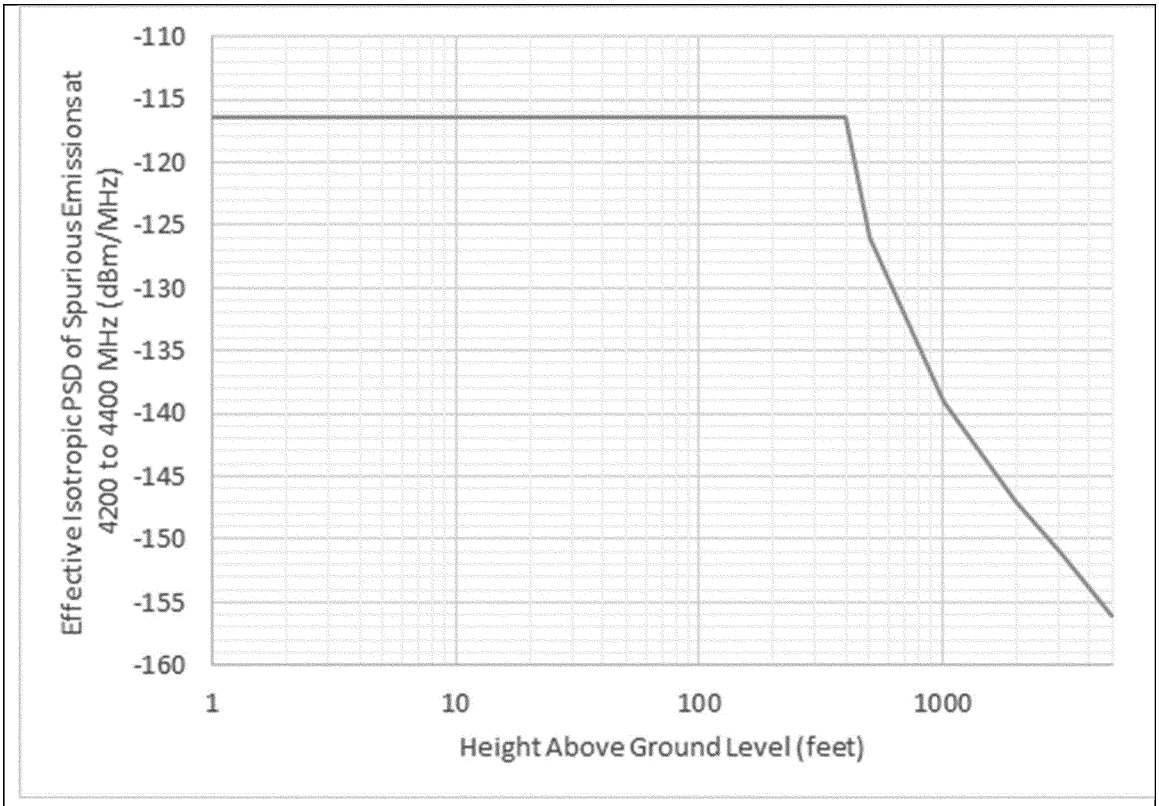
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (3.7–3.98 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(h) Retained Airplane Flight Manual (AFM) Revision

This paragraph restates the requirements of paragraph (g) of AD 2022–05–04.

(1) Within 2 days after February 24, 2022 (the effective date of AD 2022–05–04): Revise the Limitations Section of the existing AFM to include the information specified in figure 3 to paragraph (h)(1) of this AD. This may be done by inserting a copy of figure 3 to paragraph (h)(1) of this AD into the existing AFM.

Figure 3 to paragraph (h)(1)—*AFM Limitations Revisions*

(Required by AD 2022-05-04)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around
The following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Approach, Landing, and Go-Around
Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(2) Within 2 days after February 24, 2022 (the effective date of AD 2022–05–04): Revise the Operating Procedures Section of the existing AFM to include the information specified in figure 4 to paragraph (h)(2) of this AD or figure 5 to paragraph (h)(2) of this AD, as applicable. This may be done by inserting a copy of figure 4 to paragraph (h)(2) or figure 5 to paragraph (h)(2) of this AD, as applicable, into the Operating Procedures Section of the existing AFM.

Figure 4 to paragraph (h)(2)—*AFM Operating Procedures Revision for Model 737–100, –200, –200C, –300, –400, and –500 series airplanes*

(Required by AD 2022-05-04)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches
For ILS approaches not prohibited by AD 2021-23-12, during any ILS approach with autopilot engaged or flight director ON, execute a go-around for any of the following conditions, unless the runway environment is in sight and a manual, visual landing can be accomplished:

- If the flight directors automatically retract from view, or
- If the pitch guidance indicates FLARE mode prematurely, or
- If the autothrottle retards to IDLE prematurely.

During Go-Around and Missed Approach
If go-around is required, ensure thrust is increased to go-around power. Do not use flight director, autopilot, or autothrottles until reaching a safe altitude. TOGA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

Figure 5 to paragraph (h)(2)—AFM *Operating Procedures Revision for Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes*

(Required by AD 2022-05-04)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, during any ILS (and GLS if installed) approach with autopilot engaged or flight director ON, execute a go-around for any of the following conditions, unless the runway environment is in sight and a manual, visual landing can be accomplished:

- If the flight directors automatically retract from view, or
- If the pitch guidance indicates FLARE mode prematurely, or
- If the autothrottle retards to IDLE prematurely.

Landing

Adjust operational (time of arrival) landing distance for manual speedbrakes. Automatic speedbrake deployment may not occur after touchdown.

During Go-Around and Missed Approach

If go-around is required, ensure thrust is increased to go-around power. Do not use flight director, autopilot, or autothrottles until reaching a safe altitude. TOGA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

(i) New Requirement: AFM Limitations Revision for Non-Radio Altimeter Tolerant Airplanes

For non-radio altimeter tolerant airplanes, do the actions specified in paragraphs (i)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 6 to paragraph (i) of this AD. This may be done by inserting a copy of figure 6 to paragraph (i) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 6 to paragraph (i) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 6 to paragraph (i)—*AFM Limitations Revision for Non-Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-13)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in the contiguous U.S. airspace.

Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(j) New Requirement: AFM Limitations Revision for Radio Altimeter Tolerant Airplanes

For radio altimeter tolerant airplanes, do the actions specified in paragraphs (j)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 7 to paragraph (j) of this AD. This may be done by inserting a copy of figure 7 to paragraph (j) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 7 to paragraph (j) of this AD, remove the AFM

revision required by paragraph (h)(1) of this AD.

Figure 7 to paragraph (j)—*AFM Limitations Revision for Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-13)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in the contiguous U.S. airspace unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(k) New Requirement: AFM Operating Procedures Revision

For all airplanes, do the actions specified in paragraphs (k)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 8 to paragraph (k) of this AD or figure 9 to paragraph (k) of this AD, as applicable. This may be done by inserting a copy of figure 8 to paragraph (k) of this AD or figure 9 to paragraph (k) of this AD, as applicable, into the Operating Procedures Section of the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(2) of this AD.

(2) Before further flight after incorporating the operating procedures specified in figure 8 to paragraph (k) of this AD or figure 9 to paragraph (k) of this AD, remove the AFM revision required by paragraph (h)(2) of this AD.

Figure 8 to paragraph (k)—*AFM Operating Procedures Revision for Model 737–100, –200, –200C, –300, –400, and –500 series airplanes*

(Required by AD 2023-12-13)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, during any ILS approach with autopilot engaged or flight director ON, execute a go-around for any of the following conditions, unless the runway environment is in sight and a manual, visual landing can be accomplished:

- If the flight directors automatically retract from view, or
- If the pitch guidance indicates FLARE mode prematurely, or
- If the autothrottle retards to IDLE prematurely.

During Go-Around and Missed Approach

If go-around is required, ensure thrust is increased to go-around power. Do not use flight director, autopilot, or autothrottles until reaching a safe altitude. TOGA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

Figure 9 to paragraph (k)—*AFM Operating Procedures Revision for Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes*

(Required by AD 2023-12-13)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, during any ILS (and GLS if installed) approach with autopilot engaged or flight director ON, execute a go-around for any of the following conditions, unless the runway environment is in sight and a manual, visual landing can be accomplished:

- If the flight directors automatically retract from view, or
- If the pitch guidance indicates FLARE mode prematurely, or
- If the autothrottle retards to IDLE prematurely.

Landing

Adjust operational (time of arrival) landing distance for manual speedbrakes. Automatic speedbrake deployment may not occur after touchdown.

During Go-Around and Missed Approach

If go-around is required, ensure thrust is increased to go-around power. Do not use flight director, autopilot, or autothrottles until reaching a safe altitude. TOGA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (m) of this AD. Information may be emailed to: *AMOC@faa.gov.*

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(m) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

(n) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13151 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0922; Project Identifier AD–2022–01431–T; Amendment 39–22472; AD 2023–12–14]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–06–16, which applied to all The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, and 747–400F series airplanes. AD 2022–06–16 required revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate specific operating procedures for takeoff, instrument landing system (ILS) approaches, non-precision approaches, and go around and missed approaches, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) interference as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–06–16, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations section of the existing AFM to incorporate limitations requiring

specific operating procedures, and retains the operating procedures for takeoff, ILS approaches, non-precision approaches, and go-around and missed approaches from AD 2022–06–16, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0922; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–06–16, Amendment 39–21982 (87 FR 14780, March 16, 2022) (AD 2022–06–16). AD 2022–06–16 applied to all The Boeing Company (Boeing) Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, and 747–400F series airplanes. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27734). The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience 5G C-Band interference, and a determination that during takeoff, approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged.

In the NPRM, the FAA proposed to retain the AFM revisions required by AD 2022–06–16 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM revisions with limitations requiring the same procedures for dispatch or release to airports, and takeoff, approach, landing, and go-around on runways at all airports for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed that the procedures would not be required at 5G C-Band mitigated airports (5G CMAs) as identified in an FAA Domestic Notice. The FAA proposed this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from two commenters. Boeing and the Air Line Pilots Association, International (ALPA), supported the NPRM without change. The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this final rule.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available, the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. This interference can cause other airplane systems to not properly function, resulting in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–06–16, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 137 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained actions from AD 2022–02–16).	1 work-hour × $85 per hour[1] = $85	$0	$85	$11,645
New AFM revisions (new action)	1 work-hour × $85 per hour = $85	0	85	[2] 11,645

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.
[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, or 747–400F transport category airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:
■ a. Removing Airworthiness Directive (AD) 2022–06–16, Amendment 39–21982 (87 FR 14780, March 16, 2022), and
■ b. Adding the following new AD:

2023–12–14 The Boeing Company: Amendment 39–22472; Docket No. FAA–2023–0922; Project Identifier AD–2022–01431–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–06–16, Amendment 39–21982 (87 FR 14780, March 16, 2022) (AD 2022–06–16).

(c) Applicability

This AD applies to all The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200C, 747–200F, 747–300, 747–400, 747–400D, and 747–400F series airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that during takeoff, approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. The FAA is issuing this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

(f) Compliance

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

(g) Definitions

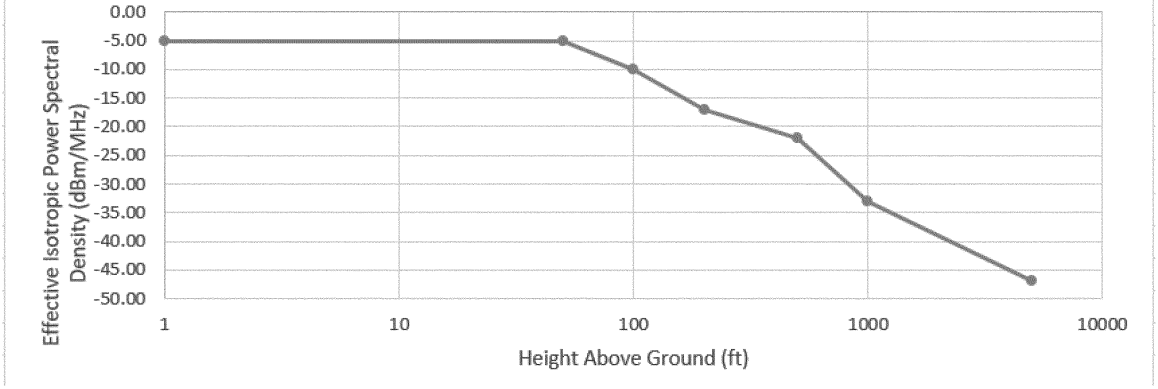
(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

BILLING CODE 4910–13–P

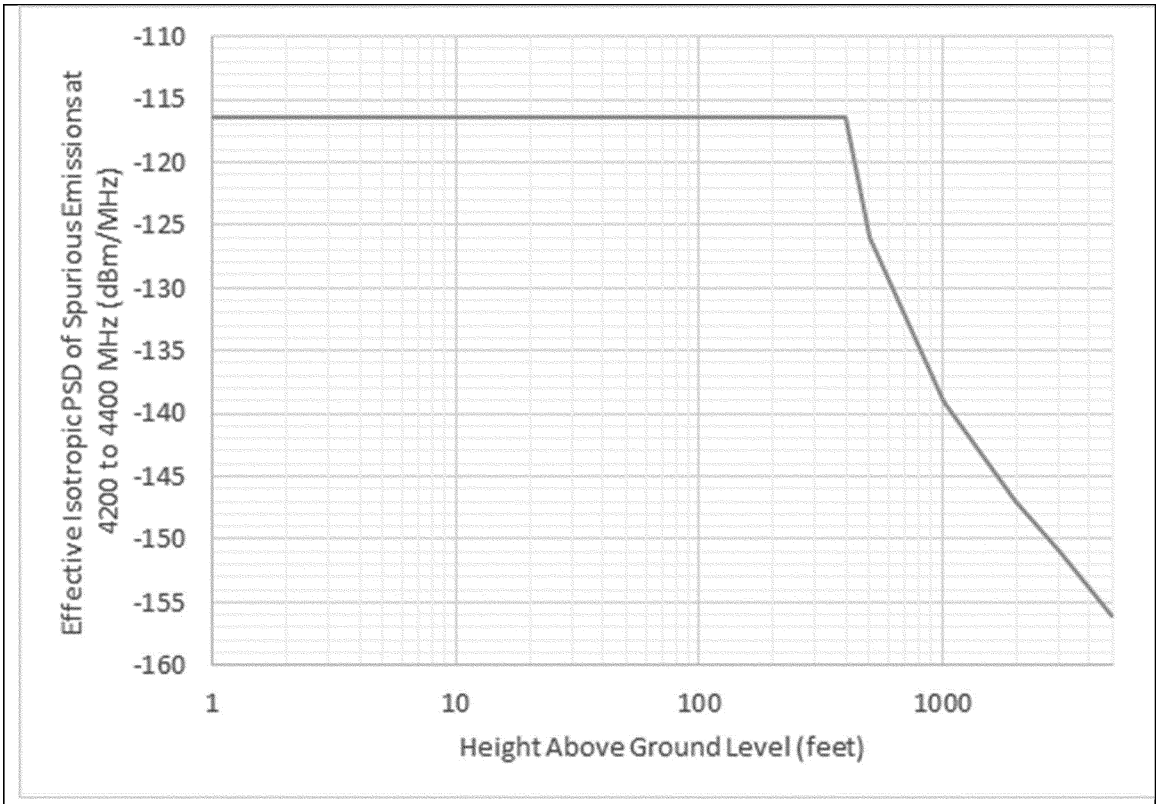
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (3.7–3.98 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(h) Retained Airplane Flight Manual (AFM) Revision

This paragraph restates the requirements of paragraph (h) of AD 2022–02–16.

(1) Within 2 days after March 16, 2022 (the effective date of AD 2022–06–16): Revise the Limitations Section of the existing AFM to include the information specified in figure 3 to paragraph (h)(1) of this AD. This may be done by inserting a copy of figure 3 to paragraph (h)(1) of this AD into the existing AFM.

Figure 3 to paragraph (h)(1)—*AFM Limitations Revision*

(Required by AD 2022-06-16)

Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around

The following limitations are required for dispatch or release to airports, and takeoff, approach, landing, and go-around on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Takeoff, Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around procedure contained in the Operating Procedures section of this AFM.

(2) Within 2 days after March 16, 2022 (the effective date of AD 2022–06–16): Revise the Operating Procedures Section of the existing AFM to include the information specified in figure 4 to paragraph (h)(2) of this AD. This may be done by inserting a copy of figure 4 to paragraph (h)(2) of this AD into the existing AFM.

Figure 4 to paragraph (h)(2)—*AFM Operating Procedures Revision*

(Required by AD 2022-06-16)

Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around

Takeoff

If autopilot does not engage above the minimum altitude, when at a safe altitude, select both flight director switches OFF, then ON, to re-engage. LNAV and VNAV may not engage or engage at an erroneous altitude after departure.

ILS Approaches

For ILS approaches, disconnect the autopilot and autothrottle, and place both flight director switches to OFF prior to glideslope intercept. Do not set RADIO minimums on the EFIS control panel, use BARO minimums only.

Non-Precision Approaches

Autopilot, autothrottles, and flight directors may be used. Do not use autothrottles if the autopilot is disengaged. Prior to descending below MDA, disconnect the autothrottle and disengage the autopilot.

Landing

Do not rely on radio altimeter-based altitude aural callouts during approach. Adjust operational (time of arrival) landing distance for manual speedbrake deployment.

During Go-Around and Missed Approach

If go-around is required, ensure thrust is increased to go-around power.

When the flight director switches are OFF, push either TO/GA switch to display the flight director bars. When able, turn both flight directors to ON.

TO/GA mode may not be available. Autopilot may not be available. Monitor pitch and roll modes for engagement.

(i) New Requirement: AFM Revision for Non-Radio Altimeter Tolerant Airplanes

For non-radio altimeter tolerant airplanes, do the actions specified in paragraphs (i)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 5 to paragraph (i) of this AD. This may be done by inserting a copy of figure 5 to paragraph (i) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 5 to paragraph (i) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 5 to paragraph (i)—*AFM Revision for Non-Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-14)

Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and takeoff, approach, landing, and go-around on runways, in the contiguous U.S. airspace.

Takeoff, Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around procedure contained in the Operating Procedures section of this AFM.

(j) New Requirement: AFM Revision for Radio Altimeter Tolerant Airplanes

For radio altimeter tolerant airplanes, do the actions specified in paragraphs (j)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 6 to paragraph (j) of this AD. This may be done by inserting a copy of figure 6 to paragraph (j) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 6 to paragraph (j) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 6 to paragraph (j)—*AFM Revision for Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-14)

Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and takeoff, approach, landing, and go-around on runways, in the contiguous U.S. airspace unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

Takeoff, Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Takeoff, Approach, Landing, and Go-Around procedure contained in the Operating Procedures section of this AFM.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *AMOC@faa.gov.*

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021), providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(l) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov*.

(m) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13149 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0671; Project Identifier AD–2022–01428–T; Amendment 39–22469; AD 2023–12–11]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–03–20, which applied to all The Boeing Company Model 737–8, 737–9, and 737–8200 airplanes. AD 2022–03–20 required revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate limitations prohibiting the use of certain minimum equipment list (MEL) items, and to incorporate operating procedures for calculating takeoff and landing distances, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–03–20, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band base stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations section of the existing AFM to incorporate limitations prohibiting the use of certain MEL items, and would retain the operating procedures from AD 2022–03–20 for calculating takeoff and landing distances, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0671; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–03–20, Amendment 39–21937 (87 FR 4787, January 31, 2022) (AD 2022–03–20). AD 2022–03–20 applied to all The Boeing Company Model 737–8, 737–9, and 737–8200 airplanes. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27786). The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience 5G C-Band interference, and a determination that, during takeoffs and landings, as a result of this interference, certain airplane systems may not properly function, resulting in longer than normal landing or rejected takeoff distances due to the effect on thrust reverser deployment, spoilers, speedbrake deployment, and increased idle thrust, regardless of the approach type or weather.

In the NPRM, the FAA proposed to retain the requirements of AD 2022–03–20 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM limitations with limitations prohibiting the same dispatching or releasing to airports, and takeoff or landings on runways, and use of certain MEL items at all airports for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed to allow the prohibited operations at 5G C-Band mitigated airports (5G CMAs) as identified in an FAA Domestic Notice. The FAA proposed this AD to address degraded deceleration performance, which could lead to a runway excursion.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from four commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for NPRM

Boeing and the Air Line Pilots Association, International (ALPA), supported the NPRM without change.

The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this AD.

Request To Extend Compliance Time

Comment summary: Southwest Airlines and American Airlines expressed concern regarding the compliance time for the proposed actions and requested the FAA revise the AD to provide a minimum of 30 days from the effective date of the AD.

FAA response: The FAA understands the commenters' concerns and made every effort to publish this AD as soon as possible. After refraining from operating at their FCC-authorized levels for a year and a half, wireless companies are now able to operate at higher levels, yet still not at the levels authorized. Specifically, wireless companies expect to operate their networks in urban areas with minimal restrictions due to the completion of retrofits. Additionally, the FAA anticipates 19 additional telecommunication companies will begin transmitting in the C-Band after June 30, 2023. Although the FAA continues to work with the companies that intend to transmit in the 3.7–3.98-GHz band near 5G CMAs, the FAA has no agreement with those companies to provide the FAA with tower locations and other information necessary to support the current NOTAM/AMOC process. Therefore, the FAA will not be able to extend the June 30, 2023, date.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available,

the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. This interference can cause other airplane systems to not properly function, resulting in longer than normal landing or rejected takeoff distances due to the effect on thrust reverser deployment, spoilers, speedbrake deployment, and increased idle thrust, regardless of the approach type or weather. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–03–20, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 276 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained actions from AD 2022–03–20).	1 work-hour [1] × $85 per hour = $85	$0	$85	$23,460
New AFM revisions (new action)	1 work-hour × $85 per hour = $85	0	85	[2] 23,460

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.
[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a Model 737–8, 737–9, or 737–8200 transport category airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2022–03–20, Amendment 39–21937 (87 FR 4787, January 31, 2022), and

■ b. Adding the following new AD:

2023–12–11 The Boeing Company: Amendment 39–22469; Docket No. FAA–2023–0671; Project Identifier AD–2022–01428–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–03–20, Amendment 39–21937 (87 FR 4787, January 31, 2022) (AD 2022–03–20).

(c) Applicability

This AD applies to all The Boeing Company 737–8, 737–9, and 737–8200 airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that, during takeoffs and landings, as a result of this interference, certain airplane systems may not properly

function, resulting in longer than normal landing or rejected takeoff distances due to the effect on thrust reverser deployment, spoilers, speedbrake deployment, and increased idle thrust, regardless of the approach type or weather. The FAA is issuing this AD to address degraded deceleration performance, which could lead to a runway excursion.

(f) Compliance

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

(g) Definitions

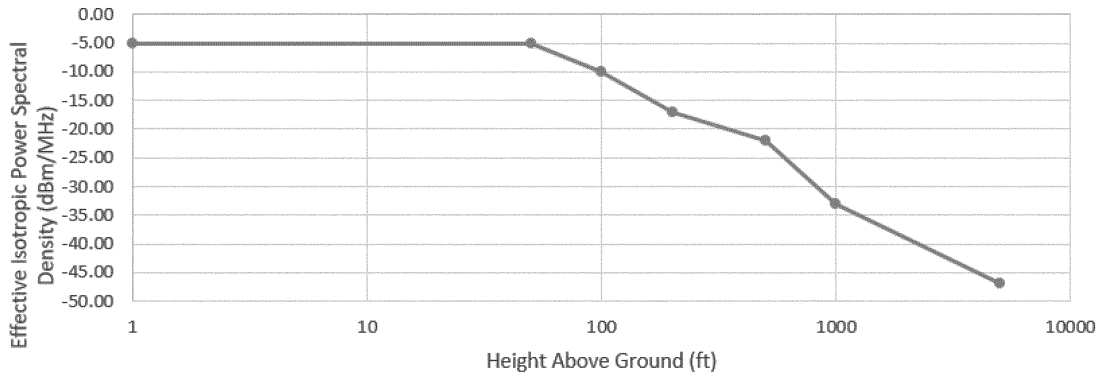
(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

BILLING CODE 4910–13–P

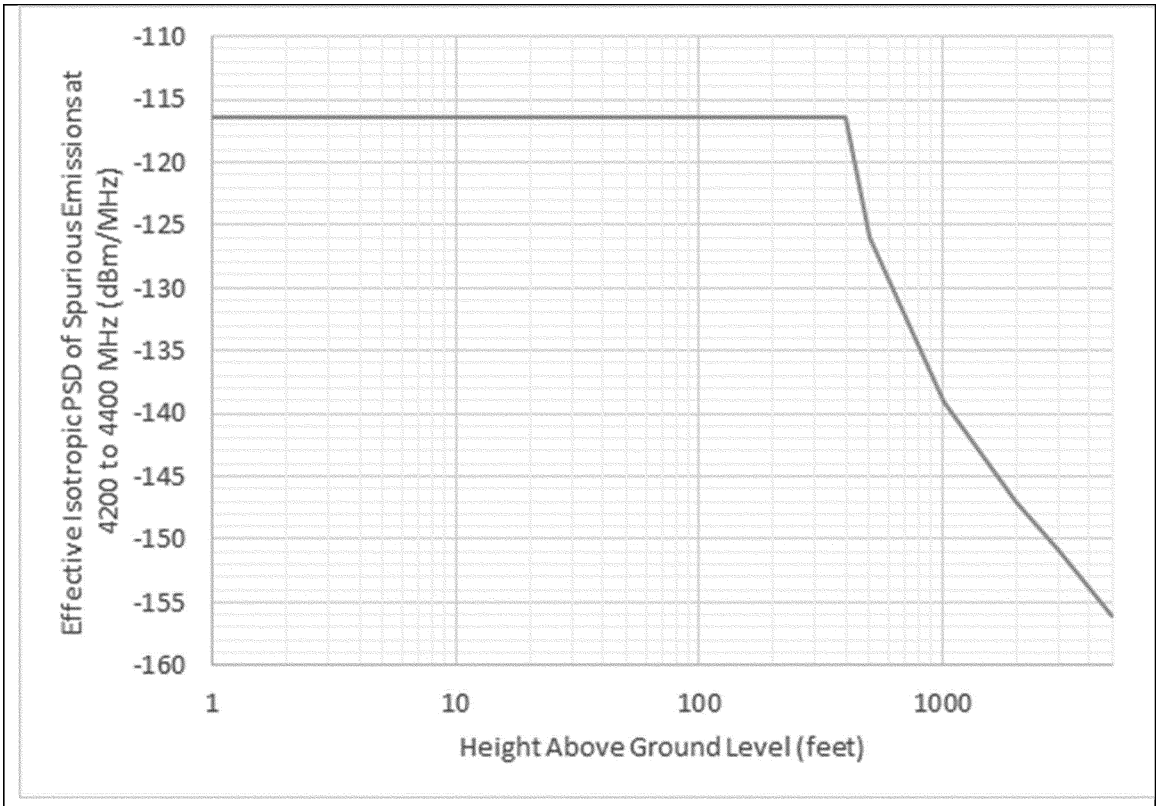
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (3.7–3.98 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(4) Runway condition codes are defined in figure 3 to paragraph (g)(4) of this AD.

Figure 3 to paragraph (g)(4)—*Runway Condition Codes*

Runway Condition Code	Runway Condition Description	Reported Braking Action
6	Dry	Dry
5	Wet (smooth, grooved, or porous friction course (PFC)) or frost 3 mm (0.12 inch) or less of: water, slush, dry snow, or wet snow	Good
4	Compacted snow at or below -15°C (5°F) outside air temperature (OAT)	Good to medium
3	Wet (slippery), dry snow, or wet snow (any depth) over compacted snow Greater than 3 mm (0.12 inch) of: dry snow or wet snow Compacted snow at OAT warmer than -15°C (5°F)	Medium
2	Greater than 3 mm (0.12 inch) of: water or slush	Medium to poor
1	Ice	Poor
0	Wet ice, water on top of compacted snow, dry snow, or wet snow over ice	Nil

(h) Retained Airplane Flight Manual (AFM) Revision

This paragraph restates the requirements of paragraph (h) of AD 2022–03–20.

(1) Within 2 days after January 31, 2022 (the effective date of AD 2022–03–20): Revise the Limitations Section of the existing AFM to include the information specified in figure 4 to paragraph (h)(1) of this AD. This may be done by inserting a copy of figure 4 to paragraph (h)(1) of this AD into the existing AFM.

Figure 4 to paragraph (h)(1)—*AFM Limitations Revisions*

(Required by AD 2022-03-20)

Radio Altimeter 5G C-Band Interference, Takeoff and Landing Performance

The following limitations are required for dispatch or release to airports, and takeoff or landing on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Minimum Equipment List (MEL)

Dispatch or release with any of the following MEL items is prohibited:

- 32-42-01 – Antiskid Systems
- 32-42-02 – Alternate Antiskid Valves
- 32-42-03 – Automatic Brake System
- 32-44-01 – Parking Brake Valve

Landing Operations on Runways with Condition Code 1 or 0

Dispatch or release to, or takeoff or landing on, runways with a runway condition code of 1 or 0 is prohibited.

Takeoff and Landing Performance

Operators must use the 5G C-Band Interference Takeoff Performance and Landing Distance Calculations procedure contained in the Operating Procedures Section of this AFM.

(2) Within 2 days after January 31, 2022 (the effective date of AD 2022–03–20): Revise the Operating Procedures Section of the existing AFM to include the information specified in figure 5 to paragraph (h)(2) of this AD. This may be done by inserting a copy of figure 5 to paragraph (h)(2) of this AD into the existing AFM.

Figure 5 to paragraph (h)(2)—*AFM Operating Procedures Revision*

(Required by AD 2022-03-20)

5G C-Band Interference Takeoff Performance and Landing Distance Calculations

Dispatch Guidance – Takeoff Performance

Stopping distance during a rejected takeoff (RTO) can be significantly increased due to the following potential effects on airplane systems:

- Limited spoiler extension
- Higher engine idle
- Thrust reversers may not deploy

For the increased stopping distance during an RTO, refer to the Departure Airport, Takeoff Performance section below.

Dispatch Guidance – Destination or Alternate Airport – Landing Performance

Calculate the required landing distance (select Method A or Method B).

Method A: Use of normal landing performance increased by a predetermined percentage

Use Prior to Descent, Required Landing Distance section below.

Method B: Use of the Non-Normal Configuration Landing Distance table for SPOILERS

Use the SPOILERS Non-Normal Configuration Landing Distance table in the Performance chapter of the AFM, or the applicable table below, for flaps 30 or flaps 40.

- Use the distance for MAX MANUAL braking configurations with the appropriate runway condition at estimated time of arrival.
- Apply all of the appropriate distance adjustments to include the reverse thrust adjustment for no reverse (NO REV).

For runway condition codes 6 and 5, obtain the required landing distance by using the higher of:

- The resulting unfactored distance increased by 15%, or
- The normal dispatch calculations.

For runway condition codes 4 and 3, increase the resulting unfactored distance by 15% to obtain the required landing distance.

For runway condition code 2, increase the resulting unfactored distance by 30% to obtain the required landing distance.

End of Method B

Departure Airport, Takeoff Performance
Select Method 1 or 2 to adjust the accelerate stop distance available (ASDA).
Note: Both methods provide an acceptable margin of safety.

Method 1: Adjust the ASDA by a predetermined value.
Adjust the ASDA by using the following adjustment:

Runway Condition Code	Runway Condition Description	Subtract from ASDA
6	Dry	950 feet
5	Wet skid resistant*	2,600 feet
5, 4, or 3	Wet/dry snow/wet snow/compact snow/slippery	3,700 feet
2	Slush or standing water	4,900 feet

*Provided approval to use wet skid resistant data has been received from the appropriate regulatory authority in accordance with the AFM.

Use the adjusted ASDA and complete the takeoff performance calculations using actual departure runway conditions and actual departure environmental conditions. Do not take credit for use of reverse thrust when calculating takeoff performance.

End of Method 1

Method 2: Adjust the ASDA by a predetermined factor.

Multiply the ASDA by the following factor:

Runway Condition Code	Runway Condition Description	ASDA Factor
6	Dry	0.86
5	Wet skid resistant*	0.76
5, 4, or 3	Wet/dry snow/wet snow/compact snow/slippery	0.71
2	Slush or standing water	0.65

*Provided approval to use wet skid resistant data has been received from the appropriate regulatory authority in accordance with the AFM.

Use the adjusted ASDA and complete the takeoff performance calculations using actual departure runway conditions and actual departure environmental conditions. Do not take credit for use of reverse thrust when calculating takeoff performance.

End of Method 2

Prior to takeoff:
Verify normal radio altimeter indications.

Climb out:
- TO/GA mode may not be available

- Monitor pitch mode engagement
- Monitor roll mode engagement
- Autopilot may not engage

Prior to Descent, Required Landing Distance

Do a time of arrival (en route) landing distance assessment using Method A or B. Use the SPOILERS Non-Normal Configuration Landing Distance table in the Performance chapter of the AFM, or the applicable table below, for flaps 30 or flaps 40.

Method A: Use of normal landing performance and increase by a predetermined percentage.

Use the Normal Configuration Landing Distance table for flaps 30 or flaps 40.

Note: The distances and adjustments shown in the Normal Configuration Landing Distance tables are factored and have been increased 15%.

Select the appropriate runway condition.

Select the distance for the MAX MANUAL braking configuration.

Apply all of the appropriate distance adjustments.

Note: Do not apply adjustments for reverse thrust.

To obtain the required landing distance, increase the resulting factored distance by the percentage below in Table 1 based on the runway condition code or runway braking action.

Table 1

Runway Condition Code	Reported Braking Action	Percentage
6	Dry	23%
5	Good	63%
4	Good to medium	56%
3	Medium	65%
2	Medium to poor	113%

Determine autobrake settings using the Determine Autobrake Settings section below.

End of Method A

Method B: Use of the Non-Normal Configuration Landing Distance table for SPOILERS

Use the SPOILERS Non-Normal Configuration Landing Distance table in the Performance chapter of the AFM, or the applicable table below, for flaps 30 or flaps 40.

Select the appropriate runway condition.

Select the distance for MAX MANUAL braking configuration.

Apply all of the appropriate distance adjustments including the reverse thrust adjustment for no reverse (NO REV).

For runway condition codes 6 to 3, increase the resulting unfactored distance by 15% to obtain the required landing distance.

For runway condition code 2, increase the resulting unfactored distance by 30% to obtain the required landing distance.

Determine autobrake settings using the Determine Autobrake Settings section below.

SPOILERS Non-Normal Configuration Landing Distance Tables

737-8 and 737-8200 One Position Tailskid, FLAPS 30, VREF30

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment*	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	150,000 LB Landing Weight	Per 10,000 LB Above / Below 150,000 LB	Per 1,000 ft STD / HIGH	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	4870	250 / -270	130 / 170	-210 / 680	80 / -70	130 / -130	310	180	280
5	6300	420 / -410	230 / 320	-330 / 1160	200 / -170	210 / -210	420	610	1300
4	6890	430 / -430	240 / 330	-350 / 1210	260 / -210	210 / -210	420	740	1620
3	7330	450 / -450	250 / 340	-360 / 1270	310 / -250	220 / -220	420	910	2090
2	8290	610 / -570	330 / 460	-470 / 1660	440 / -340	280 / -280	450	1530	4410

737-8 and 737-8200 Two Position Tailskid, FLAPS 30, VREF30

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment*	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	150,000 LB Landing Weight	Per 10,000 LB Above / Below 150,000 LB	Per 1,000 ft STD / HIGH	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	4670	250 / -250	130 / 170	-210 / 670	80 / -70	120 / -120	300	160	250
5	6030	410 / -380	220 / 320	-320 / 1130	190 / -160	200 / -200	410	550	1170
4	6610	420 / -400	230 / 330	-340 / 1180	240 / -200	200 / -200	410	680	1480
3	7050	430 / -420	240 / 340	-360 / 1240	300 / -240	210 / -200	410	850	1960
2	7980	590 / -540	330 / 460	-460 / 1640	420 / -330	270 / -270	450	1430	4110

737-9 FLAPS 30, VREF30

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment*	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	160,000 LB Landing Weight	Per 10,000 LB Above / Below 160,000 LB	Per 1,000 ft STD / HIGH	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5030	250 / -250	140 / 170	-210 / 690	90 / -80	130 / -130	310	170	270
5	6530	410 / -380	250 / 330	-340 / 1180	220 / -180	210 / -210	420	610	1290
4	7090	420 / -400	260 / 340	-350 / 1230	270 / -220	220 / -220	420	720	1560
3	7550	430 / -420	270 / 350	-370 / 1290	330 / -260	220 / -220	420	880	1990
2	8530	590 / -530	360 / 480	-480 / 1690	460 / -360	290 / -290	460	1480	4070

737-8 and 737-8200 One Position Tailskid, FLAPS 40, VREF40

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment*	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	150,000 LB Landing Weight	Per 10,000 LB Above / Below 150,000 LB	Per 1,000 ft STD / HIGH	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	4630	300 / -250	140 / 170	-210 / 670	90 / -80	120 / -120	330	160	250
5	5860	490 / -380	230 / 310	-320 / 1110	190 / -160	190 / -190	420	510	1070
4	6450	500 / -390	230 / 320	-340 / 1170	250 / -200	190 / -190	420	640	1380
3	6900	510 / -420	240 / 330	-350 / 1230	310 / -240	200 / -200	410	800	1830
2	7670	670 / -520	320 / 450	-450 / 1610	410 / -320	260 / -260	450	1260	3430

737-8 and 737-8200 Two Position Tailskid, FLAPS 40, VREF40

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment*	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	150,000 LB Landing Weight	Per 10,000 LB Above / Below 150,000 LB	Per 1,000 ft STD / HIGH	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	4600	310 / -250	140 / 170	-210 / 670	90 / -70	120 / -120	330	160	250
5	5830	500 / -370	230 / 310	-320 / 1110	190 / -160	190 / -190	420	510	1060
4	6420	510 / -390	240 / 320	-330 / 1160	250 / -200	190 / -190	420	630	1370
3	6870	520 / -410	250 / 330	-350 / 1220	310 / -240	200 / -200	410	800	1820
2	7630	680 / -520	330 / 450	-450 / 1610	410 / -320	260 / -260	450	1250	3400

737-9 FLAPS 40, VREF40

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment*	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	160,000 LB Landing Weight	Per 10,000 LB Above / Below 160,000 LB	Per 1,000 ft STD / HIGH	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	4920	330 / -250	150 / 180	-210 / 690	90 / -80	130 / -130	330	170	260
5	6280	520 / -370	250 / 340	-330 / 1160	210 / -180	200 / -200	430	550	1150
4	6850	520 / -390	250 / 340	-350 / 1200	270 / -220	210 / -210	430	660	1410
3	7300	540 / -410	260 / 350	-360 / 1260	330 / -260	210 / -210	430	820	1830
2	8140	690 / -510	340 / 470	-460 / 1650	450 / -340	270 / -270	460	1290	3420

*For landing distance at or below 8,000 ft pressure altitude, apply the STD adjustment. For altitudes higher than 8,000 ft, first apply the STD adjustment to derive a new reference landing distance for 8,000 ft then apply the HIGH adjustment to this new reference distance.

Reference distance is based on MAX MANUAL braking, sea level, standard day, no wind or slope and maximum reverse thrust.

Reference distance includes a distance from threshold to touchdown associated with a flare time of 7 seconds.

Distances are based on SPOILERS failure distances which conservatively approximates the effects of 5G interference after the Reverse Thrust Adjustment for no Reversers is applied.

Actual (unfactored) distances are shown.

Note: per procedure, MAX MANUAL braking is not required for normal operations.

End of Method B

Determine Autobrake Settings

- Determine desired AUTOBRAKE setting by using the normal configuration landing distance.

  Note: Normal manual or normal autobrakes can be used. The use of maximum brakes is not needed except as stated in the During Landing section below.

During Approach

- Monitor radio altimeters for anomalies.
- Monitor performance of autopilot and autothrottle. If the autopilot or autothrottle is not performing as expected, disconnect both the autopilot and autothrottle and apply manual inputs to ensure proper control of flight path.

At DA(H), MDA(H), or the Missed Approach Point

- If suitable visual reference is established, disengage the autopilot and autothrottle and continue for a normal manual landing.

- If a go-around is needed, do the go-around and the missed approach procedure either in manual or automatic flight.

During Landing

- Radio altitude-based altitude aural callouts during approach may not be available or may be erroneous.
- Manual deployment of the speedbrakes may be needed.
- If the thrust reversers do not deploy, immediately ensure the speedbrakes are extended, apply manual braking, and modulate as needed for the existing runway conditions.

Note: In some conditions, maximum manual braking may be needed throughout the entire landing roll.

During Go-around and Missed Approach

- TO/GA mode may not be available.
- Monitor thrust and verify that thrust increases.
- Monitor pitch mode engagement.
- Monitor roll mode engagement.
- Autopilot may not engage.

(i) New Requirement: AFM Revision for Non-Radio Altimeter Tolerant Airplanes

For non-radio altimeter tolerant airplanes, do the actions specified in paragraphs (i)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 6 to paragraph (i) of this AD. This may be done by inserting a copy of figure 6 to paragraph (i) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 6 to paragraph (i) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 6 to paragraph (i)—*AFM Revision for Non-Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-11)

Radio Altimeter 5G C-Band Interference, Takeoff and Landing Performance

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and takeoff or landing on runways, in the contiguous U.S. airspace.

Minimum Equipment List (MEL)

Dispatch or release with any of the following MEL items is prohibited:

- 32-42-01 – Antiskid Systems
- 32-42-02 – Alternate Antiskid Valves
- 32-42-03 – Automatic Brake System
- 32-44-01 – Parking Brake Valve

Landing Operations on Runways with Condition Code 1 or 0

Dispatch or release to, or takeoff or landing on, runways with a runway condition code of 1 or 0 is prohibited.

Takeoff and Landing Performance

Operators must use the 5G C-Band Interference Takeoff Performance and Landing Distance Calculations procedure contained in the Operating Procedures Section of this AFM.

(j) New Requirement: AFM Revision for Radio Altimeter Tolerant Airplanes

For radio altimeter tolerant airplanes, do the actions specified in paragraphs (j)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 7 to paragraph (j) of this AD. This may be done by inserting a copy of figure 7 to paragraph (j) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 7 to paragraph (j) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 7 to paragraph (j)—*AFM Revision for Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-11)

Radio Altimeter 5G C-Band Interference, Takeoff and Landing Performance

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and takeoff or landing on runways, in the contiguous U.S. airspace, unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

Minimum Equipment List (MEL)

Dispatch or release with any of the following MEL items is prohibited:

- 32-42-01 – Antiskid Systems
- 32-42-02 – Alternate Antiskid Valves
- 32-42-03 – Automatic Brake System
- 32-44-01 – Parking Brake Valve

Landing Operations on Runways with Condition Code 1 or 0

Dispatch or release to, or takeoff or landing on, runways with a runway condition code of 1 or 0 is prohibited.

Takeoff and Landing Performance

Operators must use the 5G C-Band Interference Takeoff Performance and Landing Distance Calculations procedure contained in the Operating Procedures Section of this AFM.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *AMOC@faa.gov*.

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(l) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov*.

(m) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13152 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0923; Project Identifier AD–2022–01432–T; Amendment 39–22473; AD 2023–12–15]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–09–18, which applied to all The Boeing Company Model 707, 717, and 727 airplanes; Model DC–8, DC–9, and DC–10 airplanes; Model MD–10 and MD–11 airplanes; Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes; and Model MD 90–30 airplanes. AD 2022–09–18 required revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate specific operating procedures for, depending on the airplane model, instrument landing system (ILS) approaches, non-precision approaches, ground spoiler deployment, and go-around and missed approaches, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–09–18, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations and operating procedures

sections of the AFM to incorporate specific operating procedures for, depending on the airplane model, ILS approaches, non-precision approaches, ground spoiler deployment, and go-around and missed approaches, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0923; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–09–18, Amendment 39–22038 (87 FR 31097, May 23, 2022) (AD 2022–09–18). AD 2022–09–18 applied to all The Boeing Company (Boeing) Model 707, 717, and 727 airplanes; Model DC–8, DC–9, and DC–10 airplanes; Model MD–10 and MD–11 airplanes; Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes; and Model MD 90–30 airplanes. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27749). The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience 5G C-Band interference, and a determination that during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged.

In the NPRM, the FAA proposed to retain the AFM revisions required by AD 2022–09–18 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM revisions with limitations requiring the same procedures for, depending on the airplane model, ILS approaches, non-precision approaches, ground spoiler deployment, and go-around and missed approaches, at all airports for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed that the procedures would not be required at 5G C-Band mitigated airports (5G CMAs) as identified in an FAA Domestic Notice. The FAA proposed this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from three commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for NPRM

Boeing and the Air Line Pilots Association, International (ALPA), supported the NPRM without change.

The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this final rule.

Request To Extend Compliance Time

Comment summary: American Airlines expressed concern regarding the compliance time for the proposed actions and requested the FAA revise the AD to provide a minimum of 30 days from the effective date of the AD.

FAA response: The FAA understands the commenter's concern and made every effort to publish this AD as soon as possible. After refraining from operating at their FCC-authorized levels for a year and a half, wireless companies are now able to operate at higher levels, yet still not at the levels authorized. Specifically, wireless companies expect to operate their networks in urban areas with minimal restrictions due to the completion of retrofits. Additionally, the FAA anticipates 19 additional telecommunication companies will begin transmitting in the C-Band after June 30, 2023. Although the FAA continues to work with the companies that intend to transmit in the 3.7–3.98–GHz band near 5G CMAs, the FAA has no agreement with those companies to provide the FAA with tower locations and other information necessary to support the current NOTAM/AMOC process. Therefore, the FAA will not be able to extend the June 30, 2023, date.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available, the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. This interference can cause other airplane systems to not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d)

for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–09–18, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 476 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained actions from AD 2022–09–18)	1 work-hour × $85 per hour [1] = $85	$0	$85	$40,460
New AFM revisions (new action)	1 work-hour × $85 per hour = $85	0	85	[2] 40,460

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.
[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a 707, 717, 727, DC–8, DC–9, DC–10, MD 10, MD–11, DC–9–81, DC–9–82, DC–9–83, DC–9–87, MD–88, or MD–90–30 transport category airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:
■ a. Removing Airworthiness Directive (AD) 2022–09–18, Amendment 39–22038 (87 FR 31097, May 23, 2022), and
■ b. Adding the following new AD:

2023–12–15 The Boeing Company: Amendment 39–22473; Docket No. FAA–2023–0923; Project Identifier AD–2022–01432–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–09–18, Amendment 39–22038 (87 FR 31097, May 23, 2022) (AD 2022–09–18).

(c) Applicability

This AD applies to all The Boeing Company airplanes identified in paragraphs (c)(1) through (9) of this AD, certificated in any category.

(1) Model 707–100 Long Body, –200, –100B Long Body, and –100B Short Body series airplanes, and Model 707–300, –300B, –300C, and –400 series airplanes.

(2) Model 717–200 airplanes.

(3) Model 727, 727C, 727–100, 727–100C, 727–200, and 727–200F series airplanes.

(4) Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8–51, DC–8–52, DC–8–53, DC–8–55, DC–8F–54, DC–8F–55, DC–8–61, DC–8–62, DC–8–63, DC–8–61F, DC–8–62F, DC–8–63F, DC–8–71, DC–8–72, DC–8–73, DC–8–71F, DC–8–72F, and DC–8–73F airplanes.

(5) Model DC–9–11, DC–9–12, DC–9–13, DC–9–14, DC–9–15, DC–9–15F, DC–9–21, DC–9–31, DC–9–32, DC–9–32 (VC–9C), DC–9–32F, DC–9–32F (C–9A, C–9B), DC–9–33F, DC–9–34, DC–9–34F, DC–9–41, and DC–9–51 airplanes.

(6) Model DC–10–10, DC–10–10F, DC–10–15, DC–10–30, DC–10–30F (KC–10A and KDC–10), DC–10–40, and DC–10–40F airplanes.

(7) Model MD–10–10F and MD–10–30F airplanes.

(8) Model MD–11 and MD–11F airplanes.

(9) Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30 airplanes.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. The FAA is issuing this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

(f) Compliance

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

(g) Definitions

(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at

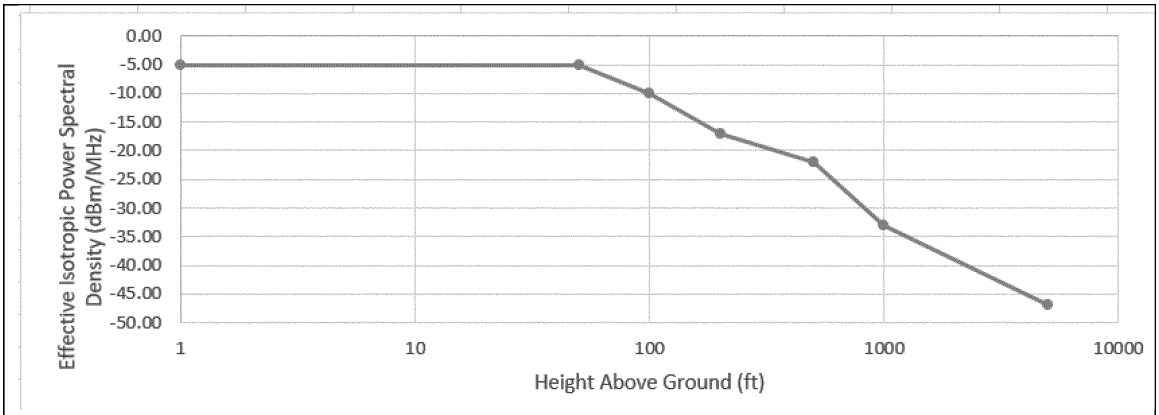
which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

BILLING CODE 4910–13–P

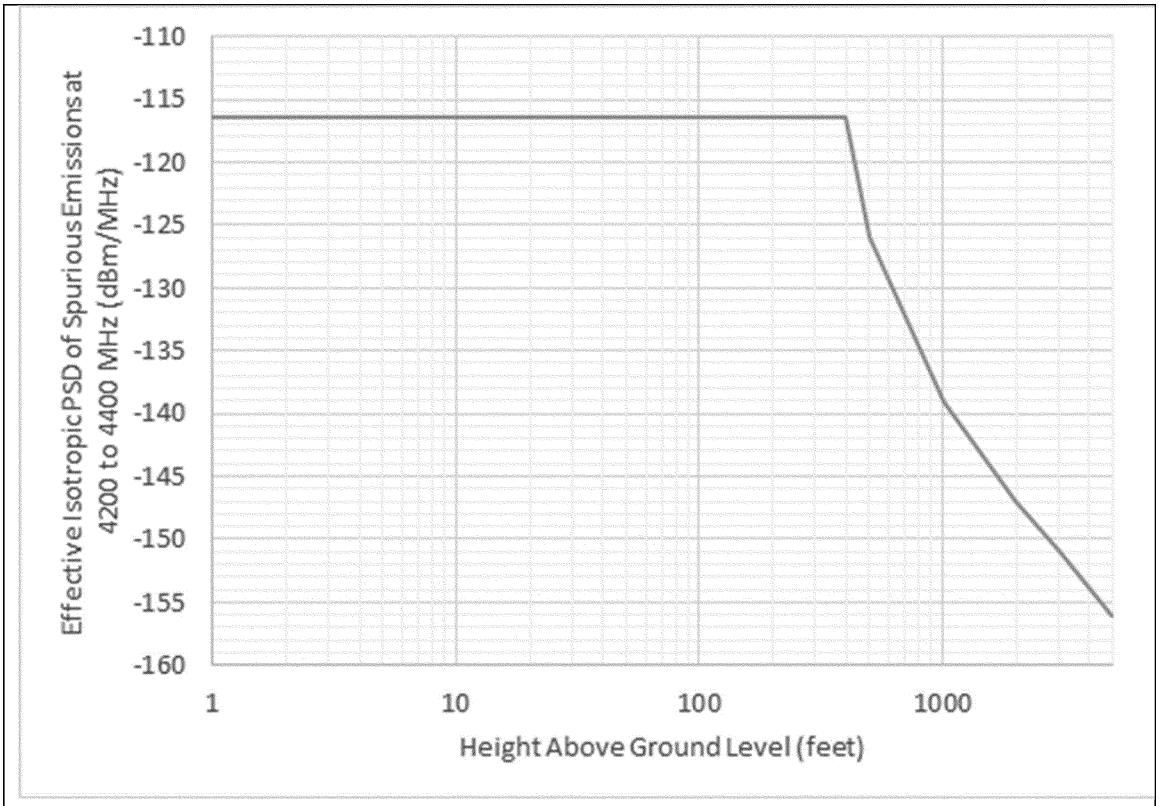
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (3.7–3.98 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(h) Retained Airplane Flight Manual (AFM) Revision-Limitations

This paragraph restates the requirements of paragraph (g) of AD 2022–09–18.

(1) For airplanes identified in paragraphs (c)(1) and (c)(3) through (6) of this AD: Within 2 days after May 23, 2022 (the effective date of AD 2022–09–18), revise the Limitations Section of the existing AFM to include the information specified in figure 3 to paragraph (h)(1) of this AD. This may be done by inserting a copy of figure 3 to paragraph (h)(1) of this AD into the existing AFM.

Figure 3 to paragraph (h)(1)—*AFM Limitations Revision for Model 707, 727, DC–8, DC–9 (except DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87)), and DC–10*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approach Procedures

The following limitations are required for ILS approaches on runways in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

ILS Approaches

Operators must use the Radio Altimeter 5G C-Band Interference, ILS Approaches procedure contained in the Operating Procedures Section of this AFM.

(2) For airplanes identified in paragraphs (c)(2), (7), and (8) of this AD: Within 2 days after May 23, 2022 (the effective date of AD 2022–09–18), revise the Limitations Section of the existing AFM to include the information specified in figure 4 to paragraph (h)(2) of this AD. This may be done by inserting a copy of figure 4 to paragraph (h)(2) of this AD into the Limitations Section of the existing AFM.

Figure 4 to paragraph (h)(2)—*AFM Limitations Revision for Model 717, MD–10, and MD–11*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around Procedures

The following limitations are required for approaches, landings, or go-arounds on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

ILS and Non Precision Approaches, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedures contained in the Operating Procedures Section of this AFM.

(3) For airplanes identified in paragraph (c)(9) of this AD: Within 2 days after May 23, 2022 (the effective date of AD 2022–09–18), revise the Limitations Section of the existing AFM to include the information specified in figure 5 to paragraph (h)(3) of this AD. This may be done by inserting a copy of figure 5 to paragraph (h)(3) of this AD into the Limitations Section of the existing AFM.

Figure 5 to paragraph (h)(3)—*AFM Limitations Revision for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approach Procedures

The following limitations are required for approaches in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

ILS and Non Precision Approaches

Operators must use the Radio Altimeter 5G C-Band Interference, Approaches procedures contained in the Operating Procedures Section of this AFM.

(i) Retained AFM Revision-Operating Procedures

This paragraph restates the requirements of paragraph (h) of AD 2022–09–18.

(1) For airplanes identified in paragraphs (c)(1) and (3) through (6) of this AD: Within 2 days after May 23, 2022 (the effective date of AD 2022–09–18), revise the Operating Procedures Section of the existing AFM to include the information specified in figure 6 to paragraph (i)(1) of this AD. This may be done by inserting a copy of figure 6 to paragraph (i)(1) of this AD into the Operating Procedures Section of the existing AFM.

Figure 6 to paragraph (i)(1)—*AFM Operating Procedures Revision for Model 707, 727, DC–8, DC–9 (except DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87)), and DC–10*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, ILS Approaches

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, disconnect the autopilot and autothrottles, and place both flight director switches to OFF prior to glideslope intercept.

(2) For airplanes identified in paragraph (c)(2) of this AD: Within 2 days after May 23, 2022 (the effective date of AD 2022–09–18), revise the Operating Procedures Section of the existing AFM to include the information specified in figure 7 to paragraph (i)(2) of this AD. This may be done by inserting a copy of figure 7 to paragraph (i)(2) of this AD into the Operating Procedures Section of the existing AFM.

Figure 7 to paragraph (i)(2)—*AFM Operating Procedures Revision for Model 717*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, disconnect the autopilot prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autothrottles and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

Landing

For landing, the Auto Ground Spoiler function may require manual extension. If manual extension is required, calculate landing distance requirements as specified in Appendix 3, Auto Ground Spoiler System Inop, of this AFM.

During Go-Around and Missed Approach

If go-around is required, initial flight director pitch guidance will provide proper speed and pitch targets, but, under certain 5G interference conditions, the flight director cannot be commanded from the Flight Control Panel (FCP) to provide speed or heading guidance, and may not provide altitude capture guidance. If this guidance is not available, manually comply with missed approach procedures, including altitude constraints.

(3) For airplanes identified in paragraph (c)(7) of this AD: Within 2 days after May 23, 2022 (the effective date of AD 2022–09–18), revise the Operating Procedures Section of the existing AFM to include the information specified in figure 8 to paragraph (i)(3) of this AD. This may be done by inserting a copy of figure 8 to paragraph (i)(3) of this AD into the Operating Procedures Section of the existing AFM.

Figure 8 to paragraph (i)(3)—*AFM Operating Procedures Revision for Model MD–10*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, disconnect the autopilot prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autothrottles and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

Landing

For landing, the Auto Ground Spoiler function may require manual extension. If manual extension is required, calculate landing distance requirements according to the following tables, as applicable.

SERIES 10
50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		260	280	300	320	340	360	380	400
S.L.	DRY	2800	2900	3030	3160	3290	3410	3540	3660
STD=15°C	WET	3670	3810	3990	4190	4370	4540	4730	4900
2000 FT	DRY	2920	3030	3170	3310	3450	3580	3720	3840
STD=11°C	WET	3840	3990	4190	4400	4600	4780	4980	5170
4000 FT	DRY	3060	3170	3320	3480	3620	3760	3920	4050
STD=7°C	WET	4040	4190	4410	4630	4850	5040	5260	5460
6000 FT	DRY	3210	3330	3490	3650	3820	3960	4130	4270
STD=3°C	WET	4240	4410	4650	4890	5120	5330	5570	5780
8000 FT	DRY	3360	3490	3670	3840	4020	4180	4360	4520
STD=-1°C	WET	4460	4650	4900	5160	5410	5640	5900	6130
10000 FT	DRY	3530	3670	3860	4060	4250	4420	4610	4780
STD=-5°C	WET	4690	4910	5180	5460	5730	5980	6260	6510
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-7	-10
ABOVE standard day	+37	+44

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-46	-96
DOWNHILL	+257	+459

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-20	-34
TAILWIND	+50	+68

SERIES 10
35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		260	280	300	320	340	360	380	400
S.L.	DRY	2800	2900	3030	3170	3300	3420	3560	3680
STD=15°C	WET	3710	3850	4050	4250	4450	4620	4820	4990
2000 FT	DRY	2930	3030	3180	3330	3470	3600	3740	3870
STD=11°C	WET	3890	4040	4260	4480	4680	4870	5080	5270
4000 FT	DRY	3070	3180	3330	3490	3640	3790	3940	4080
STD=7°C	WET	4090	4260	4480	4720	4940	5150	5370	5580
6000 FT	DRY	3210	3340	3500	3670	3840	3990	4160	4310
STD=3°C	WET	4300	4490	4730	4980	5220	5440	5690	5910
8000 FT	DRY	3380	3510	3680	3870	4050	4210	4400	4560
STD=-1°C	WET	4530	4730	4990	5260	5530	5770	6030	6280
10000 FT	DRY	3550	3690	3880	4090	4280	4460	4650	4830
STD=-5°C	WET	4790	5000	5280	5580	5860	6120	6410	6670

NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-7	-10
ABOVE standard day	+17	+25

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-47	-99
DOWNHILL	+125	+300

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-20	-34
TAILWIND	+30	+51

SERIES 30
50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		340	360	380	400	420	440	460	480
S.L.	DRY	3380	3530	3670	3800	3910	4050	4210	4370
STD=15°C	WET	4500	4700	4900	5100	5270	5470	5690	5920
2000 FT	DRY	3550	3710	3850	4000	4120	4270	4440	4610
STD=11°C	WET	4740	4960	5180	5390	5570	5790	6030	6280
4000 FT	DRY	3740	3900	4060	4220	4350	4510	4710	4910
STD=7°C	WET	5010	5250	5480	5710	5910	6150	6440	6720
6000 FT	DRY	3930	4110	4280	4450	4590	4770	5010	5240
STD=3°C	WET	5290	5550	5800	6050	6260	6520	6860	7200
8000 FT	DRY	4140	4330	4510	4720	4910	5120	5390	5650
STD=-1°C	WET	5590	5860	6130	6430	6710	7020	7390	7770

10000 FT	DRY	4370	4570	4770	5010	5260	5510	5800	6110
STD=-5°C	WET	5910	6210	6500	6840	7200	7560	7970	8410
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-10	-14
ABOVE standard day	+23	+34

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-54	-116
DOWNHILL	+168	+380

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-25	-41
TAILWIND	+79	+63

SERIES 30
35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		340	360	380	400	420	440	460	480
S.L.	DRY	3500	3650	3810	3950	4070	4220	4390	4560
STD=15°C	WET	4700	4920	5140	5360	5540	5760	6010	6250
2000 FT	DRY	3680	3840	4010	4160	4300	4460	4640	4820
STD=11°C	WET	4960	5190	5440	5670	5870	6110	6380	6640
4000 FT	DRY	3870	4040	4230	4400	4540	4720	4930	5150
STD=7°C	WET	5250	5500	5770	6020	6240	6500	6810	7120
6000 FT	DRY	4080	4270	4460	4650	4800	4990	5250	5510

STD=3°C	WET	5550	5830	6110	6390	6620	6910	7270	7640
8000 FT	DRY	4300	4500	4710	4930	5140	5370	5650	5930
STD=-1°C	WET	5870	6170	6480	6800	7100	7430	7840	8240
10000 FT	DRY	4540	4760	4990	5250	5500	5780	6090	6400
STD=-5°C	WET	6210	6540	6870	7250	7610	8010	8460	8900
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-10	-15
ABOVE standard day	+26	+37

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-58	-120
DOWNHILL	+179	+411

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-26	-42
TAILWIND	+86	+68

During Go-Around and Missed Approach

If go-around is required, initial flight director pitch guidance will provide proper speed and pitch targets, but, under certain 5G interference conditions, the flight director cannot be commanded from the Flight Control Panel (FCP) to provide speed or heading guidance, and may not provide altitude capture guidance. If this guidance is not available, manually comply with missed approach procedures, including altitude constraints.

(4) For airplanes identified in paragraph (c)(8) of this AD: Within 2 days after the effective date of this AD, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 9 to paragraph (i)(4) of this AD. This may be done by inserting a copy of figure 9 to paragraph (i)(4) of this AD into the Operating Procedures Section of the existing AFM.

Figure 9 to paragraph (i)(4)—*AFM Operating Procedures Revision for Model MD–11*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, disconnect the autopilot prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autothrottles and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

Landing

For landing, the Auto Ground Spoiler function may require manual extension. If manual extension is required, calculate landing distance requirements according to the following tables, as applicable.

50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

General Electric CF6-80C2 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4315	4480	4650	4803	4949	5126	5274	5453
STD=15°C	WET	5156	5388	5604	5805	6008	6240	6443	6677
2000 FT	DRY	4520	4695	4876	5039	5195	5384	5542	5734
STD=11°C	WET	5466	5688	5927	6140	6355	6605	6827	7084
4000 FT	DRY	4738	4925	5118	5292	5459	5661	5830	6036
STD=7°C	WET	5777	6021	6275	6510	6743	7007	7241	7527
6000 FT	DRY	4975	5175	5381	5568	5747	5963	6145	6367
STD=3°C	WET	6125	6392	6658	6917	7166	7449	7710	7999
8000 FT	DRY	5229	5443	5663	5864	6057	6290	6486	6725
STD=-1°C	WET	6497	6787	7084	7354	7628	7939	8212	8538
10000 FT	DRY	5505	5734	5972	6188	6418	6693	6931	7208
STD=-5°C	WET	6920	7220	7544	7842	8155	8532	8853	9223

NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop (includes air run distances).

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-12	-14
ABOVE standard day	+25	+35

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-84	-137
DOWNHILL	+229	+444

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-32	-46
TAILWIND	+83	+132

35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

General Electric CF6-80C2 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4632	4803	4974	5155	5340	5496	5685	5855
STD=15°C	WET	5577	5795	6020	6257	6502	6717	6969	7197
2000 FT	DRY	4856	5039	5221	5414	5613	5780	5983	6165
STD=11°C	WET	5890	6131	6373	6631	6893	7128	7394	7642
4000 FT	DRY	5096	5291	5486	5693	5906	6085	6304	6500
STD=7°C	WET	6249	6509	6763	7037	7317	7571	7864	8133
6000 FT	DRY	5357	5566	5775	5998	6227	6420	6655	6867
STD=3°C	WET	6631	6914	7190	7489	7798	8060	8380	8674
8000 FT	DRY	5637	5862	6087	6326	6574	6782	7037	7317
STD=-1°C	WET	7047	7348	7660	7980	8308	8600	8943	9324
10000 FT	DRY	5943	6185	6428	6687	6963	7267	7546	7854

STD=-5°C	WET	7513	7841	8166	8522	8888	9294	9675	10074
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop (includes air run distances).									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-13	-16
ABOVE standard day	+29	+39

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-94	-155
DOWNHILL	+275	+522

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-35	-50
TAILWIND	+95	+143

50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

Pratt & Whitney PW-4460/PW-4462 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4316	4476	4641	4791	4963	5113	5262	5443
STD=15°C	WET	5050	5269	5498	5710	5922	6157	6371	6626
2000 FT	DRY	4526	4697	4875	5036	5190	5377	5535	5728
STD=11°C	WET	5343	5585	5824	6053	6282	6531	6760	7035
4000 FT	DRY	4751	4935	5125	5297	5463	5663	5832	6038
STD=7°C	WET	5664	5914	6185	6425	6673	6943	7189	7477
6000 FT	DRY	4993	5190	5394	5580	5757	5973	6154	6375
STD=3°C	WET	6003	6284	6566	6826	7094	7392	7651	7969
8000 FT	DRY	5253	5465	5684	5883	6075	6307	6503	6741

STD=-1°C	WET	6382	6677	6983	7266	7550	7869	8158	8494
10000 FT	DRY	5534	5762	5998	6214	6443	6718	6955	7232
STD=-5°C	WET	6783	7107	7440	7749	8076	8457	8797	9182
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 60 KIAS, then forward idle to stop (includes air run distances).									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-11	-13
ABOVE standard day	+25	+34

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-83	-138
DOWNHILL	+228	+443

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-33	-45
TAILWIND	+83	+128

35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

Pratt & Whitney PW-4460/PW-4462 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4622	4790	4958	5138	5326	5484	5677	5850
STD=15°C	WET	5422	5661	5902	6154	6422	6647	6923	7169
2000 FT	DRY	4856	5035	5215	5406	5605	5773	5979	6165
STD=11°C	WET	5755	6005	6265	6533	6812	7062	7353	7626
4000 FT	DRY	5105	5298	5491	5696	5908	6087	6307	6506
STD=7°C	WET	6102	6386	6659	6950	7251	7511	7825	8121
6000 FT	DRY	5373	5581	5788	6009	6238	6430	6665	6879
STD=3°C	WET	6493	6787	7084	7397	7724	8013	8345	8656
8000 FT	DRY	5662	5885	6109	6347	6594	6802	7056	7285
STD=-1°C	WET	6907	7220	7543	7887	8236	8548	8916	9254
10000 FT	DRY	5975	6216	6458	6716	6992	7296	7575	7882
STD=-5°C	WET	7353	7703	8047	8423	8815	9243	9646	10082

NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 60 KIAS, then forward idle to stop (includes air run distances).

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-11	-15
ABOVE standard day	+28	+39

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-93	-151
DOWNHILL	+273	+524

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-35	-48
TAILWIND	+94	+140

During Go-Around and Missed Approach

If go-around is required, initial flight director pitch guidance will provide proper speed and pitch targets, but, under certain 5G interference conditions, the flight director cannot be commanded from the Flight Control Panel (FCP) to provide speed or heading guidance, and may not provide altitude capture guidance. If this guidance is not available, manually comply with missed approach procedures, including altitude constraints.

(5) For airplanes identified in paragraph (c)(9) of this AD: Within 2 days after the effective date of this AD, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 10 to paragraph (i)(5) of this AD. This may be done by inserting a copy of figure 10 to paragraph (i)(5) of this AD into the Operating Procedures Section of the existing AFM.

Figure 10 to paragraph (i)(5)—*AFM Operating Procedures Revision for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30*

(Required by AD 2022-09-18)

Radio Altimeter 5G C-Band Interference, Approaches

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, disconnect the autopilot and autothrottles, and place both flight director switches to OFF prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autopilot, autothrottles, and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

(j) New Requirement: AFM Limitations Revision for Non-Radio Altimeter Tolerant Airplanes

(1) For non-radio altimeter tolerant airplanes identified in paragraphs (c)(1) and (c)(3) through (6) of this AD, do the actions specified in paragraphs (j)(1)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 11 to paragraph (j)(1) of this AD. This may be done by inserting a copy of figure 11 to paragraph (j)(1) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 11 to paragraph (j)(1) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 11 to paragraph (j)(1)—*AFM Limitations Revision for Model 707, 727, DC–8, DC–9 (except DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87)), and DC–10*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach Procedures

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for ILS approaches on runways in the contiguous U.S. airspace.

ILS Approaches

Operators must use the Radio Altimeter 5G C-Band Interference, ILS Approaches procedure contained in the Operating Procedures Section of this AFM.

(2) For non-radio altimeter tolerant airplanes identified in paragraphs (c)(2), (7), and (8) of this AD, do the actions specified in paragraphs (j)(2)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 12 to paragraph (j)(2) of this AD. This may be done by inserting a copy of figure 12 to paragraph (j)(2) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(2) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 12 to paragraph (j)(2) of this AD, remove the AFM revision required by paragraph (h)(2) of this AD.

Figure 12 to paragraph (j)(2)—*AFM Limitations Revision for Model 717, MD–10, and MD–11*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around Procedures

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for approaches, landings, or go-arounds on runways, in the contiguous U.S. airspace.

ILS and Non Precision Approaches, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedures contained in the Operating Procedures Section of this AFM.

(3) For non-radio altimeter tolerant airplanes identified in paragraph (c)(9) of this AD, do the actions specified in paragraphs (j)(3)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 13 to paragraph (j)(3) of this AD. This may be done by inserting a copy of figure 13 to paragraph (j)(3) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(3) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 13 to paragraph (j)(3) of this AD, remove the AFM revision required by paragraph (h)(3) of this AD.

Figure 13 to paragraph (j)(3)—*AFM Limitations Revision for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach Procedures
Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for approaches in the contiguous U.S. airspace.

ILS and Non Precision Approaches
Operators must use the Radio Altimeter 5G C-Band Interference, Approaches procedures contained in the Operating Procedures Section of this AFM.

(k) New Requirement: AFM Limitations Revision for Radio Altimeter Tolerant Airplanes

(1) For radio altimeter tolerant airplanes identified in paragraphs (c)(1) and (c)(3) through (6) of this AD, do the actions specified in paragraphs (k)(1)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 14 to paragraph (k)(1) of this AD. This may be done by inserting a copy of figure 14 to paragraph (k)(1) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 14 to paragraph (k)(1) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 14 to paragraph (k)(1)—*AFM Limitations Revision for Model 707, 727, DC–8, DC–9 (except DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87)), and DC–10*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach Procedures
Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for ILS approaches on runways in the contiguous U.S. airspace unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

ILS Approaches
Operators must use the Radio Altimeter 5G C-Band Interference, ILS Approaches procedure contained in the Operating Procedures Section of this AFM.

(2) For radio altimeter tolerant airplanes identified in paragraphs (c)(2), (7), and (8) of this AD, do the actions specified in paragraphs (k)(2)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 15 to paragraph (k)(2) of this AD. This may be done by inserting a copy of figure 15 to paragraph (k)(2) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(2) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 15 to paragraph (k)(2) of this AD, remove the AFM revision required by paragraph (h)(2) of this AD.

Figure 15 to paragraph (k)(2)—*AFM Limitations Revision for Model 717, MD–10, and MD–11*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around Procedures

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for approaches, landings, or go-arounds on runways, in the contiguous U.S. airspace unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

ILS and Non Precision Approaches, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedures contained in the Operating Procedures Section of this AFM.

(3) For radio altimeter tolerant airplanes identified in paragraph (c)(9) of this AD, do the actions specified in paragraphs (k)(3)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 16 to paragraph (k)(3) of this AD. This may be done by inserting a copy of figure 16 to paragraph (k)(3) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(3) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 16 to paragraph (k)(3) of this AD, remove the AFM revision required by paragraph (h)(3) of this AD.

Figure 16 to paragraph (k)(3)—*AFM Limitations Revision for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach Procedures

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for approaches in the contiguous U.S. airspace unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

ILS and Non Precision Approaches

Operators must use the Radio Altimeter 5G C-Band Interference, Approaches procedures contained in the Operating Procedures Section of this AFM.

(l) New Requirement: AFM Operating Procedures Revision

(1) For airplanes identified in paragraphs (c)(1) and (3) through (6) of this AD, do the actions specified in paragraphs (l)(1)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 17 to paragraph (l)(1) of this AD. This may be done by inserting a copy of figure 17 to paragraph (l)(1) of this AD into the Operating Procedures Section of the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (i)(1) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 17 to paragraph (l)(1) of this AD, remove the AFM revision required by paragraph (i)(1) of this AD.

Figure 17 to paragraph (1)(1)—*AFM Operating Procedures Revision for Model 707, 727, DC–8, DC–9 (except DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87)), and DC–10*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, ILS Approaches

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, disconnect the autopilot and autothrottles, and place both flight director switches to OFF prior to glideslope intercept.

(2) For airplanes identified in paragraph (c)(2) of this AD, do the actions specified in paragraphs (l)(2)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 18 to paragraph (l)(2) of this AD. This may be done by inserting a copy of figure 18 to paragraph (l)(2) of this AD into the Operating Procedures Section of the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (i)(2) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 18 to paragraph (l)(2) of this AD, remove the AFM revision required by paragraph (i)(2) of this AD.

Figure 18 to paragraph (l)(2)—*AFM Operating Procedures Revision for Model 717*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, disconnect the autopilot prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autothrottles and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

Landing

For landing, the Auto Ground Spoiler function may require manual extension. If manual extension is required, calculate landing distance requirements as specified in Appendix 3, Auto Ground Spoiler System Inop, of this AFM.

During Go-Around and Missed Approach

If go-around is required, initial flight director pitch guidance will provide proper speed and pitch targets, but, under certain 5G interference conditions, the flight director cannot be commanded from the Flight Control Panel (FCP) to provide speed or heading guidance, and may not provide altitude capture guidance. If this guidance is not available, manually comply with missed approach procedures, including altitude constraints.

(3) For airplanes identified in paragraph (c)(7) of this AD, do the actions specified in paragraphs (l)(3)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 19 to paragraph (l)(3) of this AD. This may be done by inserting a copy of figure 19 to paragraph (l)(3) of this AD into the Operating Procedures Section of the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (i)(3) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 19 to paragraph (l)(3) of this AD, remove the AFM revision required by paragraph (i)(3) of this AD.

Figure 19 to paragraph (l)(3)—*AFM Operating Procedures Revision for Model MD–10*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, disconnect the autopilot prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autothrottles and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

Landing

For landing, the Auto Ground Spoiler function may require manual extension. If manual extension is required, calculate landing distance requirements according to the following tables, as applicable.

SERIES 10
50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		260	280	300	320	340	360	380	400
S.L.	DRY	2800	2900	3030	3160	3290	3410	3540	3660
STD=15°C	WET	3670	3810	3990	4190	4370	4540	4730	4900
2000 FT	DRY	2920	3030	3170	3310	3450	3580	3720	3840
STD=11°C	WET	3840	3990	4190	4400	4600	4780	4980	5170
4000 FT	DRY	3060	3170	3320	3480	3620	3760	3920	4050
STD=7°C	WET	4040	4190	4410	4630	4850	5040	5260	5460
6000 FT	DRY	3210	3330	3490	3650	3820	3960	4130	4270
STD=3°C	WET	4240	4410	4650	4890	5120	5330	5570	5780
8000 FT	DRY	3360	3490	3670	3840	4020	4180	4360	4520
STD=-1°C	WET	4460	4650	4900	5160	5410	5640	5900	6130
10000 FT	DRY	3530	3670	3860	4060	4250	4420	4610	4780

STD=-5°C	WET	4690	4910	5180	5460	5730	5980	6260	6510
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-7	-10
ABOVE standard day	+37	+44

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-46	-96
DOWNHILL	+257	+459

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-20	-34
TAILWIND	+50	+68

SERIES 10
35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		260	280	300	320	340	360	380	400
S.L.	DRY	2800	2900	3030	3170	3300	3420	3560	3680
STD=15°C	WET	3710	3850	4050	4250	4450	4620	4820	4990

2000 FT	DRY	2930	3030	3180	3330	3470	3600	3740	3870
STD=11°C	WET	3890	4040	4260	4480	4680	4870	5080	5270
4000 FT	DRY	3070	3180	3330	3490	3640	3790	3940	4080
STD=7°C	WET	4090	4260	4480	4720	4940	5150	5370	5580
6000 FT	DRY	3210	3340	3500	3670	3840	3990	4160	4310
STD=3°C	WET	4300	4490	4730	4980	5220	5440	5690	5910
8000 FT	DRY	3380	3510	3680	3870	4050	4210	4400	4560
STD=-1°C	WET	4530	4730	4990	5260	5530	5770	6030	6280
10000 FT	DRY	3550	3690	3880	4090	4280	4460	4650	4830
STD=-5°C	WET	4790	5000	5280	5580	5860	6120	6410	6670
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-7	-10
ABOVE standard day	+17	+25

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-47	-99
DOWNHILL	+125	+300

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-20	-34
TAILWIND	+30	+51

SERIES 30
50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB	340	360	380	400	420	440	460	480

S.L.	DRY	3380	3530	3670	3800	3910	4050	4210	4370
STD=15°C	WET	4500	4700	4900	5100	5270	5470	5690	5920
2000 FT	DRY	3550	3710	3850	4000	4120	4270	4440	4610
STD=11°C	WET	4740	4960	5180	5390	5570	5790	6030	6280
4000 FT	DRY	3740	3900	4060	4220	4350	4510	4710	4910
STD=7°C	WET	5010	5250	5480	5710	5910	6150	6440	6720
6000 FT	DRY	3930	4110	4280	4450	4590	4770	5010	5240
STD=3°C	WET	5290	5550	5800	6050	6260	6520	6860	7200
8000 FT	DRY	4140	4330	4510	4720	4910	5120	5390	5650
STD=-1°C	WET	5590	5860	6130	6430	6710	7020	7390	7770
10000 FT	DRY	4370	4570	4770	5010	5260	5510	5800	6110
STD=-5°C	WET	5910	6210	6500	6840	7200	7560	7970	8410
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-10	-14
ABOVE standard day	+23	+34

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-54	-116
DOWNHILL	+168	+380

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-25	-41
TAILWIND	+79	+63

SERIES 30

35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MANUAL SPOILERS

Weight 1000 LB		340	360	380	400	420	440	460	480
S.L.	DRY	3500	3650	3810	3950	4070	4220	4390	4560
STD=15°C	WET	4700	4920	5140	5360	5540	5760	6010	6250
2000 FT	DRY	3680	3840	4010	4160	4300	4460	4640	4820
STD=11°C	WET	4960	5190	5440	5670	5870	6110	6380	6640
4000 FT	DRY	3870	4040	4230	4400	4540	4720	4930	5150
STD=7°C	WET	5250	5500	5770	6020	6240	6500	6810	7120
6000 FT	DRY	4080	4270	4460	4650	4800	4990	5250	5510
STD=3°C	WET	5550	5830	6110	6390	6620	6910	7270	7640
8000 FT	DRY	4300	4500	4710	4930	5140	5370	5650	5930
STD=-1°C	WET	5870	6170	6480	6800	7100	7430	7840	8240
10000 FT	DRY	4540	4760	4990	5250	5500	5780	6090	6400
STD=-5°C	WET	6210	6540	6870	7250	7610	8010	8460	8900

NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop. (Includes Air Run Distance)

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-10	-15
ABOVE standard day	+26	+37

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-58	-120
DOWNHILL	+179	+411

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-26	-42

TAILWIND	+86	+68

During Go-Around and Missed Approach

If go-around is required, initial flight director pitch guidance will provide proper speed and pitch targets, but, under certain 5G interference conditions, the flight director cannot be commanded from the Flight Control Panel (FCP) to provide speed or heading guidance, and may not provide altitude capture guidance. If this guidance is not available, manually comply with missed approach procedures, including altitude constraints.

(4) For airplanes identified in paragraph (c)(8) of this AD, do the actions specified in paragraphs (l)(4)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 20 to paragraph (l)(4) of this AD. This may be done by inserting a copy of figure 20 to paragraph (l)(4) of this AD into the Operating Procedures Section of the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (i)(4) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 20 to paragraph (l)(4) of this AD, remove the AFM revision required by paragraph (i)(4) of this AD.

Figure 20 to paragraph (l)(4)—*AFM Operating Procedures Revision for Model MD–11*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, disconnect the autopilot prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autothrottles and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

Landing

For landing, the Auto Ground Spoiler function may require manual extension. If manual extension is required, calculate landing distance requirements according to the following tables, as applicable.

50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

General Electric CF6-80C2 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4315	4480	4650	4803	4949	5126	5274	5453
STD=15°C	WET	5156	5388	5604	5805	6008	6240	6443	6677
2000 FT	DRY	4520	4695	4876	5039	5195	5384	5542	5734
STD=11°C	WET	5466	5688	5927	6140	6355	6605	6827	7084
4000 FT	DRY	4738	4925	5118	5292	5459	5661	5830	6036
STD=7°C	WET	5777	6021	6275	6510	6743	7007	7241	7527

6000 FT	DRY	4975	5175	5381	5568	5747	5963	6145	6367
STD=3°C	WET	6125	6392	6658	6917	7166	7449	7710	7999
8000 FT	DRY	5229	5443	5663	5864	6057	6290	6486	6725
STD=-1°C	WET	6497	6787	7084	7354	7628	7939	8212	8538
10000 FT	DRY	5505	5734	5972	6188	6418	6693	6931	7208
STD=-5°C	WET	6920	7220	7544	7842	8155	8532	8853	9223
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop (includes air run distances).									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-12	-14
ABOVE standard day	+25	+35

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-84	-137
DOWNHILL	+229	+444

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-32	-46
TAILWIND	+83	+132

35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

General Electric CF6-80C2 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4632	4803	4974	5155	5340	5496	5685	5855
STD=15°C	WET	5577	5795	6020	6257	6502	6717	6969	7197
2000 FT	DRY	4856	5039	5221	5414	5613	5780	5983	6165
STD=11°C	WET	5890	6131	6373	6631	6893	7128	7394	7642

4000 FT	DRY	5096	5291	5486	5693	5906	6085	6304	6500
STD=7°C	WET	6249	6509	6763	7037	7317	7571	7864	8133
6000 FT	DRY	5357	5566	5775	5998	6227	6420	6655	6867
STD=3°C	WET	6631	6914	7190	7489	7798	8060	8380	8674
8000 FT	DRY	5637	5862	6087	6326	6574	6782	7037	7317
STD=-1°C	WET	7047	7348	7660	7980	8308	8600	8943	9324
10000 FT	DRY	5943	6185	6428	6687	6963	7267	7546	7854
STD=-5°C	WET	7513	7841	8166	8522	8888	9294	9675	10074
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 80 KIAS, then reverse idle to 60 KIAS, then forward idle to stop (includes air run distances).									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-13	-16
ABOVE standard day	+29	+39

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-94	-155
DOWNHILL	+275	+522

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-35	-50
TAILWIND	+95	+143

50/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

Pratt & Whitney PW-4460/PW-4462 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4316	4476	4641	4791	4963	5113	5262	5443
STD=15°C	WET	5050	5269	5498	5710	5922	6157	6371	6626

2000 FT	DRY	4526	4697	4875	5036	5190	5377	5535	5728
STD=11°C	WET	5343	5585	5824	6053	6282	6531	6760	7035
4000 FT	DRY	4751	4935	5125	5297	5463	5663	5832	6038
STD=7°C	WET	5664	5914	6185	6425	6673	6943	7189	7477
6000 FT	DRY	4993	5190	5394	5580	5757	5973	6154	6375
STD=3°C	WET	6003	6284	6566	6826	7094	7392	7651	7969
8000 FT	DRY	5253	5465	5684	5883	6075	6307	6503	6741
STD=-1°C	WET	6382	6677	6983	7266	7550	7869	8158	8494
10000 FT	DRY	5534	5762	5998	6214	6443	6718	6955	7232
STD=-5°C	WET	6783	7107	7440	7749	8076	8457	8797	9182
NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 60 KIAS, then forward idle to stop (includes air run distances).									

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET
BELOW standard day	-11	-13
ABOVE standard day	+25	+34

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-83	-138
DOWNHILL	+228	+443

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-33	-45
TAILWIND	+83	+128

35/EXT ESTIMATED LANDING DISTANCES (FEET)
USE MAN SPOILERS

Pratt & Whitney PW-4460/PW-4462 Engines

Weight 1000 LB		360	380	400	420	440	460	480	500
S.L.	DRY	4622	4790	4958	5138	5326	5484	5677	5850
STD=15°C	WET	5422	5661	5902	6154	6422	6647	6923	7169
2000 FT	DRY	4856	5035	5215	5406	5605	5773	5979	6165
STD=11°C	WET	5755	6005	6265	6533	6812	7062	7353	7626
4000 FT	DRY	5105	5298	5491	5696	5908	6087	6307	6506
STD=7°C	WET	6102	6386	6659	6950	7251	7511	7825	8121
6000 FT	DRY	5373	5581	5788	6009	6238	6430	6665	6879
STD=3°C	WET	6493	6787	7084	7397	7724	8013	8345	8656
8000 FT	DRY	5662	5885	6109	6347	6594	6802	7056	7285
STD=-1°C	WET	6907	7220	7543	7887	8236	8548	8916	9254
10000 FT	DRY	5975	6216	6458	6716	6992	7296	7575	7882
STD=-5°C	WET	7353	7703	8047	8423	8815	9243	9646	10082

NOTE: Standard day, no wind, zero slope, three engines at maximum reverse thrust to 60 KIAS, then forward idle to stop (includes air run distances).

CORRECTIONS:

Temperature: Valid from STD -20°C to STD +40°C

FEET PER °C	DRY	WET

BELOW standard day	-11	-15
ABOVE standard day	+28	+39

Slope: Valid from -2% downhill to +2% uphill

FEET PER 1% SLOPE	DRY	WET
UPHILL	-93	-151
DOWNHILL	+273	+524

Wind: Valid from -10 knot tailwind to +20 knot headwind

FEET PER KNOT	DRY	WET
HEADWIND	-35	-48
TAILWIND	+94	+140

During Go-Around and Missed Approach

If go-around is required, initial flight director pitch guidance will provide proper speed and pitch targets, but, under certain 5G interference conditions, the flight director cannot be commanded from the Flight Control Panel (FCP) to provide speed or heading guidance, and may not provide altitude capture guidance. If this guidance is not available, manually comply with missed approach procedures, including altitude constraints.

(5) For airplanes identified in paragraph (c)(9) of this AD, do the actions specified in paragraphs (l)(5)(i) and (ii) of this AD.

(i) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 21 to paragraph (l)(5) of this AD. This may be done by inserting a copy of figure 21 to paragraph (l)(5) of this AD into the Operating Procedures Section of the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (i)(5) of this AD.

(ii) Before further flight after incorporating the limitations specified in figure 21 to paragraph (l)(5) of this AD, remove the AFM revision required by paragraph (i)(5) of this AD.

Figure 21 to paragraph (l)(5)—*AFM Operating Procedures Revision for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30*

(Required by AD 2023-12-15)

Radio Altimeter 5G C-Band Interference, Approaches

ILS Approaches

For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, disconnect the autopilot and autothrottles, and place both flight director switches to OFF prior to glideslope intercept.

Note: Possible erroneous radio altimeter indications may affect autopilot, autothrottles, and flight director guidance; manually intervene if necessary.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using LNAV/VNAV with flight directors, autopilot, and autothrottle to published BARO minimums.

(m) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (n) of this AD. Information may be emailed to: *AMOC@faa.gov*.

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(n) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov*.

(o) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13155 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0672; Project Identifier AD–2022–01429–T; Amendment 39–22470; AD 2023–12–12]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–04–05, which applied to all The Boeing Company Model 757 and 767 airplanes. AD 2022–04–05 required revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate specific operating procedures for landing distance calculations, instrument landing system (ILS) approaches, non-precision approaches, speedbrake deployment, and go-around and missed approaches, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–04–05, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band base stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations and operating procedures sections of the existing AFM to incorporate specific operating procedures for landing distance calculations, ILS approaches, non-precision approaches, speedbrake deployment, and go-around and missed approaches, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0672; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room

W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–04–05, Amendment 39–21947 (87 FR 8152, February 14, 2022) (AD 2022–04–05). AD 2022–04–05 applied to all The Boeing Company (Boeing) Model 757 and 767 airplanes. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27742). The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience 5G C-Band interference, and a determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged.

In the NPRM, the FAA proposed to retain the AFM revisions required by AD 2022–04–05 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM revisions with limitations requiring the same procedures for dispatch or release to airports, and approach, landing, and go-around on runways, at all airports for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed that the procedures would not be required at 5G C-Band mitigated airports (5G CMAs) as identified in an FAA Domestic Notice. The FAA proposed this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from five commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for NPRM

Boeing and the Air Line Pilots Association, International (ALPA), supported the NPRM without change.

The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this final rule.

Request To Revise AFM Limitations

Comment summary: Northern Air Cargo, LLC, requested the FAA revise the proposed AD to allow the flight directors, autothrottle, and autopilot to remain engaged during a CAT I ILS approach until an anomaly is detected, at which time the pilot would immediately disconnect the flight directors, autothrottle, and autopilot and execute a go-around. The commenter stated this would reduce flightcrew workload during normal operations and not handicap every ILS approach based on a very remote possibility of 5G interference.

FAA response: The FAA disagrees. Boeing has not submitted any substantiating safety risk assessment data to show that the flight directors, autothrottle, and autopilot can remain safely engaged during a CAT I ILS approach.

Request To Extend Compliance Time

Comment summary: American Airlines expressed concern regarding the compliance time for the proposed actions and requested the FAA revise the AD to provide a minimum of 30 days from the effective date of the AD.

FAA response: The FAA understands the commenter's concern and made every effort to publish this AD as soon as possible. After refraining from operating at their FCC-authorized levels for a year and a half, wireless companies are now able to operate at higher levels, yet still not at the levels authorized. Specifically, wireless companies expect to operate their networks in urban areas with minimal restrictions due to the completion of retrofits. Additionally, the FAA anticipates 19 additional telecommunication companies will begin transmitting in the C-Band after June 30, 2023. Although the FAA continues to work with the companies that intend to transmit in the 3.7–3.98-GHz band near 5G CMAs, the FAA has no agreement with those companies to provide the FAA with tower locations and other information necessary to support the current NOTAM/AMOC process. Therefore, the FAA will not be able to extend the June 30, 2023, date.

Effect of Winglets on Accomplishment of the Proposed Actions

Comment summary: Aviation Partners Boeing stated that installing winglets under supplemental type certificate (STC) ST01518SE and STC ST01920SE on applicable Boeing models does not affect accomplishment of the actions specified in the proposed AD.

FAA response: The FAA agrees. The FAA has not changed this AD in this regard.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available, the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. This interference can cause other airplane systems to not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in

this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–04–05, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 1,108 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained actions from AD 2022–04–05)	1 work-hour × $85 per hour [1] = $85	$0	$85	$94,180
New AFM revisions (new action)	1 work-hour × $85 per hour = $85	0	85	[2] 94,180

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.
[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a Model 757 or 767 transport category airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2022–04–05, Amendment 39–21947 (87 FR 8152, February 14, 2022), and

■ b. Adding the following new AD:

2023–12–12 The Boeing Company: Amendment 39–22470; Docket No. FAA–2023–0672; Project Identifier AD–2022–01429–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–04–05, Amendment 39–21947 (87 FR 8152, February 14, 2022) (AD 2022–04–05).

(c) Applicability

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

(1) Model 757–200, –200PF, –200CB, and –300 series airplanes.

(2) Model 767–200, –300, –300F, –400ER, and –2C series airplanes.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that, during approach, landings, and go-arounds, as a result of this interference, certain airplane systems may not properly function, resulting in increased flightcrew workload while on approach with the flight director, autothrottle, or autopilot engaged. The FAA is issuing this AD to address 5G C-Band interference that could result in increased flightcrew workload and could lead to reduced ability of the flightcrew to maintain safe flight and landing of the airplane.

(f) Compliance

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

(g) Definitions

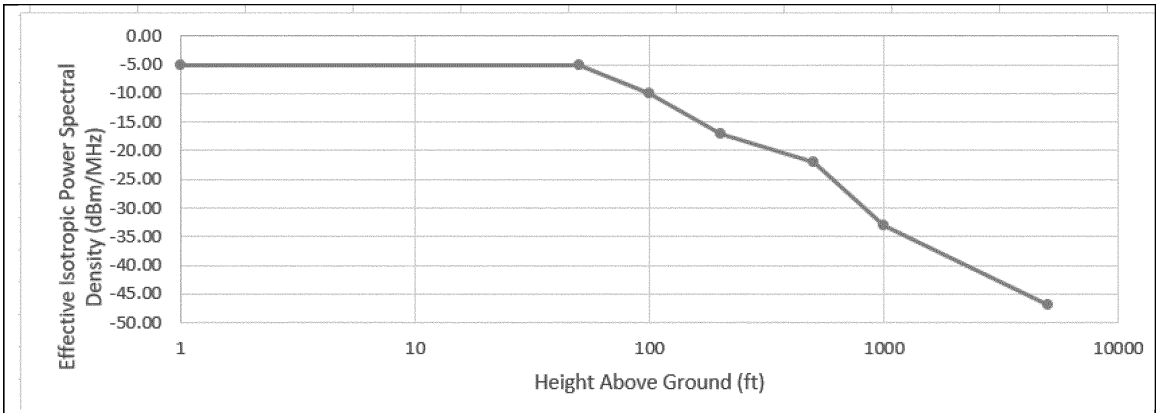
(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

BILLING CODE 4910–13–P

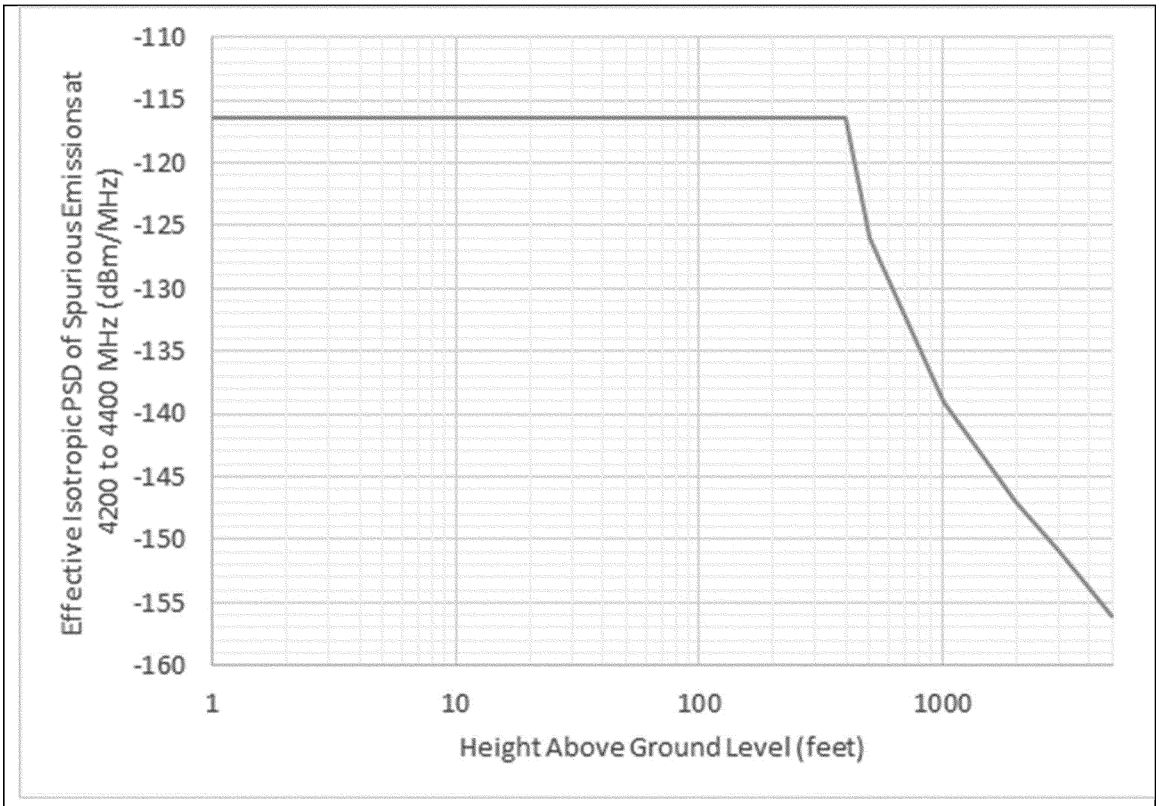
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (3.7–3.98 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(h) Retained Airplane Flight Manual (AFM) Revision

This paragraph restates the requirements of paragraph (g) of AD 2022–04–05.

(1) Within 2 days after February 14, 2022 (the effective date of AD 2022–04–05): Revise the Limitations Section of the existing AFM to include the information specified in figure 3 to paragraph (h)(1) of this AD. This may be done by inserting a copy of figure 3 to paragraph (h)(1) of this AD into the existing AFM.

Figure 3 to paragraph (h)(1)—*AFM Limitations Revisions*

(Required by AD 2022-04-05)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

The following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(2) Within 2 days after February 14, 2022 (the effective date of AD 2022–04–05): Revise the Operating Procedures Section of the existing AFM to include the information specified in figure 4 to paragraph (h)(2) of this AD. This may be done by inserting a copy of figure 4 to paragraph (h)(2) of this AD into the Operating Procedures Section of the existing AFM.

Figure 4 to paragraph (h)(2)—*AFM Operating Procedures Revision*

(Required by AD 2022-04-05)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

Landing Distance Calculations

For airplanes with Yaw Damper Stabilizer Trim module (YSM), adjust the operational (time of arrival) landing distance for manual speedbrake deployment if MAX MANUAL braking is required. When using autobrakes, no correction is needed since the calculations already take into account that manual speedbrake deployment may be needed.

ILS Approaches

For ILS approaches not prohibited by AD 2021-23-12, disconnect the autopilot and autothrottle, and place both flight director switches to OFF prior to glideslope intercept.

Non-Precision Approaches

Non-precision instrument approaches can be conducted using VNAV or V/S with flight directors, autopilot, and autothrottle to published minimums.

During Landing

For airplanes with Yaw Damper Stabilizer Trim module (YSM), if MAX MANUAL braking is required, manually deploy the speedbrake if it does not deploy automatically.

During Go-Around and Missed Approach

If the flight director is ON, cycle to OFF, then ON, as needed.
If the flight director is OFF, turn ON, as needed.

(i) New Requirement: AFM Limitations Revision for Non-Radio Altimeter Tolerant Airplanes

For non-radio altimeter tolerant airplanes, do the actions specified in paragraphs (i)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 5 to paragraph (i) of this AD. This may be done by inserting a copy of figure 5 to paragraph (i) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 5 to paragraph (i) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 5 to paragraph (i)—*AFM Limitations Revision for Non-Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-12)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in the contiguous U.S. airspace.

Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(j) New Requirement: AFM Limitations Revision for Radio Altimeter Tolerant Airplanes

For radio altimeter tolerant airplanes, do the actions specified in paragraphs (j)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 6 to paragraph (j) of this AD. This may be done by inserting a copy of figure 6 to paragraph (j) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 6 to paragraph (j) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 6 to paragraph (j)—*AFM Limitations Revision for Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-12)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

Due to the presence of 5G C-Band wireless broadband interference, the following limitations are required for dispatch or release to airports, and approach, landing, and go-around on runways, in the contiguous U.S. airspace unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

Approach, Landing, and Go-Around

Operators must use the Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around procedure contained in the Operating Procedures Section of this AFM.

(k) New Requirement: AFM Operating Procedures Revision

For all airplanes, do the actions specified in paragraphs (k)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Operating Procedures Section of the existing AFM to include the information specified in figure 7 to paragraph (k) of this AD. This may be done by inserting a copy of figure 7 to paragraph (k) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(2) of this AD.

(2) Before further flight after incorporating the operating procedures specified in figure 7 to paragraph (k) of this AD, remove the AFM revision required by paragraph (h)(2) of this AD.

Figure 7 to paragraph (k)—*AFM Operating Procedures Revision*

(Required by AD 2023-12-12)

Radio Altimeter 5G C-Band Interference, Approach, Landing, and Go-Around

Landing Distance Calculations
For airplanes with Yaw Damper Stabilizer Trim module (YSM), adjust the operational (time of arrival) landing distance for manual speedbrake deployment if MAX MANUAL braking is required. When using autobrakes, no correction is needed since the calculations already take into account that manual speedbrake deployment may be needed.

ILS Approaches
For ILS approaches other than SA CAT I, SA CAT II, CAT II, and CAT III, disconnect the autopilot and autothrottle, and place both flight director switches to OFF prior to glideslope intercept.

Non-Precision Approaches
Non-precision instrument approaches can be conducted using VNAV or V/S with flight directors, autopilot, and autothrottle to published minimums.

During Landing
For airplanes with Yaw Damper Stabilizer Trim module (YSM), if MAX MANUAL braking is required, manually deploy the speedbrake if it does not deploy automatically.

During Go-Around and Missed Approach
If the flight director is ON, cycle to OFF, then ON, as needed.
If the flight director is OFF, turn ON, as needed.

(l) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (m) of this AD. Information may be emailed to: *AMOC@faa.gov*.

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021) providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(m) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov*.

(n) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13153 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0670; Project Identifier AD–2022–01427–T; Amendment 39–22463; AD 2023–12–05]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–03–05, which applied to all The Boeing Company Model 747–8F and 747–8 series airplanes and Model 777 airplanes. AD 2022–03–05 required

revising the limitations section of the existing airplane flight manual (AFM) to incorporate limitations prohibiting dispatching or releasing to airports, and approaches or landings on runways, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–03–05, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations section of the existing AFM to incorporate limitations prohibiting dispatching or releasing to airports, and approaches or landings on runways, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0670; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–03–05, Amendment 39–21922 (87 FR 4150, January 27, 2022) (AD 2022–03–05). AD 2022–03–05 applied to all The Boeing Company (Boeing) Model 747–8F and 747–8 series airplanes and Model 777 airplanes equipped with a radio altimeter. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27799). The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band, and a determination that this interference may affect other airplane systems using radio altimeter data, including the pitch control laws, including those that provide tail strike protection, regardless of the approach type or weather.

In the NPRM, the FAA proposed to retain the AFM revisions required by AD 2022–03–05 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM revisions with limitations prohibiting dispatching or releasing to airports, and approaches or landings on runways, in the contiguous U.S. airspace for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed to allow the prohibited operations at 5G C-Band mitigated airports (5G CMAs) as identified in an FAA Domestic Notice. The FAA proposed this AD to address missing or erroneous radio altimeter data, which, in combination with multiple flight deck effects, could lead to loss of continued safe flight and landing.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from five commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for NPRM

Boeing and the Air Line Pilots Association, International (ALPA), supported the NPRM without change.

The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this AD.

Request for Additional AMOC Relief

Comment summary: All Nippon Airways (All Nippon) requested the FAA revise the proposed AD to allow AMOCs approved for AD 2023–10–02, Amendment 39–22438 (88 FR 34065, May 26, 2023) (AD 2023–10–02) as AMOCs for this AD.

FAA response: The FAA does not agree. An airplane that is a radio altimeter tolerant airplane for purposes of AD 2023–10–02 will also be a radio altimeter tolerant airplane for purposes of this AD. However, because the hazards mitigated by AD 2023–10–02 are separate and distinct from the hazards mitigated by this AD, the FAA has determined that AMOCs approved for compliance with AD 2023–10–02 may not always be appropriate to address the unsafe condition specified in this AD. For this reason, operators with an approved AMOC for AD 2023–10–02 will need to request approval of it as an AMOC for compliance with this AD.

Request To Extend Compliance Time

Comment summary: American Airlines expressed concern regarding the compliance time for the proposed actions and requested the FAA revise the AD to provide a minimum of 30 days from the effective date of the AD.

FAA response: The FAA understands the commenter's concern and made every effort to publish this AD as soon as possible. After refraining from operating at their FCC-authorized levels for a year and a half, wireless companies are now able to operate at higher levels, yet still not at the levels authorized. Specifically, wireless companies expect to operate their networks in urban areas with minimal restrictions due to the completion of retrofits. Additionally, the FAA anticipates 19 additional telecommunication companies will begin transmitting in the C-Band after June 30, 2023. Although the FAA continues to work with the companies that intend to transmit in the 3.7–3.98–GHz band near 5G CMAs, the FAA has no agreement with those companies to provide the FAA with tower locations and other information necessary to support the current NOTAM/AMOC process. Therefore, the FAA will not be able to extend the June 30, 2023, date.

Request for List of Compliant Radio Altimeters

Comment summary: All Nippon requested the FAA clarify how to determine whether a radio altimeter (for example, LRA–900 P/N 822–0334–004) corresponds to a radio altimeter tolerant airplane or non-radio altimeter tolerant airplane. An individual requested the FAA revise the AD to add the list of the part numbers for compliant radio altimeters (*e.g.,* Collins LRA–900+ and THALES ERT–530R).

FAA response: The FAA does not maintain a list of tolerant radio altimeters because the determination of a radio altimeter tolerant airplane must consider the installation details, which vary from airplane to airplane. The FAA has developed a policy statement that provides a means of compliance with this AD for all transport and commuter category airplanes and rotorcraft equipped with a radio altimeter. The FAA requested public comments on this proposed policy on May 8, 2023 (88 FR

29554). The proposed policy describes an acceptable framework and method for demonstrating that an airplane or rotorcraft is radio altimeter tolerant. The policy discusses compliance methods that should be applied to programs for type certificates, amended type certificates, STCs, and amended STCs. The proposed policy addresses how to assess 5G C-Band tolerance. Although most data submitted to demonstrate compliance in accordance with the FAA policy statement will be proposed by design approval holders, any person/entity can propose a method to demonstrate compliance.

Request To Clarify Restrictions at Non-CMAs

Comment summary: All Nippon and an individual requested the FAA clarify why the proposed AD would prohibit radio altimeter tolerant airplanes from landing at non-5G CMAs after July 2023. All Nippon stated that there are many non-5G CMAs that are unaffected by 5G C-Band interference and operations should not be restricted at such airports.

FAA response: The FAA disagrees. Boeing has not submitted any substantiating data that demonstrates the hazards addressed by this AD are adequately mitigated for radio altimeter tolerant airplanes at non-5G CMAs.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available, the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. This interference may affect other airplane systems using radio altimeter data, including the pitch control laws, including those that provide tail strike protection, regardless of the approach type or weather, which, in combination with multiple flight deck effects, could lead to loss of continued safe flight and landing. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–03–05, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 347 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained action from AD 2022–03–05) ..	1 work-hour × $85 per hour[1] = $85	$0	$85	$29,495
New AFM revision (new required action)	1 work-hour × $85 per hour = $85 ..	0	85	[2] 29,495

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.

[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a Model 747–8F, 747–8, or 777 transport category airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2022–03–05, Amendment 39–21922 (87 FR 4150, January 27, 2022), and

■ b. Adding the following new AD:

2023–12–05 The Boeing Company: Amendment 39–22463; Docket No. FAA–2023–0670; Project Identifier AD–2022–01427–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–03–05, Amendment 39–21922 (87 FR 4150, January 27, 2022) (AD 2022–03–05).

(c) Applicability

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

(1) Model 747–8F and 747–8 series airplanes.

(2) Model 777–200, –200LR, –300, –300ER, and 777F series airplanes.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that this interference may affect other airplane systems using radio altimeter data, including the pitch control laws, including those that provide tail strike protection, regardless of the approach type or weather. The FAA is issuing this AD to address missing or erroneous radio altimeter data, which, in combination with multiple flight deck effects, could lead to loss of continued safe flight and landing.

(f) Compliance

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

(g) Definitions

(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

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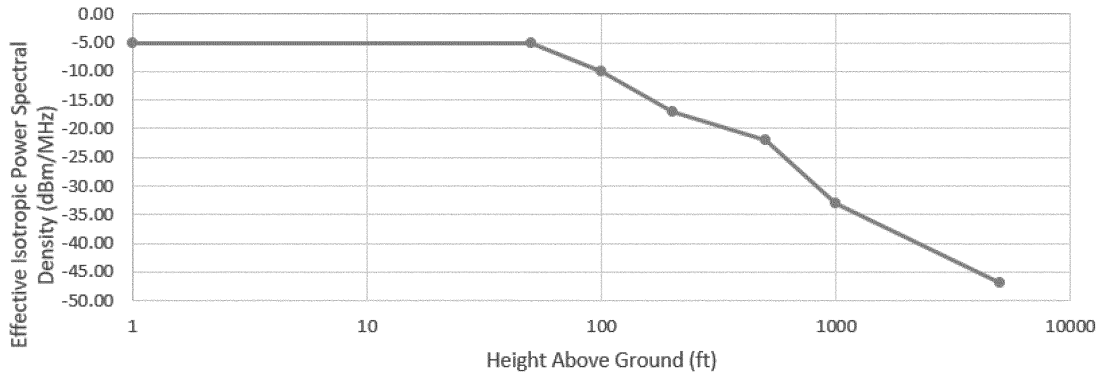
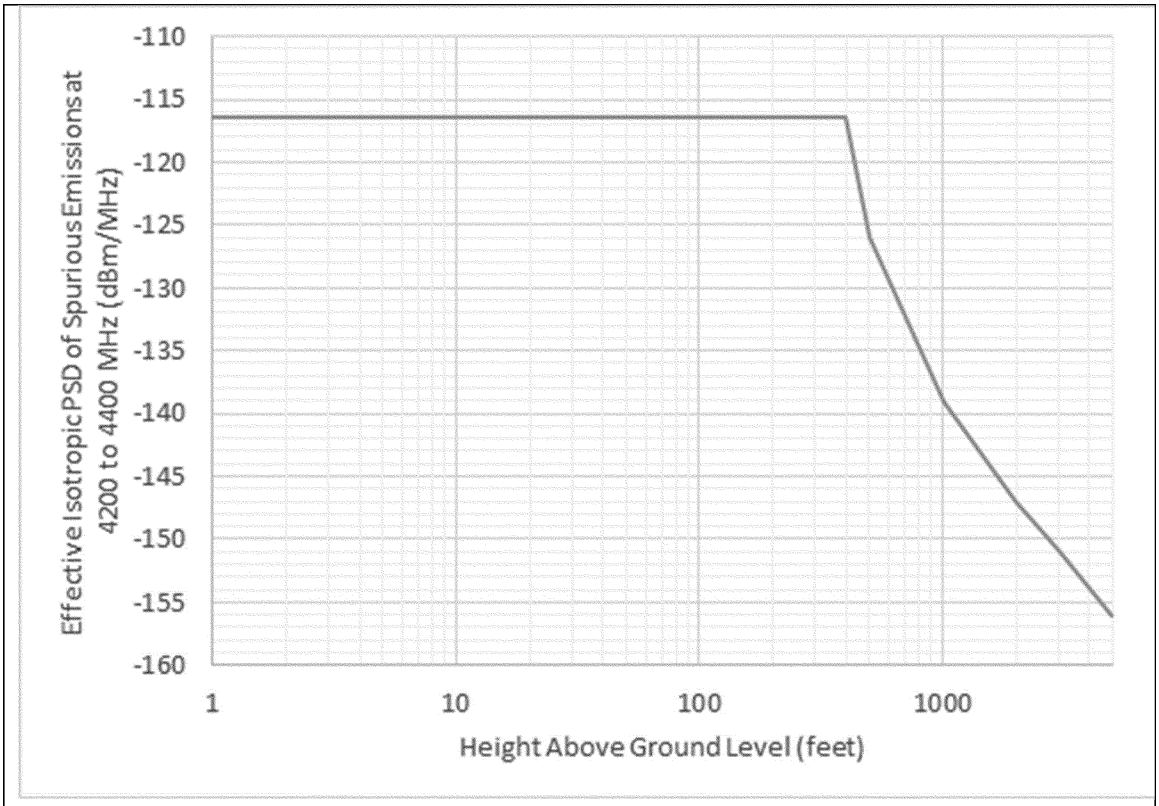
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (3.7–3.98 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(h) Retained Airplane Flight Manual (AFM) Revision

This paragraph restates the requirements of paragraph (g) of AD 2022–03–05. Within 2 days after January 27, 2022 (the effective date of AD 2022–03–05): Revise the Limitations Section of the existing AFM to include the information specified in figure 3 to paragraph (h) of this AD. This may be done by inserting a copy of figure 3 to paragraph (h) of this AD into the existing AFM.

Figure 3 to paragraph (h)—*AFM Limitations Revisions*

(Required by AD 2022-03-05)

Approaches and Landings in the Presence of Radio Altimeter 5G C-Band Interference

Dispatching or releasing to airports, and approaches or landings on runways, in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM is prohibited (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

(i) New Requirement: AFM Revision for Non-Radio Altimeter Tolerant Airplanes

For non-radio altimeter tolerant airplanes, do the actions specified in paragraphs (i)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 4 to paragraph (i) of this AD. This may be done by inserting a copy of figure 4 to paragraph (i) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 4 to paragraph (i) of this AD, remove the AFM revision required by paragraph (h) of this AD.

Figure 4 to paragraph (i)—*AFM Revision for Non-Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-05)

Approaches and Landings in the Presence of Radio Altimeter 5G C-Band Interference

Due to the presence of 5G C-Band wireless broadband interference, dispatching or releasing to airports, and approaches or landings on runways, in the contiguous U.S. airspace is prohibited.

(j) New Requirement: AFM Revision for Radio Altimeter Tolerant Airplanes

For radio altimeter tolerant airplanes, do the actions specified in paragraphs (j)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 5 to paragraph (j) of this AD. This may be done by inserting a copy of figure 5 to paragraph (j) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 5 to paragraph (j) of this AD, remove the AFM revision required by paragraph (h) of this AD.

Figure 5 to paragraph (j)—*AFM Revision for Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-05)

Approaches and Landings in the Presence of Radio Altimeter 5G C-Band Interference

Due to the presence of 5G C-Band wireless broadband interference, dispatching or releasing to airports, and approaches or landings on runways, in the contiguous U.S. airspace is prohibited unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *AMOC@faa.gov*.

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021), providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(l) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount

Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov*.

(m) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13156 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–0163; Project Identifier AD–2022–01380–T; Amendment 39–22468; AD 2023–12–10]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is superseding Airworthiness Directive (AD) 2022–02–16, which applied to all The Boeing Company Model 787–8, 787–9, and 787–10 airplanes. AD 2022–02–16 required revising the limitations and operating procedures sections of the existing airplane flight manual (AFM) to incorporate limitations prohibiting certain landings and the use of certain minimum equipment list (MEL) items, and to incorporate operating procedures for calculating landing distances, when in the presence of interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band) as identified by Notices to Air Missions (NOTAMs). Since the FAA issued AD 2022–02–16, the FAA determined that additional limitations are needed due to the continued deployment of new 5G C-Band stations whose signals are expected to cover most of the contiguous United States at transmission frequencies between 3.7–3.98 GHz. This AD requires revising the limitations section of the existing AFM to incorporate limitations prohibiting certain landings and the use of certain MEL items, and retains the operating procedures from AD 2022–02–16 for calculating landing distances, due to the presence of 5G C-Band interference. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective June 21, 2023.

ADDRESSES: *AD Docket:* You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–0163; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to supersede AD 2022–02–16, Amendment 39–21913 (87 FR 2692, January 19, 2022) (AD 2022–02–16). AD 2022–02–16 applied to all The Boeing Company (Boeing) Model 787–8, 787–9, and 787–10 airplanes. The NPRM published in the **Federal Register** on May 3, 2023 (88 FR 27716).

The NPRM was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience 5G C-Band interference, and a determination that, during landings, as a result of this interference, certain airplane systems may not properly transition from AIR to GROUND mode when landing on certain runways, resulting in a longer landing distance than normal due to the effect on thrust reverser deployment, speedbrake deployment, and increased idle thrust.

In the NPRM, the FAA proposed to retain the AFM revisions required by AD 2022–02–16 until June 30, 2023. On or before June 30, 2023, the FAA proposed to require replacing those AFM revisions with limitations prohibiting the same landings and use of certain MEL items at all airports for non-radio altimeter tolerant airplanes. For radio altimeter tolerant airplanes, the FAA proposed to allow the prohibited operations at 5G C-Band mitigated airports (5G CMAs) as identified in an FAA Domestic Notice. Lastly, the FAA proposed to retain the operating procedures from AD 2022–02–16 for calculating landing distances. The FAA proposed this AD to address degraded deceleration performance and longer landing distance, which could lead to a runway excursion.

Discussion of Final Airworthiness Directive

Comments

The FAA provided the public with an opportunity to comment on the proposed AD and received comments from five commenters. The following presents the comments received on the NPRM and the FAA's response to each comment.

Support for NPRM

Boeing and the Air Line Pilots Association, International (ALPA), supported the NPRM without change.

The supportive comments from ALPA included additional viewpoints without a suggestion specific to the AD or a request the FAA can act on. These comments are outside the scope of this final rule.

Request To Revise AFM Limitations

Comment summary: All Nippon Airways Co., Ltd. (All Nippon), requested the FAA revise paragraph (h)(2) of the proposed AD to refer to the new landing distances instead of HYD PRESS L+R failure distances, based on the new landing distance tables established by Boeing.

FAA response: The FAA has not received or reviewed a new landing distance table as described by the commenter. Anyone may propose alternative data to address the unsafe condition under the AMOC procedures referenced in paragraph (k) of this AD.

Request for Additional AMOC Relief

Comment summary: All Nippon requested that the FAA revise the proposed AD to allow AMOCs approved for AD 2023–10–02, Amendment 39–22438 (88 FR 34065, May 26, 2023) (AD 2023–10–02) as AMOCs for the new AFM revisions for radio altimeter tolerant airplanes specified in paragraph (j) of the proposed AD.

FAA response: The FAA does not agree. An airplane that is a radio altimeter tolerant airplane for purposes of AD 2023–10–02 will also be a radio altimeter tolerant airplane for purposes of this AD. However, because the hazards mitigated by AD 2023–10–02 are separate and distinct from the hazards mitigated by this AD, the FAA has determined that AMOCs approved for compliance with AD 2023–10–02 may not always be appropriate to address the unsafe condition specified in this AD. For this reason, operators with an approved AMOC for AD 2023–10–02 will need to request approval of

it as an AMOC for compliance with this AD.

Request To Extend Compliance Time

Comment summary: All Nippon and American Airlines expressed concern regarding the compliance time for the proposed actions and requested the FAA revise the AD to provide a minimum of 3 to 4 weeks from the effective date of the AD.

FAA response: The FAA understands the commenters' concerns and made every effort to publish this AD as soon as possible. After refraining from operating at their FCC-authorized levels for a year and a half, wireless companies are now able to operate at higher levels, yet still not at the levels authorized. Specifically, wireless companies expect to operate their networks in urban areas with minimal restrictions due to the completion of retrofits. Additionally, the FAA anticipates 19 additional telecommunication companies will begin transmitting in the C-Band after June 30, 2023. Although the FAA continues to work with the companies that intend to transmit in the 3.7–3.98–GHz band near 5G CMAs, the FAA has no agreement with those companies to provide the FAA with tower locations and other information necessary to support the current NOTAM/AMOC process. Therefore, the FAA will not be able to extend the compliance date beyond June 30, 2023.

Request for Clarification of Domestic Notices and 5G CMA List

Comment summary: Virgin Atlantic requested clarification on how to access Domestic Notices, as well as the mechanism to know when an airport is no longer on the 5G CMA list.

FAA response: The Domestic Notice referenced in this AD can be found at *https://www.faa.gov/air_traffic/publications/domesticnotices/domestic_gen.html.* The FAA considers this 5G CMA list permanent based upon the voluntary agreements in place with the telecommunication companies. In the event an airport from the 5G CMA list needs to be removed, the FAA will issue a NOTAM until a more permanent solution is put in place.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. This AD is adopted as proposed in the NPRM.

Interim Action

The FAA considers this AD to be an interim action. Once the Technical Standard Order (TSO) standard for radio altimeters is established, which will follow the existing international technical consensus on the establishment of the minimum operational performance standards (MOPS), the FAA anticipates that the MOPS will be incorporated into the TSO. Once a new radio altimeter TSO is developed, approved, and available, the FAA might consider additional rulemaking.

Effective Date

Section 553(d) of the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) requires publication of a rule not less than 30 days before its effective date. However, section 553(d) authorizes agencies to make rules effective in less than 30 days when the agency finds ''good cause.'' Radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 5G C-Band. During landings, as a result of this interference, certain airplane systems may not properly transition from AIR to GROUND mode when landing on certain runways, resulting in a longer landing distance than normal due to the effect on thrust reverser deployment, speedbrake deployment, and increased idle thrust, which could lead to a runway excursion. To address this unsafe condition, the actions required by this AD must be accomplished before the compliance date of June 30, 2023. The FAA based this date on the changes to the 5G C-Band environment beginning on July 1, 2023. These changes include increased wireless broadband deployment and transmissions closer to the parameters authorized by the FCC. The earlier operators learn of the requirements in this AD, the earlier they can take action to ensure compliance. An effective date less than 30 days would ensure the AD is codified earlier, thereby increasing awareness of its requirements. Therefore, the FAA finds that good cause exists pursuant to 5 U.S.C. 553(d) for making this amendment immediately effective.

Costs of Compliance

The cost information below describes the costs to change the AFM. Although this AD largely maintains the AFM limitations currently required by AD 2022–02–16, the FAA acknowledges that this AD may also impose costs on some aircraft operators from having to change their conduct to comply with the amended AFM. However, the FAA lacks the data necessary to quantify the costs associated with aircraft operators changing their conduct.

The FAA estimates that this AD affects 145 airplanes of U.S. registry. The FAA estimates the following costs to comply with this AD:

ESTIMATED COSTS FOR REQUIRED ACTIONS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
AFM revision (retained action from AD 2022–02–16) ..	1 work-hour × $85 [1] per hour = $85	$0	$85	$12,325
New AFM revision (new required action)	1 work-hour × $85 per hour = $85 ..	0	85	[2] 12,325

[1] The labor rate of $85 per hour is the average wage rate for an aviation mechanic.

[2] The estimated cost for this revision would not constitute a significant economic impact (even for small entities) because $85 is a minimal cost compared to the regular costs of maintaining and operating a Model 787–8, 787–9, or 787–10 transport category airplane.

Authority for This Rulemaking

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

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

develop on products identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by:

■ a. Removing Airworthiness Directive (AD) 2022–02–16, Amendment 39–21913 (87 FR 2692, January 19, 2022), and

■ b. Adding the following new AD:

2023–12–10 The Boeing Company: Amendment 39–22468; Docket No. FAA–2023–0163; Project Identifier AD–2022–01380–T.

(a) Effective Date

This airworthiness directive (AD) is effective June 21, 2023.

(b) Affected ADs

This AD replaces AD 2022–02–16, Amendment 39–21913 (87 FR 2692, January 19, 2022) (AD 2022–02–16).

(c) Applicability

This AD applies to all The Boeing Company Model 787–8, 787–9, and 787–10 airplanes, certificated in any category.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by a determination that radio altimeters cannot be relied upon to perform their intended function if they experience interference from wireless broadband operations in the 3.7–3.98 GHz frequency band (5G C-Band), and a determination that, during landings, as a result of this interference, certain airplane systems may not properly transition from AIR to GROUND mode when landing on certain runways, resulting in a longer landing distance than normal due to the effect on thrust reverser deployment, speedbrake deployment, and increased idle thrust. The FAA is issuing this AD to address degraded deceleration performance and longer landing distance, which could lead to a runway excursion.

(f) Compliance

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

(g) Definitions

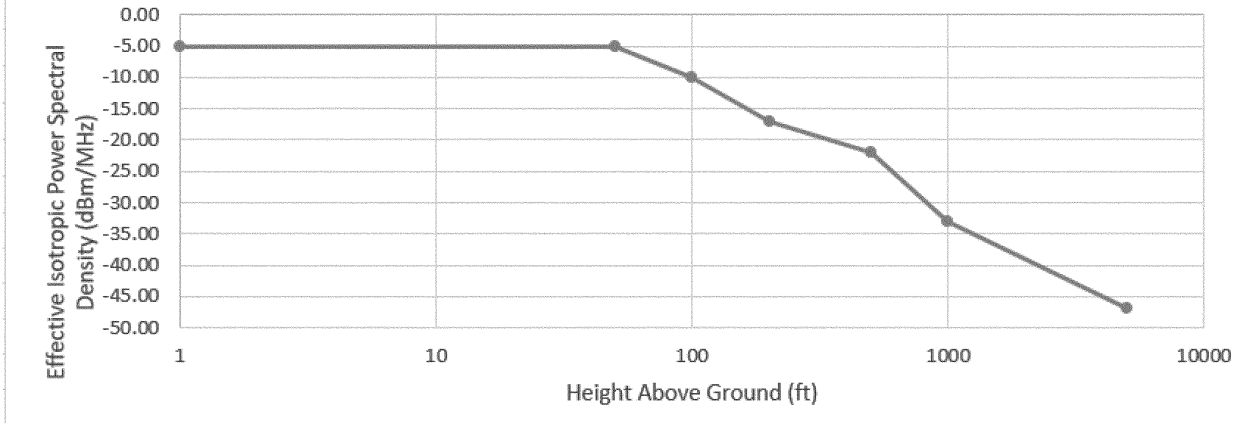
(1) For purposes of this AD, a ''5G C-Band mitigated airport'' (5G CMA) is an airport at which the telecommunications companies have agreed to voluntarily limit their 5G deployment at the request of the FAA, as identified by an FAA Domestic Notice.

(2) For purposes of this AD, a ''radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, demonstrates the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD, using a method approved by the FAA.

(i) Tolerance to radio altimeter interference, for the fundamental emissions (3.7–3.98 GHz), at or above the power spectral density (PSD) curve threshold specified in figure 1 to paragraph (g)(2)(i) of this AD.

BILLING CODE 4910–13–P

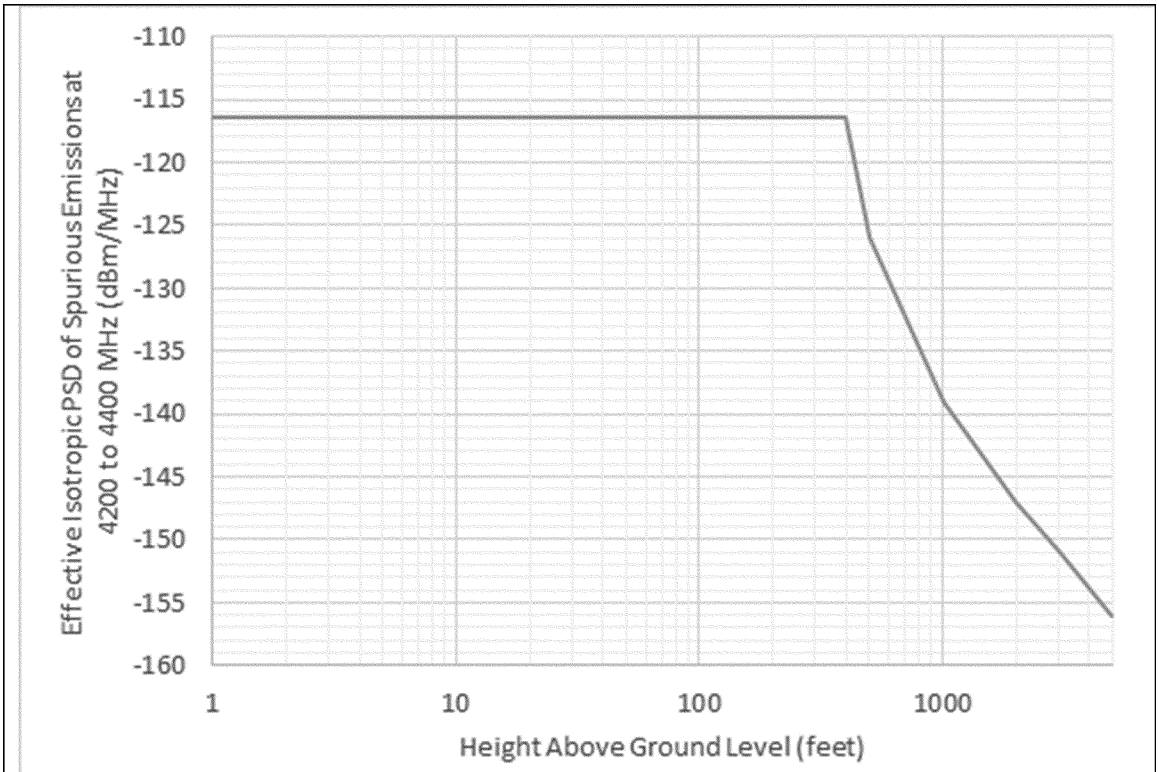
Figure 1 to paragraph (g)(2)(i)—*Fundamental Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Height above ground (ft)	Effective Isotropic PSD (dBm/MHz)
Aircraft on the ground	-5
50	-5
100	-10
200	-17
500	-22
1000	-33
5000	-47

(ii) Tolerance to radio altimeter interference, for the spurious emissions (4.2–4.4 GHz), at or above the PSD curve threshold specified in figure 2 to paragraph (g)(2)(ii) of this AD.

Figure 2 to paragraph (g)(2)(ii)—*Spurious Effective Isotropic PSD at Outside Interface of Aircraft Antenna*



Aircraft Altitude (ft AGL)	Effective Isotropic PSD (dBm/MHz)
1	-116.50
400	-116.50
500	-126.00
1000	-139.00
2000	-147.00
3000	-151.00
5000	-156.00

(3) For purposes of this AD, a ''non-radio altimeter tolerant airplane'' is one for which the radio altimeter, as installed, does not demonstrate the tolerances specified in paragraphs (g)(2)(i) and (ii) of this AD.

(4) Runway condition codes are defined in figure 3 to paragraph (g)(4) of this AD.

Figure 3 to paragraph (g)(4)—*Runway Condition Codes*

Runway Condition Code	Runway Condition Description	Reported Braking Action
6	Dry	Dry
5	Wet (smooth, grooved, or porous friction course (PFC)) or frost 3 mm (0.12 inch) or less of: water, slush, dry snow, or wet snow	Good
4	Compacted snow at or below -15°C (5°F) outside air temperature (OAT)	Good to medium
3	Wet (slippery), dry snow, or wet snow (any depth) over compacted snow Greater than 3 mm (0.12 inch) of: dry snow or wet snow Compacted snow at OAT warmer than -15°C (5°F)	Medium
2	Greater than 3 mm (0.12 inch) of: water or slush	Medium to poor
1	Ice	Poor
0	Wet ice, water on top of compacted snow, dry snow, or wet snow over ice	Nil

(h) Retained Airplane Flight Manual (AFM) Revision

This paragraph restates the requirements of paragraph (h) of AD 2022–02–16.

(1) Within 2 days after January 19, 2022 (the effective date of AD 2022–02–16): Revise the Limitations Section of the existing AFM to include the information specified in figure 4 to paragraph (h)(1) of this AD. This may be done by inserting a copy of figure 4 to paragraph (h)(1) of this AD into the existing AFM.

Figure 4 to paragraph (h)(1)—*AFM Limitations Revisions*

(Required by AD 2022-02-16)

Radio Altimeter 5G C-Band Interference, Landing Distance

The following limitations are required if dispatching or releasing to or landing on runways in U.S. airspace in the presence of 5G C-Band wireless broadband interference as identified by NOTAM (NOTAMs will be issued to state the specific airports or approaches where the radio altimeter is unreliable due to the presence of 5G C-Band wireless broadband interference).

Minimum Equipment List (MEL)

Dispatch or release with any of the following MEL items is prohibited:

- 32-42-02 – Antiskid Control Systems
- 32-45-01 – Wheel Brake Systems
- 32-45-01-01 – Wheel Brake Systems, Electric Brake Actuator Systems

Landing Operations on Runways with Condition Code 1 or 0

Dispatch or releasing to or landing on runways with a runway condition code of 1 or 0 is prohibited.

Landing Distance Calculations for Runway Condition Codes 6 through 2

Operators must follow the 5G C-Band Interference Landing Distance Procedure contained in the Operating Procedures Section of this AFM.

(2) Within 2 days after January 19, 2022 (the effective date of AD 2022–02–16): Revise the Operating Procedures Section of the existing AFM to include the information specified in figure 5 to paragraph (h)(2) of this AD. This may be done by inserting a copy of figure 5 to paragraph (h)(2) of this AD into the existing AFM.

Figure 5 to paragraph (h)(2)—AFM Operating Procedures Revision

(Required by AD 2022-02-16)

5G C-Band Interference Landing Distance

When dispatching or releasing to or landing on runways with a runway condition code of 6 through 2:

- Dispatch or Release:
  - No additional landing distance calculations are required for runway condition codes 6 and 5.
  - For runway condition codes 4 through 2, use Table 1 through 6, as applicable, to determine the unfactored landing distance, applying all adjustments. Multiply the resulting unfactored landing distance by 1.15 to obtain the minimum required landing distance.

Table 1:

787-10 / TRENT 1000

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	440,000 LB Landing Weight	Per 10,000 LB Above / Below 440,000 LB	Per 1,000 ft	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5640	110 / -90	160	-240 / 790	90 / -80	150 / -150	230	0	0
5	7680	170 / -150	330	-430 / 1570	250 / -210	280 / -270	390	0	0
4	8450	170 / -150	340	-450 / 1610	330 / -270	280 / -280	390	0	0
3	9180	170 / -150	340	-470 / 1680	440 / -340	290 / -280	390	0	0
2	12180	280 / -250	560	-770 / 2850	970 / -690	480 / -460	540	0	0

Table 2:

787-10 / GEnx

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	440,000 LB Landing Weight	Per 10,000 LB Above / Below 440,000 LB	Per 1,000 ft	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5670	110 / -90	170	-240 / 800	90 / -80	150 / -150	230	0	0
5	7760	160 / -150	350	-440 / 1590	260 / -220	280 / -280	400	0	0
4	8550	160 / -150	350	-450 / 1640	340 / -280	290 / -280	400	0	0
3	9300	170 / -150	360	-480 / 1710	450 / -350	290 / -290	400	0	0
2	12400	280 / -250	610	-790 / 2930	1010 / -710	480 / -470	540	0	0

Table 3:

787-9 / TRENT 1000

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	420,000 LB Landing Weight	Per 10,000 LB Above / Below 420,000 LB	Per 1,000 ft	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5470	100 / -90	160	-240 / 780	80 / -80	150 / -150	230	0	0
5	7500	160 / -150	330	-430 / 1550	250 / -210	280 / -270	390	0	0
4	8280	160 / -150	330	-440 / 1600	330 / -270	280 / -270	390	0	0
3	9010	170 / -160	340	-470 / 1670	430 / -340	290 / -280	390	0	0
2	11740	270 / -260	540	-750 / 2780	910 / -650	460 / -440	530	0	0

Table 4:

787-9 / GEnx

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	420,000 LB Landing Weight	Per 10,000 LB Above / Below 420,000 LB	Per 1,000 ft	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5500	100 / -90	170	-240 / 790	90 / -80	150 / -150	230	0	0
5	7580	160 / -150	340	-430 / 1580	250 / -210	280 / -280	390	0	0
4	8380	160 / -150	350	-450 / 1630	340 / -280	280 / -280	390	0	0
3	9130	170 / -150	360	-480 / 1700	450 / -350	290 / -280	390	0	0
2	11960	270 / -260	590	-770 / 2860	940 / -670	460 / -460	530	0	0

Table 5:

787-8 / TRENT 1000

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	380,000 LB Landing Weight	Per 10,000 LB Above / Below 380,000 LB	Per 1,000 ft	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5050	110 / -80	150	-230 / 750	80 / -70	130 / -130	220	0	0
5	6990	180 / -140	310	-410 / 1510	230 / -190	260 / -250	370	0	0
4	7410	140 / -130	250	-370 / 1270	280 / -230	210 / -210	310	0	0
3	8370	170 / -150	290	-440 / 1500	410 / -320	250 / -250	340	0	0
2	10800	290 / -240	520	-720 / 2680	820 / -590	430 / -420	510	0	0

Table 6:

787-8 / GEnx

	Landing Distances and Adjustments (Feet)								
	Reference Distance	Weight Adjustment	Altitude Adjustment	Wind Adjustment per 10 Knots	Slope Adjustment per 1%	Temperature Adjustment per 10°C	Approach Speed Adjustment	Reverse Thrust Adjustment	
Runway Condition Code	380,000 LB Landing Weight	Per 10,000 LB Above / Below 380,000 LB	Per 1,000 ft	Head / Tail Wind	Down / Up Hill	Above / Below ISA	per 5 KTS above VREF	One Reverser	No Reverser
6	5100	110 / -80	160	-230 / 760	80 / -70	130 / -140	220	0	0
5	7100	180 / -140	330	-420 / 1550	240 / -200	260 / -250	380	0	0
4	7530	140 / -120	260	-380 / 1290	290 / -240	210 / -220	310	0	0
3	8530	160 / -140	300	-450 / 1530	430 / -330	250 / -250	340	0	0
2	11090	290 / -240	560	-740 / 2790	880 / -620	430 / -430	510	0	0

Reference distance is based on Max Manual Braking, sea level, standard day, no wind or slope, and no reverse thrust.
Reference distance includes a distance from threshold to touchdown associated with flare time of 7 seconds.
Distances are based on HYD PRESS L+R failure distances which conservatively approximate the effects of 5G interference.
Actual (unfactored) distances are shown.
Note: per procedure, Max Manual Braking is not required for normal operations and is to be used only in the event that significant 5G interference effects occur.

- En route:
  - Plan to use Flaps 30 and V_{REF30} (with appropriate wind additives) for landing.
  - For runway condition codes 6 to 2, compute time of arrival (en route) landing distance using Table 1 through 6, as applicable, applying all adjustments. Multiply the resulting unfactored landing distance by 1.15 to obtain the minimum required landing distance at the destination. This approximates a minimum required landing distance resulting from 5G C-Band interference.
  - Determine desired AUTOBRAKE setting by using the normal configuration landing distance information from an approved source. Maximum manual braking may not be required.

- During approach and landing:
  - Monitor radio altimeter for anomalies.
  - Normal use of autothrottles is allowed. Monitor performance of autopilot and autothrottle. If the autopilot or autothrottle is not performing as expected, disconnect both the autopilot and autothrottle and apply manual inputs to ensure proper control of flight path.
  - If the autothrottle does not reduce the thrust to IDLE at 25 feet, manually reduce the thrust to idle, hold the thrust levers in the idle position and disconnect the autothrottle to prevent autothrottle from advancing the thrust levers after touchdown.
    Caution: If the autothrottle advances the thrust levers after landing, the speedbrakes will stow and the autobrake will disarm. It will not be possible to raise the reverse thrust levers to deploy the thrust reversers until the thrust levers are at idle.
  - Manual deployment of the speedbrakes may be required.
  - If the thrust reversers do not deploy, immediately ensure the speedbrakes are extended, apply manual braking and modulate as required for the existing runway conditions.
    Note: In some conditions, maximum manual braking may be required throughout the entire landing roll.

(i) New Requirement: AFM Revision for Non-Radio Altimeter Tolerant Airplanes

For non-radio altimeter tolerant airplanes, do the actions specified in paragraphs (i)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 6 to paragraph (i) of this AD. This may be done by inserting a copy of figure 6 to paragraph (i) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 6 to paragraph (i) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 6 to paragraph (i)—*AFM Revision for Non-Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-10)

Radio Altimeter 5G C-Band Interference, Landing Distance

Due to the presence of 5G C-Band wireless broadband interference, when dispatching or releasing to or landing on runways in the contiguous U.S. airspace, the following limitations are required.

Minimum Equipment List (MEL)

Dispatch or release with any of the following MEL items is prohibited:

- 32-42-02 – Antiskid Control Systems
- 32-45-01 – Wheel Brake Systems
- 32-45-01-01 – Wheel Brake Systems, Electric Brake Actuator Systems

Landing Operations on Runways with Condition Code 1 or 0

Dispatch or releasing to or landing on runways with a runway condition code of 1 or 0 is prohibited.

Landing Distance Calculations for Runway Condition Codes 6 through 2

Operators must follow the 5G C-Band Interference Landing Distance Procedure contained in the Operating Procedures Section of this AFM.

(j) New Requirement: AFM Revision for Radio Altimeter Tolerant Airplanes

For radio altimeter tolerant airplanes, do the actions specified in paragraphs (j)(1) and (2) of this AD.

(1) On or before June 30, 2023, revise the Limitations Section of the existing AFM to include the information specified in figure 7 to paragraph (j) of this AD. This may be done by inserting a copy of figure 7 to paragraph (j) of this AD into the existing AFM. Incorporating the AFM revision required by this paragraph terminates the AFM revision required by paragraph (h)(1) of this AD.

(2) Before further flight after incorporating the limitations specified in figure 7 to paragraph (j) of this AD, remove the AFM revision required by paragraph (h)(1) of this AD.

Figure 7 to paragraph (j)—*AFM Revision for Radio Altimeter Tolerant Airplanes*

(Required by AD 2023-12-10)

Radio Altimeter 5G C-Band Interference, Landing Distance

Due to the presence of 5G C-Band wireless broadband interference, when dispatching or releasing to or landing on runways in the contiguous U.S. airspace, the following limitations are required unless operating at a 5G C-Band mitigated airport as identified in an FAA *Domestic Notice*.

Minimum Equipment List (MEL)

Dispatch or release with any of the following MEL items is prohibited:

- 32-42-02 – Antiskid Control Systems
- 32-45-01 – Wheel Brake Systems
- 32-45-01-01 – Wheel Brake Systems, Electric Brake Actuator Systems

Landing Operations on Runways with Condition Code 1 or 0

Dispatch or releasing to or landing on runways with a runway condition code of 1 or 0 is prohibited.

Landing Distance Calculations for Runway Condition Codes 6 through 2

Operators must follow the 5G C-Band Interference Landing Distance Procedure contained in the Operating Procedures Section of this AFM.

(k) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Operational Safety Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or responsible Flight Standards Office, as appropriate. If sending information directly to the manager of the Operational Safety Branch, send it to the attention of the person identified in paragraph (l) of this AD. Information may be emailed to: *AMOC@faa.gov*.

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

(3) AMOCs approved for AD 2021–23–12, Amendment 39–21810 (86 FR 69984, December 9, 2021), providing relief for specific radio altimeter installations are approved as AMOCs for the requirements specified in paragraph (h) of this AD until June 30, 2023.

(l) Related Information

For more information about this AD, contact Brett Portwood, Continued Operational Safety Technical Advisor, COS Program Management Section, Operational Safety Branch, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712–4137; phone: 817–222–5390; email: *operationalsafety@faa.gov*.

(m) Material Incorporated by Reference

None.

Issued on June 9, 2023.

Michael Linegang,

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

[FR Doc. 2023–13154 Filed 6–16–23; 11:15 am]

BILLING CODE 4910–13–C

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31490; Amdt. No. 4063]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule establishes, amends, suspends, or removes Standard Instrument Approach Procedures (SIAPS) and associated Takeoff Minimums and Obstacle Departure procedures (ODPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective June 21, 2023. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 21, 2023.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30. 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC 20590–0001.

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg 26, Room 217, Oklahoma City, OK 73099. Telephone (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by establishing, amending, suspending, or removes SIAPS, Takeoff Minimums and/or ODPS. The complete regulatory description of each SIAP and its associated Takeoff Minimums or ODP for an identified airport is listed on FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR part 97.20. The applicable FAA Forms 8260–3, 8260–4, 8260–5, 8260–15A, 8260–15B, when required by an entry on 8260–15A, and 8260–15C.

The large number of SIAPs, Takeoff Minimums and ODPs, their complex nature, and the need for a special format make publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, Takeoff Minimums or ODPs, but instead refer to their graphic depiction on charts printed by publishers or aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP, Takeoff Minimums and ODP listed on FAA form documents is unnecessary. This amendment provides the affected CFR sections and specifies the typed of SIAPS, Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure, and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPS, Takeoff Minimums and/or ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP, Takeoff Minimums and ODP as amended in the transmittal. Some SIAP and Takeoff Minimums and textual ODP amendments may have been issued previously by the FAA in a Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flights safety relating directly to published aeronautical charts.

The circumstances that created the need for some SIAP and Takeoff Minimums and ODP amendments may require making them effective in less than 30 days. For the remaining SIAPs and Takeoff Minimums and ODPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs and Takeoff Minimums and ODPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making some SIAPs effective in less than 30 days.

The FAA has determined that this 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. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Lists of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on May 26, 2023.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service, Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by establishing, amending, suspending, or removing Standard Instrument Approach Procedures and/or Takeoff Minimums and Obstacle Departure Procedures effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

Effective 10 August 2023

Anaktuvuk Pass, AK, PAKP, AKUMY FIVE, Graphic DP
Northway, AK, PAOR, RNAV (GPS) RWY 6, Amdt 1
Northway, AK, PAOR, RNAV (GPS) RWY 24, Amdt 2
Texarkana, AR, KTXK, RNAV (GPS) RWY 13, Orig-D
San Carlos, CA, KSQL, Takeoff Minimums and Obstacle DP, Amdt 2
San Francisco, CA, KSFO, GLS RWY 19L, Amdt 1
San Francisco, CA, KSFO, GLS RWY 19R, Amdt 1
Buena Vista, CO, KAEJ, PUEBLO TWO, Graphic DP
Buena Vista, CO, KAEJ, Takeoff Minimums and Obstacle DP, Amdt 2
Adel, GA, 15J, Takeoff Minimums and Obstacle DP, Amdt 2

Fort Stewart (Hinesville), GA, KLHW, NDB RWY 33R, Orig-E
Des Moines, IA, KDSM, RNAV (GPS) RWY 5, Amdt 3
Des Moines, IA, KDSM, RNAV (GPS) RWY 23, Amdt 2
Des Moines, IA, KDSM, Takeoff Minimums and Obstacle DP, Amdt 12
Oskaloosa, IA, KOOA, VOR/DME RWY 31, Amdt 3A, CANCELED
Perry, IA, KPRO, RNAV (GPS) RWY 14, Orig
Perry, IA, KPRO, RNAV (GPS) RWY 14, Orig-B, CANCELED
Perry, IA, KPRO, RNAV (GPS) RWY 32, Orig
Perry, IA, KPRO, RNAV (GPS) RWY 32, Amdt 1B, CANCELED
Perry, IA, KPRO, Takeoff Minimums and Obstacle DP, Amdt 1
Decatur, IL, KDEC, ILS OR LOC RWY 6, Amdt 14B
Rantoul, IL, KTIP, VOR RWY 27, Amdt 2, CANCELED
Seymour, IN, KSER, RNAV (GPS) RWY 32, Amdt 1C
Newton, KS, KEWK, VOR/DME–A, Amdt 3A, CANCELED
Clinton, MD, W32, RNAV (GPS) RWY 5, Orig-C, CANCELED
Clinton, MD, W32, Takeoff Minimums and Obstacle DP, Orig-A, CANCELED
Fort Meade (Odenton), MD, KFME, RNAV (GPS) RWY 28, Amdt 1E
Leonardtown, MD, 2W6, RNAV (GPS) RWY 29, Amdt 1B
Albert Lea, MN, KAEL, VOR RWY 17, Amdt 1E
Longville, MN, KXVG, RNAV (GPS) RWY 31, Orig-C
Roseau, MN, KROX, VOR RWY 16, Amdt 8A, CANCELED
Roseau, MN, KROX, VOR RWY 34, Amdt 1A, CANCELED
Kansas City, MO, KMKC, ILS OR LOC RWY 4, Amdt 6
Kansas City, MO, KMKC, ILS OR LOC RWY 19, Amdt 24A
Kansas City, MO, KMKC, RNAV (GPS) RWY 4, Amdt 3B
Kansas City, MO, KMKC, RNAV (GPS) RWY 22, Amdt 2A
Kansas City, MO, KMKC, RNAV (GPS) Y RWY 19, Orig
Kansas City, MO, KMKC, RNAV (GPS) Z RWY 19, Amdt 2
Columbus/W Point/Starkville, MS, KGTR, ILS OR LOC RWY 18, Amdt 9
Columbus/W Point/Starkville, MS, KGTR, ILS OR LOC RWY 36, Amdt 2
Rockingham, NC, KRCZ, RNAV (GPS) RWY 32, Orig-E
Cross Keys, NJ, 17N, VOR OR GPS RWY 9, Amdt 6B, CANCELED
Artesia, NM, KATS, NDB RWY 13, Amdt 5, CANCELED
Artesia, NM, KATS, NDB RWY 31, Amdt 5A, CANCELED
Montgomery, NY, KMGJ, Takeoff Minimums and Obstacle DP, Amdt 3A
Springfield, OH, KSGH, RNAV (GPS) RWY 15, Orig-A
Tulsa, OK, KTUL, RNAV (GPS) RWY 36L, Amdt 2
Madras, OR, S33, Takeoff Minimums and Obstacle DP, Amdt 1B
State College, PA, KUNV, ILS OR LOC RWY 24, Amdt 10
State College, PA, KUNV, RNAV (GPS) RWY 24, Amdt 2
West Chester, PA, KOQN, RNAV (GPS) RWY 27, Amdt 1B
West Chester, PA, KOQN, RNAV (GPS) Y RWY 9, Amdt 2A
West Chester, PA, KOQN, RNAV (GPS) Z RWY 9, Orig-A
West Chester, PA, KOQN, VOR–A, Amdt 4C
Wilkes-Barre/Scranton, PA, KAVP, ILS OR LOC RWY 22, Amdt 11
Provo, UT, KPVU, VOR/DME RWY 13, Amdt 2A, CANCELED
Tappahannock, VA, KXSA, RNAV (GPS) RWY 10, Amdt 2A
Tappahannock, VA, KXSA, RNAV (GPS) RWY 28, Amdt 2A
Milwaukee, WI, KMKE, ILS OR LOC RWY 1L, ILS RWY 1L (CAT II), ILS RWY 1L (CAT III), Amdt 10A
Milwaukee, WI, KMKE, RNAV (GPS) RWY 1L, Amdt 2A
Mosinee, WI, KCWA, ILS OR LOC RWY 8, Amdt 15
Mosinee, WI, KCWA, RNAV (GPS) RWY 8, Amdt 2
Mosinee, WI, KCWA, RNAV (GPS) RWY 26, Amdt 2
Mosinee, WI, KCWA, Takeoff Minimums and Obstacle DP, Amdt 3
Huntington, WV, KHTS, RNAV (GPS) RWY 12, Amdt 4

[FR Doc. 2023–13087 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 31491; Amdt. No. 4064]

Standard Instrument Approach Procedures, and Takeoff Minimums and Obstacle Departure Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule amends, suspends, or removes Standard Instrument Approach Procedures (SIAPs) and associated Takeoff Minimums and Obstacle Departure Procedures for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, adding new obstacles, or changing air traffic requirements. These changes are designed to provide for the safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: This rule is effective June 21, 2023. The compliance date for each SIAP, associated Takeoff Minimums, and ODP is specified in the amendatory provisions.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of June 21, 2023.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination

1. U.S. Department of Transportation, Docket Ops-M30, 1200 New Jersey Avenue SE, West Bldg., Ground Floor, Washington, DC, 20590–0001;

2. The FAA Air Traffic Organization Service Area in which the affected airport is located;

3. The office of Aeronautical Information Services, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 or,

4. The National Archives and Records Administration (NARA).

For information on the availability of this material at NARA, email *fr.inspection@nara.gov* or go to: *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Availability

All SIAPs and Takeoff Minimums and ODPs are available online free of charge. Visit the National Flight Data Center online at *nfdc.faa.gov* to register. Additionally, individual SIAP and Takeoff Minimums and ODP copies may be obtained from the FAA Air Traffic Organization Service Area in which the affected airport is located.

FOR FURTHER INFORMATION CONTACT: Thomas J. Nichols, Flight Procedures and Airspace Group, Flight Technologies and Procedures Division, Flight Standards Service, Federal Aviation Administration. Mailing Address: FAA Mike Monroney Aeronautical Center, Flight Procedures and Airspace Group, 6500 South MacArthur Blvd., STB Annex, Bldg 26, Room 217, Oklahoma City, OK 73099. Telephone: (405) 954–1139.

SUPPLEMENTARY INFORMATION: This rule amends 14 CFR part 97 by amending the referenced SIAPs. The complete regulatory description of each SIAP is listed on the appropriate FAA Form 8260, as modified by the National Flight Data Center (NFDC)/Permanent Notice to Airmen (P–NOTAM), and is incorporated by reference under 5 U.S.C. 552(a), 1 CFR part 51, and 14 CFR 97.20. The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register**

expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained on FAA form documents is unnecessary. This amendment provides the affected CFR sections, and specifies the SIAPs and Takeoff Minimums and ODPs with their applicable effective dates. This amendment also identifies the airport and its location, the procedure and the amendment number.

Availability and Summary of Material Incorporated by Reference

The material incorporated by reference is publicly available as listed in the **ADDRESSES** section.

The material incorporated by reference describes SIAPs, Takeoff Minimums and ODPs as identified in the amendatory language for part 97 of this final rule.

The Rule

This amendment to 14 CFR part 97 is effective upon publication of each separate SIAP and Takeoff Minimums and ODP as amended in the transmittal. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained for each SIAP and Takeoff Minimums and ODP as modified by FDC permanent NOTAMs.

The SIAPs and Takeoff Minimums and ODPs, as modified by FDC permanent NOTAM, and contained in this amendment are based on criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these changes to SIAPs and Takeoff Minimums and ODPs, the TERPS criteria were applied only to specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a FDC NOTAM as an emergency action of immediate flight safety relating directly to published aeronautical charts.

The circumstances that created the need for these SIAP and Takeoff Minimums and ODP amendments require making them effective in less than 30 days.

Because of the close and immediate relationship between these SIAPs, Takeoff Minimums and ODPs, and safety in air commerce, I find that notice and public procedure under 5 U.S.C. 553(b) are impracticable and contrary to the public interest and, where applicable, under 5 U.S.C. 553(d), good cause exists for making these SIAPs effective in less than 30 days.

The FAA has determined that this 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. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Incorporation by reference, Navigation (air).

Issued in Washington, DC, on May 26, 2023.

Thomas J. Nichols,

Aviation Safety, Flight Standards Service, Manager, Standards Section, Flight Procedures & Airspace Group, Flight Technologies & Procedures Division.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, 14 CFR part 97 is amended by amending Standard Instrument Approach Procedures and Takeoff Minimums and ODPs, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

■ 1. The authority citation for part 97 continues to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44701, 44719, 44721–44722.

■ 2. Part 97 is amended to read as follows:

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, Identified as follows:

** * * Effective Upon Publication*

AIRAC date	State	City	Airport	FDC No.	FDC date	Subject
13–Jul–23	IL	Springfield	Abraham Lincoln Capital	3/0255	3/29/23	RNAV (GPS) RWY 22, Orig-C.

[FR Doc. 2023–13088 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 230614–0149]

RIN 0694–AJ24

Additions of Entities to the Entity List and Removal of Entity From the Entity List; Correction

AGENCY: Bureau of Industry and Security, Department of Commerce.

ACTION: Correcting amendment.

SUMMARY: The Department of Commerce is amending the Export Administration Regulations (EAR) by adding an inadvertently omitted entity to the Entity List.

DATES: This correcting amendment is effective June 16, 2023.

FOR FURTHER INFORMATION CONTACT: Chair, End-User Review Committee, Office of the Assistant Secretary for Export Administration, Bureau of Industry and Security, Department of Commerce, Phone: (202) 482–5991, Email: *ERC@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: As stated in the Entity List rule titled ''Additions

of Entities to the Entity List and Removal of Entity from the Entity List'' (June 14 Rule) (88 FR 38739), the End-User Review Committee (ERC) determined to add certain entities under the destination of China, including China Aviation Development Harbin Bearing Co., Ltd., to the Entity List for acquiring and attempting to acquire U.S.-origin items in support of China's military modernization. This activity is contrary to U.S. national security and foreign policy interests under § 744.11 of the EAR. As detailed in the June 14 Rule, licenses are required for all items subject to the EAR to these entities, and license applications will be reviewed under a presumption of denial. Further, in the June 14 Rule, the Bureau of Industry and Security (BIS) included an entity in the preamble justification but inadvertently did not instruct, nor provide regulatory text for, the addition of the entity to the Entity List. This correcting amendment amends the EAR by making the addition to the Entity List for this omitted entity.

For the reasons described above, this correcting amendment adds the following entity to the Entity List and includes, where appropriate, aliases:

China

• China Aviation Development Harbin Bearing Co., Ltd.

Savings Clause

For the changes being made in this correcting amendment, shipments of items removed from eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) as a result of this regulatory action that were en route aboard a carrier to a port of export, reexport, or transfer (in-country), on June 16, 2023, pursuant to actual orders for export, reexport, or transfer (in-country) to or within a foreign destination, may proceed to that destination under the previous eligibility for a License Exception or export, reexport, or transfer (in-country) without a license (NLR) before July 17, 2023. Any such items not actually exported, reexported, or transferred (in-country) before midnight, on July 17, 2023, require a license in accordance with this correcting amendment.

Export Control Reform Act of 2018

On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which included the Export Control Reform Act of 2018 (ECRA) (50 U.S.C. 4801–4852). ECRA provides the legal basis for BIS's principal authorities and serves as the authority under which BIS issues this rule.

Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves collections previously approved by OMB under control number 0694–0088, Simplified Network Application Processing System, which includes, among other things, license applications and commodity classifications, and carries a burden estimate of 29.4 minutes for a manual or electronic submission for a total burden estimate of 33,133 hours. Total burden hours associated with the PRA and OMB control number 0694–0088 are not expected to increase as a result of this rule.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. Pursuant to section 1762 of the Export Control Reform Act of 2018, this action is exempt from the Administrative Procedure Act (5 U.S.C. 553) requirements for notice of proposed rulemaking, opportunity for public participation, and delay in effective date.

5. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* are not applicable. Accordingly, no regulatory flexibility analysis is required, and none has been prepared.

List of Subjects in 15 CFR Part 744

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, part 744 of the Export Administration Regulations (15 CFR parts 730–774) is corrected by making the following correcting amendment:

PART 744—CONTROL POLICY: END-USER AND END-USE BASED

■ 1. The authority citation for 15 CFR part 744 is continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* 22 U.S.C. 3201 *et seq.;* 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13099, 63 FR 45167, 3 CFR, 1998 Comp., p. 208; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13224, 66 FR 49079, 3 CFR, 2001 Comp., p. 786; Notice of September 19, 2022, 87 FR 57569 (September 21, 2022); Notice of November 8, 2022, 87 FR 68015 (November 10, 2022).

■ 2. Supplement no. 4 to part 744 is amended under CHINA, PEOPLE'S REPUBLIC OF, by adding, in alphabetical order, an entry for ''China Aviation Development Harbin Bearing Co., Ltd.'' to read as follows:

Supplement No. 4 to Part 744—Entity List

* * * * *

Country	Entity	License requirement	License review policy	**Federal Register** Citation
* *	* *	*	*	*
CHINA, PEOPLE'S REPUBLIC OF				
* *	* *	*	*	*
	China Aviation Development Harbin Bearing Co., Ltd., a.k.a. the following three aliases: —AVIC Harbin Bearing; —Harbin AVIC Bearing Co Ltd; *and*	For all items subject to the EAR. (See § 744.11 of the EAR).	Presumption of denial.	88 FR [INSERT FR PAGE NUMBER] 6/21/2023.

Country	Entity	License requirement	License review policy	**Federal Register** Citation
	—AviChina Harbin Bearing No. 888 Nanjing Road, Hulan District, Harbin (New District Trust Handling Area), China; *and* No. 81, East Wujinnan Road, Xilong Street, Harbin, China; *and* North Side of Traffic Management Office, Linxi County, Xingtai City, Hebei Province, China.			
*	*	*	*	*	*	*

* * * * *

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 2023–13196 Filed 6–16–23; 8:45 am]

BILLING CODE 3510–33–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1272

[Docket No. CPSC–2023–0021]

Marking of Toy, Look-Alike, and Imitation Firearms; Correction

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule; correction.

SUMMARY: The Federal Energy Management Improvement Act Update transferred authority for regulating the marking of toy, look-alike, and imitation firearms from the Department of Commerce to the Consumer Product Safety Commission. On May 11, 2023, the Commission issued a direct final rule to adopt the Department of Commerce rule for the marking of toy, look-alike, and imitation firearms, with non-substantive and conforming changes. That document contained a typographical error. This document corrects that error.

DATES: Effective June 26, 2023.

FOR FURTHER INFORMATION CONTACT: Salman Sarwar, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7682; email: *ssarwar@cpsc.gov.*

SUPPLEMENTARY INFORMATION: The Commission is correcting a typographical error in the direct final rule, *Marking of Toy, Look-Alike, and Imitation Firearm,* 16 CFR part 1272, which appeared in the **Federal Register** on May 11, 2023. 88 FR 30226. This document corrects a typographical error in the numbering of § 1272.5 of the direct final rule. The codified text numbered § 1272.5 (Preemption) was erroneously numbered as § 272.5. This document corrects that error by changing the number for the preemption section of the rule from § 272.5 to § 1272.5. This document corrects a typographical error; it does not make any substantive changes to the direct final rule.

Correction

In FR Rule Doc. No. 2023–09999 appearing on page 30226 in the **Federal Register** of Thursday, May 11, 2023, the following correction is made

§ 1272.5 [Corrected]

■ 1. On page 30229, in the third column, correct ''**§ 272.5 Preemption**'' to read ''**§ 1272.5 Preemption**''.

Alberta Mills,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2023–13137 Filed 6–20–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9975]

RIN 1545–BQ76

Pre-Filing Registration Requirements for Certain Tax Credit Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations setting forth mandatory information and registration requirements for taxpayers planning to make an elective payment election under the Inflation Reduction Act of 2022 and the CHIPS Act of 2022 to treat the amount of certain tax credits as a payment of Federal income tax, or in the case of a partnership or S corporation, to receive a payment in the amount of such credits. This document also contains temporary regulations setting forth mandatory information and registration requirements for taxpayers planning to make an election to transfer certain Federal income tax credits under the Inflation Reduction Act of 2022. These temporary regulations affect tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year under section 6417 of the Internal Revenue Code (Code). These temporary regulations also affect taxpayers eligible to make an elective payment election instead of claiming the advanced manufacturing investment credit under section 48D of the Code. These temporary regulations further affect taxpayers eligible to elect to transfer certain Federal income tax credits under section 6418 of the Code.

DATES:

Effective date: This temporary regulation is effective on June 21, 2023.

Applicability date: For dates of applicability, *see* §§ 1.48D–6T(j), 1.6417–5T(d), and 1.6418–4T(d).

FOR FURTHER INFORMATION CONTACT: Concerning these temporary regulations, Lani M. Sinfield at (202) 317–5871 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

I. Overview

This document amends the Income Tax Regulations (26 CFR part 1) to add temporary regulations providing information and registration requirements that must be completed before elections available under sections 48D(d), 6417, and 6418 of the Code may be made.

In accordance with section 7805(e)(1) of the Code, concurrent with the publication of this Treasury Decision, the Department of the Treasury (Treasury Department) and the IRS are publishing in the Proposed Rules section of this issue of the **Federal Register** three notices of proposed

rulemaking that contain proposed regulations under §§ 1.48D–6, 1.6417–5, and 1.6418–4, the text of which is identical to the text of §§ 1.48D–6T, 1.6417–5T, and 1.6418–4T of the temporary regulations. REG–105595–23 provides proposed regulations under section 48D(d). REG–101607–23 provides proposed regulations under sections 6241 and 6417. REG–101610–23 provides proposed regulations under section 6418.

Interested persons are directed to the **ADDRESSES** and **COMMENTS AND PUBLIC HEARING** sections of the preambles to REG–105595–23, REG–101607–23, and REG–101610–23 for information on submitting public comments or the public hearings for the proposed regulations.

II. Sections 48D(d), 6417, and 6418

A notice of proposed rulemaking (REG–105595–23) in the Proposed Rules section in this issue of the **Federal Register** provides a background description of section 48D. A notice of proposed rulemaking (REG–101607–23) in the Proposed Rules section in this issue of the **Federal Register** provides a background description of section 6417. A notice of proposed rulemaking (REG–101610–23) in the Proposed Rules section in this issue of the **Federal Register** provides a background description of section 6418.

Explanation of Provisions

I. Pre-Filing Registration Requirements Under Section 48D(d)

Temp. Reg. § 1.48D–6T(b)(1) provides the mandatory pre-filing registration process that, except as provided in guidance, a taxpayer must complete as a condition of, and prior to, any amount being treated as a payment against the tax imposed under § 1.48D–6(a)(1), or an amount paid to a partnership or S corporation pursuant to § 1.48D–6(d)(2)(ii)(A). A taxpayer is required to use the pre-filing registration process to register each qualified investment in an advanced manufacturing facility. A taxpayer that does not obtain a registration number or report the registration number on its annual tax return with respect to an advanced manufacturing facility is ineligible to receive any elective payment amount with respect to the amount of any section 48D credit determined with respect to that advanced manufacturing facility. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean that the taxpayer is eligible to receive a payment with respect to the section 48D credits determined with respect to the advanced manufacturing facility.

The pre-filing registration requirements are that a taxpayer:

(1) must complete the registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein, unless otherwise provided in guidance;

(2) must satisfy the registration requirements and receive a registration number prior to making a section 48D(d)(1) elective payment election on the taxpayer's tax return for the taxable year at issue;

(3) is required to obtain a registration number for each qualified investment in an advanced manufacturing facility with respect to which a section 48D credit will be determined and for which the taxpayer wishes to make a section 48D(d)(1) elective payment election; and

(4) must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer and about the qualified investment in an advanced manufacturing facility, would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 48D. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not eligible taxpayers. Information about the taxpayer's taxable year would allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about the advanced manufacturing facility, including its address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not advanced manufacturing facilities.

Temp. Reg. § 1.48D–6T(b)(7)(i) provides that, after a taxpayer completes pre-filing registration with respect to each qualified investment in an advanced manufacturing facility with respect to which the taxpayer intends to elect a section 48D(d) elective payment election for the taxable year, the IRS will review the information provided and will issue a separate registration number for each qualified investment for which the taxpayer provided sufficient verifiable information.

Temp. Reg. § 1.48D–6T(b)(7)(ii) provides that a registration number is valid only for the taxable year for which it is obtained. Temp. Reg. § 1.48D–6T(b)(7)(iii) provides that, if an elective payment election will be made with respect to a qualified investment in an advanced manufacturing facility for a taxable year for which a registration number under this section has been obtained for a prior taxable year, the taxpayer must renew the registration each subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts that are relevant in calculating the amount of the section 48D credit. Temp. Reg. § 1.48D–6T(b)(7)(iv) provides that, if facts change with respect to the qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, the taxpayer must amend the registration to reflect these new facts. The regulations provide, for example, that if the facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit an original registration (or if the new owner previously registered other advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

Lastly, Temp. Reg. § 1.48D–6(b)(7)(v) provides that the taxpayer is required to include the registration number of the advanced manufacturing facility on the taxpayer's annual return for the taxable year for an election under Temp. Reg. § 1.48D–6(a)(1). The IRS will treat an elective payment election as ineffective with respect to any section 48D credit determined with respect to the advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual tax return.

II. Pre-Filing Registration Requirements and Additional Information Under Section 6417

Section 6417(d)(5) provides that, as a condition of, and prior to, any amount being treated as a payment that is made by the taxpayer under section 6417(a) or any payment being made pursuant to section 6417(c), the Secretary may require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing

duplication, fraud, improper payments, or excessive payments.

In general, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended that the information required to be provided to the IRS should be provided in a manner that facilitates automated procedures to help catch potential fraud, discourages abusive or otherwise illegitimate claims, and allows efficient and prompt review (both before payment and through audits). Stakeholders recommended that all required documents and information should be able to be submitted easily via an online portal. Stakeholders recommended that information or registration should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1).

Temp. Reg. § 1.6417–5T provides the mandatory pre-filing registration process. Temp. Reg. § 1.6417–5T(a) provides an overview of this process and requires an applicable entity or electing taxpayer to satisfy the pre-filing registration requirements as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer is required to use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number and report the registration number on its annual tax return with respect to an applicable credit property is ineligible to make an elective payment election to treat any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property as a payment of tax. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean that the applicable entity or electing taxpayer will receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

Temp. Reg. § 1.6417–5T(b) provides the following pre-filing registration requirements.

First, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

Second, an applicable entity or electing taxpayer must satisfy the registration requirements and receive a registration number prior to making an elective payment election on the applicable entity's tax return for the taxable year at issue.

Third, an applicable entity or electing taxpayer is required to obtain a registration number for each applicable credit property with respect to which an applicable credit will be determined and for which the applicable entity or electing taxpayer intends to make an elective payment election.

Finally, an applicable entity or electing taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the applicable credits, and about the applicable credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 6417. For example, verifying information about the taxpayer will allow the IRS to mitigate the risk of fraud or improper payments to entities that are not applicable entities or electing taxpayers. Information about the taxpayer's taxable year will allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about applicable credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date will allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not applicable credit properties. Information about whether an investment tax credit property was acquired using any Restricted Tax Exempt Amounts will allow the IRS to prevent improper payments.

Temp. Reg. § 1.6417–5T(c) provides information about the required registration number. Temp. Reg. § 1.6417–5T(c)(1) provides that, after an applicable entity or electing taxpayer completes the pre-filing registration process as provided in proposed § 1.6417–5(b) for the applicable credit properties with respect to which the entity intends to make an elective payment election in the taxable year, the IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information, as provided in guidance.

Temp. Reg. § 1.6417–5T(c)(2) provides that a registration number is valid only for the taxable year for which it is obtained. Temp. Reg. § 1.6417–5T(c)(3) provides that, if an elective payment election will be made with respect to an applicable credit property for which a registration number under proposed § 1.6417–5 has been previously obtained, the applicable entity or electing taxpayer will be required to renew the registration each year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. Temp. Reg. § 1.6417–5T(c)(4) provides that, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained, an applicable entity or electing taxpayer is required to amend the registration (or may need to submit a new registration) to reflect these new facts. For example, one stakeholder asked that, if a taxpayer becomes a party to an internal reorganization under section 368(a) (such as a merger or distribution in a nonrecognition transaction) during the election period, the elective payment election should carry over to the successor entity. The temporary regulations provide that if a facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner is required to amend the original registration to disassociate its EIN from the credit property and the new owner must submit an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered credit property.

Lastly, Temp. Reg. § 1.6417–5T(c)(5) provides that the applicable entity or electing taxpayer is required to include the registration number of the applicable credit property on their annual tax return for the taxable year. The IRS will treat an elective payment election as ineffective with respect to the portion of a credit determined with

respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

III. Pre-Filing Registration Requirements and Additional Information Under Section 6418

Section 6418(g)(1) provides that as a condition of, and prior to, any transfer of any portion of an eligible credit under section 6418, the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

In general, consistent with section 6417, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended a registration system that assigns a transfer number to an eligible taxpayer that can be used by transferee taxpayers to claim transferred credits and allows the IRS to track transfers of eligible credits. Stakeholders also recommended that information or registration requirements should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1). In order to meet the purpose of section 6418(g)(1), the Treasury Department and the IRS have determined that it is necessary to establish a mandatory registration process that is in place before the end of the 2023 calendar year, which is the first full taxable year during which a transfer election under section 6418 is available.

Temp. Reg. § 1.6418–4T generally provides rules requiring that eligible taxpayers register before filing the return on which a transfer election is made and provide information related to each eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. Temp. Reg. § 1.6418–4T(a), consistent with section 6418(g)(1), requires that, as a condition of, and prior to, making an election to transfer a specified credit portion, an eligible taxpayer satisfy the pre-filing registration requirements in Temp. Reg. § 1.6418–4T(b). After the required pre-filing registration process is successfully completed, an eligible taxpayer will receive a unique registration number from the IRS for each registered eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. The Treasury Department and the IRS intend for this pre-filling registration process to occur through an IRS electronic portal (unless otherwise allowed in guidance). An eligible taxpayer that does not obtain a registration number and report the registration number on its return with respect to an eligible credit property is ineligible to make a transfer election. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property. The registration number also must be reported on the eligible taxpayer's return.

Temp. Reg. § 1.6418–4T(b) provides the following pre-filing registration requirements.

First, an eligible taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

Second, an eligible taxpayer must satisfy the registration requirements and receive a registration number prior to making a transfer election for a specified credit portion on the eligible taxpayer's return for the taxable year at issue.

Third, an eligible taxpayer is required to obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

Finally, an eligible taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the eligible credits, and about the eligible credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive transfers under section 6418. For example, verifying information about the taxpayer will allow the IRS to mitigate the risk of fraud or improper transfers. Information about eligible credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date will allow the IRS to mitigate the risk of duplication, fraud, and improper transfers for properties that are not eligible credit properties.

Temp. Reg. § 1.6418–4T(c) provides rules related to the registration number that is obtained after the IRS has reviewed and approved the taxpayer's submitted information. First, these rules provide that a registration number is valid for an eligible taxpayer only for the taxable year for which it is obtained, and for a transferee taxpayer's taxable year in which the specified credit portion is taken into account. Second, Temp. Reg.§ 1.6418–4T(c) provides rules for the renewal of a registration number that has been previously obtained. The eligible taxpayer is required to renew the registration with respect to an eligible credit property each year in accordance with guidance, including attesting that all the facts are still correct or updating any facts. Third, the temporary regulations provide that, if facts change with respect to an eligible credit property for which a registration number has been previously obtained, an eligible taxpayer is required to amend the registration to reflect these new facts. Lastly, the temporary regulations provide that an eligible taxpayer is required to include the registration number of the eligible credit property on the eligible taxpayer's return for the taxable year, as provided in Temp. Reg. § 1.6418–2T(b), for an election to be effective with respect to any eligible credit determined with respect to any eligible credit property. The IRS will treat a transfer election as ineffective with respect to an eligible credit determined with respect to an eligible credit property for which the eligible taxpayer does not include a valid registration number on its return.

A transferee taxpayer is also required to report the registration number received from an eligible taxpayer on its return for the taxable year that the transferee taxpayer takes the transferred eligible credit into account.

Applicability Dates

The temporary regulations under § 1.48D–6T apply to taxable years ending on or after June 21, 2023. The temporary regulations under § 1.48D–6T expire on June 12, 2026.

The temporary regulations under § 1.6417–5T apply to taxable years ending on or after June 21, 2023. The temporary regulations under § 1.6417–5T expire on June 12, 2026.

The temporary regulations under § 1.6418–4T apply to taxable years ending on or after June 21, 2023. The temporary regulations under § 1.6418–4T expire on June 12, 2026.

Special Analyses

I. Good Cause

The Administrative Procedure Act (5 U.S.C. Subchapter II) provides an exception to generally applicable rulemaking requirements when an agency makes a finding of good cause (and incorporates the finding and a brief statement of reasons therefor in the rules issued).

The Treasury Department and the IRS find that good cause exists for making these temporary regulations immediately effective without notice and comment. The pre-filing registration process is critical to the implementation of sections 48D, 6417, and 6418. As expressly authorized by statute to prevent duplication, fraud, and improper or excessive payments, the temporary regulations condition elective payment and transferability on pre-registration with the IRS.[1] Section 48D applies to property placed in service after December 31, 2022, and sections 6417 and 6418 each apply to taxable years beginning after that date. This means that filers will be able take advantage of these provisions for their 2023 tax years.

The Treasury Department and the IRS believe it is important to immediately put into effect these pre-registration requirements. The pre-registration process collects critical information to minimize fraudulent elections and prevent duplication and improper or excessive payments by ensuring basic eligibility requirements for eligible credits before the election is made. Validating certain information before the annual tax return process will result in more accurate review of the veracity of the information and fewer duplicate, fraudulent, improper, or excessive transfers or payments. In addition, the pre-filing registration requirement is expected to reduce the need for recovering erroneous payments and adjusting return positions via costly, burdensome, and inefficient examination, appeals, and litigation processes (which, in the case of section 6418, could potentially be needed with respect to both parties to the credit transfer transaction). Immediate implementation of these safeguards is important because it is anticipated that there will be an immediate and significant increase in utilization of the tax incentives described in sections 48D(d), 6417, and 6418 by entities that have not historically had return-filing obligations, increasing the risk of the duplicative, fraudulent, and improper or excessive payments that the pre-registration process is intended to mitigate.

The Treasury Department and the IRS find that good cause exists for making these temporary regulations effective without notice and comment because failure to do so would be contrary to the public interest. Without these temporary regulations, the IRS may not be able to timely and effectively develop and implement a pre-filing registration system. Lack of a pre-registration process would create risk for the public fisc by increasing the likelihood of duplicate, fraudulent, improper, or excessive payments or transfers. The pre-filing registration system also must be developed sufficiently in advance of the filing season for taxpayers to have time to gather the necessary information and complete the registration process and for the IRS to be able to review the submitted information and issue registration numbers. Failing to pre-register taxpayers who have never before filed a tax return with the IRS could significantly delay the processing of those taxpayers' returns because procedures to allow them to file an annual tax return would need to be taken during the middle of filing season. Such delay would harm taxpayers and also potentially result in the IRS owing interest on any refunds due, further damaging the public fisc.

Additionally, it is in the public interest to have certainly regarding the requirements for pre-registration as far before the 2023 filing season as possible to ensure the ability to timely and accurately fulfill the requirements. This certainty is particularly crucial for those filers already or soon to be engaged in an activity that would qualify them to make an elective payment or transfer election. Taxpayer certainty is also especially important for particular populations of affected taxpayers such as entities that have not historically had return-filing obligations because they may need significant time to review and understand the underlying tax law and the pre-filing registration requirements.

The Treasury Department and the IRS also find that good cause exists for making these temporary regulations immediately effective because it would be impracticable to comply with the notice and comments process. The processes established in sections 48D, 6417, and 6418 are novel and complex. Determining how these processes interact with established tax procedures is complicated and in some aspects very difficult to reconcile. The elections under sections 6417 and 6418 apply to numerous credits, each of which contain different substantive eligibility and other requirements, which had to be separately analyzed to understand what information should be collected as part of the pre-filing registration process. Developing a previously nonexistent registration process, new filing portal, and determining the necessary elements to protect the fisc has been time consuming. The Treasury Department and the IRS have moved quickly to understand these complex Code sections and determine technological elements needed to create the pre-filing registration process and portal.

To accomplish the purpose of the pre-filing registration process, the electronic portal must open by Fall 2023. The Treasury Department and the IRS understand the need to carefully consider all public comments and provide robust responses to all relevant comments. The few months available between the publication of proposed regulations and the opening of the electronic portal is insufficient time to receive, review, and meaningfully respond to public comments. Furthermore, there would not be sufficient time after all comments are considered to then make corresponding changes to the electronic portal, which would require technological development and user testing.

Comments are being solicited in the cross-referenced notices of proposed rulemaking that are in the Proposed Rules section in this issue of the **Federal Register**. Any comments will be considered before final regulations are issued.

II. Paperwork Reduction Act

The collection of information contained in these temporary regulations has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act. Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions for the proposed information collection to the IRS via email at *pra.comments@irs.gov* (indicate REG–101607–23 on the Subject line). Comments on the collection of information should be received by August 14, 2023. Comments are specifically requested concerning:

[1] Sections 48D(d)(2)(E) and 6417(d)(5) authorize the Secretary to require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments as a condition of, and prior to, any amount being treated as a payment made by or to the taxpayer. Section 6418(g)(1) states that, as a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to section 6418(a), the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418.

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collections of information in these temporary regulations contain reporting and recordkeeping requirements. The recordkeeping requirements are considered general tax records under Section 1.6001–1(e). These records are required for IRS to validate that taxpayers have met the regulatory requirements and are entitled to transfer the credits. For PRA purposes, general tax records are already approved by OMB under 1545–0047 for tax-exempt organizations and government entities; under 1545–0074 for individuals; and under 1545–0123 for business entities.

These reporting requirements include a requirement to register with IRS to make the elective payment election or the transfer election in §§ 1.48D–6T, 1.6417–5T, 1.6418–4T. This pre-filing registration requirement is being submitted to OMB and will be processed in accordance with the PRA as required by 5 CFR 1320.10. This collection of information is necessary to prevent duplication, fraud, improper payments, or excessive payments under sections 48D, 6417 and 6418 of the Code. The IRS is seeking a new OMB control number (1545–NEW) for the pre-registration requirements. The respondents are:

(1) Under section 48D, taxpayers eligible to elect the elective payment election of the advanced manufacturing investment credit.

Estimated total annual reporting burden is 271 hours.

Estimated average annual burden per respondent is 5.41 hours.

Estimated number of respondents is 50.

(2) Under section 6417, tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and certain taxpayers eligible to elect the elective payment of applicable credits in a taxable year.

Estimated total annual reporting burden is 126,200 hours.

Estimated average annual burden per respondent is 6.31 hours.

Estimated number of respondents is 20,000.

(3) Under section 6418, eligible taxpayers that elect to transfer eligible credits in a taxable year.

Estimated total annual reporting burden is 308,000 hours.

Estimated average annual burden per respondent is 6.16 hours.

Estimated number of respondents is 50,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103. The IRS anticipates opening the electronic portal for pre-filing registration in Fall 2023, after approval of the collection of information under the Paperwork Reduction Act.

III. Regulatory Flexibility Act

For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notices of proposed rulemaking (REG–105595–23, REG–101607–23, and REG–101610–23) published elsewhere in this issue of the **Federal Register**.

IV. Section 7805(f)

Pursuant to section 7805(f), these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

V. Unfunded Mandates Reform Act

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

VI. Executive Order 13132: Federalism

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

VII. Executive Order 12866

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2). For good cause pursuant to 5 U.S.C. 808(2), see part I of this Special Analyses section.

Drafting Information

The principal author of this temporary regulation is Lani M. Sinfield, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph. 1.** The authority citation for part 1 is amended by adding the following entries in numerical order to read in part as follows:

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

* * * * *

Section 1.48D–6T also issued under 26 U.S.C. 48D(d)(2)(E) and (6) * * *

* * * * *

Section 1.6417–5T also issued under 26 U.S.C. 6417(d)(5) and (h) * * *

Section 1.6418–4T also issued under 26 U.S.C. 6418(g)(1) and (h) * * *

* * * * *

■ **Par. 2.** Section 1.48D–6T is added to read as follows:

§ 1.48D–6T Elective payment election.

(a) [Reserved]

(b) *Pre-filing registration required*—(1) *In general.* Pre-filing registration by any taxpayer (including a partnership or an S corporation) in accordance with this paragraph (b) is a condition that must be successfully completed prior to making an elective payment election under section 48D(d)(1) and this section with respect to qualified property placed in service by the taxpayer as part of an advanced manufacturing facility of an eligible taxpayer. An elective payment election will not be effective with respect to the section 48D credit determined with respect to any such qualified property placed in service by any taxpayer unless the taxpayer received a valid registration number for the taxpayer's qualified investment in the advanced manufacturing facility of an eligible taxpayer in accordance with this paragraph (b) and provided the registration number for each qualified investment in each advanced manufacturing facility on its Form 3800, *General Business Credit,* attached to the tax return in accordance with guidance. For purposes of this section, the term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. See §§ 601.601 and 601.602 of this chapter. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the taxpayer is eligible to receive a payment with respect to any section 48D credit determined with respect to the qualified property.

(2*) Manner of registration.* Unless otherwise provided in guidance, a taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(3) *Members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(4) *Timing of pre-filing registration.* A taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (b)(6) of this section prior to making any elective payment election under this section on the taxpayer's tax return for the taxable year at issue.

(5) *Each qualified investment in an advanced manufacturing facility must have its own registration number.* A taxpayer must obtain a registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer with respect to which an elective payment election is made.

(6) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, a taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal;

(iii) The taxpayer's taxable year, as determined under section 441 of the Code;

(iv) The type of annual return(s) normally filed by the taxpayer with the IRS;

(v) A list of each qualified investment in an advanced manufacturing facility that the taxpayer intends to use to determine a section 48D credit for which the taxpayer intends to make an elective payment election;

(vi) For each qualified investment in an advanced manufacturing facility listed in paragraph (b)(5)(v) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of qualified investment in the advanced manufacturing facility;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the advanced manufacturing facility);

(C) Any supporting documentation relating to the construction, reconstruction or acquisition of the advanced manufacturing facility (such as, State and local government permits to operate the advanced manufacturing facility, certifications, and evidence of ownership that ties to the land deed, lease, or other documented right to use and access any land upon which the advanced manufacturing facility is constructed or housed);

(D) The beginning of construction date and the placed in service date of any qualified property that is part of the advanced manufacturing facility;

(E) The source of funds the taxpayer used to acquire the qualified property with respect to which the qualified investment was made; and

(F) Any other information that the taxpayer or entity believes will help the IRS evaluate the registration request;

(vii) The name of a contact person for the taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the taxpayer or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative;*

(viii) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(ix) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(7) *Registration number*—(i) *In general.* The IRS will review the information provided and will issue a separate registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer for which the taxpayer making the registration provided sufficient verifiable information.

(ii) *Registration number is only valid for one year.* A registration number is valid only with respect to the taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(iii) *Renewing registration numbers.* If an elective payment election will be made with respect to any section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for a taxable year after a registration number under this section has been obtained, the taxpayer must renew the registration for that subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(iv) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to a qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, a taxpayer must

amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if an eligible taxpayer that is the owner of an advanced manufacturing facility previously registered for an elective payment election for a section 48D credit determined with respect to that advanced manufacturing facility and the advanced manufacturing facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the advanced manufacturing facility must amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit separately an original registration (or if the new owner previously registered other qualified investments or advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

(v) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The taxpayer must include the registration number of the qualified investment in the advanced manufacturing facility on the taxpayer's return as provided in paragraph (b) of this section for the taxable year. The IRS will treat an elective payment election as ineffective with respect to a section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual return.

(c)–(i) [Reserved]

(j) *Applicability date for pre-filing registration requirements.* The requirements of paragraph (b) of this section apply to property placed in service on or after December 31, 2022, and during a taxable year ending on or after June 21, 2023.

(k) *Expiration date.* The applicability of paragraph (b) of this section expires on June 12, 2026.

■ **Par. 3.** Section 1.6417–5T is added to read as follows:

§ 1.6417–5T Additional information and registration.

(a) *Pre-filing registration and election.* An applicable entity or electing taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer must use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number under paragraph (c)(1) of this section or report the registration number on its annual tax return, as defined in § 1.6417–1(b), pursuant to paragraph (c)(5) of this section with respect to an otherwise applicable credit property, is ineligible to receive any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the applicable entity or electing taxpayer is eligible to receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

(b) *Pre-filing registration requirements*—(1) *Manner of pre-filing registration.* Unless otherwise provided in guidance, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration.* An applicable entity or electing taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making an elective payment election under § 1.6417–2(b) on the applicable entity's or electing taxpayer's annual tax return for the taxable year at issue.

(4) *Each applicable credit property must have its own registration number.* An applicable entity or electing taxpayer must obtain a registration number for each applicable credit property with respect to which it intends to make an elective payment election.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an applicable entity or electing taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The applicable entity's or electing taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity.

(ii) Any additional information required by the IRS electronic portal, such as information regarding the taxpayer's exempt status under section 501(a) of the Code; that the applicable entity is a political subdivision of a State, the District of Columbia, an Indian Tribal government, or a U.S territory; or that the applicable entity is an agency or instrumentality of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory.

(iii) The taxpayer's taxable year, as determined under section 441 of the Code.

(iv) The type of annual tax return(s) normally filed by the applicable entity or electing taxpayer, or that the applicable entity or electing taxpayer does not normally file an annual tax return with the IRS.

(v) The type of applicable credit(s) for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vi) For each applicable credit, each applicable credit property that the applicable entity or electing taxpayer intends to use to determine the credit for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vii) For each applicable credit property listed in paragraph (b)(4)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of applicable credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the applicable credit property);

(C) Any supporting documentation relating to the construction or acquisition of the applicable credit property (such as State, District of Columbia, Indian Tribal, U.S. territorial, or local government permits to operate the applicable credit property; certifications; evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the applicable credit property is constructed or housed; U.S. Coast Guard registration numbers for offshore wind vessels; and the vehicle identification number of an

eligible clean vehicle with respect to which a section 45W credit is determined);

(D) The beginning of construction date and the placed in service date of the applicable credit property;

(E) If an investment-related credit property (as defined § 1.6417–2(c)(3)), the source of funds the taxpayer used to acquire the property; and

(F) Any other information that the applicable entity or electing taxpayer believes will help the IRS evaluate the registration request.

(viii) The name of a contact person for the applicable entity or electing taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the applicable entity or electing taxpayer or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative.*

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant.

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid only with respect to the applicable entity or electing taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(3) *Renewing registration numbers.* If an elective payment election will be made with respect to an applicable credit property for a taxable year after a registration number under this section has been obtained, the applicable entity or electing taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for an elective payment election for applicable credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the applicable credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered applicable credit property.

(5) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The applicable entity or electing taxpayer must include the registration number of the applicable credit property on its annual tax return as provided in § 1.6417–2(b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to an applicable credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

(d) *Applicability date.* This section applies to taxable years ending on or after June 21, 2023.

(e) *Expiration date.* The applicability of this section expires on June 12, 2026.

■ **Par. 4.** Section 1.6418–4T is added to read as follows:

§ 1.6418–4T Additional information and registration.

(a) *Pre-filing registration and election.* As a condition of, and prior to, any specified credit portion being transferred by an eligible taxpayer to a transferee taxpayer pursuant to an election under § 1.6418–2, or a specified credit portion being transferred by a partnership or S corporation pursuant to § 1.6418–3, the eligible taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section. An eligible taxpayer that does not obtain a registration number under paragraph (c)(1) of this section, and report the registration number on its return pursuant to paragraph (c)(5) of this section, is ineligible to make a transfer election for a specified credit portion under § 1.6418–2 or § 1.6418–3, with respect to the eligible credit determined with respect to the specific eligible credit property for which the eligible taxpayer has failed to obtain and report a registration number. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property.

(b) *Pre-filing registration requirements*—(1) *Manner of pre-filing registration.* Unless otherwise provided in guidance, eligible taxpayers must complete the pre-filing registration process electronically through an IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration to transfer any eligible credit determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration.* An eligible taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making a transfer election under § 1.6418–2 or § 1.6418–3 for a specified credit portion on the taxpayer's return for the taxable year at issue.

(4) *Each eligible credit property must have its own registration number.* An eligible taxpayer must obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an eligible taxpayer is required to provide the following information to the IRS to complete the pre-filing registration process:

(i) The eligible taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal,

such as information establishing that the entity is an eligible taxpayer;

(iii) The taxpayer's taxable year, as determined under section 441;

(iv) The type of annual tax return(s) normally filed by the eligible taxpayer, or that the eligible taxpayer does not normally file an annual tax return with the IRS;

(v) The type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;

(vi) Each eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election;

(vii) For each eligible credit property listed in paragraph (b)(4)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of eligible credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the eligible credit property);

(C) Any supporting documentation relating to the construction or acquisition of the eligible credit property (such as State, Indian Tribal, or local government permits to operate the eligible credit property, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the eligible credit property is constructed or housed, and U.S. Coast Guard registration numbers for offshore wind vessels);

(D) The beginning of construction date, and the placed in service date of the eligible credit property; and

(E) Any other information that the eligible taxpayer believes will help the IRS evaluate the registration request;

(viii) The name of a contact person for the eligible taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the eligible taxpayer, or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative;*

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the registration information provided and will issue a separate registration number for each eligible credit property for which the eligible taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid to an eligible taxpayer only for the taxable year in which the credit is determined for the eligible credit property for which the registration is completed, and for a transferee taxpayer's taxable year in which the eligible credit is taken into account under § 1.6418–2(f).

(3) *Renewing registration numbers.* If an election to transfer an eligible credit will be made with respect to an eligible credit property for a taxable year after a registration number under this section has been obtained, the eligible taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an eligible taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for a transfer election under § 1.6418–2 or § 1.6418–3 for eligible credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the eligible credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered eligible credit property.

(5) *Reporting of registration number by an eligible taxpayer and a transferee taxpayer*—(i) *Eligible taxpayer reporting.* As part of making a valid transfer election under § 1.6418–2 or § 1.6418–3, an eligible taxpayer must include the registration number of the eligible credit property on the eligible taxpayer's return (as provided in § 1.6418–2(b) or § 1.6418–3(d)) for the taxable year the specified credit portion was determined. The IRS will treat an election as ineffective if the eligible taxpayer does not include a valid registration number on the return.

(ii) *Transferee taxpayer reporting.* A transferee taxpayer must report the registration number received (as part of the transfer election statement as described in § 1.6418–2(b) or otherwise) from a transferor taxpayer on the Form 3800, *General Business Credit,* as part of the return for the taxable year that the transferee taxpayer takes the transferred specified credit portion into account. The specified credit portion will be disallowed to the transferee taxpayer if the transferee taxpayer does not include the registration number on the return.

(d) *Applicability date.* This section applies to taxable years ending on or after June 21, 2023.

(e) *Expiration date.* The applicability of this section expires on June 12, 2026.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: June 5, 2023.

Lily Batchelder,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2023–12797 Filed 6–14–23; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 587

Publication of Russian Harmful Foreign Activities Sanctions Regulations Web General License 69

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Publication of a Web General License.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing one general license (GL) issued pursuant to the Russian Harmful Foreign Activities Sanctions Regulations: GL 69, which was previously made available on OFAC's website.

DATES: GL 69 was issued on May 31, 2023. 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 Compliance, 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

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

Background

On May 31, 2023, OFAC issued GL 69 to authorize certain transactions otherwise prohibited by the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587. GL 69 was made available on OFAC's website (*https://ofac.treasury.gov*) when it was issued. The text of this GL is provided below.

OFFICE OF FOREIGN ASSETS CONTROL

Russian Harmful Foreign Activities Sanctions Regulations 31 CFR Part 587

GENERAL LICENSE NO. 69

Authorizing Certain Debt Securities Servicing Transactions Involving International Investment Bank

(a) Except as provided in paragraph (c) of this general license, all transactions prohibited by Executive Order (E.O.) 14024 that are ordinarily incident and necessary to the processing of interest or principal payments on debt securities issued by International Investment Bank (IIB) prior to April 12, 2023 are authorized through 12:01 a.m. eastern daylight time June 30, 2023, provided that such interest or principal payments are not made to persons located in the Russian Federation and that any payments to a blocked person, wherever located, are made into a blocked account in accordance with the Russian Harmful Foreign Activities Sanctions Regulations, 31 CFR part 587 (RuHSR).

Note to paragraph (a). For the purposes of this general license, the term ''person located in the Russian Federation'' includes persons in the Russian Federation, individuals ordinarily resident in the Russian Federation, and entities incorporated or organized under the laws of the Russian Federation or any jurisdiction within the Russian Federation.

(b) U.S. financial institutions are authorized to unblock interest or principal payments that were blocked on or after April 12, 2023 but before May 31, 2023 on debt securities issued by IIB prior to April 12, 2023, provided that the funds are unblocked solely to effect transactions authorized in paragraph (a) of this general license.

Note to paragraph (b). U.S. financial institutions unblocking property pursuant to paragraph (b) of this general license are required to file an unblocking report pursuant to 31 CFR 501.603.

(c) This general license does not authorize:

(1) Any transactions prohibited by Directive 2 under E.O. 14024, *Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions;*

(2) Any transactions prohibited by Directive 4 under E.O. 14024, *Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation;* or

(3) Any transactions otherwise prohibited by the RuHSR, including transactions involving any person blocked pursuant to the RuHSR other than the blocked person described in paragraph (a) of this general license, unless separately authorized.

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

Dated: May 31, 2023

Andrea M. Gacki,

Director, Office of Foreign Assets Control.

[FR Doc. 2023–13117 Filed 6–20–23; 8:45 am]

BILLING CODE 4810–AL–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 1, and 64

[WC Docket No. 17–97; FCC 23–18, FR ID 138840]

Call Authentication Trust Anchor

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) takes further steps to combat illegally spoofed robocalls by strengthening and expanding caller ID authentication and robocall mitigation obligations and creating new mechanisms to hold providers accountable for violations of the Commission's rules.

DATES: *Effective date:* This rule is effective August 21, 2023, except for the amendments codified at 47 CFR 64.6303(c) (amendatory instruction 9) and 64.6305(d), (e), (f), and (g) (amendatory instruction 12) which are delayed. The Commission will publish a document in the **Federal Register** announcing the effective dates for the delayed amendments to 47 CFR 64.6303(c) and 64.6305(d), (e), (f), (g).

FOR FURTHER INFORMATION CONTACT: Jonathan Lechter, Competition Policy Division, Wireline Competition Bureau, at (202) 418–0984, *jonathan.lechter@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Sixth Report and Order* in WC Docket No. 17–97 adopted on March 16, 2023 and released on March 17, 2023. The document is available for download at *https://docs.fcc.gov/public/attachments/FCC-23-18A1.pdf.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Synopsis

I. Sixth Report and Order

1. In this document, the Commission continues to strengthen and expand caller ID authentication requirements in the Secure Telephony Identity Revisited/Signature-based Handling of Asserted information using toKENs (STIR/SHAKEN) ecosystem by requiring non-gateway intermediate providers that receive unauthenticated calls directly from an originating provider to use STIR/SHAKEN to authenticate those calls. The STIR/SHAKEN framework is a set of technical standards and protocols that enable providers to authenticate and verify caller ID information transmitted with Session Initiation Protocol (SIP) calls. The STIR/SHAKEN framework consists of two components: (1) the technical process of authenticating and verifying caller ID information; and (2) the certificate governance process that maintains trust in the caller ID authentication information transmitted along with a call.

2. Further, with this document, the Commission expands robocall mitigation requirements for all providers, including those that have not yet implemented STIR/SHAKEN because they lack the necessary infrastructure or are subject to an implementation extension. The Commission empowers the Enforcement Bureau with new tools and penalties to hold providers accountable for failing to comply with its rules. The Commission also defines the STIR/SHAKEN obligations of satellite providers.

3. The STIR/SHAKEN caller ID authentication framework protects consumers from illegally spoofed robocalls by enabling authenticated caller ID information to securely travel with the call itself throughout the entire call path. The Commission, consistent with Congress's direction in the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, adopted rules requiring voice service providers to implement STIR/SHAKEN in the internet Protocol (IP) portions of their voice networks by June 30, 2021, subject to certain exceptions.

Because the TRACED Act defines ''voice service'' in a manner that excludes intermediate providers, the Commission's authentication and Robocall Mitigation Database rules use ''voice service provider'' in this manner. The Commission's rules in 47 CFR 64.1200, many of which the Commission adopted prior to adoption of the TRACED Act, use a definition of ''voice service provider'' that includes intermediate providers. For purposes of this document, the Commission uses the term ''voice service provider'' consistent with the TRACED Act definition and where discussing caller ID authentication or the Robocall Mitigation Database. In all other instances, the Commission uses ''provider'' and specifies the type of provider as appropriate. Unless otherwise specified, the Commission means any provider, regardless of its position in the call path.

A. Strengthening the Intermediate Provider Authentication Obligation

1. Requiring the First Intermediate Provider To Authenticate Unauthenticated Calls

4. Under the Commission's caller ID authentication rules, intermediate providers are required to authenticate any unauthenticated caller ID information for the SIP calls they receive or, alternatively, cooperate with the industry traceback consortium and timely and fully respond to all traceback requests received from the Commission, law enforcement, and the industry traceback consortium. In the *Fourth Call Blocking Order,* 86 FR 17726 (Apr. 6, 2021), however, the Commission required all providers in the path of a SIP call—including gateway providers and other intermediate providers—to respond fully and in a timely manner to traceback requests. The Commission later enhanced this obligation for gateway providers to require response within 24 hours in the *Fifth Caller ID Authentication Report and Order,* 87 FR 42916 (July 18, 2022). As a result of that action, intermediate providers may decline to authenticate caller ID information given that compliance with the traceback alternative has been made mandatory. In the *Fifth Caller ID Authentication Further Notice of Proposed Rulemaking (FNPRM),* 87 FR 42670 (July 18, 2022), the Commission proposed closing this gap in the STIR/SHAKEN caller ID authentication regime by requiring all U.S. intermediate providers in the path of a SIP call carrying a U.S. number in the caller ID field to authenticate unauthenticated caller ID information, irrespective of their traceback obligations. Based on its review of the record, the Commission adopts its proposal to establish a mandatory caller ID authentication obligation for intermediate providers, but does so on an incremental basis. Specifically, the Commission amends its rules to require any non-gateway intermediate provider that receives an unauthenticated SIP call directly from an originating provider to authenticate the call. Stated differently, the first intermediate provider in the path of an unauthenticated SIP call will now be subject to a mandatory requirement to authenticate the call.

5. The Commission has previously recognized that the STIR/SHAKEN framework has beneficial network effects and becomes more effective as more providers implement it. The record in this proceeding supports expanding STIR/SHAKEN implementation by requiring non-gateway intermediate providers to authenticate unauthenticated calls, regardless of their traceback obligations. Although originating providers are required to authenticate calls under the Commission's rules—with limited exceptions—some originating providers are not capable of implementing STIR/SHAKEN. In other cases, unscrupulous providers may deliberately fail to comply with the Commission's rules. The record shows that the failure of originating providers to sign calls is one of the key weaknesses in the STIR/SHAKEN regime. By requiring intermediate providers to authenticate unauthenticated SIP calls they receive directly from an originating provider, the Commission closes an important loophole in its caller ID authentication scheme, and incorporates calls that would otherwise go unauthenticated into the STIR/SHAKEN framework. Further, intermediate provider authentication will facilitate analytics, blocking, and traceback efforts by providing more information to downstream providers.

6. The Commission recognizes, however, that a mandatory authentication obligation could subject intermediate providers to significant costs. The Commission believes that the goals of the STIR/SHAKEN framework and the public interest are best served by taking a targeted approach to intermediate provider authentication that focuses on the first intermediate provider in the call path. The Commission therefore opts to take an incremental approach to imposing mandatory authentication obligations on intermediate providers, requiring only the first intermediate provider in the path of a SIP call to authenticate unauthenticated caller ID information, rather than requiring all intermediate providers in the path to do so at this time. Intermediate providers should know whether they receive calls directly from an originating provider pursuant to contracts that provide information to the intermediate provider about the originating provider's customers and expectations for handling their traffic. Further, as explained below, the Commission requires non-gateway intermediate providers to take ''reasonable steps'' to mitigate illegal robocall traffic. That duty, along with other requirements of the Commission's rules, may require an intermediate provider to perform the due diligence necessary to understand the sources of the traffic it receives. Accordingly, in the unlikely event that an intermediate provider does not know through its contracts whether it receives calls directly from an originating provider, it should obtain that information to comply with this and other aspects of the Commission's rules. The Commission finds that this approach, which focuses on the beginning of the call path, will directly address the problem of calls entering the call path without being authenticated by originating providers, as described above. The Commission agrees with YouMail that this targeted approach is likely to have the greatest impact on stopping illegally spoofed robocalls. As YouMail argues, apart from the originating provider, the ''best entity to identify and stop the sources of robocalls is the first 'downstream' provider (*i.e.,* the next provider in line that receives calls placed on the originating provider's network).'' While the Commission may consider expanding a call authentication requirement to all intermediate providers in the future, this targeted approach will provide the Commission with an opportunity to evaluate this first mandatory obligation for intermediate providers, together with other pending expansions of the caller ID authentication regime, and determine whether an authentication requirement for more downstream intermediate providers is warranted.

7. The Commission is not persuaded by the arguments submitted by commenters favoring a mandatory authentication requirement for all intermediate providers. For instance, some commenters argue that the Commission's justifications for adopting a mandatory gateway provider authentication requirement apply with equal force to all non-gateway

intermediate providers in the call path. The Commission disagrees. The gateway provider caller ID authentication rules adopted by the Commission in May 2022 apply to the first domestic intermediate provider in the path of a foreign-originated call. The authentication requirement the Commission adopts in this document similarly applies to the first intermediate provider in the path of a U.S.-originated call. Further, there are fewer gateway providers than other domestic intermediate providers. Therefore, the overall industry cost of an authentication obligation imposed on all domestic intermediate providers is likely to be significantly higher than that of the gateway provider obligation. The record in this proceeding simply does not support requiring all intermediate providers to incur those costs at this time if imposing an authentication obligation on the first intermediate provider that receives an unauthenticated call directly from an originating provider can close significant gaps in the Commission's caller ID authentication regime. The Commission finds that the incremental approach it adopts in this document will target a critical gap in its call authentication regime while minimizing the impact of the requirements on industry, including new entrants to the market.

8. The Commission also declines to impose an authentication obligation on all intermediate providers at this time to address instances in which authentication information is ''stripped out'' by the call transiting a non-IP network. The Commission has launched an inquiry into solutions to enable caller ID authentication over non-IP networks, the nexus between non-IP caller ID authentication and the IP transition generally, and on specific steps the Commission can take to encourage the industry's transition to IP. Widespread adoption of a non-IP authentication solution or IP interconnection would result in authenticated caller ID information being preserved and received by the terminating provider. The Commission therefore declines to impose an authentication obligation on all intermediate providers to address circumstances where a call traverses a non-IP network, but may revisit the subject after the Commission concludes its inquiry into whether non-IP authentication or IP interconnection solutions are feasible and can be timely implemented.

9. The Commission notes that the requirement it adopts here for the first intermediate provider to authenticate a call will arise in limited circumstances, such as where the originating provider failed to comply with their own authentication obligation or where the call is sent directly to an intermediate provider from the limited subset of originating providers that lack an authentication obligation. If the originating provider complies with its authentication obligation, the first intermediate provider in the call chain need only meet its preexisting obligation to pass-on that authentication information to the next provider in the chain. Indeed, the first intermediate provider in the call path may completely avoid the need to authenticate calls if it implements contractual provisions with its upstream originating providers stating that it will only accept authenticated traffic. USTelecom requests that the Commission clarify that non-gateway intermediate providers be deemed in compliance with their authentication obligations if they enter into contractual provisions with originating providers and such providers represent and warrant that they do not originate any unsigned traffic and thereafter ''have no reason to know, and do not know, that their upstream provider is sending unsigned traffic it originated.'' The Commission declines to do so, finding that such a clarification is unnecessary. If a non-gateway intermediate provider were to claim that it has complied with the authentication obligation that the Commission adopts pursuant to terms of a contract with an originating provider, the Commission would evaluate such a claim on a case-by-case basis.

2. Applicable STIR/SHAKEN Standards for Compliance

10. Voice service providers and gateway providers are obligated to comply with, at a minimum, the version of the STIR/SHAKEN standards ATIS–1000074, ATIS–1000080, and ATIS–1000084 and all of the documents referenced therein in effect at the time of their respective compliance deadlines, including any errata as of those dates or earlier. In the *Fifth Caller ID Authentication FNPRM,* the Commission proposed that non-gateway intermediate providers comply with, at a minimum, the versions of these standards in effect at the time of their compliance deadline. The Commission also sought comment on whether all providers should be required to comply with the same versions of the standards as non-gateway intermediate providers and whether it should establish a mechanism for updating the standard that providers must comply with going forward, including through delegation to the Wireline Competition Bureau.

11. The Commission adopts its proposal that non-gateway intermediate providers subject to the authentication obligation described above must comply with, at a minimum, the versions of the standards in effect at the time of their authentication compliance deadline (which is addressed in the following section), along with any errata. Like other providers, non-gateway intermediate providers will have the flexibility to assign the level of attestation appropriate to the call based on the applicable level of the standards and the available call information. This approach is supported in the record.

12. The Commission does not at this time require gateway and voice service providers to comply with versions of the standards that came into effect after their respective compliance deadlines. The Commission reiterates, however, that its requirement that providers must comply with a specific version of a standard ''at a minimum,'' means that while providers are required to comply with these standards, they are permitted to comply with any version of the standard that has been ratified by the Alliance for Telecommunications Industry Solutions (ATIS) subsequent to the standard in effect at the time their authentication implementation deadline. However, any later-adopted or improved version of the standards that a provider chooses to incorporate into its STIR/SHAKEN authentication framework must maintain the baseline call authentication functionality exemplified by the versions of ATIS–1000074, ATIS–1000080, and ATIS–1000084 in effect at the time of its respective compliance date.

13. The Commission nevertheless concludes that there may be significant benefits for all providers to comply with standards as they are updated, particularly where updated versions contain critical new features or functions. Requiring all providers to comply with a single, updated standard would also facilitate enforcement of the Commission's rules and ensure that any new features and functions contained in revised standards spread throughout the STIR/SHAKEN ecosystem. Therefore, the Commission adopts a process to incorporate future standards into its rules where appropriate, similar to the process it has adopted to require compliance with updated technical standards in other contexts.

14. Specifically, the Commission delegates to the Wireline Competition Bureau the authority to determine whether to seek comment on requiring compliance with revised versions of the three ATIS standards associated with the STIR/SHAKEN authentication

framework, and all documents referenced therein. The Commission also delegates to the Wireline Competition Bureau the authority to require providers subject to a STIR/SHAKEN authentication requirement to comply with those revised standards, and the authority to set appropriate compliance deadlines regarding such revised standards. Providers will only be required to implement new standards if the benefits to the STIR/SHAKEN ecosystem outweigh any compliance burdens. Additionally, a process based on delegated authority may allow the adoption of revised standards more quickly than would be the case through Commission-level notice and comment procedures.

15. As with voice service and gateway providers, the Commission also requires any non-gateway intermediate provider subject to the authentication obligation described in this section to either upgrade its network to allow for the initiation, maintenance, and termination of SIP calls and fully implement the STIR/SHAKEN framework, or maintain and be ready to provide the Commission on request with documented proof that it is participating, either on its own or through a representative, including third party representatives, as a member of a working group, industry standards group, or consortium that is working to develop a non-internet Protocol caller identification authentication solution, or actively testing such a solution. The Commission finds that expanding the requirements of § 64.6303 to non-gateway intermediate providers will ensure regulatory parity and promote the development of non-IP authentication solutions, while offering flexibility to providers that rely on non-IP infrastructure.

3. Compliance Deadlines

16. The Commission sets a December 31, 2023, deadline for the new authentication obligations adopted in this section. By that date, the first non-gateway intermediate provider in the call chain must authenticate unauthenticated calls it receives. The Commission adopts a deadline longer than the six-month deadline it suggested in the *Fifth Caller ID Authentication FNPRM* because intermediate providers need time to deploy the technical capability to comply with the Commission's requirement to authenticate calls, and providers may wish to amend their contracts with upstream originating providers to meet this new requirement. While the record reflects disagreement as to an appropriate intermediate authentication provider deadline, the Commission concludes that a later deadline is not necessary. Implementation of call authentication technology has likely become faster and less costly for many providers than when the Commission first adopted caller ID authentication requirements, particularly for those that have already implemented STIR/SHAKEN in their other roles in the call stream. Moreover, a non-gateway intermediate provider can avoid the need to implement STIR/SHAKEN where it agrees to only accept authenticated traffic from originating providers. The Commission has previously found that six months is sufficient time for providers to evaluate and renegotiate contracts to address new regulatory requirements. Accordingly, the Commission finds that the approximate nine-month period afforded by the December 31, 2023, deadline provides sufficient time for intermediate providers to amend their contracts with originating providers, if necessary, to comply with the Commission's authentication requirement.

B. Mitigation and Robocall Mitigation Database Filing Obligations

17. The Commission next takes action to strengthen the robocall mitigation requirements and Robocall Mitigation Database filing obligations of all providers. As the Commission proposed in the *Fifth Caller ID Authentication FNPRM,* it requires all providers—including intermediate providers and voice service providers without the facilities necessary to implement STIR/SHAKEN—to: (1) take ''reasonable steps'' to mitigate illegal robocall traffic; (2) submit a certification to the Robocall Mitigation Database regarding their STIR/SHAKEN implementation status along with other identifying information; and (3) submit a robocall mitigation plan to the Robocall Mitigation Database. Consistent with its proposal, the Commission also requires downstream providers to block traffic received directly from all intermediate providers that are not in the Robocall Mitigation Database. These actions have significant support in the record. While the Commission does not require providers to take specific steps to meet their mitigation obligations, it does expand the subjects that providers must describe in their filed mitigation plans and the information that providers must submit to the Robocall Mitigation Database.

1. Applying the ''Reasonable Steps'' Mitigation Standard to All Providers

18. The Commission adopts its proposal in the *Fifth Caller ID Authentication FNPRM* to expand to all providers the obligation to mitigate illegal robocalls under the general ''reasonable steps'' standard. Specifically, the Commission now requires all non-gateway intermediate providers, as well as voice service providers that have fully implemented STIR/SHAKEN, to meet the same ''reasonable steps'' general mitigation standard that is currently applied to gateway providers and voice service providers that have not fully implemented STIR/SHAKEN under the Commission's rules. The general mitigation standard the Commission adopts here for all providers is separate from and in addition to the new robocall mitigation program description obligations for all providers discussed below. The Commission also concludes that voice service providers without the facilities necessary to implement STIR/SHAKEN must mitigate illegal robocalls and meet this same mitigation standard.

19. Requiring all providers to mitigate calls under the ''reasonable steps'' standard will ensure that every provider in the call chain is subject to the same duty to mitigate illegal robocalls, promoting regulatory symmetry and administrability. There is significant support in the record for this approach. For providers with a STIR/SHAKEN authentication obligation, these mitigation duties will serve as an ''effective backstop'' to that authentication obligation and, for those without such an obligation, they will act as a key bulwark against illegal robocalls. As the Commission has noted, STIR/SHAKEN is not a silver bullet and has a limited effect on illegal robocalls where the number was obtained lawfully and not spoofed. Requiring all providers to take reasonable steps to mitigate illegal robocalls will help address these limitations in the STIR/SHAKEN regime.

20. As proposed, the Commission retains a general standard that requires providers to take ''reasonable steps'' to mitigate illegal robocall traffic, rather than mandate that providers include specific measures as part of their mitigation plans. The Commission notes, however, that what constitutes a ''reasonable step'' may depend upon the specific circumstances and the provider's role in the call path. While some commenters argue that the Commission should require providers to take specific measures under the ''reasonable steps'' standard, the Commission agrees that providers should retain ''the necessary flexibility in determining which measures to use to mitigate illegal calls on their networks.'' For this reason, the

Commission rejects ZipDX's request that it require providers to describe specific practices in their robocall mitigation plans, including specific know-your-upstream provider and analytics practices. That said, the Commission agrees that promptly investigating and mitigating illegal robocall traffic that is brought to the provider's attention through measures such as internal monitoring and tracebacks would constitute reasonable steps. Pursuant to this standard, a provider's program is ''sufficient if it includes detailed practices that can reasonably be expected to significantly reduce'' the carrying or processing (for intermediate providers) or origination (for voice service providers) of illegal robocalls. Each provider ''must comply with the practices'' that its program requires, and its program is insufficient if the provider ''knowingly or through negligence'' carries or processes calls (for intermediate providers) or originates (for voice service providers) unlawful robocall campaigns.

21. The Commission declines to adopt Voice On The Net Coalition (VON)'s proposal for a safe harbor from contract breach for providers invoking contract termination provisions against providers originating illegal robocall traffic. VON does not explain why such a safe harbor is necessary or the legal authority for the Commission to adopt such a provision, and the Commission finds it outside the scope of this proceeding. Providers' programs must also commit to respond fully, within the time period required by the Commission's rules, to all traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping illegal robocallers that use its service to originate, carry, or process illegal robocalls. The Commission declines to adopt Electronic Privacy Information Center and National Consumer Law Center (EPIC/NCLC)'s proposal to replace the ''reasonable steps'' general mitigation standard with the ''affirmative, effective measures'' standard found elsewhere in its rules. Under EPIC/NCLC's proposal, a provider would fail to meet this standard if they allow the origination of any illegal robocalls, even where the provider may have taken ''reasonable steps'' to mitigate such calls. The Commission disagrees with EPIC/NCLC's reading of its rules and conclude that these standards work hand-in-hand to prevent illegal robocalls. A key purpose of the ''reasonable steps'' standard is to ensure that providers enact a robocall mitigation program and describe that program in the Robocall Mitigation Database. If the program is not reasonable as described, or if it is not followed, the provider may be held liable. Further, if the steps described in a mitigation program are followed but are not actually effective in stopping illegal robocalls, the originating provider could be held liable for failing to put in place ''affirmative, effective'' measures to stop robocalls if they do not take further action. Regardless of the mitigation standard the Commission adopts, the Commission disagrees with EPIC/NCLC that providers should be held strictly liable for allowing the origination of any illegal robocalls regardless of whether they have taken ''reasonable steps'' to mitigate such calls, as explained in more detail below.

22. The Commission also does not adopt VON's proposal of a ''gross negligence'' standard to evaluate whether a mitigation program is sufficient, rather than the Commission's existing standard, which assesses whether a provider ''knowingly or through negligence'' originates, carries, or processes illegal robocalls. The Commission disagrees that its existing standard ''essentially impose[s] strict liability on providers,'' as VON asserts. On the contrary, if a provider is taking sufficient ''reasonable steps'' to mitigate illegal robocall traffic pursuant to a robocall mitigation program that complies with the Commission's rules, the provider is likely not acting negligently.

23. The Commission declines to adopt a heightened mitigation obligation solely for Voice over internet Protocol (VoIP) providers. The Commission acknowledges that there is evidence that VoIP providers are disproportionally involved in the facilitation of illegal robocalls. However, the Commission agrees with commenters opposing such a heightened standard, because the threat of illegal robocalls is an industry issue and impacts every type of provider. The Commission finds that applying its obligations to providers regardless of the technology used to transmit calls better aligns with the competitive neutrality of the TRACED Act.

24. *Deadlines.* Consistent with the obligation placed on other providers and the limited comments filed in the record, the Commission requires providers newly covered by the general mitigation standard to meet that standard within 60 days following **Federal Register** publication of this document. No commenter argued that a greater length of time is needed to comply, and the Commission finds no reason to depart from the same compliance timeframe previously established for other providers.

2. Expanded Robocall Mitigation Database Filing Obligations

25. The Commission next takes steps to strengthen its Robocall Mitigation Database filing obligations to increase transparency and ensure that all providers act to mitigate illegal robocalls. The Commission previously required voice service providers with a STIR/SHAKEN implementation obligation and those subject to an extension to file certifications in the Robocall Mitigation Database regarding their efforts to mitigate illegal robocalls on their networks—specifically, whether their traffic is either signed with STIR/SHAKEN or subject to a robocall mitigation program. By ''STIR/SHAKEN implementation obligation,'' the Commission means the applicable requirement under its rules that a provider implement STIR/SHAKEN in the IP portions of their networks by a date certain, subject to certain exceptions. When referencing those providers ''without'' a STIR/SHAKEN implementation obligation, the Commission means those providers that are subject to an implementation extension, such as a provider with an entirely non-IP network or one that is unable to obtain the necessary Service Provider Code (SPC) token to authenticate caller ID information, or that lack control over the facilities necessary to implement STIR/SHAKEN. Those voice service providers that certified that some or all of their traffic is ''subject to a robocall mitigation program'' were required to submit a robocall mitigation plan detailing the specific ''reasonable steps'' that they have taken ''to avoid originating illegal robocall traffic.'' The Commission did not specifically require voice service providers without the facilities necessary to implement STIR/SHAKEN to file certifications in the database and had previously concluded that they were not subject to the Commission's implementation requirements.

26. The Commission adopts its proposal to expand the obligation to file a robocall mitigation plan along with a certification in the Robocall Mitigation Database to all providers regardless of whether they are required to implement STIR/SHAKEN—including non-gateway intermediate providers and providers without the facilities necessary to implement STIR/SHAKEN—and expand the downstream blocking duty to providers receiving traffic directly from non-gateway intermediate providers not in the Robocall Mitigation Database. As

proposed, providers with a new Robocall Mitigation Database filing obligation must submit the same basic information as providers that had previously been required to file. The Commission also requires all providers to file additional information in certain circumstances, as explained below.

27. *Universal Robocall Mitigation Database Filing Obligation.* There was overwhelming record support for broadening the Robocall Mitigation Database certification and mitigation plan filing obligation to cover all providers. Like the expanded mitigation obligation above, this approach will ensure that every provider in the call chain is covered by the same basic set of rules and will increase transparency and accountability. The Commission also agrees with USTelecom that requiring non-gateway intermediate providers to file a certification and mitigation plan in the Robocall Mitigation Database will facilitate the Commission's enforcement efforts for those providers, as it will for voice service providers newly obligated to file a mitigation plan.

28. Consistent with its proposal and existing providers' obligations, all providers' robocall mitigation plans must describe the specific ''reasonable steps'' the provider has taken to avoid, as applicable, the origination, carrying, or processing of illegal robocall traffic as part of its robocall mitigation program. A provider that plays more than one ''role'' in the call chain should explain the mitigation steps it undertakes in each role, to the extent those mitigation steps are different.

29. *New Robocall Mitigation Program Description Obligations for All Providers.* Under the Commission's current rules, voice service providers are required to describe the specific ''reasonable steps'' that they have taken ''to avoid originating illegal robocall traffic'' as part of their robocall mitigation programs. Gateway providers are required to address this topic and provide a description of how they have complied with the know-your-upstream provider requirement in § 64.1200(n)(4) of the Commission's rules. The Commission now imposes specific additional requirements for the contents of robocall mitigation plans filed in the Robocall Mitigation Database. Specifically, as part of their obligation to ''describe with particularity'' their robocall mitigation techniques, (1) voice service providers must describe how they are meeting their existing obligation to take affirmative, effective measures to prevent new and renewing customers from originating illegal calls; (2) non-gateway intermediate providers and voice service providers must, like gateway providers, describe any ''know-your-upstream provider'' procedures in place designed to mitigate illegal robocalls; and (3) all providers must describe any call analytics systems they use to identify and block illegal traffic, including whether they use a third-party vendor or vendors and the name of the vendor(s). To comply with the new requirements to describe their ''new and renewing customer'' and ''know-your-upstream provider'' procedures, providers must describe any contractual provisions with end-users or upstream providers designed to mitigate illegal robocalls. The Commission does not expect providers to necessarily submit contractual provisions, but to describe them in general terms, including whether such provisions are typically included in their contracts. The Commission concludes that the obligation to describe these procedures is particularly important for voice service providers without a STIR/SHAKEN implementation obligation. While the Commission does not currently require intermediate providers other than gateway providers to engage in ''know-your-upstream provider'' procedures, if they have put such procedures in place, they must be documented in their robocall mitigation plan. While the Commission does not specifically require providers to use call analytics, doing so may be a ''reasonable step'' to mitigate illegal robocall traffic, depending on the circumstances. For example, if a provider is a reseller, it is likely to rely on any analytics software adopted by its wholesale provider to monitor call traffic. In that case, the reseller should describe this practice in its robocall mitigation plan.

30. In the *Fifth Caller ID Authentication Report and Order,* the Commission required gateway providers to comply with a new requirement to ''know'' their upstream provider and required gateway providers to include in their Robocall Mitigation Database-filed mitigation plan a description of how they have complied with this obligation. In the *Fifth Caller ID Authentication FNPRM,* the Commission sought comment on expanding these two requirements to non-gateway intermediate providers. The Commission continues to study the record on whether to do so. Similarly, the Commission continues to consider whether to adopt its proposal to require all providers to respond to traceback requests within 24 hours as gateway providers are currently required to do.

31. The Commission imposes these new requirements because it has become increasingly clear that provider due diligence and the use of call analytics are key ways to stop illegal robocalls. The public and the Commission's understanding of the steps providers take to scrutinize their relationships with other providers in the call path and analyze their traffic will facilitate compliance with and enforcement of the Commission's rules. Recent actions by the Enforcement Bureau demonstrating that some providers are not including meaningful descriptions in their mitigation plans warrants more prescriptive obligations. There is also specific record support for these new requirements.

32. *Baseline Information Submitted with Robocall Mitigation Database Certifications.* Consistent with existing providers' filing obligations and the Commission's proposal in the *Fifth Caller ID Authentication FNPRM,* all providers newly obligated to submit a certification to the Robocall Mitigation Database pursuant to the requirements adopted herein must submit the following information: (1) whether it has fully, partially, or not implemented the STIR/SHAKEN authentication framework in the IP portions of its network; (2) the provider's business name(s) and primary address; (3) other business name(s) in use by the provider; (4) all business names previously used by the provider; (5) whether the provider is a foreign provider; and, (6) the name, title, department, business address, telephone number, and email address of one person within the company responsible for addressing robocall mitigation-related issues. The certification must be signed by an officer of the company. Consistent with the Commission's proposal and current rules, providers with a new filing obligation must update any information submitted within 10 business days of ''any change in the information'' submitted, ensuring that the information is kept up to date. Certifications and robocall mitigation plans must be submitted in English or with a certified English translation.

33. *Additional Information to be Submitted with Mitigation Plans.* In order to effectively implement its new and modified authentication obligations, in addition to the baseline information currently required of all filers, the Commission also requires providers to submit additional information in their Robocall Mitigation Database certifications. The Commission requires all providers: (1) to submit additional information regarding their role(s) in the call chain; (2) asserting they do not have an obligation to implement STIR/SHAKEN to include more detail regarding the basis of that

assertion; (3) to certify that they have not been prohibited from filing in the Robocall Mitigation Database; and (4) to state whether they are subject to a Commission, law enforcement, or regulatory agency action or investigation due to suspected unlawful robocalling or spoofing and provide information concerning any such actions or investigations.

34. First, to increase transparency for the industry and regulators and better facilitate its evaluation of the mitigation plans detailed in the Robocall Mitigation Database, the Commission requires providers to submit additional information to indicate the role or roles they are playing in the call chain. Specifically, providers must indicate whether they are: (1) a voice service provider with a STIR/SHAKEN implementation obligation serving end-users; (2) a voice service provider with a STIR/SHAKEN obligation acting as a wholesale provider originating calls; (3) a voice service provider without a STIR/SHAKEN obligation; (4) a non-gateway intermediate provider with a STIR/SHAKEN obligation; (5) a non-gateway intermediate provider without a STIR/SHAKEN obligation; (6) a gateway provider with a STIR/SHAKEN obligation; (7) a gateway provider without a STIR/SHAKEN obligation; and/or (8) a foreign provider. This requirement expands upon the existing rule that providers indicate in their Robocall Mitigation Database filings whether they are a foreign provider, voice service provider, and/or gateway provider. The Commission notes that certain provider classes have different obligations under its rules and, as explained above, the ''reasonable steps'' necessary to meet the Commission's mitigation standard may differ based on the provider's role in the call path. The Commission concludes, therefore, that the collection of this information is necessary to allow the public and the Commission to determine whether a specific provider's mitigation steps are reasonable.

35. Second, the Commission expands its requirement that providers with a current Robocall Mitigation Database filing obligation must state in their mitigation plan whether a STIR/SHAKEN extension applies, and apply that rule to all current and new Robocall Mitigation Database filers. Specifically, a filer asserting it does not have an obligation to implement STIR/SHAKEN because of an ongoing extension, or because it lacks the facilities necessary to implement STIR/SHAKEN, must both explicitly state the rule that exempts it from compliance (for example, by explaining that it lacks the necessary facilities to implement STIR/SHAKEN or it cannot obtain an SPC token) and explain in detail why that exemption applies to the filer (for example, by explaining that it is a pure reseller with some facilities, but that they are not sufficient to implement STIR/SHAKEN, or the steps it has taken to diligently pursue obtaining a token). The Commission concludes that this limited expansion of its existing rule is necessary to permit the public and Commission to evaluate why a provider believes it is not subject to all or a subset of the Commission's rules and whether that explanation is reasonable.

36. Third, the Commission requires new and existing filers to certify that they have not been prohibited from filing in the Robocall Mitigation Database pursuant to a law enforcement action, including the new enforcement requirements adopted herein. Filers will be required to certify that they have not been barred from filing in the Robocall Mitigation Database by such an enforcement action. This includes, but is not limited to, instances in which a provider has been removed from the Robocall Mitigation Database and has been precluded from refiling unless and until certain deficiencies have been cured and those in which a provider's authorization to file has been revoked due to continued violations of the Commission's robocall mitigation rules. This information will enhance the effectiveness of the new enforcement measures the Commission adopts herein to impose consequences on repeat offenders of its robocall mitigation rules. The Commission disagrees with Cloud Communications Alliance (CCA) that the same purpose can be served by indicating whether a provider filed under a prior name. This is not sufficient information to facilitate the Commission's rule barring related entities of repeated bad actors from filing in the Robocall Mitigation Database. The Commission also adopts its proposal to require providers to submit information regarding their principals, affiliates, subsidiaries, and parent companies in sufficient detail to facilitate the Commission's ability to determine whether the provider has been prohibited from filing in the Robocall Mitigation Database. The Commission delegates to the Wireline Competition Bureau to determine the form and format of such data.

37. Fourth, the Commission requires all providers to: (1) state whether, at any time in the prior two years, the filing entity (and/or any entity for which the filing entity shares common ownership, management, directors, or control) has been the subject of a formal Commission, law enforcement, or regulatory agency action or investigation with accompanying findings of actual or suspected wrongdoing due to the filing entity transmitting, encouraging, assisting, or otherwise facilitating illegal robocalls or spoofing, or a deficient Robocall Mitigation Database certification or mitigation program description; and, if so (2) provide a description of any such action or investigation, including all law enforcement or regulatory agencies involved, the date that any action or investigation was commenced, the current status of the action or investigation, a summary of the findings of wrongdoing made in connection with the action or investigation, and whether any final determinations have been issued. The Commission limits this reporting requirement to formal actions and investigations that have been commenced or issued pursuant to a written notice or other instrument containing findings by the law enforcement or regulatory agency that the filing entity has been or is suspected of the illegal activities itemized above, including, but not limited to, notices of apparent liability, forfeiture orders, state or federal civil lawsuits or criminal indictments, and cease-and-desist notices. Providers that must include confidential information to accurately and fully comply with this reporting requirement, as explained below, may seek confidential treatment of that information pursuant to § 0.459 of the Commission's rules. This information will help the Commission evaluate claims made by providers in their mitigation program descriptions and identify potential violations of its rules. The Commission does not adopt USTelecom's request that the reporting requirement the Commission adopts be limited to public actions and investigations. The Commission finds that limiting the reporting requirement to formal actions and investigations that are public would simply reduce the scope of the reporting requirement and is not necessary to clarify it. The Commission agrees with commenters, however, that providers should not be required to submit information concerning mere inquiries from law enforcement or regulatory agencies or investigations that do not include findings of actual or suspected wrongdoing. Thus, for example, traceback requests, Enforcement Bureau letters of inquiry or subpoenas, or investigative demand letters or subpoenas issued by regulatory agencies or law enforcement would not trigger this obligation because they are not

accompanied by findings of actual or suspected wrongdoing. The Commission does not adopt INCOMPAS's proposal that it exempt formal actions and investigations accompanied by findings of actual or suspected wrongdoing that rely ''solely'' on tracebacks from the disclosure requirement the Commission adopts in this document. As stated above, the Commission excludes traceback requests from the disclosure requirement when they are not accompanied by findings of actual or suspected wrongdoing. When a formal action or investigation based solely on traceback requests is accompanied by findings of actual or suspected wrongdoing made by the Commission, law enforcement, or a regulatory agency, disclosure of that information may be useful in evaluating claims made by providers in their mitigation program descriptions and identifying potential violations of the Commission's rules. The Commission finds that inquiries or investigations that do not contain findings of actual or suspected wrongdoing by the law enforcement or regulatory agency would be of limited value to the Commission in evaluating the certifications and robocall mitigation plans submitted to the Robocall Mitigation Database.

38. Finally, the Commission requires filers to submit their Operating Company Number (OCN) if they have one. An OCN is a prerequisite to obtaining an SPC token, and the Commission concludes that filing the OCN or indicating that they do not have one will allow the Commission to more easily determine whether a provider is meeting its requirement to diligently pursue obtaining a token in order to authenticate their own calls and provides an additional way to determine relationships among providers. The Commission does not require filers to include additional identifying information discussed in the *Fourth Caller ID Authentication FNPRM,* 86 FR 59084 (Oct. 26, 2021). There was no support for doing so, and the Commission finds the incremental benefits of providing additional information beyond the OCN are unclear.

39. *Robocall Mitigation Database Filing Deadlines.* Providers newly subject to the Commission's Robocall Mitigation Database filing obligations must submit a certification and mitigation plan to the Robocall Mitigation Database by the later of: (1) 30 days following publication in the **Federal Register** of notice of approval by the Office of Management and Budget (OMB) of any associated Paperwork Reduction Act (PRA) obligations; or (2) any deadline set by the Wireline Competition Bureau through Public Notice. This approach provides additional flexibility to the Wireline Competition Bureau to provide an extended filing window where circumstances warrant. Existing filers subject to new or modified requirements adopted in this document must amend their filings with the newly required information by the same deadline. If a provider is required to fully implement STIR/SHAKEN but has not done so by the Robocall Mitigation Database filing deadline, it must so indicate in its filing. It must then later update the filing within 10 business days of completing STIR/SHAKEN implementation. The Commission recognizes that some of this information may be considered confidential. Providers may make confidential submissions consistent with the Commission's existing confidentiality rules. Providers may only redact filings to the extent appropriate under the Commission's confidentiality rules.

40. *Refusing Traffic From Unlisted Providers.* As proposed, the Commission extends the prohibition on accepting traffic from unlisted (including de-listed) providers to non-gateway intermediate providers. This proposal is well supported in the record and will close the final gap in the Commission's Robocall Mitigation Database call blocking regime. Under this rule, downstream providers will be prohibited from accepting any traffic from a non-gateway intermediate provider not listed in the Robocall Mitigation Database, either because the provider did not file or their certification was removed as part of an enforcement action. The Commission concludes that a non-gateway intermediate provider Robocall Mitigation Database filing requirement and an associated prohibition against accepting traffic from non-gateway intermediate providers not in the Robocall Mitigation Database will ensure regulatory symmetry. By extending this prohibition to non-gateway intermediate providers, the Commission ensures that downstream providers will no longer be required to determine the ''role'' of the upstream provider on a call-by-call basis to determine whether the call should be blocked. Consistent with the Commission's proposal, and the parallel requirements adopted for accepting traffic from gateway providers and voice service providers, compliance will be required no sooner than 90 days following the deadline for non-gateway intermediate providers to submit a certification to the Robocall Mitigation Database.

41. As a result of non-gateway intermediate providers' affirmative obligation to submit a certification in the Robocall Mitigation Database, downstream providers may not rely upon any non-gateway intermediate provider database registration imported from the intermediate provider registry. Any imported Robocall Mitigation Database entry is not sufficient to meet a non-gateway intermediate provider's Robocall Mitigation Database filing obligation or to prevent downstream providers from blocking traffic upon the effective date of the obligation for downstream providers to block traffic from non-gateway intermediate providers.

42. *Bureau Guidance.* Consistent with its prior delegations of authority concerning the Robocall Mitigation Database submission process, the Commission directs the Wireline Competition Bureau to make the necessary changes to the Robocall Mitigation Database and to provide appropriate Robocall Mitigation Database filing instructions and training materials as necessary and consistent with this document. The Commission delegates to the Wireline Competition Bureau the authority to specify the form and format of any submissions as well as necessary changes to the Robocall Mitigation Database submission interface. The Commission also delegates to the Wireline Competition Bureau the authority to make the necessary changes to the Robocall Mitigation Database to indicate whether a non-gateway intermediate provider has made an affirmative filing (as opposed to being imported as an intermediate provider) and whether any provider's filing has been de-listed as part of an enforcement action, and to announce its determination as part of its guidance. The Commission also directs the Wireline Competition Bureau to release a public notice upon Office of Management and Budget (OMB) approval of any information collection associated with the Commission's Robocall Mitigation Database filing requirements, announcing OMB approval of its rules, effective dates, and deadlines for filing and for providers to block traffic from non-gateway intermediate providers that have not filed.

C. Enforcement

43. In order to further strengthen its efforts to hold illegal robocallers accountable for their actions, the Commission adopts several enforcement proposals described in the *Fifth Caller*

ID Authentication FNPRM. Specifically, the Commission: (1) adopts a per-call forfeiture penalty for failure to block traffic in accordance with its rules and sets maximum forfeitures for such violations; (2) requires the removal of non-gateway intermediate providers from the Robocall Mitigation Database for violations of its rules, consistent with the standard applied to other filers; (3) establishes an expedited process for provider removal for facially deficient certifications; and (4) establishes rules that would impose consequences on repeat offenders of its robocall mitigation rules. The adoption of more robust enforcement tools is supported in the record.

1. Per Call Maximum Forfeitures

44. The Commission first adopts its proposal to establish a forfeiture penalty on a per-call basis for violations of its robocall blocking rules in 47 CFR 64.1200 through 64.1204 and 47 CFR 64.6300 through 64.6308. Commenters generally agreed that aggressive penalties are appropriate. Mandatory blocking is an important tool for protecting American consumers from illegal robocalls. As the Commission has found in its previous robocalling orders and enforcement actions, illegal robocalls cause significant consumer harm. Penalties for failure to comply with mandatory blocking requirements must deter noncompliance and be sufficient to ensure that entities subject to these requirements are unwilling to risk suffering serious economic harm.

45. Consistent with its proposal, the Commission authorizes the maximum forfeiture amount for each violation of the mandatory blocking requirements of $23,727 per call. This is the maximum forfeiture amount the Commission's rules permit it to impose on non-common carriers. Although common carriers may be assessed a maximum forfeiture of $237,268 for each violation, the Commission finds that it should not impose a greater penalty on one class of providers than another for purposes of the mandatory blocking requirements. The Commission also sets a base forfeiture amount of $2,500 per call because it concludes that the failure to block results in a similar consumer harm as the robocall itself (*e.g.,* the consumer receives the robocall itself). The Commission finds that a $2,500 base forfeiture is reasonable in comparison to the $4,500 base forfeiture for violations of the Telephone Consumer Protection Act of 1991 (TCPA). While the failure to block produces significant consumer harm, the harm is not as great and does not carry the same degree of culpability as the initiator of an illegal robocall campaign who may have committed a TCPA violation. While the Commission sought comment on whether it should consider specific additional mitigating or aggravating factors, it did not receive sufficient comment to provide a basis for doing so. As with other violations of its rules, however, existing upward and downward adjustment criteria in § 1.80 of the Commission's rules may apply. Additionally, there may be pragmatic factors in its prosecutorial discretion in calculating the total forfeiture amount—particularly when there is a very large number of calls at issue—as the Commission has done in its enforcement actions pursuant to the TCPA and those actions taken against spoofing.

2. Provider Removal From the Robocall Mitigation Database

46. The Commission also adopts its proposal to provide for the removal of non-gateway intermediate providers from the database for violations of its rules. In the *Second Caller ID Authentication Report and Order,* 85 FR 73360 (Nov. 17, 2020), the Commission set forth consequences for voice service providers that file a deficient robocall mitigation plan or that ''knowingly or negligently'' originate illegal robocall campaigns, including removal from the Robocall Mitigation Database. Gateway providers are now subject to the same rules for calls that they carry or process. To promote regulatory symmetry, the Commission concludes that non-gateway intermediate providers should face similar consequences.

47. Specifically, the Commission finds that a non-gateway intermediate provider with a deficient certification—such as when the certification describes a program that is unreasonable, or if it determines that a provider knowingly or negligently carries or processes illegal robocalls—the Commission will take appropriate enforcement action. This may include, among other actions, removing a certification from the database after providing notice to the intermediate provider and an opportunity to cure the filing, requiring the intermediate provider to submit to more specific robocall mitigation requirements, and/or proposing the imposition of a forfeiture. The Commission declines, however, to adopt other reasons to remove providers from the database. The Commission concludes that the existing basis for removal is appropriately tailored to the underlying purpose of the Robocall Mitigation Database—to facilitate detection and elimination of illegal robocall traffic. As proposed, the Commission explicitly expands its delegation of authority to the Enforcement Bureau to de-list or exclude a provider from the Robocall Mitigation Database to include the removal of non-gateway intermediate providers.

48. Downstream providers must refuse traffic sent by a non-gateway intermediate provider that is not listed in the Robocall Mitigation Database, as described above and consistent with the existing safeguards applicable to the Commission's existing rules for refusing traffic for calls to 911, public safety answering points, and government emergency numbers. The Commission agrees with VON that any sanctions for failure to block calls from a provider removed from the database should not occur without sufficient notice to the industry. The Commission concludes, however, that the existing Enforcement Bureau process, where providers are given two business days to block calls following Commission notice of removal from the database, is sufficient, as it appropriately balances the public's interest in blocking unwanted robocalls against the need to allow providers sufficient time to take the necessary steps to block traffic.

3. Expedited Removal Procedure for Facially Deficient Filings

49. The Commission agrees with commenters that there are certain instances in which a provider should be removed from the Robocall Mitigation Database on an expedited basis. Specifically, the Commission finds that where the Enforcement Bureau determines that a provider's filing is facially deficient, the Enforcement Bureau may remove a provider from the Robocall Mitigation Database using an expedited two-step procedure, which entails providing notice and an opportunity to cure the deficiency. This streamlined process will allow the Enforcement Bureau to move more quickly against providers whose filings clearly fail to meet the Commission's requirements.

50. In the *Second Caller ID Authentication Report and Order,* the Commission required that providers be given notice of any deficiencies in their certification and an opportunity to cure prior to removal from the Robocall Mitigation Database, but did not prescribe a specific removal procedure. Pursuant to that requirement and the Commission's prior delegation, the Wireline Competition Bureau and Enforcement Bureau have implemented the following three-step removal procedure: (1) the Wireline Competition Bureau contacts the provider, notifying

it that its filing is deficient, explaining the nature of the deficiency, and providing 14 days for the provider to cure the deficiency; (2) if the provider fails to rectify the deficiency, the Enforcement Bureau releases an order concluding that a provider's filing is deficient based on the available evidence and directing the provider to explain, within 14 days, why the Enforcement Bureau should not remove the Company's certification from the Robocall Mitigation Database and giving the provider a further opportunity to cure the deficiencies in its filing; and (3) if the provider fails to rectify the deficiency or provide a sufficient explanation why its filing is not deficient within that 14-day period, the Enforcement Bureau releases an order removing the provider from the Robocall Mitigation Database.

51. While this procedure is appropriate in cases where there may be questions about the sufficiency of the steps described in a mitigation plan, the Commission concludes that an expedited approach is warranted where the certification is facially deficient. A certification is ''facially deficient'' where the provider fails to submit a robocall mitigation plan within the meaning of the Commission's rules. That is, it fails to submit any information regarding the ''specific reasonable steps'' it is taking to mitigate illegal robocalls. While it is not practical to provide an exhaustive list of reasons why a filing would be considered ''facially deficient,'' examples include, without limitation, instances where the provider only submits: (1) a request for confidentiality with no underlying substantive filing; (2) only non-responsive data or documents (*e.g.,* a screenshot from the Commission's website of a provider's FCC Registration Number data or other document that does not describe robocall mitigation efforts); (3) information that merely states how STIR/SHAKEN generally works, with no specific information about the provider's own robocall mitigation efforts; or (4) a certification that is not in English and lacks a certified English translation. In these and similar cases, the Commission need not reach the question of whether the steps the provider is taking to mitigate robocalls are reasonable because the provider has failed to submit even the most basic information required to do so.

52. The Commission concludes that where a provider's filing is facially deficient, it has ''willfully'' violated its Robocall Mitigation Database filing obligation within the meaning of that term in section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. 558(c), which applies to revocations of licenses. Although the Commission does not reach a definitive conclusion here, the removal of a provider's certification from the Robocall Mitigation Database—which will lead to the mandatory blocking of the provider's traffic by downstream providers—is arguably equivalent to the revocation of a license. This finding is consistent with precedent concluding that a party acts ''willfully'' within the meaning of section 558(c) where it acts with ''careless disregard.'' As such, where a ''willful'' violation has occurred, the provider's Robocall Mitigation Database certification may be removed without a separate notice prior to the initiation of an ''agency proceeding'' to remove the certification. While the Commission does not specifically conclude that a Robocall Mitigation Database certification is a license within the meaning of that section, the Commission's expedited procedure would be compliant with section 558 if it reached such a conclusion. The Commission does not adopt Professional Association for Customer Engagement (PACE)'s proposal to provide a complete list of reasons for why a provider's filing might be facially deficient, and the specific steps it must take in response to avoid removal. It is not practical to provide an exhaustive list of all potential examples of facially deficient filings and methods to cure such deficiencies. Further, attempting to do so would limit the Commission's flexibility to respond to changing tactics by bad actors and could provide a roadmap for bad actors to avoid expedited removal. Moreover, the Commission concludes that PACE's due process concerns are addressed under the expedited removal process it adopts: The Enforcement Bureau's notice to the provider in the first step will explain the basis for its conclusion that the filing is facially deficient, while the second step offers providers an opportunity to cure that deficiency prior to removal. Therefore, the Commission adopts the following two-step expedited procedure for removing a facially deficient certification: (1) issuance of a notice by the Enforcement Bureau to the provider explaining the basis for its conclusion that the certification is facially deficient and providing an opportunity for the provider to cure the deficiency or explain why its certification is not deficient within 10 days; and (2) if the deficiency is not cured or the provider fails to establish that there is no deficiency within that 10-day period, the Enforcement Bureau will issue an order removing the provider from the database. The Commission notes that a number of providers have responded within 14 days to Enforcement Bureau requests to correct their deficient filings and concludes that employing a marginally shorter time period for this expedited process will further the Commission's interest in swiftly resolving these willful violations without materially affecting a providers' ability to respond to the Enforcement Bureau's notice.

53. The Commission finds that this expedited two-step procedure is also consistent with providers' Fifth Amendment due process rights under the Supreme Court's three factor test. While providers have a significant ''private interest'' under the first factor of the test that would be affected by removal from the Robocall Mitigation Database, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards under the second factor is exceedingly low, given that (1) the filings in question are facially deficient, and (2) providers would have a reasonable opportunity to cure the deficient filings by submitting a valid robocall mitigation plan. Given the extremely low risk of erroneous deprivation of a private interest in these situations, the Commission finds that these first two factors do not outweigh the third factor—the ''Government's interest''—which is very weighty here: The Government has a strong interest in ensuring that providers adopt valid robocall mitigation plans as soon as possible to further its continuing efforts to reduce the number of illegal robocalls and harm to consumers, and in blocking traffic of providers that are unable or unwilling to implement or document effective mitigation measures.

54. The Commission concludes that this expedited approach is preferable to EPIC/NCLC's proposal to automatically remove certain ''high-risk'' VoIP providers from the Robocall Mitigation Database or impose forfeitures through a bespoke, expedited process. As explained above, the Commission does not believe that a separate set of rules for VoIP providers is appropriate and the expedited procedure the Commission adopts in this document complies with the APA and due process. EPIC/NCLC do not explain how removal from the database prior to any opportunity to respond is consistent with the APA or due process.

4. Consequences for Continued Violations

55. In order to address continued violations of its robocall mitigation rules, the Commission proposed in the *Fifth Caller ID Authentication FNPRM* to subject repeat offenders to proceedings to revoke their section 214 operating authority and to ban offending companies and/or their individual company owners, directors, officers, and principals from future significant association with entities regulated by the Commission. The Commission further proposed to find that providers that are not common carriers operating pursuant to blanket section 214 authority hold other Commission authorizations sufficient to subject them to the Commission's jurisdiction for purposes of enforcing its rules pertaining to preventing illegal robocalls. The Commission also proposed to find that providers not classified as common carriers but that are registered in the Robocall Mitigation Database hold a Commission certification such that they are subject to the Commission's jurisdiction. The Commission adopts its proposal to revoke the section 214 operating authority of entities that engage in continued violations of its robocall mitigation rules. The Commission also finds that non-common carriers holding Commission authorizations and/or certifications are similarly subject to revocation of their authorizations and/or certifications. The Commission further finds that it will consider whether it is in the public interest for individual company owners, directors, officers, and principals of entities for which the Commission has revoked an authority or a certification, or for other entities with which those individuals are affiliated, to obtain future Commission authorizations, licenses, or certifications at the time that they apply for them.

56. *Revocation of Section 214 Authority and Other Commission Authorizations.* In the *Fifth Caller ID Authentication FNPRM,* the Commission proposed to find that entities engaging in continued violations of its robocall mitigation rules, be subject to revocation of their section 214 operating authority, where applicable. The Commission concludes that the ''robocall mitigation rules'' within the scope of this requirement means the specific obligations to: (1) implement a robocall mitigation program that includes specific ''reasonable steps'' to mitigate illegal robocalls and comply with the steps outlined in the plan; (2) submit a plan describing the mitigation program to the Robocall Mitigation database; and (3) not accept traffic from providers not in the Robocall Mitigation database. This includes obligations that the Commission previously adopted as well as those that it adopts in this document.

57. The Commission concludes that this requirement also pertains to continued violation of providers' authentication obligations. While in certain instances the Commission has referred to provider mitigation obligations as separate from authentication, the Commission has also concluded that they work hand in hand to stop illegal robocalls. Indeed, analytics providers often use authentication information to determine whether to block or label a call. The Commission therefore concludes that call authentication serves to mitigate illegal robocalls, and failure to follow the Commission's authentication rules falls within the scope of the enforcement authority it adopts in this document.

58. The Commission did not receive comments regarding the scope of the specific rules covered by the consequences proposed in the *Fifth Caller ID Authentication FNPRM.* The Commission finds, however, that it is reasonable to fully enforce the foregoing robocall mitigation rules by holding accountable those who engage in continued violations of those rules. The Commission will exercise its ability to revoke the section 214 authorizations for providers engaging in continued violations of those rules, consistent with its long-standing authority to revoke the section 214 authority of any provider for serious misconduct.

59. The Commission's authority to revoke section 214 authority in order to protect the public interest is well established. The Commission intends to apply that authority as necessary to address entities engaging in continued violations of its rules. Specifically, an entity engaging in continued violations of the Commission's robocall mitigation rules as defined in this section will be required to explain to the Enforcement Bureau why the Commission should not initiate proceedings to revoke its domestic and/or international section 214 authorizations. Consistent with established Commission procedures, the Commission may then adopt an order to institute a proceeding to revoke domestic and/or international section 214 authority. Should the entity fail to address concerns regarding its retention of section 214 authority, the Commission would then issue an Order on Revocation consistent with its authority to revoke section 214 authority when warranted to protect the public interest.

60. The Commission also adopts its proposals that providers not classified as common carriers but that hold other types of Commission authorizations, including a certification as a result of being registered in the Robocall Mitigation Database, are subject to the Commission's jurisdiction for the purpose of the consequences the Commission adopts in this section. Interconnected VoIP providers are subject to Title II of the Communications Act of 1934, as amended (Communications Act or Act) through their requirement to file applications to discontinue service under section 214 and § 63.71 of the Commission's rules. As explained below, this approach does not constitute an improper exercise of jurisdiction over domestic non-common carriers or foreign providers. The *Fifth Caller ID Authentication FNPRM* listed the providers that the Commission contemplated would be subject to its enforcement authority. These providers have domestic and international section 214 authorizations, have applied for and received authorization for direct access to numbering resources, are designated as eligible telecommunications carriers under section 214(e) of the Communications Act in order to receive federal universal service support, or are registered in the Robocall Mitigation Database. Where the Commission grants a right or privilege, it unquestionably has the right to revoke or deny that right or privilege in appropriate circumstances. In addition, holders of these and all Commission authorizations have a clear and demonstrable duty to operate in the public interest. Continued violations of the Commission's robocall mitigation rules are wholly inconsistent with the public interest, and the Commission finds it necessary to exercise its authority to institute a proceeding and, if warranted, revoke the authorizations, licenses, and/or certifications of all repeat offenders. Indeed, there is no opposition in the record to the Commission instituting revocation proceedings when warranted, and the Commission agrees with VON that when providers, including those without section 214 authority, have clearly and repeatedly been responsible for originating or transporting illegal robocalls and have had a sufficient opportunity to be heard through the enforcement process, there may be grounds for termination of Commission authorizations. The Commission's established section 214 revocation

process described above satisfies due process requirements, and the Commission intends to apply it to all entities that it finds to be continually violating its robocall mitigation rules.

61. *Future Review of Entities, Individual Company Owners, Directors, Officers, and Principals Applying for Commission Authorizations, Licenses, or Certifications.* Once the Commission has revoked the section 214 or other Commission authorization, license, or certification of an entity that has engaged in continued violations of its robocall mitigation rules, the Commission will consider the public interest impact of granting other future Commission authorizations, licenses, or certifications to the entity that was subject to the revocation, as well as individual company owners, directors, officers, and principals (either individuals or entities) of such entities. The Commission expects that owners, directors, officers, and principals, whether or not they have control of the entity, have influence, management, or supervisory responsibilities for the entity subject to the revocation. The Commission will consider the public interest impact as part of its established review processes for Commission applications at the time that they are filed. For example, a principal of a provider that had its section 214 authority revoked or that was removed from the Robocall Mitigation Database as a result of an enforcement action may be subject to a denial of other Commission authorizations, licenses, or certifications, including for international section 214 authority, or for approval to acquire an entity that holds blanket domestic section 214 authority or international section 214 authority. This is consistent with the Commission's current process in which it reviews many public interest factors in determining whether to grant an application, including whether an applicant for a license has the requisite citizenship, character, financial, technical, and other qualifications. To ensure that the Commission can accurately identify individual company owners, directors, officers, and principals of an entity for which it revoked authority, the Commission intends to rely on information contained in providers' registrations filed in the Robocall Mitigation Database. Where that information is insufficient for this purpose, the Commission will require entities undergoing revocation proceedings to identify their individual company owners, directors, officers, and principals as part of the revocation process.

62. The Commission proposed in the *Fifth Caller ID Authentication FNPRM* that principals and others associated with entities subject to revocation would be banned from holding a 5% or greater ownership interest in any entity that applies for or already holds any FCC license or instrument of authorization for the provision of a regulated service subject to Title II of the Act or of any entity otherwise engaged in the provision of voice service for a period of time to be determined. The record contains no information on how the Commission would undertake the complex process of identifying the providers or applicants that would be impacted by the 5% ownership trigger threshold, or whether it would risk negatively impacting the operations and customers of providers associated with the targeted principal, but which were not involved in the robocall offenses. Should the Commission see an increased volume of repeat offenses of the robocall mitigation rules, it will consider whether to adopt rules permanently barring principals and others associated with entities subject to revocation from holding both existing and future Commission authorizations. Going forward now, the Commission will generally consider whether it is in the public interest for individual company owners, directors, officers, and principals associated with an entity for which it has revoked a Commission authorization to obtain new Commission authorizations or licenses at the time that they, or an entity with which they are affiliated, apply for them. This is consistent with the Commission's stated intent in the *Fifth Caller ID Authentication FNPRM* to consider the impact these principals and others may have on ''future'' significant association with entities regulated by the Commission.

63. The Commission concludes that these new enforcement tools, acting in tandem with its new requirement for providers to submit their related entities and principals in their robocall mitigation plans, will ensure that bad actor providers and their principals will face potentially serious consequences for their repeated violation of the Commission's robocall mitigation rules. These potential consequences reach beyond a forfeiture and appropriately subject these entities and principals to specified consequences and a thorough public interest review as required. The Commission makes clear that revoking a Commission authorization or license does not transform entities that have not been classified as common carriers into common carriers or extend its general jurisdiction over foreign providers. Rather, this consequence merely allows the Commission discretion to revoke a Commission authorization or license that a provider, person, or entity would otherwise be eligible for or to deny an application for a Commission license or authorization by a principal of an entity subject to revocation. For this reason, the Commission need not exempt foreign providers from this rule, as some commenters argue.

5. Other Enforcement Matters

64. The Commission does not adopt EPIC/NCLC's proposal to base enforcement actions, including removal from the Robocall Mitigation Database, solely on the number of tracebacks a provider receives. In enforcement actions, the Commission has considered a high volume of tracebacks as a factor in determining whether a provider engaged in egregious and intentional misconduct. While receiving a high number of traceback requests may be evidence of malfeasance in certain instances, this is not always the case. The Commission's rules independently require providers to commit to respond to traceback requests—and to actually respond to such requests—in a certain time period, and they may be subject to forfeiture or removal for failure to do so. The Commission also declines to adopt licensing or bonding requirements for certain VoIP providers as EPIC/NCLC proposes.

65. The Commission declines to adopt EPIC/NCLC's strict liability standard for forfeiture or removal from the Robocall Mitigation Database for failure to block any illegal calls regardless of the circumstances, or their suggestion of an ''interim'' standard of assessing liability for transmitting illegal robocall traffic based on whether a provider ''knew or should have known that [a] call was illegal.'' The Commission concludes that expectations to stop all illegal calls are not realistic and that a strict liability standard could lead to significant market disruptions. Similarly, the Commission declines to adopt NCTA or ACA Connect's proposed ''good faith'' or CCA's proposed ''reasonableness'' standards.

D. STIR/SHAKEN Obligations of Satellite Providers

66. The Commission concludes that satellite providers that do not use North American Numbering Plan (NANP) numbers to originate calls or only use such numbers to forward calls to non-NANP numbers are not ''voice service providers'' under the TRACED Act and therefore do not have a STIR/SHAKEN

implementation obligation. The Commission also provides an ongoing extension from TRACED Act obligations to satellite providers that are small voice service providers and use NANP numbers to originate calls on the basis of a finding of undue hardship.

67. The Commission previously provided small voice services providers, including satellite providers, an extension from STIR/SHAKEN implementation until June 30, 2023. In the *Fifth Caller ID Authentication FNPRM,* the Commission sought comment on whether the TRACED Act requirements apply to some or all satellite providers and, if so, whether the Commission should grant certain satellite providers a STIR/SHAKEN extension. In addition to the questions raised in the *Fifth Caller ID Authentication FNPRM,* the Wireline Competition Bureau in August 2022 sought comment on the small provider extension generally and its applicability to satellite providers.

68. *Satellite Providers Originating Calls Using Non-NANP Numbers.* The Commission concludes that, where satellite providers originate calls using non-NANP numbers, they are not acting as ''voice service providers'' within the meaning of the TRACED Act. This conclusion is consistent with the TRACED Act's definition of voice service which requires that voice communications must use resources from the NANP. The Commission also concludes that where satellite providers utilize NANP resources for call forwarding to non-NANP numbers, such calls also fall outside of the definition of voice service. This finding is consistent with the underlying purpose of the STIR/SHAKEN regime. One of the key aims of the TRACED Act, STIR/SHAKEN, and the Commission's implementing rules, is to prevent call spoofing. Where a phone number is not displayed to the end user, as is the case in the satellite call forwarding scenario, call spoofing is not a concern.

69. *Satellite Providers Originating Calls Using NANP Numbers.* The Commission next permits an indefinite extension of time for small voice providers that are satellite providers originating calls using NANP numbers. There are de minimis instances where satellite providers may assign NANP resources to their subscribers for caller ID purposes. While the Commission finds that, in these cases, satellite providers are acting as voice service providers, the Commission believes it is also appropriate to provide an indefinite extension for STIR/SHAKEN implementation to these providers by applying the TRACED Act's ''undue hardship'' standard.

70. The TRACED Act directed the Commission to assess burdens or barriers to the implementation of STIR/SHAKEN, and granted the Commission discretion to extend the implementation deadline for a ''reasonable period of time'' based upon a ''public finding of undue hardship.'' In considering whether the hardship is ''undue'' under the TRACED Act—as well as whether an extension is for a ''reasonable period of time''—it is appropriate to balance the hardship of compliance due to the ''the burdens and barriers to implementation'' faced by a voice service provider or class of voice service providers with the benefit to the public of implementing STIR/SHAKEN expeditiously.

71. The Commission concludes that an indefinite extension is appropriate under this standard for small voice providers that are satellite providers originating calls using NANP numbers. The number of satellite subscribers using NANP resources is miniscule. There is little evidence that satellite providers or their users are responsible for illegal robocalls and satellite service costs make the high-volume calling necessary for robocallers uneconomical. The balancing of the benefits and burdens, therefore, counsels against requiring such providers to implement STIR/SHAKEN.

72. The Commission notes that it must annually reevaluate TRACED Act extensions granted, ensuring that the Commission will be able to act quickly to prevent any unforeseen abuses. While the Commission provides small voice service satellite providers an extension from STIR/SHAKEN implementation, the Commission makes clear that they must, like other voice service providers with an extension, submit a certification to the Robocall Mitigation Database pursuant to its existing rules and the new obligations the Commission adopts in this document.

E. Differential Treatment of International Roaming Traffic

73. The Commission next declines to adopt rules in this document concerning the differential treatment of international roaming traffic. The Commission also declines to adopt rules concerning differential treatment of non-conversational traffic in this document. The Commission continues to consider the record on this issue. In the *Fifth Caller ID Authentication FNPRM,* the Commission sought comment on stakeholders' assertions that international cellular roaming traffic involving NANP numbers (*i.e.,* traffic originated abroad from U.S. mobile subscribers carrying U.S. NANP numbers and terminated in the U.S.) is unlikely to carry illegal robocalls and therefore should be treated with a ''lighter'' regulatory touch. As part of that inquiry, the Commission also asked whether any separate regulatory regime for such traffic could be ''gamed'' by illegal robocallers by disguising their traffic as cellular roaming traffic.

74. Given the limited record on this issue, particularly with respect to whether and how providers could readily identify or segregate such traffic for differential treatment, the Commission directs the Wireline Competition Bureau to refer the issue to the North American Numbering Council for further investigation.

F. Summary of Cost Benefit Analysis

75. The Commission finds that the benefits of the rules it adopts in this document will greatly outweigh the costs imposed on providers. As it explained in the *First Caller ID Authentication Report and Order,* 85 FR 22029 (Apr. 21, 2020), the Commission concluded that its STIR/SHAKEN rules are likely to result in, at a minimum, $13.5 billion in annual benefits. In the *Fifth Caller ID Authentication FNPRM,* the Commission sought comment on its belief that its proposed rules and actions would achieve a large share of the annual $13.5 billion benefit and that the benefits will far exceed the costs imposed on providers. After reviewing the record in this proceeding, the Commission confirms this conclusion.

76. Limiting the ability of illegal robocallers to evade existing rules will preserve and extend the benefits of STIR/SHAKEN. The new enforcement tools the Commission adopts, as well as expanded call authentication and robocall mitigation obligations, will increase the effectiveness of its authentication regime, thereby allowing more illegal robocalls to be readily identified and stopped. As the Commission found previously, it again concludes that an overall reduction in illegal robocalls from new rules will lower network costs by eliminating both unwanted traffic congestion and the labor costs of handling numerous customer complaints. This reduction in robocalls will also help restore confidence in the U.S. telephone network and facilitate reliable access to emergency and healthcare services.

77. In this document the Commission adopts a targeted obligation applicable to the first intermediate provider in the call path. By limiting the authentication obligation to the intermediate provider at the beginning of the call chain, the

Commission maximizes the benefits of the requirement while minimizing its costs. Indeed, intermediate providers can avoid any authentication burden if they require their upstream providers to only send them authenticated traffic.

78. The Commission acknowledges that the revised and expanded mitigation and Robocall Mitigation Database filing obligations it adopts in this document will impose limited short-term implementation costs. Nevertheless, the Commission concludes that the benefits of bringing all providers within the mitigation and Robocall Mitigation Database regime will produce significant benefits to the Commission and the public by increasing transparency and accountability, and by facilitating the enforcement of the Commission's rules.

G. Legal Authority

79. Consistent with its proposals, the Commission adopts the foregoing obligations pursuant to the legal authority it relied on in prior caller ID authentication and call blocking orders.

80. *Caller ID Authentication.* The Commission concludes that the same authority through which it imposed caller ID authentication obligations on gateway providers—a subset of intermediate providers—applies equally to its rules that impose caller ID authentication obligations on non-gateway intermediate providers. Specifically, the Commission finds authority to impose caller ID authentication obligations on the first intermediate providers in the call chain under section 251(e) of the Act and the Truth in Caller ID Act. In the *Second Caller ID Authentication Report and Order,* the Commission found it had the authority to impose caller ID authentication obligations on intermediate providers under these provisions. It reasoned that calls that transit the networks of intermediate providers with illegally spoofed caller ID are exploiting numbering resources and so found authority under section 251(e). The Commission found additional, independent authority under the Truth in Caller ID Act on the basis that such rules were necessary to prevent unlawful acts and to protect voice service subscribers from scammers and bad actors, stressing that intermediate providers play an integral role in the success of STIR/SHAKEN across the voice network. The Commission relied on this reasoning in adopting authentication obligations on gateway providers and it therefore relies on this same legal authority to impose an authentication obligation on the first intermediate providers in the call chain.

81. *Robocall Mitigation.* The Commission adopts its robocall mitigation provisions for non-gateway intermediate providers and voice service providers, including those without the facilities necessary to implement STIR/SHAKEN, pursuant to sections 201(b), 202(a), and 251(e) of the Communications Act; the Truth in Caller ID Act; and the Commission's ancillary authority, consistent with the authority the Commission invoked to adopt analogous rules in the *Fifth Caller ID Authentication Report and Order* and *Second Caller ID Authentication Report and Order.* The Commission sought comment on whether it should impose a mitigation duty on voice providers without the facilities necessary to implement STIR/SHAKEN on the basis of an ongoing extension from the TRACED Act. The Commission concludes that because such providers were not granted an initial extension as a class under the TRACED Act, the clearest basis of authority for imposing a mitigation obligation is found in sections 201(b), 202(a), and 251(e) of the Communications Act; the Truth in Caller ID Act; and the Commission's ancillary authority. The Commission concludes that section 251(e) of the Act and the Truth in Caller ID Act authorize it to prohibit domestic intermediate providers and voice service providers from accepting traffic from non-gateway intermediate providers that have not filed in the Robocall Mitigation Database. In the *Second Caller ID Authentication Report and Order,* the Commission concluded that section 251(e) gives it authority to prohibit intermediate providers and voice service providers from accepting traffic from both domestic and foreign voice service providers that do not appear in the Robocall Mitigation Database, noting that its exclusive jurisdiction over numbering policy provides authority to take action to prevent the fraudulent abuse of NANP resources. The Commission observed that illegally spoofed calls exploit numbering resources whenever they transit any portion of the voice network—including the networks of intermediate providers and that preventing such calls from entering an intermediate provider's or terminating voice service provider's network is designed to protect consumers from illegally spoofed calls. The Commission found that the Truth in Caller ID Act provided additional authority for its actions to protect voice service subscribers from illegally spoofed calls.

82. The Commission concluded that it had the authority to adopt these requirements pursuant to sections 201(b), 202(a), and 251(e) of the Act, as well as the Truth in Caller ID Act, and its ancillary authority. Sections 201(b) and 202(a) provide the Commission with broad authority to adopt rules governing just and reasonable practices of common carriers. Accordingly, the Commission found that the new blocking rules were clearly within the scope of its sections 201(b) and 202(a) authority and that it is essential that the rules apply to all voice service providers, applying its ancillary authority in section 4(i). The Commission also found that section 251(e) and the Truth in Caller ID Act provided the basis to prescribe rules to prevent the unlawful spoofing of caller ID and abuse of NANP resources by all voice service providers, a category that includes VoIP providers and, in the context of its call blocking orders, intermediate providers. The Commission concludes that the same authority provides a basis to adopt the mitigation obligations it adopts in this document to the extent that providers are acting as common carriers.

83. While the Commission concludes that its direct sources of authority provide an ample basis to adopt its proposed rules on all providers, its ancillary authority in section 4(i) provides an independent basis to do so with respect to providers that have not been classified as common carriers. The Commission may exercise ancillary jurisdiction when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I of the Communications Act covers the regulated subject; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities. The Commission concludes that the regulations adopted in this document satisfy the first prong because providers that interconnect with the public switched telephone network and exchange IP traffic clearly offer ''communication by wire and radio.''

84. With regard to the second prong, requiring providers to comply with its proposed rules is reasonably ancillary to the Commission's effective performance of its statutory responsibilities under sections 201(b), 202(a), and 251(e) of the Communications Act and the Truth in Caller ID Act as described above. With respect to sections 201(b) and 202(a), absent application of its proposed rules to providers that are not classified as common carriers, originators of robocalls could circumvent the Commission's proposed scheme by sending calls only via providers that

have not yet been classified as common carriers.

85. *Enforcement.* The Commission adopts its additional enforcement rules above pursuant to sections 501, 502, and 503 of the Act. These provisions allow the Commission to take enforcement action against common carriers as well as providers not classified as common carriers following a citation. The Commission relies on this same authority to revise § 1.80 of its rules by adding new maximum and base forfeiture amounts.

II. Final Regulatory Flexibility Analysis

86. As required by the Regulatory Flexibility Act of 1980 (RFA), as amended, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *FNPRM* adopted in May 2022 (*Fifth Caller ID Authentication FNPRM*). The Commission sought written public comment on the proposals in the *Fifth Caller ID Authentication FNPRM,* including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Order

87. This document takes important steps in the fight against illegal robocalls by strengthening caller ID authentication obligations, expanding robocall mitigation rules, and granting an indefinite extension for small voice service providers that are also satellite providers originating calls using NANP numbers on the basis of undue hardship. The decisions the Commission makes here protect consumers from unwanted and illegal calls while balancing the legitimate interests of callers placing lawful calls.

88. First, this document requires any non-gateway intermediate provider that receives an unauthenticated SIP call directly from an originating provider to authenticate the call. Second, it requires non-gateway intermediate providers subject to the authentication obligation to comply with, at a minimum, the version of the standards in effect on December 31, 2023, along with any errata. Third, it requires all providers—including intermediate providers and voice service providers without the facilities necessary to implement STIR/SHAKEN—to: (1) take ''reasonable steps'' to mitigate illegal robocall traffic; (2) submit a certification to the Robocall Mitigation Database regarding their STIR/SHAKEN implementation status along with other identifying information; and (3) submit a robocall mitigation plan to the Robocall Mitigation Database. Fourth, it requires all providers to commit to fully respond to traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping illegal robocallers that use its services to originate, carry, or process illegal robocalls. Fifth, it requires downstream providers to block traffic received directly from non-gateway intermediate providers that have not submitted a certification in the Robocall Mitigation Database or have been removed through enforcement actions. Finally, this document grants an ongoing STIR/SHAKEN implementation extension on the basis of undue hardship for satellite providers that are small service providers using NANP numbers to originate calls.

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

89. There were no comments raised that specifically addressed the proposed rules and policies presented in the *Fifth Caller ID Authentication FNPRM* IRFA. Nonetheless, the Commission considered the potential impact of the rules proposed in the IRFA on small entities and took steps where appropriate and feasible to reduce the compliance burden for small entities in order to reduce the economic impact of the rules enacted herein on such entities.

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

90. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

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

91. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''mall governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**. A ''small-business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

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

93. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C. 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS. The IRS Exempt Organization Business Master File (E.O. BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS E.O. BMF data for businesses for the tax year 2020 with revenue less than or equal to $50,000,

for Region 1—Northeast Area (58,577), Region 2—Mid-Atlantic and Great Lakes Areas (175,272), and Region 3—Gulf Coast and Pacific Coast Areas (213,840) that includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

94. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. The Census of Governments survey is conducted every five (5) years compiling data for years ending with ''2'' and ''7''. Local governmental jurisdictions are made up of general purpose governments (county, municipal, and town or township) and special purpose governments (special districts and independent school districts). Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000. There were 12,040 independent school districts with enrollment populations less than 50,000. While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category. Accordingly, based on the 2017 U.S. Census of Governments data, the Commission estimates that at least 48,971 entities fall into the category of ''small governmental jurisdictions.'' This total is derived from the sum of the number of general purpose governments (county, municipal. and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments—independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments—Organizations tbls. 5, 6 & 10.

95. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers. Fixed Local Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, and Other Local Service Providers. Local Resellers fall into another U.S. Census Bureau industry group and therefore data for these providers is not included in this industry.

96. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were engaged in the provision of fixed local services. Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

97. *Local Exchange Carriers* (*LECs*). Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include both incumbent and competitive local exchange service providers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. Wired Telecommunications Carriers are also referred to as wireline carriers or fixed local service providers. Fixed Local Exchange Service Providers include the following types of providers: Incumbent Local Exchange Carriers (ILECs), Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 5,183 providers that reported they were fixed local exchange service providers. Of these providers, the Commission estimates that 4,737 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

98. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA have developed a small business size standard specifically for incumbent local exchange carriers. Wired Telecommunications Carriers is the closest industry with an SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. The available U.S. Census

Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 1,227 providers that reported they were incumbent local exchange service providers. Of these providers, the Commission estimates that 929 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of incumbent local exchange carriers can be considered small entities.

99. *Competitive Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. Providers of these services include several types of competitive local exchange service providers. Competitive Local Exchange Service Providers include the following types of providers: Competitive Access Providers (CAPs) and Competitive Local Exchange Carriers (CLECs), Cable/Coax CLECs, Interconnected VOIP Providers, Non-Interconnected VOIP Providers, Shared-Tenant Service Providers, Audio Bridge Service Providers, Local Resellers, and Other Local Service Providers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 3,956 providers that reported they were competitive local exchange service providers. Of these providers, the Commission estimates that 3,808 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

100. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA have developed a small business size standard specifically for Interexchange Carriers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms that operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 151 providers that reported they were engaged in the provision of interexchange services. Of these providers, the Commission estimates that 131 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, the Commission estimates that the majority of providers in this industry can be considered small entities.

101. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a ''small cable operator,'' which is a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000. For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice. Based on industry data, only six cable system operators have more than 677, 000 subscribers. Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. The Commission notes however, that it neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(e) of the Commission's rules. Therefore, the Commission is unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

102. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. Wired Telecommunications Carriers is the closest industry with a SBA small business size standard. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 115 providers that reported they were engaged in the provision of other toll services. Of these providers, the Commission estimates that 113 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

103. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees. Consequently, using the

SBA's small business size standard, most of these providers can be considered small entities.

104. *Satellite Telecommunications.* This industry comprises firms primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications. Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $35 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. The Commission also notes that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 71 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 48 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than of these providers can be considered small entities.

105. *Local Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Local Resellers. Telecommunications Resellers is the closest industry with a SBA small business size standard. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services for the entire year. Of that number, 1,375 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 293 providers that reported they were engaged in the provision of local resale services. Of these providers, the Commission estimates that 289 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

106. *Toll Resellers.* Neither the Commission nor the SBA have developed a small business size standard specifically for Toll Resellers. Telecommunications Resellers is the closest industry with an SBA small business size standard. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services for the entire year. Of that number, 1,375 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 518 providers that reported they were engaged in the provision of toll services. Of these providers, the Commission estimates that 495 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

107. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for prepaid calling card providers. Telecommunications Resellers is the closest industry with a SBA small business size standard. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that 1,386 firms in this industry provided resale services for the entire year. Of that number, 1,375 firms operated with fewer than 250 employees. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 58 providers that reported they were engaged in the provision of payphone services. Of these providers, the Commission estimates that 57 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

108. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.,* dial-up internet Service Providers) or VoIP services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. The available U.S. Census

Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard. The Commission also notes that according to the U.S. Census Bureau glossary, the terms receipts and revenues are used interchangeably. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

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

109. This document requires providers to meet certain obligations. These changes affect small and large companies equally and apply equally to all the classes of regulated entities identified above. Specifically, this document adopts a limited intermediate provider authentication requirement. It requires a non-gateway intermediate provider that receives an unauthenticated SIP call directly from an originating provider to authenticate the call. The requirement will arise in limited circumstances—where the originating provider failed to comply with their own authentication obligation, or where the call is sent directly to an intermediate provider from the limited subset of originating providers that lack an authentication obligation. Indeed, if the first intermediate provider in the call path implements contractual provisions with its upstream originating providers stating that it will only accept authenticated traffic, it will completely avoid the need to authenticate calls. Non-gateway intermediate providers that are subject to the authentication obligation have the flexibility to assign the level of attestation appropriate to the call based on the current version of the standards and the call information available. A non-gateway intermediate provider using non-IP network technology in its network has the flexibility to either upgrade its network to allow for the initiation, maintenance, and termination of SIP calls and fully implement the STIR/SHAKEN framework, or provide the Commission, upon request, with documented proof that it is participating, either on its own or through a representative, as a member of a working group, industry standards group, or consortium that is working to develop a non-IP solution, or actively testing such a solution. Under this rule, a non-gateway intermediate provider satisfies its obligation if it participates through a third-party representative, such as a trade association of which it is a member or vendor.

110. This document also requires all providers to take ''reasonable steps'' to mitigate illegal robocalls. The new classes of providers subject to the ''reasonable steps'' standard are not required to implement specific measures to meet that standard, but providers' programs must include detailed practices that can reasonably be expected to significantly reduce the carrying, processing, or origination of illegal robocalls. In addition, all providers must implement a robocall mitigation program and comply with the practices that its program requires. The providers must also commit to respond fully to all traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping illegal robocalls.

111. All providers must submit a certification and robocall mitigation plan to the Robocall Mitigation Database regardless of whether they are required to implement STIR/SHAKEN, including providers without the facilities necessary to implement STIR/SHAKEN. The robocall mitigation plan must describe the specific ''reasonable steps'' that the provider has taken to avoid, as applicable, the origination, carrying, or processing of illegal robocall traffic. This document also requires providers to ''describe with particularity'' certain mitigation techniques in their robocall mitigation plans. Specifically, (1) voice service providers must describe how they are complying with their existing obligation to take affirmative effective measures to prevent new and renewing customers from originating illegal calls; (2) non-gateway intermediate providers and voice service providers must describe any ''know-your-upstream provider'' procedures; and (3) all providers must describe any call analytics systems used to identify and block illegal traffic. To comply with the new requirements to describe their ''new and renewing customer'' and ''know-your-upstream provider'' procedures, providers must describe any contractual provisions with end-users or upstream providers designed to mitigate illegal robocalls.

112. All providers with new filing obligations must submit a certification to the Robocall Mitigation Database that includes the following baseline information:

(1) whether the provider has fully, partially, or not implemented the STIR/SHAKEN authentication framework in the IP portions of its network;

(2) the provider's business name(s) and primary address;

(3) other business name(s) in use by the provider;

(4) all business names previously used by the provider;

(5) whether the provider is a foreign service provider;

(6) the name, title, department, business address, telephone number, and email address of one person within the company responsible for addressing robocall mitigation-related issues.

113. Certifications and robocall mitigations plans must be submitted in English or with certified English translation, and providers with new filing obligations must update any submitted information within 10 business days.

114. This document also adopts rules requiring providers to submit additional information in their Robocall Mitigation certifications. Specifically, (1) all providers must submit additional information regarding their role(s) in the call chain; (2) all providers asserting they do not have an obligation to implement STIR/SHAKEN must include more detail regarding the basis of that assertion; (3) all providers must certify that they have not been prohibited from filing in the Robocall Mitigation Database pursuant to a law enforcement action; (4) all providers must state whether they have been subject to a formal Commission, law enforcement, or regulatory agency action or investigation with accompanying findings of actual or suspected wrongdoing due to unlawful robocalling or spoofing and provide information concerning any such actions or investigations; and (5) all filers must submit their OCN if they have one. Submissions may be made confidentially, consistent with the Commission's existing confidentiality rules.

115. This document requires downstream providers to block traffic received from a non-gateway intermediate provider that is not listed in the Robocall Mitigation Database, either because the provider did not file or their certification was removed as part of an enforcement action. After receiving notice from the Commission that a provider has been removed from the Robocall Mitigation Database, downstream providers must block all traffic from the identified provider within two business days.

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

116. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives, among

others: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

117. Generally, the decisions the Commission made in this document apply to all providers, and do not impose unique burdens or benefits on small providers. The Commission took several steps to minimize the economic impact of the rules adopted in this document on small entities.

118. This document imposes a limited intermediate provider authentication obligation that requires the first non-gateway intermediate provider in the call chain to authenticate unauthenticated calls received directly from an originating provider. Limiting the application of the authentication obligation to first non-gateway intermediate providers helps reduce the burden on intermediate providers, including small providers, and minimizes the potential costs associated with a broader authentication requirement for all intermediate providers that were identified in the record.

119. The Commission also allowed flexibility where appropriate to ensure that providers, including small providers, can determine the best approach for compliance based on the needs of their networks. For example, non-gateway intermediate providers have the flexibility to assign the level of attestation appropriate to the call based on the applicable level of the standards and the available call information. Additionally, the new classes of providers subject to the ''reasonable steps'' standard have the flexibility to determine which measures to use to mitigate illegal robocall traffic on their networks. In reaching this approach, the Commission considered and declined to adopt a ''gross negligence'' standard for evaluating whether a mitigation program is sufficient. The Commission also declined to adopt a heightened mitigation obligation solely for VoIP providers in order to ensure that the obligation applies to providers regardless of the technology used to transmit calls. Likewise, the Commission allowed non-gateway intermediate providers subject to its call authentication requirements that rely on non-IP infrastructure the flexibility to either upgrade their networks to implement STIR/SHAKEN or participate as a member of a working group, industry standards group, or consortium that is working to develop a non-IP caller ID authentication solution. This flexibility will reduce compliance costs for non-gateway intermediate providers, including small providers. The Commission also declined to require providers to submit information concerning inquiries from law enforcement or regulatory agencies or investigations that do not include findings of actual or suspected wrongdoing. And the Commission declined to require Robocall Mitigation Database filers to include certain additional identifying information discussed in the *Fourth Caller ID Authentication FNPRM* beyond their OCN.

120. This document also grants an indefinite STIR/SHAKEN implementation extension to satellite providers that are small voice service providers and use NANP numbers to originate calls.

G. Report to Congress

121. The Commission will send a copy of the *Sixth Report and Order,* including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Sixth Report and Order,* including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Sixth Report and Order* (or summaries thereof) will also be published in the **Federal Register**.

III. Procedural Matters

122. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Fifth Caller ID Authentication FNPRM.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Fifth Caller ID Authentication FNPRM,* including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis (FRFA) is set forth in Section II, above. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the *Sixth Report and Order,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

123. *Paperwork Reduction Act.* This document may contain new or modified information collection requirements subject to the PRA, Public Law 104–13. Specifically, the rules adopted in 47 CFR 64.6303(c) and 64.6305(d), (e), and (f) may require new or modified information collections. All such new or modified information collection requirements will be submitted to OMB for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, it previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. In this document, the Commission describes several steps it has taken to minimize the information collection burdens on small entities.

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

IV. Ordering Clauses

125. Accordingly, pursuant to sections 4(i), 4(j), 201, 202, 214, 217, 227, 227b, 251(e), 303(r), 501, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 201, 202, 214, 217, 227, 227b, 251(e), 303(r), 501, 502, and 503, *it is ordered* that the *Sixth Report and Order is adopted.*

126. *It is further ordered* that parts 0, 1, and 64 of the Commission's rules *are amended* as set forth in the Final Rules.

127. *It is further ordered* that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), the *Sixth Report and Order,* including the rule revisions and redesignations described in the Final Rules, *shall be effective* 60 days after publication in the **Federal Register**, except that: (1) the additions of 47 CFR 64.6303(c) and 64.6305(f) and the revisions to redesignated 47 CFR 64.6305(d) and (e) as described in the Final Rules will not be effective until OMB completes any review that the Wireline Competition Bureau determines is required under the Paperwork Reduction Act; and (2) the revisions to redesignated 47 CFR 64.6305(g) as described in the Final

Rules will not be effective until an effective date is announced by the Wireline Competition Bureau. The Commission directs the Wireline Competition Bureau to announce effective dates for the additions of and revisions to 47 CFR 64.6303(c) and 64.6305(d) through (g), as redesignated by the *Sixth Report and Order,* by subsequent notification.

128. *It is further ordered* that the Office of the Managing Director, Performance Evaluation and Records Management, *shall send* a copy of the *Sixth Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

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

List of Subjects

47 CFR Part 0

Authority delegations (Government agencies), Communications, Communications common carriers, Classified information, Freedom of information, Government publications, Infants and children, Organization and functions (Government agencies), Postal Service, Privacy, Reporting and recordkeeping requirements, Sunshine Act, Telecommunications.

47 CFR Part 1

Administrative practice and procedure, Civil rights, Claims, Communications, Communications common carriers, Communications equipment, Cuba, Drug abuse, Environmental impact statements, Equal access to justice, Equal employment opportunity, Federal buildings and facilities, Government employees, Historic preservation, Income taxes, Indemnity payments, Individuals with disabilities, internet, Investigations, Lawyers, Metric system, Penalties, Radio, Reporting and recordkeeping requirements, Satellites, Security measures, Telecommunications, Telephone, Television, Wages.

47 CFR Part 64

Carrier equipment, Communications common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0, 1, and 64 as follows:

PART 0—COMMISSION ORGANIZATION

■ 1. The authority citation for part 0 continues to read as follows:

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 409, unless otherwise noted.

Subpart A—Organization

■ 2. Amend § 0.111 by revising paragraph (a)(28)(i) and (ii) and adding paragraph (a)(29) to read as follows:

§ 0.111 Functions of the Bureau.

(a) * * *

(28) * * *

(i) Whose certification required by § 64.6305 of this chapter is deficient after giving that provider notice and an opportunity to cure the deficiency; or

(ii) Who accepts calls directly from a provider not listed in the Robocall Mitigation Database in violation of § 64.6305(g) of this chapter.

(29) Take enforcement action, including revoking an existing section 214 authorization, license, or instrument for any entity that has repeatedly violated § 64.6301, § 64.6302, or § 64.6305 of this chapter. The Commission or the Enforcement Bureau under delegated authority will provide prior notice of its intent to revoke an existing license or instrument of authorization and follow applicable revocation procedures, including providing the authorization holder with a written opportunity to demonstrate why revocation is not warranted.

* * * * *

PART 1—PRACTICE AND PROCEDURE

■ 3. 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.

Subpart A—General Rules of Practice and Procedure

■ 4. Amend § 1.80 by:

■ a. Redesignating paragraphs (b)(9) through (11) as paragraphs (b)(10) through (12);

■ b. Adding new paragraph (b)(9);

■ c. Revising newly redesignated paragraph (b)(10);

■ d. In newly redesignated paragraph (b)(11):

■ i. Revising table 1;

■ ii. Revising the headings for tables 2 and 3;

■ iii. Revising the heading and footnote 1 for table 4; and

■ iv. Revising note 2 following table 4;

■ e. In newly redesignated paragraph (b)(12)(ii), revising the heading for table 5; and

■ f. Revising note 3 following table 5 to newly redesignated paragraph (b)(12)(ii).

The addition and revisions read as follows:

§ 1.80 Forfeiture proceedings.

* * * * *

(9) *Forfeiture penalty for a failure to block.* Any person determined to have failed to block illegal robocalls pursuant to §§ 64.6305(g) and 64.1200(n) of this chapter shall be liable to the United States for a forfeiture penalty of no more than $23,727 for each violation, to be assessed on a per-call basis.

(10) *Maximum forfeiture penalty for any case not previously covered.* In any case not covered in paragraphs (b)(1) through (9) of this section, the amount of any forfeiture penalty determined under this section shall not exceed $23,727 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $177,951 for any single act or failure to act described in paragraph (a) of this section.

(11) * * *

TABLE 1 TO PARAGRAPH (b)(11)—BASE AMOUNTS FOR SECTION 503 FORFEITURES

Forfeitures	Violation amount
Misrepresentation/lack of candor	(1)
Failure to file required DODC required forms, and/or filing materially inaccurate or incomplete DODC information	$15,000
Construction and/or operation without an instrument of authorization for the service	10,000
Failure to comply with prescribed lighting and/or marking	10,000

TABLE 1 TO PARAGRAPH (b)(11)—BASE AMOUNTS FOR SECTION 503 FORFEITURES—Continued

Forfeitures	Violation amount
Violation of public file rules	10,000
Violation of political rules: Reasonable access, lowest unit charge, equal opportunity, and discrimination	9,000
Unauthorized substantial transfer of control	8,000
Violation of children's television commercialization or programming requirements	8,000
Violations of rules relating to distress and safety frequencies	8,000
False distress communications	8,000
EAS equipment not installed or operational	8,000
Alien ownership violation	8,000
Failure to permit inspection	7,000
Transmission of indecent/obscene materials	7,000
Interference	7,000
Importation or marketing of unauthorized equipment	7,000
Exceeding of authorized antenna height	5,000
Fraud by wire, radio or television	5,000
Unauthorized discontinuance of service	5,000
Use of unauthorized equipment	5,000
Exceeding power limits	4,000
Failure to Respond to Commission communications	4,000
Violation of sponsorship ID requirements	4,000
Unauthorized emissions	4,000
Using unauthorized frequency	4,000
Failure to engage in required frequency coordination	4,000
Construction or operation at unauthorized location	4,000
Violation of requirements pertaining to broadcasting of lotteries or contests	4,000
Violation of transmitter control and metering requirements	3,000
Failure to file required forms or information	3,000
Per call violations of the robocall blocking rules	2,500
Failure to make required measurements or conduct required monitoring	2,000
Failure to provide station ID	1,000
Unauthorized pro forma transfer of control	1,000
Failure to maintain required records	1,000

Table 2 to Paragraph (b)(11)—Violations Unique to the Service

* * * * *

Table 3 to Paragraph (b)(11)—Adjustment Criteria for Section 503 Forfeitures

* * * * *

Table 4 to Paragraph (b)(11)—Non-Section 503 Forfeitures That Are Affected by the Downward Adjustment Factors [1]

* * * * *

[1] Unlike section 503 of the Act, which establishes maximum forfeiture amounts, other sections of the Act, with two exceptions, state prescribed amounts of forfeitures for violations of the relevant section. These amounts are then subject to mitigation or remission under section 504 of the Act. One exception is section 223 of the Act, which provides a maximum forfeiture per day. For convenience, the Commission will treat this amount as if it were a prescribed base amount, subject to downward adjustments. The other exception is section 227(e) of the Act, which provides maximum forfeitures per violation, and for continuing violations. The Commission will apply the factors set forth in section 503(b)(2)(E) of the Act and this table 4 to determine the amount of the penalty to assess in any particular situation. The amounts in this table 4 are adjusted for inflation pursuant to the Debt Collection Improvement Act of 1996 (DCIA), 28 U.S.C. 2461. These non-section 503 forfeitures may be adjusted downward using the ''Downward Adjustment Criteria'' shown for section 503 forfeitures in table 3 to this paragraph (b)(11).

Note 2 to paragraph (b)(11): *Guidelines for Assessing Forfeitures.* The Commission and its staff may use the guidelines in tables 1 through 4 of this paragraph (b)(11) in particular cases. The Commission and its staff retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute. The forfeiture ceilings per violation or per day for a continuing violation stated in section 503 of the Communications Act and the Commission's rules are described in paragraph (b)(12) of this section. These statutory maxima became effective September 13, 2013. Forfeitures issued under other sections of the Act are dealt with separately in table 4 to this paragraph (b)(11).

(12) * * *

(ii) * * *

Table 5 to Paragraph (b)(12)(ii)

* * * * *

Note 3 to paragraph (b)(12): Pursuant to Public Law 104–134, the first inflation adjustment cannot exceed 10 percent of the statutory maximum amount.

* * * * *

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 5. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 255, 262, 276, 403(b)(2)(B), (c), 616, 617, 620, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

Subpart HH—Caller ID Authentication

■ 6. Amend § 64.6300 by redesignating paragraphs (i) through (n) as paragraphs (j) through (o) and adding new paragraph (i) to read as follows:

§ 64.6300 Definitions.

* * * * *

(i) *Non-gateway intermediate provider.* The term ''non-gateway intermediate provider'' means any entity that is an intermediate provider as that term is defined by paragraph (g) of this section that is not a gateway provider as that term is defined by paragraph (d) of this section.

* * * * *

■ 7. Amend § 64.6302 by adding paragraph (d) to read as follows:

§ 64.6302 Caller ID authentication by intermediate providers.

* * * * *

(d) Notwithstanding paragraph (b) of this section, a non-gateway intermediate provider must, not later than December 31, 2023, authenticate caller identification information for all calls it receives directly from an originating provider and for which the caller identification information has not been authenticated and which it will exchange with another provider as a SIP call, unless that non-gateway intermediate provider is subject to an applicable extension in § 64.6304.

§ 64.6303 [Amended]

■ 8. Amend § 63.6303 by adding reserved paragraph (c).

■ 9. Delayed indefinitely, further amend § 63.6303 by adding paragraph (c) to read as follows:

§ 64.6303 Caller ID authentication in non-IP networks.

* * * * *

(c) Except as provided in § 64.6304, not later than December 31, 2023, a non-gateway intermediate provider receiving a call directly from an originating provider shall either:

(1) Upgrade its entire network to allow for the processing and carrying of SIP calls and fully implement the STIR/SHAKEN framework as required in § 64.6302(d) throughout its network; or

(2) Maintain and be ready to provide the Commission on request with documented proof that it is participating, either on its own or through a representative, including third party representatives, as a member of a working group, industry standards group, or consortium that is working to develop a non-internet Protocol caller identification authentication solution, or actively testing such a solution.

■ 10. Amend § 64.6304 by:
■ a. Removing the word ''and'' at the end of paragraph (a)(1)(i);
■ b. Revising paragraph (a)(1)(ii);
■ c. Adding paragraph (a)(1)(iii); and
■ d. Revising paragraphs (b) and (d).

The revisions and addition read as follows:

§ 64.6304 Extension of implementation deadline.

(a) * * *

(1) * * *

(ii) A small voice service provider notified by the Enforcement Bureau pursuant to § 0.111(a)(27) of this chapter that fails to respond in a timely manner, fails to respond with the information requested by the Enforcement Bureau, including credible evidence that the robocall traffic identified in the notification is not illegal, fails to demonstrate that it taken steps to effectively mitigate the traffic, or if the Enforcement Bureau determines the provider violates § 64.1200(n)(2), will no longer be exempt from the requirements of § 64.6301 beginning 90 days following the date of the Enforcement Bureau's determination, unless the extension would otherwise terminate earlier pursuant to paragraph (a)(1) introductory text or (a)(1)(i), in which case the earlier deadline applies; and

(iii) Small voice service providers that originate calls via satellite using North American Numbering Plan numbers are deemed subject to a continuing extension of § 64.6301.

* * * * *

(b) *Voice service providers, gateway providers, and non-gateway intermediate providers that cannot obtain an SPC token.* Voice service providers that are incapable of obtaining an SPC token due to Governance Authority policy are exempt from the requirements of § 64.6301 until they are capable of obtaining an SPC token. Gateway providers that are incapable of obtaining an SPC token due to Governance Authority policy are exempt from the requirements of § 64.6302(c) regarding call authentication. Non-gateway intermediate providers that are incapable of obtaining an SPC token due to Governance Authority policy are exempt from the requirements of § 64.6302(d) regarding call authentication.

* * * * *

(d) *Non-IP networks.* Those portions of a voice service provider, gateway provider, or non-gateway intermediate provider's network that rely on technology that cannot initiate, maintain, carry, process, and terminate SIP calls are deemed subject to a continuing extension. A voice service provider subject to the foregoing extension shall comply with the requirements of § 64.6303(a) as to the portion of its network subject to the extension, a gateway provider subject to the foregoing extension shall comply with the requirements of § 64.6303(b) as to the portion of its network subject to the extension, and a non-gateway intermediate provider receiving calls directly from an originating provider subject to the foregoing extension shall comply with the requirements of § 64.6303(c) as to the portion of its network subject to the extension.

* * * * *

■ 11. Amend § 64.6305 by:
■ a. Revising paragraph (a)(1);
■ b. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (g) and adding new paragraph (c);
■ c. Revising newly redesignated paragraphs (d)(3) introductory text, (d)(5) introductory text, (e)(2) introductory text, (e)(3) introductory text, and (e)(5);
■ d. Adding reserved paragraph (f);
■ e. Revising newly redesignated paragraphs (g)(1) through (3);
■ f. Redesignating paragraph (g)(4) as paragraph (g)(5) and adding new reserved paragraph (g)(4); and
■ g. Revising newly redesignated paragraph (g)(5) introductory text.

The additions and revisions read as follows:

§ 64.6305 Robocall mitigation and certification.

(a) * * *

(1) Each voice service provider shall implement an appropriate robocall mitigation program.

* * * * *

(c) *Robocall mitigation program requirements for non-gateway intermediate providers.* (1) Each non-gateway intermediate provider shall implement an appropriate robocall mitigation program.

(2) Any robocall mitigation program implemented pursuant to paragraph (c)(1) of this section shall include reasonable steps to avoid carrying or processing illegal robocall traffic and shall include a commitment to respond fully and in a timely manner to all traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping any illegal robocallers that use its service to carry or process calls.

(d) * * *

(3) All certifications made pursuant to paragraphs (d)(1) and (2) of this section shall:

* * * * *

(5) A voice service provider shall update its filings within 10 business days of any change to the information it must provide pursuant to paragraphs (d)(1) through (4) of this section.

* * * * *

(e) * * *

(2) A gateway provider shall include the following information in its certification made pursuant to paragraph (e)(1) of this section, in

English or with a certified English translation:

* * * * *

(3) All certifications made pursuant to paragraphs (e)(1) and (2) of this section shall:

* * * * *

(5) A gateway provider shall update its filings within 10 business days to the information it must provide pursuant to paragraphs (e)(1) through (4) of this section, subject to the conditions set forth in paragraphs (d)(5)(i) and (ii) of this section.

* * * * *

(f) [Reserved]

(g) * * *

(1) *Accepting traffic from domestic voice service providers.* Intermediate providers and voice service providers shall accept calls directly from a domestic voice service provider only if that voice service provider's filing appears in the Robocall Mitigation Database in accordance with paragraph (d) of this section and that filing has not been de-listed pursuant to an enforcement action.

(2) *Accepting traffic from foreign providers.* Beginning April 11, 2023, intermediate providers and voice service providers shall accept calls directly from a foreign voice service provider or foreign intermediate provider that uses North American Numbering Plan resources that pertain to the United States in the caller ID field to send voice traffic to residential or business subscribers in the United States, only if that foreign provider's filing appears in the Robocall Mitigation Database in accordance with paragraph (d) of this section and that filing has not been de-listed pursuant to an enforcement action.

(3) *Accepting traffic from gateway providers.* Beginning April 11, 2023, intermediate providers and voice service providers shall accept calls directly from a gateway provider only if that gateway provider's filing appears in the Robocall Mitigation Database in accordance with paragraph (e) of this section, showing that the gateway provider has affirmatively submitted the filing, and that filing has not been de-listed pursuant to an enforcement action.

(4) [Reserved]

(5) *Public safety safeguards.* Notwithstanding paragraphs (g)(1) through (4) of this section:

* * * * *

■ 12. Delayed indefinitely, further amend § 64.6305 by:

■ a. Revising paragraphs (d)(1) introductory text, (d)(1)(ii) and (iii), (d)(2), and (d)(4)(iv) and (v) and adding paragraphs (d)(4)(vi) and (vii);

■ b. Revising paragraphs (e)(1) introductory text and (e)(2)(i) through (iii);

■ c. Adding paragraph (e)(2)(iv);

■ d. Revising paragraphs (e)(4)(iv) and (v) and adding paragraphs (e)(4)(vi) and (vii); and

■ e. Adding paragraphs (f) and (g)(4).

The additions and revisions read as follows:

§ 64.6305 Robocall mitigation and certification.

* * * * *

(d) * * *

(1) A voice service provider shall certify that all of the calls that it originates on its network are subject to a robocall mitigation program consistent with paragraph (a) of this section, that any prior certification has not been removed by Commission action and it has not been prohibited from filing in the Robocall Mitigation Database by the Commission, and to one of the following:

* * * * *

(ii) It has implemented the STIR/SHAKEN authentication framework on a portion of its network and all calls it originates on that portion of its network are compliant with § 64.6301(a)(1) and (2); or

(iii) It has not implemented the STIR/SHAKEN authentication framework on any portion of its network.

(2) A voice service provider shall include the following information in its certification in English or with a certified English translation:

(i) Identification of the type of extension or extensions the voice service provider received under § 64.6304, if the voice service provider is not a foreign voice service provider, and the basis for the extension or extensions, or an explanation of why it is unable to implement STIR/SHAKEN due to a lack of control over the network infrastructure necessary to implement STIR/SHAKEN;

(ii) The specific reasonable steps the voice service provider has taken to avoid originating illegal robocall traffic as part of its robocall mitigation program, including a description of how it complies with its obligation to know its customers pursuant to § 64.1200(n)(3), any procedures in place to know its upstream providers, and the analytics system(s) it uses to identify and block illegal traffic, including whether it uses any third-party analytics vendor(s) and the name(s) of such vendor(s);

(iii) A statement of the voice service provider's commitment to respond fully and in a timely manner to all traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping any illegal robocallers that use its service to originate calls; and

(iv) State whether, at any time in the prior two years, the filing entity (and/or any entity for which the filing entity shares common ownership, management, directors, or control) has been the subject of a formal Commission, law enforcement, or regulatory agency action or investigation with accompanying findings of actual or suspected wrongdoing due to the filing entity transmitting, encouraging, assisting, or otherwise facilitating illegal robocalls or spoofing, or a deficient Robocall Mitigation Database certification or mitigation program description; and, if so, provide a description of any such action or investigation, including all law enforcement or regulatory agencies involved, the date that any action or investigation was commenced, the current status of the action or investigation, a summary of the findings of wrongdoing made in connection with the action or investigation, and whether any final determinations have been issued.

* * * * *

(4) * * *

(iv) Whether the voice service provider is a foreign voice service provider;

(v) The name, title, department, business address, telephone number, and email address of one person within the company responsible for addressing robocall mitigation-related issues;

(vi) Whether the voice service provider is:

(A) A voice service provider with a STIR/SHAKEN implementation obligation directly serving end users;

(B) A voice service provider with a STIR/SHAKEN implementation obligation acting as a wholesale provider originating calls on behalf of another provider or providers; or

(C) A voice service provider without a STIR/SHAKEN implementation obligation; and

(vii) The voice service provider's OCN, if it has one.

* * * * *

(e) * * *

(1) A gateway provider shall certify that all of the calls that it carries or processes on its network are subject to a robocall mitigation program consistent with paragraph (b)(1) of this section, that any prior certification has not been removed by Commission action and it

has not been prohibited from filing in the Robocall Mitigation Database by the Commission, and to one of the following:

* * * * *

(2) * * *

(i) Identification of the type of extension or extensions the gateway provider received under § 64.6304 and the basis for the extension or extensions, or an explanation of why it is unable to implement STIR/SHAKEN due to a lack of control over the network infrastructure necessary to implement STIR/SHAKEN;

(ii) The specific reasonable steps the gateway provider has taken to avoid carrying or processing illegal robocall traffic as part of its robocall mitigation program, including a description of how it complies with its obligation to know its upstream providers pursuant to § 64.1200(n)(4), the analytics system(s) it uses to identify and block illegal traffic, and whether it uses any third-party analytics vendor(s) and the name(s) of such vendor(s);

(iii) A statement of the gateway provider's commitment to respond fully and within 24 hours to all traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping any illegal robocallers that use its service to carry or process calls; and

(iv) State whether, at any time in the prior two years, the filing entity (and/or any entity for which the filing entity shares common ownership, management, directors, or control) has been the subject of a formal Commission, law enforcement, or regulatory agency action or investigation with accompanying findings of actual or suspected wrongdoing due to the filing entity transmitting, encouraging, assisting, or otherwise facilitating illegal robocalls or spoofing, or a deficient Robocall Mitigation Database certification or mitigation program description; and, if so, provide a description of any such action or investigation, including all law enforcement or regulatory agencies involved, the date that any action or investigation was commenced, the current status of the action or investigation, a summary of the findings of wrongdoing made in connection with the action or investigation, and whether any final determinations have been issued.

* * * * *

(4) * * *

(iv) Whether the gateway provider or any affiliate is also foreign voice service provider;

(v) The name, title, department, business address, telephone number, and email address of one person within the company responsible for addressing robocall mitigation-related issues;

(vi) Whether the gateway provider is:

(A) A gateway provider with a STIR/SHAKEN implementation obligation; or

(B) A gateway provider without a STIR/SHAKEN implementation obligation; and

(vii) The gateway provider's OCN, if it has one.

* * * * *

(f) *Certification by non-gateway intermediate providers in the Robocall Mitigation Database.* (1) A non-gateway intermediate provider shall certify that all of the calls that it carries or processes on its network are subject to a robocall mitigation program consistent with paragraph (c) of this section, that any prior certification has not been removed by Commission action and it has not been prohibited from filing in the Robocall Mitigation Database by the Commission, and to one of the following:

(i) It has fully implemented the STIR/SHAKEN authentication framework across its entire network and all calls it carries or processes are compliant with § 64.6302(b);

(ii) It has implemented the STIR/SHAKEN authentication framework on a portion of its network and calls it carries or processes on that portion of its network are compliant with § 64.6302(b); or

(iii) It has not implemented the STIR/SHAKEN authentication framework on any portion of its network for carrying or processing calls.

(2) A non-gateway intermediate provider shall include the following information in its certification made pursuant to paragraph (f)(1) of this section in English or with a certified English translation:

(i) Identification of the type of extension or extensions the non-gateway intermediate provider received under § 64.6304, if the non-gateway intermediate provider is not a foreign provider, and the basis for the extension or extensions, or an explanation of why it is unable to implement STIR/SHAKEN due to a lack of control over the network infrastructure necessary to implement STIR/SHAKEN;

(ii) The specific reasonable steps the non-gateway intermediate provider has taken to avoid carrying or processing illegal robocall traffic as part of its robocall mitigation program, including a description of any procedures in place to know its upstream providers and the analytics system(s) it uses to identify and block illegal traffic, including whether it uses any third-party analytics vendor(s) and the name of such vendor(s);

(iii) A statement of the non-gateway intermediate provider's commitment to respond fully and in a timely manner to all traceback requests from the Commission, law enforcement, and the industry traceback consortium, and to cooperate with such entities in investigating and stopping any illegal robocallers that use its service to carry or process calls; and

(iv) State whether, at any time in the prior two years, the filing entity (and/or any entity for which the filing entity shares common ownership, management, directors, or control) has been the subject of a formal Commission, law enforcement, or regulatory agency action or investigation with accompanying findings of actual or suspected wrongdoing due to the filing entity transmitting, encouraging, assisting, or otherwise facilitating illegal robocalls or spoofing, or a deficient Robocall Mitigation Database certification or mitigation program description; and, if so, provide a description of any such action or investigation, including all law enforcement or regulatory agencies involved, the date that any action or investigation was commenced, the current status of the action or investigation, a summary of the findings of wrongdoing made in connection with the action or investigation, and whether any final determinations have been issued.

(3) All certifications made pursuant to paragraphs (f)(1) and (2) of this section shall:

(i) Be filed in the appropriate portal on the Commission's website; and

(ii) Be signed by an officer in conformity with 47 CFR 1.16.

(4) A non-gateway intermediate provider filing a certification shall submit the following information in the appropriate portal on the Commission's website:

(i) The non-gateway intermediate provider's business name(s) and primary address;

(ii) Other business names in use by the non-gateway intermediate provider;

(iii) All business names previously used by the non-gateway intermediate provider;

(iv) Whether the non-gateway intermediate provider or any affiliate is also foreign voice service provider;

(v) The name, title, department, business address, telephone number, and email address of one person within the company responsible for addressing robocall mitigation-related issues;

(vi) Whether the non-gateway intermediate provider is:

(A) A non-gateway intermediate provider with a STIR/SHAKEN implementation obligation; or

(B) A non-gateway intermediate provider without a STIR/SHAKEN implementation obligation; and

(vii) The non-gateway intermediate service provider's OCN, if it has one.

(5) A non-gateway intermediate provider shall update its filings within 10 business days of any change to the information it must provide pursuant to this paragraph (f) subject to the conditions set forth in paragraphs (d)(5)(i) and (ii) of this section.

(g) * * *

(4) *Accepting traffic from non-gateway intermediate providers.* Intermediate providers and voice service providers shall accept calls directly from a non-gateway intermediate provider only if that non-gateway intermediate provider's filing appears in the Robocall Mitigation Database in accordance with paragraph (f) of this section, showing that the non-gateway intermediate provider affirmatively submitted the filing, and that filing has not been de-listed pursuant to an enforcement action.

* * * * *

[FR Doc. 2023–12142 Filed 6–20–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 1206013412–2517–02]

RTID 0648–XD065

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2023 Commercial Closure for Gulf of Mexico Greater Amberjack

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements an accountability measure for commercial greater amberjack in the Gulf of Mexico (Gulf) reef fish fishery for the 2023 fishing year through this temporary rule. NMFS has determined that Gulf greater amberjack landings have exceeded the commercial annual catch target (ACT). Therefore, the commercial fishing season for greater amberjack in the Gulf exclusive economic zone (EEZ) will close on June 18, 2023, and the sector will remain closed until the start of the next commercial fishing season on January 1, 2024. This closure is necessary to protect the Gulf greater amberjack resource.

DATES: This rule is effective 12:01 a.m., local time, June 18, 2023, until 12:01 a.m., local time, January 1, 2024.

FOR FURTHER INFORMATION CONTACT: Kelli O'Donnell, NMFS Southeast Regional Office, telephone: 727–824–5305, or email: *Kelli.ODonnell@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS manages the reef fish fishery of the Gulf, which includes greater amberjack, under the Fishery Management Plan for the Reef Fish Resources of the Gulf (FMP). The Gulf of Mexico Fishery Management Council (Council) prepared the FMP and NMFS implements the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622. All greater amberjack weights discussed in this temporary rule are in round weight.

On June 15, 2023, NMFS published the final rule implementing Amendment 54 to the FMP (88 FR 39193). Among other measures, that final rule decreased the commercial annual catch limit (ACL) and quota (commercial ACT) for Gulf greater amberjack. Effective on the date of publication of the Amendment 54 final rule, the commercial greater amberjack ACL and ACT for the 2023 fishing year are 101,000 lb (45,813 kg) and 93,930 lb (42,606 kg), respectively (50 CFR 622.41(a)(1)(iii) and 622.39(a)(1)(v)).

Under 50 CFR 622.41(a)(1)(i), NMFS is required to close the greater amberjack commercial sector when the commercial ACT is reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS has determined that the commercial ACT of 93,930 lb (42,606 kg) has been exceeded. Accordingly, NMFS closes commercial harvest of greater amberjack from the Gulf EEZ effective 12:01 a.m., local time, June 18, 2023, until 12:01 a.m., local time, January 1, 2024.

During the commercial closure, the sale or purchase of greater amberjack taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to the sale or purchase of greater amberjack that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, June 18, 2023, and were held in cold storage by a dealer or processor. The commercial sector for greater amberjack will re-open on January 1, 2024, the beginning of the 2024 greater amberjack commercial fishing season.

During the commercial closure, the bag and possession limits specified in 50 CFR 622.38(b)(1) apply to all harvest or possession of greater amberjack in or from the Gulf EEZ. However, for the current 2022–2023 recreational fishing year of August 1, 2022, through July 31, 2023, the recreational fishing season is closed for the remainder of the current fishing year, or through July 31, 2023. Therefore, through July 31, 2023, the bag and possession limits for greater amberjack in or from the Gulf EEZ are zero. The recreational season will reopen on August 1, 2023, the start of the next recreational fishing year.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR 622.41(a)(1), which was issued pursuant to section 304(b) of the Magnuson-Stevens Act, and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment is unnecessary and contrary to the public interest. Such procedures are unnecessary because the regulations associated with the closure of the greater amberjack commercial sector 50 CFR 622.41(a)(1) have already been subject to notice and public comment, and all that remains is to notify the public of the closure. Prior notice and opportunity for public comment are contrary to the public interest because there is a need to immediately implement this action to protect the greater amberjack stock. Prior notice and opportunity for public comment would require time and could result in a harvest well in excess of the commercial ACL. NMFS is required to reduce the 2024 ACT and ACL by the amount of any overage of the 2023 commercial ACL, which would reduce the 2024 fishing season.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: June 15, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–13189 Filed 6–15–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 88, No. 118
Wednesday, June 21, 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 HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 173

[Docket No. FDA–2023–F–2319]

PHM Brands; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of petition.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that we have filed a petition, submitted by PHM Brands, proposing that the food additive regulation for chlorine dioxide be amended to provide for an additional method for producing the additive.

DATES: Either electronic or written comments on the petitioner's environmental assessment must be submitted by July 21, 2023.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of July 21, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2023–F–2319 for ''PHM Brands; Filing of Food Additive Petition.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' FDA will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Karen Hall, Center for Food Safety and Applied Nutrition, Food and Drug Administration, 5001 Campus Dr., College Park, MD 20740, 240–402–9195.

SUPPLEMENTARY INFORMATION: Under section 409(b)(5) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 348(b)(5)), we are giving notice that we have filed a food additive petition (FAP 2A4832), submitted by Burdock Group Consultants on behalf of PHM Brands, 730 17th Street, Denver, Colorado 80202. The petition proposes to amend the food additive regulations in § 173.300 (21 CFR 173.300; *Chlorine dioxide*) to provide for production of the additive via an electrolytic method from a brine solution containing chloride salts.

We are reviewing the potential environmental impact of this petition. To encourage public participation consistent with regulations issued under the National Environmental Policy Act (40 CFR 1501.4(b)), we are placing the environmental assessment submitted with the petition that is the subject of this notice on public display at the Dockets Management Staff (see **DATES** and **ADDRESSES**) for public review and comment.

We will also place on public display, at the Dockets Management Staff and at *https://www.regulations.gov,* any amendments to, or comments on, the petitioner's environmental assessment without further announcement in the **Federal Register**. If, based on our review, we find that an environmental impact statement is not required, and this petition results in a regulation, we will publish the notice of availability of our finding of no significant impact and the evidence supporting that finding with the regulation in the **Federal Register** in accordance with 21 CFR 25.51(b).

Dated: June 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13120 Filed 6–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–105595–23]

RIN 1545–BQ75

Elective Payment of Advanced Manufacturing Investment Credit

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the elective payment election of the advanced manufacturing investment credit under the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022. The proposed regulations describe rules for the elective payment election, including special rules applicable to partnerships and S corporations, repayment of excessive payments, and basis reduction and recapture. In addition, the proposed regulations provide rules related to an IRS pre-filing registration process that taxpayers wanting to make the elective payment election would be required to follow. These proposed regulations affect taxpayers eligible to make the elective payment election of the advanced manufacturing investment tax credit in a taxable year. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 24, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on August 22, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 21, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–105595–23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted electronically and comments submitted on paper to its public docket. Send hard copy submissions to: CC:PA:LPD:PR (REG–105595–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning this proposed regulation, Lani M. Sinfield at (202) 317–5871 (not a toll-free number); concerning submissions of comments and or the public hearing, Vivian Hayes at (202) 317–6901 (not a toll-free number) or by email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

Section 48D was added to the Internal Revenue Code (Code) on August 9, 2022, by section 107(a) of the CHIPS Act of 2022 (CHIPS Act), which was enacted as Division A of the CHIPS and Science Act of 2022, Public Law 117–167, 136 Stat. 1366, 1393. Section 48D established the advanced manufacturing investment credit (section 48D credit) and section 48D(d) allows taxpayers (other than partnerships and S corporations) to elect to treat the amount of the section 48D credit determined under section 48D(a) as a payment against their Federal income tax liabilities. Section 48D(d) also provides special rules relating to elective payments to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 48D and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 48D. Section 48D applies to qualified property placed in service after December 31, 2022, and, for any property the construction of which began prior to January 1, 2023, only to the extent of the basis thereof attributable to the construction, reconstruction, or erection of such qualified property after August 9, 2022 (the date of enactment of the CHIPS Act). See section 107(f)(1) of the CHIPS Act.

On March 23, 2023, the Treasury Department and the IRS published in the **Federal Register** (88 FR 17451) a notice of proposed rulemaking (REG–120653–22), which contains proposed regulations to implement the general provisions relating to the section 48D credit (March 2023 proposed regulations). The March 2023 proposed regulations included proposed definitions of various statutory terms, including ''eligible taxpayer,'' ''qualified property,'' ''advanced manufacturing facility,'' and ''semiconductor.'' The March 2023 proposed regulations also proposed rules under section 48D regarding the beginning of construction requirement; proposed rules requiring pre-filing registration with the IRS in advance of filing an elective payment election; and proposed rules implementing the ''applicable transaction'' credit recapture rules under section 50(a)(3) of the Code. In addition, the March 2023 proposed regulations requested comments on potential issues with respect to the elective payment election provisions under section 48D(d) that may require guidance. This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) to implement the statutory provisions of section 48D(d) and revise the rules in proposed § 1.48D–6 of the March 2023 proposed regulations.

In the Rules and Regulations section of this issue of the **Federal Register**, the Treasury Department and the IRS are issuing temporary regulations under § 1.48D–6T that implement the pre-filing registration process described in proposed § 1.48D–6 of the proposed regulations. The temporary regulations require taxpayers that want to elect the elective payment of the section 48D credit to register with the IRS through an IRS electronic portal in advance of the taxpayer filing the return on which the election under section 48D is made.

I. Overview of Elective Payment Election Under Section 48D

Section 48D(d)(1) allows a taxpayer to elect to treat the section 48D credit determined for the taxpayer for a taxable year as a payment against the tax imposed by subtitle A of the Code (that is, treated as a payment of Federal income tax) equal to the amount of the credit rather than a credit against the taxpayer's Federal income tax liability for that taxable year (elective payment election).

II. Section 48D Rules for Partnerships and S Corporations

Section 48D(d)(2)(A) provides special rules for partnerships (as defined in section 761(a)) and for S corporations (as defined in section 1361(a)(1) of the Code). Section 48D(d)(2)(A)(i) provides that, in the case of any credit determined with respect to any property held directly by a partnership or S corporation, any election under section 48D(d)(1) is to be made by such partnership or S corporation and must be made in such manner as the Secretary may provide. If such partnership or S corporation makes an election under section 48D(d)(1), (1) the Secretary will make a payment to such partnership or S corporation equal to the amount of such credit, (2) section 48D(d)(3) is applied with respect to the credit before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such credit, (3) any credit amount with respect to which the election in section 48D(d)(1) is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code, and (4) a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise applicable credit for each taxable year.

III. Special Rules

Section 48D(d)(2)(B) requires the elective payment election to be made no later than the due date (including extensions of time) of the tax return for the taxable year for which the election is made. The elective payment election is irrevocable once made and applies with respect to any credit for the taxable year for which the election is made.

Section 48D(d)(2)(E) provides that, as a condition of, and prior to, any amount between treated as a payment by or to the taxpayer, the Secretary may require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments.

Section 48D(d)(2)(F) provides rules relating to excessive payments. In the case of any amount treated as a payment which is made by the taxpayer under section 48D(d)(1), or the amount of the payment made pursuant to section 48D(d)(2)(A), that the Secretary determines constitutes an excessive payment, the tax imposed on such taxpayer by chapter 1 of the Code, for the taxable year in which such determination is made must be increased by an amount equal to the sum of (1) the amount of any payment treated as made by or to the taxpayer which the Secretary determines constitutes an excessive payment, (2) plus 20 percent of such excessive payment. The increase equal to 20 percent of the excessive payment does not apply if the taxpayer demonstrates to the satisfaction of the Secretary that the excessive payment resulted from reasonable cause.

Section 48D(d)(2)(F)(iii) defines ''excessive payment'' as, with respect to property for which an elective payment election is made for any taxable year, an amount equal to the excess of (I) the amount treated as a payment made by the taxpayer under section 48D(d)(1) or the amount of the payment made pursuant to section 48D(d)(2)(A)(i) over (II) the amount of the credit which, without application of section 48D(d), would be otherwise allowable under section 48D(a) (determined without regard to section 38(c)) with respect to such property for such taxable year.

Section 48D(d)(3) provides a denial of double benefit rule. It states that, in the case of a taxpayer making an elective payment election with respect to the credit determined under section 48D(a), such credit is reduced to zero and is deemed to have been allowed to the taxpayer for such taxable year for any other purposes under the Code.

Section 48D(d)(5) provides basis reduction and recapture rules. It states that rules similar to the rules of section 50(a) and (c) of the Code apply with respect to amounts treated as a payment made by a taxpayer under section 48D(d)(1) and any payment made pursuant to section 48D(d)(2)(A).

Section 48D(d)(6) authorizes the Secretary to issue regulations or other guidance determined to be necessary or appropriate to carry out the elective payment election provisions of section 48D(d), including (A) regulations or other guidance providing rules for determining a partner's distributive share of the tax exempt income described in section 48D(d)(2)(A)(i) and (B) guidance to ensure that the amount treated as a payment under section 48D(d)(1) or payment made under section 48D(d)(2)(A)(i) is commensurate with the amount of the section 48D credit that generally would be otherwise allowable (determined without regard to section 38(c) of the Code).

Explanation of Provisions

I. Rules for Making Elective Payment Elections

A. In General

These proposed regulations revise § 1.48D–6(a)(1) and (2) of the March 2023 proposed regulations to clarify that an elective payment election may only be made on an original return of tax filed not later than the due date (including extensions of time) for the return for the taxable year for which the section 48D credit is determined and in the manner as provided in guidance, and must include any required completed source credit form(s) with respect to the qualified property, a completed Form 3800, *General Business Credit,* and any additional information, including supporting calculations, required in instructions to the relevant forms. An original return would include a superseding return filed on or before the due date (including extensions). No elective payment election would be permitted to be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There also would be no relief available under §§ 301.9100–1 through 301.9100–3 of the Procedure and Administration Regulations (26 CFR part 301) for an elective payment election that is not timely filed.

These proposed regulations would further provide that a taxpayer makes the elective payment election with respect to any section 48D credit determined with respect to such taxpayer in accordance with section 48D(d)(1), and the taxpayer must include a statement with the election attesting under penalties of perjury that the taxpayer claiming to be an eligible taxpayer is not a foreign entity of concern and has not made an applicable transaction during the taxable year that the qualified property is placed in service, and will not claim a double benefit (within the meaning of section 48D(d)(3) and § 1.48–6(d)(2)(ii)(B), (C), and (e)) with respect to any elective payment election made by the taxpayer.

II. Denial of Double Benefit

These proposed regulations revise § 1.48D–6(a)(4) of the March 2023 proposed regulations by explaining the application of the section 48D(d)(3) denial of a double benefit rule and addressing the methodology for

determining the amount of an elective payment, reducing the section 48D credit amount to zero, and treating the section 48D credit as a credit allowed for the taxable year for all other purposes of the Code with respect to taxpayers other than partnerships or S corporations. The proposed application of the denial of a double benefit rule is redesignated as proposed § 1.48D–6(e). The methodology with respect to a payment made to a partnership or S corporation is provided in proposed § 1.48D–6(d)(2)(ii)(B), as described in part III of this Explanation of Provisions.

A taxpayer (other than a partnership or S corporation) making an elective payment election applies section 48D(d)(3) by taking the following steps. First, the taxpayer would compute the amount of the tax liability (if any) for the taxable year, without regard to general business credits (GBCs), that is payable on the due date of the tax return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on the amount of tax under section 38 (Step 1). Second, the taxpayer would compute the allowed amount of the GBCs carryforwards carried to the taxable year plus the amount of current year GBCs (including the section 48D credit) allowed for the taxable year under section 38 (that is, in accordance with all the rules in section 38, including the ordering rules provided in section 38(d)). Since the election would be required to be made on an original return filed before the due date (including extensions of time) for the taxable year for which the section 48D credit is determined, any GBC carryback would not be considered when determining the elective payment amount for the taxable year (Step 2). Third, the taxpayer would apply the GBCs allowed for the taxable year as computed in Step 2, including those attributable to the section 48D credit as GBCs, against the tax liability computed in Step 1. Fourth, the taxpayer would identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year section 48D credit(s) for which the taxpayer is making an elective payment election. The amount of such unused section 48D credits would be treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount) (Step 4). Fifth, the taxpayer would reduce the section 48D credit(s) for which an elective payment election is made by the amount (if any) allowed as a general business credit under section 38 for the taxable year, as provided in Step 3, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in Step 4, which results in the section 48D credit(s) being reduced to zero.

The proposed regulations would provide, consistent with section 48D(d)(3), that the full amount of the section 48D credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and the calculation of any underpayment of estimated taxes under sections 6654 and 6655 of the Code.

The Treasury Department and the IRS request comments on whether future guidance should expand or clarify the methodology that a taxpayer follows to compute the amount of its elective payment. Comments are also requested on additional Code sections under which it may be necessary to consider the section 48D credit to have been deemed to have been allowed for the taxable year in which an elective payment election is made.

III. Partnership and S Corporations

A. Overview

Section 48D(d)(2)(A)(i) provides that, in the case of any credit determined with respect to any property held directly by a partnership or S corporation, any election under section 48D(d)(1) is to be made by such partnership or S corporation and must be made in such manner as the Secretary may provide. If such partnership or S corporation makes an election under section 48D(d)(1), the special rules of section 48D(d)(2)(A)(i)(I) through (IV) apply. In that regard, proposed § 1.48D–6(d)(2)(ii) would provide that (1) the IRS will make a payment to such partnership or S corporation equal to the amount of such credit; (2) before determining any partner's distributive share, or shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated by such entity, or otherwise allowed, to any partner or shareholder) for such taxable year; (3) any amount with respect to which the election under section 48D(d)(1) is made is treated as tax exempt income for purposes of sections 705 and 1366; and (4) a partner's distributive share of such tax exempt income is equal to such partner's distributive share of its otherwise allocable basis in the qualified property as determined under § 1.48D–2(h)(2)(i) for such year. The tax exempt income is taken into account by the partnership or S corporation at the same time as the underlying credit would have been taken into account by the partnership or S corporation absent an elective payment election. Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366 of the Code, as of the date the qualified property is placed in service with respect to the partnership or S corporation. The proposed regulations provide an example illustrating this rule. Because it is the section 48D credits, and not the tax exempt income, that arise from the conduct of the trade or business, the proposed regulations would treat the tax exempt income resulting from an elective payment election by a partnership or an S corporation as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income would not be treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

In response to stakeholder comments, the Treasury Department and the IRS clarify here that there are no restrictions imposed under section 48D or the section 48D regulations on how a partnership or S corporation that receives a payment from the IRS pursuant to an elective payment election may use the cash payment in its operations (including when it makes distributions to its distributions to its partners or shareholders).

Section 48D(d)(6)(B) requires that the Secretary issue regulations or other guidance to ensure that the amount of a payment under section 48(D)(2)(A)(i)(I) to a partnership or S corporation is commensurate with the amount of the credit that would otherwise be allowable (without regard to section 38(c)). Therefore, proposed § 1.48D–6(d)(6) would provide that, in determining the section 48D credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation must compute the amount of the section 48D credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder

level), the amount of the credit determined with respect to any qualified property owned by a partnership or S corporation is not subject to limitation by section 469.

However, section 49 generally impacts the amount of a credit determined with respect to a qualified property. Proposed § 1.48D–6(d)(6)(ii) provides rules for the application of section 49 to a partnership or S corporation. The proposed regulations would provide that any amount of section 48D credit determined with respect to the qualified property held directly by a partnership or S corporation must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the qualified property is placed in service. Thus, if the credit base of the qualified property is limited to a partner or shareholder by section 49, then the amount of the section 48D credit determined by the partnership or S corporation is also limited. The proposed regulations would provide that a partnership or S corporation that makes an elective payment election must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the qualified property as of the close of the taxable year in which the property is placed in service. Additionally, the partnership or S corporation would attach to its tax return for the taxable year in which the property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to the qualified property. The Treasury Department and the IRS request comments as to whether (1) any information or reporting requirements are needed for partnerships and S corporations to apply these rules when determining the amount of the section 48D credit for which an elective payment election can be made by a partnership or S corporation or (2) any additional clarifications are needed regarding how the at-risk rules apply to the determination of the section 48D credit by a taxpayer.

B. BBA Partnership

Many partnerships are subject to the centralized partnership audit regime found in subchapter C of chapter 63 of the Code as amended by the Bipartisan Budget Act of 2015 (BBA).[1] In connection with the implementation of section 48D, the Treasury Department and the IRS identified several areas of the BBA regulations that require updates to administer section 48D in the case of a partnership subject to the BBA (BBA partnership). Section 6221 of the Code provides that any adjustment to a partnership-related item with respect to a BBA partnership, and any tax attributable thereto, is assessed and collected at the partnership-level except to the extent provided under the BBA. The BBA outlines centralized audit procedures which generally must be followed before the IRS can adjust a partnership-related item (as defined in § 301.6241–1). Accordingly, the notice of proposed rulemaking (REG–101607–23) found in the Proposed Rules of this issue of the **Federal Register**, which primarily relates to proposed rules under section 6417, would add a new paragraph (j) to § 301.6241–7 to provide that an election by a BBA partnership under section 48D(d) can be adjusted outside of the BBA audit rules. Proposed § 1.48D–6(d)(7) would cross-reference to proposed § 301.6241–7(j) for rules applicable to payments made to BBA partnerships.

IV. Pre-Filing Registration Requirements and Additional Information

Proposed § 1.48D–6(b)(1) would provide the mandatory pre-filing registration process that, except as provided in guidance, a taxpayer must complete as a condition of, and prior to, any amount being treated as a payment against the tax imposed under § 1.48D–6(a)(1), or an amount paid to a partnership or S corporation pursuant to § 1.48D–6(d)(2)(ii)(A). A taxpayer would be required to use the pre-filing registration process to register each qualified investment in an advanced manufacturing facility. A taxpayer that does not obtain a registration number or report the registration number on its annual tax return with respect to an advanced manufacturing facility would be ineligible to receive any elective payment amount with respect to the amount of any section 48D credit determined with respect to that advanced manufacturing facility. However, completion of the pre-filing registration requirements and receipt of a registration number would not, by itself, mean that the taxpayer would be eligible to receive a payment with respect to the section 48D credits determined with respect to the advanced manufacturing facility.

The pre-filing registration requirements are proposed to be that a taxpayer:

(1) must complete the registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein, unless otherwise provided in guidance;

(2) must satisfy the registration requirements and receive a registration number prior to making a section 48D(d)(1) elective payment election on the taxpayer's tax return for the taxable year at issue;

(3) is required to obtain a registration number for each qualified investment in an advanced manufacturing facility with respect to which a section 48D credit will be determined and for which the taxpayer wishes to make a section 48D(d)(1) elective payment election; and

(4) provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer and about the qualified investment in an advanced manufacturing facility that would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 48D. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not eligible taxpayers. Information about the taxpayer's taxable year would allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about the advanced manufacturing facility, including its address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not advanced manufacturing facilities.

Proposed § 1.48D–6(b)(7)(i) provides that, after a taxpayer completes pre-filing registration with respect to each qualified investment in an advanced manufacturing facility with respect to which the taxpayer intends to elect a section 48D(d) elective payment election for the taxable year, the IRS will review the information provided and will issue a separate registration number for each qualified investment for which the taxpayer provided sufficient verifiable information.

Proposed § 1.48D–6(b)(7)(ii) would provide that a registration number is valid only for the taxable year for which it is obtained. Proposed § 1.48D–6(c)(7)(iii) would provide that, if an

[1] See section 1101 of the BBA, Public Law 114–74, 129 Stat. 584, 625–638 (2015), as amended by section 411 of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114–113, 129 Stat. 2242, 3121 (2015), and sections 201 through 207 of the Tax Technical Corrections Act of 2018, Public Law 115–141, 132 Stat. 348, 1171–1183 (2018).

elective payment election will be made with respect to qualified investment in an advanced manufacturing facility for a taxable year for which a registration number under this section has been obtained for a prior taxable year, the taxpayer must renew the registration each subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts that are relevant in calculating the amount of the section 48D credit. Proposed § 1.48D–6(b)(7)(iv) would provide that, if facts change with respect to the qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, the taxpayer must amend the registration to reflect these new facts. The regulations would provide, for example, that if the facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit an original registration (or if the new owner previously registered other advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

Lastly, proposed § 1.48D–6(b)(7)(v) would provide that the taxpayer would be required to include the registration number of the advanced manufacturing facility on the taxpayer's annual return for the taxable year for an election under proposed § 1.48D–6(a)(1). The IRS will treat an elective payment election as ineffective with respect to any section 48D credit determined with respect to the advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual tax return.

The corresponding temporary regulations under § 1.48D–6T(b) published in the Rules and Regulations section of this edition of the **Federal Register**, which are identical to those that would apply under proposed § 1.48D–6(b), apply to taxable years ending on or after June 21, 2023 and expire on June 12, 2026.

V. Special Rules

These proposed regulations amend the proposed rules relating to excessive payment and basis reduction and recapture under REG–120653–22 by adding examples of excessive payment, clarifying the basis reduction and recapture notice requirement and renumbering the affected paragraphs as § 1.48D–6(f) and (g), respectively.

A. Excessive Payment

Proposed § 1.48D–6(f)(4) provides an example of excessive payment, including the year in which the tax is imposed and the calculation of the additional 20 percent tax. The Treasury Department and the IRS request comments on whether additional guidance on excessive payments is needed.

B. Basis Reduction and Recapture

Proposed § 1.48D–6(g)(1) would provide that rules similar to the rules of section 50(a) and (c) apply for purposes of section 48D. Proposed § 1.48D–6(g)(2)(i) provides that the adjusted basis of property generally must be reduced by the amount of the section 48D credit determined with respect to property for which the taxpayer has made an election under section 48D(d)(1). Proposed § 1.48D–6(g)(2)(ii) would provide a similar basis reduction rule for partnerships or S corporations making an election under section 48D(d)(1). Proposed § 1.48D–6(g)(2)(iii) would clarify the application of the basis adjustment rule under section 50(c)(5) to take into account adjustments made under proposed § 1.48D–6(e)(2)(ii) for partners and S corporation shareholders of such partnerships or S corporations.

Proposed § 1.48D–6(g)(3) would clarify that any reporting of recapture is made on the taxpayer's annual return in the manner prescribed by the IRS in any guidance. In addition, the excessive payment rules operate separately from the recapture rules. The excessive payment rules apply where the credit amount reported on the original credit source form by the taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. Thus, recapture events under section 50(a) do not result in an excessive payment.

Proposed Applicability Dates

Proposed § 1.48D–6 is proposed to apply to taxable years ending on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. Taxpayers may rely on these proposed regulations for elective payments of section 48D credit amounts after December 31, 2022, in taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, provided the taxpayers follow the proposed regulations in their entirety and in a consistent manner with respect to all elections made under section 48D(d).

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (''PRA'') generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. 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 control number.

The collections of information in these proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed regulations are considered general tax records under § 1.6001–1(e). These records are required for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election. For PRA purposes, general tax records are already approved by OMB under 1545–0074 for individuals and 1545–0123 for business entities.

These proposed regulations also mention reporting requirements related to making elections as detailed in § 1.48D–6. These elections will be made by eligible taxpayers as part of filing a return (such as the appropriate Form 1040, Form 1120, Form 1120–S, or Form 1065), including filling out the relevant source credit form and completing the Form 3800. These forms are approved under 1545–0074 for individuals and 1545–0123 for business entities.

These proposed regulations also describe recapture procedures as detailed in proposed § 1.48D–6 that are required by section 48D(d)(5). The reporting of a recapture event will still be required to be reported using Form 4255, Recapture of Investment Credit. This form is approved under 1545–0074 for individuals and 1545–0123 for business entities. These proposed regulations are not changing or creating new collection requirements for recapture not already approved by OMB.

These proposed regulations mention the reporting requirements to complete

pre-filing registration with the IRS to be able to make an elective payment election in proposed § 1.48D–6. For further information concerning the registration and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations (T.D. 9975) published in the Rules and Regulations section of this issue of the **Federal Register**. For burden estimates associated with the pre-filing registration requirement as detailed in proposed § 1.48D–6, see the preamble to the corresponding temporary regulations. These proposed regulations are not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

II. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Although these temporary regulations may affect small entities, data are not readily available about the number of small entities affected. The economic impact of these proposed regulations is not likely to be significant. Section 1.48D–6T(b) implements the statutory authority granted by section 48D(d)(2)(E) that authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments. These proposed regulations will assist small entities wanting to make the elective payment election under section 48D(d). Notwithstanding this certification, the Treasury Department and the IRS welcome comments on the impact of these temporary regulations on small entities.

III. Section 7805(f)

Pursuant to section 7805(f), these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

IV. Unfunded Mandates Reform Act

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

V. Executive Order 13132: Federalism

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

VII. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be made available at *www.regulations.gov* or upon request. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

Announcement 2023–16, 2023–20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone. Any telephonic hearing will be made accessible to people with disabilities.

A public hearing has been scheduled for August 24, 2023, beginning at 10 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the **ADDRESSES** section. If no outline of the topics to be discussed at the hearing is received by August 14, 2023, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available: (1) at the hearing, (2) at *https://www.regulations.gov,* search IRS and REG–105595–23, or (3) by emailing a request to *publichearings@irs.gov.* Please put ''REG–105595–23 Agenda Request'' in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–105595–23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG–105595–23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–105595–23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG–105595–23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–105595–23 and the language ATTEND

In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG–105595–23. Requests to attend the public hearing must be received by 5 p.m. EST on August 22, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–105595–23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG–105595–23. Requests to attend the public hearing must be received by 5 p.m. EST on August 22, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317–6901 (not a toll-free number) at least August 21, 2023.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal author of this proposed regulation is Lani M. Sinfield, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph. 1.** The authority citation for part 1 is amended by adding an entry for § 1.48D–6 in numerical order to read in part as follows:

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

Section 1.48D–6 also issued under 26 U.S.C. 48D(d)(6).

* * * * *

■ **Par. 2.** Section 1.48D–6, as proposed to be added by 88 FR 17451, March 23, 2023, is revised to read as follows:

§ 1.48D–6 Elective payment election.

(a) *Elective payment election*—(1) *In general.* A taxpayer, after successfully completing the pre-filing registration requirements under paragraph (b) of this section, may make an elective payment election with respect to any section 48D credit determined with respect to such taxpayer in accordance with section 48D(d)(1) of the Internal Revenue Code (Code) and this section. A taxpayer, other than a partnership or S corporation, that makes an elective payment election in the manner provided in paragraph (c) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A of the Code (subtitle A) for the taxable year with respect to which a section 48D credit is determined equal to the amount of the section 48D credit with respect to any qualified property otherwise allowable to the taxpayer (determined without regard to section 38(c) of the Code). The payment described in section 48D(d)(1) and this paragraph (a)(1) will be treated as made on the later of the due date (determined without regard to extensions) of the return of tax imposed by subtitle A for the taxable year or the date on which such return is filed.

(2) *Partnerships and S corporations.* See paragraph (d) of this section for special rules regarding elective payment elections under section 48D(d) applicable to partnerships and S corporations.

(3) *Irrevocable.* Any election under section 48D(d)(1) and this section, once made, will be irrevocable and, except as otherwise provided, will apply with respect to any amount of section 48D credit for the taxable year for which the election is made.

(b) *Pre-filing registration required*—(1) *In general.* Pre-filing registration by any taxpayer (including a partnership or an S corporation) in accordance with this paragraph (b) is a condition that must be successfully completed prior to making an elective payment election under section 48D(d)(1) and this section with respect to qualified property placed in service by the taxpayer as part of an advanced manufacturing facility of an eligible taxpayer. An elective payment election will not be effective with respect to the section 48D credit determined with respect to any such qualified property placed in service by any taxpayer unless the taxpayer received a valid registration number for the taxpayer's qualified investment in the advanced manufacturing facility of an eligible taxpayer in accordance with this paragraph (b) and provided the registration number for each qualified investment in each advanced manufacturing facility on its Form 3800, *General Business Credit,* attached to the tax return in accordance with guidance. For purposes of this section, the term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the *IRS.gov* website. See §§ 601.601 and 601.602 of this chapter. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the taxpayer is eligible to receive a payment with respect to any section 48D credit determined with respect to the qualified property.

(2) *Manner of registration.* Unless otherwise provided in guidance, a taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(3) *Members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(4) *Timing of pre-filing registration.* A taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (b)(6) of this section prior to making any elective payment election under this section on the taxpayer's tax return for the taxable year at issue.

(5) *Each qualified investment in an advanced manufacturing facility must have its own registration number.* A taxpayer must obtain a registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer with respect to which an elective payment election is made.

(6) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, a taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal;

(iii) The taxpayer's taxable year, as determined under section 441 of the Code;

(iv) The type of annual return(s) normally filed by the taxpayer with the IRS;

(v) A list of each qualified investment in an advanced manufacturing facility that the taxpayer intends to use to determine a section 48D credit for which the taxpayer intends to make an elective payment election;

(vi) For each qualified investment in an advanced manufacturing facility listed in paragraph (b)(6)(v) of this section, any further information required by the IRS electronic portal, such as:

(A) The type of qualified investment in the advanced manufacturing facility;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the advanced manufacturing facility);

(C) Any supporting documentation relating to the construction, reconstruction or acquisition of the advanced manufacturing facility (such as, State and local government permits to operate the advanced manufacturing facility, certifications, and evidence of ownership that ties to the land deed, lease, or other documented right to use and access any land upon which the advanced manufacturing facility is constructed or housed);

(D) The beginning of construction date and the placed in service date of any qualified property that is part of the advanced manufacturing facility;

(E) The source of funds the taxpayer used to acquire the qualified property with respect to which the qualified investment was made; and

(F) Any other information that the taxpayer or entity believes will help the IRS evaluate the registration request;

(vii) The name of a contact person for the taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either:

(A) Possess legal authority to bind the taxpayer; or

(B) Must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative;*

(viii) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(ix) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(7) *Registration number*—(i) *In general.* The IRS will review the information provided and will issue a separate registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer for which the taxpayer making the registration provided sufficient verifiable information.

(ii) *Registration number is only valid for one year.* A registration number is valid only with respect to the taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(iii) *Renewing registration numbers.* If an elective payment election will be made with respect to any section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for a taxable year after a registration number under this section has been obtained, the taxpayer must renew the registration for that subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(iv) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to a qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, a taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if an eligible taxpayer that is the owner of an advanced manufacturing facility previously registered for an elective payment election for a section 48D credit determined with respect to that advanced manufacturing facility and the advanced manufacturing facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the advanced manufacturing facility must amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit separately an original registration (or if the new owner previously registered other qualified investments or advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

(v) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The taxpayer must include the registration number of the qualified investment in the advanced manufacturing facility on the taxpayer's return as provided in this paragraph (b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to a section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual return.

(c) *Time and manner of election*—(1) *In general.* Any elective payment election under section 48D(d)(1) and this section with respect to any section 48D credit determined with respect to a taxpayer's qualified investment must—

(i) Be made on the taxpayer's original return of tax (including a superseding return) filed not later than the due date (including extensions of time) for the taxable year for which the section 48D credit is determined and the election is made in the manner prescribed by the IRS in guidance;

(ii) Include any required completed source credit form(s), a completed Form 3800, and any additional information required in instructions, including supporting calculations;

(iii) Provide on the completed Form 3800 a valid registration number for the qualified investment that is placed in service as part of an advanced manufacturing facility of an eligible taxpayer;

(iv) Include a statement attesting under the penalties of perjury that—

(A) The taxpayer claiming to be an eligible taxpayer is not a foreign entity of concern within the meaning of § 1.48D–2(f)(2) and has not made an applicable transaction as defined in § 1.50–2(b)(3) during the taxable year that the qualified property is placed in service; and

(B) The taxpayer will not claim a double benefit (within the meaning of section 48D(d)(3) and paragraphs (d)(2)(ii)(B) and (C) and (e) of this section) with respect to any elective payment election made by the taxpayer; and

(v) Be made not later than the due date (including extensions of time) for the taxable year for which the election is made, but in no event earlier than May 8, 2023.

(2) *Limitations.* No elective payment election may be made or revised on an amended return or by filing an

administrative adjustment request under section 6227 of the Code. There is no relief available under §§ 301.9100–1 through 301.9100–3 of this chapter for an elective payment election that is not timely filed in accordance with paragraph (c)(1) of this section.

(d) *Special rules for partnerships and S corporations*—(1) *In general.* If a partnership or S corporation directly holds any property for which an advanced manufacturing investment credit is determined, any election under this section must be made by the partnership or S corporation. No election under section 48D(d) and this section by any partner or shareholder is allowed.

(2) *Election*—(i) *Time and manner of election.* An elective payment election by a partnership or S corporation is made at the same time and in the same manner, and subject to the pre-filing registration and other requirements for the election to be effective, as provided in paragraphs (b) and (c) of this section.

(ii) *Effect of election.* If a partnership or S corporation makes an elective payment election with respect to a section 48D credit, the following rules will apply:

(A) The Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit, determined in accordance with paragraph (d)(6) of this section (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability);

(B) Before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated or otherwise allowed to its partners or shareholders) for such taxable year; and

(C) Any partner's or S corporation shareholder's share of any qualified investment in an advanced manufacturing facility for which an elective payment election has been made for the taxable year, is reduced to zero for such taxable year.

(iii) *Coordination with sections 705 and 1366.* Any amount with respect to which the election is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code.

(iv) *Partner's distributive share.* A partner's distributive share of such tax exempt income is equal to such partner's distributive share of its otherwise allocable basis in qualified property under § 1.48D–2(h)(2)(i) for such taxable year.

(v) *S corporation shareholder's pro-rata share.* An S corporation shareholder's pro rata share (as determined under section 1377(a) of the Code) of such tax exempt income is taken into account by the S corporation shareholder in the taxable year (as determined under sections 444 and 1378(b) of the Code) in which the section 48D credit is determined and is based on the shareholder's otherwise apportioned basis in qualified property under § 1.48D–2(h)(2)(ii) for the taxable year.

(vi) *Timing of tax exempt income.* Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366 of the Code, as of the date the qualified property is placed in service with respect to the partnership or S corporation.

(3) *Disregarded entity ownership.* In the case of a qualified property held directly by an entity disregarded as separate from a partnership or S corporation for Federal income tax purposes, such qualified property will be treated as held directly by the partnership or S corporation for purposes of making an elective payment election.

(4) *Electing partnerships in tiered structures.* If a partnership (upper-tier partnership) is a direct or indirect partner of a partnership that makes an elective payment election and directly or indirectly receives an allocation of tax exempt income resulting from the elective payment election made by the partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to each partner's distributive share of its otherwise allocable basis in qualified property under § 1.48D–2(h)(2)(i) for such taxable year.

(5) *Character of tax exempt income.* Tax exempt income resulting from an elective payment election by an S corporation or a partnership is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(6) *Determination of amount of the section 48D credit*—(i) *In general.* In determining the amount of the section 48D credit that will result in a payment under paragraph (d)(2)(ii)(A) of this section, the partnership or S corporation must compute the amount of the credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of the credit determined by a partnership or S corporation is not subject to limitation by section 469. Because the section 48D credit is an investment credit under section 46, sections 49 and 50 apply to limit the amount of the credit.

(ii) *Application of section 49 at-risk rules to determination of section 48D credit for partnerships and S corporations.* Any amount of section 48D credit determined with respect to qualified property held directly by a partnership or S corporation must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the qualified property is placed in service. Thus, if the credit base of a qualified property is limited to a partner or S corporation shareholder by section 49, then the amount of the section 48D credit determined by the partnership or S corporation is also limited. A partnership or S corporation that directly holds qualified property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the qualified property as of the close of the taxable year in which the property is placed in service. Additionally, the partnership or S corporation must attach to its tax return for the taxable year in which the qualified property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to any qualified property. Changes to at-risk amounts under section 49 for partners or S corporation shareholders after the close of the taxable year in which the qualified property is placed in service do not impact the section 48D credit determined by the partnership or S corporation, but do impact the partner(s) or S corporation shareholder(s) as provided in paragraph (d)(6)(iii) of this section.

(iii) *Changes in at-risk amounts under section 49 at partner or shareholder level.* A partner or shareholder in a partnership or S corporation, respectively, must apply the rules under section 49 at the partner or shareholder level if there is a change in nonqualified nonrecourse financing with respect to the partner or shareholder after the close of the taxable year in which the qualified property is placed in service and the section 48D credit is

determined. If there is an increase in nonqualified nonrecourse financing to a partner, any adjustment under the rules of section 49(b) is calculated based on the partner's share of the basis (or cost) of the qualified property to which the section 48D credit was determined in accordance with § 1.48D–2(h)(2)(i). If there is an increase in nonqualified nonrecourse financing to a shareholder, any adjustment under the rules of section 49(b) is calculated based on the shareholder's pro rata share of the basis (or cost) of the qualified property to which the section 48D was determined in accordance with § 1.48D–2(h)(2)(ii). If there is a decrease in nonqualified nonrecourse financing, any increase in the credit base is taken into account by the partner or shareholder as provided under section 49, and any resulting credit is not eligible for an elective payment election under section 48D(d).

(7) *Partnerships subject to subchapter C of chapter 63 of the Code.* See § 301.6241–7(j) of this chapter for rules applicable to payments made to partnerships subject to subchapter C of chapter 63 of the Code for a partnership taxable year.

(8) *Example.* The following example illustrates the rules of this paragraph (d).

(i) *Example.* P is a calendar-year partnership consisting of partners A and B, each 50% owners. P constructs Facility A, an advanced manufacturing facility, at V. P completes the pre-filing registration with respect to Facility A at V for 2024 in accordance with paragraph (b) of this section. In 2024, P places in service qualified property which is part of Facility A at V. P timely files its 2024 Form 1065 and properly makes the elective payment election in accordance with paragraph (c) of this section. On its Form 1065, P properly determines that the amount of section 48D credit with respect to the qualified property placed in service at Facility A for 2024 is $100,000. The IRS processes P's return and makes a $100,000 payment to P. Before determining A's and B's distributive shares, P reduces the section 48D credit to zero. However, for other purposes of the Code, the $100,000 section 48D credit is deemed to have been allowed to P for 2024. The $100,000 is treated as tax exempt income for purposes of section 705, and A's and B's distributive shares of such tax exempt income is based on each partner's otherwise allocable basis in qualified property under § 1.48D–2(h)(2)(i) for the 2024 taxable year ($50,000 each). A's and B's basis in their partnership interests and capital accounts will be appropriately adjusted to take into account basis adjustments made to the qualified property under section 50(c)(5) and § 1.704–1(b)(2)(iv)(*j*). See paragraph (g)(2) of this section. The tax exempt income received or accrued by P as a result of the elective payment election is treated as received or accrued, including for purposes of section 705, as of date P placed in service the qualified property in 2024.

(ii) [Reserved]

(e) *Denial of double benefit*—(1) *In general.* In the case of a taxpayer making an election under section 48D(d) and this section with respect to any section 48D credit determined under section 48D(a) and § 1.48D–1, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed to the taxpayer for such taxable year. Paragraphs (e)(2) and (3) of this section explain the application of the section 48D(d)(3) denial of a double benefit rule to a taxpayer (other than a partnership or S corporation). The application of section 48D(d)(3) to a partnership or S corporation is provided in paragraphs (d)(2)(ii)(B) and (C) of this section.

(2) *Application of the denial of double benefit rule.* A taxpayer (other than a partnership or S corporation) making an elective payment election applies section 48D(d)(3) by taking the following steps:

(i) Compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the general business credit under section 38 (GBC), that is payable on the due date of the tax return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on the amount of tax under section 38.

(ii) Compute the amount of the GBCs carryforwards carried to the taxable year plus the amount of the current year GBCs (including the current section 48D credit) allowed for the taxable year under section 38. Because the election must made on an original return of tax for the taxable year for which the section 48D credit is determined, any business credit carrybacks are not considered when determining the elective payment amount for the taxable year.

(iii) Apply the GBCs allowed for the taxable year as computed under paragraph (e)(2)(ii) of this section, including those attributable to the section 48D credit as GBC, against the tax liability computed in paragraph (e)(2)(i) of this section.

(iv) Identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year section 48D credit for which the taxpayer is making an elective payment election. Treat the amount of such unused section 48D credit as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit is determined (rather than having them available for carryback or carryover) (net elective payment amount).

(v) Reduce the section 48D credit for which an elective payment election is made by the amount (if any) allowed as a general business credit under section 38 for the taxable year, as provided in paragraph (e)(2)(iii) of this section, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in paragraph (e)(2)(iv) of this section, which results in the section 48D credit being reduced to zero.

(3) *Use of the section 48D credit for other purposes.* The full amount of the section 48D credit for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50, and the calculation of any underpayment of estimated taxes under sections 6654 and 6655 of the Code.

(4) *Examples.* The following examples illustrate the rules of this paragraph (e).

(i) *Example 1.* Z Corp is a calendar-year C corporation. Z Corp places in service qualified property which is part of an advanced manufacturing facility in June of 2024. Z Corp completes the pre-filing registration in accordance with this section and receives a registration number for the qualified property. Z Corp timely files its 2024 Form 1120 on April 15, 2025, properly making the elective payment election with respect to the section 48D credit in accordance with this section. On its return, Z Corp properly determines that it has $500,000 of tax imposed by subtitle A of the Code (see paragraph (e)(2)(i) of this section). For simplicity, assume the maximum amount of GBCs that can be claimed for the taxable year is $375,000. Z Corp properly determines that the amount of the section 48D credit determined with respect to the qualified property (its GBC for the taxable year) is $100,000 (see paragraph (e)(2)(ii) of this section. Under paragraph (e)(2)(iii) of this section, the section 48D credit reduces Z Corp's tax liability to $400,000. Z Corp pays its $400,000 tax liability on April 15, 2025. Because there is no unused section 48D credit, paragraph (e)(2)(iv) of this section does not apply. Under paragraph (e)(2)(v) of this section, the $100,000 of section 48D credit is reduced by the $100,000 of section 48D

credit claimed as GBCs for the taxable year, which results in the section 48D credit being reduced to zero. However, the $100,000 of section 48D credit is deemed to have been allowed to Z Corp for 2024 for all other purposes of the Code under paragraph (e) of this section.

(ii) *Example 2.* Assume the same facts as in paragraph (e)(4)(i) of this section (*Example 1*), except that Z Corp has $80,000 of tax imposed by subtitle A (paragraph (e)(2)(i) of this section). Z Corp's GBC credit is still $100,000 (paragraph (e)(2)(ii) of this section). For simplicity, assume the maximum amount of GBCs that can be claimed for the taxable year under section 38(c) is $60,000. Z Corp uses $60,000 of its section 48D credit against its tax liability under paragraph (e)(2)(iii) of this section. Z Corp's net elective payment amount is $40,000 determined under paragraph (e)(2)(iv) of this section. Z Corp reduces the elective payment amount by the $60,000 claimed against tax in paragraph (e)(2)(iii) of this section and by the $40,000 net elective payment amount determined in paragraph (e)(2)(iv) of this section, resulting in the applicable credit being reduced to zero (paragraph (e)(2)(v) of this section). When the IRS processes Z Corp's 2024 Form 1120, the net elective payment amount results in a $40,000 refund to Z Corp. However, for other purposes of the Code, the $100,000 section 48D credit is deemed to have been allowed to Z Corp for 2024 (paragraph (e) of this section). Even though Z Corp did not owe tax after applying the net elective payment amount against its net tax liability, Z Corp may be subject to the section 6655 penalty for failure to pay estimated income tax. The net elective payment is not an estimated tax installment, rather it is treated as a payment made at the filing of the return.

(f) *Excessive payment*—(1) *In general.* Except as provided in paragraph (f)(2) of this section, in the case of any amount treated as a payment which is made by the taxpayer under section 48D(d)(1) and paragraph (a) of this section, or any payment made pursuant to section 48D(d)(2)(A)(i)(II) and paragraph (d) of this section, with respect to any property, which amount the Commissioner determines constitutes an excessive payment as defined in paragraph (f)(3) of this section, the tax imposed on such taxpayer by chapter 1 of the Code for the taxable year in which such determination is made is increased by an amount equal to the sum of—

(i) The amount of such excessive payment; plus

(ii) An amount equal to 20 percent of such excessive payment.

(2) *Reasonable cause.* Paragraph (f)(1)(ii) of this section will not apply if the taxpayer demonstrates to the satisfaction of the Commissioner that the excessive payment resulted from reasonable cause.

(3) *Excessive payment defined.* For purposes of section 48D(d) and this paragraph (f), the term *excessive payment* means, with respect to any property for which an election is made under section 48D(d) and this section for any taxable year, an amount equal to the excess of—

(i) The amount treated as a payment which is made by the taxpayer pursuant to section 48D(d)(1) and paragraph (a) of this section, or any payment made by the Commissioner pursuant to section 48D(d)(2)(A)(I)(i) and paragraph (d) of this section, with respect to such property for such taxable year; over

(ii) The amount of the section 48D credit which, without application of section 48D(d) and this section, would be otherwise allowable (determined without regard to section 38(c)) under section 48D(a) and the section 48D regulations with respect to such property for such taxable year.

(4) *Example*s. The following example illustrates the principles of this paragraph (f).

(i) *Example.* A Corp is a calendar-year C corporation. A Corp places in service qualified property which is part of Facility A, an advanced manufacturing facility in 2023. A Corp properly completes the pre-filing registration in accordance with paragraph (b) of this section and receives a registration number for the advanced manufacturing facility. A Corp timely files its 2023 Form 1120, properly providing the registration number for Facility A and otherwise complying with paragraph (c) of this section. On its return, Corp A calculates that the amount of the section 48D credit with respect to the qualified property is $100,000 and that the net elective payment amount is $100,000. Corp A receives a refund in the amount of $100,000. In 2025, the IRS determines that the amount of the section 48D credit properly allowable to Corp A in 2023 with respect to Facility A (as determined pursuant to § 1.48D–1(b) and without regard to the limitation based on tax in section 38(c)) was $60,000. Corp A is not able to show reasonable cause for the difference. The excessive payment amount is $40,000 ($100,000 treated as a payment − $60,000 allowable amount). In 2025, the tax imposed under chapter 1 on Corp A is increased in the amount of $48,000 ($40,000 + (20% * $40,000 = $8,000).

(ii) [Reserved]

(g) *Basis reduction and recapture*—(1) *In general.* The rules in section 50(a) and (c) of the Code apply with respect to elective payments under paragraphs (a) and (d) of this section.

(2) *Basis adjustment*—(i) *In general.* If a section 48D credit is determined with respect to property for which a taxpayer makes an election under section 48D(d)(1), then the adjusted basis of the property shall be reduced by the amount of the section 48D credit determined for which the taxpayer made an election under section 48D(d)(1).

(ii) *Basis adjustment by partnership or S corporation.* If an advanced manufacturing investment credit is determined with respect to property for which a partnership or S corporation makes an election under section 48D(d)(1), then the adjusted basis of the property shall be reduced by the amount of the advanced manufacturing investment credit determined with respect to the property held by the partnership or S corporation, for which the IRS made a payment to the partnership or S corporation pursuant to section 48D(d)(2)(A)(i)(I).

(iii) *Basis adjustment of partners and S corporation shareholders.* The adjusted basis of a partner's interest in a partnership, and stock in an S corporation, shall be appropriately adjusted pursuant to section 50(c)(5) to take into account adjustments made under paragraph (g)(2)(ii) of this section in the basis of property held by the partnership or S corporation, as the case may be.

(3) *Recapture reporting.* Any reporting of recapture is made on the taxpayer's annual return in the manner prescribed by the IRS in any guidance.

(h) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–12800 Filed 6–14–23; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0309]

RIN 1625–AA00

Safety Zone; Henderson Bay, Henderson Harbor, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish a permanent safety zone for certain waters of Henderson Harbor. This action is necessary to provide for the safety of life on these navigable waters near Henderson Harbor, Henderson, NY, during annual reoccurrences of a fireworks display. This proposed rulemaking would prohibit persons and vessels from being in the safety zone unless authorized by the Captain of the Port Buffalo or a designated representative. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before July 21, 2023.

ADDRESSES: You may submit comments identified by docket number USCG–2023–0309 using the Federal Decision Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email MST2 Andrew Nevenner, Waterways Management Division MSD Massena, U.S. Coast Guard; telephone 315–769–5483, email *SMB-MSDMassena-WaterwaysManagement@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background, Purpose, and Legal Basis

On March 6, 2023, the Henderson Business and Community Council notified the Coast Guard that it will be conducting a fireworks display from 9:30 through 10 p.m. on July 29, 2023, for the Christmas in July Celebration. The fireworks are to be launched from a barge in Henderson Bay approximately 1500 yards north of the town boat ramp located on the southern shore of Henderson Harbor in Henderson Harbor, NY. Hazards from firework displays include accidental discharge of fireworks, dangerous projectiles, and falling hot embers or other debris. The Captain of the Port Buffalo (COTP) has determined that potential hazards associated with the fireworks to be used in this display would be a safety concern for anyone within a 140-yard radius of the barge.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters within a 140-yard radius of the fireworks barge before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

III. Discussion of Proposed Rule

The COTP is proposing to establish a safety zone for certain waters of Henderson Harbor for annual reoccurrences of the fireworks display, which will be announced in the **Federal Register**. The safety zone would cover all navigable waters within 140-yards of a barge in Henderson Bay located approximately 1500-yards north of the town boat ramp located on the southern shore of Henderson Harbor in Henderson Harbor, NY. The duration of the zone is intended to ensure the safety of vessels and these navigable waters before, during, and after the scheduled fireworks display. No vessel or person would be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-day of the safety zone. Vessel traffic would be able to safely transit around this safety zone which would impact a small designated area of Henderson Bay for less than 2 hour during the evening when vessel traffic is normally low. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zone, and the rule would allow vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under

the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a safety zone lasting 1.5 hours that would prohibit entry within 140 yards of a fireworks barge. Normally such actions are categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking, and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2023–0309 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 165

Harbors, marine safety, navigation (water), reporting and recordkeeping requirements, security measures, waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034; 50 U.S.C. 191; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision 1.3.

■ 2. In § 165.939, amend Table 165.939 by adding entry (b)(34)) to read as follows:

§ 165.939 Safety Zones; Annual Events in the Captain of the Port Buffalo Zone.

* * * * *

Event	Location [1]	Enforcement date and time [2]
(b) July Safety Zones		
*	*	*
(34) Christmas in July Fireworks.	Henderson Harbor, NY. All waters within a 420-foot radius of the barge at position 43°86′66″ N, 076°20′97″ W in Henderson Harbor, NY.	On or around the last weekend of July.

[1] All coordinates listed in Table 165.xxx reference Datum NAD 1983.

[2] As noted in paragraph (a)(3) of this section, the enforcement dates and times for each of the listed safety zones are subject to change. In the event of a change, or for enforcement periods listed that do not allow a specific date or dates to be determined, the Captain of the Port will provide notice to the public by publishing a Notice of Enforcement in the **Federal Register**, as well as, issuing a Broadcast Notice to Mariner.]

Dated: May 30, 2023.

Mark I. Kuperman,

Captain, U.S. Coast Guard, Captain of the Port Buffalo.

[FR Doc. 2023–11880 Filed 6–20–23; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2023–0206; FRL–11037–01–R3]

Air Plan Disapproval; Delaware; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to disapprove certain portions of a state implementation plan (SIP) revision submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control (DNREC), on November 22, 2016. The revision was submitted by Delaware in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing disapproval of certain portions of the SIP revision and proposing to determine that such SIP revision does not correct the remaining deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call in accordance with the requirements for SIP provisions under the Clean Air Act (CAA or Act). This action addresses the remaining deficiencies identified in EPA's June 2015 SIP call that have not yet been addressed by prior EPA actions on Delaware's November 2016 SIP submission.

DATES: Written comments must be received on or before July 21, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2023–0206 at *www.regulations.gov,* or via email to *gordon.mike@epa.gov.* For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Mallory Moser, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2030. Ms. Moser can also be reached via electronic mail at *moser.mallory@epa.gov.*

SUPPLEMENTARY INFORMATION: On November 22, 2016, DNREC submitted a revision to its SIP in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during SSM events.

I. Background

A. EPA's 2015 SSM SIP Action

On February 22, 2013, EPA issued a **Federal Register** notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the CAA with regard to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate.[2]

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized ''State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,'' hereafter referred to as the ''2015 SSM SIP Action.'' [3] The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[4] Importantly, the 2020

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

[2] 79 FR 55920 (September 17, 2014).

[3] 80 FR 33840 (June 12, 2015).

[4] October 9, 2020, memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State

Memorandum stated that it ''did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.'' Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Delaware in 2015. The 2020 Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).[5] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA.[6] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

B. Delaware's Provisions Related to Excess Emissions

With regard to the Delaware SIP, EPA's 2015 SSM SIP Action determined that the following regulations were substantially inadequate to meet CAA requirements: Title 7 of Delaware's Administrative Code (7 DE Admin. Code) 1104 Section (§) 1.5, 7 DE Admin. Code 1105 § 1.7, 7 DE Admin. Code 1108 § 1.2, 7 DE Admin. Code 1109 § 1.4, 7 DE Admin. Code 1114 § 1.3, 7 DE Admin. Code 1124 § 1.4 and 7 DE Admin. Code 1142 § 2.3.1.6.[7] These provisions provide a state official with the discretion, through the permitting process, to exempt sources from otherwise applicable SIP emission limitations or to set alternative limitations for periods of startup and shutdown. The rationale underlying EPA's determination that these provisions were substantially inadequate to meet CAA requirements, and therefore to issue a SIP call to Delaware to remedy the provisions, is detailed in the 2015 SSM SIP Action and the 2013 proposed SSM SIP Action.[8]

Delaware submitted a SIP revision on November 22, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. In addition to addressing deficiencies identified in 7 DE Admin. Code 1104, 1105, 1109 and 1114, Delaware's submission noted that the deficiency highlighted in 7 DE Admin. Code 1108 § 1.2 was corrected by a previous SIP revision, which was submitted to EPA on July 10, 2013. A final rulemaking which acted on this 2013 submission and remedied 7 DE Admin. Code 1108 § 1.2 published in the **Federal Register** on July 11, 2022.[9] Delaware's submission also requested that EPA revise the Delaware SIP by removing 7 DE Admin. Code 1124 § 1.4 and 7 DE Admin. Code 1142 § 2.3.1.6 in their entirety, thereby removing these provisions, and their deficiencies, from the Delaware SIP. A final rulemaking which remedied 7 DE Admin. Code 1124 § 1.4 and 7 DE Admin. Code 1142 § 2.3.1.6 published in the **Federal Register** on February 14, 2023.[10]

Lastly, Delaware's submission requested that EPA revise the SIP to address the deficiencies identified in the following regulations: 7 DE Admin. Code 1104 § 1.5, 7 DE Admin. Code 1105 § 1.7, 7 DE Admin. Code 1109 § 1.4, and 7 DE Admin. Code 1114 § 1.3. Through this proposed rulemaking, EPA will be acting on these remaining provisions that were identified as deficient in the 2015 SSM SIP Action.

II. Summary of SIP Revision and EPA Analysis

EPA has identified several significant concerns with Delaware's revisions to 7 DE Admin. Code 1104 § 1.5, 7 DE Admin. Code 1105 § 1.7, 7 DE Admin. Code 1109 § 1.4, and 7 DE Admin. Code 1114 § 1.3, which suggest that those parts of the 2016 SIP submission cannot be approved. Delaware's revisions to these sections in the SIP submission and EPA's corresponding analysis are summarized below. An underline/strikeout version of each regulation, showing the changes to the regulations or the changes requested to the Delaware SIP, is included in the docket for this rulemaking.[11]

A. Summary and Analysis of Revisions to 7 DE Admin. Code 1104 § 1.5 and 7 DE Admin. Code 1105 § 1.7

The 2015 SSM SIP Action cited 7 DE Admin. Code 1104 (Particulate Emissions from Fuel Burning Equipment) § 1.5 because it provides a potential exemption from the emission limit in 7 DE Admin. Code 1104 § 2.1. The emission limit in 7 DE Admin. Code 1104 § 2.1 currently contained in the EPA-approved SIP says, ''no person shall cause or allow the emission of particulate matter in excess of 0.3 pound per million British Thermal Units (lb/MMBTU) heat input, maximum two-hour average.'' Section 1.5 creates a potential exemption to this limit during start-up or shutdown events by stating, ''The provisions of this Regulation shall not apply to the start-up and shutdown of equipment which operates continuously or in an extended steady state when emissions from such equipment during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102.'' Delaware's SIP submission asked EPA to remove § 1.5 and § 2.1 of 7 DE Admin. Code 1104 from the EPA-approved Delaware SIP, but these provisions would remain in the Delaware regulations. In addition, Delaware revised 7 DE Admin. Code 1104 by adding a new section, § 2.2, which states, ''[n]o person shall cause or allow the emission of particulate matter in excess of 0.3 pound per million BTU heat input, maximum 30-day rolling average, from any fuel burning equipment.'' The SIP submission asked EPA to approve this new § 2.2 into the Delaware SIP. While Delaware requested to remove § 1.5, which contains the potential emission limit exemption during start-up and shutdown, from the EPA-approved SIP, the State also increased the two-hour averaging time found in § 2.1 to 30 days while keeping the same 0.3 lb/MMBTU limit. Thus, the EPA-approved SIP would have a 0.3 lb/MMBTU 30-day rolling average limit, as set forth in the

Implementation Plans,'' from Andrew R. Wheeler, Administrator.

[5] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

[6] 80 FR 33840 at 33985.

[7] See *Id.* at 33973.

[8] See *Id.* and 78 FR 12460 at 12495.

[9] 87 FR 41074.

[10] 88 FR 9399.

[11] The revisions can be found on pages 4–7 of the PDF, which corresponds to pages 1–4 of Delaware's submitted document entitled ''Revision to Satisfy EPA's State Implementation Plan (SIP) Call Related to Air Emissions During Equipment Start-up and Shutdown,'' which is in the docket for this action.

new § 2.2, while Delaware's regulations would have both a limit of 0.3 lb/MMBTU two-hour average in § 2.1, which could be changed for startup and shutdown purposes via § 1.5, and a 0.3 lb/MMBTU 30-day rolling average limit in § 2.2 that could not be changed via § 1.5.

The 2015 SSM SIP Action also highlighted 7 DE Admin. Code 1105 (Particulate Emissions from Industrial Process Operations) § 1.7 because it provides a potential exemption from the emission limit in 7 DE Admin. Code 1105 § 2.1. The emission limit in 7 DE Admin. Code 1105 § 2.1 currently contained in the EPA-approved SIP says, ''No person shall cause or allow particulate emissions into the atmosphere from any source not provided for in subsequent sections of this Regulation in excess of 0.2 grains per standard cubic foot.'' Section 1.7 creates a potential exemption to this limit by stating, ''The provisions of this Regulation shall not apply to the start-up and shutdown of equipment which operates continuously or in an extended steady state when emissions from such equipment during start-up and shutdown are governed by an operation permit issued pursuant to the provisions of 2.0 of 7 DE Admin. Code 1102.'' Delaware revised 7 DE Admin. Code 1105 by adding a new section, § 2.2, which added an emission limit of 0.2 grains per standard cubic foot on a 30-day rolling average basis. Delaware's SIP submission asked EPA to remove § 1.7 and § 2.1 from the EPA-approved SIP, but these provisions would remain in the Delaware regulations. Delaware's submission also asked EPA to approve the new § 2.2 into the SIP. Again, although Delaware requested to remove § 1.7, which contained the exemption identified in the 2015 SSM SIP Action, the State also asked EPA to approve into the SIP a newly created limit in § 2.2 which adds an averaging period of 30 days to the existing 0.2 grains per cubic foot limit. Delaware does not explain how these differing emission limits in § 2.1 and § 2.2 would be reconciled.

Delaware explained that the increases in averaging times provide the opportunity for any source subject to these limits to compensate for higher emission rates during startup or shutdown events by emitting at lower rates during normal operations, so long as continuous compliance is demonstrated on a 30-day rolling average basis.

However, Delaware's increases in the averaging times for the particulate emission limits found in 7 DE Admin. Code 1104 and 1105 were not supported by a sufficient analysis explaining why these changes meet the requirements of section 110(l) of the CAA. The 2015 SSM SIP Action did not provide an opportunity for averaging times to be increased with no explanation or analysis of how the increased averaging time would or would not affect the national ambient air quality standards (NAAQS). In response to a comment regarding opacity, EPA noted in the 2015 SSM SIP Action that the removal of impermissible SSM exemptions should not be perceived as an opportunity to provide new de facto exemptions for these emissions by manipulation of the averaging time and the numerical level of existing opacity emission limitations.[12] This reasoning is not exclusive to opacity limitations, and also applies to the SIP-approved particulate limit 30-day rolling averaging times that Delaware has added to 7 De Admin. Code 1104 and 1105. During Delaware's public comment period on these regulatory changes, EPA submitted comments raising this and other concerns.[13] EPA noted that Delaware did not address whether changes to the averaging period might affect the emissions of any criteria pollutant and recommended a more robust explanation and analysis be provided to support Delaware's conclusion in order to meet the requirements of section 110(l) of the CAA. The State responded to EPA's comments during the state regulatory comment period with minimal data to assert that the long-term average of emissions would be slightly lower with the implementation of the revised limit. The State also explained these limits were originally intended to protect the total suspended particulate (TSP) NAAQS. However, the particulate matter (PM) NAAQS replaced the TSP standard.[14] Therefore, these limits still play a role in protecting the existing PM NAAQS. Although Delaware is currently attaining the PM standards,[15] the State did not explain how this 30-day rolling average longer-term limit is still protective of the short-term NAAQS, such as the 24-hour PM standard. Delaware's response to EPA's comments did not adequately explain how the increased averaging time of the 30-day rolling average limits, without decreasing the limit itself, would be protective of the PM NAAQS, and instead noted, with minimal explanation, that this would not result in any increase in emissions on a tons per year basis. Delaware explained this using two scenarios. In the first scenario, Delaware referred to the emissions limits and startup/shut down exemptions that are currently SIP-approved. Delaware stated that if all steady-state hours of operation emit exactly at, or very near, the emissions limit, and emissions during startup/shut down events are exempt, then the long-term average of emissions would be slightly higher than the emission limit. In scenario two, they noted with the new 30-day rolling average limits and no exemptions for start-up or shut down events, emissions occurring during SSM events would have to be offset by emissions lower than the 30-day average emission limit during non-SSM operation. Delaware asserted, without any further explanation, that this would result in the long-term average of emissions to be no more than the 30-day average emission limit. Delaware explained, with respect to annual emissions, the emissions calculation in scenario two is less than the emissions in scenario one. Therefore, Delaware believes this change is SIP strengthening.

EPA does not agree that the evaluation of the impacts of changing the averaging period for an emissions limit enacted to ensure the NAAQS is attained and protected can be limited only to consideration of emissions on an annual basis. The potential short-term effect of a sharp increase in particulate emissions during a startup or shutdown event on a shorter-term NAAQS limit, such as the PM_{10} 24-hour standard, need to be examined and explained. Therefore, EPA does not consider the State's explanation of why the longer 30-day averaging period with the same emission limit are adequate to ensure continued attainment of the NAAQS. EPA's comments and Delaware's response can be found in the docket for this action.

Under CAA section 110(l), EPA cannot approve a plan revision ''if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of [title 42]), or any other applicable requirement of this chapter.'' [16] The nature of the technical demonstration needed under section 110(l) to support approval of a SIP revision depends on the facts and circumstances of the SIP revision at issue. Based on the

[12] 80 FR 33840 at 33921 (June 12, 2015).

[13] See EPA Comment #1 and EPA Comment #2 of Appendix B in State Submittal document.

[14] The $PM_{2.5}$ 24-hour standard is 35 micrograms per cubic meter ($\mu g/m^3$). The $PM_{2.5}$ annual standard is 12.0 $\mu g/m^3$. The PM_{10} 24-hour standard is 150 $\mu g/m^3$. See 40 CFR 50.6 and 50.7.

[15] See 40 CFR 81.308.

[16] A more detailed discussion of 110(l) can be found in the SO_2 air plan disapproval for Missouri at 87 FR 40759, 40760 (July 8, 2022).

information available to EPA, EPA concluded that approval of these longer-term limits for a shorter-term NAAQS would not be consistent with the requirements of section 110(l). For EPA's analysis to address CAA section 110(l), EPA requested information from the State, but the State did not respond with the appropriate information. At a minimum, Delaware should have explained how this change would not impact maintenance of the PM NAAQS, as well as explain how this change meets the applicable legal requirements of the CAA, including both sections 110(l) and 193, as EPA suggested in their comments during Delaware's public comment period. Additionally, the submittal lacks an explanation of the maximum daily emissions that could occur with the new averaging time. There is also no information regarding the likely frequency of startup and shutdown events, the likely magnitude of emissions during these events, and how many such events it would take in a 30-day period to exceed the new 30-day average. This information is relevant because it could be that one large startup or shutdown event with significant PM emissions could cause an exceedance of the PM NAAQS at a monitor. More frequent SSM events under a 30-day averaging period can cause the short-term emissions to increase, with a deleterious effect on shorter-term NAAQS. There is no explanation of how the NAAQS will continue to be protected with the new, longer averaging period.

Replacement SIP provisions should have averaging periods that are logically related to the NAAQS at issue. The 2015 SSM SIP Action notes, ''For example, if a state chooses to modify averaging times in an emission limitation to account for higher emissions during startup and shutdown, the state would need to consider and demonstrate to the EPA how the variability of emissions over that averaging period might affect attainment and maintenance of a NAAQS with a short averaging period (*e.g.,* how a 30-day averaging period for emissions can ensure attainment of an 8-hour NAAQS).'' (80 FR 33840, 33947 (June 12, 2015)). Delaware has not explained how the 30-day average is reasonably related to the 24-hour PM NAAQS. The 2015 SSM SIP Action also notes that in some cases, extension of the averaging period and elevation of the numerical limitations may in fact be appropriate. In other cases, however, it may instead be appropriate to reduce the existing numerical opacity limitations, given improvements in control technology since the original imposition of the limits.[17] In either scenario, the appropriate analysis and justification is needed, such as specific calculations, including emissions distributions for sources in the state, backed up by operating data, that shows an extension of the averaging period would not violate the NAAQS. EPA has explained, for the sulfur dioxide (SO_2) NAAQS, how an increase in the averaging period for SO_2 emission limits beyond the 8-hour standard used for the SO_2 NAAQS could be protective of the eight-hour SO_2 NAAQS. EPA's 2014 SO_2 Nonattainment Guidance recommends that the emission limits be expressed as short-term averages, but also describes the option to use emission limits with longer averaging times of up to 30 days so long as the state meets various suggested criteria.[18] The guidance recommends that—should states and sources utilize longer averaging times—the longer-term average limit should be set at an adjusted level that reflects a stringency comparable to the 1-hour average limit at the critical emission value (CEV) shown to provide for attainment that the plan otherwise would have set.[19] To preserve comparable stringency, it would be expected that adjusting the level would result in a lowering of the emission rate if lengthening the averaging time. In cases where longer-term average limits are appropriate, EPA envisions that both the short-term and longer-term limits in practice would require similar emission control levels and would commonly result in similar emission patterns.[20] Therefore, a longer averaging time can be appropriate to protect a shorter-term NAAQS but would require an in-depth analysis of what adjusted downward level would provide a comparable stringency. Delaware did not lower their emissions limit when increasing the averaging time, nor did they provide an in-depth analysis explaining how the same emission limit with a 30-day rolling averaging period is comparable in stringency to the same emission limit with a shorter, 3-hour averaging period previously found in their EPA-approved SIP.

To support their adoption of a 30-day averaging period, Delaware's response to comments cited page 2 of EPA's 1984 guidance memo, entitled ''Averaging Times for Compliance with VOC Emission Limits—SIP Revision Policy,'' [21] which states ''Averaging periods must be as short as practicable and in no case longer than 30 days.'' However, in the same memo, EPA specifically states that a demonstration must be made to show the use of long-term averaging will not jeopardize the NAAQS.[22] Though this guidance is geared towards volatile organic compounds (VOCs), the idea that retention of the same limit with a longer-term averaging period requires some demonstration explaining how the longer-term averaging time would not affect the NAAQS is applicable to the PM NAAQS too.

It is also important to recognize the broadness of the source categories for these two regulations—fuel burning equipment and industrial process operations. Given the broadness of these categories, significant consideration should be given to how a 30-day averaging period would even apply to the sources falling in these categories, especially the smaller source categories that do not operate regularly, such as emergency generators. The State's submittal also lacks an explanation of the type and number of Delaware sources which might be subject to these two regulations, and how the change in averaging time might affect their emissions and thus affect the NAAQS. Additional explanation is required to explain how the revisions would impact the sources subject to these regulations, and how these impacts would be unlikely to affect the NAAQS.

Lastly, Delaware noted that the emission limits that were highlighted in the 2015 SSM SIP Action would remain in the Delaware state regulations. Therefore, these short-term limits, along with the exemptions, are still applicable as a matter of state law only. According to Delaware, because the short-term limits are still effective at the state level, there is no change in the status quo of emissions, and this means air quality may remain unaffected. However, this is still problematic for several reasons. First, EPA cannot rely on state-only provisions when evaluating SIP submissions for compliance with CAA requirements. Presumably, Delaware asked that these emission limits be placed into the SIP because they were necessary to attain or maintain the NAAQS, and as discussed above, the effect on the NAAQS of replacing these shorter-term average SIP limits with longer-term averaging limits on attainment or maintenance of the

[17] 80 FR 33840 at 33912 (June 12, 2015).

[18] Guidance for 1-hour Sulfur Dioxide (SO_2) Nonattainment Area State Implementation Plans (SIP) Submissions, pp. 22 to 39.

[19] *Id.* at 26.

[20] *Id.* at 29.

[21] See the Averaging Times for Compliance with VOC Emission Limits—SIP Revision Policy Memorandum.

[22] *Id.* at 2.

NAAQS is not adequately explained. Second, removing the shorter-term emission limits from the EPA-approved SIP but keeping them in the state regulation, while also keeping the possibility for a state issued startup or shutdown exemption from these limits, creates the possibility that the current status quo of PM emissions may not be maintained. And, because the shorter-term emission limit is no longer in the SIP, neither EPA nor citizens can enforce the shorter-term limit under CAA sections 113 and 304. In effect, Delaware could grant an exemption to emission limits which might be necessary to attain or maintain the NAAQS without going through the SIP revision process required by the CAA.

The concerns stated above suggest that the revisions to 7 DE Admin. Code 1104, Particulate Emissions from Fuel Burning Equipment, and 7 DE Admin. Code 1105, Particulate Emissions from Industrial Process Operations, cannot be approved. Further justification and information from the State is required to explain that these changes would not be inconsistent with CAA section 110(l), as well as explain how this change meets the applicable legal requirements of the CAA, including CAA section 193.

B. Summary and Analysis of Revisions to 7 DE Admin. Code 1109 § 1.4 and 7 DE Admin. Code 1114 § 1.3

The 2015 SSM SIP Action included 7 DE Admin. Code 1109 (Emissions of Sulfur Compounds From Industrial Operations) § 1.4 because it provides a potential exemption from the emission limitations during startup and shutdown when the emissions during startup and shutdown are governed by an operation permit issued pursuant to § 2.0 of 7 DE Admin. Code 1102. Delaware's SIP revision requests that the EPA remove 7 DE Admin. Code 1109 in its entirety from the Delaware SIP but retains this regulation, including the startup and shutdown exemption, at the state level. Delaware asserts that existing Federal requirements, such as the New Source Performance Standards (NSPS) adopted pursuant to CAA section 111, are adequate to ensure Delaware's maintenance of the sulfur-related NAAQS,[23] which Delaware is currently attaining.[24] Delaware believes that removal of this regulation from the SIP, but retention of the regulation at the state level, will not result in any increase in emissions on a ton per year basis, and that this revision comports with the EPA's interpretation of the CAA and is consistent with the EPA's approach for attainment and maintenance of all NAAQS.

The 2015 SSM SIP Action included 7 DE Admin. Code 1114 (Visible Emissions), § 1.3, because it provides a similar exemption from the visible emission (VE) limits during startup and shutdown when such emissions are governed by an operation permit issued pursuant to § 2.0 of 7 DE Admin. Code 1102. Delaware's SIP revision requests that the EPA remove 7 DE Admin. Code 1114 in its entirety from the Delaware SIP but retains this regulation, including the exemption, in the state regulations. The State asserts that existing Federal requirements, such as the New Source Performance Standards (NSPS), regulate visible emissions from certain sources, while two other Delaware SIP regulations that regulate fine particulate matter and fine particulate matter precursors (7 DE Admin. Code 1108 and 1146) when combined with the NSPS, are adequate to ensure Delaware's attainment and maintenance of any particulate-related NAAQS. In addition, Delaware argues that there is no quantifiable relationship between visible emissions and fine particulate matter emissions. Delaware believes that removal of this regulation from the SIP will not result in any increase in emissions on a ton per year basis, and that because this revision removes from the SIP a provision allowing for excess emissions, the change therefore comports with the EPA's interpretation of the CAA and is consistent with the EPA's approach for attainment and maintenance of all NAAQS. Delaware's response provides no other explanation regarding how the revisions comply with the CAA.

To address CAA section 110(l), EPA believes it needs more information and analysis from the State to support EPA's approval of the removal of these two regulations from the Delaware SIP while keeping the regulations at the state level. Section 110(l) prohibits approval of a SIP revision if it would interfere with attainment or any other applicable requirement. Delaware's SIP revision merely states that the removal of this regulation from the SIP will not result in any increase in emissions on a ton per year basis but provides no further explanation or any technical demonstration to support this assertion, and EPA does not have information available that would support this conclusion. To support an approval decision that would be consistent with section 110(l), Delaware should have provided information demonstrating that these changes would not impact maintenance of the NAAQS, as well as explain how this change meets the applicable legal requirements of the CAA, including section 193. During the state public comment period on this SIP revision, EPA submitted comments to Delaware raising these concerns.[25] EPA's comments and Delaware's response can be found in the docket for this action.

Despite EPA's comments, Delaware's SIP revision did not include an analysis to address CAA section 110(l). Instead, in regard, to 7 DE Admin. Code 1109, the State responded that the sources' reliance on the NSPS is enough to protect the NAAQS. Specifically, Delaware noted there are two facilities in the state currently subject to 7 DE Admin Code 1109—the Chemours Red Lion sulfuric acid plant and the Delaware City Refinery—and that each facility is subject to a more stringent NSPS. The Chemours Red Lion sulfuric acid plant is subject to 40 CFR part 60, subpart H, and the Delaware City Refinery is subject to 40 CFR part 60, subpart J. However, both subparts H and J allow for periods of excess emissions. The provisions at 40 CFR part 60, subpart A, General Provisions, are applicable to sources subject to 40 CFR part 60, subparts H and J. Subpart A of 40 CFR part 60 contains exemptions in both 40 CFR 60.8(c)and 60.11(c) . The provisions at 40 CFR 60.11(c) note ''The opacity standards set forth in this part shall apply at all times except during periods of startup, shutdown, malfunction, and as otherwise provided in the applicable standard.'' While 40 CFR 60.8(c), states ''Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a performance test nor shall emissions in excess of the level of the applicable emission limit during periods of startup, shutdown, and malfunction be considered a violation of the applicable emission limit unless otherwise specified in the applicable standard.'' Reliance on these NSPS, which include excess emission exemptions, is problematic in some cases for multiple reasons.

EPA acknowledges that many of the existing NSPS still contain exemptions from emission limitations during periods of SSM. The exemptions in these EPA regulations, however, predate the 2008 issuance of the D.C. Circuit decision in *Sierra Club* v. *Johnson,* in which the court held that emission limitations must be continuous and thus cannot contain exemptions for

[23] The SO_2 1-hour standard is 75 ppb. See 40 CFR 50.17.

[24] See 40 CFR 81.308.

[25] See EPA Comment #3 and EPA Comment #4 of Appendix B in State Submittal document.

emissions during SSM events.[26] Since the 2008 *Sierra Club* decision, EPA has been working to remove or revise these SSM provisions as NSPS are reviewed.[27] Thus, some NSPS have been revised to address the 2008 *Sierra Club* decision, but some have not, and Delaware's sources may be subject to not-yet-updated standards. Despite the fact that EPA has not completed its work removing SSM provisions from every NSPS, the Agency is not willing to approve the removal of SIP approved regulations containing potential startup and shutdown exemptions, on the basis that affected sources would instead be subject to NSPS that also contain SSM exemptions.

Regarding 7 DE Admin Code 1114, the State responded to EPA's comment by noting that there is no discernable relationship between opacity and fine particulate matter emissions, and therefore this regulation cannot be relied on to prevent a source from impacting the NAAQS. EPA assumes Delaware meant that $PM_{2.5}$ cannot be seen as visible emissions because $PM_{2.5}$ is formed after leaving the stack or other source from the precursor emissions of nitrogen oxides (NO_X), VOCs, SO_2, and ammonia. However, PM_{10} can be seen as visible emissions, and the observation of unusual levels of visible emissions could be an indication of a malfunction in the source itself or a pollution control device which may result in increased emissions of one or more of $PM_{2.5}$ precursors. Thus, Delaware's existing opacity limits may be a warning sign of potential increases in the precursor pollutants contributing to $PM_{2.5}$, and therefore may play a role in preventing $PM_{2.5}$ NAAQS exceedances.

Delaware also cites to two other SIP approved regulations, 7 DE Admin. Code 1108 Sulfur Dioxide Emissions from Fuel Burning Equipment, and 7 DE Admin. Code 1146 EGU Multi-Pollutant Regulation, as being adequate to protect the PM NAAQS, along with unidentified NSPS, but does not adequately explain how these regulations or the NSPS control emissions of $PM_{2.5}$ precursors during VE events. In addition, the State still did not provide an explanation of the number and type of Delaware sources subject to 7 DE Admin. Code 1114, how removing this regulation from the Delaware SIP but retaining it as a state regulation with the potential startup and shutdown exemption would affect their emissions and thus affect the NAAQS, and how the Delaware SIP would remain protective of the NAAQS. Further justification is required to explain that this change will not impact attainment and maintenance of the NAAQS, as well as explain how this change meets the applicable legal requirements of the CAA, including CAA section 193.

Lastly, Delaware noted that these regulations that were highlighted in the 2015 SSM SIP Action (1109 and 1114) would be retained at the state level. These state regulations allow Delaware to issue case-by-case permits via 7 DE Admin. Code 1102 to address emissions during startup and shutdown events. Therefore, Delaware would be relying on their own permits to regulate emissions during startup and shutdown events to protect the NAAQS during these periods. Because these regulations (1109 and 1114) provide a potential exemption from the emission limitations during startup and shutdown when the emissions during startup and shutdown are governed by a section 1102 operation permit, but would no longer be in the SIP, neither EPA nor citizens would be able to enforce this alternative limit for startup or shutdown under CAA sections 113 and 304. In effect, Delaware could grant an exemption to formerly federally enforceable emission limits which might be necessary to attain or maintain the NAAQS without justifying these revisions by going through the SIP revision process required by the CAA.

The concerns stated above suggest that the revisions to the Delaware SIP requesting removal of 7 DE Admin. Code 1109, Emissions of Sulfur Compounds From Industrial Operations, and 7 DE Admin. Code 1114, Visible Emissions, from the SIP cannot be approved.

III. Proposed Action

EPA's review of this material indicates Delaware did not provide adequate justification to support the revisions to Delaware's SIP pertaining to 7 DE Admin. Code 1104, 1105, 1109 and 1114 requested in their 2016 SIP submission. Further justification is required to explain that these changes will not impact maintenance of the PM and SO_2 NAAQS. EPA is proposing to disapprove the portion of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1104 § 1.5, 7 DE Admin. Code 1105 § 1.7, 7 DE Admin. Code 1109 § 1.4, and 7 DE Admin. Code 1114 § 1.3. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' as defined by Executive Order 12866 and was therefore not submitted to the Office of Management and Budget for review.

B. Paperwork Reduction Act (PRA)

This proposed action does not impose an information collection burden under the PRA because it does not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action merely proposes to disapprove a SIP submission as not meeting the CAA.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This action does not apply on any Indian reservation land, any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction, or non-reservation areas of Indian country. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying only to those

[26] 551 F.3d 1019 (D.C. Cir. 2008).

[27] 80 FR 33840 at 33890–91 (June 12, 2015).

regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it merely proposes to disapprove a SIP submission as not meeting the CAA.

H. Executive Order 13211, Actions That Significantly Affect Energy Supply, Distribution or Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

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.''

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

The air agency 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 merely proposes to disapprove a SIP submission as not meeting the CAA.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Adam Ortiz,

Regional Administrator, Region III.

[FR Doc. 2023–13148 Filed 6–20–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 21–456; FCC 23–29; FR ID 147722]

Revising Spectrum Sharing Rules for Non-Geostationary Orbit, Fixed-Satellite Service Systems

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission or we) seeks comment on revisions to its rules governing spectrum sharing among a new generation of broadband satellite constellations to promote market entry, regulatory certainty, and spectrum efficiency. Specifically, the Commission seeks comment on which metrics should be used to define the protection afforded to a non-geostationary satellite orbit, fixed-satellite service (NGSO FSS) system authorized through an earlier processing round from an NGSO FSS system authorized through a later processing round, including the implementation of a degraded throughput methodology.

DATES: Comments are due August 7, 2023. Reply comments are due September 5, 2023.

ADDRESSES: You may submit comments, identified by IB Docket No. 21–456, by any of the following methods:

- *FCC website: http://apps.fcc.gov/ecfs.* Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Clay DeCell, 202–418–0803, *Clay.DeCell@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (FNPRM), FCC 23–29, adopted April 20, 2023, and released April 21, 2023. The full text is available online at *https://docs.fcc.gov/public/attachments/FCC-23-29A1.pdf.* To request materials in accessible formats for people with disabilities, send an email to *FCC504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

Procedural Matters

Comment Filing Requirements

Interested parties may file comments and reply comments on or before the dates indicated in the **DATES** section above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS).

- *Electronic Filers.* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs.*
- *Paper Filers.* Parties who file by paper must include an original and one copy of each filing.

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

○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD

20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

○ Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See* FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020), *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

• *People with Disabilities.* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an email to *FCC504@fcc.gov* or call 202–418–0530 (voice) or 202–418–0432 (TTY).

Ex Parte Presentations

Pursuant to 47 CFR 1.1200(a), this proceeding will be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with 47 CFR 1.1206(b). In proceedings governed by 47 CFR 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' We have prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the potential impact of the rule and policy changes contained in the FNPRM. The IRFA is set forth in Section IV below. Written public comments are requested on the IRFA. Comments must be filed by the deadlines for comments on the FNPRM indicated on the first page of this document and must have a separate and distinct heading designating them as responses to the IRFA.

Paperwork Reduction Act

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

Synopsis

I. Introduction

1. In this document, we seek comment on revisions to the Commission's rules governing spectrum sharing among a new generation of broadband satellite constellations to promote market entry, regulatory certainty, and spectrum efficiency through good-faith coordination. Specifically, we seek comment on which metrics should be used to define the protection afforded to an earlier-round NGSO FSS system from a later-round system, including the implementation of a degraded throughput methodology. This document will continue the Commission's efforts to promote development and competition in broadband NGSO satellite services made possible by the new space age.

II. Background

2. This proceeding continues the Commission's recent efforts to update and refine its rules governing NGSO FSS systems. Constellations of NGSO FSS satellites traveling in low- and medium-Earth orbit may provide broadband services to industry, enterprise, and residential customers with lower latency and wider coverage than has previously been available via satellite. The number of applications filed in recent years for NGSO FSS system authorizations, and the number of satellites launched, are unprecedented.

3. *Processing Round Procedure Overview.* Applications for NGSO FSS system licenses and petitions for declaratory ruling seeking U.S. market access for non-U.S.-licensed NGSO FSS systems are considered in groups based on filing date, under a processing round procedure. Pursuant to the Commission's rules, a license application for ''NGSO-like'' satellite operation, including operation of an NGSO FSS system, that satisfies the acceptability for filing requirements is reviewed to determine whether it is a ''competing application'' or a ''lead application.'' A competing application is one filed in response to a public notice initiating a processing round. Any other application is a lead application. Competing applications are placed on public notice to provide interested parties an opportunity to file pleadings in response to the application. Lead applications are also placed on public notice. The public notice for a lead application initiates a processing round, establishes a cut-off date for competing NGSO-like satellite system applications, and provides interested parties an opportunity to file pleadings in response to the application.

4. The Commission reviews each application in the processing round and all the pleadings filed in response to each application. Based upon this review and consideration of such other matters as it may officially notice, the Commission will grant all the applications for which the Commission finds that the applicant is legally, technically, and otherwise qualified, that the proposed facilities and

operations comply with all applicable rules, regulations, and policies, and that grant of the application will serve the public interest, convenience and necessity. The Commission will deny the other applications.

III. Discussion

5. In the Report and Order in FCC 23–29, we adopt a requirement that, prior to commencing operations, an NGSO FSS licensee or market access recipient must either certify that it has completed a coordination agreement with any operational NGSO FSS system licensed or granted U.S. market access in an earlier processing round, or submit a showing for Commission approval that it will not cause harmful interference to any such system with which coordination has not been completed using a degraded throughput methodology. In this FNPRM, we propose to finalize the details of the degraded throughput methodology and invite specific comment on the appropriate values and assumptions to be used in this requirement and whether we should adopt a rule limiting aggregate interference from later-round NGSO FSS systems into earlier-round systems.

6. We expect that the degraded throughput analysis should consist of three steps. The first step is to establish a baseline of performance. To do this, an operator models the earlier-round NGSO system's performance without any additional interference by computing the earlier-round NGSO system's probabilistic C/N level using its published system parameters and a rain-attenuation model. This provides the baseline in terms of: (1) the earlier-round system's time-weighted average throughput (derived by computing the spectral efficiency from the C/N results), and (2) the earlier-round system's link unavailability time percentage (*i.e.,* the percentage of time when the earlier-round system's expected C/N will fall below its minimum usable level). The second step is to repeat the analysis above, adding in the effect of the later-round system's interference into the earlier-round system. This produces a second measurement of time-weighted average throughput and link unavailability time-percentage. The third step is to compare these two sets of figures to measure the effect of any additional interference. If the resulting performance impact exceeds the permissible limits, then the later-round system must adjust its operations to mitigate interference to a permissible level. We seek comment on this process.

7. Specifically, noting that 3% has been suggested as an appropriate value for several aspects of the degraded throughput analysis, we invite comment on the appropriate values for these limits, including their technical justification. What is the appropriate baseline to consider for the earlier-round system, and should it include existing sources of interference, such as interference from GSO networks or intra-system interference? Should a degraded throughput methodology compare an incumbent's baseline level of performance given only natural degradation to that same incumbent's expected performance given a single new entrant's operations? Should we use standardized antenna patterns and noise temperatures for the computation of C/(I+N) in a degraded throughput method? A degraded throughput methodology would rely on detailed technical data about the relevant NGSO FSS systems. How many locations should be evaluated in the methodology, and should the locations include sites outside the United States? How should rain fade conditions in different locations be incorporated into the degraded throughput analysis? What other technical data is needed to appropriately evaluate degraded throughput effects, and how can the Commission ensure that any degraded throughput analysis appropriately protects the specific characteristics of an NGSO system's operations? What role should Schedule S information play in the analysis? Are additional means needed to protect earlier-round systems against loss of synchronization due to potentially high levels of short term interference? Should the earlier-round operator be able to specify two C/N objectives—one relative to the C/N level below which the victim modem would lose lock and another relative to the C/N level below which the victim link would become unavailable because it is not able to offer the minimum wanted throughput? What mitigation techniques would be appropriate if degraded throughput thresholds were not otherwise satisfied?

8. We also note concerns on the record about aggregate interference from multiple NGSO systems. What is a permissible aggregate interference level for protecting priority NGSO systems in a frequency band, as part of an earlier processing round? Should we expect that there will be a maximum number of NGSO FSS systems that can be accommodated in a given frequency band and if so, how should that affect any inter-round protection criteria and the opening of additional processing rounds? How does this methodology accommodate multiple NGSO systems that span multiple processing rounds?

9. Additionally, we seek comment on what criteria should be applied among NGSO systems after the sunset period. We recognize that our default spectrum splitting process is intended to encourage negotiation between systems in the same processing round. Should that also be the default procedure applicable between systems after the sunsetting of interference protection in order to facilitate coordination, or is there an alternative better suited to systems that may be at different stages of deployment? We seek comment on the fit of the default spectrum splitting process to the post-sunset environment. What does co-equal mean when there are established operators on a co-equal basis with newer entrants?

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

IV. Initial Regulatory Flexibility Analysis

11. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (FNPRM). The Commission requests written public comments on this IRFA. Commenters must identify their comments as responses to the IRFA and must file the comments by the deadlines provided in the **DATES** section above and as instructed under Comment Filing Requirements above. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

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

12. In recent years, the Commission has received an unprecedented number of applications for non-geostationary satellite orbit (NGSO) space station licenses, including for NGSO fixed-satellite service (FSS) systems. Traveling closer to the Earth than a traditional geostationary-satellite orbit (GSO) satellite, low- and medium-orbit NGSO FSS satellite constellations are capable of providing broadband services to industry, enterprise, and residential customers with lower latency and wider coverage than was previously available via satellite. This rulemaking continues to facilitate the deployment of NGSO FSS systems capable of providing broadband and other services on a global basis, and will promote competition among NGSO FSS system proponents, including the market entry of new competitors.

13. This FNPRM seeks public comment on proposed revisions to the Commission's rules governing the treatment NGSO FSS systems filed in different space station processing rounds. Specifically, this FNPRM seeks comment on details regarding the implementation of a degraded throughput methodology. It also seeks comment on what criteria should be applied among NGSO systems after the sunset period.

B. Legal Basis

14. The proposed action is authorized under sections 4(i), 7(a), 303, 308(b), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 303, 308(b), 316.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rulemaking Will Apply

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

16. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $35 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 71 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 48 providers have 1,500 or fewer employees. Consequently using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

17. *All Other Telecommunications.* The ''All Other Telecommunications'' category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications'', which consists of all such firms with annual receipts of $35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49, 999,999. Thus, the Commission estimates that the majority of ''All Other Telecommunications'' firms potentially affected by our action can be considered small.

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

18. The Commission seeks comment on potential changes to the spectrum sharing requirements among NGSO FSS satellite systems. Specifically, comment is sought on how to implement the degraded throughput methodology. Because of the costs involved in developing and deploying an NGSO FSS satellite constellation, we anticipate that few NGSO FSS operators affected by this rulemaking would qualify under the definition of ''small entity.''

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

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

20. The Commission adopted a requirement that, prior to commencing operations, an NGSO FSS licensee or market access recipient must either certify that it has completed a coordination agreement with any operational NGSO FSS system licensed or granted U.S. market access in an earlier processing round, or submit a showing for Commission approval that it will not cause harmful interference to any such system with which coordination has not been completed using a degraded throughput methodology. This FNPRM invites comment on which specific metrics should be used to define the protection afforded to an earlier-round NGSO FSS system from a later-round system.

21. The Commission seeks comment on the appropriate values and assumptions to be used with the degraded throughput requirement. The Commission also seeks comment on whether to adopt a rule limiting aggregate interference from NGSO FSS systems that were authorized in a later processing round into NGSO FSS systems authorized in an earlier processing round. The Commission also seeks comment on alternative means of

protection of earlier-round NGSO FSS systems.

22. The FNPRM also seeks comment on whether the Commission should expect that there will be a maximum number of NGSO FSS systems that can be accommodated in a given frequency band and if so, how should that affect any inter-round protection criteria and the opening of additional processing rounds. The FNPRM also seeks comment on how the degraded throughput methodology accommodates multiple NGSO systems that span multiple processing rounds.

23. To assist in the Commission's evaluation of the economic impact on small entities, as a result of actions that have been proposed in the FNPRM, and to better explore options and alternatives, the Commission seeks comment on whether any of the burdens associated with the filing, recordkeeping and reporting requirements described above can be minimized for small entities. Additionally, the Commission seeks comment on whether any of the costs associated with any of the proposed requirements to eliminate unlawful robocalls can be alleviated for small entities. The Commission expects to more fully consider the economic impact and alternatives for small entities based on its review of the record and any comments filed in response to the FNPRM and this IRFA.

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

24. None

V. Ordering Clauses

25. *It is ordered*, pursuant to Sections 4(i), 7(a), 10, 303, 308(b), and 316 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 160, 303, 308(b), 316, that this Further Notice of Proposed Rulemaking *is adopted*.

26. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center will send a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2023–12802 Filed 6–20–23; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 372

[Docket No. FMCSA–2023–0007]

RIN 2126–AC57

Exemption From Operating Authority Regulations for Providers of Recreational Activities

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: FMCSA proposes the implementation of the statutory exemption from its operating authority registration rules for providers of recreational activities. The exemption would apply to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the beginning of the trip. FMCSA also proposes to define *recreational activities* to clarify the scope of this exemption.

DATES: Comments must be received on or before August 21, 2023.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2023–0007 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov/docket/FMCSA-2023-0007/document.* Follow the online instructions for submitting comments.
- *Mail:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Dockets Operations, U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.
- *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Mr. Antonio Harris, Registration, Licensing and Insurance Division, Office of Research and Registration, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001; (202) 366–2964; *antonio.harris@dot.gov.* If you have questions on viewing or submitting material to the docket, call Dockets Operations at (202) 366–9826.

SUPPLEMENTARY INFORMATION: FMCSA organizes this notice of proposed rulemaking (NPRM) as follows:

I. Public Participation and Request for Comments

A. Submitting Comments

If you submit a comment, please include the docket number for this NPRM (FMCSA–2023–0007), indicate the specific section of this document to which your comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *https://www.regulations.gov/docket/FMCSA-2023-0007/document,* click on this NPRM, click ''Comment,'' and type your comment into the text box on the following screen.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period.

Confidential Business Information (CBI)

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to the 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 the NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission that constitutes CBI as ''PROPIN'' to indicate it contains proprietary information. FMCSA will treat such marked submissions as confidential under the Freedom of Information Act, and they will not be placed in the public docket of the NPRM. Submissions containing CBI should be sent to Mr. Brian Dahlin, Chief, Regulatory Evaluation Division, Office of Policy, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. Any comments FMCSA receives not specifically designated as CBI will be placed in the public docket for this rulemaking.

B. Viewing Comments and Documents

To view any documents mentioned as being available in the docket, go to *https://www.regulations.gov/docket/FMCSA-2023-0007/document* and choose the document to review. To view comments, click this NPRM, then click ''Browse Comments.'' If you do not have access to the internet, you may view the docket online by visiting Dockets Operations in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE, Washington, DC 20590–0001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366–9317 or (202) 366–9826 before visiting Dockets Operations.

C. Privacy

DOT solicits comments from the public to better inform its regulatory process, in accordance with 5 U.S.C. 553(c). DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL 14—Federal Docket Management System), which can be reviewed at *https://www.govinfo.gov/content/pkg/FR-2008-01-17/pdf/E8-785.pdf.*

II. Executive Summary

A. Purpose and Summary of the Regulatory Action

Section 23012 of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117–58, 135 Stat. 429 (H.R. 3684, Nov. 15, 2021)) amended 49 U.S.C. 13506 by adding, in paragraph (b)(4), a new exemption from FMCSA's operating authority registration requirements. FMCSA proposes the addition of new regulatory text implementing this statutory exemption. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person [1] that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

FMCSA also proposes to define *recreational activities* to clarify the scope of this exemption. The statute, which requires that the motor vehicle be operated ''by a person that provides recreational activities,'' does not define *recreational activities.* The proposed definition would clarify the types of recreational activities the Agency has determined would qualify for the exemption in 49 U.S.C. 13506(b)(4). FMCSA limited the proposed definition of *recreational activities* to the types of activities that Congress outlined in the IIJA for another section that uses this term. Section 11512 provided examples of ''groups representing recreational activities and interests'' in subsection (c)(4) which provided some insight as to legislative intent for the term *recreational activities* in section 23012. The definition FMCSA proposes in implementing section 23012 includes activities Congress mentioned in section 11512 and also describes activities that fall outside the intended scope of the term. This language is intended to provide context of the activities within the scope of the exemption, based on the intent of Congress, and to allow sufficient flexibility for analysis of the term's applicability to future activities.

B. Costs and Benefits

The cost impacts of the proposed definition include changes in paperwork, fees, and insurance costs associated with maintaining operating authority. Because there is no pre-existing definition of *recreational activities,* motor carriers may be interpreting their eligibility for the operating authority exemption in varying ways. Depending on current interpretations, this proposed rule would either increase, decrease, or have no incremental impact on the degree to which the operating authority exemptions are used relative to the baseline. Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. This rulemaking would resolve this information asymmetry and enforcement differences by creating a common understanding between FMCSA and motor carriers. Because this rulemaking may also lead to an increase in exemption use, it would benefit existing carriers by improving the efficiency of their business operations and increasing both consumer and producer surplus. For new potential providers of recreational activities that were not aware of this exemption, this rulemaking may encourage new entrants into the field.

III. Abbreviations

ANPRM Advance Notice of Proposed Rulemaking
BLS Bureau of Labor Statistics
CBI Confidential Business Information
CE Categorical Exclusion
CFR Code of Federal Regulations
DOL U.S. Department of Labor
DOT Department of Transportation
E.O. Executive Order
FMCSA Federal Motor Carrier Safety Administration
FMCSRs Federal Motor Carrier Safety Regulations
FR Federal Register
GDP Gross Domestic Product
ICR Information Collection Request
IRFA Initial Regulatory Flexibility Analysis
IIJA Infrastructure Investment and Jobs Act
MCMIS Motor Carrier Management Information System
NAICS North American Industry Classification System
NPRM Notice of Proposed Rulemaking
OEWS Occupational Employment and Wage Statistics
OMB Office of Management and Budget
PIA Privacy Impact Assessment

[1] While the statute refers to a ''person,'' that term can refer both to an individual or to a motor carrier under the definitions of that term in 49 U.S.C. 13102(18) and 1 U.S.C. 1.

PTA Privacy Threshold Assessment
Secretary The Secretary of the Department of Transportation
SBA Small Business Administration
UMRA Unfunded Mandates Reform Act of 1995
URS Unified Registration System
U.S.C. United States Code
USDOT United States Department of Transportation

IV. Legal Basis for the Rulemaking

Section 23012 of the IIJA (Pub. L. 117–58, 135 Stat. 429 (H.R. 3684, Nov. 15, 2021)) amended 49 U.S.C. 13506 by adding a new exemption from the requirement to obtain operating authority registration for ''providers of recreational activities'' operating passenger vehicles designed or used to transport between 9 and 15 passengers (including the driver) (see 49 U.S.C. 13506(b)(4)). The statute, which requires that the motor vehicle be operated ''by a person that provides recreational activities,'' does not define *recreational activities.* This NPRM proposes to define *recreational activities* to clarify the scope of the exemption applicability.

Under 49 Code of Federal Regulations (CFR) 1.87(a)(5), the authority of the Secretary of the Department of Transportation (the Secretary) to carry out the functions relating to the registration requirements in 49 U.S.C. 13901 and 13902 is delegated to the FMCSA Administrator. Sections 13901 and 13902 generally require that any person that wishes to provide transportation subject to jurisdiction under subchapter I of chapter 135 [2] must be registered as a *motor carrier,* defined in 49 U.S.C. 13102(14) as ''a person providing motor vehicle transportation for compensation.'' The requirements of these sections, which are enforced under § 392.9a (''Operating authority''), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365.

V. Background

Before commencing operations, any person desiring to engage in for-hire interstate transportation of passengers, regardless of vehicle size or passenger seating capacity, must first obtain operating authority registration, unless a specific exemption applies (49 U.S.C. 13102 (14), 13501, 13506, 13901, 13902, and 49 CFR part 365). The relevant regulations governing such operations derive from Title 49, Subtitle IV, Part B, and are frequently referred to as the ''commercial regulations,'' (49 U.S.C. 13102(14), 13902 and 49 CFR part 365). Historically, the regulations promulgated pursuant to this authority were largely economic in nature and did not contain new safety requirements. Today, the most substantial regulatory requirements remaining under this authority require for-hire non-exempt motor carriers to maintain evidence of financial responsibility on file with FMCSA at all times, regardless of whether the carrier is actively operating, and to maintain an active process agent filing designating an agent for the receipt of service of process in every state (49 CFR part 366 and 49 CFR 387.301T).[3] The exemptions from the commercial regulations, including the exemption for providers of recreational activities, are enumerated in 49 U.S.C. 13506 and codified in 49 CFR part 372.

Congress adopted multiple exemptions to these commercial regulations that provided financial relief for certain industries while still maintaining safety oversight over the same operators. Exemptions from the commercial regulations do not impede the Agency's oversight of operations subject to the Agency's separate safety jurisdiction codified in the Motor Carrier Act of 1935 (Pub. L. 74–255, 49 Stat. 543, Aug. 9, 1935), as amended (the 1935 Act) (codified in 49 U.S.C. 31502); the Motor Carrier Safety Act of 1984 (Pub. L. 98–554, Title II, 98 Stat. 2832, Oct. 30, 1984), as amended (codified in 49 U.S.C. chapter 311); and the Commercial Motor Vehicle Safety Act of 1986 (Pub. L. 99–570, Title XII, 100 Stat. 3207–170, Oct. 27, 1986), as amended (codified in 49 U.S.C. chapter 313). A carrier may be exempt from the commercial regulations, relieving them of the obligation to obtain operating authority, file evidence of financial responsibility, and designation of a process agent. The statutory exemptions in 49 U.S.C. 13506 however, relieve the carrier only of the obligation to file with FMCSA evidence of financial responsibility, not the obligation to maintain financial responsibility when engaged in operations. Thus, if the carrier is operating a commercial motor vehicle as defined in 49 U.S.C. chapter 311, the carrier is still required to maintain minimum levels of financial responsibility in order to operate. (49 U.S.C. 31138 and 49 CFR part 387, subpart B).

The operating authority registration required under 49 U.S.C. 13901, 13902, and 13906, provides FMCSA with information about motor carriers and their operations. Although the requirements for operating authority registration apply only to carriers subject to the Agency's commercial regulations, they also provide FMCSA with an opportunity to evaluate those potential new entrant motor carriers' willingness and ability to comply with all commercial and safety regulations (49 U.S.C. 13902). This opportunity, consistent with the Agency's mission to reduce crashes and fatalities, allows FMCSA to prevent carriers who may pose a significant safety risk from entering the industry. Motor carriers operating vehicles for compensation, in interstate commerce and not subject to exemption are prohibited from operating without the required operating authority or beyond the scope of the operating authority granted (§ 392.9a). A motor carrier that violates this provision shall be ordered out of service and may be subject to penalties (§ 392.9a(b)).

The Agency, however, also requires registration under its safety jurisdiction, 49 U.S.C. 31134. As a result, if the carrier has registered and received a USDOT number under FMCSA's safety jurisdiction, the Agency will still maintain adequate information to monitor the motor carrier's safety performance and compliance, even if the carrier is not required to obtain operating authority registration.

FMCSA is required to register a motor carrier for operating authority registration under 49 U.S.C. 13902 only if the applicant is willing and able to comply with all statutory and regulatory requirements for registration (49 U.S.C. 13902, 49 U.S.C. 13906, and 49 CFR part 365). To obtain operating authority registration, each applicant is required to file the appropriate form for the scope of its operations (*e.g.,* to operate as a motor carrier of passengers). Applicants that have never held a USDOT number or any other registration issued by FMCSA must file the Unified Registration System (URS) online application (Form MCSA–1) to obtain a USDOT number and register for operating authority. Applicants that already have a USDOT number but desire to expand to an operation requiring operating authority, such as transporting passengers in interstate commerce for compensation, must file the ''Application for Motor Passenger

[2] Absent an exemption, the Secretary has jurisdiction over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier in interstate commerce (49 U.S.C. 13501). This authority has been delegated to the FMCSA Administrator under 49 CFR 1.87(a)(3).

[3] Though providers of recreational activities may not be required to maintain an active process agent filing with FMCSA, other State and Federal law may also require those providers to maintain a process agent in order to engage in business in more than one State. Accordingly, any cost associated with maintaining a process agent, generally, would not automatically be alleviated by this rulemaking.

Carrier Authority'' (Form OP–1(P)), or other appropriate OP–1 series form for the proposed operation to register for operating authority (§ 365.105T), for a fee, currently $300. Again, among other requirements, the statutory requirements for registration require that the applicant have on file with FMCSA proof of liability insurance meeting the minimum levels of financial responsibility required (49 U.S.C. 13902, 49 U.S.C. 13906, and 49 CFR part 365). Motor carriers must submit the ''Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance'' (Form BMC–91, for a single insurance provider, or Form BMC–91X, for an aggregation of insurance coverage) to satisfy the financial responsibility requirements. A registration remains in effect only as long as the registrant continues to satisfy these financial responsibility requirements in 49 U.S.C. 13906.

Before the enactment of section 23012 of the IIJA, a provider of recreational activities operating as a motor carrier of passengers was required to maintain insurance at the minimum prescribed levels [4] for the entire year—including the months during which the provider was not operating. As a result, some providers of recreational activities were voluntarily revoking their operating authority registrations [5] during the off-season months by filing Form OCE–46 so that they did not need to maintain insurance at the minimum prescribed levels during those months. To resume operations, the providers were then required to obtain adequate financial responsibility, ensure evidence of financial responsibility is filed with FMCSA on Form BMC–91 or BMC–91X, and request to reinstate their operating authority registrations by submitting the ''Motor Carrier Records Change'' (MCSA–5889) either online or by paper during the months when they were operating, for an additional fee, currently $80.[6]

Section 23012 of the IIJA created a new exemption from the requirement to obtain FMCSA operating authority registration for providers of recreational activities operating a motor vehicle designed or used to transport not fewer than 9, and not more than 15 passengers (including the driver) whether operated alone or with a trailer [7] attached to the transport vehicle if:

1. The motor vehicle is operated by a person that provides recreational activities;
2. The transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip; and
3. In the case of a motor vehicle transporting passengers over a route between a place in a State and a place in another State, the person operating the motor vehicle is lawfully providing transportation of passengers over the entire route in accordance with applicable State law.

In this NPRM, FMCSA is undertaking only to clarify the term *recreational activities,* as the Agency believes that the other provisions in section 23012 are unambiguous.

The recreational activity industry is comprised of numerous companies, associations, and organizations that focus primarily on outdoor activities. Outdoor activities may include hunting, fishing, trapping, camping, exploring caves, nature study, bicycling, horseback riding, bird watching, motorcycling, ballooning, hang-gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, rock climbing, climbing observation towers, sport shooting, whitewater rafting, and other outdoor sport, game, or educational activities.

Congress did not define the term *recreational activities* in the IIJA and there is no current definition in statute or regulation. The lack of a definition of *recreational activities* has caused confusion for the industry and safety oversight agencies that may result in myriad interpretations and a patchwork of compliance. This NPRM proposes to define *recreational activities* consistent with the Agency's understanding of congressional intent when establishing the exemption.[8]

VI. Discussion of Proposed Rulemaking

FMCSA proposes a new § 372.113 that outlines the exemption from operating authority registration for providers of recreational activities in 49 U.S.C. 13506(b)(4). This new section would reflect the statutory language and incorporate the exemption into the FMCSRs.

The Agency also proposes a new definition of *recreational activities* to § 372.107 which would provide a clear description of the types of activities that qualify for the exemption in 49 U.S.C. 13506(b)(4). Based on the statute itself and Congress' use of the term elsewhere in the IIJA, FMCSA believes Congress intended to provide an exemption to providers of recreational activities that consist of outdoor experiences or excursions typically of a physical or athletic nature that do not have transportation as an integral part of the activity itself.

In reaching this conclusion, FMCSA has drawn from the canons of statutory construction and applied the presumption of consistent usage. The U.S. Supreme Court has framed this presumption as ''a natural presumption that identical words used in different parts of the same act are intended to have the same meaning'' (*Atlantic Cleaners & Dryers, Inc.* v. *United States,* 286 U.S. 427, 433 (1932)). The presumption should be ''applied . . . pragmatically'' (Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 171 (2012)). FMCSA's interpretation of the types of activities Congress intended to include in the term *recreational activities* is therefore potentially informed by Congress' use of the same term in section 11512 of the IIJA, which directs the Secretary to conduct a nonhighway recreational fuel study. Subsection (c)(4) states the Secretary may consult with groups representing recreational activities and interests, including hiking, biking and mountain biking, horseback riding, water trails, snowshoeing, cross-country skiing, snowmobiling, off-highway motorcycling, all-terrain vehicles and other offroad motorized vehicle activities, and recreational trail advocates (23 U.S.C. 203 note).

The application of this presumption does have limitations. Although the term *recreational activities* is found within the same act, it is used in

[4] The minimum levels of financial responsibility required to be maintained by for-hire motor carriers of passengers operating motor vehicles in interstate or foreign commerce can be found in 49 CFR part 387, subpart B. Section 387.31 prohibits a motor carrier from operating a motor vehicle transporting passengers until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as forth in § 387.33. The minimum level of financial responsibility is $1,500,000 for for-hire motor carriers of passengers operating a vehicle with a seating capacity of 15 passengers or less, including the driver (§ 387.33T).

[5] It should be noted that these revocations did not affect the status of each carrier's safety registration (USDOT number registration under 49 U.S.C. 31134), which remained intact and was still required to be updated biennially by the motor carrier (§ 390.201).

[6] The MCSA–5889 may be submitted by mail, fax, or filled out online. *https://ask.fmcsa.dot.gov/app/answers/detail/a_id/213/session/L3RpbWUvMTQ0Nzg3MzYwOS9zaWQvQXlsamRRQm0=.*

[7] The exemption includes passenger carrier operators who may also be required to have and maintain operating authority to transport property. FMCSA recognizes that a property carrier may also be transporting property for hire within the scope of its recreational activities operation. The Agency believes that the number of carriers requiring additional operating authority to transport property, however, is extremely limited.

[8] As explained in section VI of this rulemaking, FMCSA's interpretation of the term *recreational activities* has been informed by the legislative history of the IIJA. This interpretation has been further informed by the Agency's experiences in applying the operating authority requirements, particularly by the questions and concerns FMCSA has received from motor carriers regarding voluntary revocation of operating authority, *e.g.,* carriers wishing to cancel or decrease their insurance during the off season.

different titles of this lengthy legislation, and applies to different operating administrations within DOT. Nonetheless, while the use of this term in section 11512 is not dispositive of its meaning in section 13506, it can still be potentially informative of Congress' intent. Applying the presumption of consistent usage pragmatically, the language in section 11512 potentially provides insight into the types of activities that Congress intended to be covered by the term *recreational activities* under section 13506 of the IIJA. Accordingly, FMCSA limited the proposed definition of *recreational activities* to similar types of activities, as informed by FMCSA's experience.[9]

Based on these findings, FMCSA proposes to define *recreational activities* which qualify for the exemption under 49 U.S.C. 13506(b)(4) as

> . . . activities consisting of an outdoor experience or excursion typically of a physical or athletic nature which require transportation for the sole purpose of moving customers to another location or locations where the experience or excursion will take place and collecting those customers to transport them back to the place of initial boarding or another outpost of the motor carrier.

Recreational activities under this proposed definition would include things such as hiking, biking, horseback riding, canoeing, whitewater rafting, water trails, tubing, skiing, snowshoeing, snowmobiling, hunting, fishing, mountain climbing, and swimming. While this list of activities in the proposed definition is not all inclusive, it provides sufficient examples to clarify the specific types of activities that would qualify for the exemption.

FMCSA believes that, by including the language a person ''that provides'' recreational activities in the exemption, Congress intended to limit the exemption to only those persons that are actually providing recreational activities. There is no reason to infer that Congress intended for the ''providers of recreational activities'' exemption to apply to persons providing transportation as their core business or providing transportation concurrently with an activity (where the transportation is no longer incidental to the activity itself). These types of activities are distinct from those contemplated by Congress as exempt because the act of transporting passengers from one location to another is the central aspect of the service that the motor carriers are providing.

For instance, FMCSA does not believe Congress intended to exempt activities where the service provided by the motor carriers mainly focuses on transportation from one location to another. In such cases, the motor carrier's business is in fact selling transportation—not providing recreational activities. A bus company offering scheduled route service with multiple stops would not fall within the exemption, for example, merely because one of the scheduled stops was at or near a water park or a horseback riding stable. Likewise, motor carriers that advertise and provide alcohol, music, or other ''party'' activities on board the vehicle as the principal activity or purpose of the transportation would not be eligible for the exemption.[10] In situations like those described above, the activity cannot be completed and has no purpose without the transportation. The transportation in such circumstances is integral to the activities, rather than incidental. Accordingly, the proposed definition in § 372.107 would explicitly exclude any activity for which: (1) the activity offered or sold is occurring simultaneously with the transportation; or (2) the transportation is the primary service offered for sale. FMCSA solicits comment on whether the exclusions at the end of the proposed definition increase clarity. Should the agency include these exclusions at the end of the definition, remove them from the definition, or take another approach to communicate which activities would not fall within the definition in a final rule?

The exemption in 49 U.S.C. 13506(b)(4) is already in effect. This rulemaking is intended to codify the statute and provide clarity regarding which motor carriers qualify for the exemption. Motor carriers that qualify for the exemption in 49 U.S.C. 13506(b)(4) are not subject to the requirement to register for or maintain operating authority as a motor carrier of passengers.

New motor carriers that need a USDOT number, even those that qualify for the exemption, would be required to register via URS (MCSA–1). Such carriers would indicate in the Operation Classification section that they will be transporting passengers for compensation but that they are exempt pursuant to 49 U.S.C. 13506. Motor carriers with a USDOT number that do not currently have operating authority as motor carriers of passengers and would qualify for the exemption do not have to file Form OP–1(P) to obtain operating authority.

Motor carriers that currently have operating authority as motor carriers of passengers and qualify for the exemption are able to voluntarily revoke their operating authority under 49 U.S.C. 13905(d) as discussed in the background section above. After doing so, these motor carriers are no longer required to obtain or reinstate operating authority and thus, no longer required to have their insurance coverage or process agent designation on file with FMCSA (49 CFR parts 365 and 366 and § 387.301T). If a motor carrier does not voluntarily revoke its operating authority registration and fails to maintain evidence of the required level of insurance coverage on file with FMCSA, its operating authority registration will be revoked involuntarily by FMCSA.

These motor carriers would no longer need to have evidence of financial responsibility on file with FMCSA (through either Form BMC–91 or BMC–91X). However, the inapplicability of the insurance coverage filing requirement in 49 CFR part 365 and § 387.301T does not affect a motor carrier's obligation to maintain minimum levels of financial responsibility as set forth in § 387.33. As discussed above in the background section, a provider of recreational activities operating as a motor carrier of passengers is required to maintain insurance at the minimum prescribed levels while they are in operation. Additionally, a motor carrier that is no longer subject to Federal insurance requirements while not in operation may nonetheless still be required to maintain insurance coverage to meet applicable State requirements in those States in which the motor carrier operates.

[9] See Footnote 8. For example, in response to a DOT notice requesting that the public identify and provide input on the Department's existing guidance documents that are good candidates for repeal, replacement, or modification (84 FR 1820, Feb. 5, 2019), the America Outdoors Association (AOA) submitted an undated comment to the Docket (received Apr. 8, 2019) requesting that FMCSA amend its guidance on operating authority, stating that the costs to reinstate operating authority were an unnecessary expense with no added safety benefit. See *https://www.regulations.gov/comment/DOT-OST-2017-0069-2865*. (The comment is also available in the docket for this rulemaking.) AOA requested, in part, that FMCSA provide an exemption from the operating authority requirements for transportation by 9 to 15 passenger vehicles, when such transportation is provided by an entity that provides recreational activities, is not for direct compensation, and is provided entirely within a 150 air-mile radius of trip origination, provided that drivers carry appropriate commercial driver's licenses if needed, the State in which the vehicle is registered has adopted Federal inspection standards, and the operator is in compliance with State requirements.

[10] FMCSA specifically mentions these activities because the Agency has received questions from motor carriers regarding the applicability of the exemption to these activities.

Some motor carriers may have already voluntarily revoked their operating authority registration by filing Form OCE–46 under the exemption in 49 U.S.C. 13506(b)(4). Some of these motor carriers may have correctly revoked their operating authority because they meet the requirements in 49 U.S.C. 13506(b)(4) and provide transportation for activities that fall under the proposed definition in this rulemaking. If the Agency were to issue its proposed definition as a final rule, these exempt motor carriers would be permitted to continue to operate without operating authority. Other motor carriers may have incorrectly revoked their operating authority because they provide transportation for one or more activities that they mistakenly believed would fall under the scope of the statute, but do not, in fact, fall within such scope as clarified by the proposed definition in this rulemaking. These motor carriers are currently required, and would continue to be required, to reinstate their operating authority registration and have their insurance coverage on file with FMCSA in order to continue operating.[11]

VII. Section-by-Section Analysis

This section-by-section analysis describes the proposed changes in numerical order.

Section 372.107 Definitions

FMCSA would add a new paragraph (i), which would contain a definition for *recreational activities.*

Section 372.113 Providers of Recreational Activities

FMCSA would add a new § 372.113 to subpart A of 49 CFR part 372. This new section would outline the exemption from operating authority registration in 49 U.S.C. 13506(b)(4).

VIII. Regulatory Analyses

A. Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 13563 (Improving Regulation and Regulatory Review), E.O. 14094 (Modernizing Regulatory Review), and DOT Regulatory Policies and Procedures

FMCSA has considered the impact of this NPRM under E.O. 12866 (58 FR 51735, Oct. 4, 1993), Regulatory Planning and Review, E.O. 13563 (76 FR 3821, Jan. 21, 2011), Improving Regulation and Regulatory Review, and by E.O. 14094 (88 FR 21879, Apr. 11, 2023), Modernizing Regulatory Review. The Office of Information and Regulatory Affairs within the Office of Management and Budget (OMB) determined that this notice of proposed rulemaking is not a significant regulatory action under section 3(f) of E.O. 12866, as supplemented by E.O. 13563 and E.O. 14094, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. Accordingly, OMB has not reviewed it under that E.O.

Purpose

This rulemaking would codify the exemption for providers of recreational activities in regulation and define *recreational activities* to clarify the scope of this exemption by providing a clear description of what types of recreational activities do and do not qualify for the exemption in 49 U.S.C. 13506(b)(4). This would ensure that providers of recreational activities are aware of their eligibility for the exemption from filing for operating authority that FMCSA proposes to add in new § 372.113. Specifically, this rulemaking would affect motor carriers operating a motor vehicle designed or used to transport between 9 and 15 passengers (including the driver), whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip.

This proposed rule is to provide clarity to both motor carriers and enforcement officials regarding which carriers qualify for the new exemption in section 23012 of the IIJA as of November 15, 2021. Because Congress did not define *recreational activities* and there is no pre-existing definition of *recreational activities* in statute or regulation, FMCSA proposes bringing the FMCSRs into alignment with the IIJA's exemption. This clarity would resolve possible information asymmetry currently affecting the regulated industry and enforcement officials as to which carriers qualify for the operating authority exemption.

Baseline

For the purposes of this analysis, the changes proposed in this rule are compared to the baseline established by section 23012 of the IIJA and the current requirements for providers of recreational activities under 49 U.S.C. 13901 and 13902 and 49 CFR part 365. As discussed above, the IIJA created a new exemption from the requirement to obtain FMCSA operating authority registration for providers of recreational activities. Accordingly, this exemption has been available to these motor carriers since the IIJA was enacted on November 15, 2021. Therefore, the incremental impacts of this proposed rule relative to the baseline lie in how the affected industry and enforcement officials have been interpreting the term in the absence of a definition in the FMCSRs.

Uncertainties

The Agency relies on the Motor Carrier Management Information System (MCMIS) database to obtain information on commercial motor carriers subject to the FMCSRs. While MCMIS does contain data on passenger vehicle size (*e.g.,* weight and capacity) and type, it does not track industry type, nor whether an operating authority exemption is applicable. Consequently, the Agency knows neither the magnitude of the population that would be affected by this rulemaking, nor the degree to which passenger carriers are currently taking advantage of the exemption. Therefore, FMCSA describes how different carriers would be impacted by costs and benefits on a per-unit basis, depending on their current behavior. The Agency invites the public to provide information on the size of this industry.

Costs

The resulting cost impacts of the definitional clarification proposed in this rulemaking include changes in paperwork, fees, and insurance costs associated with maintaining operating authority. Because there is no pre-existing definition of *recreational activities,* motor carriers may be interpreting their eligibility for the operating authority exemption in varying ways. Depending on current interpretations, this proposed rule would either increase, decrease, or have no incremental impact on the degree to which the operating authority exemptions are used relative to the baseline. Because FMCSA is unable to ascertain how various carriers interpreted this exemption set forth by section 23012 of the IIJA in 2021, the Agency estimates the impacts of this rulemaking based on four hypothetical scenarios. The Agency also invites the public to provide additional information on the degree to which this exemption is being used.

Forms

Currently, there are several forms that providers of recreational activities are responsible for submitting to FMCSA in

[11] Motor carriers may reinstate their operating authority using the procedure detailed at *https://ask.fmcsa.dot.gov/app/answers/detail/a_id/213/~/how-do-i-make-my-mc%2Fff%2Fmx-number-active-%28request-to-reinstate-or-reactivate.*

order to maintain operating authority registration. As detailed later in this analysis, the use of these forms, as explained in table 1, may change as a result of this proposed rule, depending on how the affected carriers are interpreting this exemption.

TABLE 1—FORMS CURRENTLY USED IN MAINTAINING OPERATING AUTHORITY

Form	Affected groups
Motor Carrier Automobile Bodily Injury and Property Damage Liability Certificate of Insurance (BMC–91 or BMC–91X).	Carriers that must provide proof of liability insurance meeting the minimum levels of financial responsibility.
Motor Carrier Records Change (MCSA–5889)	Carriers reinstating operating authority.
Request for Revocation of Authority Granted (OCE–46)	Carriers voluntarily revoking operating authority.
Application for Motor Passenger Carrier Authority (OP–1(P))	Carriers with an existing USDOT number wishing to expand to an operation requiring operating authority.

Tables 2 and 3 display the paperwork burden of these forms to private entities and to the Government, respectively. These estimates are based on the Information Collection Request (ICR) supporting statements associated with each form. For example, table 2 shows that Forms BMC–91 and BMC–91X are estimated to take 10 minutes to complete by an insurance claims and policy processing clerk at a wage rate [12] of $38.72, leading to a paperwork burden of $6 (10 minutes × $38.72 = $6).[13] [14]

TABLE 2—PAPERWORK COSTS TO PRIVATE SECTOR (2021$)

Paperwork	Wage	Hours to submit form	Cost per form	Filing fee	Total cost
Forms BMC–91 or BMC–91X by insurance claims processer	$38.72	0.17	$6	.....	$6
Form MCSA–5889 by office clerk	31.90	0.25	8	80	88
Form OCE–46 by office clerk	31.90	0.25	8	.....	8
Form OP–1(P) by office clerk	31.90	2	64	300	364

Estimates may not total due to rounding.

TABLE 3—PAPERWORK COSTS TO GOVERNMENT (2021$)

Paperwork	GS–9, step 5 wage	Hours to submit form	Cost per form
Form MCSA–5889	$70.31	0.25	$18
Form OCE–46	70.31	0.25	18
Form OP–1(P)	70.31	6.5	457

Estimates may not total due to rounding.

FMCSA computes its estimates of labor costs using data gathered from several sources. Labor costs comprise wages, fringe benefits, and overhead. Fringe benefits include paid leave, bonuses and overtime pay, health and other types of insurance, retirement plans, and legally required benefits (Social Security, Medicare, unemployment insurance, and workers compensation insurance). Overhead includes any expenses to a firm associated with labor that are not part of employees' compensation; this typically includes many types of fixed costs of managing a body of employees, such as management and human resource staff salaries or payroll services. The economic costs of labor to a firm should include the costs of all forms of compensation and labor-related expenses. For this analysis, costs of labor to a firm have been calculated relative to total compensation (base wages, plus fringe benefits, plus overhead).

The primary source for industry wages is the median hourly wage data (May 2021) from the U.S. Department of Labor (DOL), Bureau of Labor Statistics (BLS), Occupational Employment and Wage Statistics (OEWS).[15]

BLS does not publish data on fringe benefits for specific occupations, but it does for the broad industry groups in its Employer Costs for Employee Compensation release. For office clerk employees, this analysis uses an average hourly wage of $26.45 and average hourly benefits of $13.78 for private industry workers in ''transportation and warehousing'' [16] to estimate that fringe benefits are equal to 52 percent ($13.78 ÷ $26.45) of wages. For insurance claims processors, this regulatory impact analysis uses an average hourly wage of $33.93 and average hourly benefits of $16.92 for private industry workers in ''financial activities'' [17] to estimate that

[12] DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2021. 43–9041 Insurance Claims and Policy Processing Clerks. Available at: *https://www.bls.gov/oes/current/oes439041.htm* (accessed Jan. 5, 2023).

[13] This estimate is based on the calculations used in the ICR titled, ''Financial Responsibility Motor Carriers, Freight Forwarders and Brokers,'' covered by OMB Control Number 2126–0017.

[14] The supporting statement for the ''Financial Responsibility Motor Carriers, Freight Forwarders and Brokers'' ICR estimates Government costs for Forms BMC–91 and BMC–91X at $0, as they are filed electronically.

[15] DOL, BLS. *Occupational Employment and Wage Statistics (OEWS). National. May 2021.* Available at: *https://www.bls.gov/oes/current/oes_nat.htm/oesm21nat.zip* (accessed Apr. 12, 2022).

[16] DOL, BLS. *Table 4: Employer costs for Employee Compensation for private industry workers by occupation and industry group, Dec 2019.* Available at: *https://www.bls.gov/news.release/archives/ecec_03192020.pdf* (accessed Apr. 13, 2022).

[17] Ibid.

fringe benefits are equal to 50 percent ($16.92 ÷ $33.93) of wages.

For estimating the overhead rates on wages, the Agency used industry data gathered for the Truck Costing Model developed by the Upper Great Plains Transportation Institute, North Dakota State University as a proxy for the overhead cost of employees in the transportation intermediary and surety and trustee industries.[18] Research conducted for this model found an average cost of $0.107 per mile of commercial motor vehicle operation for management and overhead, and $0.39 per mile for labor, indicating an overhead rate of 27 percent (27 percent = $0.107 ÷ $0.39, rounded to the nearest whole percent).

It is assumed that FMCSA reviewers will be Federal Government employees located in the Washington DC region at the GS–9 Step 5 wage rate.[19] OPM does not publish annual rates that include fringe benefits or overhead. OMB does publish an object class analysis of the budget of the U.S. Government. The Object Class Analysis estimates that, in 2021, DOT spent $6,351 million in employee compensation and $2,840 million in employee benefits. FMCSA estimates a fringe benefit rate of 45 percent (2,840 ÷ 6,351) for FMCSA personnel. FMCSA uses the DOT Volpe Center overhead rate of 64 percent for Federal personnel.[20] The Volpe Center is a Federal fee-for-service research and innovation center in the DOT. Unlike most Federal agencies, Volpe receives no direct appropriation from Congress and must cover direct and indirect expenses through agreements with project sponsors.[21] [22] These indirect costs are recovered through the overhead rate charged on direct labor costs. Volpe employees are compensated according to the Federal locality pay tables used for all Federal employees and their labor costs include the same employee benefits. Therefore, FMCSA believes that the overhead rate for Volpe personnel is similar to the rate for all DOT personnel.

Insurance

In addition to submitting forms to FMCSA, providers of recreational activities wishing to maintain a valid operating authority registration must also have proof of liability insurance filed with FMCSA, as explained in section V of this NPRM. The Agency estimates that such liability insurance currently costs entities an average of $190 per month for one vehicle, or $2,280 per year ($190 × 12 = $2,280).[23] Using a range of fleet sizes for illustrative purposes, table 4 presents the estimated costs currently associated with maintaining liability insurance by fleet size. The Agency invites the public to provide additional information on these estimates.

TABLE 4—CURRENT INSURANCE ESTIMATES BY FLEET SIZE (2022$)

Number of vehicles in fleet	Monthly premium	Yearly premium
1	$190	$2,280
5	950	11,400
10	1,900	22,800

Scenario One: Increase in Exemption Use

Scenario One includes existing providers of recreational activities that have been eligible for the operating authority exemption established by section 23012 of the IIJA in 2021 but are not utilizing it due to the definitional ambiguity of *recreational activities.* Upon issuance of this rulemaking, such carriers would understand they classify as a provider of recreational activities and are, therefore, eligible for this exemption. This would lead to an incremental increase in the number of operational authority exemptions being used relative to the baseline. As explained in detail below, these carriers would be impacted in different ways by the following costs and cost savings: financial responsibility compliance costs, operating authority registration fees, and paperwork costs.

Financial Responsibility Under Scenario One

Carriers under Scenario One that are currently maintaining their operating authority registration year-round would experience cost savings associated with maintaining financial responsibility. As displayed in table 4, the Agency estimates that the liability insurance required for carriers to maintain operating authority registration costs an average of $2,280 per year for one vehicle. Carriers under this scenario would save on insurance costs during the months they are not in operation (such as off-season months). In other words, carriers operating one vehicle would only pay for the months they need to be insured instead of the full $2,280 per year, or $190 per month, to operate one vehicle.

The Agency estimates a range of annual insurance cost savings from $190 to $17,100, depending on the number of vehicles a carrier owns and the number of months they currently maintain operating authority. These estimates are derived by multiplying the monthly insurance premiums according to fleet size in table 4 by the number of months they operate per year. Therefore, if a carrier with one vehicle is currently operating for one month per year, their annual cost savings would be $190 (1 month of insurance premiums × 1 vehicle). If a carrier with 10 vehicles is currently operating for 9 months per year, their annual cost savings would be $1,900 multiplied by 9 months ($17,100).

To illustrate further, table 5 displays estimated insurance cost savings of this rulemaking for a carrier operating five vehicles, as a result of no longer incurring year-round insurance costs. For example, using the values from table 4, the Agency estimates that a carrier operating five vehicles currently pays an average of $950 per month, or $11,400 per year, to maintain liability insurance. If such a carrier only maintained operating authority for 3 months, their cost savings would be $8,550 per year ($950 × 3 months = $2,850. $2,850 − $11,400 = − $8,550).

TABLE 5—INSURANCE COSTS BY NUMBER OF MONTHS IN OPERATION: 5-VEHICLE FLEET (2022$)

Number of months in operation	Yearly premium for 5 vehicles	Cost savings
1	$950	($10,450)
3	2,850	(8,550)
9	8,550	(2,850)

Note: estimates may not total due to rounding.

[18] Berwick, Farooq. *Truck Costing Model for Transportation Managers.* North Dakota State University. Upper Great Plains Transportation Institute. August 2003. Appendix A, pp. 42–47. Available at: *http://www.mountain-plains.org/pubs/pdf/MPC03-152.pdf* (accessed Apr. 13, 2022).

[19] OPM Pay & Leave Salaries & Wages. Salary Table 2022–DCB, Hourly Basic (B) Rates by Grade and Step. Available at *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/22Tables/html/DCB_h.aspx* (accessed Jan. 5, 2023).

[20] DOT, Volpe Center. *Volpe Project Costs.* Available at: *http://www.volpe.dot.gov/work-with-us/volpe-project-costs* (accessed Apr. 9, 2022).

[21] DOT, Volpe Center. *How to Initiate Work.* Available at: *http://www.volpe.dot.gov/work-with-us/how-initiate-work* (accessed Apr. 13, 2022).

[22] DOT, Volpe Center. *Volpe Project Costs.* Available at: *http://www.volpe.dot.gov/work-with-us/volpe-project-costs* (accessed Apr. 13, 2022).

[23] Insuranks Online Insurance Comparison Marketplace. *https://www.insuranks.com/commercial-van-insurance* (accessed Oct. 31, 2022). These estimates are quoted from 12 different insurance companies, including Geico, Progressive, State Farm, and others. The monthly quotes were summed and then divided by 12 to obtain an estimated monthly average for the industry: ($115 + $120 + $130 + $183 + $165 + $180 + $195 + $210 + $221 + $232 + $254 + $270) ÷ 12 = $190.

There would also be cost savings as a result of avoided insurance-related administrative requirements. Currently, carriers must choose an insurance plan or other acceptable form of financial responsibility, and have proof filed with FMCSA whenever they apply for or reinstate operating authority. The Agency estimates that it takes carriers 8 hours to research and identify which insurance company, financial surety, or bond provider they will use. Assuming this task is performed by an office clerk, this activity is estimated to cost each carrier $255 ($31.90 × 8 hours = $255).[24] The Agency welcomes input from the public on the amount of time spent researching financial responsibility options.

As displayed in table 2, carriers under Scenario One were also required to ensure that their financial responsibility provider submit Forms BMC–91 or BMC–91X to FMCSA at a cost of $6 per form. These administrative requirements for insurance were no longer required after the enactment of the IIJA in 2021; therefore, the definitional clarification in this proposed rule may lead to cost savings of $255 to the carrier and $6 to the insurance company.

Voluntary Revocation Under Scenario One

As detailed in section V of this NPRM, some carriers under Scenario One were filing Form OCE–46 to voluntarily revoke their operating authority registrations during the off-season months so that they did not need to maintain insurance at the minimum prescribed levels during those months. To resume operations, the providers were then required to submit Form MCSA–5889 to reinstate their operating authority registrations during the months when they were operating. As displayed in tables 2 and 3, it is estimated to cost $8 to submit Form MCSA–5889, with a fee of $80 to carriers, and $18 to FMCSA.[25] Form OCE–46 is also estimated to cost $8 per carrier and $18 for FMCSA processing time.[26] As a result of this rulemaking, carriers under this scenario would no longer be subject to the costs associated with submitting Form MCSA–5889 or Form OCE–46.

Scenario Two: Decrease in Exemption Use

It is also possible that this rulemaking would limit the use of this exemption for certain carriers. Because neither FMCSA nor Congress provided a definition of *recreational activities,* there may be carriers that incorrectly believed they are providers of recreational activities, but upon issuance of this rulemaking, would realize they are not. These carriers may currently be incorrectly utilizing this exemption and revoking their operating authority when they were not eligible to do so. Therefore, such carriers may incur a cost of $88 to submit Form MCSA–5889 as a result of this rulemaking for reinstatement of their operating authority (table 2). They would also need to resume paying for financial responsibility in order to maintain valid operating authority. Illustrative examples of possible insurance-related costs are displayed in Tables 4 and 5. FMCSA invites public comment on the number of carriers that would no longer be using this exemption as a result of this rulemaking.

Scenario Three: No Incremental Change in Exemption Use

There may also be eligible carriers that correctly interpreted Congress' intent and have been utilizing the exemption correctly since the IIJA's enactment. These carriers are not expected to be impacted by this proposed rule relative to the baseline. They have already gone through the steps of voluntarily revoking their operating authority with FMCSA, are maintaining financial responsibility only while in operation, and are not paying fees or completing paperwork associated with maintaining operating authority.

Scenario Four: New Providers

This proposed rule may also affect eligible providers considering engaging in providing recreational activities in the future. If there are new carriers considering entering this field that were not aware of the IIJA exemption, they would no longer need to account for the following costs as a result of this rulemaking: year-round financial responsibility premiums, financial responsibility-related administrative costs, and operating authority fees and paperwork. The Agency invites public comment on the industry's trajectory and how many new entrants can be expected annually.

Prior to the enactment of the IIJA, new providers of recreational activities would have had to submit the ''Application for Motor Passenger Carrier Authority'' (Form OP–1(P)).[27] The Agency estimates that this form costs $64 with a $300 fee for carriers, and $457 in Government costs (Tables 2 and 3, respectively).[28] Additionally, as described in the *Financial Responsibility Under Scenario One* section, the avoided insurance-related administrative costs would be $6 for insurance companies and $255 for carriers. An illustrative example of potential avoided insurance premium costs is presented in table 5.

Government Costs

These changes would not require additional training for enforcement personnel. The Agency expects that the definitional clarification set forth in this NPRM would be communicated to FMCSA personnel and the Agency's State-based enforcement partners through existing means, such as policy updates and ongoing training. The Agency would be impacted by the costs and cost savings associated with this NPRM, as outlined in table 3 ($457 for Form OP–1(P), $18 for Form OCE–46 and Form MCSA–5889).

Benefits

The affected entities would be providers of recreational activities that typically consist of physically demanding outdoor experiences or excursions that do not have transportation as an integral part of the activity itself. Overall, the outdoor recreation economy accounted for 1.9 percent ($454 billion) of current-dollar gross domestic product (GDP) for the nation in 2021. Hawaii, Montana, Vermont, Alaska, and Maine are among the States where outdoor recreation as a percent of that States' GDP ranks the highest. For example, in 2021, outdoor recreation accounted for $4.4 billion of Hawaii's $91.1 billion overall GDP, or 4.8 percent—the highest proportion of any State. In terms of actual levels, the States that produced the highest outdoor recreation GDP in 2021 were California ($54.7 billion), Florida ($41.9 billion), and Texas ($37.5 billion).

[24] DOL, BLS. Occupational Employment and Wage Statistics (OEWS). National. May 2021. 43–9061 Office Clerks, General. Available at: *https://www.bls.gov/oes/current/oes439061.htm* (accessed Jan. 5, 2023).

[25] This estimate is based on the calculations used in the ICR titled, ''Motor Carrier Records Change Form'' (Form MCSA–5889), covered by OMB Control Number 2126–0060. The cost of a paper submission is $6 and the cost of an electronic submission is $0.

[26] This estimate is based on the calculations used in the ICR titled ''Request for Revocation of Authority Granted,'' covered by OMB Control Number 2126–0018.

[27] Applicants that have never held a USDOT number or any other registration issued by FMCSA must file the URS online application (Form MCSA–1) to obtain a USDOT number and register for operating authority.

[28] This estimate is based on calculations used in the ICR titled ''Licensing Applications for Motor Carrier Operating Authority,'' covered by OMB Control Number 2126–0016.

Differences in interpretation between regulated entities and enforcement officials may be hindering consistent enforcement practices, thereby impacting business-related decisions in providing transportation for recreational activities. This rulemaking would resolve this information asymmetry by creating a common understanding between FMCSA and motor carriers. Because this rulemaking may also lead to an increase in exemption use, it would benefit existing carriers by improving the efficiency of their business operations and increasing both consumer and producer surplus.

For new potential providers of recreational activities that were not aware of this exemption, this rulemaking may encourage new entrants into the field. The costs of maintaining year-round financial responsibility and paying registration fees may have posed a barrier to entry that discouraged some entities from participating in this industry. Therefore, this proposed rule may introduce new businesses into the field, increase competition and market efficiency, and benefit consumers by creating more options when choosing a provider of recreational activities.

B. Congressional Review Act

This proposed rule is not a *major rule* as defined under the Congressional Review Act (5 U.S.C. 801–808).[29]

C. Advance Notice of Proposed Rulemaking

Under 49 U.S.C. 31136(g), FMCSA is required to publish an advance notice of proposed rulemaking (ANPRM) or proceed with a negotiated rulemaking, if a proposed rule is likely to lead to the promulgation of a major rule. As this proposed rule is not likely to result in the promulgation of a major rule, the Agency is not required to issue an ANPRM or to proceed with a negotiated rulemaking.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, Public Law 96–354, 94 Stat. 1164 (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, March 29, 1996) and the Small Business Jobs Act of 2010 (Pub. L. 111–240, 124 Stat. 2504, September 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. Accordingly, DOT policy requires an analysis of the impact of all regulations on small entities, and mandates that agencies strive to lessen any adverse effects on these businesses. FMCSA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FMCSA is publishing this initial regulatory flexibility analysis (IRFA) to aid the public in commenting on the potential small business impacts of the proposals in this NPRM. We invite all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. We will consider all comments received in the public comment process when making a determination in the final regulatory flexibility analysis.

An IRFA must contain the following:

1. a description of the reasons why the action by the agency is being considered;
2. a succinct statement of the objective of, and legal basis for, the proposed rule;
3. a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
4. a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. an identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.
6. a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.

1. Why the Action by the Agency is Being Considered

Section 23012 of the IIJA amended 49 U.S.C. 13506 by adding a new exemption in paragraph (b)(4) from the operating authority registration requirements. FMCSA is proposing to add a new regulatory section incorporating that statutory exemption and also including a definition for the exempt operations. The exemption from operating authority registration applies to motor carriers operating a motor vehicle designed or used to transport not fewer than 9, and not more than 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. The new statutory exemption did not include a definition of recreational activities, creating some ambiguity in the exemption's applicability. The Agency is proposing to codify the exemption in regulation and to remove ambiguity by defining the term.

2. The Objectives of and Legal Basis for the Proposed Rule

As discussed in section 1 of this IRFA, FMCSA is proposing to add a new regulatory section incorporating the statutory exemption in 49 U.S.C. 13506 that was added by section 23012 of the IIJA (see 49 U.S.C. 13506(b)(4)). The statutory provision, which relates to operating authority registration and requires, in part, that the motor vehicle be operated ''by a person that provides recreational activities,'' does not define *recreational activities.* This NPRM proposes to define *recreational activities* to clarify the scope of the exemption applicability.

The FMCSA Administrator has the authority to carry out the functions relating to the registration requirements in 49 U.S.C. 13901 and 13902, as delegated by the Secretary under § 1.87(a)(5). The requirements of these sections, which are enforced under § 392.9a (''Operating authority''), are the basis for the rules governing applications for operating authority registration in 49 CFR part 365.

3. A Description of, and Where Feasible an Estimate of, the Number of Small Entities to Which the Proposed Rule Will Apply

Small entity is defined in 5 U.S.C. 601. Section 601(3) defines a *small entity* as having the same meaning as *small business concern* under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4), likewise includes within the definition of *small entities* not-for-profit enterprises that are independently owned and operated and are not dominant in their fields of operation. Additionally, section 601(5) defines

[29] A *major rule* means any rule that OMB finds has resulted in or is likely to result in (a) an annual effect on the economy of $100 million or more; (b) a major increase in costs or prices for consumers, individual industries, geographic regions, Federal, State, or local government agencies; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (§ 389.3).

small entities as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

This NPRM would affect providers of recreational activities to motor carriers operating a motor vehicle designed or used to transport not fewer than 9, and not more than 15 passengers (including the driver) whether operated alone or with a trailer attached to the transport vehicle, if the motor vehicle is operated by a person that provides recreational activities and the transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip. Providers of recreational activities affected by this proposed rule operate under many different North American Industry Classification System [30] (NAICS) codes with differing size standards. FMCSA provides a wide range of NAICS codes in the recreational activities industry, in order to capture all of the potential NAICS codes that providers of recreational activities may operate under. In doing so, FMCSA is highlighting many entities that perform various other functions beyond transporting passengers to and from recreational activities. As shown in table 6 below, the SBA size standard for providers of recreational activities ranges from $8 million in revenue per year for the All Other Amusement Recreation Industries NAICS national industry, to $41.5 million in revenue per year for Tour Operators and Racetracks.

TABLE 6—SBA SIZE STANDARDS FOR SELECTED INDUSTRIES

[in millions of 2019$]

NAICS code	NAICS industry description	SBA size standard in millions
	Subsector 487—Scenic and Sightseeing Transportation	
487110	Scenic and Sightseeing Transportation, Land	$18
487210	Scenic and Sightseeing Transportation, Water	12.5
487990	Scenic and Sightseeing Transportation, Other	22
	Subsector 561—Administrative and Support Services	
561520	Tour Operators	41.5
	Subsector 711—Performing Arts, Spectator Sports, and Related Industries	
711212	Racetracks	41.5
711219	Other Spectator Sports	14.5
	Subsector 713—Amusement, Gambling, and Recreation Industries	
713910	Golf Courses and Country Clubs	16.5
713920	Skiing Facilities	31.0
713940	Fitness and Recreational Sports Centers	15.5
713990	All Other Amusement Recreation Industries	8.0

FMCSA examined data from the 2017 Economic Census, the most recent Census for which data were available, to determine the percentage of firms that have revenue at or below SBA's thresholds within each of the NAICS industries.[31] Boundaries for the revenue categories used in the Economic Census do not exactly coincide with the SBA thresholds. Instead, the SBA threshold generally falls between two different revenue categories. However, FMCSA was able to make reasonable estimates as to the percent of small entities within each NAICS code.

The Agency estimates that many entities affected by this NPRM may fall under the Scenic and Sightseeing Transportation NAICS subsector (487). Firms in this subsector utilize transportation equipment to provide recreation and entertainment. These operations are distinct from passenger transportation carried out for other types of for-hire transportation. The recreational activities involved are local in nature, usually involving a same-day return to the point of departure.[32] Industry groups under this subsector include Scenic and Sightseeing Transportation, Land (4871), Scenic and Sightseeing Transportation, Water (4872), and Scenic and Sightseeing Transportation, Other (4879).

The Scenic and Sightseeing Transportation, Land NAICS national industry (487110) has a revenue size standard of $18 million, which falls between two Economic Census revenue categories, $10 million and $25 million. This industry comprises firms engaged in various outdoor excursions, including horse-drawn sightseeing rides. The percentages of Scenic and Sightseeing Transportation, Land with revenue less than these amounts ranged from 97 percent to 98 percent. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of Scenic and Sightseeing Transportation, Land entities that are small will be closer to 98 percent and is using that figure.

For Scenic and Sightseeing Transportation, Water (487210), the $12.5 million SBA threshold falls between two Economic Census revenue categories, $10 million and $25 million. Entities in this national industry are primarily engaged in providing scenic and sightseeing transportation on water, such as fishing boat charter operation. The percentages of Scenic and Sightseeing Transportation, Water with revenue less than these amounts ranged from 97 percent to 99 percent. Because

[30] More information about NAICS is available at: *http://www.census.gov/eos/www/naics/* (accessed Dec. 21, 2022).

[31] U.S. Census Bureau. *2017 Economic Census.* Available at: *https://data.census.gov/cedsci/table?q=EC17008&n=48-49&tid=ECNSIZE2017.EC1700SIZEREVEST&hidePreview=true* (accessed Dec. 18, 2022).

[32] US Census Bureau 2022 NAICS Definition. Available at *https://www.census.gov/naics/?input=48&year=2022&details=487* (accessed Jan. 5, 2023).

the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 97 percent and is using that figure.

Scenic and Sightseeing Transportation, Other (487990) focuses on all other scenic and sightseeing transportation, such as hot air balloon rides and glider excursions. The SBA size standard for this national industry is $22 million. The $22 million SBA threshold falls between two Economic Census revenue categories, $10 million and $25 million. The percentages of these entities with revenue less than these amounts were 93 percent and 98 percent. Because the SBA threshold is closer to the higher of these two boundaries, FMCSA has assumed that the percent of these providers that are small will be closer to 98 percent and is using that figure.

Firms falling under the Travel Arrangement and Reservation Services industry group (5615) may also be impacted by this NPRM. This industry group comprises the Travel Agencies (561510), Tour Operators (561520), and Convention and Visitors Bureaus (561591) national industries.[33] The Agency assumes that providers of recreational activities fall under the Tour Operators national industry.

Tour Operators (561520) focuses on arranging and assembling tours, including travel or wholesale tour operators. The SBA size standard for this national industry is $41.5 million, which falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of Tour Operators with revenue less than these amounts were 92 percent and 100 percent. The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than $100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the $41.5 million SBA threshold and would be considered small. The low-end estimate assumes the suppressed firms are not small. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Tour Operators that is small will be closer to 92 percent and is using that figure.

The Agency estimates that many providers of recreational activities affected by this NPRM would also fall under the Arts, Entertainment, and Recreation sector (71). This sector includes a wide range of firms operating facilities that meet varied cultural, entertainment, and recreational interests of patrons.[34] Subsectors under this group include Performing Arts, Spectator Sports, and Related Industries (711), Amusement, Gambling, and Recreational Industries (713), and others.

The industry groups under the Spectator Sports and Related Industries (711) subsector cover Spectator Sports (7112). Spectator Sports includes the Racetracks (711212) and Other Spectator Sports (711219) national industries.

The Racetracks national industry (711212) focuses on firms operating racetracks without casinos, such as auto, motorcycle, snowmobile, and horse races. The SBA size standard for this national industry is $41.5 million. The $41.5 million SBA threshold falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of these entities with revenue less than these amounts were 83 percent and 100 percent.[35] Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Racetracks entities that are small will be closer to 83 percent and is using that figure.

Other Spectator Sports (711219) focuses on independent athletes, owners of racing participants (such as cars, dogs, and horses), and firms engaged in specialized services in support of said participants. The SBA size standard for this national industry is $14.5 million, which falls between two Economic Census revenue categories, $10 million and $25 million. The percentages of these entities with revenue less than these amounts were 82 percent and 100 percent.[36] Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of Other Spectator Sports entities that are small will be closer to 82 percent and is using that figure.

The industry groups under the Amusement, Gambling, and Recreation Industries (713) subsector include Amusement Parks and Arcades (7131), Gambling Industries (7132), and Other Amusement and Recreation Industries (7139).[37] The Agency estimates the entities affected by this NPRM would fall into the third industry group, Other Amusement and Recreation Industries (7139). This group, as detailed below, covers firms operating golf courses and country clubs, skiing facilities, and all other amusement and recreation activities.[38]

Entities falling under Golf Courses and Country Clubs (713910) primarily engage in operating such facilities, and providing food and beverage services, equipment rental, or golf instruction. The SBA size standard for this national industry is $16.5 million, which falls between two Economic Census revenue categories, $10 million and $25 million. The percentages of Golf Courses and Country Clubs with revenue less than these amounts were 95 percent and 99 percent. Because the SBA threshold is closer to the lower of these two boundaries, FMCSA has assumed that the percent of these entities that are small will be closer to 95 percent and is using that figure.

Skiing Facilities (713920) industries primarily operate downhill, cross country, or related skiing areas, and provide food and beverage services, equipment rental, and ski instruction. The SBA size standard for this national industry is $31 million, which falls between two Economic Census revenue categories, $25 million and $100 million. The percentages of Skiing Facilities with revenue less than these amounts were 93 percent and 98 percent.[39] Because the SBA threshold is

[33] U.S. Census Bureau 2022 NAICS Definition. Available at *https://www.census.gov/naics/?input=56&year=2022&details=5615* (accessed Jan. 5, 2023).

[34] U.S. Census Bureau 2022 NAICS Definition. Available at *https://www.census.gov/naics/?input=71&year=2022&details=71* (accessed Jan. 5, 2023)

[35] The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than $100,000, which would be considered small, are suppressed by the Economic Census to avoid disclosing for individual companies. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the $41.5 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

[36] The Agency presents a high-end estimate of 100 percent due to limitations in Economic Census data availability. Revenue data for firms with revenue less than $100,000, which would be considered small, are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the $14.5 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

[37] U.S. Census Bureau 2022 NAICS Definition. Available at *https://www.census.gov/naics/?input=71&year=2022&details=713* (accessed Jan. 5, 2023).

[38] U.S. Census Bureau 2022 NAICS Definition. Available at *https://www.census.gov/naics/?input=71&year=2022&details=7139* (accessed Jan. 5, 2023).

[39] The Agency presents a high-end estimate of 98 percent which includes assumptions about limitations in Economic Census data. Some revenue data for firms that would be considered small

Continued

closer to the lower of these two boundaries, FMCSA has assumed that the percent of these facilities that are small will be closer to 93 percent and is using that figure.

The Agency estimates that the majority of entities affected by this NPRM would fall under the All Other Amusement Recreation Industries national industry (713990). This includes whitewater rafting, hunting, horseback riding stables, boating clubs, canoeing, archery and shooting ranges, hiking, and others. The SBA size standard for this national industry is $8 million. The $8 million SBA threshold falls between two Economic Census revenue categories, $5 million and $10 million. The percentages of these providers with revenue less than these amounts were 60 percent and 99.6 percent. The Agency estimates a wide range in estimates due to limitations in Economic Census data for this NAICS category. Specifically, of the 12,688 firms in this industry, 12,631 have revenue between $100,000 and $10 million. However, data on small entities with revenue under $250,000 are suppressed. There are 7,490 small entities (59 percent) with revenue between $250,000 and $5 million, and 139 firms with revenue between $5 million and $10 million (1.1 percent). Of the 12,688 firms in All Other Amusement Recreation Industries, there are firms 5,002 without revenue data (39.4 percent). The high-end estimate assumes all such firms are small (99.6 percent) and FMCSA is using that figure.

Table 7 below shows the complete estimates of the number of small entities within the national industries that may be affected by this rulemaking.

TABLE 7—ESTIMATES OF NUMBERS OF SMALL ENTITIES

NAICS code	Description	Total number of firms	Number of small entities	Percent of all firms (%)
487110	Scenic and Sightseeing Transportation, Land	520	512	98
487210	Scenic and Sightseeing Transportation, Water	1,129	1,097	97
487990	Scenic and Sightseeing Transportation, Other	169	165	98
561520	Tour Operators	2,175	1,991	92
711212	Racetracks	299	248	83
711219	Other Spectator Sports	1,916	1,577	82
713910	Golf Courses and Country Clubs	8,076	7,712	95
713920	Skiing Facilities	203	189	93
713990	All Other Amusement Recreation Industries	12,688	7,629	60

4. A Description of the Proposed Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

This proposed rule would not result in new recordkeeping requirements.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FMCSA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

Given that the recreational activities exemption was statutorily mandated, FMCSA did not have an alternative or discretion as to whether to adopt the exemption but did consider whether to propose a definition of the term *recreational activities* or to remain silent. FMCSA also considered the alternative of adding a definition without including specific examples. However, FMCSA believes that remaining silent or proposing a definition without specific examples could result in confusion or inconsistent enforcement and that it was better to propose a definition with examples consistent with the legislative intent to minimize any significant economic impact on small entities.

7. Description of Steps Taken by a Covered Agency To Minimize Costs of Credit for Small Entities

FMCSA is not a covered agency as defined in section 609(d)(2) of the Regulatory Flexibility Act and has taken no steps to minimize the additional cost of credit for small entities.

8. Requests for Comment To Assist Regulatory Flexibility Analysis

FMCSA requests comments on all aspects of this initial regulatory flexibility analysis.

E. Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FMCSA wants to assist small entities in understanding this proposed rule so they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

Small businesses may send comments on the actions of Federal employees who enforce or otherwise determine compliance with Federal regulations to the Small Business Administration's Small Business and Agriculture Regulatory Enforcement Ombudsman (Office of the National Ombudsman, see *https://www.sba.gov/about-sba/oversight-advocacy/office-national-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 FMCSA, call 1–888–REG–FAIR (1–888–734–3247). DOT has a policy regarding the rights of small entities to regulatory enforcement

(revenue categories of $100,000 or more and $250,000 to $499,999) are suppressed by the Economic Census. Because the Agency is unable to ascertain the revenue for the suppressed firms, the high-end estimate assumes that such firms may fall under the $31 million SBA threshold. The low-end estimate assumes the suppressed firms are not small.

fairness and an explicit policy against retaliation for exercising these rights.

F. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires Federal agencies to assess the effects of their discretionary regulatory actions. 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 $178 million (which is the value equivalent of $100 million in 1995, adjusted for inflation to 2021 levels) or more in any 1 year. Though this NPRM would not result in such an expenditure, and the analytical requirements of UMRA do not apply as a result, the Agency discusses the effects of this proposed rule elsewhere in this preamble.

G. Paperwork Reduction Act

This proposed rule contains no new information collection requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

H. E.O. 13132 (Federalism)

A rule has implications for federalism under section 1(a) of E.O. 13132 if it has ''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.'' FMCSA has determined that this proposed rule would not have substantial direct costs on or for States, nor would it limit the policymaking discretion of States. Nothing in this document preempts any State law or regulation. Therefore, this proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Impact Statement.

I. Privacy

The Consolidated Appropriations Act, 2005,[40] requires the Agency to assess the privacy impact of a regulation that will affect the privacy of individuals. This NPRM would not require the collection of personally identifiable information.

The Privacy Act (5 U.S.C. 552a) applies only to Federal agencies and any non-Federal agency that receives records contained in a system of records from a Federal agency for use in a matching program.

The E-Government Act of 2002,[41] requires Federal agencies to conduct a Privacy Impact Assessment (PIA) for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would collect, maintain, or disseminate information as a result of this rulemaking. Accordingly, FMCSA has not conducted a PIA.

In addition, the Agency submitted a Privacy Threshold Assessment (PTA) to evaluate the risks and effects the proposed rulemaking might have on collecting, storing, and sharing personally identifiable information. The DOT Privacy Office has determined that this rulemaking does not create privacy risk.

J. E.O. 13175 (Indian Tribal Governments)

This proposed rule does not have Tribal implications under E.O. 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.

K. National Environmental Policy Act of 1969

FMCSA analyzed this proposed rule pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined this action is categorically excluded from further analysis and documentation in an environmental assessment or environmental impact statement under FMCSA Order 5610.1 (69 FR 9680), Appendix 2, (6)(b). The categorical exclusion (CE) in paragraph (6)(b) covers regulations which are editorial or procedural, such as, those updating addresses or establishing application procedures, and procedures for acting on petitions for waivers, exemptions and reconsiderations, including technical or other minor amendments to existing FMCSA regulations. The proposed requirements in this rule are covered by this CE, there are no extraordinary circumstances present, and the proposed action does not have the potential to significantly affect the quality of the environment.

[40] Public Law 108–447, 118 Stat. 2809, 3268, note following 5 U.S.C. 552a (Dec. 4, 2014).

[41] Public Law 107–347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002).

List of Subjects in 49 CFR Part 372

Agricultural commodities, Buses, Cooperatives, Freight forwarders, Motor carriers, Moving of household goods, Seafood.

Accordingly, FMCSA proposes to amend 49 CFR part 372 as follows:

PART 372—EXEMPTIONS, COMMERCIAL ZONES, AND TERMINAL AREAS

■ 1. The authority citation for part 372 continues to read as follows:

Authority: 49 U.S.C. 13504 and 13506; Pub. L. 105–178, sec. 4031, 112 Stat. 418; and 49 CFR 1.87.

■ 2. Amend § 372.107 by adding paragraph (i) to read as follows:

§ 372.107 Definitions.

* * * * *

(i) *Recreational activities.* The term recreational activities means activities consisting of an outdoor experience or excursion typically of a physical or athletic nature which require transportation for the sole purpose of moving customers to another location or locations where the outdoor experience or excursion will take place and collecting those customers to transport them back to the place of initial boarding or another outpost of the motor carrier. Recreational activities include but are not limited to hiking, biking, horseback riding, canoeing, whitewater rafting, water trails, tubing, skiing, snowshoeing, snowmobiling, hunting, fishing, mountain climbing, and swimming. The term does not include any activity for which:

(1) The activity offered or sold is occurring simultaneously with the transportation; or

(2) For which the transportation is the primary service offered for sale.

■ 3. Add § 372.113 to read as follows:

§ 372.113 Providers of recreational activities.

Transportation by a motor vehicle designed or used to transport not fewer than 9, and not more than 15, passengers (including the driver), whether operated alone or with a trailer attached for the transport of recreational equipment, is exempted from regulation promulgated pursuant to part B of title 49 U.S.C. subtitle IV if:

(a) The motor vehicle is operated by a person that provides recreational activities;

(b) The transportation is provided within a 150 air-mile radius of the location at which passengers initially boarded the motor vehicle at the outset of the trip; and

(c) In the case of a motor vehicle transporting passengers over a route between a place in a State and a place in another State, the person operating the motor vehicle is lawfully providing transportation of passengers over the entire route in accordance with applicable State law.

Issued under authority delegated in 49 CFR 1.87.

Robin Hutcheson,

Administrator.

[FR Doc. 2023–13081 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2022–0179; FF09E21000 FXES1111090FEDR 234]

RIN 1018–BE93

Endangered and Threatened Wildlife and Plants; Endangered Species Status for Southern Elktoe and Designation of Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to list the southern elktoe (*Alasmidonta triangulata*), a freshwater mussel species endemic to the Apalachicola-Chattahoochee-Flint Basin of Alabama, Georgia, and Florida, as an endangered species and designate critical habitat under the Endangered Species Act of 1973, as amended (Act). This determination also serves as our 12-month finding on a petition to list the southern elktoe. After a review of the best available scientific and commercial information, we find that listing the species is warranted. Accordingly, we propose to list the southern elktoe as an endangered species under the Act. We also propose to designate critical habitat for the southern elktoe under the Act. In total, approximately 578 river miles (929 river kilometers) in Russell County, Alabama; Calhoun, Franklin, Gadsden, Gulf, Jackson, and Liberty Counties, Florida; and Baker, Coweta, Crawford, Decatur, Dooly, Dougherty, Fayette, Harris, Macon, Meriwether, Mitchell, Peach, Pike, Spalding, Sumter, Talbot, Taylor, and Upson Counties, Georgia, fall within the boundaries of the proposed critical habitat designation. We announce the availability of a draft economic analysis of the proposed designation of critical habitat for southern elktoe. If we finalize this rule as proposed, it would add this species to the List of Endangered and Threatened Wildlife and extend the Act's protections to the species and its critical habitat.

DATES: We will accept comments received or postmarked on or before August 21, 2023. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by August 7, 2023.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–R4–ES–2022–0179, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.''

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–R4–ES–2022–0179, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Information Requested, below, for more information).

Availability of supporting materials: For the proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file and are available at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2022–0179. The species status assessment (SSA) report is also available in the docket on *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Lourdes Mena, Florida Classification and Recovery Division Manager, U.S. Fish and Wildlife Service, Florida Ecological Services Field Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256–7517; telephone 904–731–3134. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species warrants listing if it meets the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) or a threatened species (likely to become endangered within the foreseeable future throughout all or a significant portion of its range). If we determine that a species warrants listing, we must list the species promptly and designate the species' critical habitat to the maximum extent prudent and determinable. We have determined that the southern elktoe meets the definition of an endangered species; therefore, we are proposing to list it as such and proposing a designation of its critical habitat. Both listing a species as an endangered or threatened species and designating critical habitat can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 *et seq.*).

What this document does. We propose to list the southern elktoe as an endangered species, and we propose the designation of critical habitat for the species.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The primary threat to the southern elktoe is habitat loss and degradation (Factor A) resulting from increased sedimentation, degraded water quality, insufficient water quantity, and loss of habitat connectivity.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological

features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impacts of specifying any particular area as critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) The species' biology, range, and population trends, including:

(a) Biological or ecological requirements of the species, including habitat requirements for feeding, breeding, and sheltering;

(b) Genetics and taxonomy;

(c) Historical and current range, including distribution patterns;

(d) Historical and current population levels, and current and projected trends; and

(e) Past and ongoing conservation measures for the species, its habitat, or both.

(2) Factors that may affect the continued existence of the species, which may include habitat modification or destruction, overutilization, disease, predation, the inadequacy of existing regulatory mechanisms, or other natural or manmade factors.

(3) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to this species and existing regulations that may be addressing those threats.

(4) Additional information concerning the historical and current status, range, distribution, and population size of this species, including the locations of any additional populations of this species.

(5) Specific information on:

(a) The amount and distribution of southern elktoe habitat;

(b) Any additional areas occurring within the range of the species, the Apalachicola, Chattahoochee, Flint, and Chipola river basins in Georgia, Florida, and Alabama, that should be included in the designation because they (i) are occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations, or (ii) are unoccupied at the time of listing and are essential for the conservation of the species; and

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) To evaluate the potential to include areas not occupied at the time of listing, we particularly seek comments regarding whether occupied areas are adequate for the conservation of the species. Additionally, please provide specific information regarding whether or not unoccupied areas would, with reasonable certainty, contribute to the conservation of the species and contain at least one physical or biological feature essential to the conservation of the species. We also seek comments or information regarding whether areas not occupied at the time of listing qualify as habitat for the species.

(6) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(7) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(8) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and any additional information regarding probable economic impacts that we should consider.

(9) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act. If you think we should exclude any additional areas, please provide information supporting a benefit of exclusion.

(10) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(1)(A) of the Act directs that determinations as to whether any species is an endangered or a threatened species must be made solely on the basis of the best scientific and commercial data available, and section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov.*

Because we will consider all comments and information we receive during the comment period, our final determinations may differ from this proposal. Based on the information we receive (and any comments on that new information), we may conclude that the species is threatened instead of endangered, or we may conclude that the species does not warrant listing as either an endangered species or a threatened species. For critical habitat, our final designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the **Federal Register**. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On April 20, 2010, we received a petition from the Center for Biological Diversity (CBD), Alabama Rivers Alliance, Clinch Coalition, Dogwood Alliance, Gulf Restoration Network, Tennessee Forests Council, and West Virginia Highlands Conservancy (referred to below as the CBD petition) to list 404 aquatic, riparian, and wetland species, including the southern elktoe, as endangered or threatened species under the Act. On September 27, 2011, we published a 90-day finding that the petition contained substantial information indicating listing may be warranted for the species (76 FR 59836). This document serves as our 12-month finding on the April 20, 2010, petition.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the southern elktoe. The SSA team was composed of Service biologists, in consultation with other scientists with southern elktoe expertise. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we solicited independent scientific review of the information contained in the southern elktoe SSA report. We sent the SSA report to four independent peer reviewers and received responses from two. Results of this structured peer review process can be found at *https://regulations.gov.* In preparing this proposed rule, we incorporated the results of these reviews, as appropriate, into the SSA report, which is the foundation for this proposed rule.

Summary of Peer Reviewer Comments

As discussed under Peer Review, above, we received comments from two peer reviewers on the draft SSA report. We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer reviewers generally concurred with our methods and conclusions, and provided additional information, clarifications, and suggestions that were incorporated into the SSA report. No substantive changes to our analysis and conclusions within the SSA report were deemed necessary, and peer reviewer comments are addressed in version 1.1 of the SSA report.

I. Proposed Listing Determination

Background

A thorough review of the taxonomy, life history, and ecology of the southern elktoe (*Alasmidonta triangulata*) is presented in the SSA report (version 1.1; Service 2022, pp. 17–25).

The southern elktoe (*Alasmidonta triangulata;* Lea 1858) is a medium-sized freshwater mussel that reaches up to 70 millimeters (mm) (2.8 inches (in)) in length. The southern elktoe has a moderately thin and somewhat triangular shell. Adults are olive brown to black in color, usually with obscured rays; juveniles are typically yellowish brown to olive, often with dark green rays. The species can be distinguished by its moderately to highly inflated shell, sharp posterior ridge, and umbo (*i.e.,* hinge area of shell which is elevated well above the hinge line of the shell) (Williams et al. 2014, p. 132).

The southern elktoe is endemic to the Apalachicola, Chattahoochee, and Flint River (ACF) basins of Alabama, Florida, and Georgia. Although surveys since 2000 have documented the species as extant in all four large river basins of the ACF Basin (Apalachicola River, Chipola River, Chattahoochee River, and the Flint River), the southern elktoe is considered very rare in distribution (Clench and Turner 1956, entire; Brim Box and Williams 2000, entire). In the ACF Basin, the southern elktoe inhabits permanently flowing creeks and rivers with natural hydrologic regimes. The species most often occurs in areas with slow current along stream margins and prefers deposition habitats consisting of mixtures of silty mud, sand, and gravel. Unlike other freshwater mussel species, the southern elktoe does not occur in dense beds (Williams 2015, p. 3).

The southern elktoe, like other freshwater mussels, has a complex life history involving an obligate parasitic larval life stage that is dependent on a suitable host fish. During reproduction, males release sperm into the water column, females take up the sperm, and the sperm fertilizes eggs held in the female. The developing larvae (glochidia) remain in the female's gill chamber until they mature and are ready to be released. This reproductive strategy requires that adult mussels of both sexes be in proximity to one another; additionally, fish host presence must overlap with brooding mussels to allow infestation. A reproductive study found that southern elktoe, like other *Alasmidonta* species (*e.g., A. arcula*), use host fish species from the sucker family, Catostomidae, as primary glochidial hosts (Fobian et al. 2018, p. 9).

Adult freshwater mussels are suspension-feeders and filter particles from the water column. Mussels may also obtain food by deposit feeding using cilia on their foot to move food particles into the shell. Mussel diets consist of a mixture of algae, bacteria, detritus, and microscopic animals.

Little is known about growth or longevity of southern elktoe; therefore, we rely on information for closely related species to help summarize characteristics of this species. Species in the tribe Andontini, which includes the southern elktoe, generally share the following traits: moderate to high growth rate, moderate life span, early maturity, and low to moderate fecundity. Typically, species of *Alasmidonta* reach maximum ages of 10–18 years and mature at 2–3 years (Haag and Rypel 2011, p. 239; Haag 2012, pp. 210–214).

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for endangered and threatened species. In 2019, jointly with the National Marine Fisheries Service, the Service issued a final rule that revised the regulations in 50 CFR part 424 regarding how we add, remove, and reclassify endangered and threatened

species and the criteria for designating listed species' critical habitat (84 FR 45020; August 27, 2019). On the same day, the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (84 FR 44753; August 27, 2019).

The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the species' expected response and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term ''foreseeable future'' extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies.

To assess southern elktoe's viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency is the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy is the ability of the species to withstand catastrophic events (for example, droughts, large pollution events), and representation is the ability of the species to adapt to both near-term and long-term changes in its physical and biological environment (for example, climate conditions, pathogens). In general, species viability will increase with increases in resiliency, redundancy, and representation (Smith et al. 2018, p. 306). Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. Throughout all of these stages, we used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS–R4–ES–2022–0179 on *https://www.regulations.gov.*

Summary of Biological Status and Threats

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

Species Needs

We assessed the best available information for the southern elktoe to identify the physical and biological needs to support individual fitness at all life stages (Service 2022, pp. 11–15). When information specific to the southern elktoe is not available, we rely on generalized freshwater mussel literature, as well as information on six other ACF Basin freshwater mussel species listed under the Act (fat threeridge (*Amblema neislerii*), shinyrayed pocketbook (*Hamiota subangulata*), Gulf moccasinshell (*Medionidus penicillatus*), oval pigtoe (*Pleurobema pyriforme*), Chipola slabshell (*Elliptio chipolaensis*), and purple bankclimber (*Elliptoideus sloatianus*); see 63 FR 12664; March 16, 1998). Note that the Ochlockonee moccasinshell (*Medionidus simpsonianus*) was also included in that rule but does not occur in the ACF Basin. In the remainder of this document, we will refer to the six species collectively as ''the listed ACF mussels.''

Important habitat components for the southern elktoe, derived from the listed ACF mussels, are permanently flowing water and geomorphologically stable stream channels. Adequate flow levels are required to deliver oxygen, enable passive reproduction, transport food items to the sedentary juvenile and adult mussels, remove wastes and fine sediments, and maintain good water quality. Further, to maintain mussel populations over time, a natural flow regime (including magnitude, frequency, duration, and seasonality of discharge) is critical for the exchange of nutrients, movement and spawning activities of fish hosts, and maintenance of instream habitats. The southern elktoe is dependent upon stable stream channels with areas with low shear stress so that sediments on the stream bottom remain stable during high flow events.

Each life stage (fertilized egg, glochidia, juvenile, and adult) has specific resource and life-history requirements that must be met to survive. The primary requirements for all life stages of the southern elktoe are flowing waters with a moderate temperature (generally, less than 32 degrees Celsius (°C)), adequate dissolved oxygen (generally, greater than 5.0 milligrams per liter (mg/L)), and good water quality. Early life stages are uniformly sensitive to many chemical compounds including ammonia, heavy metals, pharmaceuticals, and some commonly used pesticides and surfactants. In order for eggs to be fertilized, they require mature males upstream from mature females with suitable flows for fertilization to occur. Fertilized eggs require low to moderate levels of suspended solids and appropriate spawning temperatures. Glochidia require the presence of catostomid host fish and suitable water levels to permit host-glochidia interactions. Juvenile and adult needs are similar and include areas with low shear stress, substrates consisting of stable sand and gravel free from excessive silt, and the presence of adequate food availability (bacteria, algae, diatoms, detritus) in the water column.

The southern elktoe requires the presence of host fishes to complete its life cycle. In host fish trials, southern elktoe glochidia primarily metamorphosed on species of the sucker family, Catostomidae (Fobian et al. 2018, p. 9). Several species from the sucker family are found in the ACF Basin, but detailed studies on local ecology or population trends of species identified as probable host fishes for the southern elktoe, or catostomids in general, are limited. Additionally, stressors to southern elktoe such as habitat degradation, barriers to movement, and altered flow regimes also negatively affect catostomids; however, there is uncertainty regarding the extent to which host fish availability may influence southern elktoe populations.

Connectivity among populations is also important for southern elktoe viability. Although the species' capability to disperse is evident through historical occurrence of a wide range of rivers and streams, the fragmentation of populations by small and large impoundments has resulted in isolation and only remnant patches of what once was occupied contiguous river and stream habitat. Genetic exchange occurs between and among mussel beds via sperm drift, host fish movement, and movement of mussels during high flow events. For genetic exchange to occur, connectivity must be maintained, and proximity of male and female southern elktoes is essential. Most freshwater mussels, including the southern elktoe, are found in mussel beds with other species that vary in size and density, and elktoes have very sporadic occurrences within these beds. These beds are often separated by stream reaches in which mussels are absent or rare (Vaughn 2012, p. 983). Because the species is often a component of these healthy mussel assemblages within optimal mussel habitats, maintaining connectivity between these populations is necessary for the species to maintain resiliency over time.

Threats Analysis

The following discussions include evaluations of three main influences on southern elktoe viability: (1) habitat degradation or loss, (2) presence of host fish, and (3) nonnative species. Full descriptions of each of the factors and their sources, including specific examples where threats are impacting the species or its habitat, are available in chapter 5 of the SSA report (Service 2022, pp. 70–96). Potential impacts associated with other threats such as disease, parasites, predation, sea level rise, and harvest/overcollection were evaluated, but these threats were found to have minimal effects on the viability of the species based on the best available information and are not covered in detail here.

Habitat Degradation or Loss

Agriculture—The advent of intensive row crop agricultural practices has been considered as a potential factor in freshwater mussel decline and species extirpation in the eastern United States (Peacock et al. 2005, p. 550). Based on the U.S. Geological Survey's (USGS) National Land Cover Database (NLCD) 2016, approximately 20 percent of the ACF Basin is used for cropland. Agricultural influences within the ACF Basin are most apparent in the lower areas of the Chattahoochee (Alabama and Georgia), Flint (Georgia), and Chipola Basins (Alabama and Florida), and in the northern areas of the Apalachicola Basin (Florida).

Pumping groundwater for agricultural practices is contributing to decreased spring outflows and lowered stream levels in the ACF Basin. Agriculture is the largest source of water use in the ACF Basin, accounting for 35 percent of all water withdrawals in 2010 (Lawrence 2016, p. 29). In the ACF Basin, spring-fed streams and small rivers may experience 50 to 100 percent reductions in flows during droughts (Georgia Water Coalition 2017, p. 3), and the additive effect of groundwater withdrawals can exacerbate drought conditions during dry years (Albertson and Torak 2002, p. 22; Mitra et al. 2016, entire). In the lower Flint River basin, an extensive conversion to center pivot irrigation systems increased groundwater withdrawals 100 percent between 1970 and 1976 (Rugel et al. 2011, p. 2), and the Lower Flint River experiences an approximate 20 percent decrease in median flow levels because of irrigation during drought years (Singh et al. 2016, p. 279).

During periods of drought, streams may cease to flow entirely, or be reduced to isolated pools with high temperatures, low dissolved oxygen (DO), low food resources, and concentrated contaminants. Maintaining adequate water levels in streams is particularly important during the reproductive season (*e.g.,* October to March for southern elktoe), as suitable water levels are required to permit host-glochidia interactions. Within the Flint River basin, decreases in flow velocity and DO have been highly correlated to mussel mortality (Johnson et al. 2001, p. 6). Drought-related responses could affect the long-term viability of mussel populations in the lower Flint River basin by hindering reproductive processes.

Agriculture in the ACF Basin also contributes to an increase in contaminants and sediment entering streams and rivers. Contaminants from agriculture can include excess nutrients from poultry farms and livestock feedlots, and pesticides and fertilizers from row crop agriculture (Couch et al. 1996, p. 52; Frick et al. 1998, p. 2). Although moderate levels of siltation from sediment are common in many ACF Basin streams, particularly in the Piedmont, livestock grazing in riparian buffers adds excess sediment and alters stream hydrology by increasing runoff and erosion (Agouridis 2005, p. 593, Couch et al. 1996, p. 7). The concentrations of contaminants and sediment input associated with crop lands may negatively affect the viability of southern elktoe populations, especially given the large extent of agricultural activities within the southern elktoe's range (also see *Water Quality,* below).

Development—With urban development, watersheds become more impervious. Impervious surfaces result in increased and accelerated storm-water runoff, which can alter stream sediment regimes by increasing bank erosion and bed scouring (Brim Box and Mossa 1999, p. 103). Stream bank erosion and scouring contributes up to two-thirds of the total sediment yield in urbanized watersheds (Trimble 1997, p. 1443). The increased and accelerated flows and incising associated with storm-water runoff has been shown to lower mussel richness and abundance through increased shear stress and bed mobilization (Allen and Vaughn 2010, p. 390; Doyle et al. 2000, p. 177; Layzer and Madison 1995, p. 337).

Water quantity in urban areas is affected by water consumption and runoff from impervious surfaces. Impervious surfaces and other areas with reduced permeability, such as grass and barren land, can lead to high flow events from rainfall, and the reduction in ground penetration leads to reduced groundwater recharge and thus reduced baseflows during dry periods (U.S. Army Corps of Engineers (USACE) 2016, pp. 2–13). In addition, contamination of aquatic habitats by pesticides, excess nutrients, heavy metals, pharmaceuticals, and organic pollutants is widespread in urban areas and associated with point (*e.g.,* wastewater treatment plants) and nonpoint sources (Paul and Meyer 2001, pp. 341–346). The widespread and pervasive extent of non-permitted, nonpoint discharges in urban systems has been posited as a key factor in the biological degradation frequently encountered in urban aquatic environments (Duda et al. 1982, pp. 1144–1145; see *Water Quality,* below).

Development and urbanization activities that may contribute to the southern elktoe habitat degradation and loss is mostly concentrated near Atlanta, Columbus, and Albany, Georgia, with Atlanta having a larger influence than the two smaller cities. Although the Atlanta metro region occupies a relatively small portion of the Chattahoochee and Flint River headwaters, it has a large ecological footprint and substantial downstream effects.

River Regulation—The ACF Basin includes rivers and streams with both unregulated (natural) and regulated flow. The natural rivers exhibit a relatively consistent seasonal pattern, responding to precipitation and drought periods as expected with short periods of high flows and sometimes prolonged periods of low flows, respectively. Regulated streams exhibit an induced variable daily pattern, with daily variations due to hydroelectric power generation, navigation releases, lower flood peaks, and higher sustained minimum flows through dry periods as the upstream reservoirs augment low flows. The alterations in flow regimes that result from regulated rivers can have a direct impact on freshwater mussels and their host fish. The timing and rates of discharges from dams may interrupt the ability of the host fish to become infected with glochidia, and the settlement of the juvenile mussels once released.

Habitat fragmentation as a result of dam construction is one of the primary causes of loss of mussel diversity (Haag and Williams 2014, pp. 47–48). Upstream effects resulting from dams include changes from flowing water to still water habitats, increased depths and sedimentation, decreased dissolved oxygen, and changes in fish communities that can affect mussel reproductive success by separating host fish from mussel populations (Neves et al. 1997, p. 63). Effects downstream of dams include alterations in flow regime, scouring, seasonal dissolved oxygen dips, reduced water temperatures, and changes in fish community structure (Neves et al. 1997, p. 63).

Numerous small rivers and tributaries of the ACF Basin have been transformed by dams and channel alterations (Hupp 2000, entire; Light et al. 2006, pp. 29–46; Price et al. 2006, entire). Additionally, there are 16 mainstem impoundments within the basin (Brim Box and Williams 2000, p. 4).

The impacts from navigational channels within the ACF Basin may also contribute to loss of habitat for the southern elktoe and alter habitats for host fish. A navigation channel is maintained on the Apalachicola River for 172 kilometers (km) (107 miles (mi)) between the Gulf Intracoastal Waterway and Jim Woodruff Lock and Dam; 249 km (155 mi) up the Chattahoochee River to Columbus, Georgia, and Phenix City, Alabama; and 45 km (28 mi) up the Flint River to Bainbridge, Georgia. The channelization that results from these navigation channels can affect a stream's physical (*e.g.,* erosion rates, depth, habitat diversity, geomorphic stability, riparian canopy) and biological (*e.g.,* species composition and abundance, biomass, growth rates) characteristics.

Water Quality—As a group, mussels are often the first organisms to respond to water quality impacts (Haag 2012, p. 355), with mussel early life stages frequently showing the highest sensitivity to many chemical compounds (Augspurger et al. 2007, p. 2025–2026). Contamination or alteration to water chemistry can result from both point and nonpoint sources, including spills, industrial sources, municipal effluents, and runoff from agricultural and developed areas. These sources may contribute to changes in dissolved oxygen (DO), sediment loading, and the concentrations of nitrogen, phosphorus, ammonia, heavy metals, pesticides, and pharmaceuticals in the affected waterways. Although there are no current data for the tolerance levels of southern elktoe to specific pollutants, there is some general information available on the relationships and importance of these parameters to freshwater mussels and aquatic life.

Ammonia is one of the most common and widespread pollutants found in freshwaters, with nitrogen-based fertilizers and industrial and domestic wastewater among the most significant sources of ammonia in streams.

Freshwater mussels are sensitive to elevated concentrations of ammonia, especially its un-ionized form (Augspurger et al. 2003, pp. 2571–2574; Wang et al. 2007, pp. 2039–2046), and exposure to ammonia has been linked to mussel recruitment failure when present in sediments (Strayer and Malcom 2012, p. 1787). High nitrogen loads within the ACF Basin correspond to sub-watersheds with high urban and row cropland uses, including the metro Atlanta area of the far Upper Flint, and in agricultural areas of the Lower Flint and Chipola Rivers.

In 2013, the Environmental Protection Agency (EPA) adopted final national recommended ambient water quality criteria for the protection of aquatic life from effects of ammonia in freshwater (see 78 FR 52192; August 22, 2013), and in 2016, the Florida Department of Environmental Protection adopted the chronic criteria for ammonia as both the acute and chronic values, therefore improving the ammonia standard even further for the conservation of freshwater mussels Statewide (EPA 2016, entire). In 2017, Georgia also addressed ammonia toxicity in a new National Pollutant Discharge Elimination System (NPDES) Permitting Strategy to comply with the EPA's 2013 ammonia criteria (GADNR 2017, entire). The new criteria recommendations consider the latest freshwater toxicity information for ammonia, including toxicity studies for sensitive unionid mussels and gill-breathing snails (EPA 2013, entire). We do not currently have information on specific tolerance levels for southern elktoe regarding un-ionized ammonia, but EPA's new criteria represents the best general target for freshwater mussels. Still, recent work suggests that even low levels of ammonia (*e.g.,* 1.5 mg N/L (milligrams Nitrogen per Liter)), which are below thresholds set in the 2013 criteria, can be toxic to some mussel species (Wang et al. 2017, pp. 791–792).

Agricultural and developed lands are associated with high loadings of nutrients and silt and sediments in streams. Suspended sediment and total phosphorus (TP; determined by parent-rock minerals, urban land, manure from livestock, municipal wastewater, agricultural fertilizer, and phosphate mining) are both highest toward the northern extent of the ACF Basin, and areas of higher concentrations coincide with the Upper Flint and Middle Chattahoochee southern elktoe populations. For more information on the association between land use and nitrogen, phosphorus, and suspended sediment loads by within the ACF Basin, see chapter 5 of the SSA report (Service 2022, pp. 82–87).

Mussels may suffer lethal and nonlethal effects from low dissolved oxygen levels and elevated stream temperatures (Fuller 1974, pp. 240–245; Dimock and Wright 1993, pp. 188–190; Gagnon et al. 2004, p. 675), and are particularly susceptible to these conditions during their early life stages (Sparks and Strayer 1998, pp. 132–133; Pandolfo et al. 2010, p. 965; Archambault et al. 2013, p. 247). The amount of DO in water can vary due to several factors including water temperature, nutrient levels, and water velocity. Additionally, low flow levels that result from drought conditions can expose mussels to low DO concentrations and high water temperatures for extended periods (Haag and Warren 2008, pp. 1174–1176).

Heavy metal exposure can cause substantial harm to mussels. These inorganic pollutants enter aquatic systems via point and non-point sources and are frequently associated with urban land-use, mining, and industrial processes such as energy production. Many lab trials have demonstrated that mussels are among the most sensitive aquatic organisms to several metals, including nickel, copper, and zinc (Wang et al. 2017, pp. 792, 795).

Pesticides are widespread contaminants that have been implicated in mussel declines. Pesticides have been linked to freshwater mussel die-offs (Fleming et al. 1995, pp. 877–879), and lab studies show that sensitivity of mussel glochidia and juveniles to common pesticides can be high but is variable and difficult to predict (Conners and Black 2004, pp. 362–371; Bringolf et al. 2007, pp. 2089–2093; Wang et al. 2017, p. 792).

An emerging category of contaminants of concern to aquatic species is pharmaceuticals, including contraceptive medications, antidepressants, and livestock growth hormones originating from municipal, agricultural, and industrial wastewater sources. Pharmaceuticals have been shown to bioaccumulate in mussels downstream of wastewater treatment plants (De Solla et al. 2016, p. 489), and in lab studies, acute pharmaceutical exposure has caused mortality of glochidia (Gilroy et al. 2014, p. 543) and changes to mussel physiology (Bringolf et al. 2010, pp. 1315–1317) and behavior (Hazelton et al. 2014, pp. 31–32).

Although specific physical and chemical tolerance ranges are not known for the southern elktoe, numeric standards for most water quality criteria important to mussels currently adopted by the States of Alabama, Florida, and Georgia under the Clean Water Act (33 U.S.C. 1251 are sufficient to sustain elktoe. However, some standards (such as those for chloride, potassium, and nickel) are toxic to mussels at levels below the current criteria (Gibson et al. 2018, pp. 244–250; Wang et al. 2017, p. 795). In addition, standards do not exist for some mussel toxicants (for example, the surfactant sodium dodecyl sulfate) (Gibson et al. 2016, p. 32), nor do any exist for any of the pharmaceuticals listed above.

Changing Climate Conditions—Climate conditions that may influence the southern elktoe include increasing water temperatures and changes to precipitation patterns that may result in changes to hydrologic conditions, including increased flooding, prolonged droughts, reduced stream flows, and changes in salinity levels (Nobles and Zhang 2011, pp. 147–148). Climate change may affect the frequency and duration of both drought and floods, as well as alter normal temperature regimes. Drought can cause dewatering of freshwater habitats and low flows, which exacerbate water quality impairments (*e.g.,* dissolved oxygen, temperature, contaminants), whereas floods can cause excessive erosion, destabilize banks and bed materials, and lead to increases in sedimentation and suspended solids.

Long-term climate records suggest that decade-long ''mega-droughts'' have occurred periodically during the past 1,000 years in the southeastern United States, including in the ACF Basin (Stahle et al. 2007, entire). This suggests that while the recently observed droughts in 2006–2008 and 2010–2012 were exceptional based on our recent (less than 100 years) period of record, they may not be exceptional compared to historical episodes (Pederson et al. 2012, p. 2). However, projections for the ACF watershed indicate that future droughts are likely to be more intense, replicating those historical conditions more frequently (Yao and Georgakakos 2011, entire).

The Intergovernmental Panel on Climate Change's (IPCC) Fifth Assessment Report (AR5), published in 2014, presents recent climate findings based on a set of scenarios that use representative concentration pathways (RCPs). The recently updated flow models in the ACF Basin allow a closer look at predicted flows by river reach for a range of hydrologic variables into the future (the future time period is integrated over 2045–2075). These data indicate that streams and rivers within southern elktoe occurrence could exhibit a range of changes in flow conditions under future climates

(LaFontaine et al. 2019, entire). An analysis of conditions in the ACF Basin through 2050 under RCP 4.5 and 8.5 predicts increases in temperature (particularly summer and fall, (Neupane et al. 2018, p. 2232)), surface water runoff, and evapotranspiration, and decreases in soil moisture and groundwater discharge; all patterns are more pronounced under RCP 8.5 than RCP 4.5 (Neupane et al. 2018, p. 2236).

Despite the recognition of potential climate effects on ecosystem processes, there is uncertainty about what the exact climate future for the southeastern United States will be and how ecosystems and species in this region will respond. The greatest threat from climate change may come from synergistic effects. That is, factors associated with a changing climate may act as risk multipliers by increasing the risk and severity of more imminent threats, especially for rivers in wide floodplains where stream channels have room to migrate (Elliot et al. 2014, pp. 67–68). As a result, impacts from land use change might be exacerbated under even a mild to moderate climate future. A suite of potential hydrological impacts to waters of the southeastern United States is possible under conditions of climate change, but climate models generally predict increases in extreme rainfall events and droughts of greater duration and intensity (Carter et al. 2018, pp. 745–746).

Presence of Host Fish

Host fish for southern elktoe are in the sucker family, Catostomidae, including *Moxostoma* (Apalachicola redhorse, greater jumprock, and blacktail redhorse) and *Erimyzon* (creek chubsucker and lake chubsucker). Several species from the sucker family are found in the ACF Basin, but detailed studies on local ecology or population trends of species identified as probable host fishes for the southern elktoe, or sucker fishes in general, are more limited. As such, there is some uncertainty as to whether host fish availability is a limiting factor for southern elktoe.

The primary stressors to sucker fishes in southeastern U.S. rivers are identified as habitat degradation from urbanization and agriculture, hydropower, and barriers to dispersal (Cooke et al. 2005, p. 325), so it is important to consider that some of the same stressors acting on southern elktoe at individual and watershed levels are also acting on the host fishes. Generally, sucker fishes are large-bodied fishes that move significant distances, particularly to reach spawning locations. As a result, sucker fish species can disperse mussels farther than smaller-bodied and less mobile fishes. However, we are uncertain to the extent to which barriers may limit host fish movement or affect dispersal and colonization capabilities of southern elktoe.

Nonnative Species

The invasive Asian clam (Corbicula *fluminea*) was first detected in the eastern Gulf drainages in the early 1960s and was widespread within the ACF Basin by the mid-1970s (Heard 1975, p. 3). Asian clam life history enables fast colonization; it is hermaphroditic and can self-fertilize, grows fast, reaches maturity in 3 to 6 months, and produces large numbers of juveniles (Strayer 1999, p. 81; Haag 2012, p. 368). These traits allow the species to quickly reach densities of hundreds to thousands per square meter (Gardner et al. 1976, pp. 119–121), and to thrive in disturbed habitats (Haag 2012, p. 370).

Although the Asian clam can inhabit a wide range of flow and substrate conditions, densities are highest in areas with low flow velocity and in substrates composed of sand or mixtures of mud, sand, and gravel. Southern elktoe generally exhibits similar habitat preferences as the Asian clam; therefore, Asian clams may reach high abundances in areas inhabited by southern elktoe (Gardner et al. 1976, p. 122; McDowell and Byers 2019, p. 6). Additionally, Asian clams have one of the highest filtration rates per biomass, compared to native mussels and fingernail clams (sphaeriids) (McMahon and Bogan 2001, pp. 331–429), thereby potentially competing for food resources. Asian clams may also negatively affect mussels by ingesting mussel sperm, glochidia, or newly metamorphosed juvenile mussels (Strayer 1999, pp. 81–85; Modesto et al. 2019, pp. 159–162). Although the specific interaction between Asian clams and native mussels is not well understood, there is sufficient evidence to conclude that Asian clams can negatively affect native mussel populations (Haag 2012, p. 370).

Current Condition

There are six populations of southern elktoe, and each generally corresponds with river sub-basins where southern elktoe occur: Middle Chattahoochee, Upper Flint, Lower Flint, Ichawaynochaway, Apalachicola, and Chipola. The Middle Chattahoochee and Lower Flint sub-basins (HUC8 watersheds) were slightly modified for population-level analyses of current and future condition by extending the boundaries to align with major system barriers (dams) that are relevant to the species because they form barriers for host fishes. While no significant barriers to the southern elktoe's host fishes occur between the Lower Flint and Ichawaynochaway sub-basins, or between the Apalachicola and Chipola sub-basins, factors that influence southern elktoe populations vary among those sub-basins, making it most appropriate to analyze each separately when considering current and future condition. Below, we describe occurrence records for each of the six southern elktoe populations.

Middle Chattahoochee

Historical collection records in the Middle Chattahoochee portion of the southern elktoe's range are from the mainstem Chattahoochee River near Columbus, Georgia; the Mulberry Creek system (Mulberry and Ossahatchie Creeks), Georgia; and the Uchee Creek System (Uchee and Little Uchee Creeks), Alabama. The species is known from 12 localities (sites); however, there has been only one collection record since 2000 in this sub-basin.

Upper Flint River

The historical southern elktoe distribution in the Upper Flint River includes the Flint River from Lake Blackshear upstream to Spalding County, Georgia, and the following tributaries: Patsiliga, Potato, White Oak, Line, and Whitewater Creeks. Southern elktoe has been documented at a total of 20 locations in this sub-basin; however, since 2000, southern elktoe has been observed at only one of these locations (Patsiliga Creek).

Ichawaynochaway Creek

Southern elktoe was not known from the Ichawaynochaway sub-basin prior to 2000, so there are no historical records for this population. In 2019, one live southern elktoe was found near the confluence of Chickasawhatchee Creek and Ichawaynochaway Creek in Baker County, Georgia. This site is part of Elmodel Wildlife Management Area and is managed by the State of Georgia.

Lower Flint River

The species is known from six localities in the Lower Flint River, four of which have observations since 2000. The species is historically known from Hutchinson Ferry (1953, 1954) and U.S. Highway 27 in Bainbridge (1954, 1956); however, Woodruff Dam was completed in 1954, and these sites on the lower Flint River are now in the upper reaches of Seminole Reservoir (Lake Seminole), all in the state of Georgia. In 2011, the southern elktoe was observed at four locations in the Flint River about 10.5

km (6.5 mi) north-northeast of Bainbridge. Presently, this reach is considered to harbor the most individuals known from its current rangewide distribution. Collection records from 2011–2017 noted at least 34 individuals of various sizes, some under 30 millimeters (mm) (1.2 inches (in)) in length, indicating the presence of multiple age classes and successful recruitment (Wisniewski et al. 2014, p. 37).

Apalachicola River

Prior to 2000, the southern elktoe was documented in the Apalachicola River near Chattahoochee, Florida. Currently, southern elktoe is considered rare in the Apalachicola River; one shell was collected in 2006, and one live individual each in 2010, 2012, and 2015. The lack of collections in Apalachicola River may be due in part to limited river access points and deeper habitats.

Chipola River

The southern elktoe appears to be relatively more abundant in the Chipola River in Florida; a total 18 live individuals and one shell were observed at 10 locations during 2013–2018. A recent quantitative study examining freshwater mussel distribution in the Apalachicola and lower Chipola Rivers collected six southern elktoe from the lower Chipola (Kaeser et al. 2019, p. 662).

Resiliency, Redundancy, and Representation

To assess resilience of southern elktoe, we developed population-level metrics associated with aspects of population dynamics that characterize freshwater mussel populations that are used in existing recovery criteria for other ACF Basin listed mussel species, including persistence within watersheds over both long- and short-term time frames, evidence of stable or increasing trends, and evidence of reproduction/recruitment. Presumed average lifespan of an individual elktoe is approximately 10 years; therefore, we interpret multiple collections through time in the same watershed as persistence, which implies conditions are appropriate for recruitment, growth, and survival. Also given this presumed lifespan of southern elktoe, we are confident that the species is still present in a watershed if it has been collected since 2010. Detection of small juvenile (less than 25 mm) mussels is challenging and biased by visual sampling methods. Given mussels of this size are hard to detect, we considered observation of southern elktoe less than 50 mm as evidence of recruitment in the previous 1 to 3 years. We also evaluated trends in land use/land cover as surrogates for associated stressors from both urban and agricultural development. We then combined the demographic and habitat indices into an overall resilience index to reflect the presence and severity of habitat stressors associated with those land use types within a watershed that would likely negatively influence the viability of southern elktoe populations.

TABLE 1—OVERALL RESILIENCE SUMMARY. SEE SSA REPORT FOR DETAILS ABOUT METHODOLOGY AND CALCULATIONS

[Service 2022, pp. 50–65]

	Middle chat	Upper flint	Ichaway	Lower flint	Apalach	Chipola
Demographic	0.09	0.05	0.36	0.27	0.23	0.43
Habitat	0.1	0.2	0.29	0.42	0.08	0.23
Overall	0.09 (0)	0	0.26	0.07 (0)	0.23	0.33

During the defined current time period (since 2000), the overall resilience indices (sum of all metrics) indicate that the Middle Chattahoochee, Upper Flint River, and Lower Flint River populations have extremely low resiliency and may be at risk of extirpation (Table 1). In the Middle Chattahoochee and Upper Flint Rivers, only isolated individuals have been documented since 2000, and both populations had limited evidence of recruitment. In the Lower Flint, individuals have been collected in recent years, with evidence of recent recruitment. However, elktoe persistence in this area over a longer time period is not yet evident, and land use stressors are highest in this area; therefore, there is extremely low current resilience for this population. Resilience of the other three populations (Ichawaynochaway Creek, Chipola River, and Apalachicola River) is categorized as poor. Very few elktoes were recently observed in these populations: 4 in Ichawaynochaway, 3 in Apalachicola, and 18 in Chipola. Although natural rarity of southern elktoe does not mean the species is in danger of extinction, small population size could lead to an increased chance of extirpation due to a random event. Ultimately, the overall resilience indices for all populations reflect land use patterns and stressors affecting those areas. These stressors have not been abated and continue to act on the species currently.

Based on best available data that we reviewed and synthesized in the SSA report, the southern elktoe's current condition is characterized by very low individual numbers within a restricted range, and associated reductions in redundancy and representation from the known historical distribution of the species. Southern elktoe was documented as extant in each population during the defined current time frame of 2000–2019. However, there is little redundancy as none of the six populations is categorized above poor resilience; thus, the species is extremely susceptible to catastrophic events. To assess the current representation of southern elktoe, we used three metrics to estimate and predict representative units that reflect the subspecies' adaptive capacity: (1) river basin, (2) longitudinal gradient in the watershed (ecoregions, hydrogeology, and water source/aquifers), and (3) habitat variability (size, categories range from creek to great rivers). While the species is still extant in all four river basins, there has been a loss of representation along the longitudinal gradient, and the three populations with poor resilience are all limited to large tributaries (Ichawaynochaway Creek) and rivers (Chipola, Apalachicola), thus the species has extremely limited representation across its range.

Future Conditions

To investigate future conditions, we predicted the southern elktoe's response to plausible future scenarios reflecting different environmental conditions and conservation efforts. The future scenarios project threats into the future and then consider the impacts the threats could have on the viability of the species. Based on our review of factors currently affecting viability of southern elktoe, we focused our evaluation of

future condition on habitat degradation and loss associated with two prevalent land uses in the ACF Basin, agricultural and urban development, and their associated stressors to water quality and quantity. We interpreted projections for increases in agriculture and urban development through 2050 as surrogates for the stressors that would accompany increased water use for irrigation or municipal sources, increased surface runoff, and increases in contaminants specific to each sector (*e.g.,* nutrients and pesticides for agriculture, pollutants from urban land use). We used 2050 as our future time horizon because it is within the time frame for which climate and land use model projections exist and it encompasses at least three generations of southern elktoe, which provides confidence in predicting the species' response to threats.

We evaluated three future scenarios by modifying demographic variables according to feasible future trajectories to cover a range of possibilities from stable/increasing populations to loss of populations with the lowest number of individuals documented during our current time frame. We used land use/land cover models to forecast urban and agricultural land uses within each sub-basin, and again we combined the demographic and habitat indices into ''overall resilience'' for each population. We assessed redundancy and representation in the same manner as we did for current condition. Because we determined that the current condition of southern elktoe is consistent with an endangered species (see Determination of Southern Elktoe's Status, below), we are not presenting the results of the future scenarios in this proposed rule. Please refer to the SSA report (Service 2022, pp.103–113) for the full analysis of future conditions and descriptions of the associated scenarios.

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

Conservation Efforts

Multiple water resource planning and policy actions in Georgia and Florida have been enacted to increase water quality and/or decrease water consumption. The State of Georgia's regional water plans are developed in accordance with the Georgia Comprehensive State-wide Water Management Plan (State Water Plan), which was adopted by the General Assembly in January 2008. The State Water Plan requires the preparation of regional water development and conservation plans (regional water plans) to manage water resources in a sustainable manner through 2050, thus protecting instream habitat for the southern elktoe. Additionally, the Metropolitan North Georgia Water Planning District has implemented and expanded numerous conservation measures outlined in the 2017 Water Management Plan. The State has also enacted a number of laws related to water conservation, including the Water Stewardship Act of 2010, which has decreased per capita water use in the District by 30 percent since 2000 (Metropolitan North Georgia Water Planning District 2017, pp. 5–44).

In 1977, Georgia amended the Georgia Water Control Act of 1964 to regulate wastewater discharges and required permits for municipal and industrial users in excess of 100,000 gallons per day, but it did not limit the volume of withdrawals. Not until 1988, when the Georgia Water Quality Control Act (1964) and the Groundwater Use Act (1972) were amended, did farm withdrawals of surface and groundwater in excess of 100,000 gallons per day require a permit. These State laws prevent degradation of water quality, which is important to support southern elktoe.

Georgia passed the Flint River Drought Protection Act (FRDPA) in 2000 with the goal of reducing surface water withdrawals during dry periods, keeping more water in the ACF Basin, and mitigating tri-state water resource friction. The FRDPA allowed the Georgia Environmental Protection Division (GEPD) director to declare a drought in the Flint River basin and enabled the State to pay farmers not to irrigate. The process was used in 2001 and 2002; however, the GEPD concluded that the cropland users with the highest water usage continued to irrigate. This State law allows more water to remain in rivers during dry periods, thus reducing the potential stress to southern elktoe during droughts.

The Florida Water Resources Act establishes all water in Florida as a public resource that is managed by the Florida Department of Environmental Protection and five water management districts. Each district creates a regional water supply plan every 5 years. Florida establishes minimum flow limits (MFLs) to identify the limit at which withdrawals would be significantly harmful to the water resources or ecology of an area, particularly those areas where southern elktoe exist. Also, the Florida Legislature enacted the Surface Water Improvement and Management (SWIM) Act in 1987 by to improve and manage the water quality and natural systems of Florida's surface waters, which include lakes, rivers, streams, estuaries, springs, and wetlands. These laws that are intended to maintain flow and quality of the waters also support the southern elktoe.

The presence of other listed mussels within the ACF Basin resulted in designation of their critical habitat in 2007 (see 72 FR 64286; November 15, 2007). As a result, Federal agencies have been required under the Act's section 7 to coordinate with the Service to ensure actions they carry out, fund, or authorize will not jeopardize species' persistence or adversely modify critical habitat. This requirement has indirectly offered some protection to southern elktoe throughout most of its historical range; however, it is important to note that the most recent known locations of southern elktoe collections during the current time period in the Upper Flint population are not in any species' designated critical habitat and do not benefit from this collateral protection. Additionally, lands in conservation ownership in the ACF Basin include the Apalachicola National Forest in the Apalachicola, several spring habitats in the Chipola River Basin, and Elmodel Wildlife Management Area in the Ichawaynochaway. These conservation lands provide protection from development and other stressors to the southern elktoe.

Determination of Southern Elktoe's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of an endangered species or a threatened species. The Act defines an ''endangered species'' as a species in danger of extinction throughout all or a

significant portion of its range, and a ''threatened species'' as a species likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of an endangered species or a threatened species because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the Act's section 4(a)(1) factors, we find that past and ongoing habitat degradation and loss, including impaired water quality, decreased water quantity, and barriers to host fish movement, have reduced habitat suitability (Factor A) for the southern elktoe to such a degree that there is little resiliency of the species throughout its range. Once known from a variety of small stream to large river habitats, which supported the ability to adapt to changing riverine conditions (representation), currently the southern elktoe is restricted to larger rivers and mainstem habitats within the ACF Basin. This reduction in range represents significantly reduced representation and redundancy from historical conditions. Stressors to the southern elktoe's habitat from agricultural and urban land uses are present in all the southern populations except the Apalachicola River. The Middle Chattahoochee, Upper Flint River, and Lower Flint River populations have little resiliency and may be at risk of extirpation. Resilience of the other three populations—Ichawaynochaway Creek, Chipola River, and Apalachicola River—is currently categorized as poor (*i.e.,* has an index between 0.2–0.39, see Table 1 above and Table 4.4. in SSA report (Service 2022, p. 57).

While we anticipate that the threats will continue to act on the species in the future, they are affecting the species such that it is in danger of extinction now, and, therefore, we find that a threatened species status is not appropriate. We find that the southern elktoe's vulnerability to ongoing stressors is heightened to such a degree that it is currently in danger of extinction as a result of its reduced range and critically low numbers. Thus, after assessing the best available information, we determine that southern elktoe is in danger of extinction throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. We have determined that the southern elktoe is in danger of extinction throughout all of its range and accordingly did not undertake an analysis of any significant portion of its range. Because the southern elktoe warrants listing as endangered throughout all of its range, our determination does not conflict with the decision in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), which vacated the provision of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37578; July 1, 2014) providing that if the Service determines that a species is threatened throughout all of its range, the Service will not analyze whether the species is endangered in a significant portion of its range.

Determination of Status

Our review of the best available scientific and commercial information indicates that the southern elktoe meets the Act's definition of an endangered species. Therefore, we propose to list the southern elktoe as an endangered species in accordance with sections 3(6) and 4(a)(1) of the Act.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition as a listed species, planning and implementation of recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies, including the Service, and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Section 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

The recovery planning process begins with development of a recovery outline made available to the public soon after a final listing determination. The recovery outline guides the immediate implementation of urgent recovery actions while a recovery plan is being developed. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) may be established to develop and implement recovery plans. The recovery planning process involves the identification of actions that are necessary to halt and reverse the species' decline by addressing the threats to its survival and recovery. The recovery plan identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (''downlisting'') or removal from protected status (''delisting''), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery outline, draft recovery plan, final recovery plan, and any revisions will be available on our website as they are completed (*https://www.fws.gov/program/endangered-species*), or from our Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands

because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

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

Although the southern elktoe is only proposed for listing under the Act at this time, please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Examples of actions that may be subject to the section 7 processes are land management or other landscape-altering activities on Federal lands administered by the Service, U.S. Forest Service, and National Park Service, as well as actions on State, Tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat—and actions on State, Tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency—do not require section 7 consultation. Examples of Federal agency actions that may require consultation for the southern elktoe could include: channel dredging and maintenance, dam projects including flood control, navigation, hydropower, bridge projects, stream restoration, and Clean Water Act permitting; flow management and water storage (systemwide), slough restoration project on Apalachicola River, expansion of limestone mine on Chipola River; technical and financial assistance for projects and the U.S. Forest Service (aquatic habitat restoration, fire management plans, fire suppression, fuel reduction treatments, forest plans, mining permits); renewable and alternative energy projects; issuance of section 10 permits for enhancement of survival, habitat conservation plans, and safe harbor agreements; National Wildlife Refuge planning and refuge activities; Partners for Fish and Wildlife program projects benefiting these species or other listed species, Wildlife and Sportfish Restoration program sportfish stocking; development of water quality criteria and permitting; and future river crossings/bridge replacement and maintenance. Given the difference in triggers for conferencing and consultation, Federal agencies should coordinate with the local Service Field Office (see **FOR FURTHER INFORMATION CONTACT**) with any specific questions.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any species listed as an endangered species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. The statute also contains certain exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a proposed listing on proposed and ongoing activities within the range of the species proposed for listing. At this time, we are unable to identify specific activities that would not be considered to result in a violation of section 9 of the Act because the southern elktoe occurs in several riverine habitats across its range and it is likely that site-specific conservation measures may be needed for activities that may directly or indirectly affect the species.

Based on the best available information, the following activities may potentially result in a violation of section 9 of the Act if they are not authorized in accordance with applicable law; this list is not comprehensive:

(1) Introduction of nonnative species that compete with or prey upon the southern elktoe;

(2) Release of biological control agents that affect any life stage of this species;

(3) Modification of the channel or water flow of any stream in which the southern elktoe is known to occur; and

(4) Discharge of chemicals or fill material into any waters in which the southern elktoe is known to occur.

II. Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (that is, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the Federal agency would be required to consult with the Service under section 7(a)(2) of the Act. However, even if the Service were to conclude that the proposed activity would likely result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement ''reasonable and prudent alternatives'' to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied

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

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

Summary of Essential Physical or Biological Features

As described above under Summary of Biological Status and Threats, the southern elktoe is a freshwater mussel that occurs in river and streams. Occasional or regular interaction among individuals in different reaches not interrupted by a barrier likely occurs, but in general, interaction is strongly influenced by habitat fragmentation and distance between occupied river or stream reaches. Once released from their fish host, freshwater mussels are benthic, generally sedentary aquatic organisms and closely associated with appropriate habitat patches within a river or stream.

We derive the specific physical or biological features essential to the conservation of the southern elktoe from studies of these species' (or appropriate surrogate species') habitat, ecology, and life history. The primary habitat elements that influence resiliency of the southern elktoe include water quality, water quantity, substrate, habitat connectivity, and the presence of host fish species to ensure recruitment. Adequate flows ensure delivery of oxygen, enable reproduction, deliver food to filter-feeding mussels, and reduce contaminants and fine sediments from interstitial spaces. Stream velocity is not static over time, and variations may be attributed to seasonal changes (with higher flows in winter/spring and lower flows in summer/fall), extreme weather events (*e.g.,* drought or floods), or anthropogenic influence (*e.g.,* flow regulation via impoundments).These features are also described above as resource needs under Summary of Biological Status and Threats, and a full description is available in the SSA report; the individuals' needs are summarized below in Table 2.

TABLE 2—SOUTHERN ELKTOE'S RESOURCE NEEDS

Life stage	Resources needed to complete life stage [1]
All	• Flowing water. • Moderate water temperature (in general ≤32°C). • Adequate dissolved oxygen (in general ≥5.0 mg/L). • Good water quality with low concentrations of toxicants (chlorine, un-ionized ammonia, heavy metals, salts, pesticides).
Fertilized eggs (brooding Oct–Feb).	• Normal suspended solid levels. • Appropriate spawning temperatures. • Mature males upstream from mature females. • Suitable flows for fertilization to occur.
Glochidia Winter.	• Presence of catostomid host fish. • Suitable flows to permit host-glochidia interactions.
Juveniles Excystment from host fish to ~25 mm.	• Areas with low shear stress during high flows. • Appropriate substrates (stable sand/gravel free from excessive silt). • Suitable interstitial water quality, including moderate temperature and adequate dissolved oxygen, and absence of toxicants. • Adequate food availability (bacteria, algae, diatoms, detritus) in sediment. • Suitable temperatures to maximize growth (predation risk declines as size increases). • Limited predators to juveniles (*e.g.*, flatworms).
Adults Greater than ~25 mm.	• Areas with low shear stress during high flows. • Appropriate substrates (stable sand/gravel free from excessive silt). • Adequate food availability (bacteria, algae, diatoms, detritus) in water column.

[1] These resource needs are common among North American freshwater mussels; however, due to lack of species-specific research, parameters specific to the southern elktoe are unavailable.

Additional information can be found in chapter 2 of the SSA report (Service 2022, pp. 11–15), which is available on *https://www.regulations.gov* under Docket No. FWS–R4–ES–2022–0179. We have determined that the following physical or biological features are essential to the conservation of southern elktoe:

(1) Adequate flows, or a hydrologic flow regime (magnitude, timing, frequency, duration, rate of change, and overall seasonality of discharge over time), necessary to maintain benthic habitats where the species is found and to maintain stream connectivity, specifically providing for the exchange of nutrients and sediment for maintenance of the mussel and fish host's habitat and food availability, maintenance of spawning habitat for native fishes that could serve as host fish, and the ability for newly transformed juveniles to settle and become established in their habitats.

(2) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support the southern elktoe (*e.g.,* slightly depositional habitats consisting of mixtures of silty mud, sand, and gravel).

(3) Water and sediment quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages. Water and sediment quality needs include appropriate thermal and dissolved oxygen regimes (temperature generally not above 90 degrees Fahrenheit (°F) (32 degrees Celsius (°C)) and dissolved oxygen generally greater than 5.0 mg/L) that are also low in ammonia (generally not above 1.5 mg N/L), heavy metals, pharmaceutical concentrations, salinity (generally not above 4 parts per million), total suspended solids, and other pollutants.

(4) The presence and abundance of fish hosts necessary for recruitment of the southern elktoe, specifically species of the sucker family, Catostomidae, including the genera *Moxostoma* (Apalachicola redhorse, greater jumprock, and blacktail redhorse) and *Erimyzon* (creek chubsucker and lake chubsucker).

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection.

The features essential to the conservation of the southern elktoe may require special management considerations or protections to reduce the following threats:

(1) Alteration of the natural flow regime (modifying the natural hydrograph or seasonal flows), including (but not limited to) water withdrawals that result in flow reduction and available water quantity, or channelization that changes the natural stream flow pattern;

(2) Changes of the landscape, including (but not limited to) land conversion for urban and agricultural use, infrastructure (pipelines, roads, bridges, utilities), and water uses (ground water withdrawal, water supply reservoirs, wastewater treatment, etc.);

(3) Significant degradation of water quality and nutrient pollution from a variety of sources, such as stormwater runoff or wastewater from municipal facilities;

(4) Impacts from invasive species;

(5) Incompatible land use activities that remove large areas of forested wetlands or riparian areas or watershed/floodplain disturbances that release sediments, pollutants, or nutrients into the water;

(6) Installation or maintenance of dams, culverts, or pipes that create a barrier to movement for the southern elktoe, or its host fishes; and

(7) Changes and shifts in seasonal precipitation patterns as a result of climate change.

Management activities that could ameliorate these threats include, but are not limited to: use of best management practices designed to reduce sedimentation, erosion, and bank destruction; protection of riparian corridors and native woody vegetation; moderation of surface and ground water withdrawals to maintain natural flow regimes; improved stormwater management; and avoidance or minimization of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are proposing to designate critical habitat in areas within the geographical area occupied by the species at the time of listing. The proposed critical habitat designation includes the occupied rivers and streams within the current range that we determined contain the physical and biological features that are essential to the conservation of these species. These rivers and streams contain known populations and have retained the physical or biological features that could allow for the maintenance and expansion of existing populations.

We also are proposing to designate specific areas outside the geographical area occupied by the species because we have determined that a designation limited to occupied areas would be inadequate to ensure the conservation of the species. There are current records of southern elktoe in the Upper Flint River Complex and the Middle Chattahoochee system; however, the currently occupied reaches are significantly reduced compared to historical distribution. Designating only occupied areas in these two systems (which equates to one small stream reach in each system and thus provides little redundancy for the species) is not sufficient for the conservation of the species; therefore, unoccupied reaches that had historical observations of the species are included in the designation. The addition of these unoccupied reaches will provide areas that support the southern elktoe's life processes; thus, these unoccupied reaches are considered habitat that contains all of the physical and biological features that are essential to the conservation of the southern elktoe. Further, these unoccupied areas are reasonably certain to contribute to the conservation of the species, as they currently support other freshwater mussel species and provide habitat for fish hosts that are essential for the conservation of the southern elktoe.

Sources of data for this proposed critical habitat include information from State agencies and survey reports throughout the species' range (Service 2022, entire). We have also reviewed available information that pertains to the habitat requirements of the species. Sources of information on habitat requirements include information for the six co-occurring listed mussels and other closely related species, published peer-reviewed articles, agency reports, and data collected during monitoring efforts.

In summary, for all areas within the geographic area occupied or unoccupied by the species at the time of listing that we are proposing as critical habitat, we delineated critical habitat unit boundaries using the following criteria: the upstream boundary of a unit is the first perennial tributary confluence or first permanent barrier to fish passage (such as a dam) upstream of the upstream-most occurrence record (either current or historical). The downstream boundary of a unit is the mouth of the stream, the upstream extent of tidal influence, or the upstream extent of an impoundment, whichever comes first, downstream of the farthest downstream occurrence record. The lateral extent of each unit includes the bankfull width of the stream. We consider portions of the following rivers and streams to be appropriate for critical habitat designation: Apalachicola River, Chipola River, Lower Flint River Complex, Upper Flint River Complex, and Middle Chattahoochee (see Proposed Critical Habitat Designation, below).

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

We propose to designate as critical habitat lands that we have determined are occupied at the time of listing (*i.e.,* currently occupied) and that contain one or more of the physical or biological features that are essential to support life-history processes of the species. We have determined that occupied areas are inadequate to ensure the conservation of the species. Therefore, we have also identified, and propose for designation as critical habitat, unoccupied areas that are essential for the conservation of the species. Five units are proposed for designation based on one or more of the physical or biological features being present to support the southern elktoe's life-history processes.

The proposed critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document under Proposed Regulation Promulgation. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *https://www.regulations.gov* at Docket No. FWS–R4–ES–2022–0179.

Proposed Critical Habitat Designation

We are proposing to designate approximately 578 river mi (929 river km) in five units as critical habitat for the southern elktoe. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the species. Critical habitat includes only stream channels up to bankfull height, where the stream base flow is contained within the channel. The five units we propose as critical habitat are: (1) Apalachicola River, (2) Chipola River, (3) Lower Flint River Complex, (4) Upper Flint River Complex, and (5) Middle Chattahoochee. Table 3 shows the proposed critical habitat units and the approximate area of each unit.

TABLE 3—PROPOSED CRITICAL HABITAT UNITS FOR SOUTHERN ELKTOE

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

Critical habitat unit	Land ownership by type	Length of unit in river kilometers (miles)	Occupied?
1. Apalachicola River	Public and Private	142.8 (88.7)	Yes.
2. Chipola River	Public and Private	131.3 (81.6)	Yes.
3. Lower Flint River Complex	Public and Private	165.9 (103.1)	Yes.
4. Upper Flint River Complex		Total: 396.6 (246.4)	
4a: Patsiliga Creek	Private	36.2 (22.5)	Yes.
4b: Upper Flint Tributaries	Public and Private	360.4 (223.9)	No.
5. Middle Chattahoochee		Total 92.9 (57.7)	
5a: Uchee Creek	Private	36.7 (22.8)	Yes.
5b: Little Uchee Creek	Private	20.3 (12.6)	No.
5c: Mulberry Creek	Public and Private	35.9 (22.3)	No.
Total		929.5 (577.6)	

Note: Area sizes may not sum due to rounding.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for southern elktoe, below.

Unit 1: Apalachicola River

Unit 1 consists of 142.8 river km (88.7 mi) of the Apalachicola River in Calhoun, Franklin, Gadsden, Gulf, Jackson, and Liberty Counties, Florida; this unit is currently occupied and contains all the physical and biological features essential to the conservation of the species. The main stem of the Apalachicola River in Unit 1 extends from near Prospect Bluff Historic Sites in Apalachicola National Forest at river mile 20 (U.S. Army Corps of Engineers Navigable Waterway Mile Markers) in Franklin County, Florida, upstream to the Jim Woodruff Lock and Dam in Gadsden and Jackson Counties, Florida (the river is the county boundary), including stream habitat up to bankfull height.

Riparian lands that border the unit include approximately 36.5 river km (22.7 mi) in public conservation and 41.9 river km (26 mi) in combined public conservation and private ownership. The Nature Conservancy's Apalachicola Bluffs and Ravines Preserve (included in private ownership) protects rare steephead and other habitats along the Apalachicola

River. General land use on adjacent riparian lands and the surrounding HUC 8-level management unit includes forested or rural lands with more limited threats than other units. Special management considerations that may be required to maintain the physical and biological features include, but are not limited to: use of best management practices designed to reduce sedimentation, erosion, and bank destruction and protection of riparian corridors and native woody vegetation.

Unit 2: Chipola River

Unit 2 consists of 131.3 river km (81.6 mi) of the Chipola River (including the reach known as Dead Lake) in Calhoun, Gulf, and Jackson Counties, Florida; this unit is currently occupied and contains all the physical and biological features essential to the conservation of the species. The main stem of the Chipola River in Unit 2 extends from its confluence with the Apalachicola River in Gulf County, Florida, upstream 131.3 km (81.6 mi) to approximately where the river flows underground in Florida Caverns State Park in Jackson County, Florida, including stream habitat up to bankfull height.

Riparian lands that border the unit include approximately 16.6 river km (10.3 mi) in public conservation and 19.3 river km (12 mi) in combined public conservation and private ownership. Water quality and quantity stressors from expansion of agricultural land use is a possible future threat in this unit. Special management considerations that may be required to maintain the physical and biological features include, but are not limited to: use of best management practices designed to reduce sedimentation, erosion, and bank destruction; protection of riparian corridors and native woody vegetation; moderation of surface and ground water withdrawals to maintain natural flow regimes; and avoidance or minimization of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Unit 3: Lower Flint River Complex

Unit 3 consists of 165.9 river km (103.1 mi) of the mainstem of the Flint River between Lake Seminole (impounded by the Jim Woodruff Lock and Dam) and the Flint River Dam (which impounds Lake Worth), and the mainstems of two tributaries in Baker, Decatur, Dougherty, and Mitchell Counties, Georgia; this unit is currently occupied and contains all the physical and biological features essential to the conservation of the species. The mainstem of the Flint River in Unit 3 extends from 1.3 river km (0.82 mi) downstream of U.S. Highway 84 in Decatur County, Georgia (the approximate upstream extent of Lake Seminole), upstream 122.7 river km (76.3 mi) to the Flint River Dam in Dougherty County, Georgia. Unit 3 includes 26.1 river km (16.2 mi) of the mainstem of Ichawaynochaway Creek from its confluence with the Flint River upstream to its confluence with Chickasawhatchee Creek, and 15.7 river km (9.7 mi) of the mainstem of Chickasawhatchee Creek from its confluence with Ichawaynochaway Creek upstream to its confluence with Spring Creek in Baker County, Georgia, including stream habitat up to bankfull height.

Riparian lands that border the unit include approximately 17.3 river km (10.8 mi) in public conservation and 28.5 river km (17.7 mi) in combined public conservation and private ownership. Water quality and quantity stressors from expansion of agricultural land use is a future threat in this unit. Special management considerations that may be required to maintain the physical and biological features include, but are not limited to: use of best management practices designed to reduce sedimentation, erosion, and bank destruction; protection of riparian corridors and native woody vegetation; moderation of surface and ground water withdrawals to maintain natural flow regimes; and avoidance or minimization of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Unit 4: Upper Flint River Complex

Unit 4 is comprised of two subunits; both subunits include stream habitat up to bankfull height.

Subunit 4a includes 36.2 river km (22.5 mi) of Patsiliga Creek in Taylor County, Georgia. This subunit is currently occupied by the species and contains all the physical and biological features essential to the conservation of the species.

Subunit 4b includes 360.4 river km (223.9 mi) of the mainstem Flint River and four of its tributaries upstream of Lake Blackshear in Coweta, Crawford, Dooly, Fayette, Macon, Meriwether, Peach, Pike, Spalding, Sumter, Talbot, Taylor, and Upson Counties, Georgia. This subunit is considered currently unoccupied by the species and contains all the physical and biological features essential to the conservation of the species. These unoccupied areas are essential to restore historical redundancy for the species in the Upper Flint system and provide connectivity to subunit 4a, thus enabling the southern elktoe to sustain this population over time. We are reasonably certain that the unit will contribute to the conservation of the species because it currently sustains other freshwater mussels and the fish hosts that are essential to southern elktoe viability. These unoccupied reaches are considered habitat that contains all of the physical and biological features that are essential to the conservation of the southern elktoe.

Riparian lands that border Unit 4 include approximately 12.7 river km (7.9 mi) in public conservation and 64.7 river km (40.2) in combined public conservation and private ownership. Water quality and quantity stressors from urban land use is a primary threat in this unit. Special management considerations that may be required to maintain the physical and biological features include, but are not limited to: use of best management practices designed to reduce sedimentation, erosion, and bank destruction; protection of riparian corridors and native woody vegetation; moderation of surface and ground water withdrawals to maintain natural flow regimes; improved stormwater management; and avoidance or minimization of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Unit 5: Middle Chattahoochee

Unit 5 is comprised of three subunits:

Subunit 5a includes 36.7 river km (22.8 mi) of the mainstem of Uchee Creek from its confluence with the Chattahoochee River upstream to the confluence with Island Creek in Russell County, Alabama. This subunit is currently occupied by the species and contains all of the physical and biological features essential to the conservation of the species. Because Fort Benning, which is located within this unit, has an integrated natural resources management plan (INRMP) that provides for conservation of the southern elktoe, we have not included 4 miles of Uchee Creek in this proposed designation (see Application of Section 4(a)(3) of the Act, below).

Subunit 5b includes 20.3 river km (12.6 mi) of Little Uchee Creek in Russell County, Alabama. This subunit is considered unoccupied, although it is contiguous with the occupied habitat in Uchee Creek and contains all the physical and biological features essential to the conservation of the species.

Subunit 5c includes 35.9 river km (22.3 mi) of Mulberry Creek in Harris County, Georgia. This subunit is considered currently unoccupied and

contains all the physical and biological features essential to the conservation of the species.

Subunits 5b and 5c, the two unoccupied subunits in Unit 5, are essential to restore historical redundancy for the species in the Middle Chattahoochee system, thus enabling the southern elktoe to sustain itself in this system over time. We are reasonably certain that the unit will contribute to the conservation of the species because it currently sustains other freshwater mussels and the fish hosts that are essential to southern elktoe viability. These unoccupied reaches are considered habitat that contains all of the physical and biological features that are essential to the conservation of the southern elktoe. Riparian lands that border the unit include approximately 0.5 river km (0.3 mi) in combined public conservation and private ownership; the remainder is private. Water quality and quantity stressors from expansion of agricultural land use is a future threat in this unit. Special management considerations that may be required to maintain the physical and biological features include, but are not limited to: use of best management practices designed to reduce sedimentation, erosion, and bank destruction; protection of riparian corridors and native woody vegetation; moderation of surface and ground water withdrawals to maintain natural flow regimes; improved stormwater management; and avoidance or minimization of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

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

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

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

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

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

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

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

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

(3) Are economically and technologically feasible, and

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

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

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

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

Application of the ''Destruction or Adverse Modification'' Standard

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

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

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

(1) Actions that would degrade or alter water quality. Such activities could include, but are not limited to, polluted wastewater discharge or spills from industrial, municipal, and mining facilities; or polluted stormwater runoff or infiltration from agricultural lands and urban areas. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the southern elktoe and its fish hosts.

(2) Actions that would alter flow regimes. Such activities could include, but are not limited to, groundwater pumping and surface water withdrawal or diversion, dam construction and operation, and land clearing. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the southern elktoe and its fish hosts.

(3) Actions that would destroy or alter southern elktoe habitats. Such activities could include, but are not limited to, installation or maintenance of in-stream structures (such as dams, culverts, bridges, boat ramps, retaining walls, and pipelines), dredging, impounding, channelization, or modification of stream channels or banks, and discharge of fill material. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the southern elktoe and its fish hosts.

(4) Actions that would cause silt and sediment to wash into stream channels. Such activities could include, but are not limited to, road and bridge construction, agricultural and mining activities, and commercial and residential development. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of the southern elktoe and its fish hosts.

Exemptions

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

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the proposed critical habitat designation for the southern elktoe to determine if they meet the criteria for exemption from critical habitat under section 4(a)(3) of the Act. The following areas are Department of Defense (DoD) lands with completed, Service-approved INRMPs within the proposed critical habitat designation.

Approved INRMPs

U.S. Army Fort Benning, Georgia; 4 Stream Miles (6.4 km)

We have identified one area within the proposed critical habitat designation that consists of DoD lands with a completed, Service-approved INRMP. The Army Maneuver Center of Excellence Fort Benning (Fort Benning) is located in Georgia and Alabama on 182,000 acres in three counties: Muscogee and Chattahoochee Counties, Georgia, and Russell County, Alabama. Fort Benning is federally owned land that is managed by the U.S. Army and is subject to all Federal laws and regulations. The Fort Benning INRMP covers fiscal years 2021–2026, and it serves as the principal management plan governing all natural resource activities on the installation. Among the goals and objectives listed in the INRMP is habitat management for rare, threatened, and endangered species, and the southern elktoe is included in this plan. Management actions that benefit the southern elktoe include maintenance or improvement of habitat quality in a portion of Uchee Creek by mitigating (avoiding) adverse impacts of any action within the watershed that could have effects on the quality of habitat in Uchee Creek.

Four stream miles (6.4 km) of Unit 5 (Middle Chattahoochee) are located within the area covered by this INRMP. Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands and streams are subject to the Fort Benning INRMP and that conservation efforts identified in the INRMP will provide a benefit to southern elktoe. Therefore, the streams within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 4 stream miles (6.4 km) of habitat in this proposed critical habitat designation because of this exemption.

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

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the ''2016 Policy''; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled ''The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act'' (M–37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to demonstrate that the decision is reasonable. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.''

The ''without critical habitat'' scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (*e.g.,* under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (*i.e.,* conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. Section 3(f) of E.O. 12866 identifies four criteria when a regulation is considered a ''significant'' rulemaking, and requires additional analysis, review, and approval if met. The criterion relevant here is whether the designation of critical habitat may have an economic effect of greater than $100 million in any given year (section 3(f)(1)). Therefore, our consideration of economic impacts uses a screening analysis to assess whether a designation of critical habitat for the southern elktoe is likely to exceed the economically significant threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the southern elktoe (IEc 2021, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (*i.e.,* absent critical habitat designation) and includes probable economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impacts above and beyond the impacts of listing the species. Therefore, the screening analysis focuses on areas of unoccupied critical habitat. If there are any unoccupied units in the proposed critical habitat designation, the screening analysis assesses whether any additional management or conservation efforts may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM are what we consider to be our draft economic analysis (DEA) of the proposed critical habitat designation for the southern elktoe; our DEA is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the southern elktoe, first we identified, in the IEM dated July 29, 2021, probable incremental economic impacts associated with the following categories of activities: (1) channel dredging and maintenance; dam projects including flood control, navigation, hydropower, bridge projects, stream restoration, and Clean Water Act permitting; flow management and water storage (systemwide); slough restoration project on Apalachicola River, and an expansion of a limestone mine on Chipola River; (2) technical and financial assistance for projects, including aquatic habitat restoration, fire management plans, fire suppression, fuel reduction treatments, forest plans, and mining permits; (3) renewable and alternative energy projects; (4) issuance of section 10 permits for enhancement

of survival, habitat conservation plans, and safe harbor agreements; (5) Federal lands management; (6) water quality permitting; (7) roadway and bridge construction; (8) natural disaster management; and (9) recreation (including sport fishing and sportfish stocking).

We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the Act, designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we list the species, in areas where the southern elktoe is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If, when we list the species, we also finalize this proposed critical habitat designation, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations would include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (*i.e.,* difference between the jeopardy and adverse modification standards) for the southern elktoe's critical habitat. Because the designation of critical habitat for southern elktoe is being proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would likely adversely affect the essential physical or biological features of critical habitat would also likely adversely affect the species itself. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the southern elktoe totals approximately 578 river miles (929 km), of which approximately 55 percent is currently occupied by the species. In these occupied areas, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the southern elktoe. Therefore, only administrative costs are expected in approximately 55 percent of the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, it is believed that, in most circumstances, these costs would predominantly be administrative in nature and would not be significant.

The remaining approximately 259 mi (416 km) (45 percent of the total proposed critical habitat designation) are currently unoccupied by the species but are essential for the conservation of the species. In these unoccupied areas, any conservation efforts or associated probable impacts would be considered incremental effects attributed to the critical habitat designation. Of the 259 mi (416 km) of unoccupied critical habitat, approximately 74 percent overlaps with existing designated critical habitat of other listed aquatic species. In these areas, consultations would likely occur even absent the proposed critical habitat designation for the southern elktoe.

A number of additional baseline conservation actions exist for the species, including State water conservation plans and measures, as well as best management practices for riparian activities for construction, forestry, and agricultural activities. For example, the States' Departments of Transportation report consultation road and bridge best management practices that specifically intend to benefit water quality in proposed critical habitat areas. Other conservation activities on public lands include activities on Apalachicola National Forest in Florida, tracts managed by the Northwest Florida Water Management District in Florida, and the Elmodel Wildlife Management Area managed by the State of Georgia. Conservation activity is also being conducted by nonprofit organizations that would serve to directly or indirectly benefit southern elktoe critical habitat on some private lands. Based on the substantial baseline protections afforded to the southern elktoe that are anticipated to occur in proposed critical habitat areas even absent the designation of critical habitat for the species, we do not foresee any incremental costs associated with project modifications that would involve additional conservation efforts for the species. When some incremental section 7 consultations costs are anticipated, costs are likely to be limited to the additional administrative efforts to consider adverse modification during the consultation process.

The probable incremental economic impacts of the proposed southern elktoe critical habitat designation are expected to be limited to additional administrative effort as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations. This is due to two factors: (1) A significant portion of proposed critical habitat stream reaches are considered to be occupied by the species (55 percent), and incremental economic impacts of critical habitat designation, other than administrative costs, are unlikely; and (2) in proposed areas that are not occupied by southern elktoe, approximately 74 percent of the areas are already designated as critical habitat for other listed aquatic species, so many of the conservation efforts undertaken for those other listed aquatic species would also provide substantial protections to critical habitat areas for the southern elktoe even absent critical habitat designation. In the remaining 26 percent of the areas, there are predicted to be fewer than one formal and two informal consultations per year. The associated costs are estimated to be $10,000 or less per consultation. Accordingly, in order to reach the threshold of $100 million of incremental administrative impacts in a single year, critical habitat designation would have to result in more than 11,000 consultations in a single year. However, based on consultation history areas across the entirety of the proposed designation, we only anticipate one formal consultation and six informal consultations per year. Thus, the annual administrative burden is very unlikely to reach $100 million.

We are soliciting data and comments from the public on the DEA discussed above, as well as on all aspects of this proposed rule and our required determinations. During the development of a final designation, we will consider the information presented in the DEA and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be

excluded from the final critical habitat designation under authority of section 4(b)(2) of the Act, our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (*e.g.,* a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' However, the Service must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i), because section 4(b)(2) requires the Service to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for southern elktoe are not owned or managed by the DoD or DHS, and, therefore, we anticipate no impact on national security or homeland security.

Consideration of Other Relevant Impacts

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

Summary of Exclusions Considered Under 4(b)(2) of the Act

We have not identified any areas to consider for exclusion from critical habitat based on other relevant impacts. We have determined that there are currently no HCPs or other management plans for the southern elktoe, and the proposed designation does not include any Tribal lands or trust resources or any lands for which designation would have any economic or national security impacts. Therefore, we anticipate no impact on Tribal lands, partnerships, or HCPs from this proposed critical habitat designation and thus, as described above, we are not considering excluding any particular areas on the basis of the presence of conservation agreements or impacts to trust resources.

However, if through the public comment period we receive information that we determine indicates that there are potential economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully describe our decision in the final rule for this action.

Required Determinations

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)

Executive Order 14094 reaffirms the principles of E.O. 12866 and E.O 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O.

12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

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

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

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

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

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. No known hydropower, oil/gas leases, power lines, or pipelines will be affected within or adjacent to proposed critical habitat areas. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

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

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

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

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal

funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this proposed rule would significantly or uniquely affect small governments because those governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure their actions will not adversely affect critical habitat. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

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

Federalism—Executive Order 13132

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

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

Civil Justice Reform—Executive Order 12988

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

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

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

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

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and

to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the proposed critical habitat for the southern elktoe, so no Tribal lands would be affected by the proposed designation.

References Cited

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

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Assessment Team and the Florida Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ 2. Amend § 17.11, in paragraph (h), by adding an entry for ''Elktoe, Southern'' to the List of Endangered and Threatened Wildlife in alphabetical order under CLAMS to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	*
CLAMS				
*	*	*	*	*
Elktoe, Southern	*Alasmidonta triangulata*	Wherever found	E	[**Federal Register** citation when published as a final rule]; 50 CFR 17.95(f).[CH]
*	*	*	*	*

■ 3. Amend § 17.95, in paragraph (f), by adding an entry for ''Southern Elktoe (*Alasmidonta triangulata*)'' following the entry for ''Appalachian Elktoe (*Alasmidonta raveneliana*)'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(f) *Clams and Snails.*

* * * * *

Southern Elktoe (*Alasmidonta triangulata*)

(1) Critical habitat units are depicted for Russell County, Alabama; Calhoun, Franklin, Gadsden, Gulf, Jackson, and Liberty Counties, Florida; and Baker, Coweta, Crawford, Decatur, Dooly, Dougherty, Fayette, Harris, Macon, Meriwether, Mitchell, Peach, Pike, Spalding, Sumter, Talbot, Taylor, and Upson Counties, Georgia, on the maps in this entry.

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

(i) Adequate flows, or a hydrologic flow regime (magnitude, timing, frequency, duration, rate of change, and overall seasonality of discharge over time), necessary to maintain benthic habitats where the species is found and to maintain stream connectivity, specifically providing for the exchange of nutrients and sediment for maintenance of the mussel and fish host's habitat and food availability, maintenance of spawning habitat for native fishes that could serve as host fish, and the ability for newly transformed juveniles to settle and become established in their habitats.

(ii) Suitable substrates and connected instream habitats, characterized by geomorphically stable stream channels and banks (*i.e.,* channels that maintain lateral dimensions, longitudinal profiles, and sinuosity patterns over time without an aggrading or degrading bed elevation) with habitats that support the southern elktoe (*e.g.,* slightly depositional habitats consisting of mixtures of silty mud, sand, and gravel).

(iii) Water and sediment quality necessary to sustain natural physiological processes for normal behavior, growth, and viability of all life stages. Water and sediment quality needs include appropriate thermal and dissolved oxygen regimes (temperature generally not above 90 °F (32 °C) and dissolved oxygen generally greater than 5.0 milligrams per liter (mg/L)) that are also low in ammonia (generally not above 1.5 mg N/L (milligrams Nitrogen per Liter)), heavy metals, pharmaceutical concentrations, salinity (generally not above 4 parts per million), total suspended solids, and other pollutants.

(iv) The presence and abundance of fish hosts necessary for recruitment of the southern elktoe, specifically species of the sucker family, Catostomidae, including the genera *Moxostoma* (Apalachicola redhorse, greater jumprock, and blacktail redhorse) and *Erimyzon* (creek chubsucker and lake chubsucker).

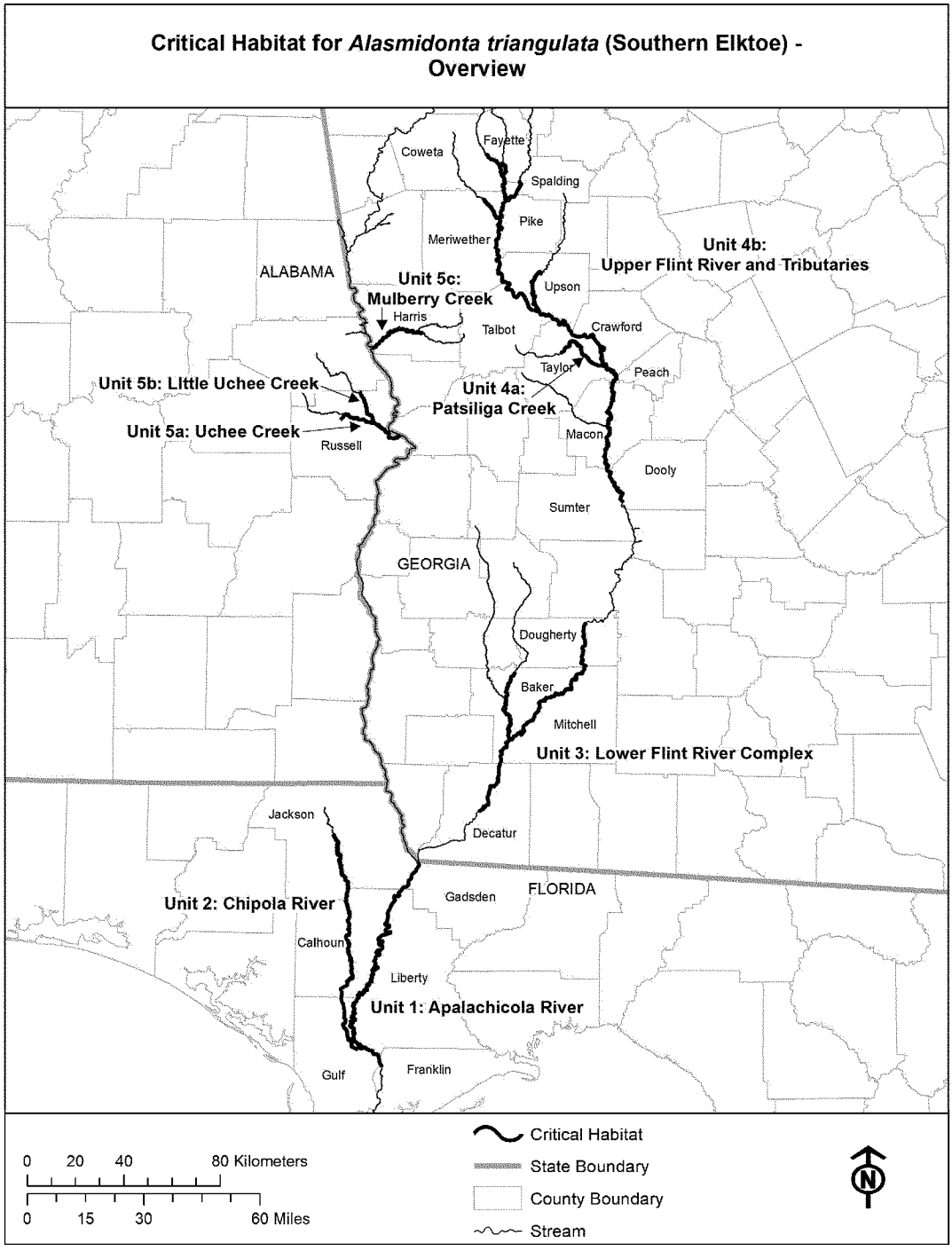
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on [EFFECTIVE DATE OF RULE].

(4) Data layers defining map units were created using ArcMap GIS, and critical habitat units were then mapped using the National Hydrography Dataset (NAD) using NAD83 UTM Zone 16N coordinates. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2022–0179.

(5) Index map follows:

BILLING CODE 4333–15–P

Figure 1 to Southern Elktoe (*Alasmidonta triangulata*) paragraph (5)

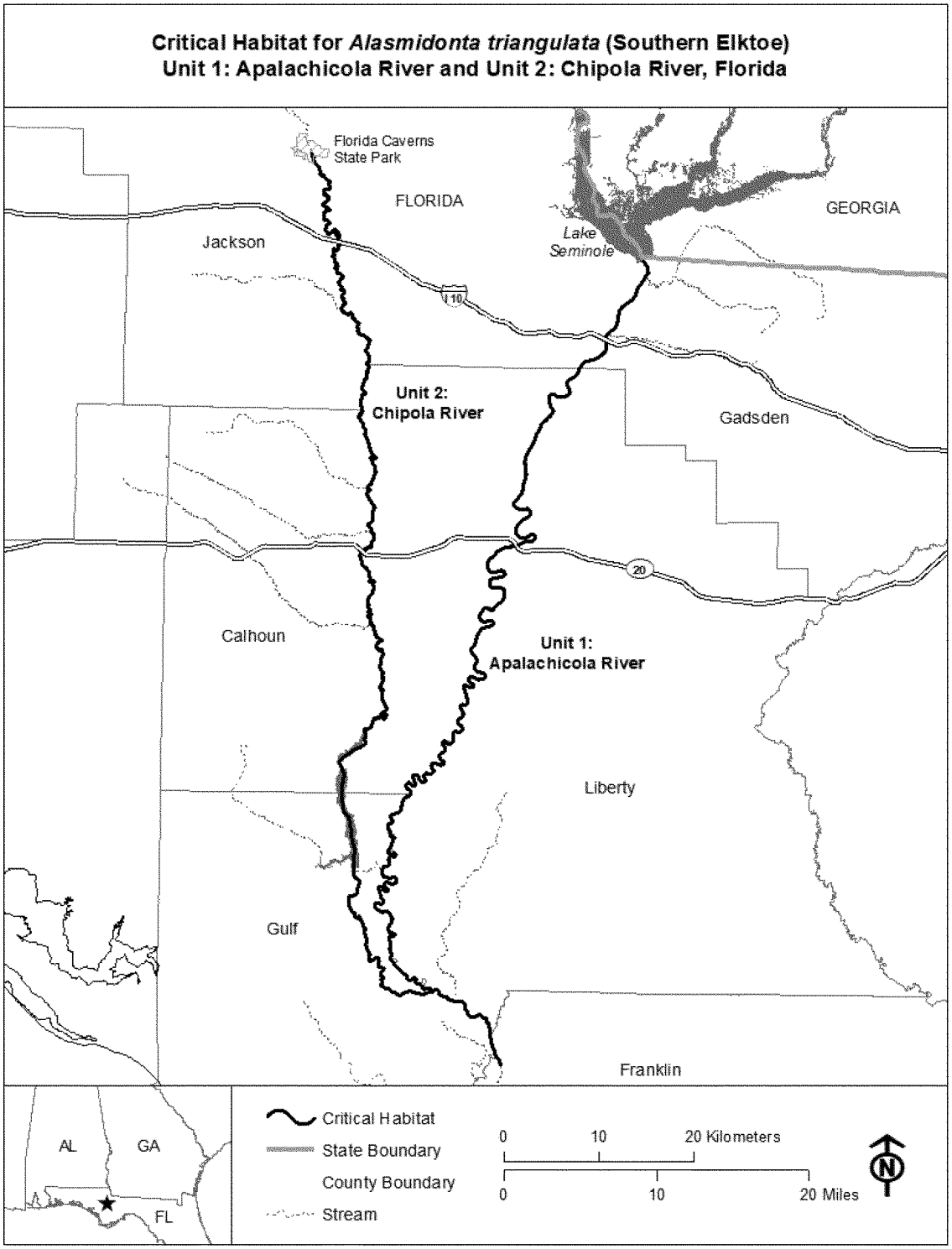


(6) Unit 1: Apalachicola River; Calhoun, Franklin, Gadsden, Gulf, Jackson, and Liberty Counties, Florida.

(i) Unit 1 consists of 142.8 river kilometers (km) (88.7 miles (mi)) of the Apalachicola River in Calhoun, Franklin, Gadsden, Gulf, Jackson, and Liberty Counties, Florida. The mainstem of the Apalachicola River in Unit 1 extends from near Prospect Bluff Historic Sites in Apalachicola National Forest at river mile 20 (U.S. Army Corps of Engineers Navigable Waterway Mile Markers) in Franklin County, Florida, upstream to the Jim Woodruff Lock and Dam in Gadsden and Jackson Counties, Florida (the river is the county boundary). Unit 1 includes stream habitat up to bankfull height.

(ii) Map of Units 1 and 2 follows:

Figure 2 to Southern Elktoe (*Alasmidonta triangulata*) paragraph (6)(ii)



(7) Unit 2: Chipola River; Calhoun, Gulf, and Jackson Counties, Florida.

(i) Unit 2 consists of 131.3 river km (81.6 mi) of the Chipola River (including the reach known as Dead Lake) in Calhoun, Gulf, and Jackson Counties, Florida. The mainstem of the Chipola River in Unit 2 extends from its confluence with the Apalachicola River in Gulf County, Florida, upstream 131.3 km (81.6 mi) to approximately where the river flows underground in Florida Caverns State Park in Jackson County, Florida. Unit 2 includes stream habitat up to bankfull height.

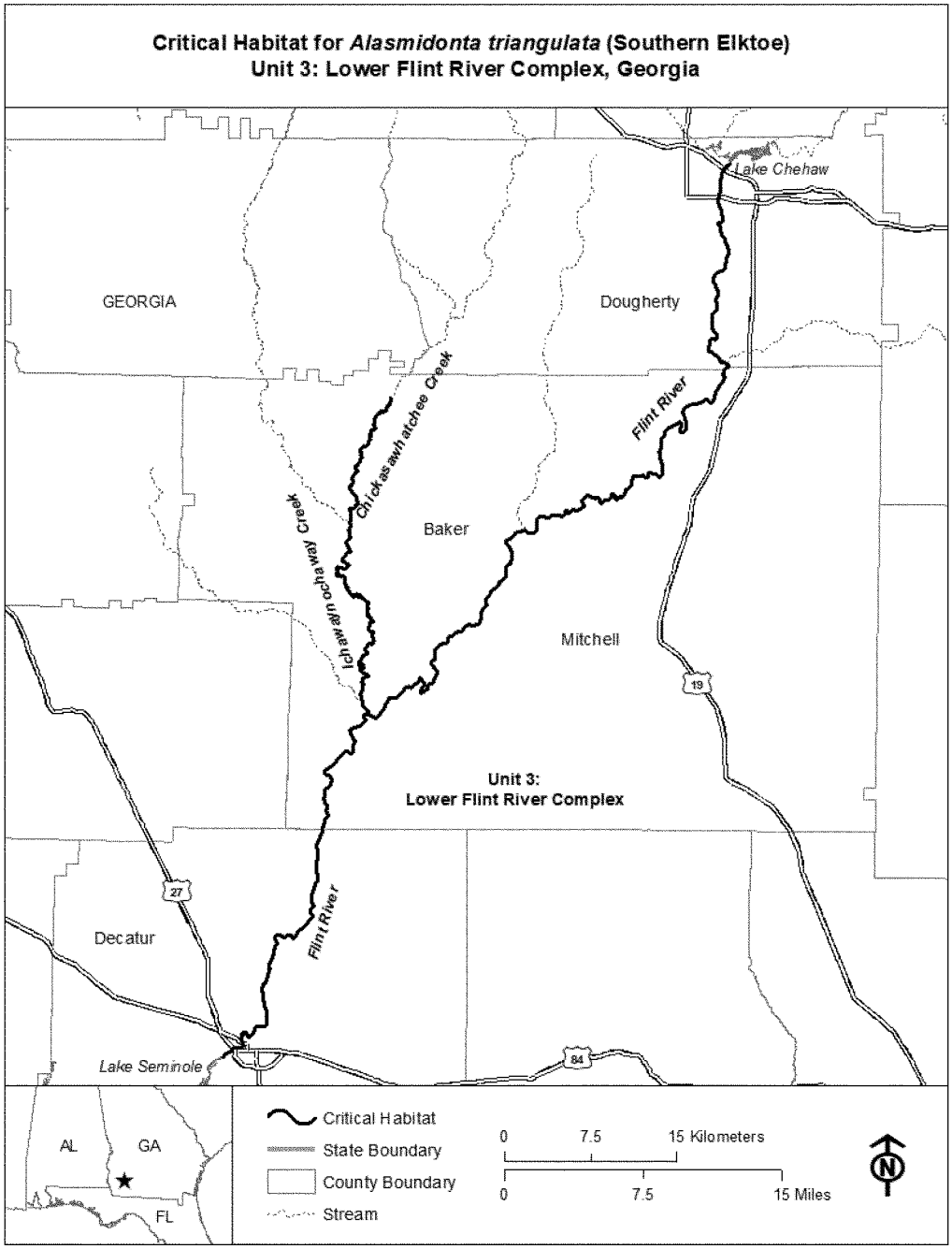
(ii) Map of Unit 2 is provided at paragraph (6)(ii) of this entry.

(8) Unit 3: Lower Flint River Complex; Baker, Decatur, Dougherty, and Mitchell Counties, Georgia.

(i) Unit 3 consists of 165.9 river km (103.1 mi) of the mainstem of the Flint River between Lake Seminole (impounded by the Jim Woodruff Lock and Dam) and the Flint River Dam (which impounds Lake Worth), and the mainstems of two tributaries in Baker, Decatur, Dougherty, and Mitchell Counties, Georgia. The mainstem of the Flint River in Unit 3 extends from 1.3 river km (0.82 mi) downstream of U.S. Highway 84 in Decatur County, Georgia (the approximate upstream extent of Lake Seminole), upstream 122.7 river km (76.3 mi) to the Flint River Dam in Dougherty County, Georgia. Unit 3 includes 26.1 river km (16.2 mi) of the mainstem of Ichawaynochaway Creek from its confluence with the Flint River upstream to its confluence with Chickasawhatchee Creek, and 15.7 river km (9.7 mi) of the mainstem of Chickasawhatchee Creek from its confluence with Ichawaynochaway Creek upstream to its confluence with Spring Creek in Baker County, Georgia. Unit 3 includes stream habitat up to bankfull height.

(ii) Map of Unit 3 follows:

Figure 3 to Southern Elktoe (*Alasmidonta triangulata*) paragraph (8)(ii)



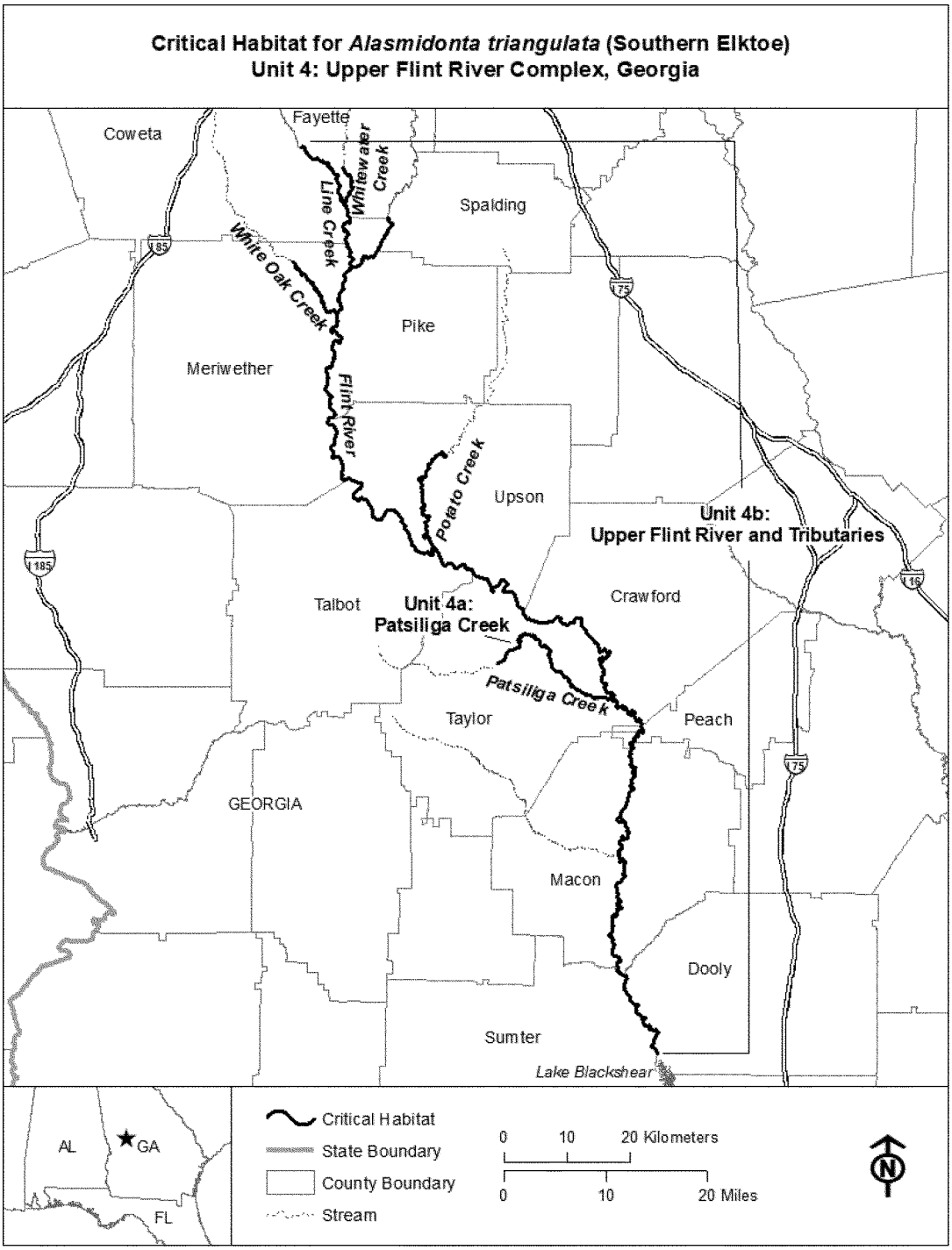
(9) Unit 4: Upper Flint River Complex; Coweta, Crawford, Dooly, Fayette, Macon, Meriwether, Peach, Pike, Spalding, Sumter, Talbot, Taylor, and Upson Counties, Georgia.

(i) Unit 4 is comprised of two subunits:

(A) Subunit 4a includes 36.2 river km (22.5 mi) of Patsiliga Creek in Taylor County, Georgia.

(B) Subunit 4b includes 360.4 river km (223.9 mi) of the mainstem of the Flint River and four of its tributaries upstream of Lake Blackshear in Coweta, Crawford, Dooly, Fayette, Macon, Meriwether, Peach, Pike, Spalding, Sumter, Talbot, Taylor, and Upson Counties, Georgia.

(ii) Map of Unit 4 follows:



(10) Unit 5: Middle Chattahoochee; Russell County, Alabama, and Harris County, Georgia.

(i) Unit 5 includes stream habitat up to bankfull height and is comprised of three subunits:

(A) Subunit 5a includes 36.7 river km (22.8 mi) of the mainstem of Uchee Creek from its confluence with the Chattahoochee River upstream to the confluence with Island Creek in Russell County, Alabama.

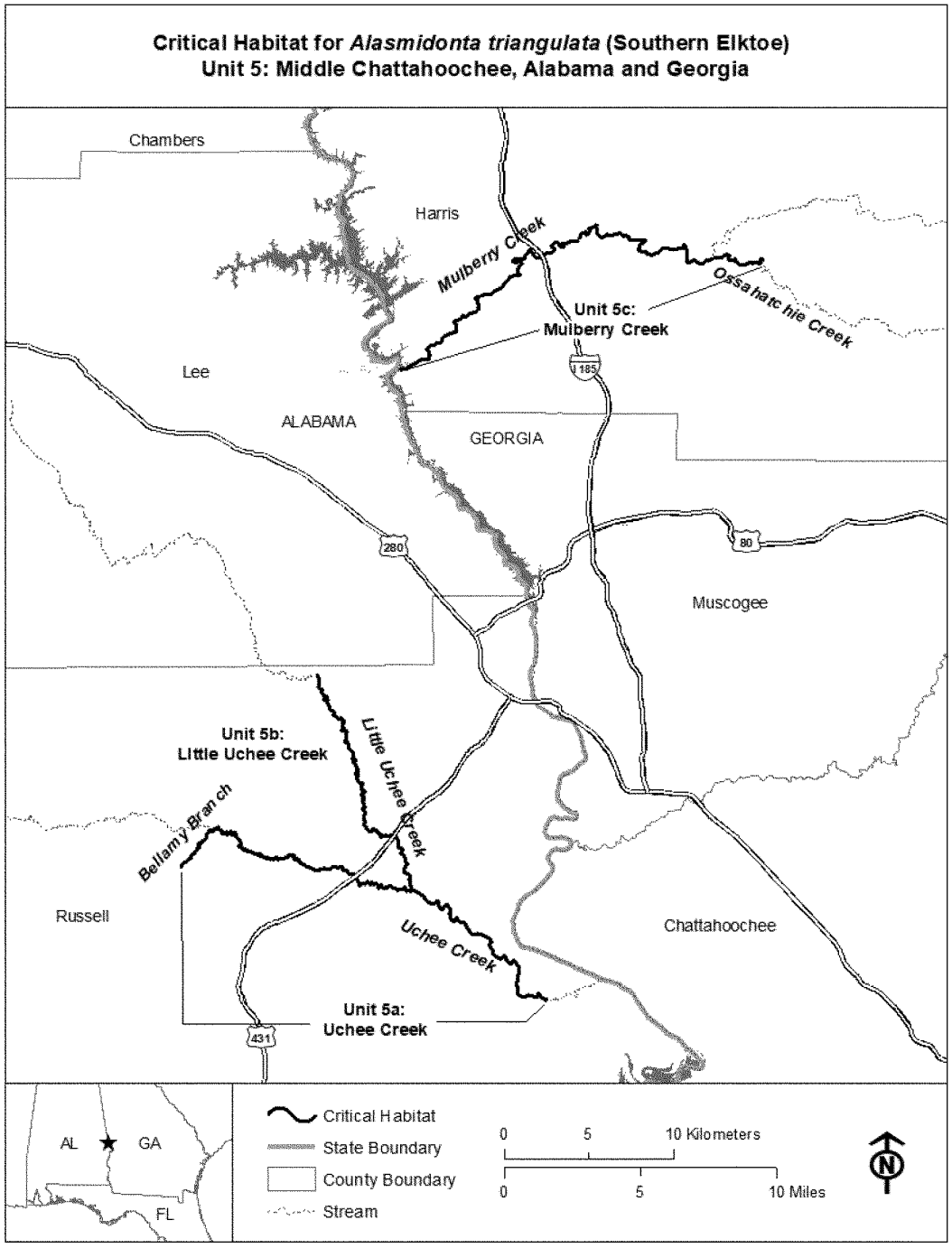
Figure 4 to Southern Elktoe (*Alasmidonta triangulata*) paragraph (9)(ii)

(B) Subunit 5b includes 20.3 river km (12.6 mi) of Little Uchee Creek in Russell County, Alabama.

(C) Subunit 5c includes 35.9 river km (22.3 mi) of Mulberry Creek in Harris County, Georgia.

(ii) Map of Unit 5 follows:

Figure 5 to Southern Elktoe (*Alasmidonta triangulata*) paragraph (10)(ii)



* * * * *

Wendi Weber,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2023–12315 Filed 6–20–23; 8:45 am]

BILLING CODE 4333–15–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BL93

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Amendment 49

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

ACTION: Announcement of availability of fishery management plan amendment; request for comments.

SUMMARY: The South Atlantic Fishery Management Council (Council) submitted Amendment 49 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP) for review, approval, and implementation by NMFS. If approved by the Secretary of Commerce, Amendment 49 to the FMP would revise the overfishing limit (OFL), acceptable biological catch (ABC), annual optimum yield (OY), sector allocations, the total and sector annual catch limits (ACLs), commercial minimum size limit, the commercial seasonal trip limits, and the April spawning season closure. In addition, Amendment 49 would remove the recreational annual catch targets (ACTs) for species in the FMP. The purpose of Amendment 49 is to ensure catch limits are based on the best scientific information available and to ensure overfishing does not occur for the South Atlantic greater amberjack stock, while increasing social and economic benefits.

DATES: Written comments must be received on or before August 21, 2023.

ADDRESSES: You may submit comments on Amendment 49, identified by ''NOAA–NMFS–2023–0061'', by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov* and enter ''NOAA–NMFS–2023–0061'' in the Search box. Click the ''Comment'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Mary Vara, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Electronic copies of Amendment 49, 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/150641.*

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

SUPPLEMENTARY INFORMATION: The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires each regional fishery management council to submit any fishery management plan or an amendment to such a plan to the Secretary of Commerce (the Secretary) for review and approval, partial approval, or disapproval. The Magnuson-Stevens Act also requires that NMFS, upon receiving a fishery management plan or an amendment to such a plan, publish an announcement in the **Federal Register** notifying the public that the plan or amendment is available for review and comment.

The Council prepared the FMP that is being revised by Amendment 49. If approved, Amendment 49 would be implemented by NMFS through regulations at 50 CFR part 622 under the authority of the 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.

In 2008, a stock assessment for greater amberjack was completed through the Southeast Data, Assessment, and Review (SEDAR) process (SEDAR 15), and it was determined that the stock was not overfished or undergoing overfishing. As a result of that stock status, the Comprehensive Amendment to the FMP (77 FR 15915, March 16, 2012) established the current total ACL and annual OY.

The most recent SEDAR stock assessment for South Atlantic greater amberjack (SEDAR 59) was completed in 2020. The assessment 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 from the Coastal Household Telephone Survey (CHTS) to the mail-based FES. Estimates of recreational catch for greater amberjack included in the previous assessment were made using the Marine Recreational Fisheries Statistics Survey (MRFSS) methodology. As explained in Amendment 49, total recreational fishing effort estimates generated from MRIP FES are different than those from the MRIP CHTS and MRFSS. 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 Scientific and Statistical Committee (SSC), the Council, and NMFS, and more robust compared to the MRFSS method previously used to estimate recreational catches for greater amberjack. The SSC reviewed SEDAR 59 (2020) 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 greater amberjack stock is not overfished or undergoing overfishing.

Updated catch and data changes incorporated in the assessment provided information to update the OFL, ABC, annual OY, and ACLs. In response to the results of SEDAR 59 (2020), the Council subsequently developed Amendment 49.

In addition to the proposed revisions to the sector ACLs and seasonal commercial quotas, the Council determined that further modifications to greater amberjack management measures are needed to ensure that overfishing does not occur, while increasing social and economic benefits through sustainable harvest of greater

amberjack in the South Atlantic exclusive economic zone (EEZ). Amendment 49 would reduce the commercial minimum size limit, increase the seasonal commercial trip limits, and revise the April spawning closure for greater amberjack. Amendment 49 would also make changes to the FMP by removing recreational ACTs from the FMP to make administrative efforts more efficient, since the Council has not used, and does not anticipate using, recreational ACTs for management.

Actions Contained in Amendment 49

For South Atlantic greater amberjack, Amendment 49 would revise the OFL, ABC, annual OY, total ACL, sector allocations, and sector ACLs. Amendment 49 would also revise the commercial minimum size limit, commercial seasonal trip limits, and the April spawning closure. In addition, Amendment 49 would remove the recreational ACTs for snapper-grouper species in the FMP.

OFL, ABC, Annual OY, and Total ACL

As implemented through the Comprehensive ACL Amendment, the current OFL for greater amberjack is 2,005,000 lb (909,453 kg), round weight. The current total ACL and annual OY are equal to the ABC of 1,968,001 lb (892,670 kg), round weight. All of these current values include recreational landings for greater amberjack tracked using MRFSS estimation methods, and the Council's choice of these values was based on the recommendations of their SSC from the SEDAR 15 stock assessment (2008).

In April 2021, the Council's SSC reviewed the latest stock assessment SEDAR 59 (2020) and recommended new OFL and ABC levels based on the assessment. As discussed above, SEDAR 59 and the associated OFL and ABC recommendations for greater amberjack incorporated the revised estimates for recreational catch and effort from the MRIP FES. MRIP replaced MRFSS in 2013 and replaced the CHTS with FES in 2018. MRIP also incorporated a new survey design for the Access Point Angler Intercept Survey in 2013. As explained in Amendment 49, total recreational fishing effort estimates generated from MRIP FES are generally higher than both the MRFSS and MRIP CHTS estimates. This difference in estimates is because MRIP FES is designed to more accurately measure fishing activity, not because there was a sudden increase 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 MRFSS method previously used to estimate recreational catches for greater amberjack. The new OFL and ABC recommendations within Amendment 49 also represent the best scientific information available as determined by the Council's SSC and NMFS. The Council chose to specify OY for greater amberjack 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).

The fishing year for greater amberjack is March 1 through the end of February; therefore, OFL, ABC, OY and total ACL values are described as a combination of years. Amendment 49 would revise the OFL to be 3,283,000 lb (1,489,144 kg), round weight, for 2023–2024; 2,839,000 lb (1,287,749 kg), round weight, for 2024–2025; 2,719,000 lb (1,233,317 kg), round weight, for 2025–2026; and 2,691,000 lb (1,220,617 kg), round weight, for 2026–2027 and subsequent years.

Amendment 49 would revise the total ACL and annual OY equal to the recommended ABC of 3,233,000 lb (1,466,464), round weight, for 2023–2024; 2,818,000 lb (1,278,223 kg), round weight, for 2024–2025; 2,699,000 lb (1,224,246), round weight, for 2025–2026; and 2,669,000 lb (1,210,638), round weight, for 2026–2027 and subsequent fishing years.

Sector Allocations and ACLs

Amendment 49 would revise the commercial and recreational allocations of the total ACL for greater amberjack. The current sector ACLs for greater amberjack are based on the current commercial and recreational allocations of the total ACL at 40.66 percent and 59.34 percent, respectively. The current allocations were established by applying the formula of sector ACL = ((mean landings 2006–2008)*0.5) + ((mean landings 1986–2008)*0.5) to the landings dataset that were used in the Comprehensive ACL Amendment (77 FR 15916, March 16, 2012).

The revised greater amberjack sector allocations in Amendment 49 would result in commercial and recreational allocations of 35.00 percent and 65.00 percent, respectively. After considering various allocation alternatives, the Council proposed allocations based on their current allocation equation, updated estimates of recreational landings from the MRIP FES method, and a consideration of economic and social impacts to the commercial and recreational sectors. The proposed sector allocations are approximate midpoints between the current allocations, and the allocations that result from applying the current allocation formula to a revised dataset that is inclusive of MRIP–FES, which results in commercial and recreational allocations of the total ACL at 29.84 percent and 70.16 percent, respectively. While the Council increased the recreational allocation percentage to account for the increase in recreational catch estimates under the new MRIP FES estimation method, the Council chose to increase the recreational allocation to 65.00 percent, instead of 70.16 percent, to account for potential adverse economic and social impacts to the commercial sector. Several recently completed stock assessments for other species in the FMP have indicated poor stock status and necessitated reduced harvest of these stocks, making greater amberjack potentially more important to the commercial sector. The proposed greater amberjack sector allocation percentages also approximate the average annual total landings percentages for each sector from 2010–2019.

The Council determined that the sector allocations in Amendment 49 would result in the most appropriate balance between the needs of both sectors to maximize harvest opportunities. The Council considers this revised allocation to be fair and equitable to fishery participants in both the commercial and recreational sectors. The Council determined that this allocation is also reasonably calculated to promote conservation and is a wise use of the resource, since it achieves OY and is based upon an ABC recommendation from their SSC that incorporates the best scientific information available. The Council acknowledged that the recreational sector would benefit with an increase to their allocation, and that the recreational sector management measures and accountability measures (AMs) are in place to prevent overages of the recreational ACL.

The commercial quota for greater amberjack is equivalent to the commercial ACL. The final rule for Regulatory Amendment 27 to the FMP established two commercial fishing seasons and divided the commercial quota between the seasons to lengthen the greater amberjack commercial season and allow for a more equitable distribution and price stability of the greater amberjack resource throughout the South Atlantic (85 FR 4588, January 27, 2020). Regulatory Amendment 27 allocated 60 percent of the commercial quota to Season 1 from March through August, and 40 percent of the quota to

Season 2 from September through February. Any remaining commercial quota from Season 1 is added to the commercial quota in Season 2. Any remaining quota from Season 2 is not carried forward into the next fishing year. Amendment 49 would not alter the current fishing seasons or seasonal allocations of the commercial ACL.

Currently, the commercial ACL is 769,388 lb (348,989 kg), gutted weight. The commercial Season 1 quota is 461,633 lb (209,393 kg), gutted weight. The commercial Season 2 quota is 307,755 lb (139,595 kg), gutted weight.

Amendment 49 would revise the commercial ACLs to be 1,088,029 lb (493,522 kg), gutted weight, for 2023–2024; 948,365 lb (430,171 kg), gutted weight, for 2024–2025; 908,317 lb (412,006 kg), gutted weight, for 2025–2026; and 898,221 lb (407,426 kg), gutted weight, for 2026–2027 and subsequent fishing years.

The commercial Season 1 quotas would be 652,817 lb (296,113 kg), gutted weight, for 2023–2024; 569,019 lb (258,103 kg), gutted weight, for 2024–2025; 544,990 lb (247,203 kg), gutted weight, for 2025–2026; and 538,933 lb (244,456 kg), gutted weight, for 2026–2027 and subsequent fishing years.

The commercial Season 2 quotas would be 435,212 lb (197,409 kg), gutted weight, for 2023–2024; 379,346 lb (172,068 kg), gutted weight, for 2024–2025; 363,327 lb (164,802 kg), gutted weight, for 2025–2026; and 359,288 lb (162,970 kg), gutted weight, for 2026–2027 and subsequent fishing years.

The current recreational ACL is 1,167,837 lb (529,722 kg), round weight. In Amendment 49,the recreational ACLs would be 2,101,450 lb (953,202 kg), round weight, for 2023–2024; 1,831,700 lb (830,845 kg), round weight, for 2024–2025; 1,754,350 lb (795,760 kg), round weight, for 2025–2026; and 1,734,850 lb (786,915 kg), round weight, for 2026–2027 and subsequent fishing years.

Commercial Minimum Size Limit

Amendment 4 to the FMP (56 FR 56016, October 31, 1991) implemented the current minimum size limit for the commercial sector of 36 inches (91.4 cm) fork length (FL).

Amendment 49 would reduce the commercial minimum size limit to 34 inches (86.4 cm), FL. Consideration of a reduced commercial minimum size limit was recommended during public scoping (April 2021) and from the Council's Snapper-Grouper Advisory Panel (AP) at their April 2021 meeting. For similar reasons as those provided through public and AP comments, the Council determined that reducing the minimum size limit would reduce regulatory discards, reduce the risk of shark depredation, and more align with the greater commercial desirability for smaller fish. Additionally, the Council decided that a reduction to 34 inches (86.4 cm), FL, is not likely to jeopardize the current positive stock status, given other management constraints on the commercial sector such as in-season AMs, trip limits, and split season quotas.

Seasonal Commercial Trip Limits

The final rule for Regulatory Amendment 27 revised the commercial trip limit for greater amberjack to the current limits of 1,200 lb (544 kg) during Season 1, and 1,000 lb (454 kg) during Season 2 (in round or gutted weight).

Amendment 49 would increase the Season 2 trip limit for greater amberjack to 1,200 lb (544 kg). After hearing a recommendation for this change from the Snapper-Grouper AP, the Council selected this option to have more regulatory consistency by having the same commercial trip limit throughout the year. Additionally, the Council acknowledged that the analyses considered in Amendment 49 indicate that under the 1,200 lb (544 kg) trip limit, the commercial sector is not expected to experience a closure in Season 2. The Council decided that having the same trip limit throughout the fishing year would best meet the purpose of revising the commercial trip limit to increase efficiency of commercial fishing for greater amberjack, while minimizing adverse social and economic effects.

April Spawning Closure

The peak spawning month for greater amberjack is during April and spawning aggregations are vulnerable to fishing effort during that time of the year. Due to the concerns of high catch rates of greater amberjack in spawning aggregations, the final rule for Amendment 4 to the FMP (56 FR 56016, October 31, 1991) implemented a spawning season closure for the commercial harvest of greater amberjack during April, in which commercial fishermen were restricted to a three fish per person per day limit (the same as the recreational bag limit at the time). To further enhance the protection to spawning greater amberjack, the final rule for Amendment 9 to the FMP revised those commercial possession limits and sale/purchase restrictions (64 FR 3624, February 24, 1999). Currently during April each year, for both the commercial and recreational sectors, no person may sell or purchase a greater amberjack harvested from the South Atlantic EEZ and the harvest and possession limit is one per person per day or one per person per trip, whichever is more restrictive.

Amendment 49 would revise the April spawning closure restrictions for both the commercial and recreational sectors from April 1 through April 30, and not allow any person to fish for, harvest, or possess a greater amberjack from the South Atlantic EEZ and the harvest and possession limits would be zero. The sale or purchase of greater amberjack would also continue to be prohibited in April. The Council determined that additional protections were needed for greater amberjack during this portion of their peak spawning period (April-May), and that both sectors should fully participate in this effort by not allowing either sector to harvest greater amberjack.

Proposed Rule for Amendment 49

A proposed rule to implement Amendment 49 has been drafted. In accordance with the Magnuson-Stevens Act, NMFS is evaluating the proposed rule for Amendment 49 to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Council has submitted Amendment 49 for Secretarial review, approval, and implementation. Comments on Amendment 49 must be received by August 21, 2023. Comments received during the respective comment periods, whether specifically directed to Amendment 49 or the proposed rule, will be considered by NMFS in the decision to approve, partially approve, or disapprove, Amendment 49. All comments received by NMFS on the amendment or the proposed rule during their respective comment periods will be addressed in the final rule.

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

Dated: June 13, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–13049 Filed 6–16–23; 11:15 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 88, No. 118
Wednesday, June 21, 2023

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

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Notice of a Request for Revision and Extension of a Currently Approved Information Collection

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Foreign Agricultural Service (FAS) to request a revision and extension from the Office of Management and Budget (OMB) of a currently approved information collection for the Dairy Tariff-Rate Quota (TRQ) Import Licensing program.

DATES: Comments on this notice must be received by August 21, 2023 to be assured of consideration.

ADDRESSES: You may send comments, identified by the OMB Control number 0551–0001, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. This portal enables respondents to enter short comments or attach a file containing lengthier comments.
- *Email: Bettyann.Gonzales@usda.gov*. Include OMB Control number 0551–0001 in the subject line of the message.
- *Mail, Courier, or Hand Delivery:* BettyAnn Gonzales, Foreign Agricultural Service, U.S. Department of Agriculture, 1400 Independence Avenue SW, Room 5550, Stop 1070, Washington, DC 20250–1070.

Instructions: All submissions received must include the agency name and OMB Control Number for this notice.

FOR FURTHER INFORMATION CONTACT: BettyAnn Gonzales, 202 720–1344, *Bettyann.Gonzales@usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Dairy TRQ Import Licensing Program.

OMB Number: 0551–0001.

Expiration Date of Approval: January 31, 2024.

Type of Request: Revision and extension of a currently approved information collection.

Abstract: The currently approved information collection supports the Dairy TRQ Import Licensing regulation (the Regulation) (7 CFR 6.20–6.36) which governs the administration of the import licensing system applicable to most dairy products subject to TRQs. The TRQs were established in the Harmonized Tariff Schedule of the United States (HTS) as a result of the entry into force of certain provisions in the Uruguay Round Agreements Act (Pub. L. 103–465) that converted existing absolute quotas to TRQs. Imports of nearly all cheeses made from cow's milk (except soft-ripened cheese such as Brie) and certain non-cheese dairy products (including butter and dried milk) are subject to TRQs and the Regulation. Licenses are issued each quota year to eligible applicants and are valid for 12 months (January 1 through December 31). Only licensees may enter specified quantities of the subject dairy articles at the applicable in-quota tariff-rates. Importers who do not hold licenses may enter dairy articles only at the over-quota tariff-rates.

Each quota year, all applicants for historical, non-historical and designated licenses must certify their eligibility for the following quota year through the online Agricultural Trade License Administration System (ATLAS) platform. ATLAS has now replaced any online forms previously utilized before. The ATLAS application process requires applicants to: (1) certify they are an importer, manufacturer, or exporter of certain dairy products; and (2) certify they meet the eligibility requirements of § 6.23 of the Regulation. Applicants for non-historical licenses must request licenses in descending order of preference for specific products and countries listed on the form.

After licenses are issued, § 6.26 requires licensees to surrender by October 1 in ATLAS any license amount that a licensee does not intend to enter that year. If October 1 falls on a weekend, then the deadline will be the next business day. These amounts are reallocated, to the extent practicable, to existing licensees for the remainder of that year based on requests submitted in ATLAS. ATLAS requires the licensee to complete a table listing the surrendered amount by license number. For reallocated quota, the licensee may complete an additional table listing the additional amounts requested by dairy article and supplying country in descending order of preference.

The estimated total annual burden of 479 hours in the Office of Management and Budget (OMB) inventory for the currently approved information collection will decrease to 394 hours. The public reporting burden for this collection of currently approved license application process through ATLAS is estimated to average 368.5 hours; and the license surrender process is 25.5 hours.

Estimate of Burden: The average burden, including the time for reviewing instructions, gathering data needed, data input, and record keeping is estimated at .67 hour for license application and .17 hour for license surrender.

Type of Respondents: Importers and manufacturers of cheese and non-cheese dairy products, and exporters of non-cheese dairy products.

Estimated Number of Respondents: For license application and license surrender under the ATLAS system: 700.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden: 394 hours.

Copies of this information collection may be obtained from Dacia Rogers, the Agency Information Collection Coordinator, at *Dacia.Rogers@usda.gov*.

Requests for Comments: Send comments regarding (a) whether the information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information including validity of the methodology and assumption used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated, electronic, mechanical, or other technological collection techniques, or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be available without change, including any personal information provided, for inspection online at *http://www.regulations.gov* and at the mail address listed above between 8:00 a.m. and 4:30 p.m., Monday through Friday, except holidays.

Comments will be summarized and included in the submission for OMB approval.

Persons with disabilities who require an alternative means for communication of information (Braille, large print, audiotape, etc.) should contact *RARequest@usda.gov*.

Daniel Whitley,

Administrator, Foreign Agricultural Service.

[FR Doc. 2023–13086 Filed 6–20–23; 8:45 am]

BILLING CODE 3410–10–P

DEPARMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS–2023–0008]

Notice of Intent To Prepare an Environmental Impact Statement for the Upper Maple River Watershed Plan, North Dakota

AGENCY: Natural Resources Conservation Service, Department of Agriculture.

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS).

SUMMARY: The Natural Resources Conservation Service (NRCS) North Dakota State Office, announces its intent to prepare an EIS for the Upper Maple River Watershed located within Cass, Barnes, Steele, and Griggs Counties, North Dakota. NRCS will examine alternative solutions through the EIS process to provide watershed protection. NRCS is requesting comments to identify significant issues, potential alternatives, information, and analyses relevant to the Proposed Action from all interested individuals, Federal and State Agencies, and Tribes.

DATES: We will consider comments that we receive by August 7, 2023. Comments received after the close of the comment period will be considered to the extent possible.

ADDRESSES: We invite you to submit comments in response to this notice. You may submit your comments through one of the methods below:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for docket ID NRCS–2023–0008. Follow the online instructions for submitting comments; or
- *Mail or Hand Delivery:* Carol Lewis, Cass County Joint Water Resource District, 1201 Main Avenue West, West Fargo, ND 58078–1301. In your comment, specify the docket ID NRCS–2023–0008.

All comments received will be posted and made publicly available on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Christi Fisher; telephone: (701) 530–2091; email: *christi.fisher@usda.gov.* Individuals who require alternative means of communication should contact USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Purpose and Need

The U.S. Army Corps of Engineers (USACE) and U.S. Fish and Wildlife Service (USFWS) are cooperating federal agencies in the watershed planning effort. NRCS is the lead federal agency implementing the National Environmental Policy Act and the National Historic Preservation Act (NHPA). An interagency team consisting of the following agencies are participating in the planning effort: Federal Emergency Management Agency; U.S. Environmental Protection Agency; North Dakota Department of Water Resources (ND DWR); North Dakota Department of Environmental Quality; North Dakota Game and Fish Department; North Dakota Department of Transportation; Cass County Joint Water Resource District; Cass County Highway Department; Cass County Sheriff's Office; Cass County Commission; Cass County Emergency Management; City of Amenia; and City of Casselton. NRCS is consulting on both the National Environmental Policy Act (NEPA) and section 106 of the NHPA with the North Dakota State Historical Preservation Office and 31 Tribal Nations.

The primary purpose of the proposed action is watershed protection. The proposed action will also result in flood damage reduction to cropland, structures, roads, drain ditches, structures, and vehicles in the watershed. Watershed protection goals consist of reducing nutrient loads from the watershed, particularly dissolved phosphorus, and increasing quantity and quality of wetlands and wildlife habitat.

The Watershed Project Plan is authorized under the authority of the Watershed Protection and Flood Prevention Act of 1954 (Pub. L. 83–566), as amended, and the Regional Conservation Partnership Program Project (16 U.S.C. chapter 58, Subchapter VIII). This action is needed because:

- The Upper Maple River Watershed, with a drainage area of 186,400 acres, annually contributes an estimated 30,200 pounds of phosphorus and 331,600 pounds of nitrogen to the Red River downstream. Approximately 88 percent of the watershed is farmed for row crops consisting predominantly of soybeans, corn, spring wheat, dry beans, and sunflowers.
- The average slope of the Upper Maple River is 4 foot per mile and the downstream Red River averages 1 foot per mile. The low topographic relief landscape results in floods over wide swaths of cropland for long durations, allowing for phosphorus dissolution from soils and vegetation into the overlying stagnant floodwaters. Within the Upper Maple Watershed, 17,684 acres of cropland are inundated by the 2-year recurrence interval (RI) flood event, 29,418 acres at the 10-year RI flood, and 37,246 acres are inundated by a 100-year RI flood.
- In addition to generating nutrient transport from cropland to the Maple River, the average annual flood inundation of 12,600 acres of cropland generates $2.1 million annual damages to agricultural producers. Total economic losses due to flooding, considering damage to cropland, structures, roads, drain ditches, structures, and vehicles in the watershed are estimated at $3.8 million a year.
- Agricultural non-point source nutrient loads in the Red River are of international significance. The Red River discharges to Lake Winnipeg, the 10th largest freshwater lake in the world, also designated one of the most eutrophic large lakes [1] in the world. Eutrophication has resulted in negative effects on the aquatic food web within the lake, resulting in declines to critical species which support recreational and commercial fisheries, tourism, and subsistence fishing of indigenous people. While the Red River contributes only 10 to 15 percent of overall annual runoff to the lake by volume, it

[1] A eutrophic lake is rich in nutrients and supports a dense phytoplankton or plant population, the respiration and decomposition of which results in depletion of dissolved oxygen levels. Eutrophication generates adverse effects on aquatic species due to zones of low dissolved oxygen in the lake and impacts recreation, public safety, and drinking water supply due to algal blooms on the lake surface.

contributes 69 percent of the total phosphorus load, largely in the form of inorganic dissolved phosphorus, and it is also a major contributor of nitrogen. Nitrogen loads have remained relatively stable in the Red River since 2000, however phosphorus loads at the U.S. and Canadian border have continued to steadily increase over the last two decades despite significant USDA–NRCS program investments in the installation of on-farm conservation practices throughout the North Dakota and Minnesota portions of the Red River Basin.

- Cropland conservation practices promoted by NRCS are effective at reducing particulate bound phosphorus, nitrogen, and sediment loss; however, have been largely ineffective in reducing dissolved phosphorus runoff from cropland in this watershed. This is demonstrated not just in the upward trend of dissolved phosphorus at the U.S. Geological Survey (USGS) gauge on the international border, but through published research from Red River Basin study sites. Other flood prone, flat, cold climate, agricultural landscapes with predominantly fine-grained soils, such as those found in Finland, Sweden, and the Netherlands, experience similar challenges with dissolved phosphorus management.
- Federal investment in nutrient reduction within the Red River Basin is an important contribution to the Boundary Waters Treaty (BWT) obligation of the United States. Article IV of the BWT states that ''boundary waters or waters flowing across the boundary shall not be polluted to the injury of health and property to the other.'' The International Joint Commission (IJC) acts as the arbitral body for the BWT, with the Red River Basin Commission (RRBC) established as a sub-entity between the two countries for management in the international Red River Basin. In 2020, based on the recommendations of the RRBC, the IJC adopted nutrient concentration objectives for the international border crossing of the Red River. Meeting the target for phosphorus will require an approximately 50 percent reduction in the average concentrations from the last two decades, which in turn will require implementation of new and innovative techniques for phosphorus reduction from cropland. U.S. negotiations with the Canadian government for similar investments to protect U.S. waterways from pollutants originating in Canada, through the IJC, will be bolstered by U.S. investments in the Red River Basin.
- The Prairie Pothole Region (PPR) in the northcentral Great Plains is one of the most threatened waterfowl habitats in the United States. The Red River Valley is one of the largest artificially drained landscapes in the world, with hundreds of miles of publicly owned drainage ditches, privately owned lateral ditches, and thousands of acres of surface tile drains. The remaining wetlands and grasslands of the PPR are one of the most productive areas in the world for breeding waterfowl and are important habitat for migratory grassland and shore birds as well. Drainage of remaining wetlands continues in the region, from 1997 to 2009 more than 50,000 individual wetlands were lost within North Dakota alone, a –3.3 percent overall change.

Preliminary Proposed Action and Alternatives

The Upper Maple Watershed planning process was initiated in 2016 with a public scoping meeting, which was not advertised in the **Federal Register** because it was assumed that an Environmental Assessment would be completed for the project. Through the course of the planning process since 2016, 38 different alternatives were evaluated with comments solicited. Based on technical analysis results and comments, all but one alternative was selected. Both the EIS and the second public scoping meeting, dated May 30, 2023, will provide a summary of the preliminary alternatives analysis and opportunity for input. The EIS is expected to evaluate two alternatives: one action alternative and one no action alternative. The alternatives we intend to carry forward to final analysis are:

Alternative 1—No Action: Taking no action would mean that no federal action would be taken in the Upper Maple River Watershed and implementation of significant flood damage reduction or watershed protection projects would not occur. The watershed will continue to contribute an average of 19,841 pounds of phosphorus and 50,223 pounds of nitrogen annually to the Maple River, and the downstream Red River and Lake Winnipeg. Wetlands and wildlife habitat will remain unchanged barring a significant change in federal conservation programs.

Alternative 2—Upper Maple River Site 2A (Proposed Action): Upper Maple River Site 2A would be a multi-purpose dry dam with interior features designed and operated for the purpose of dissolved phosphorus (DP) and nitrogen reduction, and wetlands and uplands managed for wildlife habitat. The primary dam structure would provide 2,863 acre-feet of temporary (less than 10 days inundation at the 10-year recurrence interval flood) floodwater retention for a 59.7 square mile drainage area and would consist of a 2.3-mile embankment with a maximum height of 31 feet, 48-inch principal spillway conduit, and structural concrete auxiliary spillway. Reduction of dissolved inorganic phosphorus will be through two primary means. The first involves construction and operation of three shallow retention cells, totaling 240 acres, on the interior of the dry dam to which water would be routed and held to depths of 2 to 3 feet through the growing season. Vegetation would uptake DP as it grows and in the early fall the cells would be drained via automated control structures and tile drains below the cells to allow vegetation to be cut, baled, and removed from cells prior to the first frost in 2 out of 3 years. The second primary means of DP reduction occurs through reducing the extents, frequency, and duration of cropland inundation downstream of the dam through modification of the peak flow hydrograph. The alternative would also result in enhancement of approximately 200 acres of existing wetlands, and enhancement of approximately 500 acres of uplands which would be managed to maximize wildlife habitat benefits.

Summary of Expected Impacts

An NRCS evaluation of this federally assisted action indicates that the proposed alternative may have a significant local, regional, national, or international impact on the environment. Hydrologic impacts include peak flow reductions of 82 percent and 56 percent of the 10- and 100-year recurrence interval flood events immediately downstream of the retention site, and 14 percent and 19 percent of the 10- and 100-year recurrence interval flood events at the downstream confluence between Maple River and unnamed tributary which site 2A is located. Immediately downstream of the retention site, average annual loads of total phosphorus, total nitrogen, and total suspended solids are reduced by 60 percent, 66 percent, and 38 percent respectively. The proposed alternative would result in a total loss of 21.4 acres of wetlands through fill placement, excavation, which will be mitigated via onsite wetland restoration. The project is expected to generate a net increase of 230.3 acres of wetlands and enhances approximately 30 acres of existing wetlands because of restored hydrology and vegetative communities, and enhancement of approximately 500 acres upland wildlife habitat for the benefit of migratory birds and other

wildlife species. Short term negative impacts during construction are anticipated to be local only, and may occur in relation to soils, vegetation, noise, and traffic.

Anticipated Permits and Authorizations

The following permits and other authorizations are anticipated to be required:

- *CWA Section 404 permit.* Implementation of the proposed federal action would require a Clean Water Act (CWA) Section 404 permit from the U.S. Army Corps of Engineers, which is a cooperating federal agency on the planning effort. Consultation is ongoing and no significant challenges are anticipated given the overall environmental benefits of the project.
- *CWA Section 401 permit.* The project would also require water quality certification under Section 401 of the CWA and permitting under Section 402 of the CWA (National Pollutant Discharge Elimination Permit), both of which would be issued by the North Dakota Department of Environmental Quality, which is participating on the interagency team for the watershed plan. Consultation is ongoing and no significant challenges are anticipated given the overall environmental benefits of the project.
- *Permit to Construct or Modify a Dam.* The project will require authorization from the ND DWR for construction of a dam. ND DWR is participating on the interagency team for the watershed plan and has also provided funding for the planning effort. No significant challenges are anticipated given the project is being designed to meet State of North Dakota dam safety standards.
- *Water Appropriation Permit.* The project may require a conditional water use permit from ND DWR for construction of a dam that will temporarily retain water during flood events. ND DWR is participating on the interagency team for the watershed plan and has also provided funding for the planning effort.
- *Floodplain Permit.* The project will require a floodplain development permit from Cass County. Cass County is participating on the interagency team for the watershed plan and no significant challenges are expected given the beneficial flood damage reduction effects of the project.
- *NHPA Section 106 Consultation.* Consultation with 31 Tribal Nations and the North Dakota State Historical Society is ongoing, as required by the NHPA. To date no concerns have been raised about NHPA, however consultation is ongoing.

Schedule of Decision-Making Process

A draft EIS will be prepared and circulated for review and comment by agencies and the public for at least 45 days per 40 CFR 1503.1, 1502.2, 1506.11, 1502.17, and 7 CFR 650.13. The draft EIS is anticipated to be published in the **Federal Register** approximately 6 months after publication of this NOI. A final EIS is anticipated to be published within 6 months of completion of the public comment period for the draft EIS. NRCS will then decide whether to implement one of the alternatives as evaluated in the EIS.

NRCS will provide technical and financial assistance for the proposed project through the NRCS Watershed Protection and Flood Prevention Program if an action is selected. A Record of Decision will be completed after the required 30-day waiting period and will be publicly available. The responsible Federal official for the NRCS is Nathan Jones, North Dakota Acting State Conservationist.

Public Scoping Process

Public scoping meetings will be held to further develop the scope of the draft EIS. A preliminary scoping meeting was held on February 24, 2016, in Casselton, ND. An additional public scoping meeting was held on May 30, 2023. The meeting was virtual only. A recording of the meeting may be accessed at: *https://www.nrcs.usda.gov/conservation-basics/conservation-by-state/north-dakota/upper-maple-river-watershed-plan.*

Comments received for both meetings, including names and addresses of those who comment, will be part of the public record.

NRCS will coordinate the scoping process as provided in 36 CFR 800.2(d)(3) and 800.8 (54 U.S.C. 306108) to help fulfill the NHPA, as amended, review process. The USACE and USFWS have declined to participate in the NRCS led NHPA process and instead intend to use their agency specific NHPA processes.

Identification of Potential Alternatives, Information, and Analyses

NRCS invites agencies, Tribes, and individuals who have special expertise, legal jurisdiction, or interest in the Upper Maple Watershed and the Red River Basin to provide comments concerning the scope of the analysis and identification of potential alternatives, information, and analyses relevant to the Proposed Action in writing.

Authorities

This document is published pursuant to NEPA regulations regarding publication of a notice of intent to issue an EIS (40 CFR 1501.9(d)). The EIS will be prepared to evaluate potential environmental impacts as required by section 102(2)(C) of NEPA, the Council on Environmental Quality regulations (40 CFR parts 1500–1508); and NRCS regulations that implement NEPA in 7 CFR part 650 and 7 CFR 622. Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954, as amended, (Pub. L. 83–566) and the Flood Control Act of 1944 (Pub. L. 78–534).

Federal Assistance Program

The title and number of the Federal Assistance Programs, as found in the Assistance Listing,[2] to which this document applies is 10.904, Watershed Protection and Flood Prevention.

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of the Executive Order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and direct Federal development. This program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and 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.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the

[2] See *https://sam.gov/content/assistance-listings.*

responsible Agency or USDA TARGET Center at (202) 720–2600 (voice and text telephone) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at *https://www.usda.gov/oascr/how-to-file-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov.*

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Nathan Jones,

North Dakota Acting State Conservationist, Natural Resources Conservation Service.

[FR Doc. 2023–13129 Filed 6–20–23; 8:45 am]

BILLING CODE 3410–16–P

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

[Docket No. NRCS–2023–0010]

Notice of Intent To Prepare an Environmental Impact Statement for the St. Mary Canal Modernization Project, Glacier County, MT

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Notice of intent (NOI) to prepare an environmental impact statement (EIS).

SUMMARY: The Natural Resources Conservation Service (NRCS) Montana State Office, in coordination with the U.S. Bureau of Reclamation, announces its intent to prepare a Watershed Plan and EIS for the St. Mary Canal Modernization Watershed Project (Milk River Project), located east of Babb, in Glacier County, Montana. The proposed Watershed Plan will examine alternatives through the EIS process for improving the St. Mary Canal system to provide for agricultural water management. NRCS is requesting comments to identify significant issues, potential alternatives, information, and analyses relevant to the proposed action from all interested individuals, Federal and State agencies, and Tribes.

DATES: We will consider comments that we receive by August 7, 2023. Comments received after close of comment period will be considered to the extent possible.

ADDRESSES: We invite you to submit comments in response to this notice. You may submit your comments through one of the methods below:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and search for docket ID NRCS–2023–0010. Follow the online instructions for submitting comments; or
- *Mail or Hand Delivery:* Alyssa Fellow, Environmental Compliance Specialist, 10 East Babcock Street, Room 443, Bozeman, MT 59715. For written comments, specify the docket ID NRCS–2023–0010.

All comments received will be posted without change and made publicly available on *www.regulation.gov.*

FOR FURTHER INFORMATION CONTACT: Alyssa Fellow; telephone: (406) 587–6712; email: *Alyssa.Fellow@usda.gov* for questions related to submitting comments; or visit the project website: *https://www.milkriverproject.com/projects/watershed/.* Individuals who require alternative means for communication should contact the U.S. Department of Agriculture (USDA) Target Center at (202) 720–2600 (voice and text telephone (TTY)) or dial 711 for Telecommunications Relay service (both voice and text telephone users can initiate this call from any telephone).

SUPPLEMENTARY INFORMATION:

Purpose and Need

The primary purpose of the proposed watershed project is to improve agricultural water management by rehabilitating and modernizing the St. Mary Canal along its existing alignment in Glacier County, Montana. Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954 (Pub. L. 83–566), as amended, and the Flood Control Act of 1944 (Pub. L. 78–534).

The proposed project is needed due to existing St. Mary Canal system inadequacies, as well as the risk of infrastructure failure. The current St. Mary Canal system inadequacies have reduced the water delivery reliability to users who rely on the St. Mary Canal for agricultural, municipal, residential, industrial, and recreational uses. Failure could lead to environmental damage on the Blackfeet Indian Reservation, the St. Mary River, and the North Fork Milk River.

The Milk River Joint Board of Control (MRJBOC) is the umbrella organization that works with the U.S. Bureau of Reclamation to operate and maintain the St. Mary Canal for the users that receive Milk River Project water. Milk River Project water diverted from the St. Mary River is conveyed through the St. Mary Canal to the North Fork Milk River. The Milk River Project supplies water to approximately 120,000 acres, including eight irrigation districts, the Blackfeet Indian Reservation, numerous private irrigators, several municipalities, and the Bowdoin National Wildlife Refuge.

The proposed Milk River Project will address the deteriorating state of the St. Mary Canal and associated infrastructure including the 29 mile St. Mary Canal, siphons, and concrete drops. Most of the structures have exceeded their design life and require major repairs or replacement. Aging of the St. Mary Canal system has resulted in reduced flow rates from the original design of 850 cubic feet per second (cfs) to around 600 cfs. The steel siphons are at risk of failure due to slope stability problems and leaks, and the concrete in three of the five drop structures are severely deteriorating. According to a report published by the Montana Department of Natural Resources and Conservation (DNRC), many hydraulic components of the conveyance system have an elevated risk of failure with potential damages ranging from minor to catastrophic (DNRC 2010.[1])

Agriculture is an essential part of the north-central Montana economy and agricultural production depends on the structural integrity of the St. Mary Canal and associated infrastructure. Water diverted from the St. Mary River and conveyed to the North Fork Milk River through the St. Mary Canal comprises a range of 70–95 percent of the total flow in the Milk River, as measured in Havre, MT, from May through September, depending upon whether it was a dry or average year for precipitation (DNRC 2006.[2]) Correspondingly, water conveyed through the St. Mary Canal comprises over half of the Milk River Project's water supply in an average year (Reclamation 2012.[3])

A Preliminary Investigation Feasibility Report (PIFR), completed in

[1] Montana Department of Natural Resources and Conservation (DNRC). 2010. *St. Mary Diversion and Conveyance Facilities Failure and O&M Reference Guide.* Helena, MT.

[2] DNRC. 2006. *St. Mary Diversion Facilities Data Review, Preliminary Cost Estimate, and Proposed Rehabilitation Plan.* Helena, MT.

[3] U.S. Bureau of Reclamation (Reclamation). 2012. *St. Mary River and Milk River Basins Study Summary Report.* Billings, MT.

2021, investigated and studied possible solutions to address agricultural water management for the St. Mary Canal and associated infrastructure. As a result of the information obtained during the PIFR process, the level of National Environmental Policy Act (NEPA) analysis required an EIS. Estimated federal funds required for the construction of the proposed action may exceed $25 million. The proposed action will therefore require congressional approval per the 2018 Agriculture Appropriations Act amended funding threshold. In accordance with 7 CFR 650.7(a)(2), an EIS is required for projects requiring congressional approval.

Preliminary Proposed Action and Alternatives

The objective of the EIS is to formulate and evaluate alternatives for agricultural water management along the St. Mary Canal alignment. The alternatives were preliminarily identified through the PIFR process as likely to be evaluated in the EIS, given their anticipated viability of meeting the purpose and need of the proposed watershed project. The EIS is expected to evaluate three alternatives: two action alternatives or no action alternative. The alternatives that may be considered for detailed analysis include:

Alternative 1—No Action: Taking no action would consist of activities carried out if no Federal action or funding were provided. No watershed project would be implemented, and the St. Mary Canal and associated infrastructure would not be modernized.

Alternative 2—Proposed Action: This alternative would include the following system improvement measures including: canal lining and reshaping, siphon replacement, drop structure replacement, access road improvements, wasteway turnouts, underdrain replacements, and slide mitigation. Options for each measure would be evaluated.

Alternative 3—Proposed Action: This alternative would include the following system improvement measures including: canal reshaping (no lining), siphon replacement, drop structure replacement, access road improvements, wasteway turnouts, underdrain replacements, and slide mitigation. Options for each measure would be evaluated.

Summary of Expected Impacts

Initial cost estimates of the proposed actions have determined that the Federal contribution to construction will exceed $25 million, requiring congressional approval. Per 7 CFR 650.7, an EIS is required when projects require congressional action. The NRCS Montana State Conservationist, has determined that the preparation of an EIS is required for this watershed project. An EIS will be prepared as required by section 102(2)(C) of NEPA; the Council on Environmental Quality Regulations (40 CFR parts 1500–1508); and NRCS regulations that implement NEPA in 7 CFR parts 622 and 650. In addition, the EIS will be prepared in accordance with the Principles, Requirements, and Guidelines for Water and Land Related Resources Implementation Studies (PR&Gs, USDA NRCS 2017).[4] NEPA compliance will cover the analysis of various resource concerns listed below, while compliance with the PR&Gs will include additional assessments such as analyzing effects to ecosystem services and a National Economic Efficiency Analysis.

Environmental resources in the Milk River Project area consist of the natural and human-made environment. Resource issues identified through the PIFR process included water delivery efficiency issues, soil aggregate instability, soil organism habitat loss or degradation, surface water quality, and surface water quantity. Any additional resource issues will be identified and addressed in the EIS and potential for impacts will be analyzed for Cultural Resources, Economics, Soils, Land Use, Environmental Justice, Endangered and Threatened Species, Wildlife, Hydrology, Wetlands, Vegetation, and Climate Change.

Anticipated Permits and Authorizations

The following permits and authorizations are anticipated to be required:

- *Endangered Species Act (ESA) Consultation.* Consultation with the U.S. Fish and Wildlife Service will be conducted as required by the Endangered Species Act of 1973.
- *Tribal Consultation.* Consultation with the Blackfeet Tribe is required as the Canal lies completely within the Blackfeet Indian Reservation in Glacier County, MT. Required permits will be determined through consultation.
- *Section 106 Consultation.* Consultation with the Tribal Historic Preservation Office will be conducted as required by the National Historic Preservation Act (NHPA) of 1966.
- *Clean Water Act (CWA) Section 404 Permit.* Implementation of the proposed Federal action would require a CWA section 404 permit from the U.S. Army Corps of Engineers. Permitting with the U.S. Army Corps of Engineers regarding potential impacts will be finalized prior to final design and construction.
- *Ordinance 117 Permit.* Implementation of the proposed Federal action would require an Aquatic Lands Protection Ordinance 117 permit from the Blackfeet Nation.

Schedule of Decision-Making Process

A Draft EIS (DEIS) will be prepared and circulated for review and comment by agencies, Tribes, consulting parties, and the public for at least 45 days as required by 40 CFR 1503.1, 1502.20, 1506.11, and 1502.17, and 7 CFR 650.13. The DEIS is anticipated to be published in the **Federal Register** approximately 6 months after publication of this NOI. A Final EIS is anticipated to be published within 6 months of completion of the public comment period for the DEIS.

NRCS will decide whether to implement one of the alternatives as evaluated in the EIS. A Record of Decision will be completed after the required 30-day waiting period and will be publicly available. The responsible Federal official and decision maker for the NRCS is the Montana NRCS State Conservationist.

Public Scoping Process

Public scoping meetings will be held in Browning, Havre, and Malta to determine the scope of the analysis presented in the EIS. Meetings are scheduled to occur in the summer of 2023 and will be held at selected public venues in each location. Exact meeting locations and times will be determined closer to the dates of the events. Public notices will be placed in local newspapers and on the NRCS, MRJBOC, and the U.S. Bureau of Reclamation websites. Additionally, a letter providing details on the public meetings and the scoping comment and objection processes will be sent to Federal and state agencies, Tribes, local landowners, and interested parties.

Public scoping meetings provide an opportunity to review and evaluate the Milk River Project alternatives, express concern or support, and gain further information regarding the Milk River Project. Comments received, including the names and addresses of those who comment, will be part of the public record. Comments submitted anonymously will be accepted and considered.

[4] USDA NRCS. (2017). *Guidance for Conducting Analyses Under the Principles, Requirements, and Guidelines for Water and Land Related Resources Implementation Studies and Federal Water Resource Investments. https://www.usda.gov/directives/dm-9500-013.*

Identification of Potential Alternatives, Information, and Analyses

NRCS, MRJBOC, and the U.S. Bureau of Reclamation invite agencies, Tribes, and individuals that have special expertise, legal jurisdiction, or interest, to provide comments concerning the scope of the analysis and identification of potential alternatives, information, and analyses relevant to the Proposed Action in writing.

NRCS, MRJBOC, and the U.S. Bureau of Reclamation will use the scoping process to help fulfill the public involvement process under section 106 of the NHPA (54 U.S.C. 306108), as provided in 36 CFR 800.2(d)(3). Information about historic and cultural resources within the area potentially affected by the proposed action and alternatives will assist NRCS, MRJBOC, and the U.S. Bureau of Reclamation in identifying and evaluating impacts to resources in the context of both NEPA and section 106.

Native American Tribal consultations will be conducted in accordance with Tribal policy, and Tribal concerns will be given due consideration. In addition, Federal, State, and local agencies, along with other stakeholders that may be interested or affected by NRCS, MRJBOC, or the U.S. Bureau of Reclamation decisions on this Milk River Project, are invited to participate in the scoping process. Eligible entities may request or be requested by the NRCS to participate as a cooperating or participating agency.

Authorities

This document is published pursuant to the NEPA regulations regarding publication of a NOI to issue an EIS (40 CFR 1501.9(d)). This EIS will be prepared to evaluate potential environmental impacts as required by section 102(2)(C) of NEPA; the Council on Environmental Quality regulations (40 CFR parts 1500–1508); and NRCS regulations that implement NEPA in 7 CFR part 650. Watershed planning is authorized under the Watershed Protection and Flood Prevention Act of 1954, as amended, (Pub. L. 83–566) and the Flood Control Act of 1944 (Pub. L. 78–534).

Federal Assistance Program

The title and number of the Federal Assistance Programs as found in the Assistance Listing,[5] to which this document applies is 10.904, Watershed Protection and Flood Prevention.

[5] See *https://sam.gov/content/assistance-listings.*

Executive Order 12372

Executive Order 12372, ''Intergovernmental Review of Federal Programs,'' requires consultation with State and local officials that would be directly affected by proposed Federal financial assistance. The objectives of Executive Order are to foster an intergovernmental partnership and a strengthened federalism, by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance and to direct Federal development. This Watershed Plan is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

USDA Non-Discrimination Policy

In accordance with Federal civil rights law and 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.

Individuals who require alternative means of communication for program information (for example, braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA TARGET Center at (202) 720–2600 (voice and text telephone) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any phone). Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD–3027, found online at: *https://www.usda.gov/oascr/how-to-file-a-program-discrimination-complaint* and at any USDA office or write a letter addressed to USDA and provide in the letter all the information requested in the form. To request a copy of the complaint form, call (866) 632–9992. Submit your completed form or letter to USDA by mail to: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW, Washington, DC 20250–9410 or email: *OAC@usda.gov.*

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Kyle Tackett,

Acting Montana State Conservationist, Natural Resources Conservation Service.

[FR Doc. 2023–13130 Filed 6–20–23; 8:45 am]

BILLING CODE 3410–16–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights

AGENCY: Commission on Civil Rights.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act, that the Minnesota Advisory Committee (Committee) to the U.S. Commission on Civil Rights will hold a public meeting via Zoom at 12:30 p.m. CT on Thursday, July 27, 2023, to discuss the Committee's draft project proposal on housing affordability in the state.

DATES: Thursday, July 27, 2023, from 12:30 p.m.–1:30 p.m. Central Time.

ADDRESSES: The meeting will be held via Zoom.

Registration Link (Audio/Visual): https://www.zoomgov.com/j/1612943387.

Join by Phone (Audio Only): (833) 435–1820 USA Toll-Free; Meeting ID: 161 294 3387.

FOR FURTHER INFORMATION CONTACT: David Barreras, Designated Federal Officer, at *dbarreras@usccr.gov* or (202) 656–8937.

SUPPLEMENTARY INFORMATION: This committee meeting is available to the public through the registration link above. Any interested member of the public may listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. Per the Federal Advisory Committee Act, public minutes of the meeting will include a list of persons who are present at the meeting. If joining via phone, callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Closed captioning

will be available for individuals who are deaf, hard of hearing, or who have certain cognitive or learning impairments. To request additional accommodations, please email Liliana Schiller, Support Services Specialist, at *lschiller@usccr.gov* at least 10 business days prior to the meeting.

Members of the public are entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Regional Programs Coordination Unit at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Programs Coordination Unit Office, as they become available, both before and after the meeting. Records of the meetings will be available via *www.facadatabase.gov* under the Commission on Civil Rights, Minnesota Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Programs Coordination Unit at *lschiller@usccr.gov.*

Agenda

I. Welcome & Roll Call
II. Discussion: Housing Affordability in Minnesota
III. Public Comment
IV. Next Steps
V. Adjournment

Dated: June 14, 2023.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2023–13124 Filed 6–20–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Pobeda Airlines, 108811, Russian Federation, Moscow, p. Moskovskiy, Kievskoe shosse, 22nd km, 4/1. Moscow, Russia; Order Renewing Temporary Denial of Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR Parts 730–774 (2021) (''EAR'' or ''the Regulations''),[1] I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the temporary denial order (''TDO'') issued in this matter on December 20, 2022. I find that renewal of this order is necessary in the public interest to prevent an imminent violation of the Regulations.

I. Procedural History

On June 24, 2022, I signed an order denying the export privileges of Pobeda Airlines (''Pobeda'') for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations and was effective upon issuance.[2] This temporary denial order was subsequently renewed in accordance with Section 766.24(d) of the Regulations.[3] The renewal order issued on December 20, 2022 and was effective upon issuance.[4]

On May 18, 2023, BIS, through OEE, submitted a written request for renewal of the TDO that issued on December 20, 2022. The written request was made more than 20 days before the TDO's scheduled expiration. A copy of the renewal request was sent to Pobeda in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received.

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations, or any order, license or authorization issued thereunder. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent[.]'' *Id.* A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

B. The TDO and BIS's Request for Renewal

The U.S. Commerce Department, through BIS, responded to the Russian Federation's (''Russia's'') further invasion of Ukraine by implementing a sweeping series of stringent export controls that severely restrict Russia's access to technologies and other items that it needs to sustain its aggressive military capabilities. These controls primarily target Russia's defense, aerospace, and maritime sectors and are intended to cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage. Effective February 24, 2022, BIS imposed expansive controls on aviation-related (*e.g.,* Commerce Control List Categories 7 and 9) items to Russia, including a license requirement for the export, reexport or transfer (in-country) to Russia of any aircraft or aircraft parts specified in Export Control Classification Number (ECCN) 9A991 (Section 746.8(a)(1) of the EAR).[5] BIS will review any export or reexport license applications for such items under a policy of denial. *See* Section 746.8(b).

Effective March 2, 2022, BIS excluded any aircraft registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia from being eligible for license exception Aircraft, Vessels, and Spacecraft (AVS) (Section 740.15 of the EAR), and as part of the same rule, imposed a license requirement for the export, reexport, or transfer (in-country) of all items

[1] On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the Export Administration Act, 50 U.S.C. App. 2401 *et seq.* (''EAA''), (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (''IEEPA''), and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, Section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders. 50 U.S.C. 4820(a)(5).

[2] The TDO was published in the **Federal Register** on June 29, 2022 (87 FR 38707).

[3] Section 766.24(d) provides that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation. Renewal requests are to be made in writing no later than 20 days before the scheduled expiration date of a temporary denial order.

[4] The December 20, 2022 renewal order was published in the **Federal Register** on December 23, 2022 (87 FR 78925).

[5] 87 FR 12226 (Mar. 3, 2022).

controlled under CCL Categories 3 through 9 to Belarus.[6] Accordingly, any U.S.-origin aircraft or foreign aircraft that includes more than 25% controlled U.S.-origin content, and that is registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia, is subject to a license requirement before it can travel to Russia or Belarus.

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO and the evidence developed over the course of this investigation, which indicate a blatant disregard for U.S. export controls, as well as the TDO. Specifically, the initial TDO, issued on June 24, 2022, was based on evidence that Pobeda engaged in conduct prohibited by the Regulations by operating multiple aircraft subject to the EAR and classified under ECCN 9A991.b on flights into Russia after March 2, 2022 from destinations including, but not limited to, Antalya, Turkey, Gazipasa, Turkey, and Istanbul, Turkey, without the required BIS authorization.[7]

As discussed in the December 20, 2022 renewal order, evidence presented by BIS indicated that, after the renewal order issued, Pobeda continued to operate aircraft subject to the EAR and classified under ECCN 9A991.b on flights into Russia, in violation of the Regulations and the TDO itself.[8] Specifically, the December 20, 2022 renewal order detailed Siberian's continued operation of aircraft subject to the EAR, including, but not limited to, on flights into and between Belarus and Russia.[9]

In its May 18, 2023 request for renewal of the TDO, BIS has submitted evidence that Pobeda continues to operate in violation of the December 20, 2022 TDO and/or the Regulations by operating aircraft subject to the EAR and classified under ECCN 9A991.b. Specifically, BIS's evidence and related investigation indicates that after the issuance of the TDO, Pobeda continued to fly aircraft into Russia in violation of the EAR, including flights from Gyumri, Armenia, Antalya, Turkey, and Dubai, United Arab Emirates, as well as between Russia and Belarus. Information about those flights includes, but is not limited to, the following:

Tail No.	Serial No.	Aircraft type	Departure/arrival cities	Dates
RA–73242	41227	737–8LJ (B738)	Istanbul, TR/Moscow, RU	May 24, 2023.
RA–73242	41227	737–8LJ (B738)	Dubai, AE/Moscow, RU	May 28, 2023.
RA–73242	41227	737–8LJ (B738)	Gazipasa, TR/Moscow, RU	June 3, 2023.
RA–73242	41227	737–8LJ (B738)	Gyumri, AM/Moscow, RU	June 9, 2023.
RA–73242	41227	737–8LJ (B738)	Dubai, AE/Moscow, RU	June 13, 2023.
RA–73248	41238	737–8LJ (B738)	Istanbul, TR/Moscow, RU	May 22, 2023.
RA–73248	41238	737–8LJ (B738)	Gyumri, AM/Moscow, RU	May 24, 2023.
RA–73248	41238	737–8LJ (B738)	Istanbul, TR/Moscow, RU	May 27, 2023.
RA–73248	41238	737–8LJ (B738)	Dubai, AE/Moscow, RU	May 31, 2023.
RA–73248	41238	737–8LJ (B738)	Minsk, BY/Moscow, RU	June 4, 2023.
RA–73248	41238	737–8LJ (B738)	Gazipasa, TR/Moscow, RU	June 7, 2023.
RA–73250	41242	737–8LJ (B738)	St. Petersburg, RU/Minsk, BY	May 30, 2023.
RA–73250	41242	737–8LJ (B738)	Minsk, BY/St. Petersburg, RU	May 30, 2023.
RA–73250	41242	737–8LJ (B738)	Minsk, BY/Moscow, RU	June 1, 2023.
RA–73250	41242	737–8LJ (B738)	Istanbul, TR/Moscow, RU	June 4, 2023.
RA–73250	41242	737–8LJ (B738)	Antalya, TR/Perm, RU	June 10, 2023.
RA–73250	41242	737–8LJ (B738)	Minsk, BY/St. Petersburg, RU	June 12, 2023.

III. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that Pobeda has acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of imminent violations. Therefore, renewal of the TDO is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should avoid dealing with Pobeda, in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations.

IV. Order

It is therefore ordered:

First, Pobeda Airlines, 108811, Russian Federation, Moscow, p. Moskovskiy, Kievskoe shosse, 22nd km, 4/1. Moscow, Russia, when acting for or on their behalf, any successors or assigns, agents, or employees may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license (except directly related to safety of flight), license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations, or engaging in any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

[6] 87 FR 13048 (Mar. 8, 2022).

[7] Publicly available flight tracking information shows, for example, that on March 6, 2022, serial number (''SN'') 64862 flew from Antalya, Turkey to Moscow, Russia. On March 7, 2022, SN 64863 flew from Gazipasa, Turkey to Moscow, Russia, and, on March 6, 2022, SN 64864 flew from Istanbul, Turkey to Mineralnye Vody, Russia.

[8] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.1(a) and (k).

[9] Publicly available flight tracking information shows, for example, the following flights: (1) on November 26, 2022, SN 61793 flew from Minsk, Belarus to Moscow, Russia; (2) on December 3, 2023, SN 41238 flew from Minsk, Belarus to Moscow, Russia; and (3) on November 24, 2022, SN 64866 flew from Minsk, Belarus to Moscow, Russia.

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or from any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of Pobeda any item subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by Pobeda of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby Pobeda acquires or attempts to acquire such ownership, possession or control except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from Pobeda of any item subject to the EAR that has been exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

D. Obtain from Pobeda in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by Pobeda, or service any item, of whatever origin, that is owned, possessed or controlled by Pobeda if such service involves the use of any item subject to the EAR that has been or will be exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations. For purposes of this paragraph, servicing means installation, maintenance, repair, modification, or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to Pobeda by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order.

In accordance with the provisions of Sections 766.24(e) of the EAR, Pobeda may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Pobeda as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Pobeda, and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

Dated: June 15, 2023.

Matthew S. Axelrod,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023–13161 Filed 6–20–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Nordwind Airlines, Leningradskaya Str., Building 25, Office 27. 28, Moscow Region, Khimki City, 141402, Russia; Pegas Touristik, a/k/a Pegas Touristik OOO, 5 Building 1 Volokolamsk Highway, Moscow, Russian Federation, 125080, and Yenigöl, Nergiz Sk. No:94/1, Muratpaşa/Antalya, Türkiye, 07230; Order Renewing Temporary Denial of Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR parts 730–774 (2021) (''EAR'' or ''the Regulations''),[1] I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the temporary denial order (''TDO'') issued in this matter on December 20, 2022. I find that renewal of this order, along with the addition of Pegas Touristik a/k/a Pegas Touristik OOO (''Pegas Touristik'') as a related person, is necessary in the public interest to prevent an imminent violation of the Regulations.

I. Procedural History

On June 24, 2022, I signed an order denying the export privileges of Nordwind Airlines (''Nordwind'') for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations and was effective upon issuance.[2] This temporary denial order was subsequently renewed in accordance with Section 766.24(d) of the Regulations.[3] The renewal order issued on December 20, 2022 and was effective upon issuance.[4]

On May 18, 2023, BIS, through OEE, submitted a written request for renewal of the Nordwind TDO that issued on December 20, 2022. The written request was made more than 20 days before the TDO's scheduled expiration. A copy of the renewal request was sent to Nordwind in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received. OEE submitted a separate written request that Pegas Touristik be added to the TDO as a related person to Nordwind in accordance with Section 766.23 of the Regulations.

[1] On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the Export Administration Act, 50 U.S.C. App. 2401 *et seq.* (''EAA''), (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (''IEEPA''), and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, Section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders. 50 U.S.C. 4820(a)(5).

[2] The TDO was published in the **Federal Register** on June 29, 2022 (87 FR 38704).

[3] Section 766.24(d) provides that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation. Renewal requests are to be made in writing no later than 20 days before the scheduled expiration date of a temporary denial order. Renewal requests may include discussion of any additional or changed circumstances, and may seek appropriate modifications to the order, including the addition of parties as respondents or related persons.

[4] The December 20, 2022 renewal order was published in the **Federal Register** on December 27, 2022 (87 FR 79725).

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations, or any order, license or authorization issued thereunder. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent[.]'' *Id.* A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

Pursuant to Sections 766.23 and 766.24, a TDO may also be made applicable to other persons if BIS has reason to believe that they are related to a respondent and that applying the order to them is necessary to prevent its evasion. 15 CFR 766.23(a)–(b) and 766.24(c). A ''related person'' is a person, either at the time the TDO's issuance or thereafter, who is related to a respondent ''by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.'' 15 CFR 766.23(a). Related persons may be added to a TDO on an *ex-parte* basis in accordance with Section 766.23(b) of the Regulations. 15 CFR 766.23(b).

B. The TDO and BIS's Request for Renewal

The U.S. Commerce Department, through BIS, responded to the Russian Federation's (''Russia's'') further invasion of Ukraine by implementing a sweeping series of stringent export controls that severely restrict Russia's access to technologies and other items that it needs to sustain its aggressive military capabilities. These controls primarily target Russia's defense, aerospace, and maritime sectors and are intended to cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage. Effective February 24, 2022, BIS imposed expansive controls on aviation-related (*e.g.,* Commerce Control List Categories 7 and 9) items to Russia, including a license requirement for the export, reexport or transfer (in-country) to Russia of any aircraft or aircraft parts specified in Export Control Classification Number (ECCN) 9A991 (Section 746.8(a)(1) of the EAR).[5] BIS will review any export or reexport license applications for such items under a policy of denial. *See* Section 746.8(b). Effective March 2, 2022, BIS excluded any aircraft registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia from being eligible for license exception Aircraft, Vessels, and Spacecraft (AVS) (Section 740.15 of the EAR).[6] Accordingly, any U.S.-origin aircraft or foreign aircraft that includes more than 25% controlled U.S.-origin content, and that is registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia, is subject to a license requirement before it can travel to Russia.

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO, the renewal order subsequently issued in this matter on December 20, 2022, and the evidence developed over the course of this investigation, which indicate a blatant disregard for U.S. export controls, as well as the TDO. Specifically, the initial TDO, issued on June 24, 2022, was based on evidence that Nordwind engaged in conduct prohibited by the Regulations by operating multiple aircraft subject to the EAR and classified under ECCN 9A991.b on flights into Russia after March 2, 2022 from destinations including, but not limited to, Yerevan, Armenia, Istanbul, Turkey, and Sharm el-Sheikh, Egypt, without the required BIS authorization.[7]

As discussed in the December 20, 2022 renewal order, evidence presented by BIS indicated that, after the initial order issued, Nordwind continued to operate aircraft subject to the EAR and classified under ECCN 9A991.b on flights both into and out of Russia, in violation of the Regulations and the TDO itself.[8] Specifically, the December 20, 2022 renewal order detailed Nordwind's continued operation of aircraft subject to the EAR, including, but not limited to, on flights into and out of Russia from/to Sharm el-Sheikh, Egypt, Hurghada, Egypt, and Bokhtar, Tajikistan.[9]

In its May 18, 2023 request for renewal of the TDO, BIS has submitted evidence that Nordwind continues to operate in violation of the December 20, 2022 TDO and/or the Regulations by operating aircraft subject to the EAR and classified under ECCN 9A991.b. Specifically, BIS's evidence and related investigation demonstrates that Nordwind has continued to operate aircraft subject to the EAR, including, but not limited to, on flights into and out of Russia from/to Bokhtar, Tajikistan, Tehran, Iran, and Osh, Kyrgyzstan. Information about those flights includes, but is not limited to, the following:

Tail No.	Serial No.	Aircraft type	Departure/arrival cities	Dates
RA–73313	35700	737–82R (B738)	Bokhtar, TJ/Orsk, RU	June 2, 2023.
RA–73313	35700	737–82R (B738)	Bokhtar, TJ/Orsk, RU	June 3, 2023.
RA–73313	35700	737–82R (B738)	Bokhtar, TJ/Orsk, RU	June 4, 2023.
RA–73313	35700	737–82R (B738)	Bokhtar, TJ/Orsk, RU	June 11, 2023.
RA–73317	40874	737–82R (B738)	Tehran, IR/Moscow, RU	May 16, 2023.
RA–73317	40874	737–82R (B738)	Dushanbe, TJ/UFA, RU	June 8, 2023.

[5] 87 FR 12226 (Mar. 3, 2022). Additionally, BIS published a final rule effective April 8, 2022, which imposed licensing requirements on items controlled on the Commerce Control List (''CCL'') under Categories 0–2 that are destined for Russia or Belarus. Accordingly, now all CCL items require export, reexport, and transfer (in-country) licenses if destined for or within Russia or Belarus. 87 FR 22130 (Apr. 14, 2022).

[6] 87 FR 13048 (Mar. 8, 2022).

[7] Publicly available flight tracking information shows, for example, that on March 7, 2022, serial number (''SN'') 40874 flew from Yerevan, Armenia to Kazan, Russia; SN 40233 flew from Istanbul, Turkey to Kazan, Russia; and SN 40236 flew from Sharm el-Sheikh, Egypt to Moscow, Russia.

[8] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.2(a) and (k).

[9] Publicly available flight tracking information shows that on December 3, 2022, SN 42059 flew from Sharm el-Sheikh, Egypt to Orenberg, Russia and on December 2, 2022, SN 40874 flew from Hurghada, Egypt to Moscow, Russia. In addition, on November 29, 2022, SN 35700 flew from Bokhtar, Tajikistan to Moscow, Russia.

Tail No.	Serial No.	Aircraft type	Departure/arrival cities	Dates
RA–73317	40874	737–82R (B738)	Osh, KG/Samara, RU	June 11, 2023.
RA–73314	42233	737–8KN (B738)	Dushanbe, TJ/Kazan, RU	June 4, 2023.
RA–73314	42233	737–8KN (B738)	Osh, KG/Tyumen, RU	June 10, 2023.
RA–73314	42233	737–8KN (B738)	Dushanbe, TJ/Kazan, RU	June 11, 2023.
RA–73314	42233	737–8KN (B738)	Bokhtar, TJ/Orsk, RU	June 12, 2023.

C. Pegas Touristik as a Related Person

OEE's investigation and open source documents establish that Russia-based Pegas Touristik is related to Nordwind ''by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business.'' Multiple press reports, including from Russian outlets, identify Pegas Touristik, a tour company headquartered in Moscow, as Nordwind's owner.[10] A May 2023 Russian corporate profile for Pegas Touristik lists as its founder an individual who is also reported to be Nordwind's founder (''Person A''). Additionally, a February 3, 2022 article in Kommersant, a national distributed daily newspaper in Russia, states in part that ''in addition to [controlling] NordWind and Pegas Fly, Person A is also the founder of the tour operator Pegas Touristik.'' The same article also indicates that the general director of Pegas Touristik is the wife of Person A. OEE's on-going investigation and corporate registration documents reveal additional overlap in personnel, addresses, and management with Pegas Touristik.

Moreover, OEE has reason to believe that Pegas Touristik has made additional efforts to evade export controls on Russia in part by entering into charter agreements with a Turkish airline that started shortly after the imposition of stringent Russia-related export controls described, *supra,* for international flights into Russia on U.S-origin aircraft without the required BIS authorization. As noted, *supra,* aircraft registered in, owned, or controlled by, *or under charter* or lease by Russia or a national of Russia are ineligible for license exception AVS.[11]

III. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that Nordwind has acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of imminent violations. Therefore, renewal of the TDO is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should avoid dealing with Nordwind, in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations. Additionally, I find that Pegas Touristik meets the criteria set out in Section 766.23 and should be added to the TDO as a related person.

IV. Order

It is therefore ordered:

First, Nordwind Airlines, with an address at Leningradskaya str., building 25, office 27. 28, Moscow region, Khimki city, 141402, Russia; Pegas Touristik a/k/a Pegas Touristik OOO, with addresses at 5 building 1 Volokolamsk Highway, Moscow, Russian Federation, 125080, and Yenigöl, Nergiz Sk. No:94/1, Muratpaşa/ Antalya, Türkiye, 07230, when acting for or on their behalf, any successors or assigns, agents, or employees (each a ''Denied Person'' and collectively the ''Denied Persons'') may not, directly or indirectly, participate in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license (except directly related to safety of flight), license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations, or engaging in any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or from any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of a Denied Person any item subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the EAR that has been exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

D. Obtain from a Denied Person in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the EAR that has been or will be exported from the United States

[10] *https://seatguru.com/airlines/Nordwind_Airlines/information.php.*

[11] 15 CFR 746.8(c)(5).

except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations. For purposes of this paragraph, servicing means installation, maintenance, repair, modification, or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to Nordwind by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order.

In accordance with the provisions of Sections 766.24(e) of the EAR, Nordwind may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Sections 766.23(c)(2) and 766.24(e)(3) of the EAR, Pegas Touristik may, at any time, appeal their inclusion as a related person by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Nordwind as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Nordwind and Pegas Touristik and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

Dated: June 15, 2023.

Matthew S. Axelrod,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023–13160 Filed 6–20–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Siberian Airlines d/b/a S7 Airlines, 633104, Novosibirskaya obl., g. Ob, prospekt Mozzherina, d. 10 ofis 201; Order Renewing Temporary Denial of Export Privileges

Pursuant to Section 766.24 of the Export Administration Regulations, 15 CFR parts 730–774 (2021) (''EAR'' or ''the Regulations''),[1] I hereby grant the request of the Office of Export Enforcement (''OEE'') to renew the temporary denial order (''TDO'') issued in this matter on December 20, 2022. I find that renewal of this order is necessary in the public interest to prevent an imminent violation of the Regulations.

I. Procedural History

On June 24, 2022, I signed an order denying the export privileges of Siberian Airlines d/b/a S7 Airlines (''Siberian'') for a period of 180 days on the ground that issuance of the order was necessary in the public interest to prevent an imminent violation of the Regulations. The order was issued *ex parte* pursuant to Section 766.24(a) of the Regulations and was effective upon issuance.[2] This temporary denial order was subsequently renewed in accordance with Section 766.24(d) of the Regulations.[3] The renewal order issued on December 20, 2022, and was effective upon issuance.[4]

On May 18, 2023, BIS, through OEE, submitted a written request for renewal of the TDO that issued on December 20, 2022. The written request was made more than 20 days before the TDO's scheduled expiration. A copy of the renewal request was sent to Siberian in accordance with Sections 766.5 and 766.24(d) of the Regulations. No opposition to the renewal of the TDO has been received.

II. Renewal of the TDO

A. Legal Standard

Pursuant to Section 766.24, BIS may issue an order temporarily denying a respondent's export privileges upon a showing that the order is necessary in the public interest to prevent an ''imminent violation'' of the Regulations, or any order, license or authorization issued thereunder. 15 CFR 766.24(b)(1) and 766.24(d). ''A violation may be 'imminent' either in time or degree of likelihood.'' 15 CFR 766.24(b)(3). BIS may show ''either that a violation is about to occur, or that the general circumstances of the matter under investigation or case under criminal or administrative charges demonstrate a likelihood of future violations.'' *Id.* As to the likelihood of future violations, BIS may show that the violation under investigation or charge ''is significant, deliberate, covert and/or likely to occur again, rather than technical or negligent[.]'' *Id.* A ''lack of information establishing the precise time a violation may occur does not preclude a finding that a violation is imminent, so long as there is sufficient reason to believe the likelihood of a violation.'' *Id.*

B. The TDO and BIS's Request for Renewal

The U.S. Commerce Department, through BIS, responded to the Russian Federation's (''Russia's'') further invasion of Ukraine by implementing a sweeping series of stringent export controls that severely restrict Russia's access to technologies and other items that it needs to sustain its aggressive military capabilities. These controls primarily target Russia's defense, aerospace, and maritime sectors and are intended to cut off Russia's access to vital technological inputs, atrophy key sectors of its industrial base, and undercut Russia's strategic ambitions to exert influence on the world stage. Effective February 24, 2022, BIS imposed expansive controls on aviation-related (*e.g.,* Commerce Control List Categories 7 and 9) items to Russia, including a license requirement for the export, reexport or transfer (in-country)

[1] On August 13, 2018, the President signed into law the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which includes the Export Control Reform Act of 2018, 50 U.S.C. 4801–4852 (''ECRA''). While Section 1766 of ECRA repeals the provisions of the Export Administration Act, 50 U.S.C. App. 2401 *et seq.* (''EAA''), (except for three sections which are inapplicable here), Section 1768 of ECRA provides, in pertinent part, that all orders, rules, regulations, and other forms of administrative action that were made or issued under the EAA, including as continued in effect pursuant to to the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* (''IEEPA''), and were in effect as of ECRA's date of enactment (August 13, 2018), shall continue in effect according to their terms until modified, superseded, set aside, or revoked through action undertaken pursuant to the authority provided under ECRA. Moreover, Section 1761(a)(5) of ECRA authorizes the issuance of temporary denial orders. 50 U.S.C. 4820(a)(5).

[2] The TDO was published in the **Federal Register** on June 29, 2022 (87 FR 38709).

[3] Section 766.24(d) provides that BIS may seek renewal of a temporary denial order for additional 180-day renewal periods, if it believes that renewal is necessary in the public interest to prevent an imminent violation. Renewal requests are to be made in writing no later than 20 days before the scheduled expiration date of a temporary denial order.

[4] The December 20, 2022 renewal order was published in the **Federal Register** on December 23, 2022 (87 FR 78921).

to Russia of any aircraft or aircraft parts specified in Export Control Classification Number (ECCN) 9A991 (Section 746.8(a)(1) of the EAR).[5] BIS will review any export or reexport license applications for such items under a policy of denial. *See* Section 746.8(b). Effective March 2, 2022, BIS excluded any aircraft registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia from being eligible for license exception Aircraft, Vessels, and Spacecraft (AVS) (Section 740.15 of the EAR).[6] Accordingly, any U.S.-origin aircraft or foreign aircraft that includes more than 25% controlled U.S.-origin content, and that is registered in, owned, or controlled by, or under charter or lease by Russia or a national of Russia, is subject to a license requirement before it can travel to Russia.

OEE's request for renewal is based upon the facts underlying the issuance of the initial TDO, the renewal order subsequently issued in this matter, and evidence developed during this investigation. These facts and evidence demonstrate that Siberian continues to act in blatant disregard for U.S. export controls and the TDO. Specifically, the initial TDO, issued on June 24, 2022, was based on evidence that Siberian engaged in conduct prohibited by the Regulations by operating multiple aircraft subject to the EAR and classified under ECCN 9A991.b on flights into Russia after March 2, 2022 from destinations including, but not limited to, Atyrau, Kazakhstan, Bishkek, Kyrgyzstan, and Urgench, Uzbekistan, without the required BIS authorization.[7]

As discussed in the December 20, 2022 renewal order, evidence presented by BIS indicated that, after the renewal order issued, Siberian continued to operate aircraft subject to the EAR and classified under ECCN 9A991.b on flights into Russia in violation of the Regulations and the TDO itself.[8] Specifically, the December 20, 2022 renewal order detailed Siberian's continued operation of aircraft subject to the EAR, including, but not limited to, on flights into Russia from Bangkok, Thailand, Antalya Turkey, and Tashkent, Uzbekistan.[9]

In its May 18, 2023 request for renewal of the TDO, BIS has submitted evidence that Siberian continues to operate in violation of the December 20, 2022 TDO and/or the Regulations by operating aircraft subject to the EAR and classified under ECCN 9A991.b into Russia. Specifically, BIS's evidence and related investigation indicates that after the issuance of the TDO, Siberian continued to fly aircraft into Russia in violation of the EAR, including flights from Bangkok, Thailand, Antalya, Turkey, Istanbul, Turkey, Fergana, Uzbekistan, and Tashkent, Uzbekistan. Information about those flights includes, but is not limited to, the following:

Tail No.	Serial No.	Aircraft type	Departure/arrival cities	Dates
RA–73667	41707	737–8LP (B738)	Istanbul, TR/Moscow, RU	May 20, 2023.
RA–73667	41707	737–8LP (B738)	Urgench, UZ/Moscow, RU	May 22, 2023.
RA–73667	41707	737–8LP (B738)	Antalya, TR/Moscow, RU	May 25, 2023.
RA–73667	41707	737–8LP (B738)	Antalya, TR/Moscow, RU	May 29, 2023.
RA–73667	41707	737–8LP (B738)	Urgench, UZ/Moscow, RU	May 31, 2023.
RA–73667	41707	737–8LP (B738)	Yerevan, AM/Novosibirisk, RU	June 5, 2023.
RA–73667	41707	737–8LP (B738)	Antalya, TR/Moscow, RU	June 12, 2023.
RA–73668	41709	737–8LP (B738)	Beijing, CN/Irkutsk, RU	May 27, 2023.
RA–73668	41709	737–8LP (B738)	Urgench, UZ/Moscow, RU	June 1, 2023.
RA–73668	41709	737–8LP (B738)	Istanbul, TR/Moscow, RU	June 2, 2023.
RA–73668	41709	737–8LP (B738)	Antalya, TR/Moscow, RU	June 6, 2023.
RA–73668	41709	737–8LP (B738)	Bangkok, TH/Irkutsk, RU	June 13, 2023.
RA–73670	41710	737–8LP (B738)	Bangkok, TH/Irkutsk, RU	May 20, 2023.
RA–73670	41710	737–8LP (B738)	Bukhara, UZ/Novosibirsk, RU	May 24, 2023.
RA–73670	41710	737–8LP (B738)	Dubai, AE/Novosibirsk, RU	May 26, 2023.
RA–73670	41710	737–8LP (B738)	Antalya, TR/Novosibirsk, RU	May 31, 2023.
RA–73670	41710	737–8LP (B738)	Beijing, CN/Irkutsk, RU	June 1, 2023.
RA–73670	41710	737–8LP (B738)	Fergana, UZ/Novosibirsk, RU	June 10, 2023.

III. Findings

Under the applicable standard set forth in Section 766.24 of the Regulations and my review of the entire record, I find that the evidence presented by BIS convincingly demonstrates that Siberian has acted in violation of the Regulations and the TDO; that such violations have been significant, deliberate and covert; and that given the foregoing and the nature of the matters under investigation, there is a likelihood of imminent violations. Therefore, renewal of the TDO is necessary in the public interest to prevent imminent violation of the Regulations and to give notice to companies and individuals in the United States and abroad that they should avoid dealing with Siberian, in connection with export and reexport transactions involving items subject to the Regulations and in connection with any other activity subject to the Regulations.

IV. Order

It is therefore ordered:

First, Siberian Airlines d/b/a S7 Airlines, 633104, Novosibirskaya obl., g. Ob, prospekt Mozzherina, d. 10 ofis 201, when acting for or on their behalf, any successors or assigns, agents, or employees may not, directly or indirectly, participate in any way in any transaction involving any commodity,

[5] 87 FR 12226 (Mar. 3, 2022). Additionally, BIS published a final rule effective April 8, 2022, which imposed licensing requirements on items controlled on the Commerce Control List (''CCL'') under Categories 0–2 that are destined for Russia or Belarus. Accordingly, now all CCL items require export, reexport, and transfer (in-country) licenses if destined for or within Russia or Belarus. 87 FR 22130 (Apr. 14, 2022).

[6] 87 FR 13048 (Mar. 8, 2022).

[7] Publicly available flight tracking information shows, for example, that on March 10, 2022, serial number (''SN'') 41400 flew from Atyrau, Kazakhstan to Moscow, Russia. On May 1, 2022, SN 41707 flew from Bishkek, Kyrgyzstan to Novosibirsk, Russia and, on March 4, 2022, SN 41841 flew from Urgench, Uzbekistan to Moscow, Russia.

[8] Engaging in conduct prohibited by a denial order violates the Regulations. 15 CFR 764.1(a) and (k).

[9] Publicly available flight tracking information shows, for example, that on November 30, 2022, SN 41709 flew from Bangkok, Thailand to Irkutsk, Russia. SN 41707 flew from Antalya, Turkey to Novosibirisk, Russia on November 19, 2022, and from Urgench, Uzbekistan to Moscow, Russia on December 10, 2022.

software or technology (hereinafter collectively referred to as ''item'') exported or to be exported from the United States that is subject to the EAR, or in any other activity subject to the EAR including, but not limited to:

A. Applying for, obtaining, or using any license (except directly related to safety of flight), license exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations, or engaging in any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the EAR, or from any other activity subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations.

Second, that no person may, directly or indirectly, do any of the following:

A. Export, reexport, or transfer (in-country) to or on behalf of Siberian any item subject to the EAR except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by Siberian of the ownership, possession, or control of any item subject to the EAR that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby Siberian acquires or attempts to acquire such ownership, possession or control except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from Siberian of any item subject to the EAR that has been exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations;

D. Obtain from Siberian in the United States any item subject to the EAR with knowledge or reason to know that the item will be, or is intended to be, exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations; or

E. Engage in any transaction to service any item subject to the EAR that has been or will be exported from the United States and which is owned, possessed or controlled by Siberian, or service any item, of whatever origin, that is owned, possessed or controlled by Siberian if such service involves the use of any item subject to the EAR that has been or will be exported from the United States except directly related to safety of flight and authorized by BIS pursuant to Section 764.3(a)(2) of the Regulations. For purposes of this paragraph, servicing means installation, maintenance, repair, modification, or testing.

Third, that, after notice and opportunity for comment as provided in section 766.23 of the EAR, any other person, firm, corporation, or business organization related to Siberian by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business may also be made subject to the provisions of this Order.

In accordance with the provisions of Sections 766.24(e) of the EAR, Siberian may, at any time, appeal this Order by filing a full written statement in support of the appeal with the Office of the Administrative Law Judge, U.S. Coast Guard ALJ Docketing Center, 40 South Gay Street, Baltimore, Maryland 21202–4022.

In accordance with the provisions of Section 766.24(d) of the EAR, BIS may seek renewal of this Order by filing a written request not later than 20 days before the expiration date. A renewal request may be opposed by Siberian as provided in Section 766.24(d), by filing a written submission with the Assistant Secretary of Commerce for Export Enforcement, which must be received not later than seven days before the expiration date of the Order.

A copy of this Order shall be provided to Siberian, and shall be published in the **Federal Register**.

This Order is effective immediately and shall remain in effect for 180 days.

Dated: June 15, 2023.

Matthew S. Axelrod,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2023–13162 Filed 6–20–23; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–887]

Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2021–2022

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty order on carbon and alloy steel cut-to-length plate (CTL plate) from the Republic of Korea (Korea). The period of review (POR) is May 1, 2021, through April 30, 2022. The review covers one producer and/or exporter of the subject merchandise, POSCO, POSCO International Corporation and its affiliated companies (collectively, the POSCO single entity). We preliminarily determine that sales of subject merchandise by the POSCO single entity were not made at prices below normal value (NV). Interested parties are invited to comment on these preliminary results.

DATES: Applicable June 21, 2023.

FOR FURTHER INFORMATION CONTACT: Jaron Moore or William Horn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3640 or (202) 482–4868, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 14, 2022, based on timely requests for review, in accordance with 19 CFR 351.221(c)(1)(i), we published the initiation of an administrative review on CTL plate from Korea produced and/or exported by POSCO.[1]

On December 12, 2022, we extended the preliminary results of this review to no later than May 31, 2023.[2] For a complete description of the events that followed the initiation of this review, *see* the Preliminary Decision Memorandum.[3]

[1] *See Initiation of Antidumping and Countervailing Duty Administration Reviews,* 87 FR 42144 (July 14, 2022) (*Initiation Notice*).

[2] *See* Memorandum, ''Extension of Deadline for the Preliminary Results of the 2021–2022 Antidumping Duty Administrative Review,'' dated December 12, 2022.

[3] *See* Memorandum, ''Decision Memorandum for Preliminary Results of Antidumping Duty

Continued

Scope of the Order [4]

The merchandise subject to the *Order* is CTL plate. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the *Order* may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7206.11.1000, 7226.11.9060, 7229.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180. The HTSUS subheadings are provided for convenience and customs purposes only; the written product description of the scope of the *Order* is dispositive.

For a complete description of the merchandise subject to the *Order, see* the Preliminary Decision Memorandum.

Methodology

Commerce is conducting this review in accordance with section 751(a)(1)(B) and (2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. NV is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum. The Preliminary Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *http://access.trade.gov.* In addition, a complete version of the Preliminary Decision Memorandum can be accessed at *https://access.trade.gov/public/FRNoticesListLayout.aspx.* A list of the topics discussed in the Preliminary Decision Memorandum is attached as an appendix to this notice.

Preliminary Results of the Review

As a result of our analysis of the record information, we preliminarily determine a weighted-average dumping margin of 0.00 percent for the POSCO single entity [5] for the period May 1, 2021, through April 30, 2022.[6] Therefore, Commerce preliminarily determines that the POSCO single entity made no sales of subject merchandise at prices below NV.

Disclosure and Public Comment

Commerce intends to disclose the calculations performed in connection with these preliminary results to interested parties with an administrative protective order within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Case briefs or other written comments may be submitted to the Assistant Secretary for Enforcement and Compliance. Interested parties may submit case briefs to Commerce no later than 30 days after the date of publication of this notice.[7] Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than seven days after the date for filing case briefs.[8] Pursuant to 19 CFR 351.309(c)(2) and (d)(2), parties who submit case briefs or rebuttal briefs in this review are encouraged to submit with each argument: (1) a statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.

All submissions to Commerce must be filed electronically using ACCESS and must also be served on interested parties.[9] An electronically filed document must be received successfully in its entirety by Commerce's electronic records system, ACCESS, by 5:00 p.m. Eastern Time on the date that the document is due. Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.[10]

Interested parties who wish to request a hearing must submit a written request to the Assistant Secretary for Enforcement and Compliance within 30 days of publication of this notice.[11] Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; (3) whether any participant is a foreign national, and (4) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case and rebuttal briefs. If a request for a hearing is made, Commerce intends to hold the hearing at a time and date to be determined. Parties should confirm by telephone the date, time, and location of the hearing two days before the scheduled date.

Final Results of Review

Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act and 19 CFR 351.213(h)(2), Commerce intends to issue the final results of this administrative review, including the results of its analysis of issues raised in any written briefs, not later than 120 days after the date of publication of this notice.

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this administrative review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Administrative Review: Certain Carbon and Alloy Steel Cut-To-Length Plate from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

[4] *See Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan, and Antidumping Duty Orders,* 82 FR 24096 (May 25, 2017) (*Order*).

[5] Commerce continues to find that POSCO, POSCO International Corporation, POSCO MS, and certain distributors and service centers (Taechang Steel Co., Ltd. and Winsteel Co., Ltd.) are affiliated pursuant to section 771(33)(E) of the Act, and further that these companies should be treated as a single entity (collectively, the POSCO single entity) pursuant to 19 CFR 351.401(f). *See* Preliminary Decision Memorandum.

[6] *See* Preliminary Decision Memorandum.

[7] *See* 19 CFR 351.309(c)(1)(ii).

[8] *See* 19 CFR 351.309(d); *see also Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19,* 85 FR 17006 (March 26, 2020); and *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID–19; Extension of Effective Period,* 85 FR 41363 (July 10, 2020) (collectively, *Temporary Rule*).

[9] *See* 19 CFR 351.303(b) and 19 CFR 351.303(f).

[10] *See Temporary Rule.*

[11] *See* 19 CFR 351.310(c).

Commerce will calculate importer-specific antidumping duty assessment rates when a respondent's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent). Pursuant to 19 CFR 351.212(b)(1), where the respondent reported the entered value of its U.S. sales, we will calculate importer-specific *ad valorem* antidumping duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to each importer to the total entered value of those sales. Where the respondent did not report entered value, we will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the examined sales to each importer to the total quantity of those sales.[12] We will also calculate an estimated *ad valorem* importer-specific assessment rate with which to assess whether the per-unit assessment rate is *de minimis.* We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate calculated in the final results of this review is not zero or *de minimis.* Where either the respondent's *ad valorem* weighted-average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,*[13] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Commerce's ''reseller policy'' will apply to entries of subject merchandise during the POR produced by the POSCO single entity for which the POSCO single entity did not know that the merchandise it sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[14]

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the POSCO single entity will be equal to the weighted-average dumping margin established in the final results of this review, except if the rate is *de minimis* within the meaning of 19 CFR 351.106(c)(1) (*i.e.,* less than 0.50 percent), in which case the cash deposit rate will be zero; (2) for merchandise exported by a company not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently-completed segment; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the producer is, the cash deposit rate will be the rate established for the most recently-completed segment for the producer of the merchandise; and (4) the cash deposit rate for all other producers and exporters will continue to be 7.10 percent, the all-others rate established in the less-than-fair-value investigation.[15]

These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties, and/or an increase in the amount of the antidumping duties by the amount of the countervailing duties.

Notification to Interested Parties

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(4).

Dated: May 31, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix—List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2023–13128 Filed 6–20–23; 8:45 am]

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[12] In these preliminary results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[13] *See* 19 CFR 351.106(c)(2).

[14] For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[15] *See Order.*

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD091]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of issuance of Letter of Authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico, notification is hereby given that a Letter of Authorization (LOA) has been issued to Chevron U.S.A. Inc. (Chevron) for the take of marine mammals incidental to geophysical survey activity in the Gulf of Mexico.

DATES: The LOA is effective from August 10, 2023, through January 2, 2024.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-oil-and-gas-industry-geophysical-survey-activity-gulf-mexico.* In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than

commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively ''industry operators''), in Federal waters of the U.S. Gulf of Mexico (GOM) over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

Summary of Request and Analysis

Chevron plans to conduct a 3D ocean bottom node (OBN) survey over Walker Ridge Lease Blocks 758, 759, and 802, and the surrounding approximately 90 lease blocks, with approximate water depths ranging from approximately 2,000 to 2,400 meters (m). See Chevron's LOA application for a map of the area. Chevron anticipates using a single dual source vessel, towing airgun array sources consisting of 42 elements, with a total volume of 5,380 cubic inches (in^3). Please see Chevron's application for additional detail.

Consistent with the preamble to the final rule, the survey effort proposed by Chevron in its LOA request was used to develop LOA-specific take estimates based on the acoustic exposure modeling results described in the preamble (86 FR 5398, January 19, 2021). In order to generate the appropriate take number for authorization, the following information was considered: (1) survey type; (2) location (by modeling zone); [1] (3) number of days; and (4) season.[2] The acoustic exposure modeling performed in support of the rule provides 24-hour exposure estimates for each species, specific to each modeled survey type in each zone and season.

No 3D OBN surveys were included in the modeled survey types, and use of existing proxies (*i.e.,* 2D, 3D NAZ, 3D WAZ, Coil) is generally conservative for use in evaluation of 3D OBN survey effort, largely due to the greater area covered by the modeled proxies. Summary descriptions of these modeled survey geometries are available in the preamble to the proposed rule (83 FR 29212, 29220, June 22, 2018). Coil was selected as the best available proxy survey type in this case because the spatial coverage of the planned survey is most similar to the coil survey pattern. The planned 3D OBN survey will involve a single source vessel sailing along closely spaced survey lines that are approximately 100–150 m apart and approximately 40 kilometers (km) in length. The coil survey pattern was assumed to cover approximately 144 kilometers squared (km^2) per day (compared with approximately 795 km^2, 199 km^2, and 845 km^2 per day for the 2D, 3D NAZ, and 3D WAZ survey patterns, respectively). Among the different parameters of the modeled survey patterns (*e.g.,* area covered, line spacing, number of sources, shot interval, total simulated pulses), NMFS considers area covered per day to be most influential on daily modeled exposures exceeding Level B harassment criteria. Although Chevron is not proposing to perform a survey using the coil geometry, its planned 3D OBN survey is expected to cover approximately 10 km^2 per day, meaning that the coil proxy is most representative of the effort planned by Chevron in terms of predicted Level B harassment exposures.

All available acoustic exposure modeling results assume use of a 72-element, 8,000 in^3 array. Thus, take numbers authorized through the LOA are considered conservative due to differences in the airgun array (43 elements, 5,380 in^3), as compared to the source modeled for the rule.

The survey will take place over approximately 90 days, including 75 days of sound source operation. The entire survey would occur within Zone 7. Chevron plans to conduct 25 survey days in the ''Summer'' season and 50 days in the ''Winter'' season.

For some species, take estimates based solely on the modeling yielded results that are not realistically likely to occur when considered in light of other relevant information available during the rulemaking process regarding marine mammal occurrence in the GOM. The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. Thus, although the modeling conducted for the rule is a natural starting point for estimating take, the rule acknowledged that other information could be considered (see, *e.g.,* 86 FR 5442, January 19, 2021), discussing the need to provide flexibility and make efficient use of previous public and agency review of other information and identifying that additional public review is not necessary unless the model or inputs used differ substantively from those that were previously reviewed by NMFS and the public. For this survey, NMFS has

[1] For purposes of acoustic exposure modeling, the GOM was divided into seven zones. Zone 1 is not included in the geographic scope of the rule.

[2] For purposes of acoustic exposure modeling, seasons include Winter (December–March) and Summer (April–November).

other relevant information reviewed during the rulemaking that indicates use of the acoustic exposure modeling to generate a take estimate for one marine mammal species produces results inconsistent with what is known regarding its occurrence in the GOM. Accordingly, we have adjusted the calculated take estimates for the species as described below.

Killer whales are the most rarely encountered species in the GOM, typically in deep waters of the central GOM (Roberts *et al.,* 2015; Maze-Foley and Mullin, 2006). The approach used in the acoustic exposure modeling, in which seven modeling zones were defined over the U.S. GOM, necessarily averages fine-scale information about marine mammal distribution over the large area of each modeling zone. NMFS has determined that the approach results in unrealistic projections regarding the likelihood of encountering killer whales.

As discussed in the final rule, the density models produced by Roberts *et al.* (2016) provide the best available scientific information regarding predicted density patterns of cetaceans in the U.S. GOM. The predictions represent the output of models derived from multi-year observations and associated environmental parameters that incorporate corrections for detection bias. However, in the case of killer whales, the model is informed by few data, as indicated by the coefficient of variation associated with the abundance predicted by the model (0.41, the second-highest of any GOM species model; Roberts *et al.,* 2016). The model's authors noted the expected non-uniform distribution of this rarely-encountered species (as discussed above) and expressed that, due to the limited data available to inform the model, it ''should be viewed cautiously'' (Roberts *et al.,* 2015).

NOAA surveys in the GOM from 1992–2009 reported only 16 sightings of killer whales, with an additional 3 encounters during more recent survey effort from 2017–18 (Waring *et al.,* 2013; *https://www.boem.gov/gommapps*). Two other species were also observed on fewer than 20 occasions during the 1992–2009 NOAA surveys (Fraser's dolphin and false killer whale).[3] However, observational data collected by protected species observers (PSOs) on industry geophysical survey vessels from 2002–2015 distinguish the killer whale in terms of rarity. During this period, killer whales were encountered on only 10 occasions, whereas the next most rarely encountered species (Fraser's dolphin) was recorded on 69 occasions (Barkaszi and Kelly, 2019). The false killer whale and pygmy killer whale were the next most rarely encountered species, with 110 records each. The killer whale was the species with the lowest detection frequency during each period over which PSO data were synthesized (2002–2008 and 2009–2015). This information qualitatively informed our rulemaking process, as discussed at 86 FR 5334 (January 19, 2021), and similarly informs our analysis here.

The rarity of encounters during seismic surveys is not likely to be the product of high bias on the probability of detection. Unlike certain cryptic species with high detection bias, such as *Kogia* spp. or beaked whales, or deep-diving species with high availability bias, such as beaked whales or sperm whales, killer whales are typically available for detection when present and are easily observed. Roberts *et al.* (2015) stated that availability is not a major factor affecting detectability of killer whales from shipboard surveys, as they are not a particularly long-diving species. Baird *et al.* (2005) reported that mean dive durations for 41 fish-eating killer whales for dives greater than or equal to 1 minute in duration was 2.3–2.4 minutes, and Hooker *et al.* (2012) reported that killer whales spent 78 percent of their time at depths between 0–10 m. Similarly, Kvadsheim *et al.* (2012) reported data from a study of 4 killer whales, noting that the whales performed 20 times as many dives 1–30 m in depth than to deeper waters, with an average depth during those most common dives of approximately 3 m.

In summary, killer whales are the most rarely encountered species in the GOM and typically occur only in particularly deep water (>700 m). This survey would take place in deep waters that would overlap with depths in which killer whales typically occur. While this information is reflected through the density model informing the acoustic exposure modeling results, there is relatively high uncertainty associated with the model for this species, and the acoustic exposure modeling applies mean distribution data over areas where the species is in fact less likely to occur. NMFS' determination in reflection of the data discussed above, which informed the final rule, is that use of the generic acoustic exposure modeling results for killer whales will generally result in estimated take numbers that are inconsistent with the assumptions made in the rule regarding expected killer whale take (86 FR 5403, January 19, 2021).

In past authorizations, NMFS has often addressed situations involving the low likelihood of encountering a rare species, such as killer whales in the GOM, through authorization of take of a single group of average size (*i.e.,* representing a single potential encounter). See 83 FR 63268, December 7, 2018. See also 86 FR 29090, May 28, 2021 and 85 FR 55645, September 9, 2020. For the reasons expressed above, NMFS determined that a single encounter of killer whales is more likely than the model-generated estimates and has authorized take associated with a single group encounter (*i.e.,* up to seven animals).

Based on the results of our analysis, NMFS has determined that the level of taking expected for this survey and authorized through the LOA is consistent with the findings made for the total taking allowable under the regulations. See Table 1 in this notice and Table 9 of the rule (86 FR 5322, January 19, 2021).

Small Numbers Determination

Under the GOM rule, NMFS may not authorize incidental take of marine mammals in an LOA if it will exceed ''small numbers.'' In short, when an acceptable estimate of the individual marine mammals taken is available, if the estimated number of individual animals taken is up to, but not greater than, one-third of the best available abundance estimate, NMFS will determine that the numbers of marine mammals taken of a species or stock are small. For more information please see NMFS' discussion of the MMPA's small numbers requirement provided in the final rule (86 FR 5438, January 19, 2021).

The take numbers for authorization are determined as described above in the Summary of Request and Analysis section. Subsequently, the total incidents of harassment for each species are multiplied by scalar ratios to produce a derived product that better reflects the number of individuals likely to be taken within a survey (as compared to the total number of instances of take), accounting for the likelihood that some individual marine mammals may be taken on more than 1 day (see 86 FR 5404, January 19, 2021). The output of this scaling, where appropriate, is incorporated into adjusted total take estimates that are the basis for NMFS' small numbers determinations, as depicted in Table 1.

This product is used by NMFS in making the necessary small numbers determinations through comparison

[3] However, note that these species have been observed over a greater range of water depths in the GOM than have killer whales.

with the best available abundance estimates (see discussion at 86 FR 5391, January 19, 2021). For this comparison, NMFS' approach is to use the maximum theoretical population, determined through review of current stock assessment reports (SAR; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and model-predicted abundance information (*https://seamap.env.duke.edu/models/Duke/GOM/*). For the latter, for taxa where a density surface model could be produced, we use the maximum mean seasonal (*i.e.,* 3-month) abundance prediction for purposes of comparison as a precautionary smoothing of month-to-month fluctuations and in consideration of a corresponding lack of data in the literature regarding seasonal distribution of marine mammals in the GOM. Information supporting the small numbers determinations is provided in Table 1.

TABLE 1—TAKE ANALYSIS

Species	Authorized take	Scaled take [1]	Abundance [2]	Percent abundance
Rice's whale [3]	0	n/a	51	n/a
Sperm whale	371	156.9	2,207	7.1
Kogia spp.	[4] 206	60.0	4,373	1.8
Beaked whales	3,338	337.2	3,768	8.9
Rough-toothed dolphin	590	169.3	4,853	3.5
Bottlenose dolphin	[5] 21	6.0	176,108	0.0
Clymene dolphin	1,533	439.9	11,895	3.7
Atlantic spotted dolphin	0	n/a	74,785	n/a
Pantropical spotted dolphin	15,216	4,366.9	102,361	4.3
Spinner dolphin	357	102.5	25,114	0.4
Striped dolphin	796	228.5	5,229	4.4
Fraser's dolphin	257	73.8	1,665	4.4
Risso's dolphin	252	74.3	3,764	2.0
Melon-headed whale	1,014	299.3	7,003	4.3
Pygmy killer whale	488	144.0	2,126	6.8
False killer whale	553	163.0	3,204	5.1
Killer whale	7	n/a	267	2.6
Short-finned pilot whale	80	23.7	1,981	1.2

[1] Scalar ratios were applied to ''Authorized Take'' values as described at 86 FR 5322, 5404 (January 19, 2021) to derive scaled take numbers shown here.

[2] Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.,* 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For Rice's whale and killer whale, the larger estimated SAR abundance estimate is used.

[3] The final rule refers to the GOM Bryde's whale (*Balaenoptera edeni*). These whales were subsequently described as a new species, Rice's whale (*Balaenoptera ricei*) (Rosel *et al.,* 2021).

[4] Includes 19 takes by Level A harassment and 187 takes by Level B harassment. Scalar ratio is applied to takes by Level B harassment only; small numbers determination made on basis of scaled Level B harassment take plus authorized Level A harassment take.

[5] Modeled take of 16 increased to account for potential encounter with group of average size (Maze-Foley and Mullin, 2006).

Based on the analysis contained herein of Chevron's proposed survey activity described in its LOA application and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the affected species or stock sizes (*i.e.,* less than one-third of the best available abundance estimate) and therefore the taking is of no more than small numbers.

Authorization

NMFS has determined that the level of taking for this LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. Accordingly, we have issued an LOA to Chevron authorizing the take of marine mammals incidental to its geophysical survey activity, as described above.

Dated: June 15, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–13195 Filed 6–20–23; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD032]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Site Characterization Surveys Offshore From Massachusetts to New Jersey for Vineyard Northeast, LLC

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

ACTION: Notice; proposed incidental harassment authorization (IHA); request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from Vineyard Northeast, LLC (Vineyard Northeast) for authorization to take marine mammals incidental to marine site characterization surveys offshore from Massachusetts to New Jersey in the Bureau of Ocean Energy Management (BOEM) Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Areas OCS–A 0522 and OCS–A 0544 (Lease Areas) and associated offshore export cable corridor (OECC) routes.

DATES: Comments and information must be received no later than July 21, 2023.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written

comments should be submitted via email to *ITP.Taylor@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (*e.g.,* name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable*. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The activities described in Vineyard Northeast's request and the acoustic sources proposed for use are identical to what was previously analyzed in support of the IHA issued by NMFS to Vineyard Northeast for 2022 site characterization surveys (2022 IHA) (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022), although the survey duration and project area will be a subset of the survey effort authorized for the 2022 IHA as a portion of this effort has been completed. All proposed mitigation, monitoring, and reporting requirements remain the same. While Vineyard Northeast's planned activity would qualify for renewal of the 2022 IHA, due to the availability of updated marine mammal density data (*https://seamap.env.duke.edu/models/Duke/EC/*), which NMFS has determined represents the best available scientific data, NMFS has determined to proceed with a new IHA process rather than a renewal, providing a 30-day period for the public to comment on this proposed action.

Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to allow Vineyard Northeast to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible 1-year Renewal IHA that could be issued under certain circumstances and if all requirements are met, as described in Request for Public Comments at the end of this notice. NMFS will consider public comments prior to making any final decision on the issuance of the requested MMPA authorization and agency responses will be summarized in the final notice of our decision.

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notification prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On April 17, 2023, NMFS received a request from Vineyard Northeast for an IHA to take marine mammals incidental to high resolution geophysical (HRG) marine site characterization surveys offshore from Massachusetts to New Jersey in the areas of BOEM Commercial Lease of Submerged Lands for Renewable Energy Development on the OCS–A 0522 (Lease Area), OCS–A 0544 (Lease Area), and associated offshore export cable corridor (OECC) routes. Following NMFS' review of the application, Vineyard Northeast submitted a revised request on May 25, 2023. The application (the 2023 request) was deemed adequate and complete on May 25, 2023. Vineyard Northeast's request is for take of 19 species (comprising 20 stocks) of marine mammals, by Level B harassment only. Neither Vineyard Northeast nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate. Take by Level A harassment (injury) is unlikely, even absent mitigation, based on the characteristics of the signals produced by the acoustic sources planned for use.

NMFS has previously issued a similar IHA to Vineyard Northeast. On December 17, 2021, NMFS received a request from Vineyard Northeast for an IHA to take marine mammals incidental to marine site characterization surveys offshore from Massachusetts to New Jersey, in the area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Areas OCS–A 0522 and OCS–A 0544 (Lease Areas) and potential OECC routes to landfall locations. Vineyard Northeast requested authorization to take small numbers of 19 species (comprising 20 stocks) of marine mammals by Level B harassment only. NMFS published a notice of the proposed IHA in the **Federal Register**

on May 20, 2022 (87 FR 30872). After a 30-day public comment period and consideration of all public comments received, we subsequently issued the 2022 IHA, which is effective from July 27, 2022, to July 26, 2023 (87 FR 52913, August 30, 2022).

Vineyard Northeast completed a subset of the survey work under the 2022 IHA and submitted a preliminary monitoring report, which demonstrates that they conducted the required marine mammal mitigation and monitoring, and did not exceed the authorized levels of take under the previous IHA issued for surveys offshore from Massachusetts to New Jersey (See 87 FR 52913, August 30, 2022). These monitoring results are available to the public on our website: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable*.

The 2023 request is nearly identical to the 2022 IHA, with the exception that the survey effort is a subset of the original effort authorized for the 2022 IHA. However, Duke University's Marine Geospatial Ecology Laboratory released updated marine mammal density information (June 20, 2022) for all species in the project area (*https://seamap.env.duke.edu/models/Duke/EC/*) after issuance of the 2022 IHA, and NMFS determined it would issue a proposed IHA rather than undertake the renewal process. In evaluating the 2023 request and to the extent deemed appropriate, NMFS also relies on the information presented in notices associated with issuance of the 2022 IHA (87 FR 30872, May 30 2022; 87 FR 52913, August 30, 2022).

Description of the Proposed Activity and Anticipated Impacts

Overview

Vineyard Northeast proposes to conduct HRG surveys in the BOEM Lease Areas OCS–A 0522 and 0544 and along potential submarine OECC's from southern Massachusetts to southern New Jersey. The purpose of the proposed surveys is to obtain an assessment of seabed (geophysical, geotechnical, and geohazard), ecological, and archeological conditions within the footprint of the planned offshore wind facility development area. Surveys are also conducted to inform and support engineering design and to map unexploded ordnance. Survey equipment would be deployed from multiple vessels during site characterization activities in the project area, and up to two vessels would operate at a time in the lease areas and along the OECCs. During survey effort, the vessel would operate at a maximum speed of 4 knots (4.6 miles or 7.4 km per hour). Underwater sound, resulting from Vineyard Northeast's activities, has the potential to result in incidental take of marine mammals in the form of Level B harassment.

Dates and Duration

The proposed activity is estimated to require 467 survey days (37,360 km of trackline) using a maximum of 4 concurrently operating survey vessels, and is expected to be carried out over the course of the 1-year period beginning from the date of issuance of this IHA. A ''survey day'' is defined as a 24-hour (hr) activity period in which active HRG acoustic sources are used. This schedule is inclusive of any inclement weather downtime and crew transfers. The number of survey days was calculated as the number of days needed to reach the overall level of effort required to meet survey objectives assuming any single vessel covers, on average, 80 km (49.7 miles) of survey trackline per 24 hours of operations. By the time the 2022 IHA expires, Vineyard Northeast expects to have completed 302 vessel days (24,160 km of trackline) of the original planned survey effort (869 vessel days; 69,520 km of trackline). Vineyard Northeast has estimated survey effort to require 100 vessel days (8,000 km of trackline) less than originally anticipated in association with the 2022 IHA (87 FR 52913, August 30, 2022).

Specific Geographic Region

Vineyard Northeast's proposed activities would occur in both Federal offshore waters (including Lease Areas OCS–A 0522 and OCS–A 0544) and along potential OECCs in both Federal and State nearshore waters of Massachusetts, Rhode Island, Connecticut, New York, and New Jersey, as shown in Figure 1. As compared to the 2022 IHA (87 FR 52913, August 30, 2022), Vineyard Northeast revised their project area to be more representative of the actual area in which HRG surveys would occur. The revised project area description is based upon updated information received from the Vineyard Northeast site investigation team.

The Lease Area OCS–A 0522 is approximately 536 square kilometers (km^2) (132,370 acres) and located 24 kilometers (km) (15 miles; mi) from the southeast corner of Martha's Vineyard, within the Massachusetts Wind Energy Area (WEA). The 174 km^2 (43,056 acre) Lease Area OCS–A 0544 is located approximately 38 km (24 mi) from Long Island, New York, within BOEM's Mid-Atlantic Planning Area. Surveys outside of the Lease Areas would extend from southern Massachusetts to southern New Jersey, including the Massachusetts/Rhode Island WEA as well as the northern portion of the Mid-Atlantic planning area. Total survey area would be approximately 33,814 km^2 (8,355,621.4 acres). Water depth across the proposed survey area ranges from approximately 35 to 60 meters (m) (115 to 197 feet [ft]) in the Lease Areas. Average water depth along the proposed OECCs is approximately 38 m (123.8 ft).

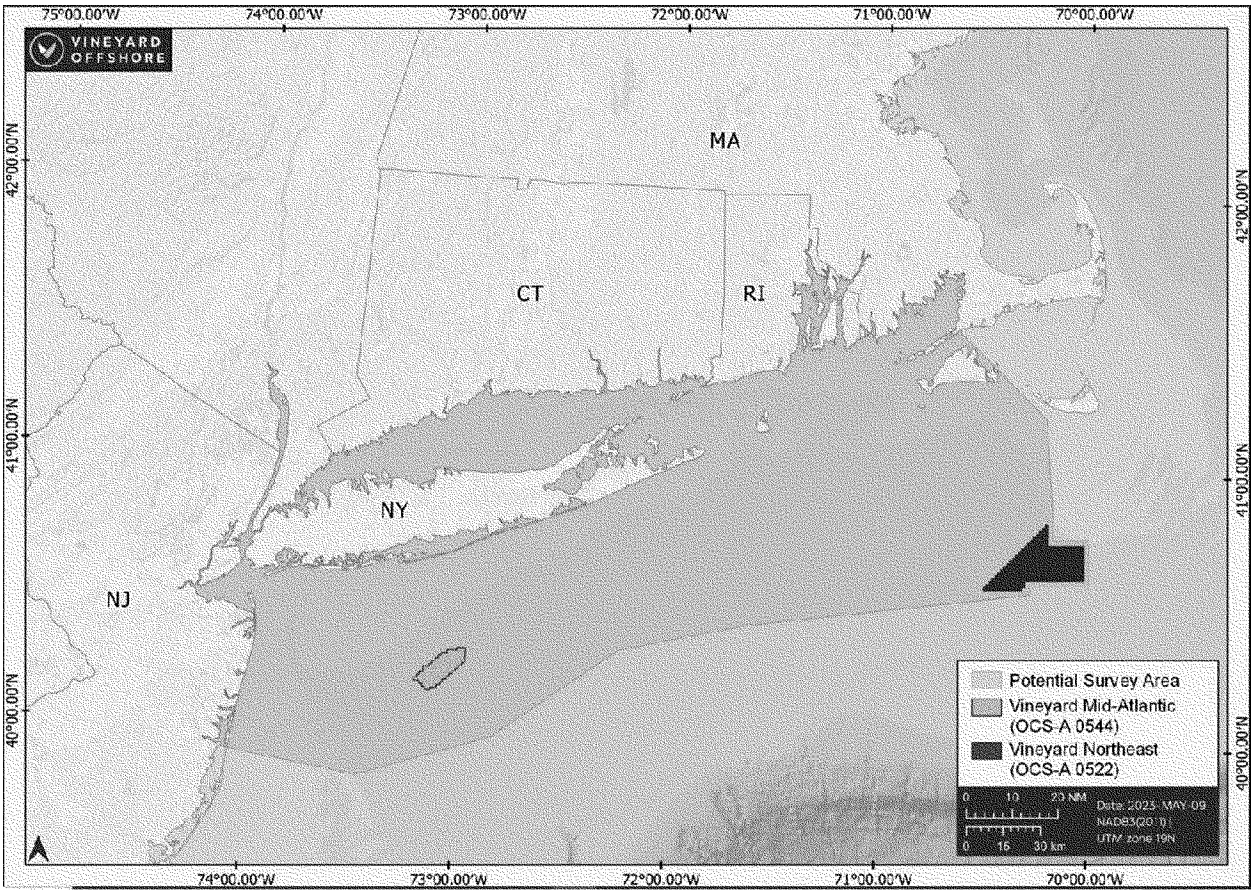

Figure 1 -- Map of the Proposed Survey Area

Detailed Description of the Action

A detailed description of the proposed survey activities can be found in the previous **Federal Register** notices (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022) and supplementary documents, available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-vineyard-northeast-llc-marine-site-characterization-surveys*. The specific geographic region and nature of the activities, including the types of HRG equipment planned for use (side scan sonar, multibeam echosounder, magnetometers and gradiometers, parametric sub-bottom profiler (SBP), compressed high intensity radar pulse (CHIRP) SBP, boomers, and sparkers; daily trackline distances (80 km per day); and the number of survey vessels (up to two in a Lease Area and up to two along OECC routes, including nearshore survey areas) are identical or nearly identical to those described in those previous notices.

Description of Marine Mammals

A description of the marine mammals in the proposed survey area can be found in the previous documents and notices for the 2022 IHA (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022), which remains applicable to this proposed IHA. NMFS reviewed the most recent draft Stock Assessment Reports (SARs, found on NMFS' website at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments,* up-to-date information on relevant Unusual Mortality Events (UMEs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-unusual-mortality-events*), and recent scientific literature and determined that no new information affects our original analysis of impacts under the 2022 IHA.

NMFS notes that, since issuance of the 2022 IHA, a new SAR is available for the North Atlantic right whale. Estimated abundance for the species declined from 368 to 338. However, this change does not affect our analysis of impacts, as described under the 2022 IHA.

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat can be found in the documents supporting the 2022 IHA (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022). At present, there is no new information on potential effects that would influence our analysis.

Estimated Take

A detailed description of the methods used to estimate take anticipated to occur incidental to the project is found in the previous **Federal Register** notices (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022). The methods of estimating take are identical to those used in the 2022 IHA. Vineyard Northeast updated the marine mammal densities based on new information (Roberts *et al.,* 2016; Roberts *et al.,* 2023), available online at: *https://seamap.env.duke.edu/models/Duke/EC/*. We refer the reader to Table 8 in Vineyard Northeast's 2023 IHA request for the specific density values used in the analysis. The IHA request is

available online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-other-energy-activities-renewable*.

The take that NMFS proposes to authorize can be found in Table 1, which presents the results of Vineyard Northeast's density-based calculations for the survey area. For comparative purposes, we have provided the 2022 IHA authorized Level B harassment take (87 FR 52913, August 30, 2022). NMFS notes that take by Level A harassment was not requested, nor does NMFS anticipate that it could occur. Therefore, NMFS has not proposed to authorize any take by Level A harassment. Mortality or serious injury is neither anticipated to occur nor proposed for authorization.

TABLE 1—SUMMARY OF TAKE NUMBERS PROPOSED FOR AUTHORIZATION

Species	Scientific name	Stock	Abundance	2022 IHA authorized take	2023 Proposed IHA	
					Take proposed for authorization [1]	Max percent population
Blue whale	*Balaenoptera musculus*	Western North Atlantic	402	1	1	0.25
North Atlantic Right Whale	*Eubalaena glacialis*	Western North Atlantic	338	40	12	3.6
Humpback Whale	*Megaptera novaeangliae*	Gulf of Maine	1,396	47	12	0.86
Fin Whale	*Balaenoptera physalus*	Western North Atlantic	6,802	77	20	0.29
Sei Whale	*Balaenoptera borealis*	Nova Scotia	6,292	5	5	0.08
Minke whale	*Balaenoptera acutorostrata*	Canadian Eastern Coastal	21,968	42	46	0.21
Sperm whale	*Physeter macrocephalus*	North Atlantic	4,349	12	2	0.05
Long-finned pilot whale [1]	*Globicephala melas*	Western North Atlantic	39,215	405	17	0.04
Killer whale [2]	*Orcinus orca*	Western North Atlantic	UNK	2	[3] 4	[4] 5.9
False killer whale [2]	*Pseudorca crassidens*	Western North Atlantic	1,791	5	5	0.28
Atlantic spotted dolphin [3]	*Stenella frontalis*	Western North Atlantic	39,921	29	29	0.07
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic	93,233	1,124	129	0.14
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic Northern Migratory Coastal.	6,639	151	45	0.68
		Western North Atlantic Offshore.	62,851	569	169	0.27
Common dolphin	*Delphinus delphis*	Western North Atlantic	172,974	13,904	7,472	4.3
Risso's dolphin	*Grampus griseus*	Western North Atlantic	35,215	101	9	0.03
White-beaked dolphin [2]	*Lagenorhynchus albirostris*	Western North Atlantic	536,016	30	30	0.006
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	95,543	2,033	347	0.36
Harbor seal [5]	*Phoca vitulina*	Western North Atlantic	61,336	939	939	1.5
Gray seal [5]	*Halichoerus grypus*	Western North Atlantic	[6] 27,300	418	418	1.5

[1] Roberts et al. (2023) only provides density estimates for pilot whales as a guild. Given the project's location, NMFS assumes that all take will be of long-finned pilot whales.
[2] Rare (or unlikely to occur) species.
[3] Adjusted according to average group size (Kraus *et al.,* 2016; Palka *et al.,* 2017).
[4] Based upon minimum population estimate of 67 individual killer whales identified in the Northwestern Atlantic Ocean (Lawson and Stevens, 2014).
[5] Roberts et al. (2023) only provides density estimates for seals without differentiating by species. In order to determine the species-specific density-based exposure estimates for seals, Vineyard Northeast used the following approach. Vineyard Northeast summed the SAR N_{best} abundance estimates (Hayes *et al.,* 2022) for the 2 seal species and divided the total by the estimate for each species to get the proportion of the total for each species. Vineyard Northeast then multiplied these proportions by the total estimated exposure for the seal guild density (Roberts et al., 2023) to get the species-specific density-based exposure estimates. NMFS accepts this approach.
[6] NMFS' stock abundance estimate (and associated PBR value) applies to U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,600.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures proposed here are identical to those included in the **Federal Register** notice announcing the final 2022 IHA and the discussion of the least practicable adverse impact included in that document remains accurate. These mitigation, monitoring, and reporting measures are described below. As described in the previous **Federal Register** notices (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022), NMFS determined that issuance of the 2022 IHA to Vineyard Northeast was within the scope of the NOAA Fisheries Greater Atlantic Regional Office (GARFO) programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (NOAA GARFO, 2021; *https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic#offshore-wind-site-assessment-and-site-characterization-activities-programmatic-consultation*). NMFS similarly concludes that the currently proposed survey activities are within scope of the consultation, and thus will require adherence to the relevant Project Design Criteria (PDC) (specifically PDCs 4, 5, and 7).

Additionally, on August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered North Atlantic right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event (87 FR 46921). Should a final vessel speed rule be issued and become effective during the effective period of this IHA (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization must be followed. The responsibility to comply with the applicable requirements of any vessel speed rule would become effective immediately upon the effective date of any final vessel speed rule and, when notice is published of the effective date, NMFS would also notify Vineyard Northeast if the measures in the speed rule were to supersede any of the measures in the MMPA authorization.

Establishment of Shutdown Zones (SZ)—Marine mammal SZs must be

established around the HRG survey equipment and monitored by NMFS-approved protected species observers (PSO) during HRG surveys as follows:

- 500-m SZ for North Atlantic right whales during use of specified acoustic sources (impulsive: sparkers and boomers; non-impulsive: non-parametric sub-bottom profilers); and,
- 100-m SZ for all other marine mammals (excluding North Atlantic right whales) during operation of the sparker and boomer. The only exception for this is for pinnipeds (seals) and small delphinids (*i.e.,* those from the genera *Delphinus, Lagenorhynchus, Stenella* or *Tursiops*).

If a marine mammal is detected approaching or entering the SZs during the HRG survey, the vessel operator would adhere to the shutdown procedures described below to minimize noise impacts on the animals. During use of acoustic sources with the potential to result in marine mammal harassment (sparkers, boomers, and non-parametric sub-bottom profilers; *i.e.,* anytime the acoustic source is active, including ramp-up), occurrences of marine mammals within the monitoring zone (but outside the SZs) must be communicated to the vessel operator to prepare for potential shutdown of the acoustic source.

Visual Monitoring—Monitoring must be conducted by qualified PSOs who are trained biologists, with minimum qualifications described in the **Federal Register** notices for the 2022 project (87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022). Vineyard Northeast must have one PSO on duty during the day and a minimum of two NMFS-approved PSOs must be on duty and conducting visual observations when HRG equipment is in use at night. Visual monitoring must begin no less than 30 minutes prior to ramp-up of HRG equipment and continue until 30 minutes after use of the acoustic source. PSOs must establish and monitor the applicable clearance zones, SZs, and vessel separation distances as described in the 2022 IHA (87 FR 52913, August 30, 2022). PSOs must coordinate to ensure 360-degree visual coverage around the vessel from the most appropriate observation posts, and must conduct observations while free from distractions and in a consistent, systematic, and diligent manner. PSOs are required to estimate distances to observed marine mammals. It is the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

Pre-Start Clearance—Marine mammal clearance zones (CZs) must be established around the HRG survey equipment and monitored by NMFS-approved PSOs prior to use of boomers, sparkers, and non-parametric sub-bottom profilers as follows:

- 500-m CZ for all Endangered Species Act-listed species; and
- 100-m CZ for all other marine mammals.

Prior to initiating HRG survey activities, Vineyard Northeast must implement a 30-minute pre-start clearance period. The operator must notify a designated PSO of the planned start of ramp-up where the notification time should not be less than 60 minutes prior to the planned ramp-up to allow the PSOs to monitor the CZs for 30 minutes prior to the initiation of ramp-up. Prior to ramp-up beginning, Vineyard Northeast must receive confirmation from the PSO that the CZs are clear prior to preceding. Any PSO on duty has the authority to delay the start of survey operations if a marine mammal is detected within the applicable pre-start clearance zones.

During this 30-minute period, the entire CZ must be visible. The exception to this would be in situations where ramp-up must occur during periods of poor visibility (inclusive of nighttime) as long as appropriate visual monitoring has occurred with no detections of marine mammals in 30 minutes prior to the beginning of ramp-up.

If a marine mammal is observed within the relevant CZs during the pre-start clearance period, initiation of HRG survey equipment must not begin until the animal(s) has been observed exiting the respective CZ, or, until an additional period has elapsed with no further sighting (*i.e.,* minimum 15 minutes for small odontocetes and seals; 30 minutes for all other species). The pre-start clearance requirement includes small delphinids. PSOs must also continue to monitor the zone for 30 minutes after survey equipment is shut down or survey activity has concluded.

Ramp-Up of Survey Equipment—When technically feasible, a ramp-up procedure must be used for geophysical survey equipment capable of adjusting energy levels at the start or re-start of survey activities. The ramp-up procedure must be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the project area by allowing them to detect the presence of the survey and vacate the area prior to the commencement of survey equipment operation at full power. Ramp-up of the survey equipment must not begin until the relevant SZs have been cleared by the PSOs, as described above. HRG equipment operators must ramp up acoustic sources to half power for 5 minutes and then proceed to full power. If any marine mammals are detected within the SZs prior to or during ramp-up, the HRG equipment must be shut down (as described below).

Shutdown Procedures—If an HRG source is active and a marine mammal is observed within or entering a relevant SZ (as described above), an immediate shutdown of the HRG survey equipment is required. When shutdown is called for by a PSO, the acoustic source must be immediately deactivated and any dispute resolved only following deactivation. Any PSO on duty has the authority to delay the start of survey operations or to call for shutdown of the acoustic source if a marine mammal is detected within the applicable SZ. The vessel operator must establish and maintain clear lines of communication directly between PSOs on duty and crew controlling the HRG source(s) to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch. Subsequent restart of the HRG equipment may only occur after the marine mammal has been observed exiting the relevant SZ, or, until an additional period has elapsed with no further sighting of the animal within the relevant SZ.

Upon implementation of shutdown, the HRG source may be reactivated after the marine mammal that triggered the shutdown has been observed exiting the applicable SZ or, following a clearance period of 15 minutes for small odontocetes (*i.e.,* harbor porpoise) and 30 minutes for all other species with no further observation of the marine mammal(s) within the relevant SZ. If the HRG equipment is shut down for brief periods (*i.e.,* less than 30 minutes) for reasons other than mitigation (*e.g.,* mechanical or electronic failure) the equipment may be reactivated as soon as is practicable at full operational level, without 30 minutes of pre-clearance, only if PSOs have maintained constant visual observation during the shutdown and no visual detections of marine mammals occurred within the applicable SZs during that time. For a shutdown of 30 minutes or longer, or if visual observation was not continued diligently during the pause, pre-clearance observation is required, as described above.

The shutdown requirement is waived for pinnipeds (seals) and certain genera of small delphinids (*i.e., Delphinus, Lagenorhynchus, Stenella,* or *Tursiops*) under certain circumstances. If a delphinid(s) from these genera is

visually detected within the SZ, shutdown would not be required. If there is uncertainty regarding identification of a marine mammal species (*i.e.,* whether the observed marine mammal(s) belongs to one of the delphinid genera for which shutdown is waived), PSOs must use best professional judgment in making the decision to call for a shutdown.

If a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized number of takes have been met, approaches or is observed within the area encompassing the Level B harassment isopleth (178 m), shutdown must occur.

Vessel Strike Avoidance—Vineyard Northeast must comply with vessel strike avoidance measures as described in the **Federal Register** notice for the 2022 IHA (87 FR 52913, August 30, 2022). This includes speed restrictions (10 knots or less) when mother/calf pairs, pods, or large assemblages of cetaceans are spotted near a vessel; species-specific vessel separation distances; appropriate vessel actions when a marine mammal is sighted (*e.g.,* avoid excessive speed, remain parallel to animal's course, *etc.*); and monitoring of the NMFS North Atlantic Right Whale reporting system and WhaleAlert daily.

Throughout all phases of the survey activities, Vineyard Northeast must monitor NOAA Fisheries North Atlantic right whale reporting systems for the establishment of a dynamic management area (DMA). If NMFS establishes a DMA in the surrounding area, including the project area or export cable routes being surveyed, Vineyard Northeast is required to abide by the 10-knot speed restriction.

Training—Project-specific training is required for all vessel crew prior to the start of survey activities.

Reporting—PSOs must record specific information as described in the **Federal Register** notice of the issuance of the 2022 IHA (87 FR 52913, August 30, 2022). Within 90 days after completion of survey activities, Vineyard Northeast must provide NMFS with a monitoring report, which must include summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

In the event of a ship strike or discovery of an injured or dead marine mammal, Vineyard Northeast must report the incident to the Office of Protected Resources (OPR), NMFS and to the New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. The report must include the information listed in the **Federal Register** notice of the issuance of the initial IHA (87 FR 52913, August 30, 2022).

Preliminary Determinations

Vineyard Northeast's HRG survey activities are a subset but otherwise unchanged from those analyzed in support of the 2022 IHA. The effects of the activity, taking into consideration the proposed mitigation and related monitoring measures, remain unchanged from those evaluated in support of the 2022 IHA, regardless of the minor increase in estimated take for one species (minke whale). NMFS expects that all potential takes would be short-term Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging, reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007). In addition to being temporary, the maximum harassment zone around a survey vessel is 178 m from use of the Applied Acoustics AA251 Boomer. Although this distance is assumed for all survey activity evaluated here and in estimating take numbers proposed for authorization, in reality, much of the survey activity would involve use of acoustic sources with a reduced acoustic harassment zone (4 m for the Edge Tech Chirp 216 or 141 m for the GeoMarine Geo Spark 2000), producing expected effects of particularly low severity. Therefore, the ensonified area surrounding each vessel is relatively small compared to the overall distribution of the animals in the area and the available habitat.

The proposed survey area overlaps or is in close proximity to feeding biologically important areas (BIA)s for North Atlantic right whales (Cape Cod Bay and Massachusetts Bay BIA, February-April/Great South Channel and Georges Bank Shelf Break BIA, April-June), humpback whales (March-December), fin whales (year-round/March-October), sei whales (May-November), and minke whales (March-November), as well as overlaps the migratory BIA for North Atlantic right whales (November 1-April 30) (LaBrecque *et al.,* 2015). In addition, the proposed survey area overlaps with the area south of Martha's Vineyard and Nantucket, referred to as ''South of the Islands,'' which has been identified as relatively new year-round core North Atlantic right whale foraging habitat (Oleson *et al.,* 2020; Quintana-Rizzo *et al.,* 2021). As prey species are mobile and broadly distributed throughout the survey area, marine mammals that are temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise, thus we do not expect biologically significant impacts to feeding behavior. In addition, most of these feeding BIAs are extensive and sufficiently large (*e.g.,* 3,149 km^2 and 12,247 km^2 for North Atlantic right whales; 47,701 km^2 for humpback whales; 18,015 km^2 and 2,933 km^2 for fin whales; 56,609 km^2 for sei whales; 54,341 for minke whales), and the acoustic footprint of the proposed survey is sufficiently small that feeding opportunities for these species would not be reduced appreciably. Due to the temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations. Even considering the increased estimated take for one species (minke whales), the impacts of these lower severity exposures are not expected to accrue to a degree that the fitness of any individuals would be impacted and, therefore, no impacts on the annual rates of recruitment or survival would result.

As previously discussed in the 2022 IHA (87 FR 52913, August 30, 2022), impacts from the survey are expected to be localized to the specific area of activity and only during periods when Vineyard Northeast's acoustic sources are active. There are no rookeries, mating or calving grounds known to be biologically important to marine mammals within the proposed survey area.

As noted for the 2022 IHA (87 FR 52913, August 30, 2022), the proposed survey area overlaps a migratory corridor BIA and migratory route SMAs (Port of New Jersey/New York and Block Island) for North Atlantic right whales. As the survey activities would be temporary and the spatial acoustic footprint produced by the survey would be very small relative to the spatial extent of the available migratory habitat in the BIA (269,448 km^2), NMFS does not expect North Atlantic right whale migration to be impacted by the survey. Required vessel strike avoidance measures would also decrease risk of ship strike during migration; no ship strike is expected to occur during Vineyard Northeast's proposed activities. Vineyard Northeast would be required to comply with seasonal speed restrictions of these SMAs, and in any dynamic management area (DMA), should NMFS establish one (or more) in the proposed survey area. Additionally,

Vineyard Northeast requested and NMFS proposes to authorize only 12 takes by Level B harassment of NARWs. This amount is less than the 40 Level B harassment takes authorized in the 2022 IHA due to the updated Duke University density data (Roberts *et al.,* 2023) and reduced survey area.

Although take by Level B harassment of North Atlantic right whales has been proposed for authorization by NMFS, we anticipate a very low level of harassment, should it occur, because Vineyard Northeast is required to maintain a shutdown zone of 500 m if a North Atlantic right whale is observed. The takes proposed for authorization account for any missed animals wherein the survey equipment is not shut down immediately. As shutdown would be called for immediately upon detection (if the whale is within 500 m), it is likely the exposure time would be very limited and received levels would not be much above the harassment threshold. Further, the 500-m shutdown zone for right whales is conservative, considering the distance to the Level B harassment isopleth for the most impactful acoustic source (*i.e.,* Applied Acoustics AA251 Boomer—which may not be used on all survey days) is estimated to be 178 m, and thereby minimizes the potential for behavioral harassment of this species. As noted previously, Level A harassment is not expected due to the small permanent threshold shift (PTS) zones associated with HRG equipment types proposed for use. NMFS does not anticipate North Atlantic right whale takes that would result from Vineyard Northeast's activities would impact annual rates of recruitment or survival. Thus, any takes that occur would not result in population level impacts.

We also note that our findings for other species with active UMEs that were previously described for the 2022 IHA (87 FR 52913, August 30, 2022) remain applicable to this project. In addition, our analysis of survey effects on species with BIAs that overlap with the proposed survey area remains unchanged. Therefore, in conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has preliminarily determined the following: (1) the required mitigation measures would effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the proposed authorized takes would have a negligible impact on the affected marine mammal species or stocks; (3) the proposed authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) Vineyard Northeast's activities would not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS OPR consults internally whenever we propose to authorize take for endangered or threatened species.

NMFS is proposing to authorize the incidental take of five species of marine mammals which are listed under the ESA, including the North Atlantic right, fin, sei, blue, and sperm whale, and has determined that this activity falls within the scope of activities analyzed in NMFS GARFO's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021).

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to Vineyard Northeast for conducting high-resolution geophysical site characterization surveys offshore of Massachusetts to southern New Jersey for a period of 1 year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Request for Public Comments

We request comment on our analyses (included in both this document and the referenced documents supporting the 2022 IHA; Incidental Take Authorization (ITA) application; issued IHA; and **Federal Register** notices including 87 FR 30872, May 20, 2022; 87 FR 52913, August 30, 2022), the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed site characterization surveys. We also request comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a one-time, 1-year renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical activities as described in the Description of the Proposed Activity and Anticipated Impacts section of this notice is planned or (2) the activities as described in the Description of the Proposed Activity and Anticipated Impacts section of this notice would not be completed by the time the IHA expires and a renewal would allow for completion of the activities beyond that described in the *Dates and Duration* section of this notice, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed renewal IHA effective date (recognizing that the renewal IHA expiration date cannot extend beyond 1 year from expiration of the initial IHA);
- The request for renewal must include the following:

(1) An explanation that the activities to be conducted under the requested renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.,* reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take);

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized; and

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

Dated: June 14, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2023–13118 Filed 6–20–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Analysis of and Participation in Ocean Exploration Video Products

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of Information Collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before August 21, 2023.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0748 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Abby Letts, LTJG/NOAA, NOAA Ocean Exploration, Joint Hydrographic Center, 24 Colovos Rd., Durham, NH 03824, (301) 325–3792; *abby.letts@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for a revision and extension to an existing information collection.

NOAA Ocean Exploration (OE) is the only federal organization dedicated to ocean exploration. By using unique capabilities in terms of personnel, technology, infrastructure, and exploration missions, OE is reducing unknowns in deep-ocean areas and providing high-value environmental intelligence needed by NOAA and the nation to address both current and emerging science and management needs. Through live video and data streams, online coverage, training opportunities, and events, we allow scientists, resource managers, students, members of the general public, and others to actively experience ocean exploration, allowing broader scientific participation, and cultivating the next generation of ocean explorers, and engaging the public in exploration activities. To better understand our ocean, our office makes exploration data available to the public. This allows us, collectively, to more effectively maintain ocean health, sustainably manage our marine resources, accelerate our national economy, and build a better appreciation of the value and importance of the ocean in our everyday lives. It is only through leveraging resources internally and externally that we can truly achieve our mission.

Since the inception of NOAA's exploration program in 2001, OE data management has been guided by the 2000 President's Panel Report recommendations which prioritized rapid and unrestricted data sharing as one of five critical exploration program components. More recently, Public Law 111–11 [Section XII Ocean Exploration] reinforced and expanded OER data management objectives, continuing to stress the importance of sharing unique exploration data and information to improve public understanding of the oceans, and for research and management purposes.

Telepresence satellite communication from the ship to shore brings the unknown ocean to the screens of both scientists and the general public in their homes, schools or offices in near real time. With technology constantly evolving, it is important to address the needs of the shore based scientists and public to maintain a high level of participation. We use voluntary surveys to identify the needs of users of data, best approaches to leverage expertise of shore based participants for meaningful public engagement focused on ocean exploration.

The five forms used to collect information are as follows: (1) Sailing Contact Information. This form is sent to the few scientists that directly sail on NOAA Ship *Okeanos Explorer.* The ship's operational officer needs certain information such as: if a sailing individual has securely submitted their proper medical documents to NOAA's Office of Marine and Aviation Operations; if the person is up to date with required security documents, such as a passport, if the ship is traveling to a foreign port; any dietary restrictions so that the person will be served food that is safe. (2) *Okeanos Explorer* Participation Assessment. This voluntary form is sent to the scientists that sailed on any *Okeanos Explorer* cruise funded by NOAA's Office of Ocean Exploration and Research to record any feedback they wish to provide to the office about their experience. The office uses their feedback in assessments for improving the utility and experience of these scientific guests sailing on the *Okeanos Explorer.* (3) EX Collaboration Tools Feedback. This voluntary form is sent to members of the marine scientific community at the beginning of a fiscal year to ask if members would like to participate in any of the upcoming cruises and to what degree, such as simply asking to be included in emailed updates or if they want to be on a direct line to the ship for remotely operated vehicle dive operations. (4) Citizen Scientist. This voluntary form is available to general members of the public and is used for members to improve the annotation efforts when watching short video clips of 30 seconds to 5 minutes. (5) Science Lead Solicitation. This voluntary form will be used to solicit interest from the scientific community to serve as a Science Lead on one of NOAA Ocean Exploration's expeditions.

The first forms described above will include minor revisions, and the fifth form is a new addition. The Sailing Contact Information form will be revised to include updated informational attachments (*e.g.,* links to updated COVID guidance, medical clearance, and underwater cultural heritage protocols) and updated expedition names and dates for a given calendar year. The *Okeanos Explorer* Participation Assessment will be revised to replace some technical/scientific questions with questions that relate to communication, leadership, and workplace climate. The EX Collaboration Tools form will be revised to include updated informational attachments (*e.g.,* underwater cultural heritage protocols) and updated expedition names and dates for a calendar year. The Citizen Scientist form will be updated for expedition names and dates for a calendar year.

II. Method of Collection

Information is collected electronically.

III. Data

OMB Control Number: 0648–0748.

Form Number(s): None.

Type of Review: Regular submission [revision and extension of an approved information collection].

Affected Public: Individuals or households; business or other for-profit organizations; not-for-profit institutions; Federal government.

Estimated Number of Respondents: 1,000.

Estimated Time per Response: 10 minutes.

Estimated Total Annual Burden Hours: 668 hours.

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Voluntary or required to obtain services or benefits.

Legal Authority: Public Law 111–11, Section XII Ocean Exploration.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–13127 Filed 6–20–23; 8:45 am]

BILLING CODE 3510–KD–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD089]

Schedules for Atlantic Shark Identification Workshops and Protected Species Safe Handling, Release, and Identification Workshops

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

ACTION: Notice of public workshops.

SUMMARY: Free Atlantic Shark Identification Workshops and Safe Handling, Release, and Identification Workshops will be held in July, August, and September of 2023. Certain fishermen and shark dealers are required to attend a workshop to meet regulatory requirements and to maintain valid permits. Specifically, the Atlantic Shark Identification Workshop is mandatory for all federally permitted Atlantic shark dealers. The Safe Handling, Release, and Identification Workshop is mandatory for vessel owners and operators who use bottom longline, pelagic longline, or gillnet gear, and who have also been issued shark or swordfish limited access permits. Additional free workshops will be conducted later in 2023 and will be announced in a future notice. In addition, NMFS has implemented online recertification workshops for persons who have already taken an in-person training.

DATES: The Atlantic Shark Identification Workshops will be held on July 20, 2023 and September 14, 2023. The Safe Handling, Release, and Identification Workshops will be held on July 7, 2023, August 24, 2023, and September 6, 2023.

ADDRESSES: The Atlantic Shark Identification Workshops will be held in Medford, NY and Virginia Beach, VA. The Safe Handling, Release, and Identification Workshops will be held in Ronkonkoma, NY, Vero Beach, FL, and Kenner, LA.

FOR FURTHER INFORMATION CONTACT: Tiffany Weidner by email at *tiffany.weidner@noaa.gov* or by phone at 301–427–8550.

SUPPLEMENTARY INFORMATION: Atlantic highly migratory species (HMS) fisheries are managed under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan and its amendments are implemented by regulations at 50 CFR part 635. Section 635.8 describes the requirements for the Atlantic Shark Identification Workshops and Safe Handling, Release, and Identification Workshops. The workshop schedules, registration information, and a list of frequently asked questions regarding the Atlantic Shark Identification and Safe Handling, Release, and Identification workshops are available online at: *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-shark-identification-workshops* and *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/safe-handling-release-and-identification-workshops.*

Atlantic Shark Identification Workshops

Since January 1, 2008, Atlantic shark dealers have been prohibited from receiving, purchasing, trading, or bartering for Atlantic sharks unless a valid Atlantic Shark Identification Workshop certificate is on the premises of each business listed under the shark dealer permit that first receives Atlantic sharks (71 FR 58057, October 2, 2006). Dealers who attend and successfully complete a workshop are issued a certificate for each place of business that is permitted to receive sharks. These certificate(s) are valid for 3 years. Thus, certificates that were initially issued in 2020 will expire in 2023.

Currently, permitted dealers may send a proxy to an Atlantic Shark Identification Workshop. However, if a dealer opts to send a proxy, the dealer must designate a proxy for each place of business covered by the dealer's permit that first receives Atlantic sharks. Only one certificate will be issued to each proxy. A proxy must be a person who is currently employed by a place of business covered by the dealer's permit; is a primary participant in the identification, weighing, and/or first receipt of fish as they are offloaded from a vessel; and who fills out dealer reports. Atlantic shark dealers are prohibited from renewing a Federal shark dealer permit unless a valid Atlantic Shark Identification Workshop certificate for each business location that first receives Atlantic sharks has been submitted with the permit renewal application. Additionally, a copy of a valid dealer or proxy Atlantic Shark Identification Workshop certificate must be in any trucks or other conveyances that are extensions of a dealer's place of business.

Workshop Dates, Times, and Locations

1. July 20, 2023, 12 p.m.–4 p.m., The Comfort Inn, 2695 Route 112, Medford, NY 11763.

2. September 14, 2023, 12 p.m.–4 p.m., Courtyard by Marriott-Virginia Beach Norfolk, 5700 Greenwich Road, Virginia Beach, VA 23462.

Registration

To register for a scheduled Atlantic Shark Identification Workshop, please contact Eric Sander at *ericssharkguide@yahoo.com* or at 386–852–8588. Pre-registration is highly recommended, but not required.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following specific items to the workshop:

- Atlantic shark dealer permit holders must bring proof that the attendee is an owner or agent of the business (such as articles of incorporation), a copy of the applicable permit, and proof of identification.
- Atlantic shark dealer proxies must bring documentation from the permitted dealer acknowledging that the proxy is attending the workshop on behalf of the permitted Atlantic shark dealer for a specific business location, a copy of the appropriate valid permit, and proof of identification.

Workshop Objectives

The Atlantic Shark Identification Workshops are designed to reduce the number of unknown and improperly identified sharks reported in the dealer reporting form and increase the accuracy of species-specific dealer-reported information. Reducing the number of unknown and improperly identified sharks will improve quota monitoring and the data used in stock assessments. These workshops will train shark dealer permit holders or their proxies to properly identify Atlantic shark carcasses.

Safe Handling, Release, and Identification Workshops

Since January 1, 2007, shark limited access and swordfish limited access permit holders who fish with longline or gillnet gear have been required to submit a copy of their Safe Handling, Release, and Identification Workshop certificate in order to renew either permit (71 FR 58057, October 2, 2006). These certificate(s) are valid for 3 years. Certificates issued in 2020 will expire in 2023. As such, vessel owners who have not already attended a workshop and received a NMFS certificate, or vessel owners whose certificate(s) will expire prior to the next permit renewal, must attend a workshop to fish with, or renew, their swordfish and shark limited access permits. Additionally, new shark and swordfish limited access permit applicants who intend to fish with longline or gillnet gear must attend a Safe Handling, Release, and Identification Workshop and submit a copy of their workshop certificate before either of the permits will be issued.

In addition to vessel owners, at least one operator on board vessels issued a limited access swordfish or shark permit that uses longline or gillnet gear is required to attend a Safe Handling, Release, and Identification Workshop and receive a certificate. Vessels that have been issued a limited access swordfish or shark permit and that use longline or gillnet gear may not fish unless both the vessel owner and operator have valid workshop certificates on board at all times. Vessel operators who have not already attended a workshop and received a NMFS certificate, or vessel operators whose certificate(s) will expire prior to their next fishing trip, must attend a workshop to operate a vessel with swordfish and shark limited access permits on which longline or gillnet gear is used.

Workshop Dates, Times, and Locations

1. July 7, 2023, 9 a.m.–5 p.m., Courtyard by Marriott, 5000 Express Drive South, Ronkonkoma, NY 11779.

2. August 24, 2023, 9 a.m.–5 p.m., Holiday Inn Ocean Breeze, 3384 Ocean Drive, Vero Beach, FL 32963.

3. September 6, 2023, 9 a.m.–5 p.m., Hilton New Orleans Airport, 901 Airline Drive, Kenner, LA 70062.

Registration

To register for a scheduled Safe Handling, Release, and Identification Workshop, please contact Angler Conservation Education at 386–682–0158. Pre-registration is highly recommended, but not required.

Registration Materials

To ensure that workshop certificates are linked to the correct permits, participants will need to bring the following specific items with them to the workshop:

- Individual vessel owners must bring a copy of the appropriate swordfish and/or shark permit(s), a copy of the vessel registration or documentation, and proof of identification;
- Representatives of a business-owned or co-owned vessel must bring proof that the individual is an agent of the business (such as articles of incorporation), a copy of the applicable swordfish and/or shark permit(s), and proof of identification; and
- Vessel operators must bring proof of identification.

Workshop Objectives

The Safe Handling, Release, and Identification Workshops are designed to teach longline and gillnet fishermen the required techniques for the safe handling and release of entangled and/or hooked protected species, such as sea turtles, marine mammals, smalltooth sawfish, Atlantic sturgeon, and prohibited sharks. In an effort to improve reporting, the proper identification of protected species and prohibited sharks will also be taught at these workshops. Additionally, individuals attending these workshops will gain a better understanding of the requirements for participating in these fisheries. The overall goal of these workshops is to provide participants with the skills needed to reduce the mortality of protected species and prohibited sharks, which may prevent additional regulations on these fisheries in the future.

Online Recertification Workshops

NMFS implemented an online option for shark dealers and longline and gillnet fishermen to renew their certificates in December 2021. To be eligible for online recertification workshops, dealers and fishermen need to have previously attended an in-person workshop. Information about the courses is available online at *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/atlantic-shark-identification-workshops* and *https://www.fisheries.noaa.gov/atlantic-highly-migratory-species/safe-handling-release-and-identification-workshops.* To access the course please visit: *https://hmsworkshop.fisheries.noaa.gov/start.*

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

Dated: June 15, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–13186 Filed 6–20–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–C–2023–0022]

Request for Comments on Southeast Regional Office and Community Outreach Office Locations

Correction

In notice document 2023–11987, appearing on page 37037 through 37039 in the issue of Tuesday, June 6, 2023, make the following correction:

On page 37038, in the third column, on the 33rd line from the top, the link should read:

''*https://iqconnect.iqfed.com/iqextranet/EForm.aspx?__cid=USPTO&__fid=100155*''.

[FR Doc. C1–2023–11987 Filed 6–20–23; 8:45 am]

BILLING CODE 0099–10–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Privacy Act of 1974; System of Records

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled, Office of Inspector General.

ACTION: Notice of new privacy act system of records.

SUMMARY: In accordance with the Privacy Act of 1974 and OMB Circular A–108, the U.S. AbilityOne Commission, Office of Inspector General proposes to establish a new U.S. AbilityOne Commission, Office of Inspector General system of records titled, AbilityOne/OIG–001 Case Management System. This system of records will allow U.S. AbilityOne Commission, Office of Inspector General to collect and maintain records on individuals who may be complainants, subjects, witnesses, and others who may be identified during an investigation. The records and information collected and maintained in this system are used to document the processing of allegations of violations of criminal, civil, and administrative laws and regulations relating to U.S. AbilityOne Commission/OIG programs, operations, and employees, as well as contractors and other individuals and entities associated with U.S. AbilityOne Commission/OIG. Additionally, the U.S. AbilityOne Commission, Office of Inspector General is issuing a Notice of Proposed Rulemaking to exempt this system from certain provisions of the Privacy Act.

DATES: Submit comments on or before July 21, 2023. This new system will be effective July 21, 2023.

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

Federal Rulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: U.S. AbilityOne Commission Office of Inspector General, 355 E Street SW (OIG Suite 335), Washington, DC 20024.

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

FOR FURTHER INFORMATION CONTACT: For general questions, please contact: Kamil Ali, Attorney-Advisor, U.S. AbilityOne Commission Office of Inspector General, 355 E Street SW (OIG Suite 335), Washington, DC 20024. (202) 603–2248, *kali@oig.abilityone.gov.* For privacy questions, please contact: Mr. Kamil Ali, Attorney-Advisor, U.S. AbilityOne Commission Office of Inspector General, 355 E Street SW (OIG Suite 335), Washington, DC 20024. Phone: (202) 603–2248, Email: *kali@oig.abilityone.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the U.S. AbilityOne Commission, Office of Inspector General (AbilityOne/OIG) proposes to establish a new system of records titled, ''AbilityOne/OIG–001 Case Management System of Records.'' This system of records will allow the U.S. AbilityOne Commission Office of the Inspector General to collect and maintain records on individuals who may be complainants, subjects, witnesses, and others who may be identified during the course of an investigation. The U.S. AbilityOne Inspector General is responsible for conducting and supervising independent and objective audits, inspections, and investigations of the programs and operations of the Commission. OIG promotes economy, efficiency, and effectiveness within the AbilityOne/OIG and prevents and detects fraud, waste, and abuse in its programs and operations. OIG's Office of Investigations investigates allegations of criminal, civil, and administrative misconduct involving U.S. AbilityOne Commission employees, contractors, and Commission programs and activities. This includes investigating for violations of criminal laws by entities regulated by U.S. AbilityOne Commission, regardless of whether they receive Federal funds. These investigations can result in criminal prosecutions, fines, civil monetary penalties, and administrative sanctions.

The AbilityOne/OIG–001 Case Management System system of records assists the OIG with receiving and processing complaints of violations of criminal, civil, and administrative laws and regulations relating to U.S. AbilityOne Commission employees, contractors, regulated persons, and other individuals and entities associated with AbilityOne. The system includes both paper investigative files and OIG's electronic case management and tracking information system which also generates reports. The case management system allows OIG to manage information provided during its investigations, and, in the process, to facilitate its management of investigations and investigative resources. Through this system, OIG can create a record showing disposition of allegations; track actions taken by management regarding misconduct; track legal actions taken following referrals to the U.S. Department of Justice for prosecution or civil action; provide a system for creating and reporting statistical information; and track government property and other resources used in investigative activities.

Additionally, the U.S. AbilityOne Commission, Office of Inspector General is issuing a Notice of Proposed Rulemaking to exempt this system from certain provisions of the Privacy Act.

II. Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the Federal Government collects, maintains, and uses personally identifiable information (PII) in a System of Records. A ''System of Records'' is a group of any records under the control of a federal agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a System of Records notice (SORN) identifying and describing each System of Records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individuals to whom a Privacy Act

record pertains can exercise their rights under the Privacy Act (*e.g.,* to determine if the system contains information about them and to contest inaccurate information).

In accordance with 5 U.S.C. 552a(r), U.S. AbilityOne Commission OIG has provided a report of this system of records to the Office of Management and Budget and to Congress. Below is the description of the AbilityOne/OIG–001 Case Management System, System of Records.

SYSTEM NAME AND NUMBER:

AbilityOne Commission/Office of Inspector General (AbilityOne/OIG)-001 Case Management System, System of Records.

SECURITY CLASSIFICATION:

Unclassified—Sensitive.

SYSTEM LOCATION:

Records are maintained at the U.S. AbilityOne Commission OIG Headquarters in Washington, DC.

SYSTEM MANAGER(S):

Case Management System Administrator; 355 E St. SW (Suite 355), Washington, DC 20024; Phone number 844–496–1536.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978, 5 U.S.C. 401–424; 5 U.S.C. app. 3.

PURPOSE(S) OF THE SYSTEM:

The records and information collected and maintained in this system are used to document the processing of allegations of violations of criminal, civil, and administrative laws and regulations relating to U.S. AbilityOne Commission programs, operations, and employees, as well as contractors and other individuals and entities associated with U.S. AbilityOne Commission; monitor case assignments, status, disposition, and results; manage investigations and information provided during the course of such investigations; track actions taken by management regarding misconduct and other allegations; track legal actions taken following referrals to the Department of Justice for prosecution or litigation; create and report statistical information; and manage property records establishing chain of custody of evidence.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals filing complaints of criminal, civil, or administrative violations, including, but not limited to, fraud, waste, or mismanagement; individuals alleged to have been involved in such violations; individuals identified as having been adversely affected by matters investigated by the OIG; individuals who have been identified as possibly relevant to, or who are contacted as part of, an OIG investigation, including: (A) current and former employees of the U.S. AbilityOne Commission, other Federal agencies, and U.S. AbilityOne Commission contractors, grantees, and persons whose association with current and former employees relate to alleged violations under investigation; and, (B) witnesses, complainants, confidential informants, suspects, defendants, or parties who have been identified by the OIG, other U.S. AbilityOne Commission components, other agencies, or members of the general public in connection with authorized OIG functions; and OIG employees performing investigative functions.

CATEGORIES OF RECORDS IN THE SYSTEM:

Categories of records in this system may include:

- Investigative agent name and contact information;
- Individual's name and aliases;
- Date of birth;
- Social Security Number;
- Telephone and cell phone numbers;
- Physical and mailing addresses;
- Electronic mail addresses;
- Physical description;
- Citizenship;
- Photographs;
- Job title, employment position, and other employment data;
- Individual Eligibility Evaluations and other medical documentation;
- Any other personal information relevant to the subject matter of an OIG investigation;
- Investigative files containing complaints and allegations, witness statements; transcripts of electronic monitoring; subpoenas and legal opinions and advice; reports of investigation; reports of criminal, civil, and administrative actions taken as a result of the investigation; and other relevant evidence;
- Property receipts establishing chain of custody of evidence.

RECORD SOURCE CATEGORIES:

Records are obtained from sources including, but not limited to, the individual record subjects; U.S. AbilityOne Commission employees, grantees, and contractors; employees of Federal, State, local, and foreign agencies; and other persons and entities.

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

In addition to those disclosures generally permitted under the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside U.S. AbilityOne Commission as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To other Federal, State, local, or foreign agencies or administrations, and licensing and professional discipline authorities, having interest or jurisdiction in the matter.

2. To third parties in the course of an investigation, when necessary to obtain pertinent information.

3. To any person when disclosure of the record is needed to enable the recipient of the record to take action to recover money or property of U.S. AbilityOne Commission or OIG, when such recovery will accrue to the benefit of the United States, or when disclosure of the record is needed to enable the recipient of the record to take appropriate disciplinary or corrective action to maintain the integrity of AbilityOne programs or operations.

4. To complainants and/or victims to the extent necessary to provide such persons with information and explanations concerning the progress and/or results of the investigation or case arising from the matters of which they complained and/or of which they were a victim.

5. To media and the public when the public interest requires, unless it is determined by OIG counsel that release of specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

6. To an individual or individuals who are in danger or in situations involving an imminent danger of death or physical injury.

7. To either the House of Congress, or, to the extent of matter within its jurisdiction, any committee thereof, any joint committee of congress or subcommittee of any such joint committee.

8. To another agency or to an instrumentality of any governmental jurisdiction within or under the control of United States for a civil or criminal law enforcement activity if the head of the agency or the instrumentality has made a written request to U.S. AbilityOne Commission OIG specifying the particular portion of the record desired and the law enforcement activity for which the record is sought.

9. To the Department of Justice when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to

represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

10. To a court or adjudicative body before which agency is authorized to appear, when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

11. To a congressional office in response to an inquiry of records of an individual from the congressional office made at the request of the individual.

12. To other agencies and the Council of Inspectors General on Integrity and Efficiency (CIGIE) for purposes of conducting and reviewing peer reviews of the OIG to ensure adequate internal safeguards and management procedures exist or to ensure that standards applicable to Government audits, investigations, or other agency activities are applied and followed.

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

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

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are stored electronically and/or on paper in secure facilities. Electronic records may be stored on magnetic disc, tape, digital media, and CD–ROM.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are primarily organized and retrieved by case numbers. Paper media are retrievable alphabetically by name of subject or complainant, by case number, and/or by special agent name and/or employee identifying number. Electronic media are retrieved by the name or identifying number for a complainant, subject, victim, or witness; by case number; by special agent name or other personal identifier; or by field office designation.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records for closed cases are kept for 15 years.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access is restricted to agency personnel whose responsibilities require access. Access to the database is password protected with two factor authentication.

RECORD ACCESS PROCEDURES:

Under the Privacy Act, individuals may request access to records about themselves. If an agency or a person, who is not the individual who is the subject of the records, requests access to records about an individual, the written consent of the individual who is the subject of the records is required. Requesters may submit requests for records under the Privacy Act in the following ways: (1) by mail to Ms. Kimberly Zeich, Executive Director, U.S. AbilityOne Commission 355 E Street SW (Suite 325), Washington, DC 20024; or (2) via email to *foia@abilityone.gov.* Requesters must provide the information that is necessary to identify the records, including the following: Requester's full name; present mailing address; home telephone; work telephone; name of subject, if other than requester; requester relationship to subject; description of type of information or specific records; and purpose of requesting information. Requesters should be as specific as possible about the records being requested including enough file-related or event-related information such as the subject matter and date and any information to permit an organized, non-random search for documents.

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records maintained on himself or herself must clearly and concisely state that information is being contested, and the proposed amendment to the information sought. Requests to amend a record must follow the Record Access Procedures above.

NOTIFICATION PROCEDURE SECTIONS:

Same as Record Access Procedures.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

Pursuant to 5 U.S.C. 552a(j)(2), this system is exempt from the following provisions of the Privacy Act: 5 U.S.C. 552a (c)(3)–(4); (d); (e)(1)–(3); (e)(4)(G)–(I); (e)(5); (e)(8); and (f)–(g); and from 41 CFR 51–9.1, § 51–9.2, § 51–9.3, § 51–9.4, and § 51–9.7.

Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act, subject to the limitations set forth in those subsections: 5 U.S.C. 552a(c)(3), (d). (e)(4)(G)–(I) and (f);; and from 41 CFR 51–9.1, § 51–9.2, § 51–9.3, § 51–9.4, and § 51–9.7.

Exemptions from the subsections are justified for because application of these provision would present a serious impediment to law enforcement. Access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation, of the existence of that investigation; of the nature and scope of the information and evidence obtained as to his activities; of the identity of confidential sources, witnesses, and law enforcement personnel, and of information that may enable the subject to avoid detection or apprehension. These factors would present a serious impediment to effective law enforcement where they prevent the successful completion of the

investigation, endanger the physical safety of confidential sources, witnesses, and law enforcement personnel, and/or lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony. In addition, granting access to such information could disclose security-sensitive or confidential business information or information that would constitute an unwarranted invasion of the personal privacy of third parties. Finally, access to the records could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with ongoing investigations and law enforcement activities and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated. It is not possible to detect relevance or necessity of specific information in the early stages of a civil, criminal or other law enforcement investigation, case, or matter, including investigations in which use is made of properly classified information. Relevance and necessity are questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023–13190 Filed 6–20–23; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 22–1]

Notice of Prehearing Conference

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: Notice of prehearing conference for *In the Matter of Leachco, Inc.;* CPSC Docket No. 22–1.

DATES: Thursday, June 29, 2023 at 11:00 a.m. Eastern Time.

ADDRESSES: This event will be held remotely.

FOR FURTHER INFORMATION CONTACT: Alberta E. Mills, Consumer Product Safety Commission, Office of the General Counsel, Division of the Secretariat, *cpsc-os@cpsc.gov;* 240–863–8938; 301–504–7479.

SUPPLEMENTARY INFORMATION: The text of the Presiding Officer's June 15, 2023 Order Scheduling Prehearing Conference appears below.

Authority: Consumer Product Safety Act, 15 U.S.C. 2064.

Dated: June 15, 2023.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of the Chief Administrative Law Judge, 1331 Pennsylvania Ave. NW, Suite 520N, Washington, DC 20004–1710, Telephone: 202–434–9950, Fax: 202–434–9949,

June 15, 2023

In the Matter of LEACHCO, INC., CPSC Docket No. 22–1

Respondent.

ORDER SCHEDULING PREHEARING CONFERENCE

An initial prehearing conference was held on April 22, 2022. A second prehearing conference was held on September 7, 2022.

On June 9, 2023, Respondent filed a motion for summary decision. Respondent also requested oral argument on the motion. Complaint Counsel has said he does not believe oral argument is necessary, but that he would be available for argument and that argument would not affect the current prehearing schedule agreed to by the parties.

Upon consultation, the parties agreed to convene a third prehearing conference for oral argument. Other relevant matters, such as the status of discovery motions, matters to be included in the final prehearing order, and any other prehearing issues the parties need to address may also be discussed. *See* 16 CFR 1025.21(c) (2022).

Each party shall be permitted 20 minutes for argument. As movant, Respondent shall be permitted to reserve five (5) minutes of its time for rebuttal.

A third prehearing conference shall be held as follows:

Date: Thursday, June 29, 2022.

Time: 11:00 a.m. Eastern Daylight Time.

Means: Zoom [link provided to those listed in Distribution].

The CPSC is working to secure a court reporter for the prehearing conference. I direct that notice of this conference be published in the **Federal Register**. 16 CFR 1025.21(b) (2022).

Michael G. Young

Administrative Law Judge

Distribution:

Brett Ruff, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *bruff@cpsc.gov*

Rosalee Thomas, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *rbthomas@cpsc.gov*

Caitlin O'Donnell, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *codonnell@cpsc.gov*

Michael J. Rogal, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *mrogal@cpsc.gov*

Gregory Reyes, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *greyes@cpsc.gov*

Frank Perilla, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *FPerilia@cpsc.gov*

Oliver J. Dunford, Pacific Legal Foundation, 4440 PGA Blvd., Suite 307, Palm Beach Gardens, FL 33410, *ODunford@pacificlegal.org*

John F. Kerkhoff, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, *JKerkhoff@pacificlegal.org*

Frank Garrison, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, *FGarrison@pacificlegal.org*

Jessica L. Thompson, Pacific Legal Foundation, 3100 Clarendon Boulevard, Suite 610, Arlington, VA 22201, *JLThompson@pacificlegal.org*

Alberta E. Mills, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, *amills@cpsc.gov*

[FR Doc. 2023–13185 Filed 6–20–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2023–HQ–0007]

Submission for OMB Review; Comment Request

AGENCY: U.S. Army Corps of Engineers (USACE), Department of the Army, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by July 21, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Angela Duncan, 571–372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Stakeholder and Community Coastal Storm Hazard Surveys; OMB Control Number 0710–CCFR.

Type of Request: New.

Number of Respondents: 3,050.

Responses per Respondent: 1.

Annual Responses: 3,050.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 1,525.

Needs and Uses: Information from the surveys described here is needed to support research that was appropriated in the Consolidated Appropriations Act, 2021 (Pub. L. 116–260). In the explanatory statement on Division D of the Act, Energy and Water Development and Related Agencies Appropriations Act, 2021, the Regional Sediment Management program was appropriated additional funding to address research and development for compound coastal flooding to ''enhance the resiliency of coastal communities and mitigate socioeconomic and environmental consequences of extreme coastal hazards.'' This includes funds provided to support cooperative efforts between the Corps and academia to address compound flooding issues. The explanatory statement can be accessed at the following link: *https://www.govinfo.gov/content/pkg/CREC-2020-12-21/pdf/CREC-2020-12-21-house-bk4.pdf.* This Congressional funding resulted in a $5 million joint effort between the U.S. Army Corps of Engineers—Engineer Research and Development Center (ERDC) and the University of Alabama under the Cooperative Agreement ''Coastal Compound Flooding under Uncertainties: Physically-based and Data Driven Modeling Framework.'' Research tasks 9 and 10 of this cooperative agreement seek to address the Congressional directive to connect enhanced flood forecasting with community resilience.

This research effort seeks to inform improved modeling of compound coastal storm events, including improved simulation of impacts to communities and of protective action-taking. The proposed tasks contained in the Broad Agency Agreement with the University of Alabama seek to identify effective flood risk communication tools that influence coastal residents' risk mitigation actions and to better understand key community stakeholder communication of hazards. Execution of these tasks requires the University of Alabama Principal Investigator and research team to gather information through three community and stakeholder surveys. Findings from their analysis will inform coastal storm hazard modeling and risk communication for better outcomes from storm events, meeting the Appropriations Bill directive described above.

Affected Public: Individuals or households.

Frequency: One-time collection.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Matthew Oreska.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

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

DoD Clearance Officer: Ms. Angela Duncan.

Requests for copies of the information collection proposal should be sent to Ms. Duncan at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: June 13, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13101 Filed 6–20–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0053]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by August 21, 2023.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments,

please write to Military Community and Family Policy, Office of Military Family Readiness, ATTN: Dianna Ganote, Alexandria, VA 22350; *dianna.m.ganote.civ@mail.mil* or by telephone: (571) 372–3990.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Department of Defense Consent to Conduct Installation Records Checks (IRC); DD Form 3058; OMB Control Number 0704–0586.

Needs and Uses: The information collection requirement is necessary as part of a criminal history background investigation on individuals working, volunteering, or residing on a military installation who provide care and services to children in DoD programs. The query of records from the installation includes: the Family Advocacy Central Registry, the military law enforcement records, and the Defense Central Index of Investigations (DCII). The query of records will assist the department in obtaining or maintaining an employment suitability or fitness determination for those individuals working with children on military installations. Programs impacted are referenced within the 34 U.S. Code 20351 (Crime Control Act of 1990) and include impacted individuals such as employees, DoD contractors, providers, adults residing in a family child care home, volunteers, and others with regular recurring contact with children.

Affected Public: Individuals or households.

Annual Burden Hours: 2,333.

Number of Respondents: 14,000.

Responses per Respondent: 1.

Annual Responses: 14,000.

Average Burden per Response: 10 minutes.

Frequency: As required.

Respondents are DoD contractors, family childcare providers, family childcare adult family members residing in the home, and specified volunteers who provide childcare services for children. This form will be initiated by DoD staff and will be maintained in the initiating DoD offices and/or appropriate human resources or security offices.

Dated: June 13, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13104 Filed 6–20–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2023–OS–0054]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness (OUSD(P&R)), Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by August 21, 2023.

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

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

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

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

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Military Community and Family Policy, Office of Military Family Readiness, ATTN: Sean O'Hare, Alexandria, VA 22350; *sean.p.ohare3.civ@mail.mil* or by telephone: (571) 372–0866.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: DoD Child Development Program (CDP)—Family Information; Department of Defense Child Development Program Request for Care Record (DD Form 2606) & Application for Department of Defense Child Care Fees (DD Form 2652); OMB Control Number 0704–0515.

Needs and Uses: The DoD requires the information in the proposed collection for program planning and management purposes. This includes two collection instruments: DD Form 2606, ''Department of Defense Child Development Program Request for Care Record,'' which is required for all patrons to apply for childcare and collects general information regarding the sponsor and family, and DD Form 2652 ''Application for Department of Defense Child Care Fees,'' which is utilized for patrons to apply for DoD childcare subsidies based on total family income.

Affected Public: Individuals or households.

Annual Burden Hours:

DD 2606: 1,042.

DD 2652: 4,167.

Total: 5,209.

Number of Respondents:

DD 2606: 12,500.

DD 2652: 50,000.

Total: 62,500.

Responses per Respondent: 1.

Annual Responses:

DD 2606: 12,500.

DD 2652: 50,000.

Total: 62,500.

Average Burden per Response: 5 minutes.

Frequency: Biennially.

Respondents for the information collection through DD Form 2606 and DD Form 2652 are patrons requesting childcare and patrons enrolled in Child Development Programs (CDPs). The DoD CDP requires the information in the proposed collections for program planning, management purposes and the determination of child care fees.

The DD Form 2606 is used to collect information for the type of care needed and sponsor status which determines eligibility and priority for child development program services. It is also used to assist management in the planning of present and future program requirements. The information from the DD Form 2652 is used to determine total

family income to determine child care fees for families enrolled in the DoD CDP.

Dated: June 13, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–13100 Filed 6–20–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Request for Project Proposals Pursuant to Section 165 of the Water Resources Development Act of 2020, Pilot Program for Continuing Authority Projects in Small or Disadvantaged Communities

AGENCY: U.S. Army Corps of Engineers, Department of the Army, DoD.

ACTION: Notice; request for pilot project proposals.

SUMMARY: Section 165 of the Water Resources Development Act of 2020 directs the Secretary of the Army to implement a pilot program for carrying out projects under a continuing authority program for economically disadvantaged communities at 100% Federal cost. The Department of the Army is requesting pilot project proposals. The Secretary is authorized to select up to 20 pilot projects.

DATES: Proposals are to be submitted no later than August 21, 2023.

ADDRESSES: You may submit proposals in writing using any of these methods:

- *Mail:* HQ, U.S. Army Corps of Engineers, ATTN: Ms. Amy Babey, at 441 G Street NW, Washington, DC 20314.
- *Email: wrda20cap165a@usace.army.mil.* Please include Section 165 Project Proposal in the subject line of the message.

Due to security requirements, we cannot receive proposals by hand delivery or courier.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Babey at *wrda20cap165a@usace.army.mil* or by phone at 502–645–7199.

SUPPLEMENTARY INFORMATION: Section 165 of the Water Resources Development Act of 2020 requires the Secretary to implement a pilot program for carrying out up to 20 projects under a continuing authority program for economically disadvantaged communities at 100 percent Federal cost. Additional information on the section 165 pilot program can be found in the Assistant Secretary of the Army for Civil Works (ASA(CW)) policy guidance issued on 12 June 2023. A copy of the guidance can be obtained at *https://www.usace.army.mil/Missions/Civil-Works/Project-Planning/Legislative-Links/wrda_2020/.*

The term ''economically disadvantaged community'' means as defined in the ASA(CW) memorandum, Implementation Guidance for Section 160 of the Water Resources Development Act of 2020, Definition of Economically Disadvantaged Community, dated 14 March 2023. A copy of the guidance can be obtained at *https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/36002.*

The term ''continuing authority program'' (CAP) means any of the following:

1. Section 14 of the Flood Control Act of 1946 (33 U.S.C. 701r).
2. Section 3 of the Act of August 13, 1946 (33 U.S.C. 426g). This authority is commonly identified as ''Section 103'' by the U.S. Army Corps of Engineers (USACE).
3. Section 107 of the River and Harbor Act of 1960 (33 U.S.C. 577).
4. Section 111 of the River and Harbor Act of 1968 (33 U.S.C. 426i).
5. Section 204 of the Water Resources Development Act of 1992 (33 U.S.C. 2326).
6. Section 205 of the Flood Control Act of 1948 (33 U.S.C. 701s).
7. Section 206 of the Water Resources Development Act of 1996 (33 U.S.C. 2330).
8. Section 2 of the Act of August 28, 1937 (33 U.S.C. 701g). This authority is commonly identified as ''Section 208'' by USACE.
9. Section 1135 of the Water Resources Development Act of 1986 (33 U.S.C. 2309a).

Notwithstanding the cost share authorized for the applicable CAP section, pursuant to section 165(a), the Federal share of the cost of a project selected under this authority shall be 100 percent. Therefore, the maximum total Federal cost of a project implemented under Section 165(a) will be the sum of the applicable statutory per project Federal participation limit (see table below) plus the amount that the non-Federal interest would pay as its cost share.

Authority	Statutory per project federal participation limit
Section 14	$10,000,000
Section 103	10,000,000
Section 107	10,000,000
Section 111	12,500,000
Section 204	10,000,000
Section 205	10,000,000
Section 206	10,000,000
Section 208	500,000
Section 1135	10,000,000

Non-Federal Interest Requirements

1. Provide all required lands, easements, rights-of-way, relocations, and disposal areas (LERRDs) required for the project.
2. Perform and pay for all costs associated with any required hazardous, toxic, and radioactive wastes (HTRW) cleanup and response in, on, or under any real property interest required for the project.
3. Operate and maintain the project at full non-Federal expense (except for a project for commercial navigation).
4. Hold and save the United States free from all damages arising from the project that are not due to the fault or negligence of the United States or its contractors.
5. For a project for navigation, provide all required local service facilities.
6. Pay all costs of planning, design, and construction that exceed the sum of the statutory per project Federal participation limit for the applicable CAP section plus the amount that the non-Federal interest would normally provide as its cost share.

Project Proposals

All information provided in a proposal is public information. Therefore, information that is confidential business information, information that should not be disclosed because of statutory restrictions, or other information that a non-Federal interest would not want to appear publicly should not be included in the submittal. Proposals to convert an active CAP or specifically authorized study or project to a Section 165 pilot program study or project will not be considered. The authority to initiate a project under the pilot program terminates on December 27, 2030.

Entities submitting proposals for a project must include the following information:

1. Name, location, and description of the proposed project.
2. Description of the Economically Disadvantaged Community. The proposal must include a map and a narrative description of the economically disadvantaged community that will be benefited by the proposed project. The narrative description must include sufficient information to validate the community's classification as economically disadvantaged. The narrative must also describe the type

and complexity of the urbanization in the community and identify any existing infrastructure in the community that is related to the purpose of the proposed project.

3. Description of the non-Federal interest for the proposed project. The description must include sufficient information to validate the non-Federal interest's eligibility as an applicant for the pilot program.

4. A letter of intent to partner with USACE in conducting a study, completing a design, constructing the project, and the long-term operation and maintenance of the constructed project. The letter of intent must include information demonstrating the non-Federal interest ability to be a partner in the study and project.

5. Description of the need for the proposed project and what the project would provide to the disadvantaged community.

6. For a project for flood risk management or coastal storm risk management (CSRM) purposes, the proposal must include a description of the history of flooding and the population at risk in the economically disadvantaged community. The narrative should include the dates of flood events and describe the property damages and life loss attributable to each event. It should also include a qualitative description or range of how deep the water was and how fast it was flowing. The description should identify any characteristics of the population that have a bearing on risk, such as the total number of people subject to flooding or a coastal storm, low per capita income, or unemployment rate above the national average.

7. A proposal for a project for CSRM purposes must include assurance of local willingness and capability to establish conditions of public use and access to beaches and shores. The proposal must identify whether the proposed project may result in a CSRM project that benefits beaches or shores the majority of which are private. In such cases, the applicant must provide assurance in the proposal that it is capable and willing to establish sufficient conditions of public use and access as a condition of Federal financial participation in a project.

8. For a project for ecosystem restoration, the proposal must describe the degraded habitat targeted for restoration and the causes of the degradation. Regionally and nationally significant habitat or natural resources should be identified.

9. For a project under section 14, the proposal must describe the ownership and function of the facility to be protected and the nature of the damage caused by flooding adjacent to the facility.

10. For a project under section 111, the proposal must describe the shoreline damage and identify the Federal navigation project responsible for the damage.

11. For a project for commercial navigation under Section 107, the proposal must describe existing facilities, vessel traffic, and the navigation problem the proposed project will address.

Michael L. Connor,

Assistant Secretary of the Army (Civil Works).

[FR Doc. 2023–13144 Filed 6–20–23; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

Inland Waterways Users Board Meeting Notice

AGENCY: U.S. Army Corps of Engineers, Department of the Army, DoD.

ACTION: Notice of open Federal advisory committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the Federal advisory committee meeting of the U.S. Army Corps of Engineers, Inland Waterways Users Board (Board). This meeting is open to the public. For additional information about the Board, please visit the committee's website at *https://www.iwr.usace.army.mil/Missions/Navigation/Inland-Waterways-Users-Board/.*

DATES: The Army Corps of Engineers, Inland Waterways Users Board will conduct a meeting from 9 a.m. to 2 p.m. CDT on July 20, 2023.

ADDRESSES: The Inland Waterways Users Board meeting will be conducted at the Paducah-McCracken County Convention and Expo Center, 415 Park Street, Paducah, Kentucky 42001, 270–408–1346. The online virtual portion of the Inland Waterways Users Board meeting can be accessed at *https://usace1.webex.com/meet/ndc.nav,* Public Call-in: USA Toll-Free 844–800–2712, USA Caller Paid/International Toll: 1–669–234–1177 Access Code: 199 117 3596, Security Code 1234.

FOR FURTHER INFORMATION CONTACT: Mr. Mark R. Pointon, the Designated Federal Officer (DFO) for the committee, in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–GN, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–428–6438; and by email at *Mark.Pointon@usace.army.mil.* Alternatively, contact Mr. Steven D. Riley, an Alternate Designated Federal Officer (ADFO), in writing at the Institute for Water Resources, U.S. Army Corps of Engineers, ATTN: CEIWR–NDC, 7701 Telegraph Road, Casey Building, Alexandria, VA 22315–3868; by telephone at 703–659–3097; and by email at *Steven.D.Riley@usace.army.mil.*

SUPPLEMENTARY INFORMATION: This committee meeting is being held under the provisions of Chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''), section 552b of title 5, U.S.C. (commonly known as the ''Government in the Sunshine Act''), and sections 102–3.140 and 102–3.150 of title 41, Code of Federal Regulations (CFR).

Purpose of the Meeting: The Board is chartered to provide independent advice and recommendations to the Secretary of the Army on construction and rehabilitation project investments on the commercial navigation features of the inland waterways system of the United States. At this meeting, the Board will receive briefings and presentations regarding the investments, projects, and status of the inland waterways system of the United States and conduct discussions and deliberations on those matters. The Board is interested in written and verbal comments from the public relevant to these purposes.

Agenda: At this meeting the agenda will include the status of the Inland Waterways Trust Fund (IWTF); Fiscal Year (FY) 2024 Budget funding for Navigation; status of Inner Harbor Navigation Canal (IHNC) Lock and Bayou Sorrel Lock activities; updates of inland waterways projects for the Mississippi River-Illinois Waterway Navigation and Ecosystem Sustainability Program (NESP), McClellan-Kerr Arkansas River Navigation System (MKARNS) Three Rivers, Arkansas, and the Gulf Intracoastal Waterway (GIWW) Brazos River Floodgates and Colorado River Locks; status of the ongoing construction activities for the Upper Ohio River Montgomery Lock, Monongahela River Locks and Dams 2, 3, and 4, Chickamauga Lock and Kentucky Lock projects.

Availability of Materials for the Meeting. A copy of the agenda or any updates to the agenda for the July 20, 2023, meeting will be available. The final version will be available at the

meeting. All materials will be posted to the website for the meeting.

Public Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.1 65, and subject to the availability of space, this meeting is open to the public. Registration of members of the public who wish to participate in the meeting will begin at 8:30 a.m. on the day of the meeting. Participation is on a first-to-arrive basis. Any interested person may participate in the meeting, file written comments or statements with the committee, or make verbal comments during the public meeting, at the times, and in the manner, permitted by the committee, as set forth below.

Special Accommodations: Individuals requiring any special accommodations related to the public meeting or seeking additional information about the procedures, should contact Mr. Mark Pointon, the committee DFO, or Mr. Steven Riley, an ADFO, at the email addresses or telephone numbers listed in the **FOR FURTHER INFORMATION CONTACT** section, at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Written Comments or Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the Board about its mission and/or the topics to be addressed in this public meeting. Written comments or statements should be submitted to Mr. Pointon, the committee DFO, or Mr. Riley, a committee ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section in the following formats: Adobe Acrobat or Microsoft Word. The comment or statement must include the author's name, title, affiliation, address, and daytime telephone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the committee DFO or ADFO at least five (5) business days prior to the meeting so that they may be made available to the Board for its consideration prior to the meeting. Written comments or statements received after this date may not be provided to the Board until its next meeting. Please note that because the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all written comments will be treated as public documents and will be made available for public inspection.

Verbal Comments: Members of the public will be permitted to make verbal comments during the public meeting only at the time and in the manner allowed herein. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three business (3) days in advance to the committee DFO or ADFO, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section. The committee DFO and ADFO will log each request to make a comment, in the order received, and determine whether the subject matter of each comment is relevant to the Board's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of the meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three (3) minutes during this period, and will be invited to speak in the order in which their requests were received by the DFO and ADFO.

Thomas P. Smith,

Chief, Operations and Regulatory Division, Directorate of Civil Works, U.S. Army Corp of Engineers.

[FR Doc. 2023–13094 Filed 6–20–23; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0060]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; School Pulse Panel 2023–24 Data Collection

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before July 21, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: School Pulse Panel 2023–24 Data Collection.

OMB Control Number: 1850–0975.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 53,955.

Total Estimated Number of Annual Burden Hours: 10,175.

Abstract: The School Pulse Panel (SPP) is a data collection originally designed to collect voluntary responses from a nationally representative sample of public schools to better understand how schools, students, and educators are responding to the ongoing stressors of the coronavirus pandemic. It is conducted by the National Center for Education Statistics (NCES), part of the Institute of Education Sciences (IES), within the United States Department of Education, in cooperation with the U.S. Census Bureau. Due to the immediate need to collect information from schools during the pandemic to satisfy the requirement of Executive Order 14000, an emergency clearance was issued to

develop and field the first several monthly collections of the SPP in 2021, and a full review of the SPP data collection was completed in 2022 (OMB# 1850–0969). SPP's innovative design and timely dissemination of findings have been used and cited frequently among Department of Education senior leadership, the White House Domestic Policy Counsel, the USDA's Food and Nutrition Service, the Centers for Disease Control and Prevention, Congressional deliberations, and the media. The ongoing, growing interest by stakeholders has resulted in the request for dedicated funding to create an established NCES quick-turnaround data collection vehicle, with the goal of standing up a post-pandemic panel to begin with the 2023–24 school year.

The initial proposal for the next SPP study extended the collection to also collect data from school districts, but this has been canceled due to lack of funding. For the 23–24 school year, the survey may ask school staff about a range of topics, including but not limited to instructional mode offered; enrollment counts of subgroups of students for various subject interests; strategies to address learning recovery; safe and healthy school mitigation strategies; mental health services; use of technology; information on staffing, nutrition services, absenteeism, usage of federal funds, facilities, and overall principal and school staff experiences. Some new content will be rotated in and out monthly.

As in previous waves, for SPP 2023–24 roughly 8,000 (4,000 in an initial sample and 4,000 in a reserve sample) public elementary, middle, high, and combined-grade schools will be randomly selected to participate in a panel. The goal is national representation from 1,200 responding schools to report national estimates. School staff will be asked to provide requested data as frequently as monthly during the 23–24 school year. This approach provides the ability to collect detailed information on various topics while also assessing changes over time for items that are repeated. Given the high demand for data collection, the content of the survey will change monthly.

This request is to conduct the SPP 2023–24 main study data collection activities, including instruments for the first quarter of monthly collections. These materials completed a 60-day public comment period in June 2023. They are now being published for 30 additional days of public comment. Some documents have been revised for the 30-day public comment period. Subsequent quarterly content submissions will be submitted for 30-day public comment periods.

Dated: June 15, 2023.

Stephanie Valentine,

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

[FR Doc. 2023–13180 Filed 6–20–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0107]

Agency Information Collection Activities; Comment Request; School Ambassador Fellowship Application

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

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a new information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before August 21, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0107. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the regulations.gov site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov*. Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Orman Feres, 202–453–6921.

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: School Ambassador Fellowship Application.

OMB Control Number: 1810–NEW.

Type of Review: A new ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 6,000.

Total Estimated Number of Annual Burden Hours: 14,250.

Abstract: The Office of Elementary and Secondary Education (OESE) in the US Department of Education (ED) requests clearance for a new information collection for the School Ambassador Fellowship program. The U.S. Department of Education established the School Ambassador Fellowship to enable outstanding teachers, administrators, and other school leaders, such as school counselors, psychologists, social workers, and librarians to bring their school and classroom expertise to the Department and to expand their knowledge of the national dialogue about education. The School Ambassador Fellowship is a professional learning community designed to improve educational outcomes for students by leveraging the expertise of school-based practitioners

in the creation, evaluation, and dissemination of information around national education initiatives. The Intergovernmental Personnel Act (IPA) mobility program regulations (5 CFR part 334), revised effective May 29, 1997, allow federal agencies to facilitate cooperation between the Federal Government and the non-Federal entity through the temporary assignment of skilled personnel. In order to identify the most skilled personnel for the position of Ambassador Fellow we are requesting OMB approval to collect School Ambassador Fellowship applications.

Dated: June 14, 2023.

Kun Mullan,

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

[FR Doc. 2023–13089 Filed 6–20–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0034]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Measuring Educational Gain in the National Reporting System for Adult Education

AGENCY: Office of Career, Technical, and Adult Education (OCTAE), Department of Education (ED).

ACTION: Notice.

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

DATES: Interested persons are invited to submit comments on or before July 21, 2023.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact John Lemaster, 202–245–6218.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Measuring Educational Gain in the National Reporting System for Adult Education.

OMB Control Number: 1830–0567.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 15.

Total Estimated Number of Annual Burden Hours: 600.

Abstract: Title 34 of the Code of Federal Regulations part 462 establishes procedures the Secretary uses to consider literacy tests for use in the National Reporting System (NRS) for adult education. This information is used by the Secretary to determine the suitability of published literacy tests to measure and report educational gain under the NRS.

Dated: June 15, 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. 2023–13157 Filed 6–20–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0108]

Agency Information Collection Activities; Comment Request; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

AGENCY: Office of Civil Rights (OCR), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before August 21, 2023.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2023–SCC–0108. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. If the *regulations.gov* site is not available to the public for any reason, the Department will temporarily accept comments at *ICDocketMgr@ed.gov.* Please include the docket ID number and the title of the information collection request when requesting documents or submitting comments. Please note that comments submitted after the comment period will not be accepted. Written requests for information or comments submitted by postal mail or delivery should be addressed to the Manager of the Strategic Collections and Clearance Governance and Strategy Division, U.S. Department of Education, 400 Maryland Ave. SW, LBJ, Room 6W203, Washington, DC 20202–8240.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Alice Yao, 202–245–8337.

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: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

OMB Control Number: 1870–0505.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Private Sector; State, Local, and Tribal Governments.

Total Estimated Number of Annual Responses: 24,785.

Total Estimated Number of Annual Burden Hours: 598,982.

Abstract: The U.S. Department of Education (the Department) published a Notice of Proposed Rulemaking for the Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (title IX NPRM) to propose amendments to the Department's implementing regulations for title IX of the Education Amendments of 1972. The Department's proposed regulations would require a recipient to maintain various documents regarding its title IX activities for a period of at least seven years. These requirements are specified in proposed 34 CFR 106.8(f). Recipients impacted by the proposed regulations include local educational agencies, institutes of higher education and other entities that receive Federal grant funds from the Department. The information collected would allow recipients and the Department to assess on a longitudinal basis whether a recipient is complying with the Department's title IX regulations when it is has information about sex discrimination, the prevalence of sex discrimination affecting access to a recipient's education program or activity, and whether additional or different training is necessary for the recipient to fulfill its obligations under title IX.

Dated: June 15, 2023.

Stephanie Valentine,

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

[FR Doc. 2023–13181 Filed 6–20–23; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid open meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, July 19, 2023; 1 to 5 p.m. MDT.

ADDRESSES: This hybrid meeting will be open to the public in person and via WebEx. To attend virtually, please contact the Northern New Mexico Citizens Advisory Board (NNMCAB) Executive Director (below) no later than 5 p.m. MDT on Friday, July 14, 2023.

Cities of Gold Hotel, Tribal Room, 10 Cities of Gold Road, Santa Fe, NM 87506.

FOR FURTHER INFORMATION CONTACT: Menice B. Santistevan, NNMCAB Executive Director, by Phone: (505) 699–0631 or Email: *menice.santistevan@em.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to provide advice and recommendations concerning the following EM site-specific issues: clean-up activities and environmental restoration; waste and nuclear materials management and disposition; excess facilities; future land use and long-term stewardship. The Board may also be asked to provide advice and recommendations on any EM program components.

Tentative Agenda:

- Surface Water and Storm Water Monitoring Presentation
- Agency Updates

Public Participation: The in-person/online virtual hybrid meeting is open to the public in person or virtually, via WebEx. Written statements may be filed with the Board no later than 5 p.m. MDT on Friday, July 14, 2023, or within seven days after the meeting by sending them to the NNMCAB Executive Director at the aforementioned email address. Written public comments received prior to the meeting will be read into the record. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to submit public comments should follow as directed above.

Minutes: Minutes will be available by emailing or calling Menice Santistevan, NNMCAB Executive Director, at *menice.santistevan@em.doe.gov* or at (505) 699–0631.

Signed in Washington, DC, on June 14, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023–13111 Filed 6–20–23; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD10–12–014]

Increasing Market and Planning Efficiency through Improved Software; Second Supplemental Notice of Technical Conference on Increasing Real-Time and Day-Ahead Market and Planning Efficiency Through Improved Software

As first announced in the Notice of Technical Conference issued in this proceeding on February 7, 2023, Commission staff will convene a technical conference on June 27, 28, and 29, 2023 to discuss opportunities for increasing real-time and day-ahead market and planning efficiency of the bulk power system through improved software. Attached to this Second Supplemental Notice is the agenda for the technical conference and speakers' summaries of their presentations.

While the intent of the technical conference is not to focus on any specific matters before the Commission, some conference discussions might include topics at issue in proceedings that are currently pending before the Commission, including topics related to capacity valuation methodologies for renewable, hybrid, or storage resources. These proceedings include, but are not limited to:

PJM Interconnection, L.L.C., Docket No. EL21–83–000
California Independent System Operator Corp., Docket No. ER21–2455–004
New York Independent System Operator, Inc., Docket No. ER21–2460–003
ISO New England, Inc., Docket No. ER22–983–002
PJM Interconnection, L.L.C., Docket No. ER22–962–003
Southwest Power Pool, Inc., Docket No. ER22–1697–001
Midcontinent Independent System Operator, Inc., Docket No. ER22–1640–000
ISO New England, Inc., Docket No. EL22–42–000
Southwest Power Pool, Inc., Docket No. ER22–379–000
PJM Interconnection, L.L.C., Docket No. ER22–1200–000
California Independent System Operator Corp., Docket No. ER23–1485–000
California Independent System Operator Corp., Docket No. ER23–1533–000
California Independent System Operator Corp., Docket No. ER23–1534–000
Midcontinent Independent System Operator, Inc., Docket No. EL23–28
Midcontinent Independent System Operator, Inc., Docket No. ER23–1195
Midcontinent Independent System Operator, Inc., Docket No. EL23–46

The conference will take place in a hybrid format, with presenters and attendees allowed to participate either in-person or virtually. Further details on both in-person and virtual participation will be available on the conference web page.[1] Foreign nationals attending in-person must register through the Commission's website on or before June 2, 2023. We also encourage all other in-person attendees to also register through the Commission's website on or before June 2, 2023, to help ensure Commission staff can provide sufficient physical and virtual facilities and to communicate with attendees in the case of unanticipated emergencies or other changes to the conference schedule or location. Access to the conference (virtual or in-person) may not be available to those who do not register.

The Commission will accept comments following the conference, with a deadline of July 28, 2023.

There is an ''eSubscription'' link on the Commission's website that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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Dated: June 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

Technical Conference: Increasing Real-Time and Day-Ahead Market Efficiency Through Improved Software

Agenda

AD10–12–014

June 27–29, 2023

Tuesday, June 27, 2023

9:15 a.m. Introduction

Elizabeth Topping, Federal Energy Regulatory Commission (*Washington, DC*)

9:30 a.m. Session T1 (*Commission Meeting Room*)

Probabilistic Energy Adequacy Assessment under Extreme Weather Events
- Jinye Zhao, ISO New England (*Holyoke, MA*)
- Stephen George, ISO New England (*Holyoke, MA*)
- Ke Ma, ISO New England (*Holyoke, MA*)
- Steven Judd, ISO New England (*Holyoke, MA*)
- Eamonn Lannoye, EPRI (*Dublin, Ireland*)
- Juan Carlos Martin, EPRI (*Madrid, Spain*)

Transmission Outage Probability Estimation Based on Real-Time Weather Forecast
- Mingguo Hong, ISO New England (*Holyoke, MA*)
- Xiaochuan Luo, ISO New England (*Holyoke, MA*)
- Slava Maslennikov, ISO New England (*Holyoke, MA*)
- Tongxin Zheng, ISO New England (*Holyoke, MA*)

Overview of MISO and PJM Hybrid Multiple Configuration Resource Model Implementation Within PROBE Software
- Qun Gu, PowerGEM (Clifton Park, NY)
- Boris Gisin, PowerGEM (Clifton Park, NY)
- Anthony Giacomoni, PJM Interconnection (Audubon, PA)
- Chuck Hansen, Midcontinent ISO (Carmel, IN)

Optimizing Combined Cycle Units in PJM's Wholesale Energy Markets using a Hybrid Multiple Configuration Resource Model
- Anthony Giacomoni, PJM Interconnection (Audubon, PA)
- Danial Nazemi, PJM Interconnection (Audubon, PA)
- Qun Gu, PowerGEM (Clifton Park, NY)
- Boris Gisin, PowerGEM (Clifton Park, NY)

11:30 a.m. Lunch

12:30 p.m. Session T2 (*Commission Meeting Room*)

Enhancements to Ramp Rate Dependent Spinning Reserve Modeling
- Shubo Zhang, New York ISO (*Rensselaer, NY*)
- John L. Meyer, New York ISO (*Rensselaer, NY*)
- Iiro Harjunkoski, Hitachi Energy (*Mannheim, Germany*)

Determining Dynamic Operating Reserve Requirements for Reliability and Efficient Market Outcomes: Tradeoffs and Price Formation Challenges
- Matthew Musto, New York ISO (*Rensselaer, NY*)
- Kanchan Upadhyay, New York ISO (*Rensselaer, NY*)
- Edward O Lo, Hitachi Energy (*San Jose, CA*)

Operational Experience with Nodal Procurement of Flexible Ramping Product
- Guillermo Bautista-Alderete, California ISO (Folsom, CA)
- George Angelidis, California ISO (Folsom, CA)
- Yu Wan, California ISO (Folsom, CA)

[1] *https://www.ferc.gov/news-events/events/increasing-real-time-and-day-ahead-market-and-planning-efficiency-through.*

Kun Zhao, California ISO (Folsom, CA)

Impact of DERs on Load Distribution Factors in Forecasting
Khaled Abdul-Rahman, California ISO (*Folsom, CA*)
Hani Alarian, California ISO (*Folsom, CA*)
Trevor Ludlow, California ISO (*Folsom, CA*)
Chiranjeevi Madvesh, California ISO (*Folsom, CA*)

Increased Congestion in SPP and Optimization in the Day Ahead Market with Gurobi
Seth Mayfield, Southwest Power Pool (*Little Rock, AR*)
Yasser Bahbaz, Southwest Power Pool (*Little Rock, AR*)

3:00 p.m. Break

3:30 p.m. Session T3 (*Commission Meeting Room*)

MISO Operations Risk Assessment and Uncertainty Management
Congcong Wang, Midcontinent ISO (*Carmel, IN*)
Long Zhao, Midcontinent ISO (*Carmel, IN*)
Jason Howard, Midcontinent ISO (*Carmel, IN*)

Market Simulation Tools and Uncertainty Quantification Methods to Support Operational Uncertainty Management
Nazif Faqiry, Midcontinent ISO (*Carmel, IN*)
Arezou Ghesmati, Midcontinent ISO (*Carmel, IN*)
Bing Huang, Midcontinent ISO (*Carmel, IN*)
Yonghong Chen, Midcontinent ISO (*Carmel, IN*)
Bernard Knueven, National Renewable Energy Laboratory (*Golden, CO*)

Pumped Storage Optimization in Real-time Markets under Uncertainty
Bing Huang, Midcontinent ISO (*Carmel, IN*)
Arezou Ghesmati, Midcontinent ISO (*Carmel, IN*)
Yonghong Chen, Midcontinent ISO (*Carmel, IN*)
Ross Baldick, University of Texas at Austin (*Austin, TX*)

Forecasting Aggregate Electricity Demand on a 5-minute Basis using Machine Learning
Yinghua Wu, PJM Interconnection (*Audubon, PA*)
Laura Walter, PJM Interconnection (*Audubon, PA*)
Anthony Giacomoni, PJM Interconnection (*Audubon, PA*)

Long-Term Outlook for the ERCOT Grid
Pengwei Du, Electric Reliability Corporation of Texas (*Austin, TX*)

6:00 p.m. Adjourn

Wednesday, June 28, 2023

9:00 a.m. Session W–A1 (*Commission Meeting Room*)

Uncertainty-Informed Renewable Energy Scheduling: A Scalable Bilevel Framework
Dongwei Zhao, Massachusetts Institute of Technology (*Cambridge, MA*)
Vladimir Dvorkin, Massachusetts Institute of Technology (*Cambridge, MA*)
Stefanos Delikaraoglou, Axpo Solutions AG (*Zurich, Switzerland*)
Alberto J. Lamadrid L., Lehigh University (*Bethlehem, PA*)
Audun Botterud, Massachusetts Institute of Technology (*Cambridge, MA*)

Enhancing Power System Resilience and Efficiency through Proactive Security Assessments and the Use of powerSAS.m: A Robust, Efficient, and Scalable Security Analysis Tool for Large-Scale Systems
Yang Liu, Argonne National Laboratory (*Lemont, IL*)
Feng Qiu, Argonne National Laboratory (*Lemont, IL*)
Jianzhe Liu, Argonne National Laboratory (*Lemont, IL*)

Stochastic Unit Commitment and Market Clearing in Julia with UnitCommitment.jl
Alinson Santos Xavier, Argonne National Laboratory (*Lemont, IL*)
Ogün Yurdakul, Technische Universität Berlin (*Berlin, Germany*)
Aleksandr M. Kazachkov, University of Florida (*Gainesville, FL*)
Jun He, Purdue University (*West Lafayette, IN*)
Feng Qiu, Argonne National Laboratory (*Lemont, IL*)

Reduced-order Decomposition and Coordination Approach for Markov-based Stochastic UC with High Penetration Level of Wind and BESS
Niranjan Raghunathan, University of Connecticut (*Storrs, CT*)
Peter B. Luh, University of Connecticut and National Taiwan University (*Alexandria, VA*)
Zongjie Wang, University of Connecticut (*Storrs, CT*)
Mikhail A. Bragin, University of California, Riverside (*Riverside, CA*)
Bing Yan, Rochester Institute of Technology (*Rochester, NY*)
Meng Yue, Brookhaven National Laboratories (*Upton, NY*)
Tianqiao Zhao, Brookhaven National Laboratories, (*Upton, NY*)

Learn to Branch and Dive for Large-scale Unit Commitment Problem
Jingtao Qin, University of California, Riverside (*Riverside, CA*)
Nanpeng Yu, University of California, Riverside (*Riverside, CA*)
Mikhail Bragin, University of Connecticut (*Storrs, CT*)

9:00 a.m. Session W–B1 (*Hearing Room One*)

Stochastic Nodal Adequacy Pricing Platform (SNAP)
Richard D. Tabors, Tabors Caramanis Rudkevich (*Newton, MA*)
Aleksandr Rudkevich, Newton Energy Group (*Newton, MA*)
Russel Philbrick, Polaris Systems Optimization (*Seattle, WA*)
Selin Yanikara, Newton Energy Group (*Newton, MA*)

Assessing Nodal Adequacy of Large Power Systems
F. Selin Yanikara, Newton Energy Group (*Newton, MA*)
Russ Philbrick, Polaris Systems Optimization (*Seattle, WA*)
Aleksandr M. Rudkevich, Newton Energy Group (*Newton, MA*)
Sophie Edelman, The Brattle Group (*New York, NY*)

Comparison of Flexibility Reserve and ORDC for Increasing System Flexibility
Phillip de Mello, Electric Power Research Institute (Niskayuna, NY)
Erik Ela, Electric Power Research Institute (Boulder, CO)
Nikita Singhal, Electric Power Research Institute (Palo Alto, CA)
Alexandre Moreira da Silva, Lawrence Berkeley National Laboratory (Berkeley, CA)
Miguel Heleno, Lawrence Berkeley National Laboratory (Berkeley, CA)

ABSCORES, A Novel Application of Banking Scoring and Rating for Electricity Systems
Alberto J. Lamadrid L., Lehigh University (*Bethlehem, PA*)
Audun Botterud, Massachusetts Institute of Technology (*Cambridge, MA*)
Jhi-Young Joo, Lawrence Livermore National Laboratory (*Livermore, CA*)
Shijia Zhao, Argonne National Laboratory (*Lemont, IL*)

Recent Developments in the Day-ahead and Real-time Electricity Market Design and Software Caused by the Higher Energy Costs and Emerging Technologies—European Experience
Petr Svoboda, Unicorn Systems A.S. (*Prague, Czech Republic*)

11:30 a.m. Lunch

12:30 p.m. Session W–A2 (*Commission Meeting Room*)

System Resilience through Electricity System Restoration and Related Services
Douglas Wilson, General Electric (*Edinburgh, United Kingdom*)
James Yu, ScottishPower Energy Networks (*Glasgow, United Kingdom*)
Ian Macpherson, ScottishPower Energy Networks (*Glasgow, United Kingdom*)
Marta Laterza, General Electric (*Glasgow, United Kingdom*)
Marcos Santos, General Electric (*Glasgow, United Kingdom*)
Richard Davey, General Electric (*Glasgow, United Kingdom*)

Coordinated Cross-Border Capacity Calculation Through The FARAO Open-Source Toolbox
Violette Berge, Artelys Canada (*Montréal, Canada*)
Nicolas Omont, Artelys (*Paris, France*)

Advanced Scenario Selection Methods for Probabilistic Transmission Planning Assessments
Eknath Vittal, Electric Power Research Institute (*Palo Alto, CA*)
Anish Gaikwad, Electric Power Research Institute (*Palo Alto, CA*)
Parag Mitra, Electric Power Research Institute (*Palo Alto, CA*)

Incorporating Climate Projections into Grid Models: Bridging the Data Gap to Capture Weather Dependent Representative and Extreme Events and Corresponding Uncertainties
Zhi Zhou, Argonne National Laboratory (*Lemont, IL*)
Neal Mann, Argonne National Laboratory (*Lemont, IL*)
Yanwen Xu, University of Illinois at Chicago, Urbana-Champaign (*Champaign, IL*)
Zuguang Gao, University of Chicago (*Chicago, IL*)
Akintomide Akinsanola, University of Illinois at Chicago (*Chicago, IL*)
Todd Levin, Argonne National Laboratory (*Lemont, IL*)
Jonghwan Kwon, Argonne National Laboratory (*Lemont, IL*)
Audun Botterud, Senior Energy Systems Engineer, Argonne National Laboratory (*Lemont, IL*)

12:30 p.m. Session W–B2 (*Hearing Room One*)

Enhancing Decision Support for Electricity Markets with Machine Learning
Yury Dvorkin, Johns Hopkins University (*Baltimore, MD*)
Robert Ferrando, University of Arizona (*Tucson, AZ*)
Laurent Pagnier, University of Arizona (*Tucson, AZ*)
Zhirui Liang, Johns Hopkins University (*Baltimore, MD*)
Daniel Bienstock, Columbia University (*New York, NY*)
Michael Chertkov, University of Arizona (*Tucson, AZ*)

Boosting Power System Operation Economics via Closed-loop Predict-and-Optimize
Lei Wu, Stevens Institute of Technology (*Hoboken, NJ*)
Xianbang Chen, Stevens Institute of Technology (*Hoboken, NJ*)

Synergistic Integration of Machine Learning and Mathematical Optimization for Sub-hourly Unit Commitment
Jianghua Wu, University of Connecticut (*Storrs, CT*)
Zongjie Wang, University of Connecticut (*Storrs, CT*)
Yonghong Chen, MIDCONTINENT ISO (*Carmel, IN*)
Bing Yan, Rochester Institute of Technology (*Rochester, NY*)
Mikhail Bragin, University of California, Riverside (*Riverside, CA*)

Privacy-Preserving Synthetic Dataset Generation for Power Systems Research
Vladimir Dvorkin, Massachusetts Institute of Technology (*Cambridge, MA*)
Audun Botterud, Massachusetts Institute of Technology (*Cambridge, MA*)

2:30 p.m. Break

3:00 p.m. Session W–A3 (*Commission Meeting Room*)

Parallel Interior-Point Solver for Security Constrained ACOPF problems on SIMD/GPU Architectures
Mihai Anitescu, Argonne National Laboratory (*Lemont, IL*)
François Pacaud, Ecole des Mines (*Paris, France*)
Michel Schanen, Argonne National Laboratory (*Lemont, IL*)
Sungho Shin, Argonne National Laboratory (*Lemont, IL*)
Daniel Adrian Maldonado, Argonne National Laboratory (*Lemont, IL*)

The Need for More Rigorous Calculation of Shadow Prices and LMPs
Xiaoming Feng, Hitachi Energy (*Raleigh, NC*)

Real-Time Market Enhancements for Reliability and Efficiency
Mort Webster, Pennsylvania State University (*University Park, PA*)
Anthony Giacomoni, PJM Interconnection (*Audubon, PA*)
Aravind Retna Kumar, Pennsylvania State University (*University Park, PA*)
Sushant Varghese, Pennsylvania State University (*University Park, PA*)
Shailesh Wasti, Pennsylvania State University (*University Park, PA*)

Economics of Grid-Supported Electric Power Markets: A Fundamental Reconsideration
Leigh Tesfatsion, Iowa State University (*Ames, IA*)

3:00 p.m. Session W–B3 (*Hearing Room One*)

Simulation of Wholesale Electricity Markets with Capacity Expansion and Production Cost Models to Understand Feedback between Short-Term Market Procedures and Long-Term Investment Incentives
Jesse Holzer, Pacific Northwest National Laboratory (*Richland, WA*)
Abhishek Somani, Pacific Northwest National Laboratory (*Richland, WA*)
Brent Eldridge, Pacific Northwest National Laboratory (*Bel Air, MD*)
Diane Baldwin, Pacific Northwest National Laboratory (*Richland, WA*)

Making the Right Resource Choice Requires Making the Right Model Choice
Rodney Kizito, Ascend Analytics (*Wheaton, MD*)
Gary W. Dorris, Ascend Analytics, CEO (*Boulder, CO*)
David Millar, Ascend Analytics (*Boulder, CO*)

Transmission Shortage Pricing By MW-Mile Based Demand Curve
Sina Gharebaghi, Pennsylvania State University (*University Park, PA*)
Xiaoming Feng, Hitachi Energy (*Raleigh, NC*)

Grid OS—A Modern Software Portfolio for Grid Orchestration
Renan Giovanini, General Electric (*Edinburgh, UK*)
Joseph Franz, General Electric (*Melbourne, FL*)

5:00 p.m. Adjourn

Thursday, June 29, 2023

9:30 a.m. Session H1 (*Commission Meeting Room*)

Integration of DER Aggregations in ISO-Scale SCUC Models
Brent Eldridge, Pacific Northwest National Laboratory (*Bel Air, MD*)
Jesse Holzer, Pacific Northwest National Laboratory (*Richland, WA*)
Abhishek Somani, Pacific Northwest National Laboratory (*Richland, WA*)
Eran Schweitzer, Pacific Northwest National Laboratory (*Richland, WA*)
Rabayet Sadnan, Pacific Northwest National Laboratory (*Richland, WA*)
Nawaf Nazir, Pacific Northwest National Laboratory (*Richland, WA*)

Soumya Kundu, Pacific Northwest National Laboratory (*Richland, WA*)

Current-Voltage AC Optimal Power Flow for Unbalanced Distribution Network
Mojdeh Khorsand Hedman, Arizona State University (*Tempe, AZ*)
Zahra Soltani, Arizona State University (*Tempe, AZ*)
Shanshan Ma, Arizona State University (*Las Vegas, NV*)

Empowering Electricity Markets through Distributed Energy Resources and Smart Building Setpoint Optimization: A Graph Neural Network-Based Deep Reinforcement Learning Approach
You Lin, Massachusetts Institute of Technology (Cambridge, MA)
Audun Botterud, Massachusetts Institute of Technology (*Cambridge, MA*)
Daisy Green, Massachusetts Institute of Technology (*Cambridge, MA*)
Leslie Norford, Massachusetts Institute of Technology (*Cambridge, MA*)
Jeremy Gregory, Massachusetts Institute of Technology (*Cambridge, MA*)

Multi-timescale Operations of Nuclear-Renewable Hybrid Energy Systems for Reserve and Thermal Products Provision
Jie Zhang, University of Texas at Dallas (*Richardson, TX*)
Jubeyer Rahman, University of Texas at Dallas (*Richardson, TX*)

11:30 a.m. Lunch

12:30 p.m. Session H2 (*Commission Meeting Room*)

Optimizing Stand-Alone Battery Storage Operations Scheduling Under Uncertainties in German Residential Electricity Market Using Stochastic Dual Dynamic Programming
Pattanun Chanpiwat, University of Maryland & Aalto University (*College Park, MD; Espoo, Finland*)
Fabricio Oliveira, Aalto University (*Espoo, Finland*)
Steven A. Gabriel, University of Maryland (*College Park, MD*)

Integration of Hybrid Storage Resources into Wholesale Electricity Markets
Nikita Singhal, Electric Power Research Institute (*Palo Alto, CA*)
Rajni Kant Bansal, Johns Hopkins University (*Baltimore, MD*)
Erik Ela, Electric Power Research Institute (*Palo Alto, CA*)
Julie Mulvaney Kemp, Lawrence Berkeley National Laboratory (*Berkeley, CA*)
Miguel Heleno, Lawrence Berkeley National Laboratory (*Berkeley, CA*)

Predicting Strategic Energy Storage Behaviors
Yuexin Bian, University of California (*San Diego, CA*)
Ningkun Zheng, Columbia University (*New York City, NY*)
Yang Zheng, University of California—San Diego (*San Diego, CA*)
Bolun Xu, Columbia University (*New York, NY*)
Yuanyuan Shi, University of California—San Diego (*San Diego, CA*)

Energy Storage Participation Algorithm Competition (ESPA-Comp)
Brent Eldridge, Pacific Northwest National Laboratory (*Bel Air, MD*)
Jesse Holzer, Pacific Northwest National Laboratory (*r*)
Abhishek Somani, Pacific Northwest National Laboratory (*Richland, WA*)
Kostas Oikonomou, Pacific Northwest National Laboratory (*Richland, WA*)
Brittany Tarufelli, Pacific Northwest National Laboratory (*Laramie, WY*)
Li He, Pacific Northwest National Laboratory (*Richland, WA*)

2:30 p.m. Break

3:00 p.m. Session H3 (*Commission Meeting Room*)

Congestion Mitigation with Transmission Reconfigurations in the Evergy Footprint
Pablo A. Ruiz, NewGrid (*Somerville, MA*)
Derek Brown, Evergy (*Topeka, KS*)
Jeremy Harris, Evergy (*Topeka, KS*)
German Lorenzon, NewGrid (*Somerville, MA*)
Grant Wilkerson, Evergy (*Kansas City, MO*)

Optimal Transmission Expansion Planning with Grid Enhancing Technologies
Swaroop Srinivasrao Guggilam, Electric Power Research Institute (*Knoxville, TN*)
Alberto Del Rosso, Electric Power Research Institute (*Knoxville, TN*)

The Key Role of Extended ACOPF-based Decision Making for Supporting Clean, Cost-Effective and Reliable/Resilient Electricity Services
Maria Ilic, Carnegie Mellon University (*Pittsburgh, PA*)
Rupamathi Jaddivada, SmartGridz (*Boston, MA*)
Jeffrey Lang, Massachusetts Institute of Technology (*Cambridge, MA*)
Eric Allen, SmartGridz (*Boston, MA*)

Data & API Standards for Clean Energy Solutions and Digital Innovation
Priya Barua, Clean Energy Buyers Institute (*Washington, DC*)
Ben Gerber, M–RETS (*Minneapolis, MN*)

Mine Production Scheduling under Time-of-Use Power Rates with Renewable Energy Sources
Daniel Bienstock, Columbia University (*New York, NY*)
Amy Mcbrayer, South Dakota School of Mines (*Rapid City, SD*)
Andrea Brickey, South Dakota School of Mines (*Rapid City, SD*)
Alexandra Newman, Colorado School of Mines (*Golden, CO*)

5:30 p.m. Adjourn

Conference Abstracts

Day 1—Tuesday, June 27

Session T1 (Tuesday, June 27, 9:30 a.m.) Commission Meeting Room

Probabilistic Energy Adequacy Assessment Under Extreme Weather Events

Dr. Jinye Zhao, Technical Manager, ISO New England (Holyoke, MA)
Stephen George, Director, ISO New England (Holyoke, MA)
Dr. Ke Ma, Senior Analyst, ISO New England (Holyoke, MA)
Steven Judd, Manager, ISO New England (Holyoke, MA)
Dr. Eamonn Lannoye, Program Manager, Electric Power Research Institute (Dublin, Ireland)
Juan Carlos Martin, Senior Engineer, Electric Power Research Institute (Madrid, Spain)

As intermittent and limited energy resources become a larger portion of the region's generation resource mix, and as the region's demand becomes increasingly electrified, it has become increasingly important to understand the operational risks associated with future weather extremes. To better inform the region's understanding of these risks, ISO New England in collaboration with EPRI, has developed a probabilistic energy adequacy assessment framework. This approach of stress testing the system's energy adequacy focuses on generating comprehensive extreme weather scenarios for the New England region and performing risk analyses across these scenarios. The framework offers a tailored approach to identify unique energy adequacy risks faced by the New England power system and enables us to analyze related stressors under extreme events.

Transmission Outage Probability Estimation Based on Real-Time Weather Forecast

Dr. Mingguo Hong, Principal Analyst, ISO New England (Holyoke, MA)
Dr. Xiaochuan Luo, Manager, ISO New England (Holyoke, MA)

Dr. Slava Maslennikov, Technical Manager, ISO New England (Holyoke, MA)
Dr. Tongxin Zheng, Director, ISO New England (Holyoke, MA)

Extreme weather patterns including both winter and summer storms have been posing increasing threats to power transmission security in the New England area. Being able to accurately predict their impacts will benefit both power system operation and planning. In recent years, the ISO New England has been developing machine-learning algorithms for estimating the probability of transmission line outage in real-time, given weather forecast variables such as wind, temperature, snow, and rain precipitation, etc. This presentation will share our study findings and on-going software implementation experience.

Overview of MISO and PJM Hybrid Multiple Configuration Resource Model Implementation Within PROBE Software

Dr. Anthony Giacomoni, Manager, Advanced Analytics, PJM Interconnection (Audubon, PA)
Dr. Danial Nazemi, Operations Research Engineer II, PJM Interconnection (Audubon, PA)
Dr. Qun Gu, Principal Consultant, PowerGEM (Clifton Park, NY)
Dr. Boris Gisin, President, PowerGEM (Clifton Park, NY)

For the past three years, PJM, MISO and PowerGEM have been working jointly on developing an advanced SCUC algorithm to prepare for the full-scale implementation of a Multiple Configuration Resource (MCR) model in their energy markets. PJM currently uses aggregate models for MCRs that do not accurately capture their true operating characteristics. Often MCRs may need to overestimate costs to ensure cost recovery, underestimate costs to ensure selection or offer reduced operating ranges to be able to accurately reflect their operating capabilities. This presentation will focus on the impacts to PJM's energy markets from optimizing the multiple configurations and components of their combined cycle units. The optimization of multiple configurations and components is very challenging due to the additional integer variables and constraints that impact the solution time and may lead to performance challenges. A prototype full-scale MCR model has been implemented in the PROBE Day-Ahead software, which is currently a critical component of PJM's Day-Ahead Market (DAM) clearing process. The prototype MCR model has the ability to perform energy and ancillary service co-optimization for combined cycle units with multiple configurations and components. The developed model has no practical limits on the number of configurations that each unit can have and the model allows for simultaneously enforcing configuration and component level constraints. Benefits of the new model include enhanced modeling flexibility and accuracy, which allows combined cycle participants to submit bids that align with their units' physical operating constraints, better alignment with the real-time model and market outcomes with increased social benefits. To quantify the impacts of the MCR model on PJM's energy markets, PJM gathered configuration and component data from a large number of combined cycle units in its footprint. Simulations using one year of historical DAM data were then performed to measure the impacts of the MCR model on the clearing engine's computational performance and market outcomes. Results clearly demonstrate significant potential bid production cost savings of over $100 million per year with a very modest increase in solution time. The MCR model is currently being implemented in PJM's DAM for the optimization of synchronous condensers. It is planned that after successful implementation of the MCR model for synchronous condensers the same model will be implemented for combined cycle units and possibly for hybrid resources as well.

Session T2 (Tuesday, June 27, 12:30 p.m.) (Commission Meeting Room)

Enhancements to Ramp Rate Dependent Spinning Reserve Modeling

Dr. Shubo Zhang, Energy Market Engineer, New York ISO (Rensselaer, NY)
John L. Meyer, Senior Energy Market Engineer, New York ISO (Rensselaer, NY)
Iiro Harjunkoski, Researcher, Hitachi Energy (Mannheim, Germany)

In a joint effort between the NYISO and Hitachi Energy, a Ramp Rate Dependent (RRD) formulation of spinning reserve scheduling that utilizes Multiple Response Rates (MRR) across a Combined Cycle Gas Turbine (CCGT) generator or other dispatchable resource's range of output has been developed. To provide more flexibility to Market Participants, a ''Limited Participation'' conceptual strategy is also included that would allow a CCGT or other dispatchable resource to selectively provide spinning reserves or regulation for a certain range of output. This presentation will discuss the market basis and design of Limited Participation in spinning reserves and regulation, in the context of Ramp Rate Dependent Spinning Reserve Modeling.

Determining Dynamic Operating Reserve Requirements for Reliability and Efficient Market Outcomes: Tradeoffs and Price Formation Challenges

Matthew Musto, Technical Specialist—Market Solutions Engineering, NYISO (Rensselaer, NY)
Kanchan Upadhyay, Senior Energy Market Engineer—Market Solutions Engineering, NYISO (Rensselaer, NY)
Edward O Lo, Consultant, Hitachi Energy (San Jose, CA)

With increasing intermittent resources in the generation mix, the need for more economic responsiveness and operational flexibility while maintaining system reliability is growing. The NYISO and Hitachi Energy have been working on advanced design and techniques for calculating operating reserve requirements dynamically for each reserve region while simultaneously optimizing the dispatch solution in the market clearing engine. A key benefit of the dynamic reserves formulation is the functionality to determine the least-cost generation and reserve mix to meet load. This dynamic determination of reserve requirements in New York Control Area (NYCA) and all reserve regions within the NYCA creates new tradeoffs between energy schedules and reserve requirements. This presentation will discuss these tradeoffs and highlight the associated price formation challenge.

Operational Experience with Nodal Procurement of Flexible Ramping Product

Dr. Guillermo Bautista-Alderete, Director, Market Analysis & Forecasting, California ISO (Folsom, CA)
George Angelidis, Executive Principal—Power Systems and Market Technology, California ISO (Folsom, CA)
Yu Wan, Power Systems Engineer, California ISO (Folsom, CA)
Kun Zhao, Market Engineering Specialist Lead, California ISO (Folsom, CA)

The CAISO's market procures flexible ramping capacity to manage weather-based uncertainty realized in real time. The CAISO introduced this product in 2016 using a procurement requirement at the system level. Using a system-level procurement requirement, the market frequently procured flexible ramping capacity from locations impacted by

congestion, thereby stranding the flexible ramping capacity. The CAISO has enhanced the design of the flexible ramping product using a formulation that observes transmission constraints. This approach considers congestion management as part of the procurement of flexible ramping capacity helping to ensure the CAISO can deploy this capacity when uncertainty arises. This new design poses additional complexity because the market clearing process now considers transmission constraints for energy and for flexible ramping capacity. The CAISO will provide an update on the performance of its flexible ramping product under this new design.

Impact of DERs on Load Distribution Factors in Forecasting

Dr. Khaled Abdul-Rahman, Vice President, Power System and Market Technology, California ISO (Folsom, CA)
Hani Alarian, Executive Director of Power Systems Technology Operations, California ISO (Folsom, CA)
Trevor Ludlow, Specialist Lead of Power Systems Technology Operations, California ISO (Folsom, CA)
Chiranjeevi Madvesh, Lead Engineer of Power Systems Technology Operations, California ISO (Folsom, CA)

The calculation of load distributing factors (LDFs) is traditionally performed based on a collection of historical state estimator calculated values and stored in libraries for use when simulating power system operations in look-ahead market and reliability applications. The inherit assumption is that bus loads are accurately estimated from the aggregate system load forecast using LDFs, and generation quantities are deterministically known. Accordingly, it is assumed that there is a strong correlation between the system load and individual bus loads. However, the proliferation of behind-the-meter distributed energy resources, solar rooftops, batteries, hybrid resources, as well as the use of behind the-meter demand response utility programs, and electric vehicles introduces a non-conforming load component at locations that were previously conforming loads.

This issue requires a more accurate forecast of non-conforming loads by taking into consideration the probabilistic nature of bus loads and variable/intermittent generation. The CAISO's enhanced LDF forecast algorithm takes into account not just the average hour of the day and the day of the week but includes machine learning ability to distinguish between flows that scales up with load in both a non-linear and linear fashion. It also includes a new fusion-forecasting model that improves forecasting accuracy. Additionally, the CAISO's algorithm uses data engineering and preprocessing options to increase the accuracy of the proposed model. The CAISO analyzes load data to verify that the proposed methodology provides higher forecasting accuracy with lower error indices.

Increased Congestion in SPP and Optimization in the Day Ahead Market With Gurobi

Seth Mayfield, Manager of Market Support & Analysis, Southwest Power Pool (Little Rock, AR)
Yasser Bahbaz, Director of Markets Development, Southwest Power Pool (Little Rock, AR)

SPP has seen substantial increased congestion in recent years. These trends have numerous reliability and economic impact. In the Day-Ahead Market, SPP has noticed high transmission activation leading to longer optimization runtimes. High activations results in large increases in the mathematical growth, which then results in slower Mixed Integer Program (MIP) runtimes. Other factors include increasing market rules complexity (such as uncertainty product) and additional market resource registrations. SPP performed a study where we evaluate swapping our existing optimization engine (IBM's CPlex) with Gurobi's optimization engine. The study reran every approved DAMKT SCUC operating day for 2021 (365 cases). Gurobi solved the cases 41% faster than CPlex using Gurobi without tuning. A very light discussion with Gurobi resulted in a few tuning suggestions which pushed the runtime reduction to 43%. SPP is in the process of acquiring Gurobi licenses and will work with our software vendor to incorporate the engine into our market. Phase 1 will include simultaneously running both CPlex and Gurobi as we believe this will give us the best/fastest results for each day. It is expected that there will be a transition to using more Gurobi instances than CPlex as time goes on.

Session T3 (Tuesday, June 27, 3:30 p.m.) (Commission Meeting Room)

MISO Operations Risk Assessment and Uncertainty Management

Dr. Congcong Wang, Lead, Operations Risk Assessment, Midcontinent ISO (Carmel, IN)
Dr Long Zhao, Senior Advisor of Operations Risk Assessment, Midcontinent ISO (Carmel, IN)
Jason Howard, Director of Operations Risk Management, Midcontinent ISO (Carmel, IN)

Fleet transition is driving a new risk profile at MISO. Uncertainty and Variability are increasing in their intensity, diversity, and volatility. While probabilistic forecasting has made progress for wind and solar, its integration into operations and markets is uneven. Furthermore, uncertainty comes in more sources than just renewable energy such as generation and transmission outages, fuel scarcity especially during extreme weather events, resulting in challenges for the RTO to manage the aggregated or net uncertainty. This presentation will outline MISO's operations risk assessment and uncertainty management initiatives including: (1) Characterize Risks—transform traditional deterministic renewable, load and ''net'' load forecasts to probabilistic forecasts in production systems; and assess generation and fuel risks to better capture the unknowns; (2) Integrate risks into Operations Situational Awareness and Operations Planning—provide control room a dynamic and geographically granular visualization of operating reserve margin; and visibility of weather driven operations risks; (3) Automate risk management through market products with dynamic reserve requirements—assess net uncertainty across different timeframes; and predict risks to establish a daily target for procuring market-based reserves using analytical and meteorological techniques. This work is done in collaboration with R&D through the joint Uncertainty Roadmap.

Market Simulation Tools and Uncertainty Quantification Methods To Support Operational Uncertainty Management

Dr. Nazif Faqiry, R&D Engineer, Midcontinent ISO (Carmel, IN)
Dr. Arezou Ghesmati, R&D Engineer, Midcontinent ISO (Carmel, IN)
Dr. Bing Huang, R&D Engineer, Midcontinent ISO (Carmel, IN)
Dr. Yonghong Chen, Consulting Advisor, Midcontinent ISO (Carmel, IN)
Dr. Bernard Knueven, Research Scientist, National Renewable Energy Laboratory (Golden, CO)

Portfolio evolution and more frequent extreme weather events are introducing more challenges to MISO Market Operations with new risk profiles. To improve market efficiency and generate efficient price signals for operational and investment decisions, it is increasingly important to align market

design with reliability and risk management needs. This work presents the Electrical Grid Research & Engineering (EGRET) market simulation tool adapted and enhanced at MISO to evaluate existing and future system, and a novel netload ramp uncertainty prediction and scenario generation method to support stochastic simulation and reserve requirement settings. First, it presents a multi-periods market simulation tool and its capabilities, including rolling real-time unit commitment and economic dispatch (UCED), followed by the results of 8 GW solar penetration study. Then, it presents a novel method that is developed to predict and generate scenarios for uncertainties across different lead times. The scenarios can be used as inputs to the market simulation tool for stochastic simulation. The two parts together may lead to multi-scenario stochastic unit commitment in the future. In the near term, the stochastic market simulation can help to validate market design and operational procedures. The uncertainty predication and scenario generation may help operational situational awareness and better define reserve requirements and operational margins.

Pumped Storage Optimization in Real-Time Markets Under Uncertainty

Bing Huang, Research Engineer, Midcontinent ISO (Carmel, IN)
Arezou Ghesmati, R&D Scientist, Midcontinent ISO (Carmel, IN)
Yonghong Chen, Consulting Advisor, Midcontinent ISO (Carmel, IN)
Ross Baldick, Emeritus Professor, University of Texas at Austin (Austin, TX)

Pumped storage hydro units (PSHU) can provide flexibility to power systems and may especially be valuable with increasing shares of intermittent renewable resources. However, the scheduling of PSHUs, particularly in the real-time market, has not been thoroughly studied. To enhance the use of PSH resources and leverage their flexibility, it is important to incorporate the uncertainties to properly address the risks in the real-time market operation. In this work, first a deterministic PSHU model that incorporates the state of charge in the Day-ahead market optimization is introduced. Second, two pumped storage hydro (PSH) models that use probabilistic price forecasts are proposed for Look-ahead commitment (LAC) in the real-time market operation. A risk neutral stochastic PSH model and a risk averse robust optimization PSH model are developed using the probabilistic price forecasts to capture the real-time market uncertainties. Numerical studies in Mid-continent Independent System Operator (MISO) system demonstrate that the proposed models improve market efficiency and reduce PSH real time risk compared to the current approach. Probabilistic forecast for Real Time Locational Marginal Price (RT–LMP) is created and embedded into the proposed stochastic and robust optimization models, a statistically robust approach is used to generate scenarios for reflecting the temporal inter-dependence of the LMP forecast uncertainties.

Forecasting Aggregate Electricity Demand on a 5-Minute Basis Using Machine Learning

Dr. Yinghua Wu, Senior Lead Data Scientist, PJM Interconnection (Audubon, PA)
Laura Walter, Senior Lead Data Scientist, PJM Interconnection (Audubon, PA)
Dr. Anthony Giacomoni, Manager—Advanced Analytics, PJM Interconnection (Audubon, PA)

PJM currently has two load forecasts used in dispatch and real-time operations. These forecasts are comprised of the short-term forecast, which is the forecasted hourly average load for the next seven days, and the very short-term load forecast, which is the forecasted 5-minute load averages for the next six hours. The very short-term load forecast is constantly fed into the real-time dispatch software for optimal power flow calculations and real-time market pricing. It is of crucial importance that these forecasts closely match the actual load in the near future to maintain system frequency and voltage. If not, dispatchers must take action to quickly intervene and adjust the load up or down. The load profiles generally follow temporal patterns, but are also driven by weather and other usage patterns. Given the recent rapid growth of machine learning technologies, this presentation will survey a collection of some of the most representative and innovative methods that are suitable to time series predictions such as load forecasting, *e.g.,* gradient boosting, recurrent neural network, causal convolution, etc. We will also revisit some traditional methods such as generalized linear models and automatic regressive moving average (ARMA) methods to explore whether they can capture the load shape in short horizons. We will survey and analyze these new technologies for their power of prediction to see if these methods provide the potential to improve on current forecasting practices.

Long-Term Outlook for the ERCOT Grid

Pengwei Du, Supervisor—Economic Analysis & Long Term Planning Studies, The Electric Reliability Council of Texas (Austin, Texas)

The bulk transmission network within ERCOT consists of the 60-kilovolt (kV) and higher transmission lines and associated equipment. ERCOT conducts a forward-looking study to understand long-term reliability and economics need to ensure continued system reliability and efficiency. This talk will present the key challenges and findings from the most recent long-term system assessment planning study, which accounts for the inherent uncertainty of planning the system in the 10- to 15-year planning horizon.

Day 2—Wednesday, June 28

Session W–A1 (Wednesday, June 28, 9:00 a.m.) (Commission Meeting Room)

Uncertainty-Informed Renewable Energy Scheduling: A Scalable Bilevel Framework

Dr. Dongwei Zhao, Postdoctoral Associate, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Vladimir Dvorkin, Postdoctoral Fellow, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Stefanos Delikaraoglou, Data Scientist, Axpo Solutions AG (Zurich, Switzerland)
Dr. Alberto J. Lamadrid L., Associate Professor, Lehigh University (Bethlehem, PA)
Dr. Audun Botterud, Principal Research Scientist, Massachusetts Institute of Technology (Cambridge, MA)

The fast-growing variable renewable energy sources (VRES) in electricity markets are creating challenges to uncertainty management. This work addresses these challenges by adopting an uncertainty-informed adjustment toward VRES bidding quantities in the day-ahead market and minimizing expected system costs under the sequential market-clearing structure. However, implementing this mechanism requires solving a bilevel optimization problem, which is computationally difficult for practical large-scale systems. To overcome this challenge, we propose a novel technique based on strong duality and McCormick envelopes. This approach relaxes the original problem to a linear program, enabling efficient computation for large-scale systems. We conduct case studies on the 1576-bus NYISO systems and compare our bilevel VRES-adjustment model with the myopic strategy where VRES producers bid the forecast value in the day-ahead market. The results

demonstrate that under a future high VRES penetration level (*e.g.,* 40%), our bilevel framework can significantly reduce the expected system cost and the volatility of the market prices, participants' revenues, and real-time re-dispatch adjustments, by efficiently optimizing VRES quantities in the day-ahead market. Furthermore, we found that increasing transmission ability may incur a much higher system cost under the myopic strategy while a lower cost under the bilevel model) because of the lack of flexible generators or reserves in real time to deal with uncertainty.

Enhancing Power System Resilience and Efficiency Through Proactive Security Assessments and the Use of powerSAS.m: A Robust, Efficient, and Scalable Security Analysis Tool for Large-Scale Systems

Dr. Yang Liu, Postdoctoral Appointee, Argonne National Laboratory (Lemont, IL)
Dr. Feng Qiu, Principal Computational Scientist, Argonne National Laboratory (Lemont, IL)
Dr. Jianzhe Liu, Energy Systems Scientist, Argonne National Laboratory (Lemont, IL)

Power system security assessment is directly related to increasing real-time and day-ahead market and planning efficiency because it helps ensure the reliable and secure operation of the power system, which is essential for efficient market and planning activities. Without proper security assessments, the power system is vulnerable to a variety of threats, including cyber attacks, natural disasters, and equipment failures, which can disrupt the operation of the system and lead to market inefficiencies and planning uncertainties. By performing security assessments and identifying potential vulnerabilities, system operators can take proactive measures to mitigate risks and improve the reliability and efficiency of the power system, which, in turn, supports the goals of real-time and day-ahead market and planning efficiency. Additionally, advanced software tools and models can be used to support security assessments, enabling operators to better anticipate and respond to potential security threats and further improve the efficiency and reliability of the power system. Existing tools (commercial or open-source) work fine for routine security analysis under normal operating conditions. However, in resilience analysis, which studies the system security and reliability under stressed scenarios, existing tools often experience various numerical issues, significantly impacting operators' assessment of system resilience. A recent example is the non-convergence issues with PSS/E, one of the best commercial power system analysis tools used in the DOE Puerto Rico resilience project led by Argonne. The numerical issues forced the team to give up more advanced analysis. A robust and efficient security analysis tool is imperative for resilience study in large-scale systems. In this talk, we will introduce a recently released open-source power system security analysis tool called powerSAS.m. The powerSAS.m is a robust, efficient, and scalable power grid analysis framework based on semi-analytical solutions (SAS) technology. The talk will cover the following two critical aspects and discuss how they are directly related to increasing real-time and day-ahead market and planning efficiency. First, we will introduce the fundamentals of the SAS technology and the major functionalities of the powerSAS.m, including (1) Steady-state analysis, including power flow, continuation power flow, and contingency analysis. (2) Dynamic security analysis, including voltage stability analysis, transient stability analysis, and flexible user-defined simulation. (3) Hybrid extended-term simulation provides adaptive quasi-steady-state-dynamic hybrid simulation in extended term with high accuracy and efficiency. We will also introduce some ongoing functionalities, including the SAS-based electromagnetic transient (EMT) simulation and multi-scale simulations. Second, we will present some use cases to demonstrate the key features and performance of the SAS technology and powerSAS.m tool, including: (1) High numerical robustness. Backed by the SAS approach, the PowerSAS tool provides much better convergence than the tools using traditional Newton-type algebraic equation solvers when solving algebraic equations/ordinary differential equations/differential-algebraic equations. (2) Enhanced computational efficiency and scalability. Due to the analytical nature, PowerSAS provides model-adaptive high-accuracy approximation, which brings significantly extended effective range and much larger steps for steady-state/dynamic analysis. PowerSAS has been used to solve large-scale system cases with 200,000+ buses.

Stochastic Unit Commitment and Market Clearing in Julia With UnitCommitment.jl

Dr. Alinson Santos Xavier, Computational Scientist, Argonne National Laboratory (Lemont, IL)
Ogün Yurdakul, Ph.D. Candidate, Technische Universität Berlin (Berlin, Germany)
Dr. Aleksandr M. Kazachkov, Assistant Professor, University of Florida (Gainesville, FL)
Jun He, Professor, Purdue University (West Lafayette, IN)
Dr. Feng Qiu, Principal Computational Scientist, Argonne National Laboratory (Lemont, IL)

UnitCommitment.jl (UC.jl) is a comprehensive open-source optimization package for the Security-Constrained Unit Commitment Problem (SCUC), providing an extensible and fully-documented data format for the problem, Julia/JuMP implementations of state-of-the-art mathematical formulations and solution methods, as well as a diverse collection of realistic and large-scale benchmark instances. This talk focuses on two major features recently introduced to the package. Firstly, the package now supports modeling and optimizing two-stage stochastic versions of the problem, in addition to the deterministic SCUC. Compared to existing implementations, UC.jl allows a broader set of network parameters to be treated as uncertain, including not only demands and generation limits, but also production costs, network topology, transmission limits, among others. Benchmark scripts are provided to accurately evaluate the performance of different stochastic solution methods. Secondly, the package now includes various functionalities for market clearing, such as the computation of generator payments and locational marginal prices (LMPs) using different methods proposed in the literature. In this talk, we will discuss the usage of these new features, technical challenges associated with them, and the potential simulations or studies that they enable.

Reduced-Order Decomposition and Coordination Approach for Markov-Based Stochastic UC With High Penetration Level of Wind and BESS

Niranjan Raghunathan, Ph.D. Student, University of Connecticut (Storrs, CT)
Dr. Peter B. Luh, Professor, University of Connecticut and National Taiwan University (Alexandria, VA)
Dr. Zongjie Wang, Professor, University of Connecticut (Storrs, CT)
Dr. Mikhail A. Bragin, Professor, University of California, Riverside (Riverside, CA)
Dr. Bing Yan, Professor, Rochester Institute of Technology (Rochester, NY)
Dr. Meng Yue, Research Staff Electrical Engineer, Brookhaven National Laboratories (Upton, NY)

Dr. Tianqiao Zhao, Renewable Energy Group, Brookhaven National Laboratories (Upton, NY)

With the growing need to achieve carbon neutrality, integrating renewable energy (*e.g.,* wind and solar) and battery energy storage systems (BESSs) into the grid is an urgent and challenging enterprise. At the day-ahead stage, unit commitment (UC) decisions need to account for uncertainties of geographically distributed renewable generation. BESS integration can help mitigate intermittence and reduce curtailment by storing energy during high renewable generation periods and releasing energy when needed, thus improving the cost efficiency of grid operation. Therefore, ensuring economic and reliable grid operations with the significant rise in renewable energy penetration necessitates the consideration of spatially distributed uncertainties and BESS in UC. To achieve this, a risk-neutral approach (*i.e.,* scenario-based stochastic UC and Markov-based stochastic UC) is preferred over risk-averse approaches (*e.g.,* robust optimization and interval optimization), as the latter yields overly conservative solutions. Between the risk-neutral approaches, Markov-based approaches have two advantages over scenario-based approaches: (1) Due to the Markov property, where stochastic information at the next time step depends only on the information at the current time step, the uncertainty can be compactly modeled by wind generation states at each time step and state transitions between subsequent time steps. Consequently, the overall number of possible states and transitions in the Markov model increases linearly with the number of intervals in the optimization horizon, whereas the number of possible scenarios increases exponentially. (2) Reduced Markov models preserve the volatility of wind generation, the underlying spatio-temporal correlation structure, and low-probability, high-impact events more effectively in uncertainty sets compared to scenarios. Therefore, the problem is formulated as Markov-based stochastic UC. With distributed wind, however, the number of possible wind states grows exponentially with the number of wind farms in different locations considered, posing major computational difficulties. To reduce complexity, an innovative decomposition and coordination framework is developed, where approximate area subproblems are formulated by utilizing area-perspective, reduced-order Markov models. In these models, the variability of local (in-area) windfarms is emphasized while that of nonlocal (out-of-area) windfarms is approximated by using Principal Component Analysis (PCA) to reduce dimensionality while preserving the maximum amount of variation. This is a reasonable approximation because variations at the local level have more impact on the behavior of local units and power flow through local transmission lines compared to variations at distant locations. The objective of an approximate area subproblem is to optimize in-area resources based on its area-perspective Markov model. The approximate area subproblems are solved iteratively while their solutions are coordinated using Surrogate Absolute-Value Lagrangian Relaxation (SAVLR), a state-of-the-art dual method with faster convergence than traditional Lagrangian Relaxation (LR)-based methods. To improve performance, an online filtering method for removing redundant transmission capacity constraints at each iteration is implemented in parallel by utilizing multiple cores. The solutions are validated using Monte Carlo simulations. Testing results based on the 118-bus system with 5 distributed wind farms show the effectiveness of the method in finding low-cost and robust UC solutions in a timely manner for multiple cases with different volatilities of wind generation and simulated extreme weather events. Analysis of the operation of BESSs shows that they absorb excess energy during high wind periods and release the energy during low wind periods, thus reducing wind curtailment and overall costs.

Learn To Branch and Dive for Large-Scale Unit Commitment Problem

Jingtao Qin, Research Assistant, University of California, Riverside (Riverside, CA)
Nanpeng Yu, Associate Professor, University of California, Riverside (Riverside, CA)
Mikhail Bragin, Assistant Research Professor, University of Connecticut (Storrs, CT)

Unit commitment (UC) problems are typically formulated as mixed-integer program (MIP) and solved by the branch-and-bound (B\&B) paradigm. The recent advances in graph neural network (GNN) motivate the application of GNN in learning to dive and branch for B\&B algorithm in modern MIP solvers. Existing GNN models are mostly constructed from B\&B trees, which are computationally expensive when dealing with large-scale UC problems. In this paper, we propose a physical network information-based hierarchical graph convolution model for neural diving that leverages the underlying features of various components of power systems to find high-quality variable assignments. Furthermore, we adopt the B\&B tree-based graph convolution model for neural branching to select the optimal variables for branching at each node of the B\&B tree. Finally, we integrate neural diving and neural branching into a modern MIP solver to establish a novel neural MIP solver that is specially designed for large-scale UC problems. Numeral studies show that our proposed model has better performance and scalability than the baseline B\&B tree-based model on neural diving. Moreover, the neural MIP solver yields the lowest MIPGap for all testing days after combining it with our proposed neural diving model and baseline neural branching model.

Session W–B1 (Wednesday, June 28, 9:00 a.m.) (Hearing Room One)

Stochastic Nodal Adequacy Pricing Platform (SNAP)

Dr Richard D. Tabors, Partner and President, Tabors Caramanis Rudkevich (Newton, MA)
Dr. Aleksandr Rudkevich, President, Newton Energy Group (Newton, MA)
Russel Philbrick, President, Polaris Systems Optimization (Seattle, WA)
Dr. Selin Yanikara, Analyst, Newton Energy Group (Newton, MA)

The Stochastic Nodal Adequacy Pricing Platform (SNAP) software system provides an implemented methodology to calculate the probability and value of RESOURCE INADEQUACY of electricity supply on an hourly basis for a period of one to five days ahead of real time. The stochasticity of SNAP is driven by the stochastic weather forecasts available and provided by IBM The Weather Company on a i5 day forward basis for a 4x4km grid worldwide (SNAP uses at most 5). Forecasts are developed from 76 different numerical weather prediction models (and their ensemble members) as inputs to their forecast system. Bayesian model averaging is used to correct for systematic errors (bias). Results are rearranged to create 100 synthetic weather system scenarios through the use of Ensemble Copula Quantile-Coupling technique. The result is a probabilistic forecast within which each of the scenarios is equally likely. As the electric supply system moves toward greater dependence on renewable sources both in front of and behind the meter and as weather conditions are evolving, the stochastics of weather have become a, if not the

driving force in forecasting power system adequacy. SNAP is developed as an information/assist tool for operational planning at the utility system level. SNAP has been developed with funding from the Department of Energy's ARPA–E PERFORM program. SNAP uses the individual components of the weather forecast scenarios to create 100 probabilistic scenarios of the output of individual wind and solar locations as well forecasting of demand incorporating behind the meter generation. Based on the probability of renewable supply, demand, and the probability of outage of traditional supply sources and transmission, SNAP runs 100,000 Monte Carlo SCED/SCUC runs of the commercially available cloud-based ENELYTIX software system to identify the existence of resource inadequacy, the nodal location of that inadequacy, its cause and potential solutions. The objective is to present the structure of the computational and analytic processes that allow for running and evaluation of 100,000 scenarios for each individual forecast hour. The presentation will discuss the cloud-based structure the allows the analysis to be completed in under 50 minutes using 500 virtual machines at a costs of $120 at spot rates.

Assessing Nodal Adequacy of Large Power Systems

Dr. F. Selin Yanikara, Energy Analyst, Newton Energy Group (Newton, MA)
Russ Philbrick, President, Polaris Systems Optimization (Seattle, WA)
Aleksandr M. Rudkevich, President, Newton Energy Group (Newton, MA)
Sophie Edelman, Electricity Research Analyst, The Brattle Group (New York, New York)

Extreme weather events, increasing electrification, and integration of wind and solar power pose significant challenges for reliable operation of the power grid. Quantitative evaluation of these impacts is critical for making efficient policy and investment decisions and in designing markets and engineering controls. This presentation will summarize the theoretical foundation for nodal probabilistic assessment of resource adequacy and its applications to modern electrical systems with a significant penetration of weather dependent variable energy resources and storage technologies. In addition, this presentation will address the need for, and will present, new adequacy metrics that reflect an economically justified contribution of each system asset—generation, transmission, or demand resource to system adequacy. The analysis relies on the Monte Carlo based methodology using new computationally efficient and statistically accurate methods. We illustrate the numerical results and computational performance of our approach using the ENELYTIX® powered by PSO SaaS and our standard dataset for the ERCOT market.

Comparison of Flexibility Reserve and ORDC for Increasing System Flexibility

Phillip de Mello, Senior Technical Leader, Electric Power Research Institute (Palo Alto, CA)
Erik Ela, Program Manager, Electric Power Research Institute (Boulder, CO)
Nikita Singhal, Technical Leader, Electric Power Research Institute (Palo Alto, CA)
Alexandre Moreira da Silva, Research Scientist, Lawrence Berkeley National Laboratory (Berkeley, CA)
Miguel Heleno, Research Scientist/Engineer, Lawrence Berkeley National Laboratory (Berkeley, CA)

Power system composition changes are making flexible resources more important to balance the increasing variability and uncertainty. System operators often look to increase the amount of flexibility available to give real time operations greater control. Two common methods for increasing flexibility are to create new reserve products that are targeted towards flexibility and ramping capability or using an extended operating reserve demand curve (ORDC) to procure more of an existing reserve when the additional value exceeds costs. Detailed operation simulations to mimic day ahead and real time markets were conducted to compare flexibility reserves and ORDCs. Benefits to reliability were measured by a reduction in shortages of reserves and energy experienced across the system. The extra reserves generally increased the costs of running the system, but it was lower than the penalty prices of the shortages relieved. Some periods showed a reduction of system costs with added reserves, suggesting that more efficient designs of reserves could not only increase system reliability but also reduce costs. Both methods increase the flexibility on the system, but function differently in typical deployments in current ISO/RTO practice. The different parameters defining each technique was explored to understand how their differences manifest in improving reliability. Most differences reflect the tradeoff between flexibility in designing a new product versus ease of implementation of procuring more of an existing product. The key difference of the techniques results due to the sharing of generator ramp rates between different reserve products. Most existing implementations require dedicated capacity for each reserve product but often do not require dedicated ramp capability. Using a new flexibility reserve that can share ramp rates will typically be able to schedule more reserve for a certain available generator capacity than applying an ORDC to an existing product. This impacts the cost and effectiveness of those reserves particularly in periods of system stress. Toggling the ramp sharing constraint can be used to make either implementation perform similarly as the other.

ABSCORES, A Novel Application of Banking Scoring and Rating for Electricity Systems

Alberto J. Lamadrid L., Associate Professor, Lehigh University (Bethlehem, PA)
Audun Botterud, Principal Research Scientist, Massachusetts Institute of Technology (Cambridge, MA)
Jhi-Young Joo, Research Scientist, Lawrence Livermore National Laboratory (Livermore, CA)
Shijia Zhao, Energy Systems Scientist, Argonne National Laboratory (Lemont, IL)

This presentation discusses the basis for the establishment of an Electric Assets Risk Bureau. We are developing different scores customized according to the application required. We study the use of financial models to determine the risk associated to individual assets in the system. We present a model focused on managing operational risk, and outline the methodology for risk metrics applied to high impact, low probability (HILP) events. We distinguish between, first, public risk, related to the physical provision of supporting services required for the stability of the electricity system (*i.e.,* ancillary services); and second, financial risk, derived from positions taken by participants with pecuniary repercussions. A key paradigm of our framework is a focus on implementability of the approach (under existing regulatory structures) and a method for dispute resolution given potential decisions taken with the metrics proposed.

Recent Developments in the Day-Ahead and Real-Time Electricity Market Design and Software Caused by the Higher Energy Costs and Emerging Technologies—European Experience

Petr Svoboda, Engineer, Unicorn Systems a.s. (Prague, Czech Republic)

Europe has been dealing with the imbalance of production and

consumption for years. This has led to the development of the single de-regulated electricity market to solve the barriers between the individual states and provide the most cost-effective way to ensure secure, sustainable, and affordable energy supply to the customers. Recent changes in the market caused by the increase of the energy costs and emergence of the new technologies have caused the fundamental shifts in the market design and software enabling its operations. In our presentation we would like to discuss the latest developments in the areas of: 1. New algorithms of transmission capacity calculation that have proven to increase the efficiency of capacity usage and relevant economic welfare. 2. Development of the HVDC interconnectors and their impact on the market efficiency and transmission costs. 3. 15-minute day-ahead markets. 4. Emergence of the integrated real-time markets, new reserve products and multi-interval market clearing. 5. Introduction of the flexibility instruments to the energy markets. 6. Successful implementation of the hourly renewable certificates as the next step towards clean energy transition.

Session W–A2 (Wednesday, June 28, 12:30 p.m.) (Commission Meeting Room)

System Resilience Through Electricity System Restoration and Related Services

Douglas Wilson, Principal Analytics Engineer, GE (Edinburgh, United Kingdom)
James Yu, Head of Future Networks, ScottishPower Energy Networks (Glasgow, United Kingdom)
Ian Macpherson, Senior Innovation Manager, ScottishPower Energy Networks (Glasgow, United Kingdom)
Marta Laterza, Power Systems Engineer, General Electric (Glasgow, United Kingdom)
Marcos Santos, Senior Power Systems Engineer, General Electric (Glasgow, United Kingdom)
Richard Davey, Senior Project Manager, General Electric (Glasgow, United Kingdom)

Electricity system restoration following a partial or system-wide outage is an essential service in the power system. There is a need to apply new resources based on renewable resources to replace the services that up to now have depended on fossil fuel generation. This presentation describes a project led by SP Energy Networks in collaboration with GE to demonstrate a co-ordinated restoration approach in the distribution grid using a novel control approach applied to a controlled zone with multiple resources. Live trials of the approach in the SP Energy Networks power system are presented, as well as results of testing the approach extensively in a hardware-in-the-loop environment. The emerging weaknesses of the traditional methodology were recognised in UK electricity regulation, which was recently changed to include a requirement for 60% of customer load to be restored within 24 hours on a regional basis, with all supplies restored within 5 days (Electricity System Restoration Standard, 2021). Previous restoration requirements were less onerous on the timeframes and did not define geographic requirements. Since some regions now lack large transmission-connected blackstart-capable plant for the traditional top-down restoration approach, there is a need to harness the capabilities that renewable and distributed generation and storage can offer to address the deficit of system restoration capability. The new service being developed and trialled involves starting distributed generation and growing an island with customer load within the distribution network. This island can be sustained by automated control through managed load pickup as well unplanned disturbances with existing distributed energy resources, battery storage and demand response providing the control capability to keep the island in balance. The blackstart zone may then be reconnected to the transmission network if this is energised and can then contribute to managing the power balance as the restoration of the wider system continues. If appropriate, neighbouring islands can be connected together, and the resulting larger island is capable of greater block load pickup of active and reactive loads. One of the distinctive benefits of the approach taken is that it uses diverse resources of existing generation, storage and demand response capability that is present and operational in the network for other day-to-day purposes. These resources can be harnessed to provide the new electricity system restoration services with few additional power assets. Inherently, some devices can provide faster response than others, and large instantaneous power, and some may be able to sustain an energy supply while others have limited energy resource. Voltage support and short circuit current are also considerations. A diversity of renewable resources is useful to mitigate against individual resources being unavailable *e.g.* low wind or low solar conditions. A key requirement for the co-ordination of an electricity system restoration zone is a wide area monitoring and control system that manages the power balancing and switching of the network to automate the process of growing and sustaining the power island. The approach being trialled includes a SCADA/distribution management system with the topology information for network switching, together with a synchrophasor based wide area control system that manages the balancing, frequency control and resynchronization alignment of the network. Since the island is small in comparison to the normal interconnection, a rapid response to disturbances is required to maintain a stable frequency. Once a distribution zone is instrumented with the measurement, communication and control equipment to deliver the service, it is possible to use the same infrastructure to offer further services to manage grid stability in the more common circumstance of disturbances during grid-connected operation.

Coordinated Cross-Border Capacity Calculation Through The FARAO Open-Source Toolbox

Violette Berge, Vice President, Artelys Canada (Montréal, Canada)
Dr. Nicolas Omont, Vice President of Operations, Artelys (Paris, France)

Cross-borders exchanges have taken a major role in European strategy to achieve climate goals. The European Commission set a target of 15% interconnections in 2030, meaning that each country should have the physical capability to export at least 15% of their production. Increasing exchanges makes short term planning more complex. In this context, the French TSO (RTE) released an open-source toolbox FARAO to perform Coordinated Capacity Calculation (CCC) and ensure the security of supply. Artelys is a consultancy expert in power systems optimization and carries out various projects around TSO operational coordination in Europe. FARAO performs the optimization of both preventive and curative remedial actions, including HVDC lines, phase-shifter transformers and counter-trading but also topological actions. It is operationally used for the exchanges between Italy and its northern neighbors as well as between France, Spain and Portugal. Artelys will present the algorithms of the FARAO toolbox and how they are actually used to enable greater operational coordination amongst the countries.

Advanced Scenario Selection Methods for Probabilistic Transmission Planning Assessments

Dr. Eknath Vittal, Principal Technical Leader, EPRI (Palo Alto, CA)
Anish Gaikwad, Senior Program Manager, Electric Power Research Institute (Palo Alto, CA)
Parag Mitra, Senior Technical Leader, Electric Power Research Institute (Palo Alto, CA)

Given the temporal and spatial characteristics of extreme weather events, developing transmission planning scenarios, *i.e.,* snapshots of instantaneous operational conditions, is a challenging problem. It requires a multi-model assessment that links long-term planning models that capture the operational performance of the system (resource adequacy and production cost modeling) to the future meteorological projections that will inform the impacts of weather and extreme events. Scenario generation and analysis is computationally and labor intensive. Identifying snapshot conditions for future system states can be challenge. This presentation will highlight and detail an EPRI application that helps transmission planners identify critical power flow conditions from operational simulations such as production cost simulations. The EPRI High-Level Screening (HiLS) for Data Analytics tool allows planners to apply statistical analysis to large dataset that capture the operational performance of the system. The tool allows for the data to be organized into clusters of similar operating conditions reducing the dimensionality of the state space. As an example, an operational simulation of 8760 hours can be reduced to 10 operating hours that capture 95% of the variability seen over the course of the year. As uncertainty and variability increase on both the generation and load, developing methods and processes to understand the conditions that present the most challenging reliability and stability conditions will be critical. The HiLS tools, provides transmission planners a platform that can help them organize and visualize data representing future operational conditions of the system that considers both load variability and generator availability.

Incorporating Climate Projections Into Grid Models: Bridging the Data Gap To Capture Weather Dependent Representative and Extreme Events and Corresponding Uncertainties

Dr. Zhi Zhou, Principal Computational Scientist, Argonne National Laboratory (Lemont, IL)
Dr. Neal Mann, Energy Systems Engineer, Argonne National Laboratory (Lemont, IL)
Yanwen Xu, Graduate Student, University of Illinois at Chicago, Urbana-Champaign (Champaign, IL)
Zuguang Gao, Graduate Student, University of Chicago (Chicago, IL)
Dr. Akintomide Akinsanola, Assistant Professor, University of Illinois at Chicago (Chicago, IL)
Dr. Todd Levin, Team Lead, Argonne National Laboratory (Lemont, IL)
Dr. Jonghwan Kwon, Energy Systems Engineer, Argonne National Laboratory (Lemont, IL)
Dr. Audun Botterud, Senior Energy Systems Engineer, Argonne National Laboratory (Lemont, IL)

It is crucial to consider high-fidelity weather data and climate projections in grid models in order to capture future weather trends, extremes, and uncertainties. However, traditional power system studies often overlook many of these considerations and rely solely on historical weather data. To address this challenge, we develop a computationally manageable framework to process high-quality representations of climate data for use with power system models. The framework includes a three-stage architecture to select representative regions and periods, and also identify periods of extreme weather conditions after translating climate data (temperature, wind-speed, etc.) into grid inputs (load, power generation profiles and outage probabilities). The framework also models and represents uncertainty of future weather events based on ensembles of climate model simulations. The outcome of the framework is a set of processed grid inputs in time series format that capture the impact of climate features on the system. This includes grid inputs directly converted from weather variables at the cell level, as well as those from representative regions and time periods, those representing the impact from extreme weather events, and their associated uncertainties. We apply this computational framework to translate downscaled climate projections generated by three different global climate models, encompassing over 60 different weather variables at 12-km geographic and 3-hour temporal resolution for all North America. We then demonstrate how consideration of high-quality climate-driven grid inputs in electricity system models impacts optimal long-term planning decisions. Capturing future weather conditions and associated uncertainties is becoming important as power systems, and their associated markets, are being impacted by both efforts to decarbonize the effects of a changing climate. These are also important considerations when updating market designs to maintain reliability and economic efficiency as the underlying power system evolves. In addition, capturing weather uncertainty is critical for risk-aware decision making. Therefore, this work provides a valuable resource for power system modelers by bridging the gap between climate models and grid models to help ensure that long-term system planning decisions are informed by the impacts of future climate conditions.

Session W–B2 (Wednesday, June 28, 12:30 p.m.) (Hearing Room One)

Enhancing Decision Support for Electricity Markets With Machine Learning

Yury Dvorkin, Faculty, Johns Hopkins University (Baltimore, MD)
Robert Ferrando, Graduate Assistant, University of Arizona (Tucson, AZ)
Laurent Pagnier, Assistant Professor, University of Arizona (Tucson, AZ)
Zhirui Liang, Ph.D. Student, Johns Hopkins University (Baltimore, MD)
Daniel Bienstock, Professor, Columbia University (New York, NY)
Michael Chertkov, Professor, University of Arizona (Tucson, AZ)

This presentation describes how machine learning can be leveraged to enhance computational speed of day-ahead and real-time unit commitment and optimal power flow routines, which are at the core of market-clearing procedures in US ISOs. Our machine learning architecture embeds both power flow physics and market design properties (*e.g.,* cost recovery and revenue adequacy) into the training stage, which increases accuracy of computations and preserves a relationship between primal (dispatch) and dual (prices) variables. The accuracy and scalability of the proposed method is tested on a realistic 1814-bus NYISO system with current and future renewable energy penetration levels. We also demonstrate ~100x gain in computations relative to traditional optimization approaches.

Synergistic Integration of Machine Learning and Mathematical Optimization for Sub-Hourly Unit Commitment

Jianghua Wu, Ph.D. Candidate, University of Connecticut (Vernon, CT)
Dr. Zongjie Wang, Assistant Professor, University of Connecticut (Storrs, CT)
Dr. Yonghong Chen, Consulting Advisor, Midcontinent ISO (Carmel, IN)

Dr. Bing Yan, Assistant Professor, Rochester Institute of Technology (Rochester, NY)
Dr. Mikhail Bragin, Assistant Project Scientist, University of California, Riverside (Riverside, CA)

The integration of intermittent renewables into power systems presents significant challenges for operators due to increased uncertainties and greater intra-hour net load variability. Sub-hourly Unit Commitment (UC) has been suggested as a solution to quickly respond to changes in electricity supply and demand, which is more complicated than hourly UC because of a higher number of time periods, and higher dependencies among coupled periods. Traditional optimization methods could be time-consuming while machine learning (ML) may have additional feasibility concerns. To address these challenges, a hybrid approach based on synergistic integration of ML and optimization is developed. This novel approach adopts our recent decomposition and coordination Surrogate Absolute-Value Lagrangian Relaxation (SAVLR) method with efficient coordination and accelerated convergence. ML is then used to quickly predict SAVLR subproblem solutions. Compared to those of the original overall problem, subproblem solutions are much easier to learn. Nevertheless, predicting ''good'' subproblem solutions is still challenging because of the ''jumps'' of binary decisions and many types of unit-level constraints. To overcome these issues, a generic ML model, embedding recurrent neural networks (RNNs) and the Attention mechanism in the encoder-and-decoder structure, is developed. Because of the features of RNNs and Attention, this generic model can learn different subproblem solutions to reduce the training effort, and can provide time-based predictions to capture dependencies. In addition, to resolve the limitation of ML in handling constraints, a rule-based feasibility layer is incorporated in the predicting process, ensuring feasibility with respect to unit-level constraints. Testing on the IEEE 118-bus system demonstrates the effectiveness of our approach, providing feasible and accurate subproblem solutions quickly, and obtaining near-optimal overall solutions efficiently.

Boosting Power System Operation Economics Via Closed-Loop Predict-and-Optimize

Dr. Lei Wu, Anson Wood Burchard Chair Professor, Stevens Institute of Technology (Hoboken, NJ)
Xianbang Chen, Ph.D. Candidate, Stevens Institute of Technology (Hoboken, NJ)

By and large, power system operations are implemented by Independent System Operators (ISO) in an open-loop predict-then-optimize (O–PO) process. First, the uncertainty realizations (*e.g.,* renewable energy availability) are predicted as accurately as possible. Taking the predictions as inputs, day-ahead unit commitment and real-time economic dispatch problems are then optimally resolved for determining the operation plan (*i.e.,* optimization). The operation goal is to achieve the minimum system operation cost, *i.e.,* the optimal operation economics. However, the operation economics could suffer from the open-loop process because its predictions may be myopic to the optimizations, *i.e.,* the predictions seek to improve the immediate statistical prediction errors (*i.e.,* accuracy-oriented) instead of the ultimate operation economics. To this end, we propose to improve operation economics by closing the open loop between the prediction and the optimization, *i.e.,* a closed-loop predict-and-optimize (C–PO) idea. Specifically, two C–PO frameworks are designed, including a feature-driven C–PO framework and a bilevel mixed-integer program (MIP) C–PO framework. Their core is to feed the induced operation cost back for training the predictor and measuring the prediction quality with the operation cost (*i.e.,* cost-oriented). As a result, the prediction and the optimization can be implemented jointly in a single framework. Based on real-world data, the feature-driven C–PO is compared to the traditional O–PO, showing noticeable improvement in operation economics, although with slightly compromised prediction accuracy for certain cases. The experiments on a large-size system show that the C–PO has potential in a real-world application. The bilevel MIP C–PO is more versatile than the feature-driven C–PO. Based on an IEEE 118-bus system, the bilevel MIP C–PO is compared to the state-of-the-art methods of handling uncertainties, *i.e.,* stochastic programming and robust optimization. The case studies show that the bilevel MIP C–PO is economically competitive with the state-of-the-art methods but is more compatible with the current operational practice.

Privacy-Preserving Synthetic Dataset Generation for Power Systems Research

Dr. Vladimir Dvorkin, Postdoctoral Fellow, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Audun Botterud, Principal Research Scientist, Massachusetts Institute of Technology (Cambridge, MA)

Power systems research heavily relies on the availability of real-world power system datasets (network parameters, time series, etc.). However, data owners, such as system operators, are often hesitant to share their data due to valid security and privacy concerns. To overcome these challenges, we have developed state-of-the-art algorithms that enable the synthetic generation of optimization and machine learning datasets for the power systems industry. Our algorithms take real-world datasets as input and output their synthetic, perturbed versions that maintain the accuracy of the original data on specific problem classes, such as power system dispatch and wind power forecasting. Importantly, the original data remains undisclosed, effectively controlling the privacy risk in data releases. To ensure privacy preservation, we employ rigorous perturbation techniques of differential privacy that strictly control the amount of privacy loss. Furthermore, we preserve the accuracy of original data through post-processing convex optimization. Our algorithms have many applications, including synthetic generation of transmission parameters and renewable generation records. We have open-sourced our algorithms to encourage their use by interested parties. For more information, please visit our GitHub repository at *https://github.com/wdvorkin/SyntheticData.*

Session W–A3 (Wednesday, June 28, 3:30 p.m.) (Commission Meeting Room)

Parallel Interior-Point Solver for Security Constrained ACOPF Problems on SIMD/GPU Architectures

Dr. Mihai Anitescu, Senior Mathematician, Argonne National Laboratory (Lemont, IL)
François Pacaud, Assistant Professor, Ecole des Mines (Paris, France)
Michel Schanen, Computer Scientist, Argonne National Laboratory (Lemont, IL)
Sungho Shin, Postdoctoral Scientist, Argonne National Laboratory (Lemont, IL)
Daniel Adrian Maldonado, Assistant Energy Systems Scientist, Argonne National Laboratory (Lemont, IL)

We investigate how to port the standard interior-point method for security constrained ACOPF problems, which are block-structured nonlinear programs with state equations, on SIMD/GPU architectures. Computationally, we decompose the interior-point algorithm into two

successive operations: the evaluation of the derivatives and the solution of the associated Karush-Kuhn-Tucker (KKT) linear system. Our method accelerates both operations using two levels of parallelism. First, we distribute the computations on multiple processes using coarse parallelism. Second, each process uses a SIMD/GPU accelerator locally to accelerate the operations using fine-grained parallelism. The KKT system is reduced by eliminating the inequalities and the state variables from the corresponding equations, to a dense matrix encoding the sensitivities of the problem's degrees of freedom, drastically minimizing the memory exchange. Our experiments on SIMD/GPU with security-constrained AC optimal power flow problem show that the method can achieve a 50x speed-up compared to the state-of-the-art method.

The Need for More Rigorous Calculation of Shadow Prices and LMPs

Dr. Xiaoming Feng, Research Fellow, Hitachi Energy (Raleigh, NC)

LMPs (locational Marginal Prices) are used in nodal electricity markets to determine payments or charges to market participants. Due to the great monetary impact, it is imperative LMP is defined rigorously and calculated consistently. It has been observed the current method of shadow price and LMP calculation could produce values that are non-unique under certain conditions, which might signal non-economic incentives to the market. We start with formal definitions for shadow price and LMP and present the properties of the perturbation functions and their computational consequences. We use simple examples to illustrate the discrepancy between theoretical shadow price and the shadow price calculated by state-of-the-art optimization solvers. From the discussion, we make the case for more rigorous calculation of both shadow prices and LMPs.

Real-Time Market Enhancements for Reliability and Efficiency

Dr. Mort Webster, Professor of Energy Engineering, Pennsylvania State University (University Park, PA)
Dr. Anthony Giacomoni, Manager, Advanced Analytics, PJM Interconnection (Audubon, PA)
Aravind Retna Kumar, Ph.D. Candidate, Pennsylvania State University (University Park, PA)
Sushant Varghese, Ph.D. Candidate, Pennsylvania State University (University Park, PA)
Shailesh Wasti, Ph.D. Candidate, Pennsylvania State University (University Park, PA)

The projected trends in the U.S. power system, increasing wind and solar generation and retiring fossil fuel generation, will increase the net load variability and forecast uncertainty over the next several decades. There has been considerable research focusing on how to provide more flexibility to the power system. Within this line of research, numerous market design proposals have been explored: multi-interval dispatch, ramp products, stochastic market clearing, an increase in flexible resources (virtual power plants (VPP), energy storage). Although flexibility is often cited as an objective the outcomes of concern are reliability (unserved demand and reserve shortages), efficiency (reducing bid production cost and uplift payments), curtailment of renewable generation, and incentives for future flexible resources (*i.e.,* price formation). In the U.S., Independent System Operator (ISO) and Regional Transmission Organization (RTO) real-time market clearing and operations have the following properties: they operate on a rolling horizon basis throughout the operating day, face changing forecasts throughout the day with forecast errors, and frequently solve a real-time unit commitment (RUC), which is separate from the real-time dispatch. In contrast, most of the analysis and academic literature on market design enhancements neglect one or more of these characteristics in their analysis framework. The separation of commitment from dispatch raises the question: which market enhancement in which clearing engine? In this work, we present a simulation framework for the PJM wholesale energy markets with a rolling horizon and forecast errors. Specifically, we simulate the solution of the day-ahead market, followed by PJM's Intermediate-Term Security Constrained Economic Dispatch (IT–SCED) (real-time commitment process) every 15 minutes and PJM's Real-Time Security Constrained Economic Dispatch (RT–SCED) (real-time dispatch) every 5 minutes throughout the operating day. Net load forecasts change every 5 minutes. We use this framework to simulate several of the commonly discussed market enhancements applied to either IT–SCED, RT–SCED, or both. We consider multi-interval dispatch, ramp products, and stochastic market clearing. Our results demonstrate that market design changes are most successful if they addresses both commitment (bringing enough capacity and operating range online) and dispatch (using the online operating range effectively).

Economics of Grid-Supported Electric Power Markets: A Fundamental Reconsideration

Dr. Leigh Tesfatsion, Research Professor of Economics, Courtesy Research Professor of Electrical & Computer Engineering, Iowa State University (Ames, IA)

U.S. RTO/ISO-managed wholesale power markets operating over high-voltage AC transmission grids are transitioning from heavy reliance on fossil-fuel based power to greater reliance on renewable power. This presentation highlights four conceptually-problematic economic presumptions reflected in the legacy core design of these markets that are hindering this transition. The key problematic presumption is the static conceptualization of the basic transacted product as grid-delivered energy (MWh) competitively priced at designated grid delivery locations during successive operating periods, supported by ancillary services. The presentation then discusses an alternative conceptually-consistent ''Linked Swing-Contract Market Design'' that appears well-suited for the scalable support of increasingly decarbonized grid operations with more active participation by demand-side resources. This alternative design entails a fundamental switch to a dynamic insurance focus on advance reserve procurement permitting continual balancing of real-time net load. Reserve consists of the guaranteed availability of diverse power-path production capabilities for possible RTO/ISO dispatch during future operating periods, as protection against volumetric grid risk. Each reserve offer submitted by a dispatchable power resource m to a forward reserve market M(T) for a future operating period T is a two-part pricing swing-contract in firm or option form that permits m to ensure its revenue sufficiency.

Session W–B3 (Wednesday, June 28, 3:30 p.m.) (Hearing Room One)

Simulation of Wholesale Electricity Markets With Capacity Expansion and Production Cost Models To Understand Feedback Between Short Term Market Procedures and Long Term Investment Incentives

Dr. Jesse Holzer, Mathematician, Pacific Northwest National Laboratory (Richland, WA)
Dr. Abhishek Somani, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)
Dr. Brent Eldridge, Electrical Engineer, Pacific Northwest National Laboratory (Bel Air, MD)

Diane Baldwin, Project Manager, Pacific Northwest National Laboratory (Richland, WA)

Wholesale electricity markets are undergoing rapid changes, including variability and uncertainty and low prices from wind and solar, load flexibility and price responsiveness, distributed energy resources, energy storage, and revenue adequacy concerns. In response to these changes, enhancements to electricity market procedures have been proposed, including new reserve product, sloped reserve demand curves, multi-settlement forward markets, and stochastic modeling in market clearing optimization engines. These enhancements have the potential to improve operational outcomes in the short term time scale of hours to days by enabling better market responses to the changing market conditions. But they also affect the long run incentives for investment in grid equipment that ultimately result in the mix and capacity of various grid technologies. This mix in turn influences short term market conditions. We use linked models of capacity expansion and production cost to explore this feedback between short term and long term market conditions and to shed light on how this feedback affects the assessment of market enhancements to address changing market conditions.

Making the Right Resource Choice Requires Making the Right Model Choice

Dr. Rodney Kizito, Senior Manager, Ascend Analytics (Boulder, CO)
Gary W. Dorris, Ph.D., CEO, Ascend Analytics (Boulder, CO)
David Millar, Director of Consulting Services, Ascend Analytics (Boulder, CO)

Production cost modeling simulates the operation of electric systems. It provides a lens into a highly uncertain future, allowing utilities to craft strategy and make critical decisions for their customers, shareholders, and stakeholders. The power and acuity of this lens will determine what resources will be deemed the most economic to provide a reliable, lower-carbon supply portfolio. Resource planning using production cost models that simulate the operation of power systems, once a straightforward exercise of deciding how many new power plants would be needed to meet future load growth, has become a much more complicated and challenging enterprise. The dramatic decline in the cost of renewables and storage technologies and the societal push for decarbonization means planners must model more complex and uncertain portfolio options. Renewables and their meteorologically determined fuel supply are creating new dynamics that highlight the need for more powerful modeling tools to capture the increasing variability in the power supply and the ensuing effect on market price volatility. This presentation highlights the benefits of using a new class of resource planning models to plan for a decarbonized future. Utilities, regulators, independent system operators, and other industry stakeholders rely heavily on modeling to support decision making for the allocation of scarce capital resources, as well as to ensure that the right resources are available to maintain a high level of reliability and resilience. This presentation argues that the older generations of models that remain widely in use today fail to capture the emerging dynamics of a power grid supplied primarily by renewable energy. For this reason, industry decision makers are unknowingly burdened by ''model-limited choice,'' which can lead to imprudent investments in assets liable to become functionally useless and ultimately disallowed. This presentation also provides a new terminology to classify a model's ability to capture the new market dynamics, high-definition production cost models (HD PCMs) versus traditional production cost models (PCMs). HD PCMs use simulation to capture the stochastic nature of load and electricity production generated by renew able energy sources, as well as to drill down to a 5-minute level of temporal and spatial (*i.e.,* nodal) granularity to capture the flexibility requirements of renewable integration. Further, HD PCMs mimic real-world uncertainty by simulating imperfect foresight of future system conditions between the day-ahead forecast and the real-time dispatch. Traditional PCMs are highly simplified because they were developed when computing power was a significant limitation. Today, resource planners can take advantage of the rapid increase in computing power provided by distributed computing to upgrade their analytical platforms to enable HD PCMs that provide more robust analysis.

Transmission Shortage Pricing By MW-Mile Based Demand Curve

Sina Gharebaghi, Graduate Research Assistant, Pennsylvania State University, Hitachi Energy (University Park, PA)
Dr. Xiaoming Feng, Research Fellow, Hitachi Energy (Raleigh, NC)

ISOs use transmission demand curves (TDC) in security constrained unit commitment (SCUC) to relax transmission constraints when no feasible solution exists with hard transmission constraints. TDC is a penalty curve administratively specified as a function of the amount of MW violation of the transmission line's limits. Use of TDCs to ensure non-empty feasible solution space can result in excessively high LMP when multiple TDCs are active. Researchers have studied a transmission constraint screening approach to remove 'redundant constraints' of serially connected transmission lines before the pricing run to avoid the accumulation of high shadow prices over multiple redundant constraints for LMP calculation. The screening approach alleviates to a large degree the occurrence of excessive LMP but has subtle and significant unintended consequences with respect to SCUC solution stability. We propose an alternative approach using MW-Mile based TDC to solve the transmission constraint violation problem and eliminate the root cause of excessive LMP without the need to remove redundant constraints. We discuss the economic justification of the MW-Mile based TDC approach and its advantage of solution stability with illustrative examples.

Grid OS—A Modern Software Portfolio for Grid Orchestration

Renan Giovanini, Ph.D., MBA, Transmission Product Marketing Director, General Electric (Edinburgh, United Kingdom)
Joseph Franz, Senior Marketing Manager, General Electric (Melbourne, FL)

The 21st century has brought new challenges for Transmission and Distribution Operators that were hardly perceived in the turn of the century. There have been fast increases in bulk and micro renewable resources in conjunction with international agreements on CO_2 emission targets. Severe droughts, and more frequent floods happening in the same country are driving needs also. An increasing number of changing weather patterns creating disruptions at several levels. Data tsunami has been created due to increasing types and number of sensors installed in the field. The grid itself was initially designed in the early 1900s based on a uni-directional flow requirement now is called to become bi-directional. Previous electric software solutions were created very organically since late 1970s/early 1980s addressing

use-cases from that era. New tools were created over time, but always bolted-on to existent solutions. Energy Management Systems became more and more complex and started to present challenges in terms of scalability and maintainability leading to increasing staff and costs. Previous well defined siloes between Generation, Transmission and Distribution are becoming more blurred. In order to address all of these challenges, utilities and software companies started a journey to re-invent itself. Based on the most recent digital technologies, these companies created new modular and composable solution prepared for ultra-scaling and immense amounts of data ready to leverage the most modern mathematical algorithms and artificial intelligence methods available to date for assisted and automated control. The need for project executions in months as opposed to years has been taken carefully in consideration, creating a software solution ready for faster time-to-value. These solutions are already in production at a few customers and a number of new use-cases are currently under proof-of-concept, development or available for productization. The presentation will cover some of these latest software developments and highlight regulatory challenges to slowing the adoption of these technologies by utilities: 1. A new market system prepared to validate & clear more frequent and increasing number of bids with smaller amounts of power; 2. Digital twin technologies such as digital dynamic line ratings ready to integrate electrical and weather data to provide real-time and forecast ampacity for transmission lines integrated to real-time and look-ahead security assessment systems; 3. Advanced forecasting solutions based on AI for (1) renewable power production at T&D levels and (2) outage predictions for improved crew allocation and faster restoration times; 4. Optimal system restoration management in real-time in assisted and automated modes; 5. Exploration of Distributed Energy Resource to supply grid services at transmission level such as grid stabilization and blackstart restoration.

Day 3—Thursday, June 29

Session H1 (Thursday, June 29, 9:30 a.m.) (Commission Meeting Room)

Integration of DER Aggregations in ISO-Scale SCUC Models

Dr. Brent Eldridge, Electrical Engineer, Pacific Northwest National Laboratory (Bel Air, MD)
Jesse Holzer, Mathematician, Pacific Northwest National Laboratory (Richland, WA)
Abhishek Somani, Economist, Pacific Northwest National Laboratory (Richland, WA)
Eran Schweitzer, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)
Rabayet Sadnan, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)
Nawaf Nazir, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)
Soumya Kundu, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)

FERC issued Order 2222 in September 2020, which will require all ISOs in the U.S. to implement participation models for DER aggregators. Among other requirements, this rule required ISOs to lower the participation threshold for wholesale market participation to 0.1 MW. Wider participation of these resources can bring significant benefits to the grid, such as by locating energy supply closer to demand, opening up more participation from the demand side, and providing an additional flexibility source to balance intermittent renewables. However, DER aggregations will have unique characteristics that may pose challenges to the large-scale security-constrained unit commitment (SCUC) software used by ISOs. This presentation will focus on the formulation of a new mathematical model to represent the internal constraints of a DER aggregator and the study design that is intended to better understand the challenges associated with DER integration.

Current-Voltage AC Optimal Power Flow for Unbalanced Distribution Network

Dr. Mojdeh Khorsand Hedman, Assistant Professor, Arizona State University (Tempe, AZ)
Zahra Soltani, Ph.D. Candidate, Arizona State University (Tempe, AZ)
Dr. Shanshan Ma, Postdoctoral Research Scholar, Arizona State University (Las Vegas, NV)

With proliferation of distributed energy resources (DERs), distribution management systems (DMSs) need to be advanced in order to enhance the reliability and efficiency of modern distribution systems. This work proposes novel nonlinear and convex AC optimal power flow (ACOPF) models based on current-voltage (IVACOPF) formulation for an unbalanced distribution system with DERs. In the proposed formulation, untransposed distribution lines, shunt elements of distribution lines, and detailed representation of distribution transformers and DERs are modeled. The proposed nonlinear IVACOPF model is linearized and convexified using the Taylor series. The performance of the proposed nonlinear and convex IVACOPF approaches is compared with OpenDSS and the widely used LinDistFlow method for modeling unbalanced distribution systems. The proposed accurate convex IVACOPF model has multiple applications for distribution system management, planning, and operation. Applications of the proposed model on two key parts of advanced DMS, (i) DERs scheduling and (ii) simultaneous topology processor and state estimation, will be presented. Two models are developed including Quadratic Programming (QP) and linear programming (LP) for performing the distribution state estimation. The performance of the methods is compared. The proposed models are tested using distribution feeder of an electric utility in Arizona.

Empowering Electricity Markets Through Distributed Energy Resources and Smart Building Setpoint Optimization: A Graph Neural Network-Based Deep Reinforcement Learning Approach

Dr. You Lin, Postdoctoral Associate, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Audun Botterud, Principal Research Scientist, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Daisy Green, Postdoctoral Associate, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Leslie Norford, Professor, Massachusetts Institute of Technology (Cambridge, MA)
Dr. Jeremy Gregory, Executive Director of Climate and Sustainability Consortium, Massachusetts Institute of Technology (Cambridge, MA)

Smart buildings play a pivotal role in the electricity market by boosting energy efficiency and demand flexibility by implementing advanced control strategies. In this study, a setpoint optimization model is proposed using a graph neural network-based deep reinforcement learning (DRL) algorithm that considers thermal exchanges among various zones within buildings. By intelligently scheduling the day-ahead temperature setpoints and adjusting the real-time setpoints in response to dynamic conditions and price signals, DRL-based controllers can optimize energy consumption while reducing overall costs. This strategic energy

management not only benefits building occupants but also bolsters the electricity grid through load balancing and the provision of essential grid services. Through the testbed of MIT campus buildings, it is demonstrated that smart buildings employing DRL for setpoint optimization contribute to a more efficient, reliable, and sustainable electricity market.

Multi-Timescale Operations of Nuclear-Renewable Hybrid Energy Systems for Reserve and Thermal Products Provision

Jie Zhang, Associate Professor, University of Texas at Dallas (Richardson, TX)
Jubeyer Rahman, Ph.D. Student, University of Texas at Dallas (Richardson, TX)

This talk will present an optimal operation strategy of a nuclear-renewable hybrid energy system (N–R HES), in conjunction with a district heating network, which is developed within a comprehensive multi-timescale electricity market framework. The grid-connected N–R HES is simulated to explore the capabilities and benefits of N–R HES of providing energy products, different reserve products, and thermal products. An N–R HES optimization and control strategy is formulated to exploit the benefits from the hybrid energy system in terms of both energy and ancillary services. A case study is performed on the customized NREL–118 bus test system with high renewable penetrations, based on a multitimescale (*i.e.,* three-cycle) production cost model. Both day-ahead and real-time market clearing prices are determined from the market model simulation. The results show that the N–R HES can contribute to the reserve requirements and also meet the thermal load, thereby increasing the economic efficiency of N–R HES (with increased revenue ranging from 1.55% to 35.25% at certain cases) compared to the baseline case where reserve and thermal power exports are not optimized.

Session H2 (Thursday, June 29, 12:30 p.m.) (Commission Meeting Room)

Optimizing Stand-Alone Battery Storage Operations Scheduling Under Uncertainties in German Residential Electricity Market Using Stochastic Dual Dynamic Programming

Pattanun Chanpiwat, Doctoral Candidate, University of Maryland (College Park, MD) & Aalto University (Espoo, Finland) (Silver Spring, MD)
Fabricio Oliveira, Ph.D., Associate Professor, Aalto University (Espoo, Finland)
Steven A. Gabriel, Ph.D., Full Professor, University of Maryland (College Park, MD)

We present a new variation of the stochastic dual dynamic programming (SDDP) algorithm for solving multistage, convex stochastic programming problems considering uncertainties such as electricity prices, variable renewable energy generation, and residential demand in the electricity market. We approximate the convex expected-cost-to-go functions via a linear policy graph, to obtain optimal operational strategies for the battery storage usage of residential households. We develop a heuristic algorithm (*i.e.,* executable on edge-computing devices located at the households) of a residential electricity network with a flexible structure that allows residents to efficiently hedge their electricity consumption via community-shared battery storage while accounting for uncertainties and limitations of the energy system. We provide an economic assessment and insights into battery storage scheduling strategies and the model capabilities through case studies on a test network model of Southern German residential households. The results are compared with other mathematical models including a multistage stochastic convex optimization model with the assumptions of a perfect information case and/or a business-as-usual case.

Integration of Hybrid Storage Resources Into Wholesale Electricity Markets

Dr. Nikita Singhal, Technical Leader, Electric Power Research Institute (Palo Alto, CA)
Rajni Kant Bansal, Ph.D. Candidate, Johns Hopkins University (Baltimore, MD)
Dr. Erik Ela, Program Manager, Electric Power Research Institute (Palo Alto, CA)
Dr. Julie Mulvaney Kemp, Research Scientist, Lawrence Berkeley National Laboratory (Berkeley, CA)
Dr. Miguel Heleno, Research Scientist, Lawrence Berkeley National Laboratory (Berkeley, CA)

Electric storage resources and other technologies that are co-located and share a common point of interconnection are presently being incorporated into bulk power systems in increasing numbers, with more hybrid storage resources planned and under study within interconnection queues. Such hybrid storage resources are predominantly seen being combined with variable energy resources and are either being operated as two separate resources or as a single integrated resource. Market designers and system operators are presently researching ways to effectively integrate hybrid storage resources into their existing system operations and scheduling processes given the ambiguity around their impacts, particularly when high levels of hybrid resources are present. This research explores advanced market participation modeling options for integrating utility-scale hybrid storage resources into market clearing software in addition to discussing the economic and reliability implications of the different modeling options. This includes the consecutive impact of the participation models on the market clearing software solution and the dispatch and revenue of hybrid battery projects. The alternate participation models evaluated in this research include two separate resources ISO-managed co-located participation model, single integrated resource self-managed hybrid participation model and two separate resources ISO-managed linked co-located participation model.

Predicting Strategic Energy Storage Behaviors

Yuexin Bian, Ph.D. Student, University of California, San Diego (San Diego, CA)
Ningkun Zheng, Ph.D. Student, Columbia University (New York City, NY)
Yang Zheng, Assistant Professor, University of California, San Diego (San Diego, CA)
Bolun Xu, Assistant Professor, Columbia University (New York, NY)
Yuanyuan Shi, Assistant Professor, University of California, San Diego (San Diego, CA)

Energy storage are strategic participants in electricity markets to arbitrage price differences. Future power system operators must understand and predict strategic storage arbitrage behaviors for market power monitoring and capacity adequacy planning. This paper proposes a novel data-driven approach that incorporates prior model knowledge for predicting the behaviors of strategic storage participants. We propose a gradient-descent method to find the storage model parameters given the historical price signals and observations. We prove that the identified model parameters will converge to the true user parameters under a class of quadratic objective and linear equality-constrained storage models. We demonstrate the effectiveness of our approach through numerical experiments with synthetic and real-world storage behavior data. The proposed approach significantly

improves the accuracy of storage model identification and behavior forecasting compared to previous blackbox data-driven approaches.

Energy Storage Participation Algorithm Competition (ESPA-Comp)

Dr. Brent Eldridge, Electrical Engineer, Pacific Northwest National Laboratory (Bel Air, MD)
Jesse Holzer, Mathematician, Pacific Northwest National Laboratory (Richland, WA)
Abhishek Somani, Economist, Pacific Northwest National Laboratory (Richland, WA)
Kostas Oikonomou, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)
Brittany Tarufelli, Economist, Pacific Northwest National Laboratory (Laramie, WY)
Li He, Electrical Engineer, Pacific Northwest National Laboratory (Richland, WA)

Energy Storage Participation Algorithm Competition (ESPA-Comp) is an upcoming pilot competition that will challenge participants to develop innovative algorithms for energy storage participation in wholesale electricity markets. Energy storage technologies will play a critical role in making sure we have access to reliable and low-cost electricity. However, optimizing energy storage systems in wholesale electricity markets is a complex task that requires sophisticated algorithms to accurately predict electricity prices and account for the physical constraints of energy storage technologies. ESPA-Comp aims to bring together researchers, engineers, and students with expertise in AI/ML, optimization, and economics to develop algorithms that can effectively address these challenges. In this competition, participants will ''operate'' an energy storage resource in a simulated wholesale electricity market and will be awarded based on the profits they earn. Participants will need to submit algorithms that generate strategic offer curves, taking into account factors like weather, market competition, and network congestion. Competition results will help us to understand how different market designs can affect storage incentives and support the efficient use of storage resources.

Session H3 (Thursday, June 29, 3:00 p.m.) (Commission Meeting Room)

Congestion Mitigation With Transmission Reconfigurations in the Evergy Footprint

Dr. Pablo A. Ruiz, CEO and CTO, NewGrid, Inc. (Somerville, MA)
Derek Brown, Regulatory Affairs Manager, Evergy (Topeka, KS)
Jeremy Harris, Transmission Operations Planning Manager, Evergy (Topeka, KS)
German Lorenzon, Senior Engineer, NewGrid (Somerville, MA)
Grant Wilkerson, Director of Business Development, Evergy (Kansas City, MO)

Transmission needs are becoming more variable and are rising rapidly, as shown by significant increases in congestion management costs and in the frequency of transmission overloads. Further, transmission capability has been critical during recent extreme events, to support power transfers from less affected areas to the more affected ones. Topology optimization software is a grid-enhancing technology that identifies reconfiguration options to re-route power flow around transmission bottlenecks employing less utilized facilities and satisfying reliability criteria. These reconfigurations provide cost savings to power customers and increase the transmission network performance from both reliability and market efficiency perspectives. At the same time, the use of reconfigurations remains limited. For example, the usual practice in the Southwest Power Pool is to employ known reconfigurations as a last resort, after resource redispatch is exhausted and constraints are breached. This presentation will discuss the reliability and cost saving impacts of reconfigurations implemented in the Evergy footprint to mitigate congestion under the current SPP practice, as well as illustrate additional benefits that could be obtained if topology optimization opportunities were used proactively to address congestion.

Optimal Transmission Expansion Planning With Grid Enhancing Technologies

Swaroop Srinivasrao Guggilam, Senior Engineer, Electric Power Research Institute (Knoxville, TN)
Alberto Del Rosso, Program Manager, Electric Power Research Institute (Knoxville, TN)

The power system is evolving with a rapid increase in demand. It provokes rethinking ways to increase generation and expand the system's capacity to support it. This combination of fast-paced demand growth and supply has made the planning and expansion of the transmission system challenging in recent years. The futuristic hyperactive power system grid needs to be versatile. The grid should be able to host a variety of renewable energy resources, adapt to various system conditions, be highly secured under extreme events, and be dynamically responsive to make the power system reliable. All this is to be achieved at minimal cost to the customers and efficiently. The traditional transmission solutions will continue to be the backbone of the power system transmission grid, but upcoming state-of-the-art grid-enhancing technologies can significantly aid in supporting these ever-changing power system grid requirements with optimal cost and improved efficiency. Various grid-enhancing technologies include power flow control devices such as SmartValve devices and phase shift transformers, dynamic and adaptive transmission line ratings, and optimal topology control. The increasing penetration of distributed energy resources such as batteries also activates a different avenue to pursue being able to support transmission expansion planning needs. The term around the battery as a viable alternative is coined as a non-wire alternative solution. In many utilities, it's necessary to assess the non-wire alternative solutions such as batteries to meet FERC requirements. Developing and analyzing these various modern transmission solutions that work in tandem is challenging. One needs proper technical characterization of these technologies and assess the technology readiness. One also needs to evaluate its performance under normal and extreme conditions, the flexibility to deploy and install these technologies, calculate capital and operational costs, understand different available control options for these devices, and analyze potential limitations. Suitable analytical methods and high-performing software tools are needed to run the optimization simulations to enable integration and efficient use of these grid-enhancing technologies. EPRI has developed a software tool called CPLANET (Controlled PLANning Expansion Tool) that helps identify effective and low-cost solutions for mitigating thermal overloads in a power system over various operating scenarios. An optimal solution is determined from a given set of candidate projects, including various grid-enhancing technologies and traditional transmission expansion projects such as installing new transmission lines or upgrading existing substations. The software uses a mixed-integer linear programming formulation in the optimization engine to identify the least-cost solution for the grid's various physical and operating needs. The scope and goal of this presentation are to discuss the ongoing efforts at EPRI's forefront around grid-enhancing technologies. Showcase the current capabilities of the CPLANET tool and

discuss case studies and share existing challenges and future goals.

The Key Role of Extended ACOPF-Based Decision Making for Supporting Clean, Cost-Effective and Reliable/Resilient Electricity Services

Maria Iilic, Professor Emerita, Carnegie Mellon University (Pittsburgh, PA)
Rupamathi Jaddivada, Director of Innovation, SmartGridz (Boston, MA)
Jeffrey Lang, Vitesse Professor, Massachusetts Institute of Technology (Cambridge, MA)
Eric Allen, Director of Engineering, SmartGridz (Boston, MA)

Societal objectives are rapidly moving towards decarbonized, affordable, and reliable/resilient electricity services. In this talk we first revisit these objectives by identifying basic changes and the related challenges taking place. In particular, decarbonization requires planning and operations of the changing electric energy systems so that seamless integration of clean resources, ranging across wind, solar, nuclear, geothermal, and hydro, is enabled. Notably, this must be done with an eye on generation adequacy. Also, these new resources present locational issues (NIMBY) in operating the existing power grid. Finally, the end users still must be served without interruptions and without being exposed to wide-spread blackouts. Similar challenges are related to ensuring cost-effective and reliable/resilient services. Second, we show how an extended (robust, adaptive, multi-temporal) ACOPF is essential for meeting these societal challenges. Pretty much any of the new software needed (for wind integration, resilient service, and preventing blackouts) requires effective optimization tools for identifying the main bottlenecks/obstacles to physical implementation and for advising operators and planners regarding the most effective remedial actions (new investments and/or flexible utilization). We illustrate potential benefits from utilizing ACOPF as a basic means of supporting software tools needed for meeting the societal challenges. We offer a taxonomy of such badly needed tools and illustrate the role of extended ACOPF estimated benefits on several real-world systems based on our work to-date.

Data & API Standards for Clean Energy Solutions and Digital Innovation

Priya Barua, Director of Market Policy and Innovation, Clean Energy Buyers Institute (Washington, DC)
Ben Gerber, President & CEO, M–RETS (Minneapolis, MN)

There is an opportunity for energy attribute certificate (EAC) issuing bodies in the U.S. and abroad to enable next generation carbon-free electricity (CFE) procurement solutions that accelerate grid decarbonization investments by capturing more attributes and better serving as a digital ''platform of platforms''. Energy customers who buy clean energy rely on EACs to assert ownership claims over each megawatt-hour of CFE they procure for auditing, reporting, and marketing purposes. EAC issuing bodies promote CFE procurement integrity and validation by issuing, tracking, and canceling EACs, which each represent a unique standardized tradable instrument representing one megawatt-hour of verified CFE generation. By adopting open data and automated programming interface (API) standards, EAC issuing bodies can improve data access and solutions for customers. This session will explore opportunities for EAC issuing bodies to establish consistent, modern automated programming interfaces (APIs), template legal agreements, and other tools that will make it easier for data providers to deliver data and for users to update the status of EACs through connected digital trading platforms— enabling innovation for CFE procurement solutions.

Mine Production Scheduling Under Time-of-Use Power Rates With Renewable Energy Sources

Dr. Daniel Bienstock, Professor, Columbia University (New York, NY)
Amy Mcbrayer, Ph.D. Candidate, South Dakota School of Mines (Rapid City, SD)
Andrea Brickey, Professor, South Dakota School of Mines (Rapid City, SD)
Alexandra Newman, Professor, Colorado School of Mines (Golden, CO)

Renewable energy use on active and reclaimed mine lands has increased dramatically in recent years. With mining companies focused on increasing efficiencies, reducing carbon intensity, and developing sustainable mining practices, opportunity exists to integrate data on electricity usage and demand into mine production schedules to capitalize on alternative energy sources and to take advantage of favorable pricing strategies. Utilizing real data from an active coal mine that has already integrated electric equipment into their loading fleet, we show the impacts of (i) seasonal power price fluctuations on a medium-term production schedule; and, (ii) hourly power price fluctuations on a short-term extraction schedule. Results reveal the economic potential both for: (i) the integration of renewable energy sources on reclaimed and active mine lands; and (ii), the corresponding synchronization of a production schedule with time-of-use energy pricing contracts.

[FR Doc. 2023–13168 Filed 6–20–23; 8:45 am]
BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2130–000]

Glover Creek Solar, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Glover Creek Solar, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 5, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to

view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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: June 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13163 Filed 6–20–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings # 1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC23–98–000.

Applicants: Glover Creek Solar, LLC,PGR 2022 Lessee 9, LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Glover Creek Solar, LLC, et al.

Filed Date: 6/13/23.

Accession Number: 20230613–5176.

Comment Date: 5 p.m. ET 7/5/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23–195–000.

Applicants: DeCordova BESS LLC.

Description: DeCordova BESS LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 6/13/23.

Accession Number: 20230613–5142.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: EG23–196–000.

Applicants: Crane 2 BESS, LLC.

Description: Crane 2 BESS, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 6/14/23.

Accession Number: 20230614–5077.

Comment Date: 5 p.m. ET 7/5/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–1706–005.

Applicants: Newark Energy Center, LLC.

Description: Newark Energy Center LLC submits Supplement to Informational Filing, Request for Prospective One-Time Waiver, Shortened Comment Period, Expedited Consideration, and Confidential Treatment.

Filed Date: 6/9/23.

Accession Number: 20230609–5217.

Comment Date: 5 p.m. ET 6/20/23.

Docket Numbers: ER17–1531–009.

Applicants: CPV Fairview, LLC.

Description: Notice of Change in Status of CPV Fairview, LLC.

Filed Date: 6/13/23.

Accession Number: 20230613–5173.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER22–962–004.

Applicants: PJM Interconnection, L.L.C.

Description: Compliance filing: Order No. 2222 Compliance and Request for Action by November 30, 2023 to be effective 7/1/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5084.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–739–001.

Applicants: ISO New England Inc., Eversource Energy Service Company (as agent), New England Power Pool Participants Committee, The United Illuminating Company.

Description: Tariff Amendment: ISO New England Inc. submits tariff filing per 35.17(b): ISO-NE; Deficiency Response—Treatment of Storage as Transmission-Only Assets to be effective 12/31/9998.

Filed Date: 6/14/23.

Accession Number: 20230614–5032.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–743–001.

Applicants: ISO New England Inc., Eversource Energy Service Company (as agent), The United Illuminating Company, New England Power Pool Participants Committee.

Description: Tariff Amendment: ISO New England Inc. submits tariff filing per 35.17(b): ISO-NE; Deficiency Response—Treatment of Storage as Transmission-Only Assets to be effective 12/31/9998.

Filed Date: 6/14/23.

Accession Number: 20230614–5034.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–2134–000.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.

Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2023–06–14_SA 3028 Ameren IL-Prairie Power Project #34 Westridge to be effective 8/14/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5024.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–2135–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original IISA, SA No. 6950 and ICSA, SA No. 6951; Queue No. AF2–222 to be effective 5/15/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5040.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–2136–000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of ISA, SA No. 2547, Queue No. S29B to be effective 6/14/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5055.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–2137–000.

Applicants: Northern States Power Company, a Minnesota corporation.

Description: § 205(d) Rate Filing: 2023–6–14 NSP BLUE CIAC 735–NSP to be effective 6/15/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5056.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–2138–000.

Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.

Description: § 205(d) Rate Filing: Midcontinent Independent System Operator, Inc. submits tariff filing per 35.13(a)(2)(iii): 2023–06–14_SA 4085 Ameren IL–SIPC Interconnection Agreement to be effective 8/14/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5087.

Comment Date: 5 p.m. ET 7/5/23.

Docket Numbers: ER23–2139–000.

Applicants: Interstate Power and Light Company.

Description: § 205(d) Rate Filing: Interstate Power and Light Company

Lansing Retirement to be effective 8/14/2023.

Filed Date: 6/14/23.

Accession Number: 20230614–5094.

Comment Date: 5 p.m. ET 7/5/23.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES23–47–000; ES23–48–000; ES23–49–000; ES23–50–000.

Applicants: The United Illuminating Company, The Central Maine Power Company, Gas and Electric Corporation, New York State Electric & Gas Corporation.

Description: Application Under Section 204 of the Federal Power Act for Authorization to Issue Securities of New York State Electric & Gas Corporation, et al.

Filed Date: 6/12/23.

Accession Number: 20230612–5222.

Comment Date: 5 p.m. ET 7/3/23.

Take notice that the Commission received the following qualifying facility filings:

Docket Numbers: QF15–475–003.

Applicants: REUT Origination, LLC, a Delaware Limited Liability Company.

Description: Refund Report of SunE Solar XVII Project1, LLC [RMP—Fiddler's Canyon 1–UT].

Filed Date: 6/14/23.

Accession Number: 20230614–5081.

Comment Date: 5 p.m. ET 7/5/23.

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.

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: June 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13166 Filed 6–20–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EF23–6–000]

Western Area Power Administration; Notice of Filing

Take notice that on June 8, 2023, Western Area Power Administration submits tariff filing: eTariff_Corrections_Submitted-20230605 to be effective 8/7/2023.

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.

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.

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.

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Comment Date: 5:00 p.m. Eastern Time on July 8, 2023.

Dated: June 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13167 Filed 6–20–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Staff Attendance at the Reliability and Security Technical Committee Meetings

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission and/or Commission staff may attend the following meetings either in person or virtually:

The Reliability and Security Technical Committee (RSTC) Meetings:

MRO 380 St. Peter Street, Suite 800, St. Paul, MN 55102

June 21, 2023 (8:30 a.m.–4:30 p.m. Central)

June 22, 2023 (8:30 a.m.–10:30 a.m. Central)

Further information regarding these meetings may be found at: *https://www.nerc.com/Pages/Calendar.aspx.*

The discussions at the meetings, which are open to the public, may address matters at issue in the following Commission proceeding:

Docket Nos. RD23–1–000, RD23–1–001
Extreme Cold Weather Reliability Standards EOP–011–3 and EOP–012–1; RD22–4–000, RD22–4–001
Registration of Inverter-Based Resources

For further information, please contact Chanel Chasanov, 202–502–8569, or *chanel.chasanov@ferc.gov.*

Dated: June 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13169 Filed 6–20–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER23–2133–000]

PGR 2022 Lessee 9, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of PGR 2022 Lessee 9, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is July 5, 2023.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Hand delivered submissions in docketed proceedings should be delivered to Health and Human Services, 12225 Wilkins Avenue, Rockville, Maryland 20852.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID–19), issued by the President on March 13, 2020. For assistance, contact the Federal Energy Regulatory Commission at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

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: June 14, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–13164 Filed 6–20–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0765; FRL–10950–01–ORD]

Value of Information (VOI) Under the Board of Scientific Counselors (BOSC)—July 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has selected technical experts to serve as Special Government Employees (SGEs) on a review panel under the authority of the Board of Scientific Counselors (BOSC), a federal advisory committee to the Office of Research and Development (ORD). Selected experts will participate in the review of the Office of Research and Development (ORD)'s draft report on a case study that uses value of information (VOI) analysis to weigh the public health and economic trade-offs associated with the timeliness, uncertainty, and costs of the draft EPA Transcriptomic Assessment Product (ETAP). The ETAP is a proposed ORD assessment product that utilizes a standardized short-term *in vivo* study design and data analysis procedures to develop a transcriptomic-based reference values for data poor chemicals.

DATES: The meeting will be held on Tuesday, July 25, 2023, from 11 a.m. to 5 p.m., and Wednesday, July 26, 2023, from 11 a.m. to 5 p.m. All times noted are Eastern Time and approximate. The meeting may adjourn early if all business is finished. Attendees should register by July 18, 2023, at *https://EPA-VOI_July_meeting.eventbrite.com.* Requests for making oral presentations at the meeting will be accepted up to one business day before the meeting. Comments may be submitted through Friday, July 21, 2023.

ADDRESSES: Instructions on how to connect to the videoconference via Zoom will be provided upon registration at: *https://EPA-VOI_July_meeting.eventbrite.com.* Please note that no Zoom information for the meeting will be provided without registration.

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Mail:* Send comments by mail to: Board of Scientific Counselors (BOSC) Executive Committee Docket, Mail Code: 2822T, 1301 Constitution Ave. NW, Washington, DC 20004, Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room 3334, William Jefferson Clinton West Building, 1301 Constitution Ave. NW, Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2015–0765. *Note:* This is not a mailing address. Deliveries are only accepted during the docket's normal

hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov* including any personal information provided unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.*

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer (DFO), Tom Tracy, via phone/voicemail at: 919–541–4334; or via email at: *tracy.tom@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information: The meeting is open to the public. Any member of the public interested in receiving a draft agenda, attending the meeting, or making a presentation at the meeting may contact Tom Tracy, the Designated Federal (DFO), via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. Individuals making an oral presentation will be limited to a total of three minutes.

For security purposes, all attendees must provide their names to the DFO by registering online at *https://EPA-VOI_July_meeting.eventbrite.com* by July 21, 2023, and must go through a metal detector, sign in with the security desk, and show REAL ID Act-compliant government-issued photo identification to enter the building. Attendees are encouraged to arrive at least 15 minutes prior to the start of the meeting to allow enough time for security screening. Proposed agenda items for the meeting include but are not limited to the following: Review of charge questions, overview of the report outlining the case study that uses VOI analysis to weigh the public health and economic trade-offs associated with the timeliness, uncertainty, and costs of the draft EPA Transcriptomic Assessment Product (ETAP), and subcommittee deliberations.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Tom Tracy (202) 564–6518 or *tracy.tom@epa.gov.* To request accommodation of a disability, please contact Tom Tracy, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

Mary Ross,

Director, Office of Science Advisor, Policy, and Engagement.

[FR Doc. 2023–13188 Filed 6–20–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2023–0061; FRL–10581–05–OCSPP]

Certain New Chemicals; Receipt and Status Information for May 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is required under the Toxic Substances Control Act (TSCA), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, to make information publicly available and to publish information in the **Federal Register** pertaining to submissions under TSCA section 5, including notice of receipt of a Premanufacture notice (PMN), Significant New Use Notice (SNUN) or Microbial Commercial Activity Notice (MCAN), including an amended notice or test information; an exemption application (Biotech exemption); an application for a test marketing exemption (TME), both pending and/or concluded; a notice of commencement (NOC) of manufacture (including import) for new chemical substances; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review. This document covers the period from 5/1/2023 to 5/31/2023.

DATES: Comments identified by the specific case number provided in this document must be received on or before July 21, 2023.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2023–0061, through the *Federal eRulemaking Portal* at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* Jim Rahai, Project Management and Operations Division (MC 7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 564–8593; email address: *rahai.jim@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. What action is the Agency taking?

This document provides the receipt and status reports for the period from 5/01/2023 to 5/31/2023. The Agency is providing notice of receipt of PMNs, SNUNs, and MCANs (including amended notices and test information); an exemption application under 40 CFR part 725 (Biotech exemption); TMEs, both pending and/or concluded; NOCs to manufacture a new chemical substance; and a periodic status report on new chemical substances that are currently under EPA review or have recently concluded review.

EPA is also providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/

MCAN notices on its website at: *https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices.* This information is updated on a weekly basis.

B. What is the Agency's authority for taking this action?

Under the TSCA, 15 U.S.C. 2601 *et seq.,* a chemical substance may be either an ''existing'' chemical substance or a ''new'' chemical substance. Any chemical substance that is not on EPA's TSCA Inventory of Chemical Substances (TSCA Inventory) is classified as a ''new chemical substance,'' while a chemical substance that is listed on the TSCA Inventory is classified as an ''existing chemical substance.'' (See TSCA section 3(11).) For more information about the TSCA Inventory please go to: *https://www.epa.gov/tsca-inventory.*

Any person who intends to manufacture (including import) a new chemical substance for a non-exempt commercial purpose, or to manufacture or process a chemical substance in a non-exempt manner for a use that EPA has determined is a significant new use, is required by TSCA section 5 to provide EPA with a PMN, MCAN, or SNUN, as appropriate, before initiating the activity. EPA will review the notice, make a risk determination on the chemical substance or significant new use, and take appropriate action as described in TSCA section 5(a)(3).

TSCA section 5(h)(1) authorizes EPA to allow persons, upon application and under appropriate restrictions, to manufacture or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a)(2), for ''test marketing'' purposes, upon a showing that the manufacture, processing, distribution in commerce, use, and disposal of the chemical will not present an unreasonable risk of injury to health or the environment. This is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: *https://www.epa.gov/chemicals-under-tsca.*

Under TSCA sections 5 and 8 and EPA regulations, EPA is required to publish in the **Federal Register** certain information, including notice of receipt of a PMN/SNUN/MCAN (including amended notices and test information); an exemption application under 40 CFR part 725 (biotech exemption); an application for a TME, both pending and concluded; NOCs to manufacture a new chemical substance; and a periodic status report on the new chemical substances that are currently under EPA review or have recently concluded review.

C. Does this action apply to me?

This action provides information that is directed to the public in general.

D. Does this action have any incremental economic impacts or paperwork burdens?

No.

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

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

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

II. Status Reports

In the past, EPA has published individual notices reflecting the status of TSCA section 5 filings received, pending, or concluded. In 1995, the Agency modified its approach and streamlined the information published in the **Federal Register** after providing notice of such changes to the public and an opportunity to comment (see the **Federal Register** of May 12, 1995 (60 FR 25798) (FRL–4942–7)). Since the passage of the Lautenberg amendments to TSCA in 2016, public interest in information on the status of section 5 cases under EPA review and, in particular, the final determination of such cases, has increased. In an effort to be responsive to the regulated community, the users of this information, and the general public, to comply with the requirements of TSCA, to conserve EPA resources and to streamline the process and make it more timely, EPA is providing information on its website about cases reviewed under the amended TSCA, including the section 5 PMN/SNUN/MCAN and exemption notices received, the date of receipt, the final EPA determination on the notice, and the effective date of EPA's determination for PMN/SNUN/MCAN notices on its website at: *https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices.* This information is updated on a weekly basis.

III. Receipt Reports

For the PMN/SNUN/MCANs that have passed an initial screening by EPA during this period, Table I provides the following information (to the extent that such information is not subject to a CBI claim) on the notices screened by EPA during this period: The EPA case number assigned to the notice that indicates whether the submission is an initial submission, or an amendment, a notation of which version was received, the date the notice was received by EPA, the submitting manufacturer (*i.e.,* domestic producer or importer), the potential uses identified by the manufacturer in the notice, and the chemical substance identity.

As used in each of the tables in this unit, (S) indicates that the information in the table is the specific information provided by the submitter, and (G) indicates that this information in the table is generic information because the specific information provided by the submitter was claimed as CBI. Submissions which are initial submissions will not have a letter following the case number. Submissions which are amendments to previous submissions will have a case number followed by the letter ''A'' (*i.e.,* P–18–1234A). The version column designates submissions in sequence as ''1'', ''2'', ''3'', etc. Note that in some cases, an initial submission is not numbered as version 1; this is because earlier version(s) were rejected as incomplete or invalid submissions. Note also that future versions of the following tables may adjust slightly as the Agency works to automate population of the data in the tables.

TABLE I—PMN/SNUN/MCANS APPROVED * FROM 05/01/2023 TO 05/31/2023

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P–21–0168A	4	05/10/2023	CBI	(G) Colorant	(G) Metal, [heteropolycyclic]-, [[[(hydroxyalkyl)amino]sulfonyl]alkyl] sulfonyl(sulfoalkyl)sulfonyl derivs., ammonium sodium salts.
P–22–0014A	5	05/03/2023	Colonial Chemical, Inc.	(G) Precursor	(G) Sodium bis(chloropropanediol) phosphate.
P–22–0053A	4	05/11/2023	CBI	(G) Additive in agricultural formulations	(S) Ethanol, 2-amino-, compds. with polyethylene glycol hydrogen sulfate C10–16-alkyl ether.
P–22–0078A	5	05/09/2023	CBI	(S) Dispersing agent for pesticide formulators.	(G) Oxirane, 2-methyl-, polymer with oxirane, mono-isoalkyl ethers, phosphates, salt.
P–22–0095A	4	05/05/2023	Locus Fermentation Solutions.	(G) Surfactant for commercial, industrial, consumer applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–22–0096A	4	05/05/2023	Locus Fermentation Solutions.	(G) Surfactant for commercial, industrial, consumer applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–22–0097A	4	05/05/2023	Locus Fermentation Solutions.	(G) Surfactant for commercial, industrial, consumer applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–22–0098A	4	05/05/2023	Locus Fermentation Solutions.	(G) Surfactant for commercial, industrial, consumer applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–22–0099A	4	05/05/2023	Locus Fermentation Solutions.	(G) Surfactant for commercial, industrial, consumer applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–22–0100A	4	05/05/2023	Locus Fermentation Solutions.	(G) Surfactant for commercial, industrial, consumer applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–22–0130A	4	05/17/2023	Integrity Bio-chemical, LLC.	(S) Surfactant—surface tension reducing agent for use in production enhancement in oil wells (industrial), emulsifier, surface reduction household and industrial detergents, emulsifier, wetting agent personal care, cosmetic, and pet care grooming products, wetting agent—agriculture, surfactants—as raw materials for use in the manufacture of industrial products and consumer and household products.	(S) Maltodextrin, octanoate.
P–22–0131A	4	05/17/2023	Integrity Bio-chemical, LLC.	(S) Surfactant—surface tension reducing agent for use in production enhancement in oil wells (industrial), emulsifier, surface reduction household and industrial detergents, emulsifier, wetting agent personal care, cosmetic, and pet care grooming products, wetting agent—agriculture, surfactants—as raw materials for use in the manufacture of industrial products and consumer and household products.	(S) Maltodextrin, hexadecanoate.
P–22–0132A	4	05/17/2023	Integrity Bio-chemical, LLC.	(S) Surfactant—surface tension reducing agent for use in production enhancement in oil wells (industrial), emulsifier, surface reduction household and industrial detergents, emulsifier, wetting agent personal care, cosmetic, and pet care grooming products, wetting agent—agriculture, surfactants—as raw materials for use in the manufacture of industrial products and consumer and household products.	(S) Maltodextrin, decanoate.

TABLE I—PMN/SNUN/MCANS APPROVED * FROM 05/01/2023 TO 05/31/2023—Continued

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P–22–0133A	4	05/17/2023	Integrity Bio-chemical, LLC.	(S) Surfactant—surface tension reducing agent for use in production enhancement in oil wells (industrial), emulsifier, surface reduction household and industrial detergents, emulsifier, wetting agent personal care, cosmetic, and pet care grooming products, wetting agent—agriculture, surfactants—as raw materials for use in the manufacture of industrial products and consumer and household products.	(S) Maltodextrin, octadecanoate.
P–22–0134A	4	05/17/2023	Integrity Bio-chemical, LLC.	(S) Surfactant—surface tension reducing agent for use in production enhancement in oil wells (industrial), emulsifier, surface reduction household and industrial detergents, emulsifier, wetting agent personal care, cosmetic, and pet care grooming products, wetting agent—agriculture, surfactants—as raw materials for use in the manufacture of industrial products and consumer and household products.	(S) Maltodextrin, dodecanoate.
P–22–0135A	4	05/17/2023	Integrity Bio-chemical, LLC.	(S) Surfactant—surface tension reducing agent for use in production enhancement in oil wells (industrial), emulsifier, surface reduction, household and industrial detergents, emulsifier, wetting agent personal care, cosmetic, and pet care grooming products, wetting agent—agriculture, surfactants—as raw materials for use in the manufacture of industrial products and consumer and household products.	(S) Maltodextrin, tetradecanoate.
P–22–0151A	5	05/08/2023	CBI	(G) Surfactant for commercial applications.	(G) Glycolipids, sophorose-contg., yeast-fermented, from glycerides and carbohydrates.
P–23–0070A	3	05/04/2023	CBI	(G) Surfactant for cleaning products, pet shampoo, hand cleansing, laundry, and dishwasher detergent.	(S) Fatty Acids, C8–14, methyl-2-sulfoethyl esters, sodium salts.
P–23–0079	4	05/09/2023	Lawter	(G) Non-reactive resin to improve ink performance Establishes a good flow and disperse pigment and has lithographic properties.	(S) rosin, maleated, polymer with benzoic acid, glycerol, propylene glycol and 3a,4,7,7a-tetrahydro-1,3-isobenzofurandione.
P–23–0105A	3	05/02/2023	Heebut Materials, LLC.	(G) Plastic and rubber additive	(G) Multi-Walled Carbon Nanotube.
P–23–0118	3	04/27/2023	CBI	(G) Reactant	(G) Glycerides from fermentation of genetically modified microorganism, ethoxylated, reaction products with ethanol, polycyclic isocyanate.
P–23–0127	2	05/18/2023	CBI	(S) Ingredient in laundry detergent that is used for degradation of stains on fabric.	(G) Polysaccharide Lyase.
P–23–0128	2	05/17/2023	CBI	(G) Textile softening applications	(S) Fatty acids, C16–18, reaction products with diethanolamine.
P–23–0129	3	05/16/2023	Polymer Additives, Inc.	(G) Used as an intermediate and will be consumed internally by Valtris to make the end product which is intended to market to customers.	(G) Soy or rapeseed fatty acid, benzyl esters.
P–23–0133	1	05/08/2023	CBI	(G) Component in asphalt	(G) Fatty acids reaction products with alcoholamine reaction by-products, salts.
P–23–0135	1	05/12/2023	CBI	(G) Destructive use	(G) Alken-1-ol, 1-acetate.
P–23–0136	1	05/17/2023	CBI	(G) Component in asphalt	(G) Fatty acids, reaction products with hexamethylenediamine and 12-hydroxyoctadecanoic acid.

TABLE I—PMN/SNUN/MCANS APPROVED * FROM 05/01/2023 TO 05/31/2023—Continued

Case No.	Version	Received date	Manufacturer	Use	Chemical substance
P–23–0140 ...	2	05/23/2023	CBI	(G) Additive for consumer and commercial products.	(G) Polysaccharide, (hydroxytrialkylammonio)alkyl ether, chloride.
P–23–0141 ...	1	05/23/2023	Hach Company	(G) Buffer solution for free chlorine determination.	(S) 2-Butenedioic acid (2Z)-, potassium salt (1:?).
SN–16–0013A	5	05/08/2023	CBI	(G) Surfactant	(G) Polyfluorinated alkyl quaternary ammonium chloride.
SN–20–0003A	10	05/08/2023	CBI	(S) An anionic fluorosurfactant used in firefighting foam concentrates such as AFFF (Aqueous Film Forming Foam) and AR–AFFF (Alcohol Resistant Aqueous Fim Forming Foam).	(S) 1-Propanesulfonic acid, 2-methyl-2-[[1-oxo-3-[(3,3,4,4,5,5,6,6,7,7,8,8,8-tridecafluorooctyl)thio]propyl]amino]-, sodium salt (1:1).
SN–21–0011A	3	05/11/2023	CBI	(G) Solvent	(S) 2-Propanol, 1-[bis(2-hydroxyethyl)amino]-.

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs that have passed an initial screening by EPA during this period: The EPA case number assigned to the NOC including whether the submission was an initial or amended submission, the date the NOC was received by EPA, the date of commencement provided by the submitter in the NOC, a notation of the type of amendment (*e.g.,* amendment to generic name, specific name, technical contact information, etc.) and chemical substance identity.

TABLE II—NOCS APPROVED * FROM 05/01/2023 TO 05/31/2023

Case No.	Received date	Commencement date	If amendment, type of amendment	Chemical substance
P–19–0185 ..	05/11/2023	04/03/2023	N	(S) Benzoic acid, 2-chloro-3-methyl-, sodium salt (1:1).
P–95–0224 ..	05/16/2023	04/28/1995	N	(S) 2-propenoic acid,2-methyl-,2-(dimethylamino)ethyl ester, polymer with 1-ethenylhexahydro-2h-azepin-2-one & vinylpyrrolidone.

* The term 'Approved' indicates that a submission has passed a quick initial screen ensuring all required information and documents have been provided with the submission.

In Table III of this unit, EPA provides the following information (to the extent such information is not subject to a CBI claim) on the test information that has been received during this time period: The EPA case number assigned to the test information; the date the test information was received by EPA, the type of test information submitted, and chemical substance identity.

TABLE III—TEST INFORMATION RECEIVED FROM 05/01/2023 TO 05/31/2023

Case No.	Received date	Type of test information	Chemical substance
P–23–0124 ..	05/24/2023	Acute Oral Toxicity/Pathogenicity (OCSPP Test Guideline 885.3050); Bacterial Reverse Mutation Test (OECD Test Guideline 471).	(G) Sulfonium, tricabocyclic-, 2-heteroatom-substituted-(halocarbocyclic)carboxylate (1:1).

If you are interested in information that is not included in these tables, you may contact EPA's technical information contact or general information contact as described under **FOR FURTHER INFORMATION CONTACT** to access additional non-CBI information that may be available.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: June 14, 2023.

Pamela Myrick,

Director, Project Management and Operations Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2023–13165 Filed 6–20–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–ORD–2015–0765; FRL–10949–01–ORD]

EPA Transcriptomic Assessment Product (ETAP) Panel Under the Board of Scientific Counselors (BOSC)—July 2023

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public meeting.

SUMMARY: The U.S. Environmental Protection Agency (EPA) has selected technical experts to serve as Special Government Employees (SGEs) on a review panel under the authority of the Board of Scientific Counselors (BOSC), a federal advisory committee to the Office of Research and Development (ORD). Selected experts will review ORD's draft documents detailing scientific studies supporting the development of transcriptomic-based reference values and their implementation as a new EPA Transcriptomic Assessment Product (ETAP). The ETAP is a proposed ORD assessment product that utilizes a standardized short-term *in vivo* study

design and data analysis procedures to develop transcriptomic-based reference values for data poor chemicals.

DATES: The meeting will be held on Tuesday, July 11, 2023, from 9 a.m. to 5 p.m. and Wednesday, July 12, 2023, from 9 a.m. to 5 p.m. All times noted are Eastern Time and approximate. The meeting may adjourn early if all business is finished. Attendees should register by July 3, 2023, at *https://EPA-ETAP_July_meeting.eventbrite.com.* Requests for making oral presentations at the meeting will be accepted through July 3, 2023. Comments may be submitted through Friday, July 7, 2023.

ADDRESSES: The meeting will be held at the EPA's Research Triangle Park Main Campus Facility, 109 T.W. Alexander Drive, Research Triangle Park, North Carolina 27711. Submit your comments to Docket ID No. EPA–HQ–ORD–2015–0765 by one of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email:* Send comments by electronic mail (email) to: *ORD.Docket@epa.gov,* Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Fax:* Fax comments to: (202) 566–0224, Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Mail:* Send comments by mail to: Board of Scientific Counselors (BOSC) Executive Committee Docket, Mail Code: 2822T, 1301 Constitution Ave. NW, Washington, DC 20004, Attention Docket ID No. EPA–HQ–ORD–2015–0765.
- *Hand Delivery or Courier:* Deliver comments to: EPA Docket Center (EPA/DC), Room 3334, William Jefferson Clinton West Building, 1301 Constitution Ave. NW, Washington, DC, Attention Docket ID No. EPA–HQ–ORD–2015–0765. Note: This is not a mailing address. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov* including any personal information provided unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* website is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about the EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/dockets/.*

FOR FURTHER INFORMATION CONTACT: The Designated Federal Officer (DFO), Tom Tracy, via phone/voicemail at: 919–541–4334; or via email at: *tracy.tom@epa.gov.*

SUPPLEMENTARY INFORMATION:

General Information: The meeting is open to the public. Any member of the public interested in receiving a draft agenda, attending the meeting, or making a presentation at the meeting may contact Tom Tracy, the Designated Federal (DFO), via any of the contact methods listed in the **FOR FURTHER INFORMATION CONTACT** section above. Individuals making an oral presentation will be limited to a total of three minutes.

For security purposes, all attendees must provide their names to the DFO by registering online at *https://EPA-ETAP_July_meeting.eventbrite.com* by July 7, 2023, and must go through a metal detector, sign in with the security desk, and show REAL ID Act-compliant government-issued photo identification to enter the building. Attendees are encouraged to arrive at least 15 minutes prior to the start of the meeting to allow enough time for security screening. Proposed agenda items for the meeting include but are not limited to the following: Review of charge questions, overview of the report outlining scientific studies supporting the development of transcriptomic-based reference values, overview of the report outlining implementation of the proposed EPA Transcriptomic Assessment Product, overview of the socio-economic case study of the proposed EPA Transcriptomic Assessment Product, and subcommittee deliberations.

Information on Services for Individuals with Disabilities: For information on access or services for individuals with disabilities, please contact Tom Tracy (202) 564–6518 or *tracy.tom@epa.gov.* To request accommodation of a disability, please contact Tom Tracy, preferably at least ten days prior to the meeting, to give the EPA as much time as possible to process your request.

Mary Ross,

Director, Office of Science Advisor, Policy, and Engagement.

[FR Doc. 2023–13187 Filed 6–20–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2022–0417; FRL–11041–01–OMS]

Notice of Objections to Chlorpyrifos; Notice of Intent To Cancel Pesticide Registrations; Notice of Public Hearing

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of objections and public hearing.

SUMMARY: The Environmental Protection Agency (EPA or Agency) has received objections and hearing requests in response to its issuance of a Notice of Intent to Cancel registrations of three pesticide products containing the insecticide chlorpyrifos due to the Agency's revocation of all tolerances for chlorpyrifos. The EPA will hold a public hearing to receive evidence related to the proposed cancellation of the chlorpyrifos product registrations.

DATES: A public hearing will be held beginning at 9 a.m. January 8, 2024, and continue as necessary through January 11, 2024.

ADDRESSES: The public hearing will take place in the EPA Administrative Courtroom, EPA East Building, Room 1152, 1201 Constitution Ave. NW, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Mary Angeles, Headquarters Hearing Clerk, Office of Administrative Law Judges, 1200 Pennsylvania Ave. NW, Mail Code 1900R, Washington, DC 20460; telephone number: (202) 564–6281; email address: *angeles.mary@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The regulatory docket for this action, identified by docket identification number EPA–HQ–OPP–2022–0417, is available electronically at *https://www.regulations.gov* or in hard copy at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

The adjudication docket for the proceeding in which petitioners have requested a public hearing, captioned *In re Chlorpyrifos; Notice of Intent to Cancel Pesticide Registrations* and identified by docket number FIFRA–HQ–2023–0001, is available electronically on the website of the EPA's Office of Administrative Law Judges at: *https://yosemite.epa.gov/oarm/alj/alj_web_docket.nsf/Active+Dockets?OpenView.*

II. Public Hearing to be Held on Objections to EPA's Notice of Intent to Cancel Pesticide Registrations

EPA previously published (87 FR 76474, Dec. 14, 2022) a Notice of Intent to Cancel (NOIC) the registration of the following three pesticide products pursuant to its authority under Section 6(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. 136d(b):

- EPA Reg. No. 93182–3 Chlorpyrifos Technical.
- EPA Reg. No. 93182–7 Pilot 4E Chlorpyrifos Agricultural Insecticide.
- EPA Reg. No. 93182–8 Pilot 15G Chlorpyrifos Agricultural Insecticide.

Section 6(b) of FIFRA provides that any person adversely affected by the NOIC may request a hearing on the proposed cancellation within 30 days of the registrant receiving the notice or of the notice's publication, whichever comes later. 7 U.S.C. 136d(d). On January 13, 2023, Gharda Chemicals International, Inc., the registrant for the pesticide products proposed for cancellation, filed an objection to the NOIC and requested a hearing. Also on January 13, 2023, the following 19 entities jointly filed an objection to the NOIC and requested a hearing: Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, American Farm Bureau Federation, American Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, Missouri Soybean Association, Nebraska Soybean Association, South Dakota Soybean Association, North Dakota Soybean Growers Association, National Association of Wheat Growers, Cherry Marketing Institute, Florida Fruit and Vegetable Association, Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America.

The hearing requests commenced a proceeding under Section 6(d) of FIFRA, 7 U.S.C. 136d(d), and the EPA's procedural rules, 40 CFR 164, before the EPA's Office of Administrative Law Judges. The proceeding includes a public hearing that will be held to receive evidence from the parties relevant and material to issues raised by the petitioners' objections to the proposed cancellation of the listed chlorpyrifos pesticide product registrations.

As set forth in **DATES** and **ADDRESSES**, the hearing will begin at 9 a.m. January 8, 2024, and continue as necessary through January 11, 2024, in the EPA Administrative Courtroom, EPA East Building, Room 1152, 1201 Constitution Ave. NW, Washington, DC 20460. Anyone wishing to attend the hearing must notify Mary Angeles, Headquarters Hearing Clerk, Office of Administrative Law Judges, by email no later than January 2, 2024, at the email address listed under **FOR FURTHER INFORMATION CONTACT**. A notice of intent to attend the hearing shall include the individual's name, email address, telephone number, and any organization they represent. On the day of the hearing, attendees must present government-issued identification to enter EPA facilities. Attendees may face further restrictions on entry based on the community level of COVID–19 at the time of the hearing.

Authority: 7 U.S.C. 136 *et seq.;* 40 CFR 164.

Susan Biro,

Chief Administrative Law Judge.

[FR Doc. 2023–13115 Filed 6–20–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OAR–2023–0226; 10963–01–OAR]

Proposed Baseline Approval of the Contact-Handled Transuranic Waste Characterization Program Implemented at the Department of Energy's Argonne National Laboratory, Lemont, Illinois

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability; opening of a 45-day public comment period.

SUMMARY: The Environmental Protection Agency (EPA or the Agency) is announcing the availability of, and soliciting public comments on, the proposed ''baseline'' approval of the contact-handled (CH) transuranic (TRU) debris waste characterization program implemented by the Central Characterization Program (CCP) at the U.S. Department of Energy's (DOE) Argonne National Laboratory in Lemont, IL. The inspections supporting this proposed baseline approval took place from November 15–17, 2022 remotely and on site in Lemont, IL. EPA identified no findings or concerns and proposes to approve the ANL–CCP CH TRU debris waste characterization program. EPA's report documenting the inspection results and proposed baseline approval is available for review in the public docket listed in the **ADDRESSES** section of this document. Until the Agency finalizes its baseline approval decision, the DOE Carlsbad Field Office may not certify ANL–CCP's CH waste characterization program and the site may not ship transuranic waste to the Waste Isolation Pilot Plant for disposal.

DATES: Comments must be received on or before August 7, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2023–0226, to the *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or withdrawn. EPA may publish any comment received to its public docket. Do not electronically submit any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is

restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit: *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Jerry Ellis (202–564–2766) or Edward Feltcorn (202–343–9422). Radiation Protection Division, Center for Waste Management and Regulations, Mail Code 6608T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; email addresses: *ellis.jerry@epa.gov* or *feltcorn.ed@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

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

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

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number EPA–HQ–OAR–2023–0226 and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions: The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

II. Background

The DOE operates the Waste Isolation Pilot Plant (WIPP) facility near Carlsbad in southeastern New Mexico as a deep geologic repository for disposal of defense-related TRU radioactive waste. TRU waste contains more than 100 nanocuries of alpha-emitting TRU isotopes, with half-lives greater than twenty years, per gram of waste. Much of the existing TRU waste, which may also be contaminated with hazardous chemicals, consists of items contaminated during the production of nuclear weapons, such as debris waste (rags, equipment, tools) and solid waste (sludges, soil). Legacy weapons production facilities, including ANL, that have generated TRU waste for shipment to and disposal at WIPP are expected use approved waste characterization programs.

EPA's inspection and approval processes for waste generator sites, including quality assurance and waste characterization programs, are described at 40 CFR 194.8. The Agency has discretion in establishing technical priorities, the ability to accommodate variation in the site's waste characterization capabilities, and flexibility in scheduling site waste characterization inspections.

In accordance with the conditions in the WIPP compliance certification and relevant regulatory provisions, including 40 CFR 194.8, EPA conducts ''baseline'' inspections at waste generator sites, as well as subsequent inspections to confirm continued compliance. As part of a baseline inspection, EPA evaluates each waste characterization process component (equipment, procedures and personnel training and experience) for adequacy and appropriateness in characterizing TRU waste intended for disposal at the WIPP. During the inspection, the site demonstrates its capabilities to characterize TRU waste and its ability to comply with the regulatory limits and tracking requirements under § 194.24. The baseline inspection can result in approval with limitations and conditions or may require follow-up inspection(s) before approval. Within the approval documentation, EPA specifies what subsequent program changes should be reported to the Agency, referred to as Tier 1 (T1) or Tier 2 (T2) changes, depending largely on the anticipated effect of the changes on data quality.

A T1 designation requires that the DOE Carlsbad Field Office (CBFO) provide to EPA documentation on proposed changes to the approved components of an individual site-specific waste characterization process (such as radioassay equipment), which the Agency must approve before the change can be implemented. T2 designated changes are minor changes to the approved components of individual waste characterization processes (such as visual examination procedures) which must also be reported to EPA, but the site may implement such changes without awaiting Agency approval. The inspections conducted to evaluate T1 or T2 changes are under the authority of EPA's WIPP compliance certification conditions and regulations, including 40 CFR 194.8 and 194.24(h). In addition to follow-up inspections, EPA may opt to conduct continued compliance inspections at TRU waste sites with a baseline approval under the authority of the WIPP compliance certification regulations, including § 194.24(h).

In accordance with 40 CFR 194.8, EPA issues a **Federal Register** notice proposing a baseline compliance decision, dockets the inspection report for public review, and seeks public comment on the proposed decision for a minimum period of 45 days. The report describes the waste characterization processes the Agency inspected at the site, as well as their compliance with 40 CFR 194.8 and 194.24 requirements.

A. Proposed Baseline Decision

This notice announces EPA's proposed baseline approval of the CH TRU waste characterization program implemented by the CCP at the DOE's Argonne National Laboratory. In accordance with 40 CFR 194.8(b), EPA conducted Baseline Inspection No. ANL–CCP–CH–Baseline–2022 on November 15–17, 2022, remotely and at Argonne National Laboratory. Upon EPA's final approval, the DOE may emplace ANL–CCP CH TRU waste in the WIPP.

ANL is located in Lemont, Illinois, approximately 25 miles southwest of downtown Chicago. Originally founded

in 1946 as the first national laboratory, ANL grew from conducting initial experiments performed at the University of Chicago to producing plutonium for nuclear weapons. Since then, ANL has supported research and development of nuclear reactors and related systems, materials, and components for civilian and national defense programs. This work historically included development of essentially all domestic reactor systems in use today for isotope production, power generation and naval submarine propulsion, as well as applications for weapons destruction, defense waste management, defense safeguards and security and space propulsion. Currently, ANL is a multi-disciplinary research laboratory that performs basic and applied work in engineering, chemistry, physics, materials and environmental studies. Transuranic waste-generating activities at ANL consist mainly of cleaning out buildings or other areas previously used for a variety of research activities.

EPA is proposing to approve the ANL–CCP waste characterization program implemented to characterize CH TRU waste as documented in the accompanying inspection report. Specifically, the proposed approval includes:

(1) The AK (Acceptable Knowledge) process for ANL CH TRU waste.

(2) The MILCC5 (Mobile ISOCS Large Container Counter No. 5) NDA (Non-destructive assay) system and processes for characterizing CH TRU waste.

(3) The VE (Visual Examination) process to identify waste material parameters and the physical form of CH TRU waste.

Any changes to the waste characterization activities after the date of the baseline inspection must be reported to and, if applicable, approved by EPA according to Table 1 below. All T1 changes must be submitted for approval before their implementation and will be evaluated by EPA. Upon approval, the Agency will post the results of the evaluations in EPA's general WIPP docket at *regulations.gov* (Docket No. EPA–HQ–OAR–2001–0012). ANL–CCP must submit T2 changes at the end of the fiscal year quarter in which they were implemented.

EPA's final approval decision regarding the ANL–CCP CH waste characterization program will be conveyed to the DOE separately by letter following EPA's review of public comments received in response to this notice and proposed approval discussed in the inspection report. This information will be provided through EPA's WIPP docket provided for this action at *regulations.gov* (Docket No. EPA–HQ–OAR–2023–0226), in accordance with 40 CFR 194.8(b)(3).

TABLE 1

[Based on November 15–17, 2022, Baseline Inspection ANL–CCP–CH–Baseline–2022]

Process elements	ANL–CCP CH waste characterization process—T1 changes	ANL–CCP CH waste characterization process—T2 changes *
Acceptable Knowledge (AK).	Implementation of payload management.	Submission of a list of active ANL–CCP CH AK experts and site project managers Notification to EPA upon availability of or substantive modification ** to: • AK summary reports (e.g., CCP–AK–ANLE–002) • AK accuracy reports (annually, at a minimum) • Waste stream profile forms and any associated change notices • Add container memoranda • Site AK procedures requiring CBFO approval *** • Enhanced AK documents such as CCP–TP–005, Attachment 9 forms and AK Assessment, CCE and Basis of Knowledge memoranda (including addition of new figures or attachments).
Nondestructive Assay (NDA).	New equipment or substantive physical modifications ** to approved equipment. Extension of or changes to approved calibration ranges for approved equipment. Measurement geometries other than 55-gallon drums.	Submission of a list of ANL–CCP NDA operators, expert analysts and independent technical reviewers that performed work during the previous quarter Notification to EPA upon substantive modification ** to: • Software for approved equipment • Operating ranges upon CBFO approval • Site NDA procedures requiring CBFO approval. ***
Visual Examination (VE).	VE for non-debris waste ..... VE by any process other than ANL–CCP VE operators observing ANL waste handlers package the waste in a glovebox, as demonstrated during the 2022 baseline inspection.	Submission of a list of ANL–CCP VE operators, VE experts and independent technical reviewers that performed work during the previous quarter Notification to EPA upon substantive modification ** to site VE procedures requiring CBFO approval. ***
Real-time Radiography (RTR).	Implementation of RTR.	

* ANL–CCP will report all T2 changes to EPA every three months.

** ''Substantive modification'' refers to a change with the potential to affect ANL–CCP's CH waste characterization processes or documentation of them, excluding changes that are solely related to the environment, safety and health; nuclear safety; or the Resource Conservation and Recovery Act; or that are editorial in nature or are required to address administrative concerns. EPA may request copies of new references that the DOE adds during a document revision.

*** Site procedures include any procedures used by ANL–CCP personnel that require Carlsbad Field Office (CBFO) approval. This includes ANL–CCP-specific procedures as well as applicable CCP-wide procedure.

III. Availability of the Baseline Inspection Report and Proposed Approval for Public Comment

EPA has placed the report discussing the results of the inspection of the CH TRU waste characterization program at ANL in the public docket as described in the **ADDRESSES** section of this document. In accordance with 40 CFR 194.8, the Agency is providing the public 45 days to comment on this and EPA's proposed decision to approve the ANL–CCP CH TRU waste characterization program. The Agency will accept public comment on this

notice and supplemental information as described in Section I above. At the end of the public comment period, EPA will evaluate all relevant public comments and, as the Agency may deem appropriate and necessary, revise the report and proposed approval or take other appropriate action. If EPA concludes that there are no unresolved issues after the public comment period, the Agency will issue an approval letter and the final report. The letter of approval will authorize the DOE to approve the ANL–CCP waste characterization program implemented to characterize CH TRU waste at ANL.

Information on the approval decision will be filed in the official public docket opened for this action on *www.regulations.gov,* Docket ID No. EPA–HQ–OAR–2023–0226 (as listed in the **ADDRESSES** section of this document).

Jonathan Edwards,

Director, Office of Radiation and Indoor Air.

[FR Doc. 2023–13084 Filed 6–20–23; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Privacy Act of 1974; System of Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is given that the Board of Governors of the Federal Reserve System (Board) proposes to modify an existing system of records entitled BGFRS–20, ''FRB—Survey of Consumer Finances'' to account for changes necessitated by title III of the Foundations for Evidence-Based Policymaking Act of 2018 (Evidence Act). BGFRS–20 is a system of records that covers the Survey of Consumer Finances (SCF), which is a voluntary triennial survey of a representative sample of households that collects information on household finances, income, employment, attitudes and demographics.

DATES: Comments must be received on or before July 21, 2023. This modified system of records will become effective July 21, 2023, without further notice, unless comments dictate otherwise.

The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act, requires a 30-day period prior to publication in the **Federal Register** in which to review the system and to provide any comments to the agency. The public is then given a 30-day period in which to comment, in accordance with 5 U.S.C. 552a(e)(4) and (11).

ADDRESSES: You may submit comments, identified by *BGFRS–20 ''FRB—Survey of Consumer Finances,''* by any of the following methods:

- *Agency Website: https://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include SORN name and number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. during Federal business weekdays.

FOR FURTHER INFORMATION CONTACT: David B. Husband, Senior Counsel, (202) 530–6270, or *david.b.husband@frb.gov;* Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of telephone systems via text telephone (TTY) or any TTY-based Telecommunications Relay Services, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION: The Board is modifying this system of records in response to the passage of title III of the Foundations for Evidence-Based Policymaking Act of 2018 (Evidence Act), which reauthorized and expanded the Confidential Information Protection and Statistical Efficiency Act (CIPSEA). Under CIPSEA as amended, OMB is tasked with creating a Standard Application Process (SAP) to permit entities and individuals to apply to access confidential data assets accessed or acquired under CIPSEA by a statistical agency or unit for the purposes of developing evidence. The Board is therefore amending this SORN to permit access to information in the system of records for the purpose of developing evidence.

Specifically, the Board is adding a new routine use to permit access to protected information (the Survey of Consumer Finances (SCF)) by individuals for the purpose of developing evidence, subject to appropriate control, supervision, and agreement to comply with all relevant legal provisions. These include requirements and standards issued by the Office of Management and Budget (OMB) in accordance with the Standard Application Process laid out in M–23–04 or any successor document. The Board is deleting the existing system-specific routine uses because the routine uses do not describe intended sharing of SCF data but rather describe administrative and technical safeguards and thus has moved that language to the administrative and technical safeguards section. The Board is also revising the administrative, technical, and physical safeguards to reflect that access may be granted to outside entities or individuals for the purposes of developing evidence, subject to appropriate controls, supervision, and agreement to comply with all relevant legal provisions. The Board is also adding Routine Use G to permit sharing with contractors and taking the opportunity to update the system location, the system manager, the authority for maintenance of the system, the purpose of the system, and the policies and practices for storage of records.

The Board is also making technical changes to BGFRS–20 consistent with the template laid out in OMB Circular No. A–108. Accordingly, the Board has made technical corrections and non-substantive language revisions to the following sections: ''Policies and Practices for Storage of Records,'' ''Policies and Practices for Retrieval of Records,'' ''Policies and Practices for Retention and Disposal of Records,'' ''Administrative, Technical and Physical Safeguards,'' ''Record Access Procedures,'' ''Contesting Record Procedures,'' and ''Notification Procedures.'' The Board has also created and populated the following new sections: ''Security Classification'' and ''History.''

SYSTEM NAME AND NUMBER:

BGFRS–20, ''FRB—Survey of Consumer Finances''.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Board of Governors of the Federal Reserve System, 502 S Sharp Street, Baltimore, MD 21201 and U.S. Census

Bureau, Bowie Computer Center, 17101 Melford Boulevard, Bowie, MD 20715. Information is also collected and maintained on behalf of the Board, by National Opinion Research Center at the University of Chicago (NORC) at 1808 Swift Drive, Oak Brook, IL 60523.

SYSTEM MANAGER(S):

Alice H. Volz, Chief, Microeconomics Survey Section, Research and Statistics Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Ave NW, Washington, DC 20551, 202–452–3080, or *alice.h.volz@frb.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 2A and 12A of the Federal Reserve Act (12 U.S.C. 225a and 263) and the Confidential Information Protection and Statistical Efficiency Act of 2018 (44 U.S.C. 3561–3583).

PURPOSE(S) OF THE SYSTEM:

The Microeconomic Survey Section, a recognized statistical unit of the U.S. government, collects and maintains the Survey of Consumer Finance (SCF) records for statistical purposes only in accordance with CIPSEA. The SCF records are used to structure, conduct, and process the SCF. The SCF is a key part of the national statistical system and it provides a basis for a wide variety of government, academic, and other statistical research.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who voluntarily respond to the SCF.

CATEGORIES OF RECORDS IN THE SYSTEM:

NORC, the independent contractor for survey data collection, holds three types of files for the SCF:

(a) Answers given by survey participants in the course of the administration of the survey questionnaire. No identifying information is included in this category.

(b) Answers given by interviewers to questions about the administration, or attempted administration, of the survey interview, and answers given by interviewers to questions about the area around the sample addresses. No identifying information is included in this category.

(c) A control file containing the name, address, other identifying or locating characteristics of members of the survey sample, and technical information describing survey participation.

The Board holds five types of files:

(a) All information included in NORC (a) and NORC (b).

(b) A control file containing general geographic characteristics and technical information describing survey participation. No identifying information is included in this category.

(c) For a part of the survey sample, information from statistical records derived from individual tax returns, which includes a Social Security Number and date of birth, but otherwise contains no other identifying information.

(d) Files of information matched to the survey data by high-level characteristics, such as general location, occupation, banking market, etc. No identifying information is included in this category.

RECORD SOURCE CATEGORIES:

Survey participants provide the information. Survey interviewers provide other information about the steps taken to obtain an interview, the progress of the interview, and the general characteristics of the neighborhood of the sample address. NORC provides technical sample design information for a geographically based part of the survey sample. Statistical records for sample members in the other part of the sample are derived from individual tax returns, which are obtained from the Statistics of Income Division of the Internal Revenue Service.

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

Data collected as a part of the SCF are protected under the Confidential Information Protection and Statistical Efficiency Act of 2018 (CIPSEA). To the extent that disclosure is permitted under CIPSEA, records may be disclosed for general routine uses C, G, I, and J. These general routine uses are located at *https://www.federalreserve.gov/files/SORN-page-general-routine-uses-of-board-systems-of-records.pdf* and are published in the **Federal Register** at 83 FR 43872 at 43873–74 (August 28, 2018). In addition, records may also be disclosed to permit outside entities or individuals to access information for the purposes of developing evidence subject to appropriate controls, supervision, and agreement to comply with all relevant legal provisions. These include requirements and standards issued by the Office of Management and Budget in accordance with the Standard Application Process laid out in M–23–04 or any successor document.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored in electronic form and some historical records are kept in paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records of answers provided by survey participants or interviewers can be retrieved by an identification number (which is generated for administrative purposes). Control file records can be retrieved by all categories of identifying information and above noted identification number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

All input information is retained at least six months after the accuracy of the database has been verified and destroyed when no longer needed for administrative or reference purposes. The final version of the SCF data set is one statistically altered to protect the identity of the survey participants; this data set is placed in the public domain. A data set without these alterations is retained as a restricted version within the Microeconomics Surveys Section at the Federal Reserve Board.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Access to records is limited to those whose official duties, consistent with CIPSEA, require it, or to outside entities or individuals for the purposes of developing evidence, subject to appropriate controls, supervision, and agreement to comply with all relevant legal provisions. All records are secured by such controls as required to comply with CIPSEA. Electronic files are stored on secure servers. The system has the ability to track individual user actions within the system. The audit and accountability controls are based on NIST and Board standards which, in turn, are based on applicable laws and regulations. The controls assist in detecting security violations and performance or other issues in the system. Users are classified into different roles and common access and usage rights are established for each role. User roles are used to delineate between the different types of access requirements such that users are restricted to data that is required in the performance of their duties. Periodic assessments and reviews are conducted to evaluate the overall security of the system and data, determine whether users still require access, have the appropriate role, and whether there have been any unauthorized changes. The survey contractor uses information in the system to devise and execute a plan to request an interview with all members of the survey sample; access to such information is available only to those involved in the sample design and its implementation in the field. Upon

completion of the data collection, access by the contractor is limited to the specific information necessary to complete the initial processing of the data and to respond to requests from survey participants.

RECORD ACCESS PROCEDURES:

The Privacy Act allows individuals the right to access records maintained about them in a Board system of records. Your request for access must: (1) contain a statement that the request is made pursuant to the Privacy Act of 1974; (2) provide either the name of the Board system of records expected to contain the record requested or a concise description of the system of records; (3) provide the information necessary to verify your identity; and (4) provide any other information that may assist in the rapid identification of the record you seek.

The Board handles all Privacy Act requests as both a Privacy Act request and as a Freedom of Information Act request. The Board does not charge fees to a requestor seeking to access or amend his/her Privacy Act records.

You may submit your Privacy Act request to the—Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

You may also submit your Privacy Act request electronically by filling out the required information at: *https://foia.federalreserve.gov/.*

CONTESTING RECORD PROCEDURES:

The Privacy Act allows individuals to seek amendment of information that is erroneous, irrelevant, untimely, or incomplete and is maintained in a system of records that pertains to them. To request an amendment to your record, you should clearly mark the request as a ''Privacy Act Amendment Request.'' You have the burden of proof for demonstrating the appropriateness of the requested amendment and you must provide relevant and convincing evidence in support of your request.

Your request for amendment must: (1) provide the name of the specific Board system of records containing the record you seek to amend; (2) identify the specific portion of the record you seek to amend; (3) describe the nature of and reasons for each requested amendment; (4) explain why you believe the record is not accurate, relevant, timely, or complete; and (5) unless you have already done so in a related Privacy Act request for access or amendment, provide the necessary information to verify your identity.

NOTIFICATION PROCEDURES:

Same as ''Access procedures'' above. You may also follow this procedure in order to request an accounting of previous disclosures of records pertaining to you as provided for by 5 U.S.C. 552a(c).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

This SORN was previously published in the **Federal Register** at 73 FR 24984 at 24987 (May 6, 2008). The SORN was also amended to incorporate two new routine uses required by OMB at 83 FR 43872 (August 28, 2018).

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Secretary of the Board.

[FR Doc. 2023–13091 Filed 6–20–23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Privacy Act of 1974; System of Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is given that the Board of Governors of the Federal Reserve System (Board) proposes to establish a new system of records, entitled BGFRS–45, ''FRB—Debt Collection Records.'' BGFRS–45 includes records concerning debts owed to the Board or to the United States (including but not limited to restitution collectible by the United States) that arise out of the Board's operations or other activities, and records concerning the Board's efforts to collect these debts. The Board will create, collect, and maintain these records to support its debt collection efforts, and to facilitate compliance with statutory and regulatory requirements.

DATES: Comments must be received on or before July 21, 2023. This new system of records will become effective July 21, 2023, without further notice, unless comments dictate otherwise.

The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act, requires a 30-day period prior to publication in the **Federal Register** in which to review the system and to provide any comments to the agency. The public is then given a 30-day period in which to comment, in accordance with 5 U.S.C. 552a(e)(4) and (11).

ADDRESSES: You may submit comments, identified by *BGFRS–45 ''FRB—Debt Collection Records,''* by any of the following methods:

- *Agency Website: https://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include SORN name and number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. during Federal business weekdays.

FOR FURTHER INFORMATION CONTACT: David B. Husband, Senior Counsel, (202) 530–6270, or *david.b.husband@frb.gov;* Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of telephone systems via text telephone (TTY) or any TTY-based Telecommunications Relay Services, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION: In 2019, the Board adopted regulations providing for the collection of debts owing to the United States arising out of the Board's operations or its enforcement and other regulatory activities. *See* 84 FR 15502 (April 16, 2019) and codified at 12 CFR part 267, ''Procedures for Debt Collection.'' Prior to the adoption of these regulations, the Board's debt collection processes focused on salary offset from current Board employees and were addressed via the Board's payroll processes. Building upon this adoption of new procedures and after reviewing the Board's existing debt collection processes, the Board has determined to expand its collection processes beyond current employees, to include persons indebted either to the Board or the United States (including but not limited to restitution or

disgorgement debts collectible by the United States) in connection with the Board's operations or activities. The Board is therefore proposing to establish a new system of records for the maintenance and operation of the Board's expanded debt collection activities.

SYSTEM NAME AND NUMBER:

BGFRS–45, ''FRB—Debt Collection Records''.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

SYSTEM MANAGER(S):

Cynthia Francis, Senior Manager—Accounting, Division of Financial Management, (202) 452–2386, or *cynthia.h.francis@frb.gov* and Joshua Chadwick, Senior Special Counsel—Enforcement and Litigation, Legal Division, (202) 263–4835, or *joshua.p.chadwick@frb.gov.* Both managers are located at the Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 10 and 11 of the Federal Reserve Act (12 U.S.C. 244 and 248), 12 CFR part 267, Federal Debt Collection Improvement Act, 5 U.S.C. 5514, 31 U.S.C. 3711–3720D, and Executive Order 9397.

PURPOSE(S) OF THE SYSTEM:

The Board maintains these records for debt collection purposes to reduce the debts owed to the Board arising out of its operations and activities, to protect the programmatic and financial integrity of the Board's operations and activities, and to facilitate compliance with regulatory and statutory requirements.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons indebted to the Board or the United States (including but not limited to restitution or disgorgement debts collectible by the United States) in connection with the Board's operations or activities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records documenting the basis for the person's debts; the amount of the debt, payments on the debt (potentially including associated banking information), and accruals on the person's debts; and internal and external correspondence concerning the person's debts. Sensitive personally identifying information in the system could include debtors' Social Security or tax identification numbers, dates of birth, bank account information, tax records, financial information, educational records, insurance records, payroll records, and pension records.

RECORD SOURCE CATEGORIES:

Information is provided by other Board components whose activities are connected to the debt, the Board's payroll department, debtors, third parties holding information about debtors, materials produced in litigation, public records and databases compiling information from such records, and the U.S. Treasury Department or other Federal agencies.

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

General routine uses A, B, C, D, E, F, G, H, I, and J apply to this system. These general routine uses are located at *https://www.federalreserve.gov/files/SORN-page-general-routine-uses-of-board-systems-of-records.pdf* and are published in the **Federal Register** at 83 FR 43872 at 43873–74 (August 28, 2018). Records may also be used:

1. to disclose information to the U.S. Social Security Administration to report wages paid and FICA or other tax deductions;

2. to disclose information to the U.S. Internal Revenue Service and to state, local, tribal, and territorial governments for tax purposes;

3. to disclose information to the U.S. Office of Personnel Management in connection with programs administered by that office;

4. to disclose information to an employee, agent, contractor, or administrator of any Federal Reserve System, or Federal Government employee benefit or savings plan, any information necessary to carry out any function authorized under such plan, or to carry out the coordination or audit of such plan;

5. to disclose information to a Federal agency, Federal court, or a debtor's obligor for the purpose of collecting a debt owed to the Federal Government (including restitution collectible by the United States) through administrative or salary offset or the offset of tax refunds or other Federal payments, or by other legally authorized means;

6. to disclose relevant information to other Federal agencies conducting computer matching programs to eliminate fraud and abuse and to detect unauthorized overpayments made to individuals.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper records in this system are stored in locked file cabinets with access limited to staff with a need to know. Electronic records are stored on a secure server with access limited to staff with a need to know.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records maintained can be retrieved by name.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records relating to a debt will be retained for at least six years after final payment of the debt.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records are secured by lock and key and electronic files are stored on secure servers. The system has the ability to track individual user actions within the system. The audit and accountability controls are based on NIST and Board standards which, in turn, are based on applicable laws and regulations. The controls assist in detecting security violations and performance or other issues in the system. Access to the system is restricted to authorized users who require access for official business purposes. Users are classified into different roles and common access and usage rights are established for each role. User roles are used to delineate between the different types of access requirements such that users are restricted to data that is required in the performance of their duties. Periodic assessments and reviews are conducted to determine whether users still require access and have the appropriate role, and whether there have been any unauthorized changes.

RECORD ACCESS PROCEDURES:

The Privacy Act allows individuals the right to access records maintained about them in a Board system of records. Your request for access must: (1) contain a statement that the request is made pursuant to the Privacy Act of 1974; (2) provide either the name of the Board system of records expected to contain the record requested or a concise description of the system of records; (3) provide the information necessary to verify your identity; and (4) provide any other information that may assist in the rapid identification of the record you seek.

Current or former Board employees may make a request for access by contacting the Board office that maintains the record. The Board

handles all Privacy Act requests as both a Privacy Act request and as a Freedom of Information Act request. The Board does not charge fees to a requestor seeking to access or amend his/her Privacy Act records.

You may submit your Privacy Act request to the—Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

You may also submit your Privacy Act request electronically by filling out the required information at: *https://foia.federalreserve.gov/.*

CONTESTING RECORD PROCEDURES:

The Privacy Act allows individuals to seek amendment of information that is erroneous, irrelevant, untimely, or incomplete and is maintained in a system of records that pertains to them. To request an amendment to your record, you should clearly mark the request as a ''Privacy Act Amendment Request.'' You have the burden of proof for demonstrating the appropriateness of the requested amendment and you must provide relevant and convincing evidence in support of your request.

Your request for amendment must: (1) provide the name of the specific Board system of records containing the record you seek to amend; (2) identify the specific portion of the record you seek to amend; (3) describe the nature of and reasons for each requested amendment; (4) explain why you believe the record is not accurate, relevant, timely, or complete; and (5) unless you have already done so in a related Privacy Act request for access or amendment, provide the necessary information to verify your identity.

NOTIFICATION PROCEDURES:

Same as ''Access procedures'' above. You may also follow this procedure in order to request an accounting of previous disclosures of records pertaining to you as provided for by 5 U.S.C. 552a(c).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Secretary of the Board.

[FR Doc. 2023–13092 Filed 6–20–23; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Privacy Act of 1974; System of Records

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, notice is given that the Board of Governors of the Federal Reserve System (Board) proposes to modify an existing system of records, entitled BGFRS–9, ''FRB—Supplier Files.'' BGFRS–9 includes the supplier information form, W–9 tax identification document, and any other information pertaining to a supplier's status.

DATES: Comments must be received on or before July 21, 2023. This new system of records will become effective July 21, 2023, without further notice, unless comments dictate otherwise.

The Office of Management and Budget (OMB), which has oversight responsibility under the Privacy Act, requires a 30-day period prior to publication in the **Federal Register** in which to review the system and to provide any comments to the agency. The public is then given a 30-day period in which to comment, in accordance with 5 U.S.C. 552a(e)(4) and (11).

ADDRESSES: You may submit comments, identified by *BGFRS–9 ''FRB—Supplier Files,''* by any of the following methods:

- *Agency Website: https://www.federalreserve.gov.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include SORN name and number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann E. Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. during Federal business weekdays.

FOR FURTHER INFORMATION CONTACT: David B. Husband, Senior Counsel, (202) 530–6270, or *david.b.husband@frb.gov;* Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. For users of telephone systems via text telephone (TTY) or any TTY-based Telecommunications Relay Services, please call 711 from any telephone, anywhere in the United States.

SUPPLEMENTARY INFORMATION: The Board is replacing its enterprise business system (EBS) and is making minor modifications to the system. The Board is modifying the records source categories section to reflect that the new system will no longer store information related to travel expenses and updating the category of records section to explicitly include wire bank information. The Board is also updating the records retention section to reflect that the records can be destroyed six years after final payment or cancellation, but longer retention is authorized if required for business use. Finally, the Board is also making minor updates to the system manager and system location as well as the storage and retrieval of records sections. The Board is also updating the ''Routine Uses'' section to incorporate a link to the Board's general routine uses. The Board is not amending or establishing any new routine uses.

The Board is also making technical changes to BGFRS–9 consistent with the template laid out in OMB Circular No. A–108. Accordingly, the Board has made technical corrections and non-substantive revisions to the following categories: ''Policies and Practices for Storage of Records,'' ''Policies and Practices for Retrieval of Records,'' ''Policies and Practices for Retention and Disposal of Records,'' ''Administrative, Technical and Physical Safeguards,'' ''Record Access Procedures,'' ''Contesting Record Procedures,'' and ''Notification Procedures.'' The Board has also added new fields for ''Security Classification'' and ''History.''

SYSTEM NAME AND NUMBER:

BGFRS–9 ''FRB—Supplier Files''.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551. Some data will be hosted by third-party vendors, in government clouds managed by Workday and Coupa, located at 6110, Stoneridge Mall Road, Pleasanton, CA 94588 and 1855 S

Grant Street, San Mateo, CA 94402 respectively.

SYSTEM MANAGER(S):

Stefani Nick, Manager Procurement Policy and Compliance, Division of Financial Management, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551, 202–452–2509 or *stefani.m.nick@frb.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sections 10 and 11 of the Federal Reserve Act (12 U.S.C. 244 and 248), and Executive Order 9397.

PURPOSE(S) OF THE SYSTEM:

These records are collected and maintained to assist the Board in tracking and paying suppliers and completing reports for the Internal Revenue Service.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who supply contracted goods and/or services to the Board, speakers, applicants, or other individuals to whom the Board provides reimbursement for fees, travel or other expenses (collectively referred to as ''suppliers'').

CATEGORIES OF RECORDS IN THE SYSTEM:

Supplier Information Form, W–9 Tax Identification Document, and any other information pertaining to the supplier's status. The Supplier Information Form contains the following information: individual's name, social security number or taxpayer identification number, address, telephone/fax numbers, email address, contact name/telephone number, supplier classification (such as vendor, speaker, or applicant), and EFT or wire bank information.

RECORD SOURCE CATEGORIES:

Information is provided by the individual to whom the record pertains and information from contract documents.

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

General routine uses A, C, D, G, I, and J, apply to this system. These general routine uses are located at *https://www.federalreserve.gov/files/SORN-page-general-routine-uses-of-board-systems-of-records.pdf* and are published in the **Federal Register** at 83 FR 43872 at 43873–74 (August 28, 2018). Records may also be used to disclose information to the Internal Revenue Service to report payments that may be considered income to the suppliers.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper records in this system are stored in locked file cabinets with access limited to staff with a need to know. Electronic records are stored on a secure server with access limited to staff with a need to know.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Paper records can be retrieved by a supplier's name. Electronic records can be retrieved by name, social security number, taxpayer identification number, purchase order number, or other identifier.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Destroy six years after final payment or cancellation, but longer retention is authorized if required for business use. The final payment of cancellation is based on the final payment of the contract, and not each individual payment to the vendor.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records are secured by lock and key and electronic files are stored on secure servers. The system has the ability to track individual user actions within the system. The audit and accountability controls are based on NIST and Board standards which, in turn, are based on applicable laws and regulations. The controls assist in detecting security violations and performance or other issues in the system. Access to the system is restricted to authorized users within the Board who require access for official business purposes. Users are classified into different roles and common access and usage rights are established for each role. User roles are used to delineate between the different types of access requirements such that users are restricted to data that is required in the performance of their duties. Periodic assessments and reviews are conducted to determine whether users still require access, have the appropriate role, and whether there have been any unauthorized changes.

RECORD ACCESS PROCEDURES:

The Privacy Act allows individuals the right to access records maintained about them in a Board system of records. Your request for access must: (1) contain a statement that the request is made pursuant to the Privacy Act of 1974; (2) provide either the name of the Board system of records expected to contain the record requested or a concise description of the system of records; (3) provide the information necessary to verify your identity; and (4) provide any other information that may assist in the rapid identification of the record you seek.

The Board handles all Privacy Act requests as both a Privacy Act request and as a Freedom of Information Act request. The Board does not charge fees to a requestor seeking to access or amend his/her Privacy Act records.

You may submit your Privacy Act request to the—Secretary of the Board, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

You may also submit your Privacy Act request electronically by filling out the required information at: *https://foia.federalreserve.gov/.*

CONTESTING RECORD PROCEDURES:

The Privacy Act allows individuals to seek amendment of information that is erroneous, irrelevant, untimely, or incomplete and is maintained in a system of records that pertains to them. To request an amendment to your record, you should clearly mark the request as a ''Privacy Act Amendment Request.'' You have the burden of proof for demonstrating the appropriateness of the requested amendment and you must provide relevant and convincing evidence in support of your request.

Your request for amendment must: (1) provide the name of the specific Board system of records containing the record you seek to amend; (2) identify the specific portion of the record you seek to amend; (3) describe the nature of and reasons for each requested amendment; (4) explain why you believe the record is not accurate, relevant, timely, or complete; and (5) unless you have already done so in a related Privacy Act request for access or amendment, provide the necessary information to verify your identity.

NOTIFICATION PROCEDURES:

Same as ''Access procedures'' above. You may also follow this procedure in order to request an accounting of previous disclosures of records pertaining to you as provided for by 5 U.S.C. 552a(c).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

This SORN was previously published in the **Federal Register** at 73 FR 24984 at 24994–995 (May 6, 2008). The SORN was also amended to incorporate two

new routine uses required by OMB at 83 FR 43872 (August 28, 2018).

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2023–13090 Filed 6–20–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10418]

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 August 21, 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–10418 Medical Loss Ratio Annual Reports, MLR Notices, and Recordkeeping Requirements

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Revision of a currently approved collection of information; *Title of Information Collection:* Medical Loss Ratio Annual Reports, MLR Notices, and Recordkeeping Requirements; *Use:* Under section 2718 of the Affordable Care Act and implementing regulation at 45 CFR part 158, a health insurance issuer (issuer) offering group or individual health insurance coverage must submit a report to the Secretary concerning the amount the issuer spends each year on claims, quality improvement expenses, non-claims costs, Federal and State taxes and licensing and regulatory fees, the amount of earned premium, and beginning with the 2014 reporting year, the amounts related to the transitional reinsurance and risk adjustment programs established under sections 1341 and 1343, respectively, of the Affordable Care Act. An issuer must provide an annual rebate if the amount it spends on certain costs compared to its premium revenue (excluding Federal and States taxes and licensing and regulatory fees) does not meet a certain ratio, referred to as the medical loss ratio (MLR). Each issuer is required to submit annually MLR data, including information about any rebates it must provide, on a form prescribed by CMS, for each State in which the issuer conducts business. Each issuer is also required to provide a rebate notice to each policyholder that is owed a rebate and each subscriber of policyholders that are owed a rebate for any given MLR reporting year. Additionally, each issuer is required to maintain for a period of seven years all documents, records and other evidence that support the data included in each issuer's annual report to the Secretary.

Based upon CMS' experience in the MLR data collection and evaluation process, CMS is updating its annual burden hour estimates to reflect the actual numbers of submissions, rebates and rebate notices. The 2022 MLR Reporting Form and Instructions reflect changes for the 2020 reporting year and beyond. For 2022, it is expected that issuers will submit fewer reports and on average, send fewer notices and rebate checks in the mail to policyholders and subscribers, which will reduce burden on issuers. It is estimated that there will be a net decrease in total burden from 232,427 to 170,091. *Form Number:* CMS–10418 (OMB Control Number: 0938–1164); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 480; *Number of Responses:* 1,677 *Total Annual Hours:* 170,091. (For policy questions regarding this collection contact Jiyun Lim at 301–492–4172.)

Dated: June 14, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023–13103 Filed 6–20–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–D–2275]

Oncology Drug Products Used With Certain In Vitro Diagnostic Tests: Pilot Program; Guidance for Industry, Clinical Laboratories, and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of a final guidance for industry, clinical laboratories, and FDA staff entitled ''Oncology Drug Products Used with Certain In Vitro Diagnostic Tests: Pilot Program.'' FDA is issuing this guidance to announce and describe FDA's voluntary pilot program for certain oncology drug products regulated by FDA's Center for Drug Evaluation and Research (CDER) used with certain in vitro diagnostic tests. FDA intends to pilot a new approach to provide greater transparency regarding performance characteristics that certain tests for oncology biomarkers should meet. Through this transparency FDA seeks to support better and more consistent performance of certain laboratory-developed tests (LDTs) used to identify patients for treatment with certain oncology drug products, resulting in better drug selection and improved care for patients with cancer. The guidance has been implemented without prior comment, but remains subject to comment in accordance with the Agency's good guidance practices.

DATES: The announcement of the guidance is published in the **Federal Register** on June 21, 2023.

ADDRESSES: You may submit either electronic or written comments on Agency guidances at any time as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–D–2275 for ''Oncology Drug Products Used with Certain In Vitro Diagnostic Tests: Pilot Program.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for single copies of the guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002; or to the Office of Policy, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

FOR FURTHER INFORMATION CONTACT: Brittany Schuck, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5422, Silver Spring, MD 20993–0002, 301–796–5199 or Reena Philip, Oncology Center of Excellence, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 301–796–6179.

SUPPLEMENTARY INFORMATION:

I. Background

We are announcing the availability of a guidance for industry, clinical laboratories, and FDA staff entitled ''Oncology Drug Products Used with Certain In Vitro Diagnostic Tests: Pilot Program.'' We are issuing this guidance consistent with our good guidance practices (GGP) regulation (§ 10.115 (21 CFR 10.115)). We are implementing this guidance without prior public comment because we have determined that prior public participation is not feasible or appropriate (§ 10.115(g)(2)). The pilot is intended to provide greater transparency regarding performance characteristics that certain tests for oncology biomarkers should meet. Although this guidance document is being implemented without prior public comment, it remains subject to comment in accordance with FDA's GGP regulation.

An in vitro companion diagnostic test (also known as an in vitro companion diagnostic device) provides information that is essential for the safe and effective use of a corresponding therapeutic product. FDA is issuing this guidance to announce and describe FDA's voluntary pilot program for drug product sponsors with regard to certain CDER-regulated oncology drug products for which FDA determines that use of an in vitro diagnostic test is needed to identify the intended patient population, and corresponding clinical trial assay(s) that use the same technology as a previously FDA-authorized companion diagnostic test for any indication for which there is a well-validated reference method, well-validated comparator method, and/or well-characterized materials that can be used to support test accuracy. This pilot is intended for tests for which FDA believes it is appropriate to extrapolate clinical validity of the test(s) used to select patients in a drug trial to other tests of the same type with similar analytical performance. In this pilot, FDA will evaluate no more than nine sponsors for possible acceptance into the pilot based on evaluation of the factors described in the guidance. Sponsors who are interested in being considered for the voluntary pilot program and who affirm their commitment to provide information set forth in the guidance if FDA subsequently requests that they do so should submit correspondence titled ''Statement of interest in participation in the Oncology Drug Products Used with Certain In Vitro Diagnostic Tests: Pilot Program'' to their Investigational New Drug (IND) applications, New Drug Applications (NDA), or Biologic License Applications (BLA), as appropriate.

Under this pilot, if FDA concludes that the drug product meets the applicable standards for its approval, FDA intends to rely on the same pivotal clinical trial(s) that support approval of the drug product to establish the clinical validity for the clinical trial assays (CTAs) used in those trial(s). Further, FDA intends to recommend minimum analytical performance characteristics for other tests that, when established through properly conducted validation studies, FDA believes would support extrapolation of the clinical validity of the CTA(s) to additional tests of the same type. If FDA approves an oncology drug product enrolled in this pilot program, FDA intends to recommend minimum performance characteristics for in vitro diagnostic tests to identify patients for treatment with those drug products, and make this information publicly available on FDA's website.

The guidance represents the current thinking of FDA on ''Oncology Drug Products Used with Certain In Vitro Diagnostic Tests: Pilot Program.'' It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

II. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *https://www.fda.gov/medical-devices/device-advice-comprehensive-regulatory-assistance/guidance-documents-medical-devices-and-radiation-emitting-products.* This guidance document is also available at *https://www.regulations.gov, https://www.fda.gov/regulatory-information/search-fda-guidance-documents,* or *https://www.fda.gov/drugs/guidance-compliance-regulatory-information/guidances-drugs.* Persons unable to download an electronic copy of ''Oncology Drug Products Used with Certain In Vitro Diagnostic Tests: Pilot Program'' may send an email request to *CDRH-Guidance@fda.hhs.gov* to receive an electronic copy of the document. Please use the document number 22001 and complete title to identify the guidance you are requesting.

III. Paperwork Reduction Act of 1995

For this pilot, FDA will request information from no more than 9 sponsors. Initial statements of interest from sponsors interested in being evaluated for participation in the pilot, as described in the guidance, are not ''information'' in accordance with 5 CFR 1320.3(h)(1). Thus, this guidance contains no new collection of information.

While this guidance contains no new collection of information, to the extent the guidance does refer to previously approved FDA collections of information, clearance by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3521) is not required for this guidance. The previously approved collections of information are subject to review by OMB under the PRA. The collections of information in the following FDA regulations, guidance, and forms have been approved by OMB as listed in the following table:

21 CFR part; guidance; or FDA form	Topic	OMB control No.
807, subpart E	Premarket notification	0910–0120
814, subparts A through E	Premarket approval	0910–0231
860, subpart D	De Novo classification process	0910–0844
312	Investigational new drug applications	0910–0014
314	New drug applications	0910–0001
601	Biologic license applications	0910–0338

Dated: June 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13134 Filed 6–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–2687]

Daylen Diaz: Final Debarment Order

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing an order under the Federal Food, Drug, and Cosmetic Act (FD&C Act) permanently debarring Daylen Diaz from providing services in any capacity to a person that has an approved or pending drug product application. FDA bases this order on a finding that Daylen Diaz was convicted of a felony under Federal law for conduct relating to the development or approval, including the process for development or approval, of any drug product under the FD&C Act. Daylen Diaz was given notice of the proposed permanent debarment and was given an opportunity to request a hearing to show why she should not be debarred. As of February 26, 2023 (30 days after receipt of the notice), Ms. Diaz had not responded. Ms. Diaz' failure to respond and request a hearing within the prescribed timeframe constitutes a waiver of her right to a hearing concerning this action.

DATES: This order is applicable June 21, 2023.

ADDRESSES: Any application by Daylen Diaz for special termination of debarment under section 306(d)(4) of the FD&C Act (21 U.S.C. 335a(d)(4)) may be submitted as follows:

Electronic Submissions

■ *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. An application submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your application will be made public, you are solely responsible for ensuring that your application does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your application, that information will be posted on *https://www.regulations.gov*.

■ If you want to submit an application with confidential information that you do not wish to be made available to the public, submit the application as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

■ *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

■ For a written/paper application submitted to the Dockets Management Staff, FDA will post your application, as well as any attachments, except for information submitted, marked, and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All applications must include the Docket No. FDA–2022–N–2687. Received applications will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

■ Confidential Submissions—To submit an application with confidential information that you do not wish to be made publicly available, submit your application only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of your application. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your application and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf*.

Docket: For access to the docket, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852 between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Jaime Espinosa, Division of Compliance and Enforcement, Office of Policy, Compliance, and Enforcement, Office of Regulatory Affairs, Food and Drug Administration, 240–402–8743, or *debarments@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a)(2)(A) of the FD&C Act (21 U.S.C. 335a(a)(2)(A)) requires debarment of an individual from providing services in any capacity to a person that has an approved or pending drug product application if FDA finds that the individual has been convicted of a felony under Federal law for conduct relating to the development or approval, including the process of development or approval, of any drug product under the FD&C Act. On October 18, 2022, Ms. Diaz was convicted as defined in section 306(l)(1) of the FD&C Act in the U.S. District Court for the Southern District of Florida, Miami Division, when the court accepted her plea of guilty and entered judgment against her for one count of conspiracy to commit mail fraud and wire fraud in violation of 18 U.S.C. 1349.

The factual basis for this conviction is as follows: As contained in the Information, entered into the docket on March 16, 2021, and the Factual Proffer in support of Ms. Diaz' guilty plea, entered into the docket on August 8, 2022, both from her case, Ms. Diaz was a research assistant and assistant study coordinator employed at Tellus Clinical Research, Inc. (Tellus). Tellus was a medical research clinic that conducted clinical trials on behalf of pharmaceutical company sponsors. Sponsor 1 was a drug manufacturer that developed drugs for commercial distribution in the United States. Contract Research Organization 1 (CRO 1) was an organization that hired clinical investigators and managed clinical trials for sponsors. On or about December 23, 2013, CRO 1 entered into a contract with Tellus and one of Ms.

Diaz' co-conspirators in which Tellus and Ms. Diaz' co-conspirator agreed to serve as study site and clinical investigator, respectively, for a clinical trial initiated by sponsor 1 (IBS study 1) designed to evaluate a drug intended to treat irritable bowel syndrome in female patients. On or about September 5, 2014, CRO 1 entered into a contract to conduct a second clinical trial initiated by sponsor 1 (IBS study 2), which evaluated the same drug in the same population over the course of 52 weeks. Sponsor 2 was a drug manufacturer that developed drugs for commercial distribution in the United States. On or about January 5, 2015, sponsor 2 entered into a contract with Tellus and one of Ms. Diaz' co-conspirators in which they agreed to serve as study site and clinical investigator, respectively, for a clinical trial initiated by sponsor 2 (the diabetes study). The diabetes study was designed to evaluate the safety and efficacy of an experimental injectable drug intended to treat subjects with kidney damage from diabetes.

Ms. Diaz served as an assistant study coordinator for IBS study 1, IBS study 2, and the diabetes study (collectively, the ''Studies''). As an assistant study coordinator for the Studies, Ms. Diaz was responsible for administering procedures to subjects in the Studies and preparing honest and accurate written records, including records known as ''case histories,'' describing the participation of subjects in the Studies. Ms. Diaz along with her co-conspirators caused false information to be entered in subject case histories to make it appear that subjects had, among other things, satisfied the eligibility criteria to participate in the Studies, provided informed consent to participate in the Studies, received physical examinations, received or been administered the investigational drug for the Studies, and received payments for visits to Tellus when, in truth and in fact, and as Ms. Diaz well knew, such events had not occurred. For example, on or about April 6, 2015, Ms. Diaz initialed case history documentation for a study subject, K.L., falsely representing that K.L. was a study subject participating in IBS study 2, that K.L. visited Tellus, that Ms. Diaz obtained K.L.'s urine and blood for analysis as required by the protocol governing IBS study 2, that Ms. Diaz had performed an electrocardiogram on K.L., and that Ms. Diaz dispensed IBS study 2 medication to K.L. In truth and in fact, Ms. Diaz knew that K.L. was not participating in IBS study 2 and these representations were false. In addition, Ms. Diaz knew that IBS study 2 subjects were required to make daily phone calls to an ''e-diary'' (a toll-free number maintained by a third party) and report their personal experience with the IBS study 2 drug. In furtherance of the conspiracy, Ms. Diaz along with her co-conspirators knowingly placed telephone calls to the e-diary system, using the subjects' individual PIN numbers, for purposes of reporting fabricated data on behalf of IBS study 2 subjects. Ms. Diaz along with her co-conspirators placed these fraudulent telephone calls on behalf of more than 10 subjects in IBS study 2.

Ms. Diaz also participated in falsifying and fabricating data in connection with the diabetes study. For example, on May 13, 2015, Ms. Diaz initialed case history documentation for subject S.D., falsely representing that S.D. has visited Tellus, that Ms. Diaz trained S.D. on the appropriate handling of the investigational drug, and that S.D. self-administered the study drug by injection. In truth and in fact, Ms. Diaz knew that S.D. had not visited Tellus or received the study drug, and these representations were false. Ms. Diaz, along with her co-conspirators, also enrolled subjects in the diabetes study who did not meet the eligibility criteria or participate in the trial. Further, Ms. Diaz observed her co-conspirator dispense diabetes study medication into the garbage, but falsely represent in case history documentation that the medication had been administered to study subject S.D.

As a result of this conviction, FDA sent Ms. Diaz by certified mail on January 20, 2023, a notice proposing to permanently debar her from providing services in any capacity to a person that has an approved or pending drug product application. The proposal was based on a finding, under section 306(a)(2)(A) of the FD&C Act, that Ms. Diaz was convicted, as set forth in section 306(l)(1) of the FD&C Act, of a felony under Federal law for conduct relating to the development or approval, including the process of development or approval, of any drug product under the FD&C Act. The proposal also offered Ms. Diaz an opportunity to request a hearing, providing her 30 days from the date of receipt of the letter in which to file the request, and advised her that failure to request a hearing constituted an election not to use the opportunity for a hearing and a waiver of any contentions concerning this action. Ms. Diaz received the proposal on January 27, 2023. She did not request a hearing within the timeframe prescribed by regulation and has, therefore, waived her opportunity for a hearing and any contentions concerning her debarment (21 CFR part 12).

II. Findings and Order

Therefore, the Assistant Commissioner, Office of Human and Animal Food Operations, under section 306(a)(2)(A) of the FD&C Act, under authority delegated to the Assistant Commissioner, finds that Ms. Diaz has been convicted of a felony under Federal law for conduct relating to the development or approval, including the process of development or approval, of any drug product under the FD&C Act.

As a result of the foregoing finding, Ms. Diaz is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application, effective (see **DATES**) (see sections 306(a)(2)(A) and 306(c)(2)(A)(ii) of the FD&C Act). Any person with an approved or pending drug product application who knowingly employs or retains as a consultant or contractor, or otherwise uses the services of Ms. Diaz in any capacity during her debarment, will be subject to civil money penalties (section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6))). If Ms. Diaz provides services in any capacity to a person with an approved or pending drug product application during her period of debarment, she will be subject to civil money penalties (section 307(a)(7) of the FD&C Act (21 U.S.C. 335b(a)(7))). In addition, FDA will not accept or review any abbreviated new drug application from Ms. Diaz during her period of debarment, other than in connection with an audit under section 306 of the FD&C Act (section 306(c)(1)(B) of the FD&C Act (21 U.S.C. 335a(c)(1)(B))). Note that, for purposes of sections 306 and 307 of the FD&C Act (21 U.S.C. 335a and 335b), a ''drug product'' is defined as a ''drug subject to regulation under section 505, 512, or 802 of this Act (21 U.S.C. 355, 360b, 382) or under section 351 of the Public Health Service Act (42 U.S.C. 262)'' (section 201(dd) of the FD&C Act (21 U.S.C. 321(dd))).

Dated: June 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13135 Filed 6–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0008]

Circulatory System Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or Agency) announces a forthcoming public advisory committee meeting of the Circulatory System Devices Panel of the Medical Devices Advisory Committee. The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues. The meeting will be open to the public.

DATES: The meeting will take place virtually on August 22 and 23, 2023, from 9 a.m. to 6 p.m. Eastern Time.

ADDRESSES: All meeting participants will be heard, viewed, captioned, and recorded for this advisory committee meeting via an online teleconferencing and/or video conferencing platform. Answers to commonly asked questions, including information regarding special accommodations due to a disability, may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FOR FURTHER INFORMATION CONTACT: Jarrod Collier, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993–0002, *Jarrod.Collier@fda.hhs.gov,* 240–672–5763, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. On both days, the committee will discuss, make recommendations, and vote on devices indicated to reduce blood pressure in patients with hypertension. On August 22, 2023, the committee will discuss, make recommendations, and vote on information regarding the premarket approval application (PMA) for the ReCor Paradise Ultrasound Renal Denervation System by ReCor, Inc. The proposed indication for use statement is as follows: The ReCor Paradise Ultrasound Renal Denervation System is indicated to reduce blood pressure in adult (≥ 22 years of age) patients with uncontrolled hypertension, who may be inadequately responsive to, or who are intolerant to, antihypertensive medications, which is intended to be used in renal arteries of diameters ranging from 3.0 to 8.0 mm.

On August 23, 2023, the committee will discuss, make recommendations, and vote on information regarding the PMA for the Medtronic Symplicity Spyral Renal Denervation System by Medtronic, Inc. The proposed indication for use statement is as follows: The Symplicity Spyral multielectrode renal denervation catheter and the Symplicity G3 RF Generator are indicated for the reduction of blood pressure in patients with uncontrolled hypertension despite the use of antihypertensive medications or in patients in whom blood pressure lowering therapy is poorly tolerated.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material and the link to the online teleconference meeting room will be available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down and select the appropriate advisory committee meeting link. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 1, 2023. Oral presentations from the public will be scheduled on August 22 and 23, 2023 between approximately 1:30 p.m. and 2:30 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person (see **FOR FURTHER INFORMATION CONTACT**) and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before July 24, 2023. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by July 25, 2023.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Ann Marie Williams at *Annmarie.williams@fda.hhs.gov* or 240–507–6496 at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 14, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–13136 Filed 6–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0937–NEW]

Agency Information Collection Request; 30-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed collection for public comment.

DATES: Comments on the ICR must be received on or before July 21, 2023.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Sherrette Funn, *Sherrette.Funn@hhs.gov* or (202) 264–0041. When submitting comments or requesting information, please include the document identifier 0937—New–30D and project title for reference.

SUPPLEMENTARY INFORMATION: Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Title of the Collection: FY2023 Teen Pregnancy Prevention Performance Measures.

Type of Collection: New.

OMB No. 0937–NEW–OASH—Office of Population Affairs (OPA).

Abstract: The Office of Population Affairs (OPA), in the Office of the Assistant Secretary for Health (OASH), U.S. Department of Health and Human Services (HHS), requests a new clearance for the collection of performance measures specifically for new FY2023Teen Pregnancy Prevention (TPP) Program grantees. In FY2023, OPA expects to award 5-year TPP cooperative agreements to up to 96 organizations across three Notice of Funding Opportunities (NOFOs). Collection of performance measures is a requirement of all TPP awards and is included in the NOFOs. The semiannual data collection will allow OPA to comply with federal accountability and performance requirements, inform stakeholders of grantee progress in meeting TPP program goals, provide OPA with metrics for monitoring FY2023 TPP grantees, and facilitate individual grantees' continuous quality improvement efforts within their projects. OPA requests clearance for three years.

ESTIMATED ANNUALIZED BURDEN TABLE

Type of respondent	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
TPP Tier 1 & Tier 2 Rigorous Impact grantees	86	2	8	1,376
Tier 1 Grantees (Supportive Services Form)	70	2	15/60	35
Tier 2 Innovation Network Grantees	10	2	1	20
Total		2		1,431

Sherrette A. Funn,

Paperwork Reduction Act Reports Clearance Officer, Office of the Secretary.

[FR Doc. 2023–13173 Filed 6–20–23; 8:45 am]

BILLING CODE 4150–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; 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 cooperative agreement 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 Advancing Translational Sciences Special Emphasis Panel; Translational Centers for Microphysiological Systems Review.

Date: July 17–18, 2023.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1037, Bethesda, MD 20892.

Contact Person: Victor Henriquez, Ph.D., Scientific Review Officer, Office of Scientific Director, National Center for Advancing Translational Sciences, National Institutes of Health, 6701 Democracy Boulevard, Room 1080, Bethesda, MD 20892–4878, 301–451–2405, *henriquv@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.350, B—Cooperative Agreements; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: June 15, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–13184 Filed 6–20–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering Notice of Proposed Reorganization

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Institute of Biomedical Imaging and Bioengineering (NIBIB) will host a public online forum to enable public discussion of the Institute's proposal to establish the Section on Mechanics and Tissue Remodeling Integrating Computational & Experimental Systems (MATRICES). The proposed reorganization will more accurately reflect the current structure by which the Intramural Research

Program is functioning and improve the coordination of the scientific activities within the Institute. The online forum will allow members of the public to review the reorganization proposal and submit comments.

DATES: The public online forum will become available on June 26, 2023, and will remain open for five calendar days, through June 30, 2023. Any interested person may file written comments by sending an email to *NIBIBorgchange@nih.gov*. The statement should include the individual's name, and when applicable, professional affiliation.

ADDRESSES: The public forum will be held online, at *https://www.nibib.nih.gov/about-nibib/proposed-org-changes* for the period of time listed above.

FOR FURTHER INFORMATION CONTACT: Frank Flannery, Management Analyst, National Institute of Biomedical Imaging and Bioengineering, NIH, (301) 451–0713, *NIBIBorgchange@nih.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to the NIH Reform Act of 2006 (42 U.S.C. 281(d)(4)), NIBIB will have a public hearing to discuss the proposed reorganization plans. This announcement and the public forum serve as that notice.

Ann G. Gawalt,

Acting Executive Officer, National Institute of Biomedical Imaging and Biomedical Engineering, National Institutes of Health.

[FR Doc. 2023–13098 Filed 6–20–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Cancer Centers Study Section (A).

Date: August 2, 2023.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda North Marriott Hotel and Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, Maryland 20852.

Contact Person: Shamala K. Srinivas, Ph.D., Associate Director, Office of Referral, Review, and Program Coordination, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W530, Rockville, Maryland 20850, 240–276–6442, *ss537t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Liver Cancer Projects with the Cirrhosis Network.

Date: August 4, 2023.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Cancer Institute Shady Grove, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850 (Virtual Meeting).

Contact Person: Jeffrey E. DeClue, Ph.D., Scientific Review Officer, Research Technology and Contract Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 9609 Medical Center Drive, Room 7W238, Rockville, Maryland 20850, 240–276–6371, *decluej@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: June 15, 2023.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–13183 Filed 6–20–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel; Small Business: Social and Community Influences Across the Life Course.

Date: July 12–13, 2023.

Time: 9:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David E. Pollio, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1006F, Bethesda, MD 20892, (301) 594–4002, *polliode@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Respiratory Sciences.

Date: July 13, 2023.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Stefania Senger, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–867–5309, *stefania.senger@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Epidemiology and Population Sciences.

Date: July 17–18, 2023.

Time: 9:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: James J. Li, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5148, MSC 7849, Bethesda, MD 20892, 301–806–8065, *lijames@csr.nih.gov*.

Name of Committee: Infectious Diseases and Immunology A Integrated Review Group; HIV Molecular Virology, Cell Biology, and Drug Development Study Section.

Date: July 17–18, 2023.

Time: 10:00 a.m. to 9:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA–OD–23–003: Short Courses on Innovative Methodologies and Approaches in the Behavioral and Social Sciences.

Date: July 17, 2023.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Rochelle Francine Hentges, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1000C, Bethesda, MD 20892, (301) 402–8720, *hentgesrf@mail.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Hypersensitivity, Allergies and Mucosal Immunology (HAMI).
Date: July 18, 2023.
Time: 9:30 a.m. to 7:30 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Shinako Takada, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–827–5997, *shinako.takada@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–23–038: Testing Centers for Development of Somatic Cell Genome Editing in Model Organisms (U42).
Date: July 18, 2023.
Time: 10:00 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Mollie Kim Manier, Ph.D,. Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 594–0510, *mollie.manier@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Myalgic Encephalomyelitis-Chronic Fatigue Syndrome.
Date: July 18, 2023.
Time: 11:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Roger Janz, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (301) 402–8515, *janzr2@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Musculoskeletal, Skin, and Oral Sciences.
Date: July 18, 2023.
Time: 12:00 p.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Jonathan Arias, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, (301) 435–2406, *ariasj@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: June 14, 2023.

David W. Freeman,

Supervisory Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2023–13142 Filed 6–20–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Proposed Reorganization

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Institute of Biomedical Imaging and Bioengineering (NIBIB) will host a public online forum to enable public discussion of the Institute's proposal to establish the Section on Mechanics and Tissue Remodeling Integrating Computational & Experimental Systems (MATRICES). The proposed reorganization will more accurately reflect the current structure by which the Intramural Research Program is functioning and improve the coordination of the scientific activities within the Institute. The online forum will allow members of the public to review the reorganization proposal and submit comments.

DATES: The public hearing will take place on July 6, 2023, at 2 p.m. using NIBIB's social media accounts. Any interested party may also file written comments by sending an email to *NIBIBorgchange@nih.gov* prior or during the scheduled public hearing. The statement should include the individual's name, and when applicable, professional affiliation.

ADDRESSES: The following email address has been established for comments on the reorganization: *NIBIBorgchange@nih.gov*. The social media platforms that will be used and monitored during this hearing are:

- *Twitter: @NIBIBgov.*
- *Facebook: https://www.facebook.com/nibibgov/.*

FOR FURTHER INFORMATION CONTACT: Frank Flannery, Management Analyst, National Institute of Biomedical Imaging and Bioengineering, NIH, (301) 451–0713, *NIBIBorgchange@nih.gov*.

SUPPLEMENTARY INFORMATION: Pursuant to the NIH Reform Act of 2006 (42 U.S.C. 281(d)(4)), NIBIB will have a public hearing to discuss the proposed reorganization plans. This announcement and the public forum serve as that notice. More information can be found at *https://www.nibib.nih.gov/about-nibib/proposed-org-changes*.

Ann G. Gawalt,

Acting Executive Officer, National Institute of Biomedical Imaging and Biomedical Engineering, National Institutes of Health.

[FR Doc. 2023–13099 Filed 6–20–23; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2023 Notice of Supplemental Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, Department of Health and Human Services (HHS).

ACTION: Notice of intent to award supplemental funding.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) is supporting one administrative supplement in scope of the parent award to the State Opioid Response (SOR)/Tribal Opioid Response (TOR) Technical Assistance Grant recipient, the American Academy of Addiction Psychiatry (AAAP) funded in FY 2022 under Notice of Funding Opportunity (NOFO) TI–22–007 to provide training and technical assistance to federally-recognized Tribes and Tribal organizations.

FOR FURTHER INFORMATION CONTACT: William Longinetti, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857, telephone 240–276–1190; email: *William.longinetti@samhsa.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: FY 2022 State Opioid Response (SOR)/Tribal Opioid Response (TOR) Technical Assistance TI–22–007.
Assistance Listing Number: 93.243.
Authority: Section 509 of the Public Health Service Act, as amended.

Justification: This is not a formal request for application. Assistance will only be provided to the American Academy of Addiction Psychiatry (AAAP) to provide webinar trainings and technical assistance based on the receipt of a satisfactory application and associated budget that is approved by a review group. AAAP has already established a network of TA providers, as well as linkages with Tribes and Tribal organizations, and this assistance will augment these preexisting resources and relationships.

Dated: June 15, 2023.

Ann Ferrero,

Public Health Analyst.

[FR Doc. 2023–13146 Filed 6–20–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2023 Notice of Supplemental Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, Department of Health and Human Services (HHS).

ACTION: Notice of intent to award supplemental funding.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) is supporting administrative supplements (in the scope of the parent award) for the 60 eligible grant recipients funded in FY 2023 under the Substance Use Prevention, Treatment, and Recovery Services Block Grant (SUBG). Recipients may receive an amount of between $25,000 and $2,089,193 for a total of $15,400,000. If all eligible SUBG recipients do not apply, remaining funds will be redistributed to applicants. These recipients have a project end date of September 30, 2024. The supplemental funding will be used for providing and/or obtaining training and technical assistance, or workforce development meetings and activities.

FOR FURTHER INFORMATION CONTACT: Spencer Clark, Chief, CSAT State Systems Partnership Branch, Substance Abuse and Mental Health Services Administration, 5600 Fishers Lane, Rockville, MD 20857, telephone 240–276–1027; email: *Spencer.Clark@samhsa.hhs.gov*.

SUPPLEMENTARY INFORMATION:

Funding Opportunity Title: FY 2023 Substance Use Prevention, Treatment, and Recovery Services Block Grant.

Assistance Listing Number: 93.959.

Authority: Section 1935 of the Public Health Service Act.

Justification: This supplemental funding is limited in eligibility to only the recipients of the Substance Use Prevention, Treatment, and Recovery Services Block Grant because it will be used to expand and enhance the training and technical assistance efforts of the recipients.

This is not a formal request for application. Assistance will only be provided to the 60 SUBG recipients funded in FY 2023 based on the receipt of a written statement from the Single State Agency (SSA) of the recipient's interest in receiving these funds to be used for the stated purposes.

Dated: June 15, 2023.

Ann Ferrero,

Public Health Analyst.

[FR Doc. 2023–13145 Filed 6–20–23; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0087]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application for Citizenship and Issuance of Certificate Under Section 322

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed revision of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until August 21, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0087 in the body of the letter, the agency name and Docket ID USCIS–2007–0019. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2007–0019.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2007–0019 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Citizenship and Issuance of Certificate Under Section 322.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* N–600K; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–600K is used by children who regularly reside in a foreign country to claim U.S. citizenship based on eligibility criteria met by their U.S. citizen parent(s) or grandparent(s). The form may be used by both biological and adopted children under age 18. USCIS uses information collected on this form to determine that the child has met all of the eligibility requirements for naturalization under section 322 of the Immigration and Nationality Act (INA). If determined eligible, USCIS will naturalize and issue the child a Certificate of Citizenship before the child reaches age 18.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–600K (Paper filed) is 2,187 and the estimated hour burden per response is 1.71 hours; the estimated total number of respondents for the information collection N–600K (online filing) is 2,860 and the estimated hour burden per response is 1.14 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 7,003 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $649,801.

Dated: June 14, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13110 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2732–22; DHS Docket No. USCIS–2008–0034]

RIN 1615–ZB71

Reconsideration and Rescission of Termination of the Designation of El Salvador for Temporary Protected Status; Extension of the Temporary Protected Status Designation for El Salvador

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice of Reconsideration and Rescission of Termination of the Designation of El Salvador for Temporary Protected Status (TPS) and Notice of Extension of TPS Designation for El Salvador.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is rescinding the previous termination of the designation of El Salvador for TPS, which was published on January 18, 2018 and extending the designation of El Salvador for Temporary Protected Status (TPS) for 18 months, beginning on September 10, 2023, and ending on March 9, 2025. This extension allows existing TPS beneficiaries to retain TPS through March 9, 2025, so long as they otherwise continue to meet the eligibility requirements for TPS. Existing TPS beneficiaries who wish to extend their status through March 9, 2025, must re-register during the 60-day re-registration period as described in this notice.

DATES: The *Rescission of Termination of the Designation of El Salvador for TPS* took effect June 9, 2023.

Extension of Designation of El Salvador for TPS: The 18-month extension of TPS for El Salvador begins on September 10, 2023, and will remain in effect through March 9, 2025. The extension impacts existing beneficiaries of TPS under the designation of El Salvador.

Re-registration: The 60-day re-registration period for existing beneficiaries runs from July 12, 2023 through September 10, 2023.

FOR FURTHER INFORMATION CONTACT:

- You may contact Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.
- For further information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* You can find specific information about El Salvador's TPS designation by selecting ''El Salvador'' from the menu on the left side of the TPS web page.
- If you have additional questions about TPS, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).
- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at *uscis.gov,* or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.*
- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

BIA—Board of Immigration Appeals
CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
Form I–131—Application for Travel Document
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
FR—Federal Register
Government—U.S. Government
IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
IJ—Immigration Judge
INA—Immigration and Nationality Act
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security

TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action (TPS)

Through this notice, DHS announces the reconsideration and rescission of the termination of the designation of El Salvador for TPS and the Secretary's decision to extend the TPS designation for 18 months from September 10, 2023 through March 9, 2025. This notice also sets forth procedures necessary for nationals of El Salvador (or individuals having no nationality who last habitually resided in El Salvador) to re-register for TPS and to apply for renewal of their EADs with USCIS.

Re-registration is limited to individuals who have previously registered or re-registered for TPS under El Salvador's designation, whose applications were granted, and whose TPS has not been withdrawn for individual ineligibility for the benefit. Failure to re-register properly within the 60-day re-registration period may result in the withdrawal of your TPS following appropriate procedures. *See* 8 CFR 244.14.

For individuals who have already been granted TPS under El Salvador's designation, the 60-day re-registration period runs from July 12, 2023 through September 10, 2023. USCIS will issue new EADs with a March 9, 2025 expiration date to eligible Salvadoran TPS beneficiaries who timely re-register and apply for EADs.

Individuals who have an El Salvador TPS application (Form I–821) and Application for Employment Authorization (Form I–765) that were still pending as of June 21, 2023 do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through March 9, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765 filed in connection with a Form I–821, USCIS will issue the individual a new EAD that will be valid through the same date. If you have TPS and only a pending Form I–765, you must file the Form I–821 to re-register for TPS or risk having your TPS withdrawn for failure to timely re-register without good cause. There are currently approximately 239,000 beneficiaries under El Salvador's TPS designation who may be eligible to continue their TPS under the extension announced in this Notice.

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the INA, or to eligible individuals without nationality who last habitually resided in the designated foreign state before arrival in the United States, regardless of their country of birth.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS.
- TPS beneficiaries may also apply for and be granted travel authorization as a matter of DHS discretion.
- To qualify for TPS, beneficiaries must meet the eligibility standards at INA section 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).
- When the Secretary terminates a foreign state's TPS designation, beneficiaries return to one of the following:
  - The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or terminated); or
  - Any other lawfully obtained immigration status or category they received while registered for TPS, as long as it is still valid beyond the date TPS terminates.

When was El Salvador designated for TPS?

El Salvador was initially designated for TPS on the basis of environmental disaster, following two separate massive earthquakes in 2001 [1] that resulted in a substantial disruption of living conditions, at the request of the country's government, and because El Salvador temporarily was unable to handle adequately the return of its nationals. *See Designation of El Salvador Under Temporary Protected Status Program,* 66 FR 14214 (Mar. 9, 2001). After its initial designation, El Salvador's TPS designation was extended 11 consecutive times [2] (for periods of 12 or 18 months at a time) under the same statutory basis of environmental disaster. The Secretary last extended TPS for El Salvador from July 8, 2016 through March 9, 2018.[3] Following the statutorily required review of the country conditions, former Secretary Nielsen announced the termination of TPS for El Salvador with an effective date of September 9, 2019.[4] As discussed below, this termination decision has been the subject of litigation and a court order. As a result, the termination has not taken effect.

[1] *El Salvador—Earthquakes Final Fact Sheet, Fiscal Year (FY) 2001,* US Agency for International Development Situation Report, Sept. 7, 2001, available at *https://reliefweb.int/report/el-salvador/el-salvador-earthquakes-final-fact-sheet-fiscal-year-fy-2001* (last visited March 6, 2023). (The first earthquake on January 13, 2001, registered 7.6 in magnitude on the standard seismic scale; the earthquake on February 13, 2001, one month later, measured 6.6 in magnitude.)

[2] *Extension of the Designation of El Salvador Under the Temporary Protected Status Program; Automatic Extension of Employment Authorization Documentation for Salvadorans,* 67 FR 46000 (July 11, 2002); *Extension of the Designation of El Salvador Under Temporary Protected Status Program; Automatic Extension of Employment Authorization Documentation for El Salvador,* 68 FR 42071 (July 16, 2003); *Extension of the Designation of Temporary Protected Status for El Salvador; Automatic Extension of Employment Authorization Documentation for El Salvador TPS Beneficiaries,* 70 FR 1450 (Jan. 7, 2005); *Extension of the Designation of Temporary Protected Status for El Salvador; Automatic Extension of Employment Authorization Documentation for El Salvadorian TPS Beneficiaries,* 71 FR 34637 (June 15, 2006); *Extension of the Designation of El Salvador for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries,* 72 FR 46649 (Aug. 21, 2007); *Extension of the Designation of El Salvador for Temporary Protected Status,* 73 FR 57128 (Oct. 1, 2008); *Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries,* 75 FR 39556 (July 9, 2010); *Extension of the Designation of El Salvador for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Salvadoran TPS Beneficiaries,* 77 FR 1710 (Jan. 11, 2012); *Extension of the Designation of El Salvador for Temporary Protected Status,* 78 FR 32418, (May 30, 2013); *Extension of the Designation of El Salvador for Temporary Protected Status,* 80 FR 893 (Jan. 7, 2015); *Extension of the Designation of El Salvador for Temporary Protected Status,* 81 FR 44645 (July 8, 2016).

[3] *Extension of the Designation of El Salvador for Temporary Protected Status,* 81 FR 44645 (July 8, 2016).

[4] *Termination of the Designation of El Salvador for Temporary Protected Status,* 83 FR 2654 (Jan. 18, 2018).

Litigation Background Regarding Termination of Certain TPS Designations

In addition to El Salvador, in 2017–2018, TPS termination decisions were also announced for five other countries by the Secretary or Acting Secretary: Sudan, Nicaragua, Haiti, Nepal, and Honduras.[5] Lawsuits challenging the terminations were filed in the U.S. District Court for the Northern District of California in *Ramos* v. *Nielsen,* 326 F. Supp. 3d 1075 (N.D. Cal. 2018), and *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019), and in the U.S. District Court for the Eastern District of New York in *Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019).[6] In *Ramos,* the district court granted a preliminary injunction enjoining the terminations of TPS for El Salvador, Haiti, Sudan, and Nicaragua and directed DHS to maintain the *status quo* and to continue the TPS and TPS-related documentation of affected TPS beneficiaries under those countries' designations. The U.S. Government appealed, and a three-judge panel vacated the injunction. The appellate court, however, has granted rehearing en banc of the panel decision, vacating the panel's decision.[7] The district court's preliminary injunction thus remains in place. In *Bhattarai,* the district court has stayed proceedings until the *Ramos* appeal is decided and approved the parties' stipulation for the continuation of TPS and TPS-related documentation for eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the *Ramos* appeal. In *Saget,* the district court granted a preliminary injunction enjoining termination of TPS for Haiti, and the Government appealed. However, following the new TPS designation of Haiti in August 2021, the district court dismissed the lawsuit based on the parties' stipulation to dismissal.[8] Beneficiaries under the TPS designations for El Salvador, Nicaragua, Sudan, Haiti, Honduras, and Nepal will retain their TPS while the preliminary injunction in *Ramos* remains in effect, and 120 days thereafter, provided that their TPS is not withdrawn because of individual ineligibility.[9]

DHS has taken actions to ensure its continued compliance with the court orders in *Ramos* and *Bhattarai.* DHS has published periodic notices to continue TPS and extend the validity of TPS-related documentation previously issued to beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal.[10] The most recent such notice continued TPS and extended the TPS-related documents specified in the notice through June 30, 2024.[11] These extensions apply where the TPS beneficiary properly filed for re-registration during either the most recent DHS-announced registration period for their country, or any applicable previous DHS-announced re-registration periods for the beneficiary's country, or has a re-registration application that remains pending.[12] Although the notice published at 87 FR 68717 remains valid, individuals who wish to remain eligible for TPS under the extension of TPS for El Salvador announced in this notice through March 9, 2025, and any potential future extensions must apply for re-registration in accordance with the procedures announced in this notice.[13] Failure to timely re-register without good cause is a ground for TPS withdrawal. *See* INA section 244(c)(3)(C), 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17.

What authority does the Secretary have to reconsider and rescind the termination of TPS for El Salvador and extend the prior designation?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist.[14] The decision to designate any foreign state

[5] *Termination of the Designation of Sudan for Temporary Protected Status,* 82 FR 47228 (Oct. 11, 2017); *Termination of the Designation of Nicaragua for Temporary Protected Status,* 82 FR 59636 (Dec. 15, 2017); *Termination of the Designation of Haiti for Temporary Protected Status,* 83 FR 2648 (Jan. 18, 2018); *Termination of the Designation of Nepal for Temporary Protected Status,* 83 FR 23705 (May 22, 2018); *Termination of the Designation of Honduras for Temporary Protected Status,* 83 FR 26074 (June 5, 2018). Haiti and Sudan were later newly designated for TPS on August 3, 2021 and April 19, 2022, respectively, for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021); *Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022).

[6] *See Ramos* v. *Nielsen,* 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *vacated,* 975 F.3d 872 (9th Cir. 2020), *reh'g en banc granted,* 59 F.4th 1010 (Feb. 10, 2023); *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (staying proceedings until *Ramos* appeal decided and approved parties' stipulation for continued TPS and issuance of TPS-related documentation to eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the appeal). In 2019, the U.S. District Court for the Eastern District of New York also enjoined the termination of the 2011 TPS designation for Haiti in *Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019), and DHS cited to that order in previous notices continuing the affected beneficiaries' TPS and documentation. *See, e.g.,* 86 FR 50725, 50726 (Sept. 10, 2021). However, the *Saget* case was dismissed upon the court's approval of the parties' joint Stipulation of Dismissal for mootness following the Secretary's new 18-month designation of Haiti for TPS on August 3, 2021, and DHS' continuation of existing beneficiaries' TPS and related documentation under the Ramos injunction through Dec. 31, 2022. *See id.,* Order approving Stipulation of Dismissal, dated Oct. 15, 2021. Other litigation was filed relating to the terminations of El Salvador, Honduras, and Haiti. A Haiti-related case, *NAACP* v. *U.S. Dept. of Homeland Security,* No. 1:18–cv–00239 (D. Md. Jan. 24, 2018) was dismissed on May 22, 2021, subsequent to the same DHS designation. An El Salvador-related case, *Casa de Maryland,* v. *Biden,* No. GJH–18–00845 (D. Md. Mar. 23, 2018), is currently stayed until April 17, 2023. *Centro Presente* v. *Biden,* No. 1:18–cv–10340 (D. Mass. July 23, 2018), relating to El Salvador, Haiti, and Honduras, is currently stayed until April 14, 2023.

[7] *See Ramos* v. *Wolf,* 975 F.3d 872 (9th Cir. 2020), *petition for reh'g en banc granted,* 59 F.4th 1010 (Feb. 10, 2023) (No. 18–16981).

[8] *See Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019) and Order approving Stipulation of Dismissal, dated Oct. 15, 2021.

[9] As noted, Haiti was newly designated for TPS on August 3, 2021 for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021). On April 19, 2022, the Secretary also newly designated Sudan TPS. *See Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022). Those designations cover all Haitian and Sudanese nationals who were eligible for TPS under the Haiti and Sudan TPS designations that were terminated in 2018 and 2017, respectively.

[10] 83 FR 54764 (Oct. 31, 2018); 84 FR 7103 (Mar. 1, 2019); 84 FR 20647 (May 10, 2019) (correction notice issued at 84 FR 23578 (May 22, 2019)); 84 FR 59403 (Nov. 4, 2019); 85 FR 79208 (Dec. 9, 2020); 86 FR 50725 (Sept. 10, 2021) (correction notice issued at 86 FR 52694 (Sept. 22, 2021)).

[11] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations of El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

[12] *Id.,* at 68719, note 5 (listing acceptable re-registration periods for each of the 6 countries).

[13] Through the re-registration process, which is generally conducted every 12 to 18 months while a foreign state is designated for TPS, USCIS determines whether each TPS beneficiary is continuing to maintain individual eligibility for TPS, including but not limited to, the requirements related to disqualifying criminal or security issues. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 87 FR 68717, 68720 (Nov. 16, 2022) (noting potential future action for El Salvador TPS beneficiaries may include a requirement to re-register).

[14] Although the text of INA section 244(b)(1) continues to ascribe this power to the Attorney General, this authority is now held by the Secretary of Homeland Security by operation of the Homeland Security Act of 2002, Pub. L. 107–296, 116 Stat. 2135. *See, e.g.,* 6 U.S.C. 557; *Nielsen* v. *Preap,* 139 S. Ct. 954, 959 n.2 (2019). The Secretary may designate a country (or part of a country) for TPS on the basis of ongoing armed conflict such that returning would pose a serious threat to the personal safety of the country's nationals and habitual residents, environmental disaster (including an epidemic), or extraordinary and temporary conditions in the country that prevent the safe return of the country's nationals. For environmental disaster-based designations, certain other statutory requirements must be met, including that the foreign government must request TPS. A designation based on extraordinary and temporary conditions cannot be made if the Secretary finds that allowing the country's nationals to remain temporarily in the United States is contrary to the U.S. national interest. INA section 244(b)(1).

(or part thereof) is a discretionary decision, and there is no judicial review of any determination with respect to the designation, termination, or extension of a designation. *See* INA section 244(b)(5)(A); 8 U.S.C. 1254a(b)(5)(A).

At least 60 days before the expiration of a foreign state's TPS designation, the Secretary, after consultation with appropriate U.S. Government agencies, must review the conditions in the foreign state designated for TPS to determine whether they continue to meet the conditions for the TPS designation. *See* INA section 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA section 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). If the Secretary does not determine that the foreign state no longer meets the conditions for TPS designation, the designation is extended for an additional period of 6 months or, in the Secretary's discretion, 12 or 18 months. *See* INA section 244(b)(3)(A), (C); 8 U.S.C. 1254a(b)(3)(A), (C).

On January 18, 2018, the Secretary of Homeland Security issued notice of her decision that El Salvador no longer continued to meet the conditions for TPS designation and announced the termination of TPS for El Salvador. The Secretary also announced an orderly transition period of 18 months, such that the termination was set to go into effect on September 9, 2019. On March 12, 2018, as noted above, plaintiffs in *Ramos* filed suit challenging the termination decision for El Salvador, as well as contemporaneous decisions to terminate TPS for Nicaragua, Sudan, and Haiti. On October 3, 2018, the U.S. District Court for the Northern District of California issued a preliminary injunction order in *Ramos,* preventing the termination decision from going into effect until the court reaches a decision on the merits of the plaintiffs' claims and further directing that DHS maintain the *status quo,* including continuing TPS and TPS-related documentation, such as Employment Authorization Documents (EADs), for affected beneficiaries. After reaching a stipulation with plaintiffs that no termination would go in effect for at least 120 days following the conclusion of any appeal, DHS has issued a series of **Federal Register** notices continuing TPS and TPS-related documentation for affected TPS beneficiaries, with the most recent continuation notice effective through June 30, 2024.[15] As a result, the announced termination of the TPS designation for El Salvador has never gone into effect, and TPS beneficiaries under that designation have retained their TPS, unless it has been individually withdrawn pursuant to INA section 244(c)(3), 8 U.S.C. 1254a(c)(3).

An agency has inherent (that is, statutorily implicit) authority to revisit its prior decisions unless Congress has expressly limited that authority.[16] The TPS statute does not limit the Secretary's inherent authority to reconsider any TPS-related determination, and upon reconsideration, to change the determination. *See* INA sections 244(b)(3), (b)(5)(A); 8 U.S.C. 1254a(b)(3), (b)(5)(A).

Why is the Secretary rescinding the previous decision to terminate the TPS designation for El Salvador?

After conducting an independent assessment of the country conditions in El Salvador as they existed in 2018 and exist today, the Secretary has determined that El Salvador's 2001 TPS designation should not have been terminated. As explained below, the conditions in El Salvador that gave rise to its TPS designation in 2001 persisted in 2018 and persist to this day. Accordingly, the Secretary is, upon reconsideration, vacating the 2018 decision terminating El Salvador's TPS designation and extending that designation for an additional 18 months.

El Salvador was initially designated for TPS in 2001 on environmental disaster grounds[17] following two separate earthquakes that occurred that year. El Salvador suffered catastrophic damage as a result of the 2001 earthquakes. Together, the earthquakes killed over 1,150 people,[18] injured over 8,000, and affected more than 1.5 million people[19] (approximately 25 percent of the population[20]). The earthquakes damaged or destroyed over 300,000 homes, 2,647 public schools and demolished critical infrastructure throughout the country.[21] The international community responded to the disaster with a significant amount of aid, with the United States initially providing $16 million in relief assistance and announcing another $52 million for reconstruction assistance.[22] Intergovernmental organizations and other governments also provided substantial aid, including a $20 million emergency loan from the Inter-American Development Bank (IDB), $4 million for World Food Programme (WFP) emergency operations, and $1.3 billion in pledges from various countries.[23]

While some progress on reconstruction projects had been made by 2018, many of the problems caused by the 2001 earthquakes persisted.[24] Since the disastrous effects of the earthquakes in 2001, El Salvador has

[15] *See* note 13 above.

[16] *Ivy Sports Medicine, LLC* v. *Burwell,* 767 F.3d 81, 86 (D.C. Cir. 2014) (''[A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion. . . . [I]nherent authority for timely administrative reconsideration is premised on the notion that the power to reconsider is inherent in the power to decide.'' (quotation marks and citations omitted)); *Macktal* v. *Chao,* 286 F.3d 822, 825–26 (5th Cir. 2002) (''It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.'') (collecting cases); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977) (''We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.'').

[17] *Designation of El Salvador Under Temporary Protected Status Program,* 66 FR 14214 (Mar. 9, 2001).

[18] *Earthquakes Fast Facts,* CNN Editorial Research, June 22, 2022, available at *https://www.cnn.com/2013/07/05/world/earthquakes-fast-facts/index.html* (last visited March 6, 2023).

[19] *El Salvador—Earthquakes Final Fact Sheet, Fiscal Year (FY) 2001,* US Agency for International Development Situation Report, Sept. 7, 2001, available at *https://reliefweb.int/report/el-salvador/el-salvador-earthquakes-final-fact-sheet-fiscal-year-fy-2001* (last visited March 6, 2023).

[20] *El Salvador Earthquakes: Final Fact Sheet (FY 2001); AFSC El Salvador earthquake response: Two years later—An assessment and report,* American Friends Service Committee, May 15, 2003, available at *https://reliefweb.int/report/el-salvador/afsc-el-salvador-earthquake-response-two-years-later-assessment-and-report* (last visited March 6, 2023).

[21] El Salvador Earthquakes: Final Fact Sheet (FY 2001); AFSC El Salvador earthquake response: Two years later—An assessment and report, American Friends Service Committee, May 15, 2003, available at *https://reliefweb.int/report/el-salvador/afsc-el-salvador-earthquake-response-two-years-later-assessment-and-report* (last visited March 6, 2023).

[22] Statement by the President: Relief and Reconstruction Assistance for El Salvador, March 2, 2001, *https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010302-9.html* (last visited: March 6, 2023).

[23] El Salvador—Earthquakes Final Fact Sheet, Fiscal Year (FY) 2001, Sept. 7, 2001, *https://reliefweb.int/report/el-salvador/el-salvador-earthquakes-final-fact-sheet-fiscal-year-fy-2001* (last visited: March 6, 2023).

[24] A January 2016 report by a Salvadoran media outlet found individuals living in homes in San Salvador (El Salvador's capital city) which were declared uninhabitable due to structural damage from the 2001 earthquakes or their locations in areas at high risk from landslides or the potential collapse of walls. While schools have been reconstructed and repaired—including via the U.S. Agency for International Development's (USAID) Earthquake Reconstruction Program—in January 2016 a Salvadoran media outlet reported that certain buildings and schools damaged by the 2001 earthquakes had not yet been repaired or rebuilt. Joma, Susana, Edificios dañados por los terremotos aún son amenaza, El Diario de Hoy (El Sal.), Jan. 11, 2016; Contributions of the PDNA and DRF to Post-Disaster Recovery: El Salvador Case Study 2022, United Nations Development Programme, available at *https://www.undp.org/latin-america/publications/case-study-contributions-pdna-and-drf-post-disaster* (last visited: March 17, 2023).

been encumbered by several natural disasters, environmental challenges, high levels of violence, and economic instability, all of which significantly slowed its recovery and continued to render El Salvador unable to handle the return of its nationals at the time of the decision to terminate the designation.[25]

At the time of the determination to terminate the designation of TPS, DHS found that the social and economic conditions affected by the earthquakes had stabilized. That conclusion was in error and reflects an inadequate assessment of conditions in El Salvador leading up to the announcement of the decision to terminate. Although some social and economic progress had been made by 2018, frequent and significant environmental disasters occurred after the 2001 earthquakes causing additional challenges.[26] Recovery from the earthquakes continued to be slow and encumbered by hurricanes and tropical storms, heavy rains and flooding, volcanic and seismic activity, a coffee rust epidemic, a prolonged and severe drought, and an increase in various mosquito-borne diseases, among other things.

Numerous natural disasters have negatively affected El Salvador since the 2001 earthquakes and have adversely impacted its ability to adequately handle the return of its nationals granted TPS. In October 2005, for instance, the severe flooding caused by Tropical Storm Stan, coupled with the eruption of the Ilamatepec volcano in early October 2005, affected approximately half of the population of El Salvador.[27] In November 2009, Tropical Storm Ida caused severe damage and loss of life.[28] In October 2011, Tropical Storm 12–E caused flooding and mudslides across El Salvador.[29] In June 2013, Tropical Storm Barry caused flooding.[30] and the high waves produced by tropical storms in May 2015 forced evacuations and caused damage along the Salvadoran coastal line.[31] In October 2015, heavy rains produced flooding and landslides across El Salvador.[32] In 2016, El Salvador had the third highest percentage of people exposed to disaster risk in the world, with 88.7 percent of the land and 95.4 percent of the population at risk of multiple kinds of disasters.[33] In June 2017, several days of heavy rainfall caused floods and landslides; four people were killed, nearly 300 were displaced, and over 200 homes were damaged.[34] In early October 2017, Tropical Storm Nate impacted El Salvador, leaving one person dead and one missing.[35] In late October 2017, Tropical Storm Selma brought heavy rain and flooding that caused massive mudslides, overflowed rivers, and left debris on roads.[36]

These environmental disasters have had negative impacts on El Salvador's economic stability that were not considered in the 2018 termination decision.[37] The 2018 termination decision highlighted El Salvador's steady unemployment rate of 7 percent from 2014–2016 but failed to consider that it has the second slowest economic growth rate in Central America, leading to an underemployment rate of 36.8 percent in 2018.[38] According to the 2017 Global Climate Risk Index, El Salvador ranked as the 15th most affected country in the world by extreme weather events from 1996 to 2015, the most recent year for which data was available at the time the termination decision was made.[39] During this time, El Salvador averaged $282 million in damages per year—equivalent to 0.7 percent of its GDP.[40] In 2016, El Salvador was considered the 17th highest country in the world in terms of the impact of disasters on the gross domestic product.[41] An estimated

[25] El Salvador-Disaster Response, USAID, Sept. 7, 2022, available at *https://www.usaid.gov/el-salvador/our-work/disaster-response* (last visited March 6, 2023); Miracle or Mirage? Gangs and Plunging Violence in El Salvador, International Crisis Group, p.2, July 8, 2020, available at *https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/81-miracle-or-mirage-gangs-and-plunging-violence-el-salvador* (last visited March 6, 2023); El Salvador: Civil War, Natural Disasters, and Gang Violence Drive Migration, Migration Policy Institute, Aug. 29, 2018, available at: *https://www.migrationpolicy.org/article/el-salvador-civil-war-natural-disasters-and-gang-violence-drive-migration* (last visited: March 6, 2023).

[26] Report: Extending Temporary Protected Status for El Salvador: Country Conditions and U.S. Legal Requirements, American University, Dec. 2017, available at: *https://www.american.edu/centers/latin-american-latino-studies/extending-tps-for-el-salvador.cfm* (last visited: March 6, 2023); Resolving Land Ownership Issues for a Community Water Project: A Post-Earthquake Development Dispute in Rural El Salvador, April 07, 2010, *https://www.tandfonline.com/doi/pdf/10.1080/14649350903538046* (last visited: March 6, 2023).

[27] El Salvador: Hurricane Stan, Floods and Volcanic Activity OCHA Situation Report No. 2, UN Office for the Coordination of Humanitarian Affairs, Oct. 7, 2005, available at *https://reliefweb.int/report/el-salvador/el-salvador-hurricane-stan-floods-and-volcanic-activity-ocha-situation-report-no* (last visited March 6, 2023); Analysis of Tropical Storm Stan in El Salvador, Centro de Intercambio y Solidaridad, Nov. 16, 2005, available at: *https://reliefweb.int/report/el-salvador/analysis-tropical-storm-stan-el-salvador* (last visited Mar. 6, 2023); El Salvador-Disaster Response, USAID, Sept. 7, 2022, available at *https://www.usaid.gov/el-salvador/our-work/disaster-response* (last visited March 6, 2023).

[28] Hurricane Ida and floods in Central America: OCHA Situation Report No. 1, UN Office for the Coordination of Humanitarian Affairs, Nov. 9, 2009 available at: *https://reliefweb.int/report/el-salvador/hurricane-ida-and-floods-central-america-ocha-situation-report-no-1-9-nov-2009* (last visited Mar. 6, 2003); El Salvador-Disaster Response, USAID, Sept. 7, 2022, available at *https://www.usaid.gov/el-salvador/our-work/disaster-response* (last visited March 6, 2023).

[29] Bertelsmann Stiftung, BTI 2014—El Salvador Country Report. Gütersloh: Bertelsmann Stiftung, 2014, available at *https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2014_SLV.pdf* (last visited Mar. 7, 2023); El Salvador-Disaster Response, USAID, Sept. 7, 2022, available at *https://www.usaid.gov/el-salvador/our-work/disaster-response* (last visited March 6, 2023).

[30] Stewart, Stacy R., *Tropical Storm Barry (AL022013), 17–20 June 2013,* National Hurricane Center, Oct. 7, 2013, available at *https://www.nhc.noaa.gov/data/tcr/AL022013_Barry.pdf* (last visited March 6, 2023).

[31] El Salvador: Storm Surge Emergency Plan of Action (EPoA) DREF Operation n° MDRSV008, International Federation of Red Cross And Red Crescent Societies (IFRC) Situation Report, May 15, 2015, available at *http://reliefweb.int/report/el-salvador/el-salvador-storm-surge-emergency-plan-action-epoa-dref-operation-n-mdrsv008* (last visited March 6, 2023).

[32] Guinto, Joel, Typhoon Kills At Least 16 In Philippines, Strands Thousands, Terra Daily, Oct. 19, 2015, available at *http://www.terradaily.com/reports/Typhoon_kills_at_least_16_in_Philippines_strands_thousands_999.html* (last visited: March 6, 2023).

[33] Signing of Japanese ODA Loan with El Salvador: Improving the capacity to mitigate and manage disaster risk, and providing speedy assistance for financing needs in the reconstruction stage, Japan International Cooperation Agency, May 30, 2016, available at *https://reliefweb.int/report/el-salvador/signing-japanese-oda-loan-el-salvador-improving-capacity-mitigate-and-manage* (last visited: March 6, 2023).

[34] *El Salvador—Floods (Dirección General de Protección Civil, SNET, Local Media) (ECHO Daily Flash of 20 June 2017),* European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations, June 20, 2017, available at *https://reliefweb.int/report/el-salvador/el-salvador-floods-direcci-n-general-de-protecci-n-civil-snet-local-media-echo* (last accessed March 6, 2023).

[35] *Nate Kills At Least 20 in Central America, Tracks Toward US,* VOA News, Oct. 6, 2017, available at *https://www.voanews.com/a/nate-takes-aim-us-still-reeling-from-earlier-storms/4059008.html* (last accessed March 6, 2023).

[36] Report: Extending Temporary Protected Status for El Salvador: Country Conditions and U.S. Legal Requirements, American University, Dec. 2017, available at: *https://www.american.edu/centers/latin-american-latino-studies/extending-tps-for-el-salvador.cfm* (last visited: March 6, 2023).

[37] Contributions of the PDNA and DRF to Post-Disaster Recovery: El Salvador Case Study 2022, United Nations Development Programme, available at *https://www.undp.org/latin-america/publications/case-study-contributions-pdna-and-drf-post-disaster* (last accessed March 6, 2023).

[38] Fact Sheet Employment and Migration El Salvador 2021, International Labour Organization, December 8, 2021, available at *https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---sro-san_jose/documents/publication/wcms_831274.pdf* (last accessed March 6, 2023).

[39] Kreft, Sönke, Eckstein, David and Melchior, Inga, Global Climate Risk Index 2018, Germanwatch, p. 23, Nov. 2017.

[40] Kreft, Sönke, Eckstein, David and Melchior, Inga, *Global Climate Risk Index 2018,* Germanwatch, p. 23, Nov. 2017.

[41] Signing of Japanese ODA Loan with El Salvador: Improving the capacity to mitigate and manage disaster risk, and providing speedy assistance for financing needs in the reconstruction stage, Japan International Cooperation Agency, May 30, 2016, available at *https://reliefweb.int/report/el-*

95.4 percent of its GDP is exposed to two or more natural hazards, making it the country with the second highest economic multi-hazard risk worldwide relative to its GDP.[42] In fact, earthquakes have been responsible for the greatest proportion of economic loss, with the 2001 earthquakes causing effects equivalent to 12 percent of El Salvador's GDP.[43] These facts highlight that El Salvador continued to face serious environmental obstacles at the time of the decision to terminate TPS.

In addition to the ongoing environmental and economic impacts from the 2001 earthquakes, high levels of violence have continued to render El Salvador unable to handle the return of those granted TPS. At the time of the decision to terminate TPS, DHS found that the social and economic conditions affected by the earthquakes had stabilized but did not sufficiently consider the combined impacts of the earthquakes and economic instability on rates of violence and general insecurity.[44] El Salvador's recovery had been (and continues to be) encumbered by staggering levels of violence—mainly related to gang activity and the state's response—as well as pervasive and high levels of gender-based violence. In 2018, El Salvador had one of the world's highest homicide rates and its security forces were widely reported as either ineffective or engaged in human rights violations and abuses, including the extrajudicial executions of alleged gang members, sexual assaults, and enforced disappearances.[45] Violent gang activity is particularly serious in El Salvador due to the country's economic and social challenges.[46] Young people are highly vulnerable to gang recruitment, with a quarter of Salvadoran youth not engaged in education, employment, or training.[47] Violent nonstate actors impact the ability of NGOs to operate by imposing restrictions in areas they control.[48] DHS also found that, in 2018, El Salvador was accepting the returns of its nationals who were removed for various reasons; however, it did not adequately consider that some of those who returned became targets for violent nonstate actors, leading to extortion, torture, and murder of deportees.[49]

As explained above, at the time of the decision to terminate TPS, El Salvador continued to experience ongoing environmental disasters, economic instability, and high rates of violence, that were either insufficiently considered or not considered in the termination decision. The termination decision failed to adequately assess conditions in El Salvador in 2018. Those conditions continued to substantially disrupt living conditions and temporarily affected the country's ability to adequately handle the return of its nationals residing in the United States. The Secretary has concluded that reconsideration and rescission of the termination of TPS is appropriate and timely, particularly given that the 2018 termination decision has not yet gone into effect due to the ongoing litigation and associated court orders.

What authority does the Secretary have to extend the designation of El Salvador for TPS?

As noted above, section 244(b) of the INA, 8 U.S.C. 1254a(b), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist and instructs the Secretary to periodically review the country conditions underpinning each designation and determine whether they still exist, leading to either termination or extension of the TPS designation. However, if the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA section 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). If the Secretary does not make a decision as to either extension or termination, then INA section 244(b)(3)(C) requires the automatic extension of the designation for six months (or 12 or 18 months in the Secretary's discretion).

Prior to the now-rescinded termination of the TPS designation for El Salvador, the most recent extension of the designation was due to end on March 9, 2018.[50] In light of the Secretary's reconsideration and rescission of the January 18, 2018 decision to terminate the TPS designation for El Salvador, there is no longer any standing secretarial determination that El Salvador ''no longer meets the conditions for designation'' under INA section 244(b)(1). Accordingly, pursuant to INA section 244(b)(3)(C), and in the absence of an affirmative decision by any Secretary to extend the designation for 12 or 18 months rather than the automatic six months triggered by the statue, the TPS designation for El Salvador shall have been extended in consecutive increments of six months between the date when the last designation extension was due to end on March 9, 2018, and the effective date of the TPS extension announced in this notice on September 10, 2023. Coupled with the existing *Ramos* order and corresponding **Federal Register** notices continuing TPS and TPS-related documentation for affected beneficiaries under the designation for El Salvador, this means that all such individuals whose TPS has not been finally withdrawn for individual ineligibility are deemed to have retained TPS since March 9, 2018, and may re-register under procedures announced in this Notice.

Why is the Secretary extending the TPS designation for El Salvador for TPS for 18 months through March 9, 2025?

DHS has reviewed country conditions in El Salvador. Based on the review, including input received from DOS and other U.S. Government agencies, the Secretary has determined that an 18-month TPS extension is warranted because the conditions supporting El Salvador's 2001 designation for TPS on the basis of environmental disaster remain.

As previously discussed, El Salvador was originally designated for TPS in 2001[51] following two separate

salvador/signing-japanese-oda-loan-el-salvador-improving-capacity-mitigate-and-manage (last visited: March 6, 2023).

[42] Contributions of the PDNA and DRF to Post-Disaster Recovery: El Salvador Case Study 2022, United Nations Development Programme, available at *https://www.undp.org/latin-america/publications/case-study-contributions-pdna-and-drf-post-disaster* (last accessed March 6, 2023).

[43] Contributions of the PDNA and DRF to Post-Disaster Recovery: El Salvador Case Study 2022, United Nations Development Programme, available at *https://www.undp.org/latin-america/publications/case-study-contributions-pdna-and-drf-post-disaster* (last accessed March 6, 2023).

[44] Termination of the Designation of El Salvador for Temporary Protected Status, 83 FR 2654 (Jan. 18, 2018).

[45] El Salvador Events of 2018, Human Rights Watch, available at *https://www.hrw.org/world-report/2019/country-chapters/el-salvador* (last accessed March 6, 2023).

[46] Cheatham, Amelia & Roy, Diana, Central America's Turbulent Northern Triangle, Council on Foreign Relations, available at *https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle* (last accessed March 6, 2023).

[47] Brand-Weiner, Ian, Reducing Violence in El Salvador: What it Will Take, Organization for Economic Cooperation and Development, available at *https://oecd-development-matters.org/2018/01/17/reducing-violence-in-el-salvador-what-it-will-take/* (last accessed March 6, 2023).

[48] Disaster Risk Reduction in El Salvador, An Evaluation of Non-Governmental Organizations' Role and Impact, Texas A&M University, May 3, 2022, available at *condevcenter.org/Portals/0/El%20Salvador%20Capstone%202022.pdf* (last accessed March 6, 2023).

[49] El Salvador: Background and U.S. Relations, Congressional Research Service, July 1, 2020, available at *https://sgp.fas.org/crs/row/R43616.pdf* (last accessed March 6, 2023).

[50] *See* 81 FR 44645 (July 8, 2016).

[51] *Designation of El Salvador Under Temporary Protected Status Program,* 66 FR 14214 (Mar. 9, 2001).

earthquakes. Recovery from these earthquakes has been impeded by El Salvador's ongoing environmental challenges, including its high vulnerability to ''more frequent occurrences of floods, droughts, and tropical storms, all of which disproportionally affect poor and vulnerable populations.'' [52] During the rainy season, which generally runs from June to November, El Salvador is impacted by extreme weather, which damages roads, property, and infrastructure; disrupts supplies, services, and utilities; and even causes loss of life.[53] Through the present, El Salvador continues to experience compounding environmental disasters, hindering recovery and rendering it unable to handle adequately the return of its nationals.

As recently as October 2022, Tropical Storm Julia passed over El Salvador, leaving extensive flooding and deadly mudslides due to oversaturated ground from an active rainy season.[54] El Salvador declared a 15-day state of national emergency in response to Tropical Storm Julia.[55] Approximately 120 shelters were activated for 2,837 people, and at least 10 individuals died.[56] Assessments indicated that 180,000 people who were already facing acute food insecurity were affected by heavy rains.[57] A trend analysis of food insecurity and disasters found that environmental degradation and natural disasters led to increased insecurity, and both of these factors have significantly impacted El Salvador since 2001.[58]

In October 2018, the Government of El Salvador published an updated report regarding the heavy rain situation in the country at that time. Seven rivers flooded and 1,409 homes were affected.[59] In May and June 2020, tropical storms Amanda and Cristóbal causing widespread floods and landslides throughout the country, causing loss of life and significant material damage.[60] Collectively, the storms also disrupted agricultural production, and caused acute food insecurity due to irregular rainfall, which was worsened by the impacts of the COVID–19 pandemic.[61] More than 149,000 people were directly affected the storms, and as a result, the WFP estimated that more than 330,000 people were facing severe food insecurity.[62] In November 2020, the Civil Protection Agency in El Salvador issued a national red alert due to the formation of Hurricane Eta, which sent more than 2,200 people to shelters.[63] As a result of Hurricane Eta, El Salvador experienced major flooding and soon after, experienced heavy rain and flooding from Hurricane Iota.[64] It also caused two deaths and significant agricultural damage across the country.[65] It is estimated that 17,000 people were internally displaced as a result of Hurricanes Eta and Iota.[66] These countrywide consecutive events led to an overwhelming increase in the number of identified people in need of humanitarian assistance from 643,000 before the start of the COVID–19 pandemic to 1.7 million.[67]

In addition to the numerous environmental disasters following the 2001 earthquakes, El Salvador continues to experience a frail macroeconomic environment, a high rate of unemployment, violence, and a poor security situation that continues to render the country temporarily unable to adequately handle the return of its nationals. El Salvador is plagued by intense violence involving criminal groups and gang warfare, as well as a deteriorating political crisis, due to the government's aggressive security strategies to combat gang violence. As reported in July 2020 by the International Crisis Group (ICG), El Salvador continues to be exposed to violence involving criminal groups, particularly Mara Salvatrucha (MS–13) and the 18th Street gang's two factions, the Revolutionaries and the Southerners.[68] At that time, authorities estimated that 60,000 active gang members operated in 94 percent of the country's municipalities.[69] Gang violence has hampered reconstruction efforts, with NGOs reporting that in gang-controlled territories, they must abide by curfews, stop work when ordered, and often require approval from gangs to work in those areas.[70]

[52] The World Bank in El Salvador, Overview, The World Bank, Apr. 22, 2022, available at *https://www.worldbank.org/en/country/elsalvador/overview* (last visited March 6, 2023).

[53] Foreign Travel Advice El Salvador, *Gov.UK,* Oct. 20, 2022, available at *https://www.gov.uk/foreign-travel-advice/el-salvador/print* (last visited March 6, 2023).

[54] Northern Central America: TS Julia and Rainy Season Flash Update No. 01, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Oct. 14, 2022, available at: *https://reliefweb.int/report/guatemala/northern-central-america-ts-julia-and-rainy-season-flash-update-no-01-14-october-2022* (last visited March 6, 2023).

[55] Northern Central America: TS Julia and Rainy Season Flash Update No. 01, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Oct. 14, 2022, available at: *https://reliefweb.int/report/guatemala/northern-central-america-ts-julia-and-rainy-season-flash-update-no-01-14-october-2022* (last visited March 6, 2023).

[56] El Salvador: Tropical Storm Julia—Emergency Plan of Action (EPoA), DREF Operation No. MDRSV015, International Federation of Red Cross and Red Crescent Societies (IFRC) Situation Report, Oct. 26, 2022, available at *https://reliefweb.int/report/el-salvador/el-salvador-tropical-storm-julia-emergency-plan-action-epoa-dref-operation-no-mdrsv015* (last visited March 6, 2023).

[57] Northern Central America: TS Julia and Rainy Season Flash Update No. 01, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Oct. 14, 2022, available at *https://reliefweb.int/report/guatemala/northern-central-america-ts-julia-and-rainy-season-flash-update-no-01-14-october-2022* (last visited March 6, 2023).

[58] Restoring Food Security and Livelihoods for Vulnerable Groups Affected by Recurrent Shocks in El Salvador, Guatemala, Honduras and Nicaragua, UN World Food Programme, Oct. 7, 2013, *https://one.wfp.org/operations/current_operations/project_docs/200490.pdf* (last visited: March 6, 2023).

[59] Natural Disasters Monitoring, News and Press Release Pan-American Health Organization (PAHO), Oct. 10, 2018, available at *https://reliefweb.int/report/el-salvador/natural-disasters-monitoring-october-10-2018* (last visited March 6, 2023).

[60] Durroux-Malpartida, Veronique, As El Salvador faces the double impact of hurricanes and COVID–19, NGOs step in, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Dec. 30, 2020, available at *https://www.unocha.org/story/el-salvador-faces-double-impact-hurricanes-and-covid-19-ngos-step* (last visited March 6, 2023).

[61] El Salvador-Disaster Response, USAID, Sept. 7, 2022, available at: *https://www.usaid.gov/el-salvador/our-work/disaster-response* (last visited March 6, 2023).

[62] Durroux-Malpartida, Veronique, As El Salvador faces the double impact of hurricanes and COVID–19, NGOs step in, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Dec. 30, 2020, available at *https://www.unocha.org/story/el-salvador-faces-double-impact-hurricanes-and-covid-19-ngos-step* (last visited March 6, 2023).

[63] Durroux-Malpartida, Veronique, As El Salvador faces the double impact of hurricanes and COVID–19, NGOs step in, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Dec. 30, 2020, available at *https://www.unocha.org/story/el-salvador-faces-double-impact-hurricanes-and-covid-19-ngos-step* (last visited March 6, 2023).

[64] National Hurricane Center Tropical Cyclone Report: Hurricane Eta, NHC, Nov. 2020, *https://www.nhc.noaa.gov/data/tcr/AL292020_Eta.pdf* (last visited: Feb. 24, 2023); National Hurricane Center Tropical Cyclone Report: Hurricane Iota, NHC, Nov. 2020, *https://www.nhc.noaa.gov/data/tcr/AL312020_Iota.pdf* (last visited: March 6, 2023).

[65] *Id.*

[66] US Department of State, 2021 Country Report on Human Rights Practices: El Salvador, April 12, 2022, *https://www.ecoi.net/en/document/2071137.html* (accessed on March 6, 2023).

[67] Durroux-Malpartida, Veronique, As El Salvador faces the double impact of hurricanes and COVID–19, NGOs step in, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Dec. 30, 2020, available at *https://www.unocha.org/story/el-salvador-faces-double-impact-hurricanes-and-covid-19-ngos-step* (last visited March 6, 2023).

[68] Miracle or Mirage? Gangs and Plunging Violence in El Salvador, International Crisis Group, p.2, July 8, 2020, available at *https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/81-miracle-or-mirage-gangs-and-plunging-violence-el-salvador* (last visited March 6, 2023).

[69] Miracle or Mirage? Gangs and Plunging Violence in El Salvador, International Crisis Group, p.2, July 8, 2020, available at *https://www.crisisgroup.org/latin-america-caribbean/central-america/el-salvador/81-miracle-or-mirage-gangs-and-plunging-violence-el-salvador* (last visited March 6, 2023).

[70] Disaster Risk Reduction in El Salvador, An Evaluation of Non-Governmental Organizations' Role and Impact, Texas A&M University, May 3, 2022, available at *condevcenter.org/Portals/0/*

Elected in 2019, President Nayib Bukele has attributed a plunge in homicides to a security policy of sending police and troops into gang-controlled neighborhoods.[71] However, El Salvador's overall decline in its homicide rate in 2020 and 2021[72] has also been attributed to a ''covert pact'' between the government and the largest gangs operating in the country—the collapse of which reportedly led to a spike in murders in late March 2022.[73]

President Bukele has been described as ''increasingly authoritarian, and his critics say the leader's threat to democracy has only grown.''[74] In a December 2021 report, the Congressional Research Service described a series of actions taken by President Bukele and his government as ''democratic backsliding''[75] and ''removing checks on presidential power.''[76] In March 2022, the government of El Salvador declared a 30-day state of emergency, suspending citizen's constitutional rights, in response to a spike in homicides, when El Salvador registered 62 murders in a single day, ''the bloodiest since the end of the country's civil war in 1992.''[77] This initial month-long crackdown on gangs has been regularly renewed since then, with the latest renewal announced in March 2023.[78] As of March 2023, more than 65,000 people had been arrested under these orders, and human rights groups claim that many of the of the mass detentions could amount to arbitrary detentions based on ''poorly substantiated investigations or crude profiling of the physical appearance or social background of those detained.''[79] Human Rights Watch reported that the government's emergency provisions suspended privacy rights, freedom of association and peaceful assembly, and some fair trial guarantees and other applicable legal protections.[80] Amnesty International has documented that authorities in El Salvador have dismantled judicial independence and committed torture and thousands of arbitrary detentions and violations of fair trial guarantees and other applicable legal protections.[81]

Since March 2022, police and soldiers have been conducting raids and arresting thousands at their home and in the street.[82] The number of arrests under the state of emergency increased to 50,000 as of mid-August 2022.[83] Official statistics and other government information has become increasingly difficult to access under the state of emergency, and authorities reportedly have changed ''what counts as a homicide.''[84] The discrepancy between reported homicide numbers and the actual numbers of bodies reportedly recovered from mass graves continues to be of concern.[85] Under President Bukele, significant human rights abuses and violations by security forces are widely reported to continue, including unlawful disappearances, torture, and extrajudicial killings of suspected gang members.[86]

The Internal Displacement Monitoring Centre (IDMC) noted in a 2018 report that ''[d]isplacement caused by crime and violence has, by any measure, risen to the level of a humanitarian crisis in El Salvador.''[87] In July 2018, internal forced displacement was officially recognized by the Supreme Court of El Salvador.[88] In January 2020, the Legislative Assembly approved the ''Special Law for the Comprehensive Care and Protection of People in a situation of Forced Internal Displacement,'' a fundamental instrument to provide care, protection, and lasting solutions to people internally displaced due to violence from organized crime and criminal gangs, as well as those who may be at risk of displacement.[89] In August 2021, the United Nations High Commissioner for Refugees (UNHCR) reported that communities in El Salvador are severely affected by gang violence, extortion, death threats, and sexual violence, as

El%20Salvador%20Capstone%202022.pdf (last accessed March 6, 2023).

[71] Treasury Targets Corruption Networks Linked to Transnational Organized Crime, Press Release, U.S. Treasury, Dec. 8, 2021, available at *https://home.treasury.gov/news/press-releases/jy0519* (last visited March 6, 2023). After experiencing a spike in homicides in 2015, El Salvador went from Latin America's most violent country to number 11 in 2021. *See* United States Institute of Peace, ''El Salvador Needs Long-Term Solutions to End Cycles of Violence,'' Apr. 6, 2022, available at *https://www.usip.org/publications/2022/04/el-salvador-needs-long-term-solutions-end-cycles-violence#:~:text=From%20Latin%20America's%20most%20violent,Mexico%20(26%20per%20100%2C000* (last visited March 6, 2023).

[72] InSight Crime's 2021 Homicide Round-Up, InSight Crime, Feb. 1, 2022, available at *https://insightcrime.org/news/insight-crimes-2021-homicide-round-up/* (last visited on March 6, 2023).

[73] Martínez, Carlos, Collapsed Government Talks with MS–13 Sparked Record Homicides in El Salvador, Audios Reveal, El Faro (El Sal.), May 17, 2022, available at *https://www.nytimes.com/2022/04/28/world/americas/el-salvador-bukele-gangs.html* (last visited March 6, 2023).

[74] El Salvador's Nayib Bukele: Strong and Getting Stronger, America's Quarterly, Feb. 23, 2021, available at *https://www.americasquarterly.org/article/aq-podcast-el-salvadors-nayib-bukele-strong-and-getting-stronger/* (last visited March 6, 2023).

[75] El Salvador: Authoritarian Actions and U.S. Response, Congressional Research Service, p.1, Dec. 23, 2021, available at *https://crsreports.congress.gov/product/pdf/IN/IN11658* (last visited March 6, 2023).

[76] El Salvador: Authoritarian Actions and U.S. Response, Congressional Research Service, p.2, Dec. 23, 2021, available at *https://crsreports.congress.gov/product/pdf/IN/IN11658* (last visited March 6, 2023).

[77] Renteria, Nelson, In El Salvador's gang crackdown, quotas drive 'arbitrary' arrests of innocents, Reuters, May 16, 2022, available at *https://www.reuters.com/world/americas/el-salvadors-gang-crackdown-quotas-drive-arbitrary-arrests-innocents-2022-05-16/* (last visited March 6, 2023).

[78] El Salvador urged to uphold human rights amid state of emergency, United Nations News, Mar. 28, 2023, available at *https://news.un.org/en/story/2023/03/1135097* (last visited March 30, 2023).

[79] El Salvador urged to uphold human rights amid state of emergency, United Nations News, Mar. 28, 2023, available at *https://news.un.org/en/story/2023/03/1135097* (last visited March 30, 2023); How is a 'state of exception' changing El Salvador?, Al Jazeera, June 7, 2022, available at *https://www.aljazeera.com/program/the-stream/2022/6/7/what-is-the-true-impact-of-el-salvadors-state-of* (last visited March 6, 2023).

[80] El Salvador: Evidence of Serious Abuse in State of Emergency, Human Rights Watch, May 2, 2022, available at *https://www.hrw.org/news/2022/05/02/el-salvador-evidence-serious-abuse-state-emergency* (last visited March 6, 2023).

[81] Tucker, Duncan, Eviscerating Human Rights Is Not The Answer To El Salvador's Gang Problem, Amnesty International, Aug. 31, 2022, available at *https://www.amnesty.org/en/latest/news/2022/08/eviscerating-human-rights-el-salvador-gang-problem/* (last visited March 6, 2023).

[82] El Salvador: Evidence of Serious Abuse in State of Emergency, Human Rights Watch, May 2, 2022, available at *https://www.hrw.org/news/2022/05/02/el-salvador-evidence-serious-abuse-state-emergency* (last visited March 6, 2023).

[83] El Salvador extends state of exception as arrests hit 50,000, Al Jazeera, Aug. 17, 2022, available at *https://www.aljazeera.com/news/2022/8/17/el-salvador-extends-state-of-exception-as-arrests-hit-50000* (last visited March 6, 2023).

[84] Renteria, Nelson, In El Salvador, discrepancy over deaths and mass graves alarms critics, Reuters, Aug. 3, 2022, available at *https://www.reuters.com/world/americas/el-salvador-discrepancy-over-deaths-mass-graves-alarms-critics-2022-08-03/* (last visited March 6, 2023).

[85] Renteria, Nelson, In El Salvador, discrepancy over deaths and mass graves alarms critics, Reuters, Aug. 3, 2022, available at *https://www.reuters.com/world/americas/el-salvador-discrepancy-over-deaths-mass-graves-alarms-critics-2022-08-03/* (last visited March 6, 2023).

[86] US Department of State, 2021 Country Report on Human Rights Practices: El Salvador, April 12, 2022, *https://www.ecoi.net/en/document/2071137.html* (last visited March 6, 2023).

[87] Knox, Vickie, An Atomised Crisis: Reframing displacement caused by crime and violence in El Salvador, Internal Displacement Monitoring Centre (IDMC), p.6, Sept. 2018, available at *https://www.internal-displacement.org/sites/default/files/publications/documents/201809-el-salvador-an-atomised-crisis-en.pdf* (last visited March 6, 2023).

[88] Fact Sheet > El Salvador, United Nations High Commissioner for Refugees (UNHCR), p.2, Aug. 2021, available at *https://reporting.unhcr.org/sites/default/files/El%20Salvador%20Factsheet%20August%202021.pdf* (last visited March 6, 2023).

[89] Fact Sheet > El Salvador, United Nations High Commissioner for Refugees (UNHCR), p.2, Aug. 2021, available at *https://reporting.unhcr.org/sites/default/files/El%20Salvador%20Factsheet%20August%202021.pdf* (last visited March 6, 2023).

well as other serious human rights violations.[90]

Gang violence and lack of access to effective protection has forced tens of thousands to flee internally since 2006.[91] Violence and lack of opportunities have forced people to leave their homes in search of protection, access to basic services and livelihood opportunities. COVID–19 has exacerbated the needs of internally displaced persons and those at risk of displacement by impacting their access to protection and livelihoods.[92] While President Bukele's tactics have caused a decrease in the rate of gang violence, severe gang violence persists, and the tactics used by the Bukele administration have failed to address the root causes of gang membership, including poverty and insecurity, which are exacerbated by the lingering effects of major environmental disasters. Impoverished individuals are less likely to move to safer areas due to lack of financial resources and the geographic areas where they can afford to live are more likely to be gang-impacted and environmentally degraded.[93]

In summary, while progress has been made in repairing damage caused by the 2001 earthquakes, El Salvador continues to experience numerous natural disasters that significantly disrupt living conditions and adversely impact its ability to adequately handle the return of those granted TPS. A weak macroeconomic environment, a high rate of unemployment, violence, and a poor security situation adversely impact the country's ability to fully recover and continue to render the country temporarily unable to adequately handle the return of its nationals.

Based upon this review and after consultation with appropriate U.S. Government agencies, the Secretary has determined that:

- At the time the Secretary's decision to terminate El Salvador's designation for TPS was announced on January 18, 2018, conditions in El Salvador continued to support the country's designation for TPS on the ground of environmental disaster; therefore, the termination should be rescinded and such rescission is timely given that the termination has not yet gone into effect. *See* INA section 244(b)(1)(B), 8 U.S.C. 1254a(b)(1)(B).
- The conditions supporting El Salvador's designation for TPS still continue to be met. *See* INA section 244(b)(3)(A) and (C), 8 U.S.C. 1254a(b)(3)(A) and (C).
- There has been an earthquake, flood, drought, epidemic, or other environmental disaster in El Salvador resulting in a substantial, but temporary, disruption of living conditions in the area affected; El Salvador is unable, temporarily, to handle adequately the return of its nationals; and El Salvador officially requested designation of TPS. *See* INA section 244(b)(1)(B), 8 U.S.C. 1254a(b)(1)(B);
- The designation of El Salvador for TPS should be extended for an 18-month period, beginning on September 10, 2023 and ending on March 9, 2025. *See* INA section 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C).

Notice of the Rescission of TPS Termination and Extension of the TPS Designation of El Salvador

Pursuant to my lawful authorities, including under sections 103(a) and 244 of the Immigration and Nationality Act, I am hereby rescinding the termination of the TPS designation of El Salvador announced in the **Federal Register** at 83 FR 2654 on January 18, 2018. Due to this rescission and pursuant to INA section 244(b)(3)(C), as well as the ongoing preliminary injunction in *Ramos* v. *Nielsen,* 336 F. Supp. 3d 1075 (N.D. Cal. 2018), the TPS designation of El Salvador has continued to automatically extend under the statute since July 8, 2016, without a standing secretarial determination as to whether TPS should be extended or terminated. TPS beneficiaries under the designation, whose TPS has not been finally withdrawn for individual ineligibility, therefore have continued to maintain their TPS since March 9, 2018.

By the authority vested in me as Secretary under INA section 244, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate U.S. Government agencies, the statutory conditions supporting El Salvador's designation for TPS on the basis of environmental disaster continue to be met. *See* INA sections 244(b)(1)(B) and 244(b)(3)(A); 8 U.S.C. 1254a(b)(1)(B) and 1254a(b)(3)(A). On the basis of this determination, I am extending the existing designation of El Salvador for TPS for 18 months, beginning on September 10, 2023 and ending on March 9, 2025. *See* INA section 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C). Individuals holding TPS under the designation of El Salvador may file to reregister for TPS under the procedures announced in this notice if they wish to continue their TPS under this 18-month extension.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Eligibility and Employment Authorization for TPS

Required Application Forms and Application Fees To Re-Register for TPS

To re-register for TPS based on the designation of El Salvador, you must submit a Form I–821, Application for Temporary Protected Status during the 60-day reregistration period that starts on July 12, 2023 and ends on September 10, 2023. There is no Form I–821 fee for re-registration. *See* 8 CFR 244.17. You may be required to pay the biometric services fee. If you can demonstrate an inability to pay the biometric services fee, you may request to have the fee waived. Please see additional information under the ''Biometric Services Fee'' section of this notice.

Individuals who have an El Salvador TPS application (Form I–821) that was still pending as of June 21, 2023 do not need to file the application again. If USCIS approves an individual's Form I–821, USCIS will grant the individual TPS through March 9, 2025.

Required Application Forms and Application Fees To Obtain an EAD

Every employee must provide their employer with documentation showing they have a legal right to work in the United States. TPS beneficiaries are authorized to work in the United States and are eligible for an EAD which proves their employment authorization. If you have an existing EAD issued under the TPS designation of El Salvador that has been auto-extended through June 30, 2024 by the notice published at 87 FR 68717, you may continue to use that EAD through that date. If you want to obtain a new EAD valid through March 9, 2025, you must file an Application for Employment Authorization (Form I–765) and pay the Form I–765 fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver).

You may, but are not required to, submit Form I–765, Application for

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[90] Fact Sheet > El Salvador, United Nations High Commissioner for Refugees (UNHCR), p.1, Aug. 2021, available at *https://reporting.unhcr.org/sites/default/files/El%20Salvador%20Factsheet%20August%202021.pdf* (last visited March 6, 2023).

[91] Fact Sheet > El Salvador, United Nations High Commissioner for Refugees (UNHCR), p.2, Aug. 2021, available at *https://reporting.unhcr.org/sites/default/files/El%20Salvador%20Factsheet%20August%202021.pdf* (last visited March 6, 2023).

[92] Fact Sheet > El Salvador, United Nations High Commissioner for Refugees (UNHCR), p.1, Aug. 2021, available at *https://reporting.unhcr.org/sites/default/files/El%20Salvador%20Factsheet%20August%202021.pdf* (last visited March 6, 2023).

[93] Disaster risk reduction in El Salvador, Texas A&M University, May 3, 2022, *condevcenter.org/Portals/0/El%20Salvador%20Capstone%202022.pdf* (last visited: March 6, 2023).

Employment Authorization, with your Form I–821 re-registration application. If you do not want a new EAD now, you can request one later by filing your I–765 and paying the fee (or requesting a fee waiver) at that time, provided you have TPS or a pending TPS application. If you have TPS and only a pending Form I–765, you must file the Form I–821 to reregister for TPS or risk having your TPS withdrawn for failure to reregister without good cause.

Information About Fees and Filing

USCIS offers the option to applicants for TPS under El Salvador's designation to file Form I–821 and related requests for EADs online or by mail. When filing a TPS application, applicants can also request an EAD by submitting a completed Form I–765, with their Form I–821.

Online filing: Form I–821 and I–765 are available for concurrent filing online.[94] To file these forms online, you must first create a USCIS online account.[95] However, if you are requesting a fee waiver, you cannot submit the applications online. You will need to file paper versions of the fee waiver request and the form for which you are requesting the fee waiver.

Mail filing: Mail your application for TPS to the proper address in Table 1.

Table 1—Mailing Addresses: Mail your completed Form I–821, Application for Temporary Protected Status and Form I–765, Application for Employment Authorization, Form I–912, Request for Fee Waiver, if applicable, and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If you live in:	Then mail your application to:
• Texas	USCIS Dallas Lockbox. *U.S. Postal Service (USPS):* USCIS, Attn: TPS El Salvador, P.O. Box 660864, Dallas, TX 75266–0864. *FedEx, UPS, or DHL:* USCIS, Attn: TPS El Salvador (Box 660864), 2501 S State Highway 121 Business, Suite 400, Lewisville, TX 75067–8003.
• American Samoa • Arizona. • California. • Connecticut. • Delaware. • District of Columbia. • Georgia. • Guam. • Illinois. • Indiana. • Kentucky. • Maine. • Massachusetts. • Michigan. • Nevada. • New Hampshire. • New Jersey. • North Carolina. • Northern Mariana Islands. • Ohio. • Oregon. • Pennsylvania. • Puerto Rico. • Rhode Island. • South Carolina. • Vermont. • Virgin Islands. • Virginia. • Washington. • West Virginia.	USCIS Chicago Lockbox. *U.S. Postal Service (USCIS):* USPS, Attn: TPS El Salvador, P.O. Box 8635, Chicago, IL 60680–8635. *FedEx, UPS, or DHL:* USCIS, Attn: TPS El Salvador (Box 8635), 131 S. Dearborn St., 3rd Floor, Chicago, IL 60603–5517.
• Alabama • Alaska. • Arkansas. • Colorado. • Florida. • Hawaii. • Idaho. • Iowa. • Kansas. • Louisiana. • Maryland. • Minnesota. • Mississippi. • Missouri.	USCIS Elgin Lockbox. *U.S. Postal Service (USPS):* USCIS, Attn: TPS El Salvador, P.O. Box 4091, Carol Stream, IL 60197–4091. *FedEx, UPS, or DHL:* USCIS, Attn: TPS El Salvador (Box 4091), 2500 Westfield Drive, Elgin, IL 60124–7836.

[94] Find information about online filing at ''Forms Available to File Online,'' *https://www.uscis.gov/file-online/forms-available-to-file-online.*

[95] *https://myaccount.uscis.gov/users/sign_up.*

TABLE 1—MAILING ADDRESSES—Continued

If you live in:	Then mail your application to:
• Montana. • Nebraska. • New Mexico. • New York. • North Dakota. • Oklahoma. • South Dakota. • Tennessee. • Utah. • Wisconsin. • Wyoming.	

If you were granted TPS by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) and you wish to request an EAD, please mail your Form I–765 application to the appropriate mailing address in Table 1. When you are requesting an EAD based on an IJ/BIA grant of TPS, please include a copy of the IJ or BIA order granting you TPS with your application. This will help us verify your grant of TPS and process your application.

Supporting Documents

The filing instructions on the Form I–821 list all the documents needed to establish eligibility for TPS. You may also find information on the acceptable documentation and other requirements for applying (*i.e.,* registering) for TPS on the USCIS website at *https://www.uscis.gov/tps* under ''El Salvador.''

Travel

TPS beneficiaries may also apply for and be granted travel authorization as a matter of discretion. You must file for travel authorization if you wish to travel outside of the United States. If granted, travel authorization gives you permission to leave the United States and return during a specific period. To request travel authorization, you must file Form I–131, Application for Travel Document, available at *https://www.uscis.gov/i-131.* You may file Form I–131 together with your Form I–821 or separately. When filing the Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for the Form I–131, or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver.

If you are filing Form I–131 together with Form I–821, send your forms to the address listed in Table 1. If you are filing Form I–131 separately based on a pending or approved Form I–821, send your form to the address listed in Table 2 and include a copy of Form I–797 for the approved or pending Form I–821.

TABLE 2—MAILING ADDRESSES

If you are . . .	Mail to . . .
Filing Form I–131 together with a Form I–821, Application for Temporary Protected Status	The address provided in Table 1.
Filing Form I–131 based on a pending or approved Form I–821, and you are using the U.S. Postal Service (USPS): You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, P.O. Box 660167, Dallas, TX 75266–0867.
Filing Form I–131 based on a pending or approved Form I–821, and you are using FedEx, UPS, or DHL: You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, 2501 S State Hwy. 121, Business Ste. 400, Lewisville, TX 75067.

Biometric Services Fee for TPS

Biometrics (such as fingerprints) are required for all applicants 14 years of age and older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay the biometric services fee, you may request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver. For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* Fees for Form I–765 and biometric services are also described in 8 CFR 103.7(b)(1) (Oct. 1, 2020). If necessary, you may be required to visit an Application Support Center to have your biometrics captured. For additional information on the USCIS biometric screening process, please see the USCIS Customer Profile Management Service Privacy Impact Assessment, available at *https://www.dhs.gov/publication/dhsuscispia-060-customer-profile-management-service-cpms.*

Refiling a TPS Re-Registration Application After Receiving a Denial of a Fee Waiver Request

You should file as soon as possible within the 60-day re-registration period so USCIS can process your application and issue your EAD promptly, if one has been requested. Properly filing early will also allow you to have time to refile your application before the deadline, should USCIS deny your fee waiver request. The fee waiver denial notice will contain specific instructions about resubmitting your application. However, you are urged to refile within 45 days of the date on any USCIS fee waiver denial notice, if possible. See INA section 244(c)(3)(C); 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(b). For more information on good cause for late re-registration, visit the USCIS TPS web page at *www.uscis.gov/tps.*

Note: A re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the Form I–821 fee), or request a fee waiver, when filing a TPS re-registration application. As discussed above, if you decide to wait to request an EAD, you do not have to file the Form I–765 or pay the

associated Form I–765 fee (or request a fee waiver) at the time of re-registration. You may wait to seek an EAD until after USCIS has approved your TPS re-registration application or at any later date you decide you want to request an EAD. To re-register for TPS, you only need to file the Form I–821 with the biometrics services fee, if applicable (or request a fee waiver).

General Employment-Related Information for TPS Applicants and Their Employers

How can I obtain information on the status of my TPS application and EAD request?

To get case status information about your TPS application, as well as the status of your TPS-based EAD request, you can check Case Status Online at uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *https://egov.uscis.gov/e-request/Intro.do* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on Form I–9, Employment Eligibility Verification, as well as the Acceptable Documents web page at *https://www.uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees. Within three days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements.

You may present any document from List A (which provides evidence of both identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of employment authorization), or you may present an acceptable receipt as described in the Form I–9 Instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *https://www.uscis.gov/I-9Central.* An EAD is an acceptable document under List A.

If I have an EAD based on another immigration status, can I obtain a new TPS-based EAD?

Yes, if you are eligible for TPS, you can obtain a new TPS-based EAD, regardless of whether you have an EAD or work authorization based on another immigration status. If you want to obtain a new TPS-based EAD valid through March 9, 2025, then you must file Form I–765, Application for Employment Authorization, and pay the associated fee (unless USCIS grants your fee waiver request).

Can my employer require that I provide any other documentation such as evidence of my status or proof of my Salvadoran citizenship or a Form I–797C showing that I registered for TPS for Form I–9 completion?

No. When completing Form I–9, employers must accept any documentation you choose to present from the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. Employers may not request proof of Salvadoran citizenship or proof of registration for TPS when completing Form I–9 for new hires or reverifying the employment authorization of current employees. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin. Employers can refer to the compliance notice that DHS published on November 16, 2022, for information on how to complete the Form I–9 with TPS EADs that DHS extended through June 30, 2024.[96]

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or job applicants may also call the IER Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based on citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I–9 Instructions. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of ''Tentative Nonconfirmation'' (mismatch) must promptly inform employees of the mismatch and give such employees an opportunity to take action to resolve the mismatch. A mismatch result means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of a mismatch while the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call

[96] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *https://www.justice.gov/crt/immigrant-and-employee-rights-section* and the USCIS and E-Verify websites at *https://www.uscis.gov/i-9-central* and *https://www.e-verify.gov.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

This **Federal Register** Notice does not invalidate the compliance notice DHS issued on November 16, 2022, which extended the validity of certain TPS documentation through June 30, 2024 and does not require individuals to present a Form I–797, Notice of Action. While Federal Government agencies must follow the guidelines laid out by the Federal Government, State and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, or that may be used by DHS to determine if you have TPS or another immigration status. Examples of such documents are:

- Your current EAD with a TPS category code of A–12 or C–19, even if your country of birth noted on the EAD does not reflect the TPS designated country of El Salvador; or
- Your Form I–94, Arrival/Departure Record or Form I–797, Notice of Action, as shown in the **Federal Register** notice published at 87 FR 68717.

Check with the government agency requesting documentation regarding which document(s) the agency will accept. Some state and local government agencies use SAVE to confirm the current immigration status of applicants for public benefits.

While SAVE can verify that an individual has TPS, each state and local government agency's procedures govern whether they will accept an unexpired EAD, Form I–797, Form I–797C, or Form I–94. It may also assist the agency if you:

a. Give the agency a copy of the relevant **Federal Register** notice listing the TPS-related document, including any applicable auto-extension of the document, in addition to your recent TPS-related document with your A-number, USCIS number or Form I–94 number;

b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

c. Ask the agency to initiate a SAVE query with your information and follow through with additional verification steps, if necessary, to get a final SAVE response verifying your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or any automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed.

You can check the status of your SAVE verification by using CaseCheck at *https://save.uscis.gov/casecheck/.* CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (A-number, USCIS number, or Form I–94 number) or Verification Case Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the SAVE response is correct, the SAVE website, *www.uscis.gov/save*, has detailed information on how to correct or update your immigration record, make an appointment, or submit a written request to correct records.

[FR Doc. 2023–13018 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2735–22; DHS Docket No. USCIS–2014–0006]

RIN 1615–ZB69

Reconsideration and Rescission of Termination of the Designation of Nicaragua for Temporary Protected Status; Extension of the Temporary Protected Status Designation for Nicaragua

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice of Reconsideration and Rescission of Termination of the Designation of Nicaragua for Temporary Protected Status (TPS) and Notice of Extension of TPS Designation for Nicaragua.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is rescinding the previous termination of the designation of Nicaragua for TPS, which was published on December 15, 2017 and extending the designation of Nicaragua for Temporary Protected Status (TPS) for 18 months, beginning on January 6, 2024 and ending on July 5, 2025. This extension allows existing TPS beneficiaries to retain TPS through July 5, 2025, so long as they otherwise continue to meet the eligibility requirements for TPS. Existing TPS beneficiaries who wish to extend their status through July 5, 2025, must re-register during the 60-day re-registration period as described in this notice.

DATES: The *Rescission of Termination of the Designation of Nicaragua for TPS* took effect June 9, 2023.

Extension of Designation of Nicaragua for TPS: The 18-month extension of TPS for Nicaragua begins on January 6, 2024, and will remain in effect through July 5, 2025. The extension impacts existing beneficiaries of TPS under the designation of Nicaragua.

Re-registration: The 60-day re-registration period for existing beneficiaries runs from November 6, 2023, through January 5, 2024.

FOR FURTHER INFORMATION CONTACT:

- You may contact Rená Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital

Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.

- For further information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* You can find specific information about Nicaragua's TPS designation by selecting ''Nicaragua'' from the menu on the left side of the TPS web page.
- If you have additional questions about TPS, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).
- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.*
- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

BIA—Board of Immigration Appeals
CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
Form I–131—Application for Travel Document
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
FR—**Federal Register**
Government—U.S. Government
IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
IJ—Immigration Judge
INA—Immigration and Nationality Act
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action (TPS)

Through this notice, DHS announces the reconsideration and rescission of the termination of the designation of Nicaragua for TPS and the Secretary's decision to extend the TPS designation for 18 months from January 6, 2024, through July 5, 2025. This notice also sets forth procedures necessary for nationals of Nicaragua (or individuals having no nationality who last habitually resided in Nicaragua) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with USCIS.

Re-registration is limited to individuals who have previously registered or re-registered for TPS under Nicaragua's designation, whose applications were granted, and whose TPS has not been withdrawn for individual ineligibility for the benefit. Failure to re-register properly within the 60-day re-registration period may result in the withdrawal of your TPS following appropriate procedures. *See* 8 CFR 244.14.

For individuals who have already been granted TPS under Nicaragua's designation, the 60-day re-registration period runs from November 6, 2023, through January 5, 2024. USCIS will issue new EADs with a July 5, 2025, expiration date to eligible Nicaraguan TPS beneficiaries who timely re-register and apply for EADs.

Individuals who have a Nicaragua TPS application (Form I–821) and Application for Employment Authorization (Form I–765) that were still pending as of June 21, 2023 do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through July 5, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765 filed in connection with a Form I–821, USCIS will issue the individual a new EAD that will be valid through the same date. If you have TPS and only a pending Form I–765, you must file the Form I–821 to re-register for TPS or risk having your TPS withdrawn for failure to timely re-register without good cause. There are currently approximately 4,000 beneficiaries under Nicaragua's TPS designation who may be eligible to continue their TPS under the extension announced in this Notice.

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the INA, or to eligible individuals without nationality who last habitually resided in the designated foreign state before arrival in the United States, regardless of their country of birth.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS.
- TPS beneficiaries may also apply for and be granted travel authorization as a matter of DHS discretion.
- To qualify for TPS, beneficiaries must meet the eligibility standards at INA section 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).
- When the Secretary terminates a foreign state's TPS designation, beneficiaries return to one of the following:
  - The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or terminated); or
  - Any other lawfully obtained immigration status or category they received while registered for TPS, as long as it is still valid beyond the date TPS terminates.

When was Nicaragua designated for TPS?

Nicaragua was initially designated on the basis of environmental disaster that prevented nationals of Nicaragua from returning in safety following this environmental disaster, at the request of the country's government, and because Nicaragua was unable, temporarily, to handle adequately the return of its nationals. *See Designation of Nicaragua Under Temporary Protected Status,* 64 FR 526 (Jan. 5, 1999). Since its initial designation in 1999, TPS for Nicaragua was extended 13 consecutive times (for periods of 12 or 18 months at a time) under the same statutory basis of environmental disaster. The last such extension was due to expire on January 5, 2018.[1]

Following the statutorily required review of the country conditions, former Acting Secretary Elaine C. Duke announced the termination of TPS for Nicaragua, with an effective date of January 5, 2019. *See Termination of the Designation of Nicaragua for Temporary Protected Status,* 82 FR 59636 (Dec. 15, 2017); *see also* INA secs. 244(b)(3)(A) and (B); 8 U.S.C. 1254a(b)(3)(A) and (B). As discussed below, this termination decision has been the subject of litigation and a court order. As a result, the termination has not taken effect.

Litigation Background Regarding Termination of Certain TPS Designations

In addition to Nicaragua, in 2017–2018, TPS termination decisions were also announced for five other countries

[1] *Extension of the Designation of Nicaragua for Temporary Protected Status,* 81 FR 30325 (July 6, 2016).

by the Secretary or Acting Secretary: Sudan, El Salvador, Haiti, Nepal, and Honduras.[2] Lawsuits challenging the terminations were filed in the U.S. District Court for the Northern District of California in *Ramos* v. *Nielsen,* 326 F. Supp. 3d 1075 (N.D. Cal. 2018), and *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019), and in the U.S. District Court for the Eastern District of New York in *Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019).[3] In *Ramos,* the district court granted a preliminary injunction enjoining the terminations of TPS for El Salvador, Haiti, Sudan, and Nicaragua and directed DHS to maintain the *status quo* and to continue the TPS and TPS-related documentation of affected TPS beneficiaries under those countries' designations. The U.S. Government appealed, and a three-judge panel vacated the injunction. The appellate court, however, has granted rehearing en banc of the panel decision, vacating the panel's decision.[4] The district court's preliminary injunction thus remains in place. In *Bhattarai* the district court has stayed proceedings until the *Ramos* appeal is decided and approved the parties' stipulation for the continuation of TPS and TPS-related documentation for eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the *Ramos* appeal. In *Saget,* the district court granted a preliminary injunction enjoining termination of TPS for Haiti, and the Government appealed. However, following the new TPS designation of Haiti in August 2021, the district court dismissed the lawsuit based on the parties' stipulation to dismissal.[5] Beneficiaries under the TPS designations for El Salvador, Nicaragua, Sudan, Haiti, Honduras, and Nepal will retain their TPS while the preliminary injunction in *Ramos* remains in effect, and 120 days thereafter, provided that their TPS is not withdrawn because of individual ineligibility.[6]

DHS has taken actions to ensure its continued compliance with the court orders in *Ramos* and *Bhattarai.* DHS has published periodic notices to continue TPS and extend the validity of TPS-related documentation previously issued to beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal.[7] The most recent such notice continued TPS and extended the TPS-related documents specified in the notice through June 30, 2024.[8] These extensions apply where the TPS beneficiary properly filed for re-registration during either the most recent DHS-announced registration period for their country, or any applicable previous DHS-announced re-registration periods for the beneficiary's country, or has a re-registration application that remains pending.[9] Although the notice published at 87 FR 68717 remains valid, individuals who wish to remain eligible for TPS under the extension of TPS for Nicaragua announced in this notice through July 5, 2025, and any potential future extensions must apply for re-registration in accordance with the procedures announced in this notice.[10] Failure to timely re-register without good cause is a ground for TPS withdrawal. *See* INA sec. 244(c)(3)(C), 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17.

What authority does the Secretary have to reconsider and rescind the termination of TPS for Nicaragua and extend the prior designation?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist.[11] The decision to designate any foreign state (or part thereof) is a discretionary decision, and there is no judicial review of any determination with respect to the designation, termination, or extension of

[2] *Termination of the Designation of Sudan for Temporary Protected Status,* 82 FR 47228 (Oct. 11, 2017); *Termination of the Designation of El Salvador for Temporary Protected Status,* 83 FR 2654 (Jan. 18, 2018); *Termination of the Designation of Haiti for Temporary Protected Status,* 83 FR 2648 (Jan. 18, 2018); *Termination of the Designation of Nepal for Temporary Protected Status,* 83 FR 23705 (May 22, 2018); *Termination of the Designation of Honduras for Temporary Protected Status,* 83 FR 26074 (June 5, 2018). Haiti and Sudan were later newly designated for TPS on August 3, 2021 and April 19, 2022, respectively, for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021); *Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022).

[3] *See Ramos* v. *Nielsen,* 336 F.Supp.3d 1075 (N.D. Cal. Oct. 3, 2018) (''*Ramos*'') (district court granted preliminary injunction against terminations of TPS for El Salvador, Haiti, Sudan, and Nicaragua). On appeal, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit vacated the district court's injunction and remanded the case to the district court, but the plaintiffs filed a motion for rehearing en banc. *Ramos* v. *Wolf,* 975 F.3d 872 (9th Cir. 2020). The appellate court did not issue its directive to the district court to make its vacatur of the injunction effective, thus the injunction remained in place. On February 10, 2023, the Ninth Circuit issued an order granting rehearing en banc and vacated the previous ruling from its three-judge panel. 59 F.4th 1010 (9th Cir. 2023). En banc arguments are scheduled to be heard during the week of June 20, 2023. In the meantime, the injunction remains in place. *See also Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (district court stayed proceedings until *Ramos* appeal decided and approved parties' stipulation for continued TPS and issuance of TPS-related documentation to eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the appeal, treatment similar to that provided *Ramos*-covered individuals). Other litigation was filed relating to the terminations of El Salvador, Honduras, and Haiti. The Haiti-related case, NAACP v. *U.S. Dep't of Homeland Sec.,* No. 1:18–cv–00239 (D. Md. Jan. 24, 2018) was dismissed on May 22, 2021, subsequent to the same DHS designation. Meanwhile, *Centro Presente* v. *Biden,* No. 1:18–cv–10340 (D. Mass. July 23, 2018), relating to El Salvador, Honduras, and Haiti, and *Casa de Maryland* v. *Biden,* No. 18–00845 (D. Md. Mar. 23, 2018), relating to El Salvador, are currently either stayed or subject to a pending stay motion.

[4] *Ramos* v. *Nielsen,* 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *vacated,* 975 F.3d 872 (9th Cir. 2020), *pet. for reh'g en banc granted,* 59 F.4th 1010 (Feb. 10, 2023) (No. 18–16981). (''*Ramos*'').

[5] *See Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019) and Order approving Stipulation of Dismissal, dated Oct. 15, 2021.

[6] As noted, Haiti was newly designated for TPS on August 3, 2021 for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021). On April 19, 2022, the Secretary also newly designated Sudan TPS. *See Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022). Those designations cover all Haitian and Sudanese nationals who were eligible for TPS under the Haiti and Sudan TPS designations that were terminated in 2018 and 2017, respectively.

[7] 83 FR 54764 (Oct. 31, 2018); 84 FR 7103 (Mar. 1, 2019); 84 FR 20647 (May 10, 2019) (correction notice issued at 84 FR 23578 (May 22, 2019)); 84 FR 59403 (Nov. 4, 2019); 85 FR 79208 (Dec. 9, 2020); 86 FR 50725 (Sept. 10, 2021) (correction notice issued at 86 FR 52694 (Sept. 22, 2021)).

[8] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations of El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

[9] *Id.,* at 68719.

[10] Through the re-registration process, which is generally conducted every 12 to 18 months while a foreign state is designated for TPS, USCIS determines whether each TPS beneficiary is continuing to maintain individual eligibility for TPS, including but not limited to, the requirements related to disqualifying criminal or security issues. *See Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717, 68720 (Nov. 16, 2022) (noting potential future action for TPS beneficiaries may include a requirement to re-register).

[11] Although the text of INA section 244(b)(1) continues to ascribe this power to the Attorney General, this authority is now held by the Secretary of Homeland Security by operation of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135. *See, e.g.,* 6 U.S.C. 557; *Nielsen* v. *Preap,* 139 S. Ct. 954, 959 n.2 (2019). The Secretary may designate a country (or part of a country) for TPS on the basis of ongoing armed conflict such that returning would pose a serious threat to the personal safety of the country's nationals and habitual residents, environmental disaster (including an epidemic), or extraordinary and temporary conditions in the country that prevent the safe return of the country's nationals. For environmental disaster-based designations, certain other statutory requirements must be met, including that the foreign government must request TPS. A designation based on extraordinary and temporary conditions cannot be made if the Secretary finds that allowing the country's nationals to remain temporarily in the United States is contrary to the U.S. national interest. INA sec. 244(b)(1).

a designation. *See* INA sec. 244(b)(5)(A); 8 U.S.C. 1254a(b)(5)(A).

At least 60 days before the expiration of a foreign state's TPS designation, the Secretary, after consultation with appropriate U.S. Government agencies, must review the conditions in the foreign state designated for TPS to determine whether they continue to meet the conditions for the TPS designation. *See* INA sec. 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA sec. 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). If the Secretary does not determine that the foreign state no longer meets the conditions for TPS designation, the designation is extended for an additional period of 6 months or, in the Secretary's discretion, 12 or 18 months. *See* INA sec. 244(b)(3)(A), (C); 8 U.S.C. 1254a(b)(3)(A), (C).

On December 15, 2017, the Acting Secretary of Homeland Security issued notice of her decision that Nicaragua no longer continued to meet the conditions for TPS designation and announced the termination of TPS for Nicaragua. The Secretary also announced an orderly transition period of 12 months, such that the termination was set to go into effect on January 5, 2019. On March 12, 2018, as noted above, plaintiffs in *Ramos* filed suit challenging the termination decision for Nicaragua, as well as contemporaneous decisions to terminate TPS for El Salvador, Sudan, and Haiti. On October 3, 2018, the U.S. District Court for the Northern District of California issued a preliminary injunction order in *Ramos,* preventing the termination decision from going into effect until the court reaches a decision on the merits of the plaintiffs' claims and further directing that DHS maintain the *status quo,* including continuing TPS and TPS-related documentation such as EADs for affected beneficiaries. After reaching a stipulation with plaintiffs that no termination would go in effect for at least 120 days following the conclusion of any appeal, DHS has issued a series of **Federal Register** notices continuing TPS and TPS-related documentation for affected TPS beneficiaries, with the most recent continuation notice effective through June 30, 2024.[12] As a result, the announced termination of the TPS designation for Nicaragua has never gone into effect, and TPS beneficiaries under that designation have retained their TPS, unless it has been individually withdrawn pursuant to INA section 244(c)(3), 8 U.S.C. 1254a(c)(3).

An agency has inherent (that is, statutorily implicit) authority to revisit its prior decisions unless Congress has expressly limited that authority.[13] The TPS statute does not limit the Secretary's inherent authority to reconsider any TPS-related determination, and upon reconsideration, to change the determination. *See* INA secs. 244(b)(3), (b)(5)(A); 8 U.S.C. 1254a(b)(3), (b)(5)(A).

Why is the Secretary rescinding the previous decision to terminate the TPS designation for Nicaragua?

After conducting an independent assessment of the country conditions in Nicaragua as they existed in 2017 and exist today, the Secretary has determined that Nicaragua's 1999 TPS designation should not have been terminated. As explained below, the conditions in Nicaragua that gave rise to its TPS designation in 1999 persisted in 2017 and persist to this day. Accordingly, the Secretary is, upon reconsideration, vacating the 2017 decision terminating Nicaragua's TPS designation and extending that designation for an additional 18 months.

Nicaragua was initially designated for TPS in 1999 on environmental disaster grounds following Hurricane Mitch, at the request of the country's government, and because Nicaragua was unable, temporarily to handle adequately the return of its nationals.[14] The hurricane, which struck in 1998, killed approximately 2,500 people and 885 were reported missing.[15] The devastation of Hurricane Mitch affected nearly 868,000 people.[16] Landslides and floods destroyed entire villages and caused extensive damages to the transportation network, housing, medical and educational facilities, water supply and sanitation facilities, and the agricultural sector.[17] Overall damage estimates ranged between $1.3–1.5 billion.[18]

At the time of the decision to terminate the designation of TPS, Nicaragua continued to experience significant challenges due to the destruction of the hurricane. While the international community and the Government of Nicaragua helped to repair the damage and destruction left behind by Hurricane Mitch and there were notable improvements in some sectors, several sectors including housing and infrastructure remained severely impacted. In 2017, Habitat for Humanity reported that Nicaragua had one of the highest housing deficits in Central America stating, ''The total deficit generates a need for 957,000 new houses and home improvements, and only 50 percent of the total need is covered between the private and public sectors.'' [19] Moreover, though a significant amount of aid was dedicated to repairing and improving road infrastructure following Hurricane Mitch, transportation infrastructure in Nicaragua remained poor and suffered from damage from tropical storms and hurricanes.[20]

Additionally, according to the 2017 Global Climate Risk Index, Nicaragua

[12] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations of El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

[13] *Ivy Sports Medicine, LLC* v. *Burwell,* 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.); *see, e.g., id.* (''[A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion. . . . ''[I]nherent authority for timely administrative reconsideration is premised on the notion that the power to reconsider is inherent in the power to decide.'' (quotation marks and citations omitted)); *NRDC* v. *Regan,* 67 F.4th 397, 401 (D.C. Cir. 2023) (''[A]lthough the power to decide is normally accompanied by the power to reconsider, Congress undoubtedly can limit an agency's discretion to reverse itself.'' (quotation marks omitted); *Macktal* v. *Chao,* 286 F.3d 822, 825–26 (5th Cir. 2002) (''It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.'') (collecting cases); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977) (''We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.''); *see also Last Best Beef, LLC* v. *Dudas,* 506 F.3d 333, 340 (4th Cir. 2007) (agencies possess especially ''broad authority to correct their prior errors'').

[14] *See Designation of Nicaragua Under Temporary Protected Status,* 64 FR 526 (Jan. 5, 1999).

[15] OCHA, Central America—Hurricane Tropical Storm Mitch OCHA Situation Report No. 14, Nov. 16, 1998, available at *https://reliefweb.int/report/belize/central-america-hurricanetropical-storm-mitch-ocha-situation-report-no-14* (last visited Nov. 7, 2022).

[16] *Id.*

[17] Nicaragua: Huracán Mitch Daños, Costos, Acciones de Rehabilitación del Gobierno y la Cooperación Internacional, Government of Nicaragua, May 28, 1999, available at *https://reliefweb.int/report/nicaragua/nicaragua-huracan-mitch-da%C3%B1os-costos-acciones-de-rehabilitaci%C3%B3n-del-gobierno-y-la* (last visited Nov. 18, 2022).

[18] *Nicaragua Overview,* U.S. Agency for International Development (USAID), *http://web.archive.org/web/20110606154439/http://www.usaid.gov/pubs/bj2001/lac/ni/* (last visited Nov. 16, 2022). According to a USAID source, overall damages were US$1.5 billion. The Government of Nicaragua assessed damages at US$1.3 billion. *See Nicaragua:* Huracán Mitch Daños, Costos, Acciones de Rehabilitación del Gobierno y la Cooperación Internacional.

[19] *Habitat for Humanity in Nicaragua, Habitat for Humanity, https://web.archive.org/web/20171121013537/https://www.habitat.org/where-we-build/nicaragua,* (last visited June 6, 2017).

[20] Nicaragua > *Infrastructure,* Jane's Sentinel Security Assessment—Central America And The Caribbean, Feb. 3, 2017, *http://janes.ihs.com/Janes/Display/1302302* (last visited Nov. 16, 2022).

ranked as the 4th most affected country in the world by extreme weather events from 1996 to 2015; during this time, Nicaragua averaged $234.7 million in damages per year, and witnessed over 3,200 total fatalities from extreme weather events.[21] Per the World Food Program, Nicaragua's vulnerability to natural disasters hinders its progress in addressing both poverty and food security.[22]

Since Hurricane Mitch, various hurricanes, tropical depressions, and tropical storms have made landfall in Nicaragua.[23] The conditions leading up to the decision to terminate show recurrent hydrometeorological and environmental events that delayed and prolonged Nicaragua's ability to recover. In 2016, heavy rains and wind once again caused damage and flooding in Nicaragua.[24] In July 2016, more than 8,900 people were affected, 3,900 people were evacuated, and nearly 1,700 homes were flooded due to heavy rains and flooding.[25] In November 2016, Hurricane Otto—a category 2 storm—damaged 817 and destroyed 120 homes and necessitated the evacuation of over 11,600 people.[26] Also, consecutive years of drought (from November 2013 to April 2016) [27] negatively impacted agriculture, fishing, and hydroelectric energy production in Nicaragua.[28]

The conditions in Nicaragua at the time of the TPS termination decision prevented Nicaraguan nationals from returning to Nicaragua in safety and negatively affected the country's ability to adequately handle the return of its nationals residing in the United States. As explained above, at the time of the decision to terminate TPS, Nicaragua continued to experience ongoing environmental disasters that were either insufficiently considered or not considered in the termination decision. The termination decision failed to adequately assess conditions in Nicaragua in 2017. Those conditions continued to substantially disrupt living conditions and temporarily affected the country's ability to adequately handle the return of its nationals residing in the United States. The Secretary has concluded that reconsideration is appropriate and timely, particularly given that the 2017 termination decision has not yet gone into effect due to the ongoing litigation and associated court orders.

What authority does the Secretary have to extend the designation of Nicaragua for TPS?

As noted above, section 244(b) of the INA, 8 U.S.C. 1254a(b), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist and instructs the Secretary to periodically review the country conditions underpinning each designation and determine whether they still exist, leading to either termination or extension of the TPS designation. However, if the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA sec. 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). If the Secretary does not make a decision as to either extension or termination, then INA section 244(b)(3)(C) requires the automatic extension of the designation for six months (or 12 or 18 months in the Secretary's discretion).

Prior to the now-rescinded termination of the TPS designation for Nicaragua, the most recent extension of the designation was due to end on January 5, 2018.[29] In light of the Secretary's reconsideration and rescission of the December 15, 2017 decision to terminate the TPS designation for Nicaragua, there is no longer any standing secretarial determination that Nicaragua ''no longer meets the conditions for designation'' under INA section 244(b)(1). Accordingly, pursuant to INA section 244(b)(3)(C), and in the absence of an affirmative decision by any Secretary to extend the designation for 12 or 18 months rather than the automatic six months triggered by the statue, the TPS designation for Nicaragua shall have been extended in consecutive increments of six months between the date when the last designation extension was due to end on January 5, 2018, and the effective date of the TPS extension announced in this notice on January 6, 2024. Coupled with the existing *Ramos* order and corresponding **Federal Register** notices continuing TPS

[21] Kreft, Sönke, Eckstein, David and Melchior, Inga, *Global Climate Risk Index 2017,* Germanwatch, p. 5–6, Nov. 2016, available at *https://reliefweb.int/report/world/global-climate-risk-index-2017-who-suffers-most-extreme-weather-events-weather-related* (last visited Nov. 17, 2022).

[22] *WFP Nicaragua Country Brief,* World Food Programme, p.2, Feb. 2017, available at *https://reliefweb.int/report/nicaragua/wfp-nicaragua-country-brief-february-2017* (last visited Nov. 17, 2022).

[23] *Central America—Drought in El Salvador, Guatemala, Honduras and Nicaragua,* ACAPS, p.5, Sept. 29, 2015, available at *https://reliefweb.int/report/el-salvador/acaps-briefing-note-central-america-drought-el-salvador-guatemala-honduras* (last visited Nov. 17, 2022).

[24] *Gobierno atiende a familias afectadas por fuertes vientos en Malpaisillo,* Government of Nicaragua, Apr. 27, 2016, available at *https://reliefweb.int/report/nicaragua/gobierno-atiende-familias-afectadas-por-fuertes-vientos-en-malpaisillo* (last visited May 22, 2023); REDLAC *Weekly Note on Emergencies Latin America & The Caribbean—Year 9—Volume 451,* UNOCHA, May 10, 2016, available at *https://reliefweb.int/report/ecuador/redlac-weekly-note-emergencies-latin-america-caribbean-year-9-volume-451* (last visited Nov. 17, 2022); *Monitoring Emergencies: Nicaragua—06/01/2016: 509 people affected by rain,* Pan American Health Organization, June 1, 2016, available at *https://reliefweb.int/report/nicaragua/monitoring-emergencies-nicaragua-06012016-509-people-affected-rain* (last visited Nov. 17, 2022); *Ríos crecidos y zonas incomunicadas por las lluvias,* El Nuevo Diario (Nica.), Jun. 6, 2016, available at *https://reliefweb.int/report/nicaragua/r-os-crecidos-y-zonas-incomunicadas-por-las-lluvias* (last visited Nov. 17, 2022); *Monitoring Emergencies: Nicaragua—07/12/2016: 1,781 families have been affected in 9 municipalities due to flooding—Update,* Pan American Health Organization, July 12, 2016, available at *https://reliefweb.int/report/nicaragua/monitoring-emergencies-nicaragua-07122016-1781-families-have-been-affected-9* (last visited Nov. 17, 2022); *Monitoring Emergencies: Nicaragua—12/13/2016: Strong rains affect the Southern Caribbean region,* Pan American Health Organization, Dec. 13, 2016, available at *https://reliefweb.int/report/nicaragua/monitoring-emergencies-nicaragua-12132016-strong-rains-affect-southern-caribbean* (last visited Nov. 17, 2022); *Más de 900 familias afectadas por lluvias,* Redhum, Oct. 22, 2016, available at *https://reliefweb.int/report/nicaragua/m-s-de-900-familias-afectadas-por-lluvias* (last visited Nov. 17, 2022).

[25] *Monitoring Emergencies: Nicaragua—07/12/2016: 1,781 families have been affected in 9 municipalities due to flooding—Update,* Pan American Health Organization, July 12, 2016, available at *https://reliefweb.int/report/nicaragua/monitoring-emergencies-nicaragua-07122016-1781-families-have-been-affected-9* (last visited Nov. 17, 2022); *World events—ECHO Daily Map | 12/07/2016,* European Commission Humanitarian Aid Office, July 12, 2016, available at *https://reliefweb.int/map/world/world-events-echo-daily-map-12072016* (last visited Nov. 17, 2022).

[26] *Humanitarian Bulletin—Latin America and the Caribbean,* UNOCHA, p.2, Nov–Dec. 2016, available at *https://reliefweb.int/report/world/humanitarian-bulletin-latin-america-and-caribbean-volume-30-november-december-2016* (last visited Nov. 17, 2022); *Huracán Otto provoca daños en 817 viviendas,* Redhum, Nov. 29, 2016, available at *https://reliefweb.int/report/nicaragua/hurac-n-otto-provoca-da-os-en-817-viviendas* (last visited Nov. 17, 2022); *Rosario presenta informe sobre respuesta a familias afectadas por el huracán Otto,* Redhum, Nov. 28, 2016, available at *https://reliefweb.int/report/nicaragua/rosario-presenta-informe-sobre-respuesta-familias-afectadas-por-el-hurac-n-otto* (last visited Nov. 17, 2022).

[27] *Situación ''muy grave'' con 40 pozos comunitarios secos en Occidente,* La Prensa (Nic.), Feb. 16, 2017, available at *https://reliefweb.int/report/nicaragua/situaci-n-muy-grave-con-40-pozos-comunitarios-secos-en-occidente* (last visited Nov. 17, 2022).

[28] Rios, Julia, *In drought-hit central Nicaragua, water 'is like looking for gold',* Agence France-Presse, Apr. 7, 2016, available at *https://www.yahoo.com/news/drought-hit-central-nicaragua-water-looking-gold-101011971.html?guccounter=1* (last visited Nov. 17, 2022); Silva, José Adán, *Cambio climático seca a Nicaragua, Inter Press Service,* Mar. 30, 2016, available at *https://ipsnoticias.net/2016/03/cambio-climatico-seca-a-nicaragua/* (last visited Nov. 17, 2022).

[29] *See Extension of the Designation of Nicaragua for Temporary Protected Status,* 81 FR 30325 (July 6, 2016).

and TPS-related documentation for affected beneficiaries under the designation for Nicaragua, this means that all such individuals whose TPS has not been finally withdrawn for individual ineligibility are deemed to have retained TPS since January 5, 2018, and may re-register under procedures announced in this Notice.

Why is the Secretary extending the TPS designation for Nicaragua for TPS for 18 months through July 5, 2025?

DHS has reviewed country conditions in Nicaragua. Based on the review, including input received from the United States Department of State (DOS) and other U.S. Government agencies, the Secretary has determined that an 18-month TPS extension is warranted because the conditions supporting Nicaragua's 1999 designation for TPS on the basis of environmental disaster remain.

As previously discussed, Nicaragua was originally designated for TPS in 1999 [30] following Hurricane Mitch. Since the disastrous hurricane in 1998, Nicaragua has been encumbered by several significant natural disasters and environmental challenges.

Nicaragua continues to suffer from the residual effects of Hurricane Mitch, and subsequent disasters have caused additional damage and added to the country's fragility. ''In the last 20 years, Nicaragua has been hit by major, extreme weather events such as Hurricanes Mitch in 1998, Beta in 2005, Felix in 2007, and most recently by hurricanes Eta and Iota in November 2020 . . . The economic, social, housing, and infrastructure losses have been devastating for the region.'' [31] According to the International Federation of Red Cross and Red Crescent Societies (IFRC), Hurricane Eta and Hurricane Iota left severe damage in the region, including loss of lives.[32] The ''back-to-back major hurricanes affected 60 per cent of the national territory,'' [33] while ''[c]oastal areas such as the North Caribbean Coast Autonomous Region (RACCN), a rural area mostly inhabited by indigenous and Afro-descendant peoples, bore the brunt of the destruction.'' [34] More than 3 million people were exposed to these hurricanes, with an estimated 1.8 million people affected.[35] Damages from the hurricanes were estimated at $738 million[36] and limited access to safe drinking water and sanitation facilities, damaged staple crops, and worsened food insecurity for vulnerable individuals.[37]

On July 1, 2022, Tropical Storm Bonnie hit the Caribbean coast of Nicaragua.[38] The storm ''caused flash flooding, overflow in rivers and landslides in the North and South Caribbean Coast,'' [39] and ''affected 21 municipalities, flooding 300 homes, ripping off the roofs of 123 homes, and destroying 3 homes.'' [40] At least 3,000 people were evacuated,[41] and ''[t]ens of thousands of people across Nicaragua were left without power and more than 10,000 homes had no water.'' [42] In addition, 12 people were injured,[43] and four people were killed when they were ''swept away by rivers which had been turned into raging torrents by the heavy rains.'' [44]

On October 9, 2022, Hurricane Julia hit Nicaragua's central Caribbean coast.[45] Reports indicate that Hurricane Julia damaged hundreds of homes but left no reported casualties.[46] The director of Nicaragua's disaster system reported that more than 13,000 families had been evacuated, more than 800 houses had been flooded, and many roofs had been damaged.[47]

In addition to hurricanes, Nicaragua has also been impacted by other hydrometeorological events [48] and is also one of the countries in the Dry Corridor of Central America.[49] These environmental shocks have affected conditions throughout Nicaragua resulting in deaths, damage to homes and infrastructure, and loss of crops throughout the years.[50]

[30] *Designation of Nicaragua Under Temporary Protected Status,* 64 FR 526 (Jan. 5, 1999).

[31] Nicaragua: Preparatory Action for Disaster/Crisis—DREF Plan of Action, Operation No. MDRNI011, International Federation of Red Cross and Red Crescent Societies (IFRC), p.2, Sept. 3, 2021, available at *https://reliefweb.int/report/nicaragua/nicaragua-preparatory-action-disastercrisis-dref-plan-action-operation-ndeg-mdrni011* (last visited Feb. 7, 2023).

[32] OCHA, Nicaragua: Hurricanes Eta & Iota—Emergency Appeal No. MDR43007, Operation Update No. 2, International Federation of Red Cross and Red Crescent Societies (IFRC), p. 2, Jan. 20, 2021, available at *https://reliefweb.int/report/nicaragua/nicaragua-hurricanes-eta-iota-emergency-appeal-n-mdr43007-operation-update-no-2* (last visited Feb. 7, 2023).

[33] OCHA, Nicaragua: Plan of Action √ Hurricanes Eta and Iota, January 2021, Feb. 22, 2021, available at *https://reliefweb.int/report/nicaragua/nicaragua-plan-action-hurricanes-eta-and-iota-january-2021-one-pager* (last visited Feb. 7, 2023).

[34] OCHA, Nicaragua Action Plan to focus on recovery efforts after hurricanes Eta and Iota, United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Mar. 17, 2021, available at *https://www.unocha.org/story/nicaragua-action-plan-focus-recovery-efforts-after-hurricanes-eta-and-iota* (last visited Feb. 7, 2023).

[35] OCHA, Nicaragua: Plan of Action | Hurricanes Eta and Iota, January 2021, Feb. 22, 2021, available at *https://reliefweb.int/report/nicaragua/nicaragua-plan-action-hurricanes-eta-and-iota-january-2021-one-pager* (last visited Feb. 7, 2023).

[36] *Id.*

[37] USAID, Nicaragua Assistance Overview, Aug. 2022, available at *https://www.usaid.gov/humanitarian-assistance/nicaragua#:~:text=With%20approximately%20%2412.6%20million%20in,affected%20by%20Eta%20and%20Iota.* (last visited Feb. 7, 2023).

[38] Tropical Storm Bonnie hits Nicaragua's Caribbean Coast, AP, July 1, 2022, available at *https://apnews.com/article/storms-central-america-tropical-cyclones-nicaragua-51688c5a8896b3679b0358004e20d076* (last visited Feb. 7. 2023).

[39] OCHA, WFP Nicaragua Country Brief, July 2022, Aug. 26, 2022, available at *https://reliefweb.int/report/nicaragua/wfp-nicaragua-country-brief-july-2022* (last visited Feb. 7, 2023).

[40] PAHO, Natural Hazards Monitoring—5 August 2022, Aug. 5, 2022, available at *https://www.paho.org/en/natural-hazards-monitoring/natural-hazards-monitoring-5-august-2022* (last visited Feb. 7, 2023).

[41] Nicaragua—Floods (PAHO, SINAPRED, INETER) (ECHO Daily Flash of 06 July 2022), European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), Jul. 6, 2022, available at *https://reliefweb.int/report/nicaragua/nicaragua-floods-paho-sinapred-ineter-echo-daily-flash-06-july-2022* (last visited Feb. 7. 2023).

[42] Buschschlüter, Vanessa, Storm Bonnie leaves deadly trail in Central America, BBC, July 4, 2022, available at *https://www.bbc.com/news/world-latin-america-62037088* (last visited Feb. 7, 2023).

[43] Nicaragua—Floods (PAHO, SINAPRED, INETER) (ECHO Daily Flash of 06 July 2022), European Commission's Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO), July 6, 2022, available at *https://reliefweb.int/report/nicaragua/nicaragua-floods-paho-sinapred-ineter-echo-daily-flash-06-july-2022* (last visited Feb. 7, 2023).

[44] Buschschlüter, Vanessa, Storm Bonnie leaves deadly trail in Central America, BBC, July 4, 2022, available at *https://www.bbc.com/news/world-latin-america-62037088* (last visited Feb. 7, 2023).

[45] Hurricane Julia hits Nicaragua with torrential rainfall, AP, Oct. 9, 2022, available at *https://apnews.com/article/hurricanes-caribbean-storms-nicaragua-tropical-2a6032a0432971cb2c88a9643b5e8f75* (last visited Feb. 7, 2023).

[46] Tropical Storm Julia emerges over Pacific after crossing Nicaragua, Reuters, Oct. 10, 2022, available at *https://www.reuters.com/business/environment/hurricane-julia-hits-nicaragua-with-high-winds-2022-10-09/* (last visited Feb. 7, 2023).

[47] *Id.*

[48] OCHA, Hydrometeorological and Climate Services Modernisation Plan For Nicaragua—January 2019, World Bank Group, p.2, Jan. 31, 2019, available at *https://reliefweb.int/report/nicaragua/hydrometeorological-and-climate-services-modernisation-plan-nicaragua-january-2019* (last visited Feb. 7, 2023).

[49] OCHA, Central America's Dry Corridor: Turning emergency into opportunities, Oct. 19, 2022, available at *https://reliefweb.int/report/honduras/central-americas-dry-corridor-turning-emergency-opportunities* (last visited Feb. 7, 2023).

[50] Velásquez, Uriel, Lluvias dejan 14 muertos en Nicaragua [Rains leave 14 dead in Nicaragua], El Nuevo Diario (Ni.), Oct. 19, 2018, available at *https://web.archive.org/web/20181019114015/https://www.elnuevodiario.com.ni/nacionales/477437-lluvias-dejan-14-muertos-nicaragua/*; Nicaragua floods: DREF final report (8 July 2018), International Federation of Red Cross and Red Crescent Societies (IFRC), p.1, July 8, 2018, available at *https://reliefweb.int/report/nicaragua/nicaragua-floods-dref-final-report-8-july-2018;* A comprehensive action plan for the Dry Corridor in Nicaragua, Food and Agriculture Organization of the United Nations (FAO), Nov. 27, 2017, available at *https://web.archive.org/web/20200731011949/*

Continued

In addition to the numerous environmental disasters following the 1998 hurricane, Nicaragua is experiencing political instability and a humanitarian crisis that continue to render the country temporarily unable to adequately handle the return of its nationals.

The Nicaraguan government's harsh response to domestic dissent and political opponents began in 2018 when President Ortega proposed to reduce social security benefits in Nicaragua which triggered protests.[51] The government's response was repressive [52] and included an ''estimated 325–600 extrajudicial killings, as well as torture, political imprisonment, and suppression of the press, and led to thousands of citizens going into exile'' according to a 2019 Report of the High-Level Commission on Nicaragua of the Organization of the American States.[53] The Ortega government launched a new period of increased oppression beginning in May 2021, arresting dozens of government critics, including several revolutionary leaders who once fought alongside Ortega.[54]

In a September 2022 report, the Office of the United Nations High Commissioner for Human Rights (OHCHR) reported that the ''human rights situation in Nicaragua has progressively deteriorated since 2018.'' [55] The Associated Press noted in August 2022 that political stability in Nicaragua ''has never fully returned'' since the outbreak of protests in 2018 and the subsequent ''crackdown by security forces and allied civilian militias.'' [56] Moreover, OHCHR reported that it had noted ''a deterioration of the human rights situation'' in 2022, ''particularly regarding civil and political rights, in a context characterized by the absence of dialogue, the deepening of the political crisis, and the isolation of Nicaragua from the international ommunity.'' [57] As part of the government's authoritarian crackdown, it has shut down nearly 3,000 NGOs in 2022, reducing the number of organizations that would have assisted with disaster response and recovery efforts.[58] These actions along with insufficient investment in public works and other programs necessary for long-term socioeconomic development have impacted Nicaragua's ability to recover from Hurricane Mitch.

The resulting instability has caused a humanitarian crisis. Between 2018 and 2020, more than 108,000 Nicaraguans fled their country, according to UNHCR.[59] Further, UNHCR has reported that in 2021, new asylum applications worldwide by nationals of Nicaragua were among the most commonly registered and experienced a five-fold increase from 2020.[60] The UN High Commissioner for Human Rights stated that the ''sociopolitical, economic and human rights crises we are witnessing in Nicaragua are driving thousands of people from the safety of their homes. The number of Nicaraguans leaving the country is growing in unprecedented numbers, even higher than in the 1980s.'' [61] UNHCR discussed ''Conflict-Induced Displacement'' in Nicaragua stating that, ''[d]ue to the continuously deteriorating political and security situation coupled with ongoing state repression, thousands of people have been forced to flee their homes, hide in safe houses or leave the country altogether.'' [62]

As of June 2022, more than 260,000 Nicaraguans had been forced to flee their country, including 191,875 to Costa Rica, 30,937 to Mexico, 21,556 to the United States,[63] 8,124 to Guatemala, 6,774 to Spain, and 5,170 to Panama.'' [64] In early September 2022, reports indicated that Nicaraguans seeking asylum in Costa Rica were at its highest level since Nicaragua's political crisis exploded in April 2018.[65] Additionally, more than ''200,000 pending applications and another 50,000 people waiting for their appointment to make a

https://www.fao.org/in-action/agronoticias/detail/en/c/1062713/; Moloney, Anastasia, In Honduras, years of drought pressure farmers to leave land, Reuters, Sept. 27, 2019, available at *https://news.trust.org/item/20190927063451-szxlj/*; Tórrez García, Cinthya, Trescientos mil nicaragüenses viven en riesgo ante sequía [Three hundred thousand Nicaraguans live at risk of drought], La Prensa (Ni.), Feb. 27, 2018, available at *https://web.archive.org/web/20220613192407/https://www.laprensani.com/2018/02/27/nacionales/2383214-trescientos-mil-nicaraguenses-viven-en-riesgo-ante-sequia*; Josefsen Hermann, Lise, Caught between floods and drought: Farmers in Nicaragua living in uncertainty, DW, June 12, 2019, available at *https://www.dw.com/en/caught-between-floods-and-drought-farmers-in-nicaragua-living-in-uncertainty/a-49021423*; NICARAGUA: Dry spell in northern Nicaragua, ACAPS, p.1, July 24, 2019, available at *https://www.acaps.org/sites/acaps/files/products/files/20190724_acaps_start_briefing_note_nicaragua_drought.pdf*. (All sources listed in this footnote last visited Feb. 7, 2023).

[51] Nicaragua: Announcement of Ortega's re-election augurs a terrible new cycle for human rights, Amnesty International, Nov. 8, 2021, available at *https://www.amnesty.org/en/latest/news/2021/11/nicaragua-announcement-of-ortegas-re-election-augurs-a-terrible-new-cycle-for-human-rights/* (last visited Feb. 7, 2023).

[52] United Nations Human Rights Office of the Commissioner, Human Rights Committee Considers Report of Nicaragua in the Absence of a Delegation, Experts Ask about the Treatment of Protesters and Reported Fraudulent Practices in Past Elections, Oct. 19, 2022, available at *https://www.ohchr.org/en/press-releases/2022/10/human-rights-committee-considers-report-nicaragua-absence-delegation-experts* (last visited Feb. 7, 2023); Amnesty International, Shoot to Kill: Nicaragua's Strategy to Repress Protest, May 29, 2018, available at *https://www.amnesty.org/en/documents/amr43/8470/2018/en/* (last visited Feb. 7, 2023).

[53] Congressional Research Service, Nicaragua in Brief: Political Developments in 2021, U.S. Policy, and Issues for Congress, November 4, 2021, available at *https://crsreports.congress.gov* (last visited Feb. 7, 2023).

[54] Congressional Research Service, Nicaragua in Brief: Political Developments and U.S. Policy, June 3, 2022, available at *https://crsreports.congress.gov* (last visited Feb. 7, 2023).

[55] Human Rights Situation in Nicaragua, OHCHR, p. 2, Sept. 2, 2022, available at *https://reliefweb.int/report/nicaragua/human-rights-situation-nicaragua-report-united-nations-high-commissioner-human-rights-ahrc5142-unofficial-english-translation* (last visited Feb. 7, 2023).

[56] Selser, Gabriela, and Hernández, Maria Teresa, EXPLAINER: Tension between Nicaragua and the Catholic Church, The Associated Press, Aug. 14, 2022, available at *https://apnews.com/article/religion-caribbean-nicaragua-daniel-ortega-a445a59fd605f8089c5e661cb66c2773* (last visited Feb. 7, 2023).

[57] Human rights situation in Nicaragua, OHCHR, p.2, Sept. 2, 2022, available at *https://reliefweb.int/report/nicaragua/human-rights-situation-nicaragua-report-united-nations-high-commissioner-human-rights-ahrc5142-unofficial-english-translation* (last visited Feb. 7, 2023).

[58] Associated Press, Nicaragua orders Red Cross to close, in Ortega government's latest crackdown on civic groups, May 10, 2023, available at *https://apnews.com/article/nicaragua-ortega-red-cross-crackdown-b34298af8fb89f89f0b8ab28b5b21e95* (last visited May 23, 2023).

[59] As reported in Noticias Financieras, ''Diaspora and Exiles Call for March Against 'Electoral Fraud' in Nicaragua,'' Oct. 19, 2021, referenced from Congressional Research Service, Nicaragua in Brief: Political Developments and U.S. Policy, June 3, 2022, available at *https://crsreports.congress.gov* (last visited Feb. 7, 2023).

[60] UNHCR, 2021 Global Trends Report, June 16, 2022, available at *https://www.unhcr.org/62a9d1494/global-trends-report-2021* (last visited Feb. 7, 2023).

[61] UN rights chief warns of 'unprecedented' exodus from Nicaragua, Al Jazeera, June 16, 2022, available at *https://www.aljazeera.com/news/2022/6/16/un-rights-chief-warns-of-unprecedented-exodus-from-nicaragua* (last visited Feb. 7, 2023).

[62] International Protection Considerations with Regard to People Fleeing Nicaragua, UNHCR, Jan. 2023, available at *https://www.refworld.org/country,,UNHCR,,NIC,,63bc17264,0.html* (last visited May 5, 2023).

[63] In January 2023, the Processes for Cubans, Haitians, Nicaraguans, and Venezuelans (CHNV) allowed for certain Nicaraguan nationals to request to come to the United States. The U.S. government will provide travel authorization for up to 30,000 individuals to come to the United States each month across the Cuban, Haitian, Nicaraguan, and Venezuelan parole processes. The United States has consistently met the cap since the implementation of the process. The 21,566 individuals noted above does not include Nicaraguan nationals who have come to the United States with travel authorization under CHNV.

[64] International Protection Considerations with Regard to People Fleeing Nicaragua, UNHCR, Jan. 2023, available at *https://www.refworld.org/country,,UNHCR,,NIC,,63bc17264,0.html* (last visited May 5, 2023).

[65] Castillo, Moises, and Sherman, Christopher, Fleeing Nicaraguans strain Costa Rica's asylum system, The Associated Press, Sept. 2, 2022, available at *https://apnews.com/article/covid-health-elections-presidential-caribbean-52044748d15dbbb6ca706c66cc7459a5* (last visited Feb. 7, 2023).

formal application'' to seek asylum in Costa Rica, ''Nicaraguans account for nearly nine out of 10 applicants.'' [66]

In summary, while progress has been made in repairing damage caused by the 1998 hurricane, Nicaragua continues to experience numerous natural disasters that significantly disrupt living conditions and adversely impact its ability to adequately handle the return of those granted TPS. Nicaragua is encumbered by the effects of several significant natural disasters, environmental challenges, political instability, and a resulting humanitarian crisis that adversely impact the country's ability to fully recover and continue to render the country temporarily unable to adequately handle the return of its nationals.

Based upon this review and after consultation with appropriate U.S. Government agencies, the Secretary has determined that:

- At the time the Secretary's decision to terminate Nicaragua's designation for TPS was announced on December 15, 2017, conditions in Nicaragua continued to support the country's designation for TPS on the ground of environmental disaster; therefore, the termination should be rescinded and such rescission is timely given that the termination has not yet gone into effect. *See* INA sec. 244(b)(1)(B), 8 U.S.C. 1254a(b)(1)(B).
- The conditions supporting Nicaragua's designation for TPS still continue to be met. *See* INA sec. 244(b)(3)(A) and (C), 8 U.S.C. 1254a(b)(3)(A) and (C).
- There has been an earthquake, flood, drought, epidemic, or other environmental disaster in Nicaragua resulting in a substantial, but temporary, disruption of living conditions in the area affected; Nicaragua is unable, temporarily, to handle adequately the return of its nationals; and Nicaragua officially requested designation of TPS. *See* INA sec. 244(b)(1)(B), 8 U.S.C. 1254a(b)(1)(B);
- The designation of Nicaragua for TPS should be extended for an 18-month period, beginning on January 6, 2024, and ending on July 5, 2025. *See* INA sec. 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C).

Notice of the Rescission of TPS Termination and Extension of the TPS Designation of Nicaragua

Pursuant to my lawful authorities, including under sections 103(a) and 244 of the Immigration and Nationality Act, I am hereby rescinding the termination of the TPS designation of Nicaragua announced in the **Federal Register** at 82 FR 59636 on December 15, 2017. Due to this rescission and pursuant to INA section 244(b)(3)(C), as well as the ongoing preliminary injunction in *Ramos* v. *Nielsen,* 336 F. Supp. 3d 1075 (N.D. Cal. 2018), the TPS designation of Nicaragua has continued to automatically extend under the statute since May 16, 2016, without a standing secretarial determination as to whether TPS should be extended or terminated. TPS beneficiaries under the designation, whose TPS has not been finally withdrawn for individual ineligibility, therefore have continued to maintain their TPS since January 5, 2018.

By the authority vested in me as Secretary under INA section 244, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate U.S. Government agencies, the statutory conditions supporting Nicaragua's designation for TPS on the basis of environmental disaster continue to be met. *See* INA secs. 244(b)(1)(B) and 244(b)(3)(A); 8 U.S.C. 1254a(b)(1)(B) and 1254a(b)(3)(A). On the basis of this determination, I am extending the existing designation of Nicaragua for TPS for 18 months, beginning on January 6, 2024, and ending on July 5, 2025. *See* INA sec. 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C). Individuals holding TPS under the designation of Nicaragua may file to re-register for TPS under the procedures announced in this notice if they wish to continue their TPS under this 18-month extension.

Alejandro N. Mayorkas

Secretary, U.S. Department of Homeland Security.

Eligibility and Employment Authorization for TPS

Required Application Forms and Application Fees To Re-Register for TPS

To re-register for TPS based on the designation of Nicaragua, you must submit a Form I–821, Application for Temporary Protected Status during the 60-day reregistration period that starts on November 6, 2023, through January 5, 2024. There is no Form I–821 fee for re-registration. *See* 8 CFR 244.17. You may be required to pay the biometric services fee. If you can demonstrate an inability to pay the biometric services fee, you may request to have the fee waived. Please see additional information under the ''Biometric Services Fee'' section of this notice.

Individuals who have a Nicaragua TPS application (Form I–821) that was still pending as of June 21, 2023 do not need to file the application again. If USCIS approves an individual's Form I–821, USCIS will grant the individual TPS through July 5, 2025.

Required Application Forms and Application Fees To Obtain an EAD

Every employee must provide their employer with documentation showing they have a legal right to work in the United States. TPS beneficiaries are authorized to work in the United States and are eligible for an EAD which proves their employment authorization. If you have an existing EAD issued under the TPS designation of Nicaragua that has been auto-extended through June 30, 2024, by the notice published at 87 FR 68717, you may continue to use that EAD through that date. If you want to obtain a new EAD valid through July 5, 2025, you must file an Application for Employment Authorization (Form I–765) and pay the Form I–765 fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver).

You may, but are not required to, submit Form I–765, Application for Employment Authorization, with your Form I–821 re-registration application. If you do not want a new EAD now, you can request one later by filing your I–765 and paying the fee (or requesting a fee waiver) at that time, provided you have TPS or a pending TPS application. If you have TPS and only a pending Form I–765, you must file the Form I–821 to re-register for TPS or risk having your TPS withdrawn for failure to re-register without good cause.

Information About Fees and Filing

USCIS offers the option to applicants for TPS under Nicaragua's designation to file Form I–821 and related requests for EADs online or by mail. When filing a TPS application, applicants can also request an EAD by submitting a completed Form I–765, with their Form I–821.

Online filing: Forms I–821 and I–765 are available for concurrent filing online.[67] To file these forms online, you must first create a USCIS online account.[68] However, if you are requesting a fee waiver, you cannot submit the applications online. You will need to file paper versions of the fee waiver request and the form for which you are requesting the fee waiver.

Mail filing: Mail your application for TPS to the proper address in Table 1.

Table 1-Mailing Addresses

Mail your completed Form I–821, Application for Temporary Protected

[66] *Id.*

[67] Find information about online filing at ''Forms Available to file Online,'' *https://www.uscis.gov/file-online/forms-available-to-be-file-online.*

[68] ''*https://myaccount.uscis.gov/users/sign_up.*''

Status and Form I–765, Application for Employment Authorization, Form I–912, Request for Fee Waiver, if applicable, and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If you send your paper applications via:	Then mail your application to:
U.S. Postal Service (USPS):	USCIS, Attn: TPS Nicaragua, P.O. Box 4413, Chicago, IL 60680–4388.
FedEx, UPS, or DHL deliveries:	USCIS, Attn: TPS Nicaragua (Box 4413), 131 S. Dearborn St., 3rd Floor, Chicago, IL 60603–5517.

If you were granted TPS by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) and you wish to request an EAD, please mail your Form I–765 application to the appropriate mailing address in Table 1. When you are requesting an EAD based on an IJ/BIA grant of TPS, please include a copy of the IJ or BIA order granting you TPS with your application. This will help us verify your grant of TPS and process your application.

Supporting Documents

The filing instructions on the Form I–821 list all the documents needed to establish eligibility for TPS. You may also find information on the acceptable documentation and other requirements for applying (*i.e.,* registering) for TPS on the USCIS website at *https://www.uscis.gov/tps* under ''Nicaragua.''

Travel

TPS beneficiaries may also apply for and be granted travel authorization as a matter of discretion. You must file for travel authorization if you wish to travel outside of the United States. If granted, travel authorization gives you permission to leave the United States and return during a specific period. To request travel authorization, you must file Form I–131, Application for Travel Document, available at *https://www.uscis.gov/i-131.* You may file Form I–131 together with your Form I–821 or separately. When filing the Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for the Form I–131, or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver.

If you are filing Form I–131 together with Form I–821, send your forms to the address listed in Table 1. If you are filing Form I–131 separately based on a pending or approved Form I–821, send your form to the address listed in Table 2 and include a copy of Form I–797 for the approved or pending Form I–821.

TABLE 2—MAILING ADDRESSES

If you are	Mail to
Filing Form I–131 together with a Form I–821, Application for Temporary Protected Status.	The address provided in Table 1.
Filing Form I–131 based on a pending or approved Form I–821, and you are using the U.S. Postal Service (USPS): You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, P.O. Box 660167, Dallas, TX 75266–0867.
Filing Form I–131 based on a pending or approved Form I–821, and you are using FedEx, UPS, or DHL: You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, 2501 S. State Hwy. 121 Business, Ste. 400, Lewisville, TX 75067.

Biometric Services Fee for TPS

Biometrics (such as fingerprints) are required for all applicants 14 years of age and older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay the biometric services fee, you may request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver. For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* Fees for Form I–765 and biometric services are also described in 8 CFR 103.7(b)(1) (Oct. 1, 2020). If necessary, you may be required to visit an Application Support Center to have your biometrics captured. For additional information on the USCIS biometric screening process, please see the USCIS Customer Profile Management Service Privacy Impact Assessment, available at *https://www.dhs.gov/publication/dhsuscispia-060-customer-profile-management-service-cpms.*

Refiling a TPS Re-Registration Application After Receiving a Denial of a Fee Waiver Request

You should file as soon as possible within the 60-day re-registration period so USCIS can process your application and issue your EAD promptly, if one has been requested. Properly filing early will also allow you to have time to refile your application before the deadline, should USCIS deny your fee waiver request. The fee waiver denial notice will contain specific instructions about resubmitting your application. However, you are urged to refile within 45 days of the date on any USCIS fee waiver denial notice, if possible. *See* INA sec. 244(c)(3)(C); 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(b). For more information on good cause for late re-registration, visit the USCIS TPS web page at *www.uscis.gov/tps.*

Note: A re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the Form I–821 fee), or request a fee waiver, when filing a TPS re-registration application. As discussed above, if you decide to wait to request an EAD, you do not have to file the Form I–765 or pay the associated Form I–765 fee (or request a fee waiver) at the time of re-registration. You may wait to seek an EAD until after USCIS has approved your TPS re-registration application or at any later date you decide you want to request an EAD. To re-register for TPS, you only need to file the Form I–821 with the biometrics services fee, if applicable (or request a fee waiver).

General employment-related information for TPS applicants and their employers

How can I obtain information on the status of my TPS application and EAD request?

To get case status information about your TPS application, as well as the status of your TPS-based EAD request, you can check Case Status Online at uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *https://egov.uscis.gov/e-request/Intro.do* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on Form I–9, Employment Eligibility Verification, as well as the Acceptable Documents web page at *https://www.uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees. Within three days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements.

You may present any document from List A (which provides evidence of both identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of employment authorization), or you may present an acceptable receipt as described in the Form I–9 Instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *https://www.uscis.gov/I-9Central.* An EAD is an acceptable document under List A.

If I have an EAD based on another immigration status, can I obtain a new TPS-based EAD?

Yes, if you are eligible for TPS, you can obtain a new TPS-based EAD, regardless of whether you have an EAD or work authorization based on another immigration status. If you want to obtain a new TPS-based EAD valid through July 5, 2025, then you must file Form I–765, Application for Employment Authorization, and pay the associated fee (unless USCIS grants your fee waiver request).

Can my employer require that I provide any other documentation such as evidence of my status or proof of my Nicaraguan citizenship or a Form I–797C showing that I registered for TPS for Form I–9 completion?

No. When completing Form I–9, employers must accept any documentation you choose to present from the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. Employers may not request proof of Nicaraguan citizenship or proof of registration for TPS when completing Form I–9 for new hires or reverifying the employment authorization of current employees. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin. Employers can refer to the compliance notice that DHS published on November 16, 2022, for information on how to complete the Form I–9 with TPS EADs that DHS extended through June 30, 2024.69

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or job applicants may also call the IER Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based on citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I–9 Instructions. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of ''Tentative Nonconfirmation'' (mismatch) must promptly inform employees of the mismatch and give such employees an opportunity to take action to resolve the mismatch. A mismatch result means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of a mismatch while the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *https://www.justice.gov/ier* and the USCIS and E-Verify websites at *https://www.uscis.gov/i-9-central* and *https://www.e-verify.gov.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

This **Federal Register** Notice does not invalidate the compliance notice DHS issued on November 16, 2022, which extended the validity of certain TPS documentation through June 30, 2024, and does not require individuals to present a Form I–797, Notice of Action. While Federal Government agencies must follow the guidelines laid out by the Federal Government, State and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, or that may be used by DHS to determine if you have TPS or another immigration status. Examples of such documents are:

- Your current EAD with a TPS category code of A–12 or C–19, even if your country of birth noted on the EAD does not reflect the TPS designated country of Nicaragua; or
- Your Form I–94, Arrival/Departure Record or Form I–797, Notice of Action, as shown in the **Federal Register** notice published at 87 FR 68717.

Check with the government agency requesting documentation regarding which document(s) the agency will accept. Some state and local government agencies use SAVE to confirm the current immigration status of applicants for public benefits.

While SAVE can verify that an individual has TPS, each state and local government agency's procedures govern whether they will accept an unexpired EAD, Form I–797, Form I–797C, or Form I–94. It may also assist the agency if you:

a. Give the agency a copy of the relevant **Federal Register** notice listing the TPS-related document, including any applicable auto-extension of the document, in addition to your recent TPS-related document with your A-number, USCIS number or Form I–94 number;

b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

c. Ask the agency to initiate a SAVE query with your information and follow through with additional verification steps, if necessary, to get a final SAVE response verifying your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or any automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed.

You can check the status of your SAVE verification by using CaseCheck at https://
CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (A-number, USCIS number, or Form I–94 number) or Verification Case Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the SAVE response is correct, the SAVE website, *www.uscis.gov/save,* has detailed information on how to correct or update your immigration record, make an appointment, or submit a written request to correct records.

[FR Doc. 2023–13246 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2733–22; DHS Docket No. USCIS–2014–0007]

RIN 1615–ZB75

Reconsideration and Rescission of Termination of the Designation of Honduras for Temporary Protected Status; Extension of the Temporary Protected Status Designation for Honduras

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice of Reconsideration and Rescission of Termination of the Designation of Honduras for Temporary Protected Status (TPS) and Notice of Extension of TPS Designation for Honduras.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is rescinding the previous termination of the designation of Honduras for TPS which was published on June 5, 2018 and extending the designation of Honduras for Temporary Protected Status (TPS) for 18 months, beginning on January 6, 2024, and ending on July 5, 2025. This extension allows existing TPS beneficiaries to retain TPS through July 5, 2025, so long as they otherwise continue to meet the eligibility requirements for TPS. Existing TPS beneficiaries who wish to extend their status through July 5, 2025, must re-register during the 60-day re-registration period as described in this notice.

DATES: The *Rescission of Termination of the Designation of Honduras for TPS* took effect June 9, 2023.

Extension of Designation of Honduras for TPS: The 18-month extension of TPS for Honduras begins on January 6, 2024, and will remain in effect through July 5, 2025. The extension impacts existing beneficiaries of TPS under the designation of Honduras.

Re-registration: The 60-day re-registration period for existing beneficiaries runs from November 6, 2023 through January 5, 2024.

FOR FURTHER INFORMATION CONTACT:

- You may contact René Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.
- For further information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* You can find specific information about Honduras's TPS designation by selecting ''Honduras'' from the menu on the left side of the TPS web page.
- If you have additional questions about TPS, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).
- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at *uscis.gov*, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.*
- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

BIA—Board of Immigration Appeals
CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
Form I–131—Application for Travel Document
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
FR—Federal Register
Government—U.S. Government
IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
IJ—Immigration Judge
INA—Immigration and Nationality Act
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action (TPS)

Through this notice, DHS announces the reconsideration and rescission of the termination of the designation of Honduras for TPS and the Secretary's decision to extend the TPS designation for 18 months from January 6, 2024, through July 5, 2025. This notice also sets forth procedures necessary for nationals of Honduras (or individuals having no nationality who last habitually resided in Honduras) to re-register for TPS and to apply for renewal of their EADs with USCIS.

Re-registration is limited to individuals who have previously registered or re-registered for TPS under Honduras' designation, whose applications were granted, and whose TPS has not been withdrawn for individual ineligibility for the benefit. Failure to re-register properly within the 60-day re-registration period may result in the withdrawal of your TPS following appropriate procedures. *See* 8 CFR 244.14.

For individuals who have already been granted TPS under Honduras's designation, the 60-day re-registration period runs November 6, 2023 through January 5, 2024. USCIS will issue new EADs with a July 5, 2025, expiration date to eligible Honduran TPS beneficiaries who timely re-register and apply for EADs.

Individuals who have a Honduras TPS application (Form I–821) and Application for Employment Authorization (Form I–765) that were still pending as of June 21, 2023 do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through July 5, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765 filed in connection with a Form I–821, USCIS will issue the individual a new EAD that will be valid through the same date. If you have TPS and only a pending Form I–765, you must file the Form I–821 to re-register for TPS or risk having your TPS withdrawn for failure to timely reregister without good cause. There are currently approximately 76,000 beneficiaries under Honduras's TPS designation who may be eligible to continue their TPS under the extension announced in this Notice.

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the INA, or to eligible individuals without nationality who last habitually resided in the designated foreign state before arrival in the United States, regardless of their country of birth.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS.
- TPS beneficiaries may also apply for and be granted travel authorization as a matter of DHS discretion.
- To qualify for TPS, beneficiaries must meet the eligibility standards at INA section 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).
- When the Secretary terminates a foreign state's TPS designation, beneficiaries return to one of the following:
  - The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or terminated); or
  - Any other lawfully obtained immigration status or category they received while registered for TPS, as long as it is still valid beyond the date TPS terminates.

When was Honduras designated for TPS?

Honduras was initially designated for TPS based on an environmental disaster that resulted in a substantial disruption of living conditions, in response to a request by the country's government, and because Honduras temporarily was unable to handle adequately the return of its nationals. *See Designation of Honduras Under Temporary Protected Status*, 64 FR 524 (Jan. 5, 1999). Since its initial designation in 1999, TPS for Honduras was extended thirteen consecutive times [1] by subsequent Attorneys General and Secretaries of Homeland Security until 2017. That year, former Acting Secretary Elaine Duke did not make a decision on extending or terminating Honduras's TPS designation by the statutory deadline, resulting in an automatic 6-month extension of the designation, through July 5, 2018.[2]

Following the statutorily required review of the country conditions, former Secretary Kirstjen M. Nielsen announced the termination of TPS for Honduras, with an effective date of January 5, 2020; *see* Termination of the Designation of Honduras for Temporary Protected Status; [3] *see also* INA secs. 244(b)(3)(A) and (B), 8 U.S.C. 1254a(b)(3)(A) and (B). As discussed below, this termination has been the

[1] *Extension of Designation of Honduras Under Temporary Protected Status Program,* 65 FR 30438 (May 11, 2000); *Extension of the Designation of Honduras Under the Temporary Protected Status Program,* 66 FR 23269 (May 8, 2001); *Extension of the Designation of Honduras Under the Temporary Protected Status Program,* 67 FR 22451 (May 3, 2002); *Extension of the Designation of Honduras Under Temporary Protected Status Program; Automatic Extension of Employment Authorization Documentation for Hondurans,* 68 FR 23744 (May 5, 2003); *Extension of the Designation of Temporary Protected Status for Honduras; Automatic Extension of Employment Authorization Documentation for Honduras TPS Beneficiaries,* 69 FR 64084 (November 3, 2004); *Extension of the Designation of Temporary Protected Status for Honduras; Automatic Extension of Employment Authorization Documentation for Honduras TPS Beneficiaries,* 71 FR 16328 (March 31, 2006); *Extension of the Designation of Honduras for Temporary Protected Status; Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries,* 72 FR 29529 (May 29, 2007); *Extension of the Designation of Honduras for Temporary Protected Status,* 73 FR 57133 (Oct. 1, 2008); *Extension of the Designation of Honduras for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries,* 75 FR 24734 (May 5, 2010); *Extension of the Designation of Honduras for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries,* 76 FR 68488 (Nov. 4, 2011); *Extension of the Designation of Honduras for Temporary Protected Status,* 78 FR 20123 (Apr. 3, 2013); *Extension of the Designation of Honduras for Temporary Protected Status,* 79 FR 62170 (Oct. 16, 2014); *Extension of the Designation of Honduras for Temporary Protected Status,* 81 FR 30331 (May 16, 2016).

[2] *See* 82 FR 59630 (Dec. 15, 2017). If the Secretary makes no decision on extension or termination of a country's TPS designation by at least 60 days before the expiration of the existing TPS designation, then INA, section 244(b)(3)(C) requires that the designation be extended an additional six months (or 12 or 18 months in the Secretary's discretion).

[3] 83 FR 26074 (June 5, 2018).

subject of litigation and a court order that has prevented the termination from taking effect.

Litigation Background Regarding Termination of Certain TPS Designations

In addition to Honduras, in 2017–2018, TPS was also terminated for five additional countries by the Secretary or Acting Secretary: Sudan, Nicaragua, El Salvador, Haiti, and Nepal.[4] Lawsuits challenging the terminations were filed in the U.S. District Court for the Northern District of California in *Ramos* v. *Nielsen,* 326 F. Supp. 3d 1075 (N.D. Cal. 2018), and *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019), and in the U.S. District Court for the Eastern District of New York in *Saget,* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019).[5] In *Ramos* the district court granted a preliminary injunction enjoining the terminations of TPS for El Salvador, Haiti, Sudan, and Nicaragua and directed DHS to maintain the *status quo* and to continue the TPS and TPS-related documentation of affected TPS beneficiaries under those countries' designations. The U.S. Government appealed, and a three-judge panel vacated the injunction. The appellate court, however, has granted rehearing en banc of the panel decision, vacating the panel's decision.[6] The court's preliminary injunction thus remains in place. In *Bhattarai*—which challenged the determination to terminate TPS for Honduras—the district court has stayed proceedings until the *Ramos* appeal is decided and approved the parties' stipulation for the continuation of TPS and TPS-related documentation for eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the appeal. In *Saget,* the district court granted a preliminary injunction enjoining termination of TPS for Haiti, and the Government appealed.[7] Beneficiaries under the TPS designations for El Salvador, Nicaragua, Sudan, Haiti, Honduras, and Nepal will retain their TPS while the preliminary injunction in *Ramos* remains in effect, and 120 days thereafter, provided that their TPS is not withdrawn because of individual ineligibility.[8]

DHS has taken actions to ensure its continued compliance with the court orders in *Ramos* and *Bhattarai.* DHS has published periodic notices to continue TPS and extend the validity of TPS-related documentation previously issued to beneficiaries under the TPS designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal.[9] The most recent such notice continued TPS and extended the TPS-related documents specified in the notice through June 30, 2024.[10] These extensions of documentation apply where the TPS beneficiary properly filed for re-registration during either the most recent DHS-announced registration period for their country, or any applicable previous DHS-announced re-registration periods for the beneficiary's country, or has a re-registration application that remains pending.[11] Although the notice published at 87 FR 68717 remains valid, individuals who wish to remain eligible for TPS under the extension of TPS for Honduras announced in this notice through July 5, 2025, and any potential future extensions must apply for re-registration in accordance with the procedures announced in this notice.[12] Failure to timely re-register without good cause is a ground for TPS withdrawal. *See INA* section 244(c)(3)(C); 8 U.S.C. 12(c)(3)(C); 8 CFR 244.17.

What authority does the Secretary have to reconsider and rescind the termination of TPS for Honduras?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist.[13] The

[4] *Termination of the Designation of Sudan for Temporary Protected Status,* 82 FR 47228 (Oct. 11, 2017); *Termination of the Designation of Nicaragua for Temporary Protected Status,* 82 FR 59636 (Dec. 15, 2017); *Termination of the Designation of El Salvador for Temporary Protected Status,* 83 FR 2654 (Jan. 18, 2018); *Termination of the Designation of Haiti for Temporary Protected Status,* 83 FR 2648 (Jan. 18, 2018); *Termination of the Designation of Nepal for Temporary Protected Status,* 83 FR 23705 (May 22, 2018). Haiti and Sudan were newly designated for TPS on August 3, 2021, and April 19, 2022, respectively, for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021) and *Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022).

[5] *See Ramos* v. *Nielsen,* 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *vacated,* 975 F.3d 872 (9th Cir. 2020), *reh'g en banc granted,* 59 F.4th 1010 (Feb. 10, 2023); *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (staying proceedings until *Ramos* appeal decided and approved parties' stipulation for continued TPS and issuance of TPS-related documentation to eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the appeal). In 2019, the U.S. District Court for the Eastern District of New York also enjoined the termination of the 2011 TPS designation for Haiti in *Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019), and DHS cited to that order in previous notices continuing the affected beneficiaries' TPS and documentation. *See, e.g.,* 86 FR 50725, 50726 (Sept. 10, 2021). However, the *Saget* case was dismissed upon the court's approval of the parties' joint Stipulation of Dismissal for mootness following the Secretary's new 18-month designation of Haiti for TPS on August 3, 2021, and DHS' continuation of existing beneficiaries' TPS and related documentation under the Ramos injunction through Dec. 31, 2022. *See id.,* Order approving Stipulation of Dismissal, dated Oct. 15, 2021. Other litigation was filed relating to the terminations of El Salvador, Honduras, and Haiti. A Haiti-related case, *NAACP* v. *U.S. Dept. of Homeland Security,* No. 1:18–cv–00239 (D. Md., Jan. 24, 2018) was dismissed on May 22, 2021, subsequent to the same DHS designation. An El Salvador-related case, *Casa de Maryland* v. *Biden,* No. GJH–18–00845 (D. Md. Mar. 23, 2018) is currently stayed until April 17, 2023. *Centro Presente* v. *Biden,* No. 1:18–cv–10340 (D. Mass. July 23, 2018), relating to El Salvador, Haiti, and Honduras, is currently stayed until April 14, 2023.

[6] *See Ramos* v. *Wolf,* 975 F.3d 872 (9th Cir. 2020), *petition for reh'g en banc granted,* 2023 WL 1880467 (Feb. 10, 2023) (No. 18–16981).

[7] *See Saget, et. al.,* v. *Trump, et. al.,* 375 F.Supp 280 (E.D.N.Y. April 11, 2019) and Order approving Stipulation of Dismissal, dated Oct. 15, 2021.

[8] As noted, Haiti was newly designated for TPS on August 3, 2021, for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021). On April 19, 2022, the Secretary also newly designated Sudan TPS. *See Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022). Plaintiffs in *Ramos* and *Bhattarai* remain eligible for TPS status based on DHS new and continued designations.

[9] 83 FR 54764 (Oct. 31, 2018); 84 FR 7103 (March 1, 2019); 84 FR 20647 (May 10, 2019) (correction notice issued at 84 FR 23578 (May 22, 2019)); 84 FR 59403 (Nov. 4, 2019); 85 FR 79208 (Dec. 9, 2020); and 86 FR 50725 (Sept. 10, 2021) (correction notice issued at 86 FR 52694 (Sept. 22, 2021). Those designations cover all Haitian and Sudanese nationals who were eligible for TPS under the Haiti and Sudan TPS designations that were terminated in 2018 and 2017, respectively.

[10] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations of El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

[11] *Id. See* fn. 1 for acceptable re-registration periods for TPS Honduras beneficiaries).

[12] Through the re-registration process, which is generally conducted every 12 to 18 months while a foreign state is designated for TPS, USCIS determines whether each TPS beneficiary is continuing to maintain individual eligibility for TPS, including but not limited to, the requirements related to disqualifying criminal or security issues. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 87 FR 68717, 68720 (Nov. 16, 2022) (noting potential future action for Honduras TPS beneficiaries may include a requirement to re-register).

[13] Although the text of INA section 244(b)(1) continues to ascribe this power to the Attorney General, this authority is now held by the Secretary of Homeland Security by operation of the Homeland Security Act of 2002, Public Law 107296, 116 Stat. 2135. Congress transferred this authority from the Attorney General to the Secretary of Homeland Security. *See* Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135. *See, e.g.,* 6 U.S.C. 557; *Nielsen* v. *Preap,* 139 S. Ct. 954, 959 n.2 (2019). The Secretary may designate a country (or part of a country) for TPS on the basis of ongoing armed conflict such that returning would pose a serious threat to the personal safety of the country's nationals and habitual residents, environmental disaster (including an epidemic), or extraordinary and temporary conditions in the country that prevent the safe return of the country's nationals. For environmental disaster-based designations, certain other statutory requirements must be met, including that the foreign government must request TPS. A designation based on extraordinary and temporary conditions cannot be made if the Secretary finds that allowing the

decision to designate any foreign state (or part thereof) is a discretionary decision, and there is no judicial review of any determination with respect to the designation, termination, or extension of a designation. *See* INA section 244(b)(5)(A); 8 U.S.C. 1254a(b)(5)(A).

At least 60 days before the expiration of a foreign state's TPS designation, the Secretary, after consultation with appropriate U.S. Government agencies, must review the conditions in the foreign state designated for TPS to determine whether they continue to meet the conditions for the TPS designation. *See* INA section 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA section 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). If the Secretary does not determine that the foreign state no longer meets the conditions for TPS designation, the designation is extended for an additional period of 6 months or, in the Secretary's discretion, 12 or 18 months. *See* INA section 244(b)(3)(A), (C); 8 U.S.C. 1254a(b)(3)(A), (C).

On June 5, 2018, the Secretary of Homeland Security issued notice of her decision that Honduras no longer continued to meet the conditions for TPS designation and terminated TPS for Honduras stating that the conditions supporting Honduras's 1999 designation for TPS on the basis of environmental disaster due to the damage caused by Hurricane Mitch in October 1998 were no longer met. The Secretary also announced an orderly transition period of 18 months, such that the termination was set to go into effect on January 5, 2020. However, as noted above, plaintiffs in *Bhattarai* challenged the termination decisions for Honduras and Nepal. On March 12, 2019, the proceedings were stayed, and the parties stipulated that the termination decision would not go into effect during the pendency of the *Ramos* appeal and for at least 120 days thereafter. The district court also approved the parties' stipulation that TPS and TPS-related documentation of affected beneficiaries of the Honduras and Nepal TPS designations would continue under terms similar to those applied to the *Ramos*-covered beneficiaries. The order to stay proceedings and approval of the stipulation remain in effect.[14] DHS has since issued a series of **Federal Register** notices continuing TPS and TPS-related documentation for affected TPS beneficiaries, with the most recent notice effective through June 30, 2024.[15] As a result, the termination of the TPS designation for Honduras has never gone into effect, and TPS beneficiaries under that designation have retained their TPS, unless it has been individually withdrawn pursuant to INA section 244(c)(3), 8 U.S.C. 1254a(c)(3).

An agency has inherent (that is, statutorily implicit) authority to revisit its prior decisions within a reasonable period unless Congress has expressly limited that authority.[16] The TPS statute does not limit the Secretary's inherent authority to reconsider any TPS-related determination, and upon reconsideration, to change the determination. *See* INA sections 244(b)(3), (b)(5)(A); 8 U.S.C. 1254a(b)(3), (b)(5)(A).

Why is the Secretary rescinding the previous termination of the TPS designation for Honduras?

After conducting an independent assessment of the country conditions in Honduras as they existed in 2018 and exist today, the Secretary has determined that Honduras's 1999 designation should not have been terminated. As explained below, the conditions in Honduras that gave rise to its TPS designation in 1999 persisted in 2018 and continue to this day. Accordingly, the Secretary is, upon reconsideration, rescinding the 2018 decision terminating Honduras's TPS designation and extending that designation for an additional 18 months.

Honduras was initially designated for TPS in 1999[17] following the destruction wrought by Hurricane Mitch, which struck Honduras in October 1998, causing a substantial disruption of living conditions in Honduras.[18] In the Secretary's view, the determination to terminate Honduras's TPS designation erroneously concluded that the conditions giving rise to that designation had been ameliorated by 2018, such that Honduras was able to adequately handle the return of its nationals. Numerous environmental, political, and social crises since Hurricane Mitch, however, have prevented the country from recovering from the hurricane and continue to impair Honduras from ensuring the safe return of its nationals.

Although recovery efforts were implemented in the years after Hurricane Mitch, the effects of Hurricane Mitch set back Honduras economically and socially by as much as 20 years.[19] Since Hurricane Mitch, various hurricanes, tropical storms, and tropical depressions have made landfall in Honduras. These subsequent natural disasters, to which the termination decision gave inadequate attention, significantly impeded Hurricane Mitch-related reconstruction projects.

Hurricane Mitch caused a substantial disruption of living conditions in Honduras, resulting in, among other things, substantial housing, and food shortages. *See* 65 FR 30438 (May 11, 2000). The determination to terminate TPS for Honduras failed to recognize that many of these conditions persisted in 2018, exacerbated by subsequent environmental disasters and other problems. The termination determination did not consider that in the years prior to the determination, approximately 1.3 million people remained in need of humanitarian assistance[20] due in part to Hurricane

country's nationals to remain temporarily in the United States is contrary to the U.S. national interest. INA section 244(b)(1).

[14] *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019).

[15] *See* 84 FR 20647(May 10, 2019) (correction notice issued at 84 FR 23578 (May 22, 2019)); 84 FR 59403 (Nov. 4, 2019); 85 FR 79208 (Dec. 9, 2020); and 86 FR 50725 (Sept. 10, 2021) (correction notice issued at 86 FR 52694 (Sept. 22, 2021); and 87 FR 68717 (Nov. 16, 2022). DHS had published previous notices to comply with the earlier preliminary injunction order issued by the Ramos court. *See* 83 FR 54764 (Oct. 31, 2018); 84 FR 7103 (March 1, 2019).

[16] *Ivy Sports Medicine, LLC* v. *Burwell,* 767 F.3d 81, 86 (D.C. Cir. 2014) (''[A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion. . . . [I]nherent authority for timely administrative reconsideration is premised on the notion that the power to reconsider is inherent in the power to decide.'' (quotation marks and citations omitted)); *NRDC* v. *Regan,* 67 F.4th 397, 401 (D.C. Cir. 2023) (''[A]lthough the power to decide is normally accompanied by the power to reconsider, Congress undoubtedly can limit an agency's discretion to reverse itself.'' (quotation marks omitted); *Macktal* v. *Chao,* 286 F.3d 822, 825–26 (5th Cir. 2002) (''It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.'') (collecting cases); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977) (''We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.'').

[17] *Designation of Honduras Under Temporary Protected Status,* 64 FR 526 (Jan. 5, 1999).

[18] OCHA, Analysis of the medium-term effects of Hurricane Mitch on food security in Central America, Nov. 30, 2001, available at *https://reliefweb.int/report/belize/analysis-medium-term-effects-hurricane-mitch-food-security-central-america.*

[19] Suárez, Ginés, & Sánchez, Walter J., Desastres, riesgo y desarrollo en Honduras: Delineando los vínculos entre el desarrollo humano y la construcción de riesgo en Honduras, Programa de las Naciones Unidas para el Desarrollo (PNUD), p.22, Jan. 2012, available at: *https://criterio.hn/wp-content/uploads/2020/11/INFORME-PNUD-desastres-ambientales-honduras.pdf.*

[20] Central America Sub-Regional Analysis—El Salvador, Guatemala, Honduras: Humanitarian Needs Overview 2016 (Dec 2015), United Nations

Continued

Mitch and subsequent environmental impacts. For example, over 2 million Hondurans—approximately 25% of the population—had been severely affected by drought, and over 460,000 were in need of food assistance.[21] By March 2017, consecutive years of drought had left many subsistence farmers in the Dry Corridor struggling to produce food.[22] In addition to impacting food security, UNOCHA reported that the drought had also ''contributed to the spread of mosquito-borne diseases, such as Zika, malaria, dengue and chikungunya.'' [23] Also contributing to illness was destruction from forest fires which increased by 40% in the first three months of 2017 compared to the same time period the previous year.[24] The termination decision failed to assess adequately or give sufficient weight to these health and safety issues that have persisted since Hurricane Mitch and impeded recovery from the hurricane.

The decision to terminate also did not appropriately consider that despite efforts and foreign assistance after Hurricane Mitch, Honduras was still experiencing a housing deficit. According to a 2016 study by Habitat for Humanity Honduras, Honduras had a housing deficit exceeding 1.3 million units.[25]

Aside from environmental impacts on the recovery from Hurricane Mitch, at the time of the decision to terminate TPS, Honduras continued to face challenges of violent crime, which have likewise made recovery from the hurricane more difficult.[26] In 2016, there were an estimated 174,000 internally displaced people in Honduras.[27] ''Internal displacement was generally caused by violence, national and transnational gang activity, human trafficking, and migrant smuggling.'' [28] Additionally, although Honduras's murder rate had been falling in recent years, Honduras remained ''one of the world's deadliest peacetime nations'' in 2017 with a murder rate of 59.1 killings per 100,000 people.[29] Extortion remained a critical problem and a major source of violence that impacted almost all segments of society, including bus and taxi companies, small businesses, and ordinary citizens.[30] Together, these factors negatively impacted Honduras's ability to adequately handle the return of its nationals granted TPS.

At the time of the TPS termination decision, the country continued to suffer from impacts of Hurricane Mitch and subsequent environmental events, including humanitarian needs, hunger, disease, housing deficits, and underdeveloped infrastructure, in addition to widespread violence. The enduring impact of Hurricane Mitch in Honduras at the time of the decision to terminate TPS continued to substantially disrupt living conditions. Those enduring conditions impacting Honduras's ability to recover from Hurricane Mitch along with Honduras's challenges with violent crime affected the country's ability to adequately handle the return of its nationals granted TPS residing in the United States. The Secretary has concluded that reconsideration and rescission of the termination of TPS is timely, particularly given that the 2018 termination decision has not yet gone into effect.

What authority does the Secretary have to extend the designation of Honduras for TPS?

As noted above, INA section 244(b), 8 U.S.C. 1254a(b), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist and instructs the Secretary to periodically review the country conditions underpinning each designation and determine whether they still exist, leading to either termination or extension of the TPS designation. However, if the Secretary does not make a decision as to either extension or termination, then INA section 244(b)(3)(C) requires the automatic extension of the designation for six months (or 12 or 18 months in the Secretary's discretion).

Prior to the now-rescinded termination of the TPS designation for Honduras, the most recent extension of the designation was due to end on July 5, 2018.[31] In light of the Secretary's reconsideration and rescission of the June 5, 2018 notice of termination of the TPS designation for Honduras, there is no longer any standing secretarial determination that Honduras ''no longer meets the conditions for designation'' under INA section 244(b)(1). Accordingly, with this rescission of the prior termination, pursuant to INA section 244(b)(3)(C), and in the absence of an affirmative decision by any Secretary to extend the designation for 12 or 18 months rather than the

Office for the Coordination of Humanitarian Affairs (UNOCHA), p. 6, Jan. 14, 2016, available at: *https://reliefweb.int/report/guatemala/central-america-sub-regional-analysis-el-salvador-guatemala-honduras-humanitarian.*

[21] El Niño: Overview of Impact, Projected Humanitarian Needs, and Reponses, p.18; WFP Honduras—Country Brief, p.1, Jun. 2016, available at: *http://reliefweb.int/sites/reliefweb.int/files/resources/Honduras_CB_June2016OIM.pdf;* UN Envoy: Drought-hit Honduras Needs New Approach to Tackle Extreme Weather, Reuters, Aug. 1, 2016, available at: *http://www.voanews.com/a/un-envoy-drought-hit-honduras-needs-new-approach-to-tackle-extreme-weather/3444720.html.*

[22] Hares, Sophie, Honduran farmers prize rainwater as most precious harvest, Thomson Reuters Foundation, Mar. 22, 2017, available at: *http://reliefweb.int/report/honduras/honduran-farmers-prize-rainwater-most-precious-harvest.*

[23] El Niño: Overview of Impact, Projected Humanitarian Needs, and Reponses, UN Office for the Coordination of Humanitarian Affairs (UNOCHA), p. 23, June 3, 2016, available at: *https://reliefweb.int/report/world/el-ni-o-overview-impact-projected-humanitarian-needs-and-response-02-june-2016.*

[24] En un 40% aumentan incendios en el país, La Tribuna (Hon.), Apr. 2, 2017, available at: *http://reliefweb.int/report/honduras/en-un-40-aumentan-incendios-en-el-pa-s.*

[25] Habitat for Humanity Honduras, Habitat for Humanity, available at: *http://www.habitat.org/where-we-build/honduras* (last visited Apr. 6, 2023).

[26] World Report 2018—Honduras Events of 2017, Human Rights Watch, Jan. 18, 2018, available at: *https://www.hrw.org/world-report/2018/country-chapters/honduras* (last visited: Apr. 6, 2023); Freedom in the World 2018, Honduras, Freedom House, Jan. 2018, available at: *https://freedomhouse.org/country/honduras/freedom-world/2018* (last visited: Apr. 6, 2023).

[27] U.S. Department of State, 2017 Country Reports on Human Rights Practices: Honduras, Apr. 20, 2018, available at: *https://www.state.gov/reports/2017-country-reports-on-human-rights-practices/honduras/* (last visited: Apr. 6, 2023).

[28] *Id.*

[29] Reuters, Honduras murder rate fell by more than 25 percent in 2017: government, Jan. 18, 2018, available at: *https://www.reuters.com/article/us-honduras-violence/honduras-murder-rate-fell-by-more-than-25-percent-in-2017-government-idUSKBN1ER1K9* (last visited: Mar. 17, 2023).

[30] Gurney, Krya, What an Extortion Call in Honduras Sounds Like, InSight Crime, Mar. 4, 2015, available at: *http://www.insightcrime.org/news-analysis/what-an-extortion-call-in-honduras-sounds-like;* Refworld, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras, July 27, 2016, available at: *https://www.refworld.org/docid/579767434.html* (last visited: March 17, 2023).

[31] 82 FR 59631 (Dec. 15, 2017).

automatic six months triggered by the statute, the TPS designation for Honduras shall have been extended in consecutive increments of 6 months between the date when the last designation extension was due to end on July 5, 2018, and the effective date of the TPS extension announced in this Notice, January 6, 2024. Coupled with the existing *Bhattarai* order and corresponding **Federal Register** notices continuing the TPS and TPS-related documentation for affected beneficiaries under the designation for Honduras, this means that all such individuals whose TPS has not been finally withdrawn for individual ineligibility are deemed to have retained TPS since July 5, 2018, and may re-register under procedures announced in this notice.

Why is the Secretary extending the TPS designation for Honduras for TPS for 18 months through July 5, 2025?

DHS has reviewed country conditions in Honduras. Based on the review, including input received from DOS and other U.S. Government agencies, the Secretary has determined that an 18-month TPS extension is warranted because the environmental disaster conditions and substantial disruption of living conditions supporting Honduras's TPS designation remain.

Since Honduras was designated for TPS in January 1999, various natural disasters, and related environmental concerns—including hurricanes, tropical storms, flooding and heavy rain, severe drought, and mosquito-borne illnesses—have contributed to loss of life and damages to property and infrastructure in Honduras and prevented the country from fully recovering from Hurricane Mitch. Additionally, since the extension of TPS for Honduras in 2018,[32] violence and social and political concerns have adversely impacted living conditions and hindered recovery from environmental disasters in Honduras.[33] These subsequent natural disasters, violence, and social and political concerns continue to inflict damage on a population that has not fully recovered from Hurricane Mitch and impact Honduras's ability to adequately handle the return of its nationals granted TPS. Accordingly, the Secretary has concluded that the conditions that gave rise to Honduras's 1999 TPS designation persist, and an extension is therefore warranted. Since Hurricane Mitch, Honduras has been impacted by a ''repetitive cycle'' of storm-related damage to infrastructure and 16 of the 18 departments in the country recently reported damaged roads, collapsed bridges, devastated crops, flooded houses, and landslides.[34]

In 2019, Honduras experienced a severe drought that ''decimated staple-crop harvests of beans and maize by up to 80% in some areas,'' and led the government to declare a state of emergency.[35] In November 2020, within weeks of each other,[36] hurricanes Eta and Iota, both Category 4 storms,[37] struck Honduras. UNHCR noted that ''more than 4 million people were affected by Hurricanes Eta and Iota in Honduras alone,'' [38] about ''half the country's population.'' [39] ''In 2020, hurricanes Eta and Iota forced more than 55,000 to move into temporary shelters, according to the Red Cross.'' [40] In rural areas, the storms destroyed fields and slow receding water hindered sowing, impacting the livelihood of those who depend on seasonal crops. In urban areas, the storms greatly impacted populations already suffering socioeconomic effects of the COVID–19 pandemic, job losses, and increased violence.[41]

Among the storms affecting Honduras recently was Tropical Storm Julia, which ''wreaked havoc in 15 of the country's 18 departments.'' [42]Flooding related to Julia is estimated to have affected over 200,000 Hondurans.[43] Even a ''relatively weak'' hurricane like Julia reportedly can cause significant destruction in Honduras due to unaddressed damage to infrastructure from previous storms.[44]

Recent tropical storms, flooding, and subsequent landslides across the country in 2022 ''affected 188,000 people'' and sparked another government declared country-wide state of emergency, after 23,000 people were evacuated from homes and more than 12,300 people moved into housing shelters across eight departments.[45] As of August 2022, ''more than 16,000 public educational centers in Honduras lack adequate infrastructure. Some 5,700 centers lack drinking water, and 44% of schools do not have electricity.'' [46] ''Between 1 September and 10 October, 162 municipalities in 15 of the 18 departments in Honduras reported damage to basic and critical infrastructure, including over 3,500 damaged or destroyed houses (COPECO/Gov't of Honduras 11/10/2022).'' [47]

[32] The TPS designation of Honduras was statutorily automatically extended for 6 months (from January 6, 2018, through July 5, 2018) after the Secretary of Homeland Security did not make a determination on Honduras's designation 60 days prior to the previous expiration (January 5, 2018). Subsequently, on June 5, 2018, the Secretary published a determination to terminate TPS for Honduras, effective January 5, 2020.

[33] United Nations Office for the Coordination of Humanitarian Affairs, Honduras Humanitarian Needs Overview 2023 (September 2022) (Feb. 8, 2023), *https://reliefweb.int/report/honduras/honduras-humanitarian-needs-overview-2023-september-2022* (last visited Mar. 13, 2023).

[34] Starting from Scratch Over and Over Again: Heavy Rains and Floods Displace Thousands of Hondurans, International Organization for Migration (IOM), Oct. 28, 2022, available at: *https://reliefweb.int/report/honduras/starting-scratch-over-and-over-again-heavy-rains-and-floods-displace-thousands-hondurans* (last visited Apr. 6, 2023).

[35] Moloney, Anastasia, In Honduras, years of drought pressure farmers to leave land, Reuters, Sept. 27, 2019, available at: *https://reliefweb.int/report/honduras/honduras-years-drought-pressure-farmers-leave-land.*

[36] In Honduras, climate change is one more factor sparking displacement, United Nations High Commissioner for Refugees (UNHCR), Nov. 9, 2021, available at: *https://reliefweb.int/report/honduras/honduras-climate-change-one-more-factor-sparking-displacement.*

[37] The National Oceanic and Atmospheric Administration (NOAA) defines category 4 hurricanes as major storms with winds between 130–156 miles per hour which cause catastrophic damage. *See:* Saffir-Simpson Hurricane Wind Scale, National Oceanic and Atmospheric Administration, *https://www.nhc.noaa.gov/aboutsshws.php.* (last visited Jun. 17, 2022).

[38] In Honduras, climate change is one more factor sparking displacement, United Nations High Commissioner for Refugees (UNHCR), Nov. 9, 2021, available at: *https://reliefweb.int/report/honduras/honduras-climate-change-one-more-factor-sparking-displacement.*

[39] Lakhani, Nina, 'We can't live like this': climate shocks rain down on Honduras's poorest, The Guardian, Oct. 28, 2021, available at: *https://www.theguardian.com/environment/2021/oct/28/honduras-climate-crisis-floods-hurricanes-poor-community.*

[40] World Report 2022—Honduras, Human Rights Watch, Jan. 13, 2022, available at: *https://www.hrw.org/world-report/2022/country-chapters/honduras#dbcb23.*

[41] Honduras: Hurricane Eta and Iota—Emergency appeal n° MDR43007 Operation Update no. 2, International Federation of Red Cross and Red Crescent Societies (IFRC), Jan. 21, 2021, available at: *https://reliefweb.int/report/honduras/honduras-hurricane-eta-and-iota-emergency-appeal-n-mdr43007-operation-update-no-2.*

[42] United Nations Office for the Coordination of Humanitarian Affairs, Honduras Humanitarian Needs Overview 2023 (September 2022) (Feb. 8, 2023), *https://reliefweb.int/report/honduras/honduras-humanitarian-needs-overview-2023-september-2022* (last visited Feb. 9, 2023).

[43] *Id.*

[44] Brigida, Anna-Cat, Hurricane Julia pushes displaced Hondurans to consider migration, Al Jazeera, Oct. 18, 2022, available at: *https://www.aljazeera.com/news/2022/10/18/hurricane-julia-pushes-displaced-hondurans-to-consider-migration.*

[45] ACAPS Briefing Note: Honduras—Impact of Floods, ACAPS, p.1, Oct. 27, 2022, available at: *https://reliefweb.int/report/honduras/acaps-briefing-note-honduras-impact-floods-27-october-2022.*

[46] Quartucci, Soledad, Educational Reform in Honduras-The Roots of Challenges and the Way Forward, Latina Republic, Aug. 29, 2022, available at: *https://latinarepublic.com/2022/08/29/educational-reform-in-honduras-the-roots-of-challenges-and-the-way-forward/.*

[47] ACAPS Briefing Note: Honduras—Impact of Floods, ACAPS, p.1, Oct. 27, 2022, available at: *https://reliefweb.int/report/honduras/acaps-briefing-note-honduras-impact-floods-27-october-2022.*

The Food and Agriculture Organization of the United Nations (FAO) noted in April 2022 that ''[t]he number of acutely food-insecure people in Honduras has doubled in just over a year, due to the combined impact of COVID–19, poverty and climate-related disasters.'' [48] The United Nations estimated a similar impact, reporting that in early 2022, 2.8 million people in Honduras were in need of humanitarian assistance.[49] Recent reports indicate that food insecurity is worsening, with at least 2.6 million people in Crisis (IPC Phase 3) [50] or worse levels of food insecurity, which is more than a quarter of the population.[51] Environmental events have been a driving factor for food insecurity by ''affecting food production and availability and increasing staple food prices in markets,'' such that Honduras faced a ''Crisis (IPC Phase 3) food insecurity.'' [52]

In June 2022, *The Guardian* reported that pneumonia was ''one of the leading causes of child death in Honduras,'' and deaths of children ''caused by the disease are strongly linked to malnutrition, lack of safe water and sanitation, and inadequate access to healthcare.'' [53] Honduras reported the highest number of severe dengue fever cases in the Americas in both 2020 [54] and 2021.[55] In 2020, the risks of major infectious diseases including typhoid fever, dengue fever and malaria were also rated as high.[56] According to the U.S. Embassy in Honduras, ''medical care in Honduras varies greatly in quality and availability.'' [57] Outside of Honduras's two major cities, it is ''inadequate to address complex situations,'' ''facilities for advanced surgical procedures are not available,'' and ''ambulance services are limited in major cities and almost non-existent elsewhere.'' [58]

''Honduras is one of the most unequal, corrupt and violent countries in Latin America, where a handful of politically powerful clans control the economy while more than two-thirds of the population live in poverty.'' [59] In 2021, Honduras ''saw some of its worst political violence in the run-up to November's presidential elections . . . [in which] 68 candidates in various local and national races were killed.'' [60] The United States indicted the out-going president of Honduras, Juan Orlando Hernandez, (president of Honduras from 2014 through January 2022),[61] on federal drug and arms trafficking charges shortly after he left office,[62] and Honduras extradited him to the United States in April 2022 to face the charges.[63] The current president who took office on January 27, 2022, inherited the remnants of what U.S. prosecutors have called a ''narco state.'' [64]

In recent years, Honduras has been plagued by staggering levels of crime and violence—ranking as the murder capital of the world in 2012 and 2013.[65] Gangs that originated in the United States are engaged in violent fighting in Honduras. They ''have laid siege to communities'' and ''have plunged the country into a state of crisis''—''govern[ing] much of daily life for residents living in their areas of control, [as] stand-ins for a corrupt and ineffectual government.'' [66] A UNHCR representative stated in November 2021 that gangs in Honduras ''took advantage of the extreme vulnerability of victims of the hurricanes to tighten their control, imposing restrictions on movements [. . .] For many who were displaced by the storms, going back could be dangerous.'' [67] Honduras was Central America's most deadly country in 2021, with homicides slightly outpacing 2020, and falling below rates in 2019.[68]

In 2020, internally displaced Hondurans ''represented almost 80 percent of the internally displaced population in Central America and Mexico.'' [69] The United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) reported that

[48] Honduras: Humanitarian Response Plan 2022, Food and Agriculture Organization of the United Nations (FAO), p.1, Apr. 6, 2022, available at: *https://reliefweb.int/report/honduras/honduras-humanitarian-response-plan-2022.*

[49] Global Humanitarian Overview 2022, United Nations Office for the Coordination of Humanitarian Affairs, *https://www.unocha.org/sites/unocha/files/Global%20Humanitarian%20Overview%202022.pdf.*

[50] IPC Acute Food Insecurity is categorized in five distinct phases: (1) Minimal/None, (2) Stressed, (3) Crisis, (4) Emergency, (5) Catastrophe/Famine. For additional information on these classifications, please see the IPC Technical Manual, available at: *https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC-Manual-2-Interactive.pdf.*

[51] United Nations Office for the Coordination of Humanitarian Affairs, Honduras Humanitarian Needs Overview 2023 (September 2022) (Feb. 8, 2023), *https://reliefweb.int/report/honduras/honduras-humanitarian-needs-overview-2023-september-2022.* (last visited Mar. 13, 2023).

[52] ACAPS Briefing Note: Honduras—Impact of Floods, ACAPS, p.2, Oct. 27, 2022, available at: *https://www.acaps.org/sites/acaps/files/products/files/20221027_acaps_rapid_analysis_team_briefing_note_honduras_flooding.pdf.*

[53] Johnson, Sarah, Fears for Honduran children as poverty worsens pneumonia's toll, The Guardian, June 9, 2022, available at: *https://www.theguardian.com/global-development/2022/jun/09/poverty-drought-impending-famine-now-pneumonia-takes-its-cruel-toll-on-honduran-children-acc.*

[54] Epidemiological Update for Dengue, Chikungunya and Zika in 2020, Pan American Health Organization, updated June 16, 2022, available at: *https://www3.paho.org/data/index.php/en/mnu-topics/indicadores-dengue-en/annual-arbovirus-bulletin-2020.html.*

[55] Epidemiological Update for Dengue, Chikungunya and Zika in 2021, Pan American Health Organization, updated June 16, 2022, available at: *https://www3.paho.org/data/index.php/en/mnu-topics/indicadores-dengue-en/annual-arbovirus-bulletin-2021.html.*

[56] World Fact Book, U.S. Central Intelligence Agency, available at: *https://www.cia.gov/the-world-factbook/countries/honduras/* (last visited June 23, 2022).

[57] Medical Assistance, U.S. Embassy in Honduras, *https://hn.usembassy.gov/u-s-citizen-services/local-resources-of-u-s-citizens-2/doctors/* (last visited Jun. 16, 2022).

[58] Medical Assistance, U.S. Embassy in Honduras, *https://hn.usembassy.gov/u-s-citizen-services/local-resources-of-u-s-citizens-2/doctors/* (last visited Jun. 16, 2022).

[59] Lakhani, Nina, 'We can't live like this': climate shocks rain down on Honduras's poorest, The Guardian, Oct. 28, 2021, available at: *https://www.theguardian.com/environment/2021/oct/28/honduras-climate-crisis-floods-hurricanes-poor-community.*

[60] InSight Crime's 2021 Homicide Round-Up, Insight Crime, Feb. 1, 2022, available at: *https://insightcrime.org/news/insight-crimes-2021-homicide-round-up/.*

[61] Honduras ex-President Hernandez pleads not guilty in U.S. court, Al Jazeera, May 10, 2022, available at: *https://www.aljazeera.com/news/2022/5/10/honduras-ex-president-hernandez-pleads-not-guilty-in-us-court.*

[62] Fernández Simon, Maite, Who is Juan Orlando Hernández and why was he extradited to the U.S.?, The Washington Post, Apr. 21, 2022, available at: *https://www.washingtonpost.com/world/2022/04/21/honduras-juan-orlando-hernandez-extradition/.*

[63] Martin, Maria and Griffiths, Robbie, Ex-Honduran President Hernández is extradited to the U.S. on drug charges, National Public Radio (NPR), Apr. 21, 2022, available at: *https://www.npr.org/2022/04/21/1093975738/ex-honduran-president-hernandez-will-be-extradited-to-the-u-s-on-drugs-charges.*

[64] Grant, Will, Has Honduras become a 'narco-state'?, BBC News, Apr. 22, 2022, available at: *https://www.bbc.com/news/world-latin-america-56947595.*

[65] Kahn, Carrie, Honduras Claims Unwanted Title Of World's Murder Capital, NPR, July 2, 2013, available at: *http://www.npr.org/sections/parallels/2013/06/13/190683502/honduras-claims-unwanted-title-of-worlds-murder-capital;* Rhodan, Maya, Honduras Is Still the Murder Capital of The World, Time, Feb. 17, 2014, available at: *http://world.time.com/2014/02/17/honduras-is-still-the-murder-capital-of-the-world/;* UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras, UNHCR, p.10, July 27, 2016, available at: *http://www.refworld.org/docid/579767434.html.*

[66] Azam, Ahmed, Three Weeks Embedded in Honduran Gang Territory, The New York Times, May 7, 2019.

[67] Rubi, María and Gaynor, Tim, In Honduras, climate change is one more factor sparking displacement, United Nations High Commissioner for Refugees (UNHCR), Nov. 9, 2021, available at: *https://reliefweb.int/report/honduras/honduras-climate-change-one-more-factor-sparking-displacement.*

[68] InSight Crime's 2021 Homicide Round-Up, Insight Crime, Feb. 1, 2022, available at: *https://insightcrime.org/news/insight-crimes-2021-homicide-round-up/.*

[69] World Report 2022—Honduras, Human Rights Watch, Jan. 13, 2022, available at: *https://www.hrw.org/world-report/2022/country-chapters/honduras#dbcb23.*

''Honduras registered 937,000 new displacements, ranking it among the top four countries in Latin America and the Caribbean for new disaster-triggered displacements . . . surpass[ing] countries such as South Sudan in the number of new displacements due to disasters and conflicts in 2020.'' [70] The United Nations High Commissioner for Refugees (UNHCR) reported in July 2022 that ''58,000 families abandon their homes in Honduras annually, being internally displaced due to the violence crisis in the country.'' [71]

In summary, Honduras's slow recovery after Hurricane Mitch and more recent environmental disasters, including hurricanes, tropical storms, flooding and heavy rain, severe drought, and mosquito-borne illness, continue to disrupt living conditions and render Honduras temporarily unable to handle the return of those granted TPS under the 1999 designation and are currently residing in the United States. Additionally, since the 2018 extension of TPS for Honduras,[72] violence, social and political concerns have adversely impacted living conditions and hindered recovery from environmental disasters in Honduras.

Based upon this review and after consultation with appropriate U.S. Government agencies, the Secretary has determined that:

- At the time the Secretary's determination to terminate Honduras's designation for TPS was announced on June 5, 2018, conditions in Honduras continued to support the country's designation for TPS based on environmental disaster grounds; therefore, the termination should be rescinded, and such rescission is timely given that the termination has not yet gone into effect. *See* INA section 244(b)(1)(B), 8 U.S.C. 1254a(b)(1)(B).
- The conditions supporting Honduras's designation for TPS continue to be met. *See* INA section 244(b)(3)(A) and (C), 8 U.S.C. 1254a(b)(3)(A) and (C).
- There has been an earthquake, flood, drought, epidemic, or other environmental disaster in Honduras resulting in a substantial, but temporary, disruption of living conditions in the area affected; Honduras is unable, temporarily, to handle adequately the return of its nationals; and Honduras officially requested designation of TPS. *See* INA section 244(b)(1)(B)(i), 8 U.S.C. 1254a(b)(1)(B)(i);
- The designation of Honduras for TPS should be extended for an 18-month period, beginning on January 6, 2024, and ending on July 5, 2025. *See* INA section 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C).

Notice of the Rescission of TPS Termination and Extension of the TPS Designation of Honduras

Pursuant to my lawful authorities, including under sections 103(a) and 244 of the INA, I am hereby rescinding the termination of the TPS designation of Honduras announced in the **Federal Register** at 83 FR 26074 (June 5, 2018). Due to this rescission and pursuant to section 244(b)(3)(C) of the INA as well as the court order in *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019), the TPS designation of Honduras has continued to exist since July 5, 2018, without a standing secretarial determination as to whether TPS should be extended or terminated. TPS beneficiaries under the designation, whose TPS has not been finally withdrawn for individual ineligibility, therefore have continued to maintain their TPS since July 5, 2018.

By the authority vested in me as Secretary under INA section 244, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate U.S. Government agencies, the statutory conditions supporting Honduras's designation for TPS on the basis of an environmental disaster continue to be met. *See* INA sections 244(b)(1)(B), 244(b)(3)(A); 8 U.S.C. 1254a(b)(1)(B), 1254a(b)(3)(A). On the basis of this determination, I am extending the existing designation of Honduras for TPS for 18 months, beginning on January 6, 2024, and ending on July 5, 2025. *See* INA section 244(b)(1)(B), (b)(3)(C); 8 U.S.C. 1254a(b)(1)(B), (b)(3)(C). Individuals holding TPS under the designation of Honduras may file to reregister for TPS under the procedures announced in this Notice if they wish to continue their TPS under this 18-month extension.

Alejandro N. Mayorkas,
Secretary, U.S. Department of Homeland Security.

Eligibility and Employment Authorization for TPS

Required Application Forms and Application Fees to Re-Register for TPS:

To re-register for TPS based on the designation of Honduras, you must submit a Form I–821, Application for Temporary Protected Status during the 60-day re-registration period that runs November 6, 2023 through January 5, 2024. There is no Form I–821 fee for re-registration. *See* 8 CFR 244.17. You may be required to pay the biometric services fee. If you can demonstrate an inability to pay the biometric services fee, you may request to have the fee waived. Please see additional information under the ''Biometric Services Fee'' section of this notice.

Individuals who have a Honduras TPS application (Form I–821) that was still pending as of June 21, 2023 do not need to file the application again. If USCIS approves an individual's Form I–821, USCIS will grant the individual TPS through July 5, 2025.

Required Application Forms and Application Fees To Obtain an EAD

Every employee must provide their employer with documentation showing they have a legal right to work in the United States. TPS beneficiaries are authorized to work in the United States and are eligible for an EAD which proves their employment authorization. If you have an existing EAD issued under the TPS designation of Honduras that has been auto-extended through June 30, 2024 by the notice published at 87 FR 68717, you may continue to use that EAD through that date. If you want to obtain a new EAD valid through July 5, 2025, you must file an Application for Employment Authorization (Form I–765) and pay the Form I–765 fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver).

You may, but are not required to, submit Form I–765, Application for Employment Authorization, with your Form I–821 re-registration application. If you do not want a new EAD now, you can request one later by filing your I–765 and paying the fee (or requesting a fee waiver) at that time, provided you have TPS or a pending TPS application. If you have TPS and only a pending Form I–765, you must file the Form I–821 to re-register for TPS or risk having

[70] *Honduras: Humanitarian Response Plan (August 2021–December 2022),* United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Nov. 19, 2021, available at: *https://reliefweb.int/report/honduras/honduras-humanitarian-response-plan-august-2021-december-2022.*

[71] Honduras External Update—June to July 2022, United Nations High Commissioner for Refugees (UNHCR), Jul. 31, 2022, available at: *https://reliefweb.int/report/honduras/honduras-external-update-june-july-2022.*

[72] The TPS designation of Honduras was statutorily automatically extended for 6 months (from January 6, 2018, through July 5, 2018) after the Secretary of Homeland Security did not make a determination on Honduras's designation 60 days prior to the previous expiration (January 5, 2018). Subsequently, on June 5, 2018, the Secretary published a determination to terminate TPS for Honduras, effective January 5, 2020.

your TPS withdrawn for failure to reregister without good cause.

Information About Fees and Filing

USCIS offers the option to applicants for TPS under Honduras's designation to file Form I–821 and related requests for EADs online or by mail. When filing a TPS application, applicants can also request an EAD by submitting a completed Form I–765, with their Form I–821.

Online filing: Form I–821 and I–765 are available for concurrent filing online.[73] To file these forms online, you must first create a USCIS online account.[74] However, if you are requesting a fee waiver, you cannot submit the applications online. You will need to file paper versions of the fee waiver request and the form for which you are requesting the fee waiver.

Mail filing: Mail your application for TPS to the proper address in Table 1.

Table 1—Mailing Addresses

Mail your completed Form I–821, Application for Temporary Protected Status and Form I–765, Application for Employment Authorization, Form I–912, Request for Fee Waiver, if applicable, and supporting documentation to the proper address in Table 1.

TABLE 1—MAILING ADDRESSES

If you live in:	Then mail your application to:
• Alabama • Alaska • American Samoa • Arizona • Arkansas • California • Colorado • Guam • Hawaii • Idaho • Kentucky • Louisiana • Mississippi • Montana • Nevada • New Mexico • North Carolina • Northern Mariana Islands • Oklahoma • Oregon • Puerto Rico • Tennessee • Texas • Utah • Virgin Islands • Virginia • Washington • West Virginia • Wyoming.	USCIS Phoenix Lockbox. *U.S. Postal Service (USPS):* USCIS, Attn: TPS Honduras, P.O. Box 21800, Phoenix, AZ 85036–1800. *FedEx, UPS, or DHL:* USCIS, Attn: TPS Honduras (Box 21800), 2108 E. Elliot Rd., Tempe, AZ 85284–1806.
• Connecticut • Delaware • District of Columbia • Florida • Georgia • Illinois • Indiana • Iowa • Kansas • Maine • Maryland • Massachusetts • Michigan • Minnesota • Missouri • Nebraska • New Hampshire • New Jersey • New York • North Dakota • Ohio • Pennsylvania • Rhode Island • South Carolina	USCIS Elgin Lockbox. *U.S. Postal Service (USPS):* USCIS, Attn: TPS Honduras, P.O. Box 4091, Carol Stream, IL 60197–4091. *FedEx, UPS, or DHL:* USCIS, Attn: TPS Honduras (Box 4091), 2500 Westfield Drive, Elgin, IL 60124–7836.

[73] Find information about online filing at ''Forms Available to File Online,'' *https://www.uscis.gov/file-online/forms-available-to-file-online.*

[74] *https://myaccount.uscis.gov/users/sign_up.*

TABLE 1—MAILING ADDRESSES—Continued

If you live in:	Then mail your application to:
• South Dakota • Vermont • Wisconsin	

If you were granted TPS by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) and you wish to request an EAD, please mail your Form I–765 application to the appropriate mailing address in Table 1. When you are requesting an EAD based on an IJ/BIA grant of TPS, please include a copy of the IJ or BIA order granting you TPS with your application. This will help us verify your grant of TPS and process your application.

Supporting Documents

The filing instructions on the Form I–821 list all the documents needed to establish eligibility for TPS. You may also find information on the acceptable documentation and other requirements for applying (*i.e.,* registering) for TPS on the USCIS website at *https://www.uscis.gov/tps* under ''Honduras.''

Travel

TPS beneficiaries may also apply for and be granted travel authorization as a matter of discretion. You must file for travel authorization if you wish to travel outside of the United States. If granted, travel authorization gives you permission to leave the United States and return during a specific period. To request travel authorization, you must file Form I–131, Application for Travel Document, available at *https://www.uscis.gov/i-131.* You may file Form I–131 together with your Form I–821 or separately. When filing the Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for the Form I–131, or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver.

If you are filing Form I–131 together with Form I–821, send your forms to the address listed in Table 1. If you are filing Form I–131 separately based on a pending or approved Form I–821, send your form to the address listed in Table 2 and include a copy of Form I–797 for the approved or pending Form I–821.

TABLE 2—MAILING ADDRESSES

If you are . . .	Mail to . . .
Filing Form I–131 together with a Form I–821, Application for Temporary Protected Status	The address provided in Table 1.
Filing Form I–131 based on a pending or approved Form I–821, and you are using the U.S. Postal Service (USPS): You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, P.O. Box 660167, Dallas, TX 75266–0867.
Filing Form I–131 based on a pending or approved Form I–821, and you are using FedEx, UPS, or DHL: You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, 2501 S State Hwy. 121 Business, Ste. 400, Lewisville, TX 75067.

Biometric Services Fee for TPS

Biometrics (such as fingerprints) are required for all applicants 14 years of age and older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay the biometric services fee, you may request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver. For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* Fees for Form I–765 and biometric services are also described in 8 CFR 103.7(b)(1) (Oct. 1, 2020). If necessary, you may be required to visit an Application Support Center to have your biometrics captured. For additional information on the USCIS biometric screening process, please see the USCIS Customer Profile Management Service Privacy Impact Assessment, available at *https://www.dhs.gov/publication/dhsuscispia-060-customer-profile-management-service-cpms.*

Refiling a TPS Re-Registration Application After Receiving a Denial of a Fee Waiver Request

You should file as soon as possible within the 60-day re-registration period so USCIS can process your application and issue your EAD promptly, if one has been requested. Properly filing early will also allow you to have time to refile your application before the deadline, should USCIS deny your fee waiver request. The fee waiver denial notice will contain specific instructions about resubmitting your application. However, you are urged to refile within 45 days of the date on any USCIS fee waiver denial notice, if possible. *See* INA section 244(c)(3)(C); 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(b). For more information on good cause for late re-registration, visit the USCIS TPS web page at *www.uscis.gov/tps.*

Note: A re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the Form I–821 fee), or request a fee waiver, when filing a TPS re-registration application. As discussed above, if you decide to wait to request an EAD, you do not have to file the Form I–765 or pay the associated Form I–765 fee (or request a fee waiver) at the time of re-registration. You may wait to seek an EAD until after USCIS has approved your TPS re-registration application or at any later date you decide you want to request an EAD. To re-register for TPS, you only need to file the Form I–821 with the biometrics services fee, if applicable, (or request a fee waiver).

General Employment-Related Information for TPS Applicants and Their Employers

How can I obtain information on the status of my TPS application and EAD request?

To get case status information about your TPS application, as well as the status of your TPS-based EAD request, you can check Case Status Online at

uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *https://egov.uscis.gov/e-request/Intro.do* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on Form I–9, Employment Eligibility Verification, as well as the Acceptable Documents web page at *https://www.uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees. Within three days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements.

You may present any document from List A (which provides evidence of both identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of employment authorization), or you may present an acceptable receipt as described in the Form I–9 Instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *https://www.uscis.gov/I-9Central.* An EAD is an acceptable document under List A.

If I have an EAD based on another immigration status, can I obtain a new TPS-based EAD?

Yes, if you are eligible for TPS, you can obtain a new TPS-based EAD, regardless of whether you have an EAD or work authorization based on another immigration status. If you want to obtain a new TPS-based EAD valid through July 5, 2025, then you must file Form I–765, Application for Employment Authorization, and pay the associated fee (unless USCIS grants your fee waiver request).

Can my employer require that I provide any other documentation such as evidence of my status or proof of my Honduran citizenship or a Form I–797C showing that I registered for TPS for Form I–9 completion?

No. When completing Form I–9, employers must accept any documentation you choose to present from the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. Employers may not request proof of Honduran citizenship or proof of registration for TPS when completing Form I–9 for new hires or reverifying the employment authorization of current employees. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin. Employers can refer to the compliance notice that DHS published on November 16, 2022, for information on how to complete the Form I–9 with TPS EADs that DHS extended through June 30, 2024.[75]

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or job applicants may also call the IER Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based on citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I–9 Instructions. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of ''Tentative Nonconfirmation'' (mismatch) must promptly inform employees of the mismatch and give such employees an opportunity to take action to resolve the mismatch. A mismatch result means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of a mismatch while the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *https://www.justice.gov/crt/immigrant-and-employee-rights-section* and the USCIS and E-Verify websites at *https://www.uscis.gov/i-9-central* and *https://www.e-verify.gov.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

This **Federal Register** Notice does not invalidate the compliance notice DHS issued on November 16, 2022, which

[75] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

extended the validity of certain TPS documentation through June 30, 2024, and does not require individuals to present a Form I–797, Notice of Action. While Federal Government agencies must follow the guidelines laid out by the Federal Government, State and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, or that may be used by DHS to determine if you have TPS or another immigration status. Examples of such documents are:

- Your current EAD with a TPS category code of A–12 or C–19, even if your country of birth noted on the EAD does not reflect the TPS designated country of Honduras; or
- Your Form I–94, Arrival/Departure Record or Form I–797, Notice of Action, as shown in the **Federal Register** notice published at 87 FR 68717.

Check with the government agency requesting documentation regarding which document(s) the agency will accept. Some state and local government agencies use the SAVE program to confirm the current immigration status of applicants for public benefits.

While SAVE can verify that an individual has TPS, each state and local government agency's procedures govern whether they will accept an unexpired EAD, Form I–797, Form I–797C, or Form I–94. It may also assist the agency if you:

a. Give the agency a copy of the relevant **Federal Register** notice listing the TPS-related document, including any applicable auto-extension of the document, in addition to your recent TPS-related document with your A-number, USCIS number or Form I–94 number;

b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

c. Ask the agency to initiate a SAVE query with your information and follow through with additional verification steps, if necessary, to get a final SAVE response verifying your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or any automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed.

You can check the status of your SAVE verification by using CaseCheck at *https://save.uscis.gov/casecheck/.* CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (A-number, USCIS number, or Form I–94 number) or Verification Case Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the SAVE response is correct, the SAVE website, *www.uscis.gov/save,* has detailed information on how to correct or update your immigration record, make an appointment, or submit a written request to correct records.

[FR Doc. 2023–13017 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0003]

Agency Information Collection Activities; Revision of a Currently Approved Collection: Application To Extend/Change Nonimmigrant Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The purpose of this notice is to allow an additional 30 days for public comments.

DATES: Comments are encouraged and will be accepted until July 21, 2023.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, must be submitted via the Federal eRulemaking Portal website at *http://www.regulations.gov* under e-Docket ID number USCIS–2007–0038. All submissions received must include the OMB Control Number 1615–0003 in the body of the letter, the agency name and Docket ID USCIS–2007–0038.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, Telephone number (240) 721–3000 (This is not a toll-free number; comments are not accepted via telephone message.). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *http://www.uscis.gov,* or call the USCIS Contact Center at (800) 375–5283; TTY (800) 767–1833.

SUPPLEMENTARY INFORMATION:

Comments

The information collection notice was previously published in the **Federal Register** on January 30, 2023, at 88 FR 5903, allowing for a 60-day public comment period. USCIS did receive 5 comments in connection with the 60-day notice.

You may access the information collection instrument with instructions, or additional information by visiting the Federal eRulemaking Portal site at: *http://www.regulations.gov* and enter USCIS–2007–0038 in the search box. The comments submitted to USCIS via this method are visible to the Office of Management and Budget and comply with the requirements of 5 CFR 1320.12(c). All submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the

functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application to Extend/Change Nonimmigrant Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–539; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. This form will be used for nonimmigrants to apply for an extension of stay, for a change to another nonimmigrant classification, or for obtaining V nonimmigrant classification.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection Form I–539 (paper) is 217,000 and the estimated hour burden per response is 1.85 hours, the estimated total number of respondents for the information collection I–539 (electronic) is 93,000 and the estimated hour burden per response is 1 hour; and the estimated total number of respondents for the information collection I–539A is 114,044.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 534,365 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $69,874,000.

Dated: June 14, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13122 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0050]

Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: Request for Hearing on a Decision in Naturalization Proceedings Under Section 336

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: 60-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) invites the general public and other Federal agencies to comment upon this proposed extension of a currently approved collection of information. In accordance with the Paperwork Reduction Act (PRA) of 1995, the information collection notice is published in the **Federal Register** to obtain comments regarding the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort, and resources used by the respondents to respond), the estimated cost to the respondent, and the actual information collection instruments.

DATES: Comments are encouraged and will be accepted for 60 days until August 21, 2023.

ADDRESSES: All submissions received must include the OMB Control Number 1615–0050 in the body of the letter, the agency name and Docket ID USCIS–2007–0020. Submit comments via the Federal eRulemaking Portal website at *https://www.regulations.gov* under e-Docket ID number USCIS–2007–0020.

FOR FURTHER INFORMATION CONTACT: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, Samantha Deshommes, Chief, telephone number (240) 721–3000 (This is not a toll-free number. Comments are not accepted via telephone message). Please note contact information provided here is solely for questions regarding this notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online, available at the USCIS website at *https://www.uscis.gov,* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

SUPPLEMENTARY INFORMATION:

Comments

You may access the information collection instrument with instructions or additional information by visiting the Federal eRulemaking Portal site at: *https://www.regulations.gov* and entering USCIS–2007–0020 in the search box. All submissions will be posted, without change, to the Federal eRulemaking Portal at *https://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. DHS may withhold information provided in comments from public viewing that it determines may impact the privacy of an individual or is offensive. For additional information, please read the Privacy Act notice that is available via the link in the footer of *https://www.regulations.gov.*

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Request for Hearing on a Decision in

Naturalization Proceedings under Section 336.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* N–336; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form N–336 is used by an individual whose Form N–400, Application for Naturalization was denied, to request a hearing before an immigration officer on the denial of the N–400. USCIS uses the information submitted on Form N–336 to locate the requestor's file and schedule a hearing in the correct jurisdiction. It allows USCIS to determine if there is an underlying Form N–400, Application for Naturalization that was denied, to warrant the filing of Form N–336. The information collected also allows USCIS to determine if a member of the U.S. armed forces has filed the appeal.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection N–336 (paper filed) is 3,788 and the estimated hour burden per response is 2.75 hours; the estimated total number of respondents for the information collection N–336 (filed online) is 1,263 and the estimated hour burden per response is 2.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 13,575 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $2,601,265.

Dated: June 14, 2023.

Samantha L. Deshommes,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2023–13125 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2734–22; DHS Docket No. USCIS–2015–0003]

RIN 1615–ZB74

Reconsideration and Rescission of Termination of the Designation of Nepal for Temporary Protected Status; Extension of the Temporary Protected Status Designation for Nepal

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS).

ACTION: Notice of Reconsideration and Rescission of Termination of the Designation of Nepal for Temporary Protected Status (TPS) and Notice of Extension of TPS Designation for Nepal.

SUMMARY: Through this notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is rescinding the previous termination of the designation of Nepal for TPS, which was published on May 22, 2018 and extending the designation of Nepal for Temporary Protected Status (TPS) for 18 months, beginning on December 25, 2023, and ending on June 24, 2025. This extension allows existing TPS beneficiaries to retain TPS through June 24, 2025, so long as they otherwise continue to meet the eligibility requirements for TPS. Existing TPS beneficiaries who wish to extend their status through June 24, 2025, must re-register during the 60-day re-registration period as described in this notice.

DATES: The *Rescission of Termination of the Designation of Nepal for TPS* is effective took effect June 9, 2023.

Extension of Designation of Nepal for TPS: The 18-month extension of TPS for Nepal begins on December 25, 2023 and will remain in effect through June 24, 2025. The extension impacts existing beneficiaries of TPS under the designation of Nepal.

Re-registration: The 60-day re-registration period for existing beneficiaries runs from October 24, 2023 through December 23, 2023.

FOR FURTHER INFORMATION CONTACT:

- You may contact René Cutlip-Mason, Chief, Humanitarian Affairs Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Drive, Camp Springs, MD 20746, or by phone at 800–375–5283.
- For further information on TPS, including guidance on the registration process and additional information on eligibility, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* You can find specific information about Nepal's TPS designation by selecting Nepal from the menu on the left side of the TPS web page.
- If you have additional questions about TPS, please visit *uscis.gov/tools.* Our online virtual assistant, Emma, can answer many of your questions and point you to additional information on our website. If you are unable to find your answers there, you may also call our USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).
- Applicants seeking information about the status of their individual cases may check Case Status Online, available on the USCIS website at *uscis.gov*, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.*
- Further information will also be available at local USCIS offices upon publication of this notice.

SUPPLEMENTARY INFORMATION:

Table of Abbreviations

BIA—Board of Immigration Appeals
CFR—Code of Federal Regulations
DHS—U.S. Department of Homeland Security
DOS—U.S. Department of State
EAD—Employment Authorization Document
FNC—Final Nonconfirmation
Form I–131—Application for Travel Document
Form I–765—Application for Employment Authorization
Form I–797—Notice of Action
Form I–821—Application for Temporary Protected Status
Form I–9—Employment Eligibility Verification
Form I–912—Request for Fee Waiver
Form I–94—Arrival/Departure Record
FR—Federal Register
Government—U.S. Government
IER—U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section
IJ—Immigration Judge
INA—Immigration and Nationality Act
SAVE—USCIS Systematic Alien Verification for Entitlements Program
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
TTY—Text Telephone
USCIS—U.S. Citizenship and Immigration Services
U.S.C.—United States Code

Purpose of This Action (TPS)

Through this notice, DHS announces the reconsideration and rescission of the termination of the designation of Nepal for TPS, and the Secretary's decision to extend Nepal's designation for TPS for 18 months from December 25, 2023 through June 24, 2025. This notice also

sets forth procedures necessary for nationals of Nepal (or individuals having no nationality who last habitually resided in Nepal) to re-register for TPS and to apply for renewal of their EADs with USCIS.

Re-registration is limited to individuals who have previously registered or reregistered for TPS under Nepal's designation, whose applications were granted, and whose TPS has not been withdrawn for individual ineligibility for the benefit. Failure to re-register properly within the 60-day re-registration period may result in the withdrawal of your TPS following appropriate procedures. *See* 8 CFR 244.14.

For individuals who have already been granted TPS under Nepal's designation, the 60-day re-registration period runs from October 24, 2023 through December 23, 2023. USCIS will issue new EADs with a June 24, 2025 expiration date to eligible Nepalese TPS beneficiaries who timely re-register and apply for EADs.

Individuals who have a Nepal TPS application (Form I–821) and Application for Employment Authorization (Form I–765) that were still pending as of June 21, 2023 do not need to file either application again. If USCIS approves an individual's pending Form I–821, USCIS will grant the individual TPS through June 24, 2025. Similarly, if USCIS approves a pending TPS-related Form I–765 filed in connection with a Form I–821, USCIS will issue the individual a new EAD that will be valid through the same date. If you have TPS and only a pending Form I–765, you must file the Form I–821 to reregister for TPS or risk having your TPS withdrawn for failure to timely reregister without good cause. There are currently approximately 14,500 beneficiaries under Nepal's TPS designation who may be eligible to continue their TPS under the extension announced in this Notice.

What is Temporary Protected Status (TPS)?

- TPS is a temporary immigration status granted to eligible nationals of a foreign state designated for TPS under the INA, or to eligible individuals without nationality who last habitually resided in the designated foreign state before arrival in the United States, regardless of their country of birth.
- During the TPS designation period, TPS beneficiaries are eligible to remain in the United States, may not be removed, and are authorized to obtain EADs so long as they continue to meet the requirements of TPS.
- TPS beneficiaries may also apply for and be granted travel authorization as a matter of DHS discretion.
- To qualify for TPS, beneficiaries must meet the eligibility standards at INA section 244(c)(1)–(2), 8 U.S.C. 1254a(c)(1)–(2).
- When the Secretary terminates a foreign state's TPS designation, beneficiaries return to one of the following:
  - The same immigration status or category that they maintained before TPS, if any (unless that status or category has since expired or terminated); or
  - Any other lawfully obtained immigration status or category they received while registered for TPS, as long as it is still valid beyond the date TPS terminates.

When was Nepal designated for TPS?

On June 24, 2015, former Secretary of Homeland Security Jeh Johnson designated Nepal for TPS on environmental disaster grounds as a result of the magnitude 7.8 earthquake that occurred on April 25, 2015 that resulted in a substantial disruption of living conditions, at the request of the country's government, and because Nepal was temporarily unable to adequately handle the return of its nationals. *See Designation of Nepal for Temporary Protected Status,* 80 FR 36346 (June 24, 2015). On October 26, 2016, former Secretary Johnson announced an 18-month extension of Nepal's TPS designation, effective December 25, 2016 through June 24, 2018.[1]

Following the statutorily required review of the country conditions, former Secretary Kirstjen M. Nielsen announced the termination of TPS for Nepal, with an effective date of June 24, 2019. *See* Termination of the Designation of Nepal for Temporary Protected Status, 83 FR 23705 (May 22, 2018); *see also* INA secs. 244(b)(3)(A) and (B), 8 U.S.C. 1254a(b)(3)(A) and (B). As discussed below, this termination has been the subject of litigation and a court order that has prevented the termination from taking effect.

Litigation Background Regarding Termination of Certain TPS Designations

In addition to Nepal, in 2017–2018, TPS was also terminated for five other countries by the Secretary or Acting Secretary: Sudan, El Salvador, Haiti, Nicaragua, and Honduras.[2] Lawsuits challenging the terminations were filed in the U.S. District Court for the Northern District of California in *Ramos* v. *Nielsen,* 326 F. Supp. 3d 1075 (N.D. Cal. 2018), and *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019), and in the U.S. District Court for the Eastern District of New York in *Saget* v. *Trump,* 375 F. Supp 3d 280 (E.D.N.Y. 2019).[3] In *Ramos,* the district court granted a preliminary injunction enjoining the terminations of TPS for El Salvador, Haiti, Sudan, and Nicaragua and directed DHS to maintain the *status quo* and to continue the TPS and TPS-related documentation of affected TPS beneficiaries under those countries' designations. The U.S. Government appealed, and a three-judge panel vacated the injunction. The appellate court, however, has granted rehearing *en banc* of the panel decision, vacating the panel's decision.[4] The district court's preliminary injunction thus remains in place. In *Bhattarai*—which challenged the determination to terminate TPS for Nepal—the district court has stayed proceedings until the *Ramos* appeal is decided and approved the parties' stipulation for the

[1] *Extension of the Designation of Nepal for Temporary Protected Status,* 81 FR 74470 (October 26, 2016).

[2] Sudan (82 FR 47228) (Oct. 11, 2017), El Salvador (83 FR 2654) (Jan. 18, 2018), Haiti (83 FR 2648) (Jan. 18, 2018), Nicaragua (82 FR 59636) (Dec. 15, 2017), and Honduras (83 FR 26074) (June 05, 2018).

[3] See *Ramos* v. *Nielsen,* 336 F. Supp. 3d 1075 (N.D. Cal. 2018), *vacated,* 975 F.3d 872 (9th Cir. 2020), *reh'g en banc granted,* 59 F.4th 1010 (Feb. 10, 2023) (No. 18–16981) (''*Ramos*'').; *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019) (staying proceedings until *Ramos* appeal decided and approved parties' stipulation for continued TPS and issuance of TPS-related documentation to eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the appeal). In 2019, the U.S. District Court for the Eastern District of New York also enjoined the termination of the 2011 TPS designation for Haiti in *Saget* v. *Trump,* 375 F. Supp. 3d 280 (E.D.N.Y. 2019), and DHS cited to that order in previous notices continuing the affected beneficiaries' TPS and documentation. See, *e.g.,* 86 FR 50725, 50726 (Sept. 10, 2021). However, the *Saget* case was dismissed upon the court's approval of the parties' joint Stipulation of Dismissal for mootness following the Secretary's new 18-month designation of Haiti for TPS on August 3, 2021, and DHS' continuation of existing beneficiaries' TPS and related documentation under the *Ramos* injunction through Dec. 31, 2022. See id., Order approving Stipulation of Dismissal, dated Oct. 15, 2021. Other litigation was filed relating to the terminations of El Salvador, Honduras, and Haiti. A Haiti-related case, *NAACP* v. *U.S. Dept. of Homeland Security,* No. 1:18–cv–00239 (D. Md., Jan. 24, 2018) was dismissed on May 22, 2021, subsequent to the same DHS designation. An El Salvador related case, *Casa de Maryland.,* v. *Biden,* No. GJH–18–00845 (D. Md., Mar. 23, 2018), is currently stayed until April 17, 2023. *Centro Presente* v. *Biden,* No. 1:18–cv–10340 (D. Mass, July 23, 2018), relating to El Salvador, Haiti, and Honduras, is currently stayed until April 14, 2023.

[4] *See Ramos* v. *Wolf,* 975 F.3d 872 (9th Cir. 2020), *petition for reh'g en banc granted,* 59 F.4th 1010 (Feb. 10, 2023) (No. 18–16981) (''*Ramos*'').

continuation of TPS and TPS-related documentation for eligible, affected beneficiaries of TPS for Honduras and Nepal during the stay and pendency of the *Ramos* appeal. In *Saget,* the district court granted a preliminary injunction enjoining termination of TPS for Haiti, and the Government appealed. However, following the new TPS designation of Haiti in August 2021, the district court dismissed the lawsuit based on the parties' stipulation to dismissal.[5] Beneficiaries under the TPS designations for El Salvador, Nepal, Sudan, Haiti, Honduras, and Nepal will retain their TPS while the preliminary injunction in *Ramos* remains in effect, and for at least 120 days thereafter, provided that their TPS is not withdrawn because of individual ineligibility.[6]

DHS has taken actions to ensure its continued compliance with the court orders in *Ramos* and *Bhattarai.* DHS has published periodic notices to continue TPS and extend the validity of TPS-related documentation previously issued to beneficiaries under the TPS designations for El Salvador, Haiti, Nepal, Sudan, Honduras, and Nepal.[7] The most recent such notice continued TPS and extended the TPS-related documents specified in the notice through June 30, 2024.[8] These extensions apply where the TPS beneficiary properly filed for re-registration during either the most recent DHS-announced registration period for their country, or any applicable previous DHS-announced re-registration periods for the beneficiary's country, or has a re-registration application that remains pending.[9] Although the notice published at 87 FR 68717 remains valid, individuals who wish to remain eligible for TPS under the extension of TPS for Nepal announced in this notice through June 24, 2025 and any potential future extensions must apply for re-registration in accordance with the procedures announced in this notice.[10] Failure to timely re-reregister without good cause is a ground for TPS withdrawal. *See* INA section 244(c)(3)(C), 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17.

What authority does the Secretary have to reconsider and rescind the termination of TPS for Nepal?

Section 244(b)(1) of the INA, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist.[11] The decision to designate any foreign state (or part thereof) is a discretionary decision, and there is no judicial review of any determination with respect to the designation, termination, or extension of a designation. *See* INA section 244(b)(5)(A); 8 U.S.C. 1254a(b)(5)(A).

At least 60 days before the expiration of a foreign state's TPS designation, the Secretary, after consultation with appropriate U.S. Government agencies, must review the conditions in the foreign state designated for TPS to determine whether they continue to meet the conditions for the TPS designation. *See* INA section 244(b)(3)(A), 8 U.S.C. 1254a(b)(3)(A). If the Secretary determines that the foreign state no longer meets the conditions for TPS designation, the Secretary must terminate the designation. *See* INA section 244(b)(3)(B), 8 U.S.C. 1254a(b)(3)(B). If the Secretary does not determine that the foreign state no longer meets the conditions for TPS designation, the designation is extended for an additional period of 6 months or, in the Secretary's discretion, 12 or 18 months. *See* INA section 244(b)(3)(A), (C); 8 U.S.C. 1254a(b)(3)(A), (C).

On May 22, 2018, the Secretary of Homeland Security issued notice of her decision that Nepal no longer continued to meet the conditions for TPS designation and terminated TPS for Nepal, indicating that the conditions for Nepal's 2015 designation for TPS on the basis of environmental disaster due to the damage caused by the 2015 earthquake were no longer met.[12] The Secretary also announced an orderly transition period of 12 months, such that the termination was set to go into effect on June 24, 2019. However, as noted above plaintiffs in *Bhattarai* filed suit challenging the termination decisions for Nepal and Honduras. On March 12, 2019, the proceedings were stayed and the parties stipulated that the termination decisions would not go into effect during the pendency of the *Ramos* appeal of similar issues and for at least 120 days thereafter. The district court also approved the parties' stipulation that TPS and TPS-related documentation of affected beneficiaries of the Nepal and Honduras TPS designations would continue under terms similar to those applied to the *Ramos*-covered beneficiaries. The order to stay proceedings and approval of the stipulation remain in effect.[13]

DHS has since issued a series of **Federal Register** notices continuing TPS and TPS-related documentation for affected TPS beneficiaries, with the most recent continuation notice effective through until June 30, 2024.[14] As a result, the termination of the TPS designation for Nepal has never gone into effect, and TPS beneficiaries under that designation have retained their TPS, unless it has been individually

[5] *See Saget* v. *Trump,* 375 F. Supp 3d 280 (E.D.N.Y. 2019) and Order approving Stipulation of Dismissal, dated Oct. 15, 2021.

[6] As noted, Haiti was newly designated for TPS on August 3, 2021 for 18 months. *See Designation of Haiti for Temporary Protected Status,* 86 FR 41863 (Aug. 3, 2021). On April 19, 2022, the Secretary also newly designated Sudan TPS. *See Designation of Sudan for Temporary Protected Status,* 87 FR 23202 (Apr. 19, 2022). Those designations cover all Haitian and Sudanese nationals who were eligible for TPS under the Haiti and Sudan TPS designations that were terminated in 2018 and 2017, respectively.

[7] 83 FR 54764 (Oct. 31, 2018); 84 FR 7103 (Mar. 1, 2019); 84 FR 20647(May 10, 2019) (correction notice issued at 84 FR 23578 (May 22, 2019)); 84 FR 59403 (Nov. 4, 2019); 85 FR 79208 (Dec. 9, 2020); and 86 FR 50725 (Sept. 10, 2021) (correction notice issued at 86 FR 52694 (Sept. 22, 2021).

[8] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations of El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

[9] *Id.,* at 68719 note 5 (listing acceptable re-registration periods for each of the 6 countries).

[10] Through the re-registration process, which is generally conducted every 12 to 18 months while a foreign state is designated for TPS, USCIS determines whether each TPS beneficiary is continuing to maintain individual eligibility for TPS, including but not limited to the requirements related to disqualifying criminal or security issues. Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal, 87 FR 68717, 68720 (Nov. 16, 2022) (noting potential future action for Nepal TPS beneficiaries may include a requirement to re-register).

[11] Although the text of INA section 244(b)(1) continues to ascribe this power to the Attorney General, this authority is now held by the Secretary of Homeland Security by operation of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135. See, *e.g.,* 6 U.S.C. 557; *Nielsen* v. *Preap,* 139 S. Ct. 954, 959 n.2 (2019). The Secretary may designate a country (or part of a country) for TPS on the basis of ongoing armed conflict such that returning would pose a serious threat to the personal safety of the country's nationals and habitual residents, environmental disaster (including an epidemic), or extraordinary and temporary conditions in the country that prevent the safe return of the country's nationals. For environmental disaster-based designations, certain other statutory requirements must be met, including that the foreign government must request TPS. A designation based on extraordinary and temporary conditions cannot be made if the Secretary finds that allowing the country's nationals to remain temporarily in the United States is contrary to the U.S. national interest. INA section 244(b)(1).

[12] *Termination of the Designation of Nepal for Temporary Protected Status,* 83 FR 23705 (May 22, 2018).

[13] *Bhattarai* v. *Nielsen,* No. 19–cv–00731 (N.D. Cal. Mar. 12, 2019).

[14] *See* 84 FR 20647 (May 10, 2019) (correction notice issued at 84 FR 23578 (May 22, 2019)); (Nov. 4, 2019); (Dec. 9, 2020); and 86 FR 50725 (Sept. 10, 2021) (correction notice issued at 86 FR 52694 (Sept. 22, 2021)); and 87 FR 68717 (Nov. 16, 2022). DHS had published previous notices to comply with the earlier preliminary injunction order issued by the *Ramos* court. *See* 83 FR 54764 (Oct. 31, 2018); 84 FR 7103 (March 1, 2019).

withdrawn pursuant to INA § 244(c)(3), 8 U.S.C. 1254a(c)(3).

An agency has inherent (*i.e.* statutorily implicit) authority to revisit its prior decisions unless Congress has expressly limited that authority.[15] The TPS statute does not limit the Secretary's inherent authority to reconsider any TPS-related determination, and upon reconsideration, to change the determination. *See* INA sections 244(b)(3), (b)(5)(A); 8 U.S.C. 1254a(b)(3), (b)(5)(A).

Why is the Secretary rescinding the previous termination of the TPS designation for Nepal?

After conducting an independent assessment of the country conditions in Nepal as they existed in 2018 and exist today, the Secretary has determined that Nepal's 2015 TPS designation should not have been terminated. As explained below, the conditions in Nepal that gave rise to its TPS designation in 2015 persisted in 2018 and persist to this day. Accordingly, the Secretary is, upon reconsideration, rescinding the 2018 decision terminating Nepal's TPS designation and extending that designation for an additional 18 months.

On April 25, 2015, an earthquake of magnitude 7.8 struck Nepal, with the epicenter approximately 77 to 81 kilometers (km) northwest of Kathmandu, Nepal's capital.[16] Dozens of aftershocks followed, including one of magnitude 7.3 on May 12, 2015.[17] Over 8 million people—roughly 25% to 33% of Nepal's population—were affected in 39 of Nepal's 75 districts.[18] Over 2 million people lived in the 11 most critically hit districts.[19] In these districts, half of the population was estimated to be affected.[20] In response, Nepal was designated for TPS for 18 months effective June 24, 2015.[21]

At the time of the determination to terminate the designation of TPS, DHS found that Nepal had made progress in reconstruction and that the disruption in living conditions had decreased. While some progress had been made in these areas, Nepal continued to experience significant challenges due to the destruction caused by the earthquake and subsequent landslides that hampered reconstruction that were not sufficiently considered in the termination decision. These challenges include continued internal displacement and problems in allocation of reconstruction funds and assistance. Ongoing environmental disasters, like landslides, that Nepal continued to experience, were also not considered at the time of the termination decision. In 2017, Amnesty International found that delays in allocation of earthquake relief funds led to more than 70% of those living in the most seriously damaged districts continuing to live in temporary shelters.[22] This lack of adequate protection from environmental changes negatively impacted the health of earthquake survivors.[23] In both 2017 and 2018, the Department of State reported that the most vulnerable populations, such as internally displaced people, stateless individuals, indigenous people, and a large number of children remained in camps or informal settlements and/or faced discrimination in receiving reconstruction assistance while also acknowledging the government promoted their safe, voluntary return and had policies in place to help them.[24] A comprehensive report from Human Rights Watch corroborated ''the country is still far from recovery'' and that ''an already poor nation leaves its most impoverished citizens without the support that could, and should, be provided because of available resources.'' [25] The Kathmandu Post reported that ''a debilitating shortfall of necessary funds, an initial shortage of reconstruction materials as a result of the unofficial border blockade, the absence of a central coordinating body, frequent changes in leadership, and the politicization of reconstruction have resulted in snail paced-recovery efforts.'' [26] A 2017 assessment on vulnerabilities found that Nepal lacks comprehensive social vulnerability analyses and mapping which would directly influence disaster preparedness.[27] The assessment also found that ''Nepal's preparedness and policy interventions are not compatible with the existing hazard, exposure, and risk perception level'' and this ''leads to losses every year''.[28] In the weeks following the earthquake, more than 4,300 landslides were mapped using spaceborne and ground observations

[15] *Ivy Sports Medicine, LLC* v. *Burwell,* 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.); *see, e.g., id.* (''[A]dministrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion. . . . ''[I]nherent authority for timely administrative reconsideration is premised on the notion that the power to reconsider is inherent in the power to decide.'' (quotation marks and citations omitted)); *NRDC* v. *Regan,* 67 F.4th 397, 401 (D.C. Cir. 2023) (''[A]lthough the power to decide is normally accompanied by the power to reconsider, Congress undoubtedly can limit an agency's discretion to reverse itself.'' (quotation marks omitted); *Macktal* v. *Chao,* 286 F.3d 822, 825–26 (5th Cir. 2002) (''It is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions.'') (collecting cases); *Mazaleski* v. *Treusdell,* 562 F.2d 701, 720 (D.C. Cir. 1977) (''We have many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time.''); *see also Last Best Beef, LLC* v. *Dudas,* 506 F.3d 333, 340 (4th Cir. 2007) (agencies possess especially ''broad authority to correct their prior errors'').

[16] More than 1900 killed by 7.8 magnitude quake in Nepal, Washington Post, Apr. 26, 2015, available at: *https://www.washingtonpost.com/world/magnitude-79-earthquake-hits-densely-populated-area-of-nepal/2015/04/25/1c1b3f46-eb21-11e4-9a6a-c1ab95a0600b_story.html* (last visited Mar. 10, 2023); UN Nepal Earthquake Flash Appeal, U.N. Development Program, Jul. 28, 2017, available at: *https://www.undp.org/publications/un-nepal-earthquake-flash-appeal;* Nepal Earthquake Fact Sheet #8—May 4, 2015, U.S. Agency for International Development, May 4, 2015, available at: *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://2012-2017.usaid.gov/sites/default/files/documents/1866/nepal_eq_fs08_05-04-2015.pdf* (last visited Mar. 10, 2023).

[17] Deadly aftershock rocks Nepal, CBS News, May 14, 2015, available at: *https://www.cbsnews.com/pictures/earthquake-rocks-nepal/* (last visited Mar. 10, 2023).

[18] UN Nepal Earthquake Flash Appeal, U.N. Development Program, Jul. 28, 2017, available at: *https://www.undp.org/publications/un-nepal-earthquake-flash-appeal* (last accessed Mar. 10, 2023).

[19] UN Nepal Earthquake Flash Appeal, U.N. Development Program, Jul. 28, 2017, available at: *https://www.undp.org/publications/un-nepal-earthquake-flash-appeal* (last accessed Mar. 10, 2023).

[20] UN Nepal Earthquake Flash Appeal, U.N. Development Program, Jul. 28, 2017, available at: *https://www.undp.org/publications/un-nepal-earthquake-flash-appeal* (last accessed Mar. 10, 2023).

[21] Designation of Temporary Protected Status for Nepal, **Federal Register**, Jun. 24, 2015, available at: *https://www.federalregister.gov/documents/2015/06/24/2015-15576/designation-of-nepal-for-temporary-protected-status* (last visited Mar. 10, 2023).

[22] Amnesty International, ''Building Inequality''—The failure of the Nepali government to protect the marginalised in post-earthquake reconstruction efforts, April 25, 2017, *https://www.ecoi.net/en/file/local/1398796/1226_1493194920_asa3160712017english.pdf* (accessed on April 6, 2023).

[23] Id.

[24] Country Report on Human Rights Practices 2017—Nepal, U.S. Department of State, 20 April 2018, available at: *https://www.ecoi.net/en/document/1430386.html* (last visited April 6, 2023); Country Report on Human Rights Practices 2018—Nepal, U.S. Department of State, 13 March 2019, available at: *https://www.ecoi.net/en/document/2004213.html* (last visited Mar. 10, 2023).

[25] Tejshree Thapa, Lessons for Nepal, Three Years After Deadly Earthquake: Government Should Ensure Support for Survivors, Human Rights Watch, April 25, 2018, available at: *https://www.hrw.org/news/2018/04/25/lessons-nepal-three-years-after-deadly-earthquake* (last visited Mar. 10, 2023).

[26] Costs of Reconstruction, April 25, 2018, available at: *https://kathmandupost.com/editorial/2018/04/25/costs-of-reconstruction,* (last visited: Mar. 10, 2023).

[27] Gautam, Dipendra, Assessment of social vulnerability to natural hazards in Nepal, Natural Hazards and Earth System Sciences, Dec. 15, 2017, available at: *https://nhess.copernicus.org/articles/17/2313/2017/nhess-17-2313-2017.pdf* (last visited: April 10, 2023).

[28] Id.

and the likelihood of landslides remained due to the cyclical monsoon season and unstable ground from the earthquake.[29] In fact, a 2017 study found that landslides triggered by large earthquakes contribute not only to earthquake losses but ''pose a major secondary hazard that can persist for months or years.'' [30] Even while Nepal worked to reconstruct damaged infrastructure and homes, it continued to experience earthquake aftershocks until August 24, 2017.[31] These assessments and reports highlight that while Nepal made some progress in reconstruction, it continued to face environmental obstacles at the time of the determination to terminate TPS that hindered meaningful progress.

The conditions in Nepal at the time of the TPS termination determination continued to substantially disrupt living conditions and negatively affected the country's ability to adequately handle the return of its nationals residing in the United States. At the time of the determination to terminate TPS, Nepal continued to experience challenges, including internal displacement, problems with reconstruction fund distribution, and ongoing environmental disasters, that were either insufficiently considered or not considered. The Secretary has concluded that reconsideration and rescission of the termination of TPS is timely, particularly given that the 2018 termination decision has not yet gone into effect.

What authority does the Secretary have to extend the designation of Nepal for TPS?

As noted above, section 244(b) of the INA, 8 U.S.C. 1254a(b), authorizes the Secretary, after consultation with appropriate agencies of the U.S. Government, to designate a foreign state (or part thereof) for TPS if the Secretary determines that certain country conditions exist and instructs the Secretary to periodically review the country conditions underpinning each designation and determined whether they still exist, leading to either termination or extension of the TPS designation. However, if the Secretary does not make a decision as to either extension or termination, then INA section 244(b)(3)(C) requires the automatic extension of the designation for six months (or 12 or 18 months in the Secretary's discretion).

Prior to the now-rescinded termination of the TPS designation for Nepal, the most recent extension of the designation was due to end on June 24, 2018.[32] In light of the Secretary's reconsideration and rescission of the May 22, 2018 decision to terminate the TPS designation for Nepal, there is no longer any standing secretarial determination that Nepal ''no longer meets the conditions for designation'' under INA section 244(b)(1). Accordingly, with this rescission of the prior termination, pursuant to INA section 244(b)(3)(C), and in the absence of an affirmative decision by any Secretary to extend the designation for 12 or 18 months rather than the automatic six months triggered by the statute, the TPS designation for Nepal shall have been extended in consecutive increments of 6 months between the date when the last designation extension was due to end on June 24, 2018, and the effective date of the TPS extension announced in this notice, December 25, 2023. Coupled with the existing *Bhattarai* order and corresponding **Federal Register** notices continuing TPS and TPS-related documentation for affected beneficiaries under the designation for Nepal, this means that all such individuals whose TPS has not been finally withdrawn for individual ineligibility are deemed to have retained TPS since June 24, 2018 and may re-register under procedures announced in this notice.

Why is the Secretary extending the TPS designation for 18 months through June 24, 2025?

While Nepal had been making progress on its recovery in the years immediately following the 2015 earthquake, subsequent environmental disasters, and the associated macroeconomic shocks, have impeded the recovery process.

There continues to be a substantial disruption of living conditions, including earthquakes and other environmental events that continue to inflict damage on a population that has still not fully recovered from the earthquake in 2015, and this has impacted Nepal's ability to adequately handle the return of its nationals. Recent earthquakes have caused considerable damage throughout Nepal and impeded or reversed the progress the country had made since the 2015 earthquake. On November 9, 2022, a 5.6 magnitude earthquake in Western Nepal killed six people living in mud and brick houses in Doti District, 430 kilometers (270 miles) west of Kathmandu and affected 200 families.[33] Shortly thereafter, on November 12, 2022, a second strong earthquake followed in the Bajhang district.[34] The International Federation of Red Cross/Red Crescent Societies reported that as of November 14, 2022, affected people were living in the open and were in need of emergency shelter, as well as improved access to water, sanitation and hygiene, psychosocial support and protection services.[35] As recently as January 24, 2023, another 5.9 magnitude earthquake struck Bajura district in the Sudurpaschim province.[36] Reports indicate that this earthquake resulted in damage to approximately 400 houses and the displacement of over 40 families.[37] A 2018 World Bank study based on interviews with displaced persons from three villages indicated continuing vulnerabilities due to environmental degradation.[38] That study, conducted during the monsoon season in 2018 (June to October), found that there were ''[i]ncreased landslide risks due to road/tunnel constructions for hydropower projects'' and that [p]eople in hazard-prone areas need[ed] safe/adequate land through monsoon seasons.'' [39] It also found that ''[a]nalysis

[29] When the Earth Shook, NASA, Nov. 28, 2017, available at: *https://appliedsciences.nasa.gov/our-impact/story/when-earth-shook* (last visited: April 10, 2023).

[30] Jack Williams, et al., Satellite-based emergency mapping: Landslides triggered by the 2015 Nepal earthquake, Natural Hazards and Earth System Sciences, Jan. 16, 2018, available at: *https://nhess.copernicus.org/preprints/nhess-2017-273/nhess-2017-273.pdf* (last visited: April 10, 2023).

[31] Nepal Disaster Report 2017, Government of Nepal-Ministry of Home Affairs, Dec. 2017, available at: *http://drrportal.gov.np/uploads/document/1321.pdf* (last visited: April 10, 2023).

[32] *See* 81 FR 74470 (Oct. 26, 2016).

[33] Doti Earthquake Response, NRCS, Nov. 18, 2022, available at: *https://reliefweb.int/report/nepal/doti-earthquake-response* (last visited: Mar. 10, 2023).

[34] Far Western Earthquake Response in Nepal DREF Application, International Foundation of Red Cross/Red Crescent Societies, Nov. 18, 2022, available at: *https://reliefweb.int/report/nepal/nepal-far-western-earthquake-response-nepal-dref-application-mdrnp013* (last visited Mar. 10, 2023).

[35] Far Western Earthquake Response in Nepal DREF Application, International Foundation of Red Cross/Red Crescent Societies, Nov. 18, 2022, available at: *https://reliefweb.int/report/nepal/nepal-far-western-earthquake-response-nepal-dref-application-mdrnp013* (last visited Mar. 10, 2023).

[36] 5.9 M earthquake with epicentre in Bajura recorded, Kathmandu Post, Jan. 24, 2023, available at: *https://kathmandupost.com/national/2023/01/24/5-9-m-earthquake-with-epicentre-in-bajura-recorded* (last visited Mar. 10, 2023).

[37] HRRP Bulletin, Housing Recovery and Reconstruction Platform—Nepal, Feb. 1, 2023, available at: *https://reliefweb.int/report/nepal/nepal-hrrp-bulletin-31-january-2023* (last visited Mar. 10, 2023).

[38] Kerstin Rieger, Multi-hazards, displaced people's vulnerability and resettlement: Post-earthquake experiences from Rasuwa district in Nepal and their connections to policy loopholes and reconstruction practices, Progress in Disaster Science, Oct. 2021, available at: *https://www.sciencedirect.com/science/article/pii/S2590061721000478* (last visited Mar. 10, 2023).

[39] Kerstin Rieger, Multi-hazards, displaced people's vulnerability and resettlement: Post-

Continued

demonstrate[ed] that no clear relocation plan for displaced people exist[ed], and that livelihood opportunities in new re-settlement areas receiv[ed] no attention.'' [40] Further, according to a 2021 study in open access journal *Progress in Disaster Science,* mapping showed that the landslide hazard in the fourteen worst-affected districts remained significantly higher than on the day of the earthquake in 2015.[41] While some areas experienced a degree of stabilization, new areas experienced landslides and others continued to develop risk of landslides.[42] The study emphasized that it should be expected that the levels of landslide risk in these areas will remain elevated for at least ''several more years.'' [43]

Both droughts and heavy monsoon floods, made more frequent by climate change, have drastically increased food insecurity in areas of the country that were most heavily affected by the 2015 earthquake while also significantly slowing Nepal's reconstruction efforts by causing increasingly severe damage to existing infrastructure.[44] In December 2022, UNICEF published a report indicating that the prolonged monsoon season triggered disasters, including floods and landslides, claiming more than 1,200 lives and affecting over 2,321 households across the country in the previous year.[45]

Furthermore, Nepal continues to experience housing insecurity after the 2015 earthquake that is evidence of the continued disruption in living conditions that temporarily impacts the country's ability to handle the return of its nationals granted TPS. Nepal's National Reconstruction Authority (NRA) was disbanded on December 26, 2021, despite the fact that it had not fully completed reconstruction of damage caused by the 2015 earthquake.[46] Local news reports indicate that a delay in the release of NRA funding led to incomplete settlements being built, leaving people without homes or with partly completed dwellings that lacked roofs and other necessities.[47] Incomplete rebuilding is more prevalent in areas where poor and vulnerable populations live.[48] This has led to many internally displaced persons (IDP) remaining in camps or informal settlements because their homes were not rebuilt or remain vulnerable to environmental disasters, or because they did not hold title to the homes they were living in at the time of the 2015 earthquake.[49]

In addition to the subsequent environmental events following the 2015 earthquake, Nepal continues to experience serious food insecurity, health-infrastructure concerns, and agricultural instability that render Nepal temporarily unable to handle the return of its nationals granted TPS. An August 2020 NIH article noted that Nepal's ''already strained health system was worsened'' by the 2015 earthquakes and highlighted the continuing impact of the earthquakes on vulnerable populations, which were further impacted by COVID.[50] Additionally, a 2021 Penn State Department of Agricultural Sciences study found that heavy monsoon rains compounded food insecurity in areas most affected by the 2015 earthquake, likely due to increased landslides, which damaged roads, disrupted distribution of food aid, and destroyed agricultural land and assets.[51]

In October 2022, Nepal experienced widespread damage in many regions as a result of flooding and landslides that occurred after heavy rainfall.[52] In Lumbini Province alone, more than 8,000 households were impacted by flooding with over 1,000 displaced.[53] As a result of floods, at least 33 people died, while at least 22 people remain missing.[54] The flooding and numerous landslides resulting from the storm destroyed critical infrastructure,

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earthquake experiences from Rasuwa district in Nepal and their connections to policy loopholes and reconstruction practices, Progress in Disaster Science, Oct. 2021, available at: *https://www.sciencedirect.com/science/article/pii/S2590061721000478* (last visited Mar. 10, 2023).

[40] Kerstin Rieger, Multi-hazards, displaced people's vulnerability and resettlement: Post-earthquake experiences from Rasuwa district in Nepal and their connections to policy loopholes and reconstruction practices, Progress in Disaster Science, Oct. 2021, available at: *https://www.sciencedirect.com/science/article/pii/S2590061721000478* (last visited Mar. 10, 2023).

[41] Nick Rosser, *et al.*, Changing significance of landslide hazard and risk after the 2015 Mw 7.8 Gorkha, Nepal Earthquake, Progress in Disaster Science, April 2021, available at: *https://www.sciencedirect.com/science/article/pii/S2590061721000193* (last visited: Mar. 10, 2023).

[42] Nick Rosser, *et al.*, Changing significance of landslide hazard and risk after the 2015 Mw 7.8 Gorkha, Nepal Earthquake, Progress in Disaster Science, April 2021, available at: *https://www.sciencedirect.com/science/article/pii/S2590061721000193* (last visited: Mar. 10, 2023).

[43] Nick Rosser, *et al.*, Changing significance of landslide hazard and risk after the 2015 Mw 7.8 Gorkha, Nepal Earthquake, Progress in Disaster Science, April 2021, available at: *https://www.sciencedirect.com/science/article/pii/S2590061721000193* (last visited: Mar. 10, 2023).

[44] Sangam Prasain and Mohan Budhaair, Fertiliser shortage, drought, heat wave threaten Nepal's farming future, Asia News Network, Aug. 31, 2022, available at: https://asianews.network/fertiliser-shortage-drought-heat-wave-threaten-nepals-farming-future/ (last visited: Mar. 10, 2023); Nepal Development Update, World Bank Group, Oct. 6, 2022, available at: *https://thedocs.worldbank.org/en/doc/a27ca3a08e77befb785fc6742708a56c-0310012022/original/Nepal-Development-Update-October-2022.pdf* (last visited: Mar. 10, 2023); Poudel S, Funakawa S, Shinjo H., Household Perceptions about the Impacts of Climate Change on Food Security in the Mountainous Region of Nepal, *Sustainability,* 2017, *https://doi.org/10.3390/su9040641* (last visited Mar. 31, 2023); 2015 Nepal Earthquake: Facts, FAQS, and how to help, World Vision, April 3, 2018, *https://www.worldvision.org/disaster-relief-news-stories/2015-nepal-earthquake-facts#:~:text=by%20Crislyn%20FelisildaWhere%20did%20the%202015%20Nepal%20earthquake%20strike%3F,%2C%20Bangladesh%2C%20and%20southern%20Tibet* (last visited Mar. 31, 2023).

[45] Nepal Humanitarian Situation Report No. 3, 1 January—30 December 2022, UNICEF, Dec. 30, 2022, available at: *https://reliefweb.int/report/nepal/unicef-nepal-humanitarian-situation-report-no-3-1-january-30-december-2022* (last visited Feb. 10, 2023).

[46] See *e.g.,* Tika Prasad Bhatta, Integrated settlements meant for earthquake victims left incomplete in Ramechhap, The Kathmandu Post, Feb. 15, 2021, available at: *https://kathmandupost.com/province-no-3/2021/02/15/integrated-settlements-meant-for-earthquake-victims-left-incomplete-in-ramechhap* (last visited: Mar. 10, 2023); Rastriya Samachar Samiti, NRA's term comes to an end, The Himalayan Times, available at: *https://thehimalayantimes.com/nepal/nras-term-comes-to-an-end* (last visited: Mar. 10, 2023).

[47] Tika Prasad Bhatta, Integrated settlements meant for earthquake victims left incomplete in Ramechhap, The Kathmandu Post, Feb. 15, 2021, available at: *https://kathmandupost.com/province-no-3/2021/02/15/integrated-settlements-meant-for-earthquake-victims-left-incomplete-in-ramechhap* (last visited: Mar. 10, 2023)

[48] See *e.g.,* Tika Prasad Bhatta, Integrated settlements meant for earthquake victims left incomplete in Ramechhap, The Kathmandu Post, Feb. 15, 2021, available at: *https://kathmandupost.com/province-no-3/2021/02/15/integrated-settlements-meant-for-earthquake-victims-left-incomplete-in-ramechhap* (last visited: Mar. 10, 2023); The poorest are the hardest hit in rural Nepal, World Bank Blogs, May 05, 2015, *https://blogs.worldbank.org/endpovertyinsouthasia/poorest-are-hardest-hit-rural-nepal* (last visited Mar. 31, 2023).

[49] 2022 Country Report on Human Rights Practices: Nepal, US Department of State, March 20, 2023, *https://www.ecoi.net/en/document/2089245.html* (last visited: April 6, 2023).

[50] Bipin Adhikari, *et al.*, Earthquake rebuilding and response to COVID–19 in Nepal, a country nestled in multiple crises, Journal of Global Health, Aug. 23, 2020, available at: *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7567410* (last visited: Mar. 10, 2023).

[51] Heather Randell, *et al.*, Food insecurity and compound environmental shocks in Nepal: Implications for a changing climate, World Development, September 2021, available at: *https://www.sciencedirect.com/science/article/abs/pii/S0305750X21001236* (last visited: Mar. 10, 2023).

[52] Nepal: Disruptions due to flooding and landslides ongoing in multiple regions as of Oct. 11, Crisis24, Oct. 11, 2022, available at: *https://crisis24.garda.com/alerts/2022/10/nepal-disruptions-due-to-flooding-and-landslides-ongoing-in-multiple-regions-as-of-oct-11* (last visited: Mar. 10, 2023).

[53] Nepal: Disruptions due to flooding and landslides ongoing in multiple regions as of Oct. 11, Crisis24, Oct. 11, 2022, available at: *https://crisis24.garda.com/alerts/2022/10/nepal-disruptions-due-to-flooding-and-landslides-ongoing-in-multiple-regions-as-of-oct-11* (last visited: Mar. 10, 2023).

[54] At least 33 killed in Nepal flooding and landslides, BBC, Oct. 12, 2022, available at: *https://www.bbc.com/news/world-asia-63224454* (last visited: Mar. 10, 2023).

including sections of major highways and market access roads, all of which continue to further affect food security and impede post-earthquake recovery in these especially vulnerable areas.[55]

The destruction of agricultural lands and disruption of supply chains due to these road blockages have resulted in shortages and price increases of key staples. This has exacerbated recent dramatic rises in the price of key staples resulting from Russia's war on Ukraine,[56] which has resulted in global food, fuel, and fertilizer shortages and rising food prices around the world, which have impacted Nepal with particular severity.[57] The war has posed new threats to Nepal's food security and economy, both of which have struggled to stabilize under the impacts of the COVID–19 pandemic, environmental shocks, and above-average global food prices.[58] While food security conditions in Nepal have improved in recent years, ''nearly 3.9 million people—approximately 13 percent of the country's population—were experiencing food insecurity as of June 2022. . . Additionally, an estimated 33 percent of Nepali children ages 6–23 months did not meet the recommended minimum standards for dietary diversity and nutrient intake.'' [59]

The global fertilizer shortage resulting from the Ukraine conflict has left Nepal, a country heavily reliant on imports, unable to supply the necessary fertilizers for its farmers.[60] A significant portion of this year's agricultural productivity was lost before the planting season even began, with many farmers opting not to plant, given the challenges with obtaining sufficient fertilizer to make commercial farming feasible.[61]

Rising inflation, currently at a new, six-year high of 8.64 percent in September, and fuel prices that have remained about 50% higher this year have already contributed to growing food prices and heightened risk of food insecurity.[62] Prices have risen across nearly all commodities, and the cost of the household food basket is around 10% higher nationally than a year ago, and as much as 27% higher in some of the most isolated and disaster-affected regions, raising concerns about the immediate and longer-term impacts on Nepal's economic growth, stability, and food security.[63] High inflation rates and recent interest rate hikes by Nepal's central bank compound the effects of an ongoing liquidity crunch, constraining access to finance and hampering economic growth and completion of water projects that would address Nepal's environmental vulnerabilities.[64] Given the high level of household-level poverty and the high share of food spending—representing as much as two-thirds of the total income for poor families—the ongoing war and food inflation will continue to stress an already volatile food security and nutrition situation.[65] A 2021 UNICEF report indicated that 17.4 percent of Nepalese are poor on a multidimensional poverty index, so over one in six Nepalese—five million people—are under serious threat due to ongoing food inflation on top of previous economic and environmental stressors.[66]

Due to the triple threat of global economic effects, dire environmental shocks, and the lingering impacts of the COVID–19 pandemic, more poor households are expected to slip into poverty across the country, erasing years of hard-won development gains.[67] According to the International Food Policy Research Institute (IFPRI), Nepal's poverty rate is expected to rise by 4.5 percent, pushing more than 1.27 million people into poverty this year.[68] Labor migration emerges as a primary coping strategy for Nepalese during times of hardship, with households and the economy relying heavily on remittances.[69]

In summary, Nepal's slow recovery after the 2015 earthquake and more recent environmental disasters, including devastating floods, further earthquakes, and landslides, continue to

[55] Sunir Pandey, Flooding affects millions in Bangladesh, India and Nepal, UNICEF, Aug. 21, 2017, available at: *https://www.unicef.org/stories/flooding-affects-millions-bangladesh-india-and-nepal* (last visited Mar. 10, 2023).

[56] See *e.g.,* Lekhanath Pandey Kathmandu, Ukraine conflict intensifies Nepal's economic woes, DW, April 15, 2022, available at: *https://www.dw.com/en/ukraine-conflict-intensifies-nepals-economic-woes/a-61488700* (last visited Mar. 10, 2023).

[57] See *e.g.,* Lekhanath Pandey Kathmandu, Ukraine conflict intensifies Nepal's economic woes, DW, April 15, 2022, available at: *https://www.dw.com/en/ukraine-conflict-intensifies-nepals-economic-woes/a-61488700* (last visited Mar. 10, 2023).

[58] See *e.g.,* Lekhanath Pandey Kathmandu, Ukraine conflict intensifies Nepal's economic woes, DW, April 15, 2022, available at: *https://www.dw.com/en/ukraine-conflict-intensifies-nepals-economic-woes/a-61488700* (last visited Mar. 10, 2023); Kristine Eck, Nepal in 2021: From Bad to Worse, University of California Press, Feb. 09, 2022, *https://doi.org/10.1525/as.2022.62.1.19* (last visited Mar. 31, 2023).

[59] Nepal Assistance Overview, USAID Bureau for Humanitarian Assistance, November 2022, available at: *https://www.usaid.gov/humanitarian-assistance/nepal* (last visited Mar. 17, 2023).

[60] Sangam Prasain, *et al.*, Farmers reduce acreage for lack of adequate fertilizer, The Kathmandu Post, July 29, 2022, available at: *https://kathmandupost.com/money/2022/07/29/farmers-reduce-acreage-for-lack-of-adequate-fertiliser* (last visited Mar. 10, 2023); Sangam Prasain, Crippling fertiliser shortage clouds Paddy Day celebrations for thousands of farmers, The Kathmandu Post, June 29, 2022, available at: *https://kathmandupost.com/money/2022/06/29/crippling-fertiliser-shortage-clouds-paddy-day-celebrations-for-thousands-of-farmers* (last visited Mar. 10, 2023); Sangam Prasain and Mohan Budhaair, Fertiliser shortage, drought, heat wave threaten Nepal's farming future, The Kathmandu Post, Aug. 31, 2022, available at: https://asianews.network/fertiliser-shortage-drought-heat-wave-threaten-nepals-farming-future/ (last visited Mar. 10, 2023).

[61] Sangam Prasain, *et al.*, Farmers reduce acreage for lack of adequate fertilizer, The Kathmandu Post, July 29, 2022, available at: *https://kathmandupost.com/money/2022/07/29/farmers-reduce-acreage-for-lack-of-adequate-fertiliser* (last visited: Mar. 10, 2023); Sangam Prasain, Crippling fertiliser shortage clouds Paddy Day celebrations for thousands of farmers, The Kathmandu Post, June 29, 2022, available at: *https://kathmandupost.com/money/2022/06/29/crippling-fertiliser-shortage-clouds-paddy-day-celebrations-for-thousands-of-farmers* (last visited: Mar. 10, 2023); Sangam Prasain and Mohan Budhaair, Fertiliser shortage, drought, heat wave threaten Nepal's farming future, The Kathmandu Post, Aug. 31, 2022, available at: https://asianews.network/fertiliser-shortage-drought-heat-wave-threaten-nepals-farming-future/ (last visited: Mar. 10, 2023).

[62] Nepal Multidimensional Poverty Index 2021: Report, UNICEF, Sept. 2021, available at: *https://www.unicef.org/nepal/reports/nepal-multidimensional-poverty-index-2021-report* (last visited Mar. 10, 2023).

[63] Nepal Multidimensional Poverty Index 2021: Report, UNICEF, Sept. 2021, available at: *https://www.unicef.org/nepal/reports/nepal-multidimensional-poverty-index-2021-report* (last visited Mar. 10, 2023).

[64] Nepal Multidimensional Poverty Index 2021: Report, UNICEF, Sept. 2021, available at: *https://www.unicef.org/nepal/reports/nepal-multidimensional-poverty-index-2021-report* (last visited Mar. 10, 2023); Development projects suffer from funds crunch as government revenue takes hit, The Kathmandu Post, *https://kathmandupost.com/national/2023/01/05/development-projects-suffer-from-funds-crunch-as-government-revenue-takes-hit* (last visited Mar. 31, 2023).

[65] Nepal Multidimensional Poverty Index 2021: Report, UNICEF, Sept. 2021, available at: *https://www.unicef.org/nepal/reports/nepal-multidimensional-poverty-index-2021-report* (last visited Mar. 10, 2023).

[66] Nepal Multidimensional Poverty Index 2021: Report, UNICEF, Sept. 2021, available at: *https://www.unicef.org/nepal/reports/nepal-multidimensional-poverty-index-2021-report* (last visited: Nov. 22, 2022).

[67] Xinshen Diao, *et al.*, Nepal: Impacts of the Ukraine and Global Crises on Poverty and Food Security, International Food Policy Research, July 7, 2022, available at: *https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/135953/filename/136162.pdf* (last visited Mar. 10, 2023).

[68] Xinshen Diao, *et al.*, Nepal: Impacts of the Ukraine and Global Crises on Poverty and Food Security, International Food Policy Research, July 7, 2022, available at: *https://ebrary.ifpri.org/utils/getfile/collection/p15738coll2/id/135953/filename/136162.pdf* (last visited: Dec. 8, 2022).

[69] Sangam Prasain, Remittance hits Rs961 billion, an all-time high in the time of Covid-19, The Kathmandu Post, Aug. 22, 2021, available at: *https://kathmandupost.com/money/2021/08/22/remittance-hits-rs961-billion-an-all-time-high-in-the-time-of-covid-19* (last visited: Mar. 10, 2023); Rohan Byanjankar and Mira Sakha, Impact of Remittances on Rural Poverty in Nepal: Evidence from Cross-Section Data, NRB, Aug. 2021, available at: *https://www.nrb.org.np/contents/uploads/2021/08/NRB-WP-53-Impact-of-Remittances-Rohan-and-Mira-1.pdf* (last visited: Nov. 22, 2022).

disrupt living conditions and render Nepal temporarily unable to handle the return of those granted TPS. Since the disastrous earthquake in 2015, Nepal has continued to be encumbered by significant environmental events that have hindered Nepal's recovery. The subsequent environmental disasters and the associated macroeconomic shocks have impeded the recovery process, and as a result, there continues to be a substantial disruption of living conditions. Soaring food and fuel prices further exacerbate the situation. Nepal continues to lack the infrastructure and capacity to adequately handle the return of Nepalese nationals (as well as others with no nationality who last habitually resided there) who were granted TPS under the 2015 designation and are currently residing in the United States.

Based upon this review and after consultation with appropriate U.S. Government agencies, the Secretary has determined that:

- The conditions supporting Nepal's designation for TPS continue to be met. *See* INA section 244(b)(3)(A) and (C), 8 U.S.C. 1254a(b)(3)(A) and (C).
- There has been an earthquake, flood, drought, epidemic, or other environmental disaster in Nepal resulting in a substantial, but temporary, disruption of living conditions in the area affected; Nepal is unable, temporarily, to handle adequately the return of its nationals; and Nepal has officially requested designation of TPS. *See* INA section 244(b)(1)(B)(i), 8 U.S.C. 1254a(b)(1)(B)(i);
- The designation of Nepal for TPS should be extended for an 18-month period, beginning on December 25, 2023, and ending on June 24, 2025. *See* INA section 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C).
- There are approximately 14,500 current Nepal TPS beneficiaries who are expected to be eligible to re-register for TPS under the extension.

Notice of the Rescission of TPS Termination and Extension and Redesignation of Nepal for TPS

Pursuant to my lawful authorities, including under sections 103(a) and 244 of the Immigration and Nationality Act, I am hereby rescinding the termination of the TPS designation of Nepal announced in the **Federal Register** at 83 FR 23705 (May 2018). Due to this rescission and pursuant to section 244(b)(3)(C) as well as the ongoing stay of proceedings order and approval of the parties' stipulation in *Bhattarai,* the TPS designation of Nepal has continued to exist since June 24, 2018, without a standing secretarial determination as to whether TPS should be extended or terminated. TPS beneficiaries under the designation, whose TPS has not been finally withdrawn for individual ineligibility, therefore have continued to maintain their TPS since June 24, 2018.

By the authority vested in me as Secretary under INA section 244, 8 U.S.C. 1254a, I have determined, after consultation with the appropriate U.S. Government agencies, the statutory conditions supporting Nepal's designation for TPS on the basis of environmental disaster are met. *See* INA section 244(b)(1)(B), 8 U.S.C. 1254a(b)(1)(B) and section 244(b)(3)(A); 8 U.S.C. 1254a(b)(3)(A). On the basis of this determination, I am extending the existing designation of Nepal for TPS for 18 months, beginning on December 25, 2023, and ending on June 24, 2025. *See* INA section 244(b)(3)(C), 8 U.S.C. 1254a(b)(3)(C). Individuals holding TPS under the designation of Nepal may file to reregister for TPS under the procedures announced in this notice if they wish to continue their TPS under this 18-month extension.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Eligibility and Employment Authorization for TPS

Required Application Forms and Application Fees to Re-Register for TPS

To re-register for TPS based on the designation of Nepal, you must submit a Form I–821, Application for Temporary Protected Status during the 60-day reregistration period that begins on October 24, 2023 and ends on December 23, 2023. There is no Form I–821 fee for re-registration. *See* 8 CFR 244.17. You may be required to pay the biometric services fee. If you can demonstrate an inability to pay the biometric services fee, you may request to have the fee waived. Please see additional information under the ''Biometric Services Fee'' section of this notice.

Individuals who have a Nepal TPS application (Form I–821) that was still pending as of June 21, 2023 do not need to file the application again. If USCIS approves an individual's Form I–821, USCIS will grant the individual TPS through June 24, 2025.

Required Application Forms and Application Fees to Obtain an EAD

Every employee must provide their employer with documentation showing they have a legal right to work in the United States. TPS beneficiaries are authorized to work in the United States and are eligible for an EAD which proves their employment authorization. If you have an existing EAD issued under the TPS designation of Nepal that has been auto-extended through June 30, 2024, by the notice published at 87 FR 68717, you may continue to use that EAD through that date. If you want to obtain a new EAD valid through June 24, 2025, you must file an Application for Employment Authorization (Form I–765) and pay the Form I–765 fee (or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver).

You may, but are not required to, submit Form I–765, Application for Employment Authorization, with your Form I–821 re-registration application. If you do not want a new EAD now, you can request one later by filing your I–765 and paying the fee (or requesting a fee waiver) at that time, provided you have TPS or a pending TPS application. If you have TPS and only a pending Form I–765, you must file the Form I–821 to reregister for TPS or risk having your TPS withdrawn for failure to reregister without good cause.

Information About Fees and Filing

USCIS offers the option to applicants for TPS under Nepal's designation to file Form I–821 and related requests for EADs online or by mail. When filing a TPS application, applicants can also request an EAD by submitting a completed Form I–765, with their Form I–821.

Online filing: Form I–821 and I–765 are available for concurrent filing online.[70] To file these forms online, you must first create a USCIS online account.[71]

Mail filing: Mail your application for TPS to the proper address in Table 1.

Table 1—Mailing Addresses

Mail your completed Form I–821, Application for Temporary Protected Status and Form I–765, Application for Employment Authorization, Form I–912, Request for Fee Waiver, if applicable, and supporting documentation to the proper address in Table 1.

[70] Find information about online filing at ''Forms Available to File Online,'' *https://www.uscis.gov/file-online/forms-available-to-file-online.*

[71] *https://myaccount.uscis.gov/users/sign_up.*

TABLE 1—MAILING ADDRESSES

If you live in:	Then mail your application to:
• Connecticut • Delaware • District of Columbia • Maine • Maryland • Massachusetts • New Hampshire • New York • North Carolina • Pennsylvania • Rhode Island • Texas • Vermont • Virginia • West Virginia	USCIS Elgin Lockbox. U.S. Postal Service (USPS): USCIS, Attn: TPS Nepal, P.O. Box 4091, Carol Stream, IL 60197–4091. FedEx, UPS, or DHL: USCIS, Attn: TPS Nepal (Box 4091), 2500 Westfield Drive, Elgin, IL 60124–7836.
• Alabama • Alaska • American Samoa • Arizona • Arkansas • California • Colorado • Florida • Georgia • Guam • Hawaii • Idaho • Louisiana • Mississippi • Montana • Nevada • New Mexico • Northern Mariana Islands • Oklahoma • Oregon • Puerto Rico • South Carolina • Utah • Virgin Islands • Washington • Wyoming	USCIS Phoenix Lockbox. U.S. Postal Service (USPS): USCIS, Attn: TPS Nepal, P.O. Box 21800, Phoenix, AZ 85036–1800. FedEx, UPS, or DHL: USCIS, Attn: TPS Nepal (Box 21800), 2108 E. Elliot Rd., Tempe, AZ 85284–1806.
• Illinois • Indiana • Iowa • Kansas • Kentucky • Michigan • Minnesota • Missouri • Nebraska • North Dakota • Ohio • South Dakota • Tennessee • Wisconsin	USCIS Chicago Lockbox. U.S. Postal Service (USPS): USCIS, Attn: TPS Nepal, P.O. Box 6943, Chicago, IL 60680–6943. FedEx, UPS, or DHL: USCIS, Attn: TPS Nepal (Box 6943), 131 S. Dearborn St., 3rd Floor, Chicago, IL 60603–5517.

If you were granted TPS by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) and you wish to request an EAD, please mail your Form I–765 application to the appropriate mailing address in Table 1. When you are requesting an EAD based on an IJ/BIA grant of TPS, please include a copy of the IJ or BIA order granting you TPS with your application. This will help us verify your grant of TPS and process your application.

Supporting Documents

The filing instructions on the Form I–821 list all the documents needed to establish eligibility for TPS. You may also find information on the acceptable documentation and other requirements for applying (*i.e.,* registering) for TPS on the USCIS website at *https://www.uscis.gov/tps* under ''Nepal.''

Travel

TPS beneficiaries may also apply for and be granted travel authorization as a matter of discretion. You must file for travel authorization if you wish to travel outside of the United States. If granted, travel authorization gives you permission to leave the United States

and return during a specific period. To request travel authorization, you must file Form I–131, Application for Travel Document, available at *https://www.uscis.gov/i-131.* You may file Form I–131 together with your Form I–821 or separately. When filing the Form I–131, you must:

- Select Item Number 1.d. in Part 2 on the Form I–131; and
- Submit the fee for the Form I–131, or request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver.

If you are filing Form I–131 together with Form I–821, send your forms to the address listed in Table 1. If you are filing Form I–131 separately based on a pending or approved Form I–821, send your form to the address listed in Table 2 and include a copy of Form I–797 for the approved or pending Form I–821.

TABLE 2—MAILING ADDRESSES

If you are	Mail to
Filing Form I–131 together with a Form I–821, Application for Temporary Protected Status.	The address provided in Table 1.
Filing Form I–131 based on a pending or approved Form I–821, and you are using the U.S. Postal Service (USPS): You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, P.O. Box 660167, Dallas, TX 75266–0867.
Filing Form I–131 based on a pending or approved Form I–821, and you are using FedEx, UPS, or DHL: You must include a copy of the receipt notice (Form I–797 or I–797C) showing we accepted or approved your Form I–821.	USCIS, Attn: I–131 TPS, 2501 S. State Hwy. 121 Business, Ste. 400, Lewisville, TX 75067.

Biometric Services Fee for TPS:

Biometrics (such as fingerprints) are required for all applicants 14 years of age and older. Those applicants must submit a biometric services fee. As previously stated, if you are unable to pay the biometric services fee, you may request a fee waiver, which you may submit on Form I–912, Request for Fee Waiver. For more information on the application forms and fees for TPS, please visit the USCIS TPS web page at *https://www.uscis.gov/tps.* If necessary, you may be required to visit an Application Support Center to have your biometrics captured. For additional information on the USCIS biometric screening process, please see the USCIS Customer Profile Management Service Privacy Impact Assessment, available at *https://www.dhs.gov/publication/dhsuscispia-060-customer-profile-management-service-cpms.*

Refiling a TPS Re-Registration Application After Receiving a Denial of a Fee Waiver Request

You should file as soon as possible within the 60-day re-registration period so USCIS can process your application and issue your EAD promptly, if one has been requested. Properly filing early will also allow you to have time to refile your application before the deadline, should USCIS deny your fee waiver request. The fee waiver denial notice will contain specific instructions about resubmitting your application. However, you are urged to refile within 45 days of the date on any USCIS fee waiver denial notice, if possible. See INA section 244(c)(3)(C); 8 U.S.C. 1254a(c)(3)(C); 8 CFR 244.17(b). For more information on good cause for late re-registration, visit the USCIS TPS web page at *www.uscis.gov/tps.*

Note: A re-registering TPS beneficiary age 14 and older must pay the biometric services fee (but not the Form I–821 fee), or request a fee waiver, when filing a TPS re-registration application. As discussed above, if you decide to wait to request an EAD, you do not have to file the Form I–765 or pay the associated Form I–765 fee (or request a fee waiver) at the time of re-registration. You may wait to seek an EAD until after USCIS has approved your TPS re-registration application or at any later date you decide you want to request an EAD. To re-register for TPS, you only need to file the Form I–821 with the biometrics services fee, if applicable, (or request a fee waiver).

General Employment-Related Information for TPS Applicants and Their Employers

How can I obtain information on the status of my TPS application and EAD request?

To get case status information about your TPS application, as well as the status of your TPS-based EAD request, you can check Case Status Online at uscis.gov, or visit the USCIS Contact Center at *https://www.uscis.gov/contactcenter.* If your Form I–765 has been pending for more than 90 days, and you still need assistance, you may ask a question about your case online at *https://egov.uscis.gov/e-request/Intro.do* or call the USCIS Contact Center at 800–375–5283 (TTY 800–767–1833).

When hired, what documentation may I show to my employer as evidence of identity and employment authorization when completing Form I–9?

You can find the Lists of Acceptable Documents on Form I–9, Employment Eligibility Verification, as well as the Acceptable Documents web page at *https://www.uscis.gov/i-9-central/acceptable-documents.* Employers must complete Form I–9 to verify the identity and employment authorization of all new employees. Within three days of hire, employees must present acceptable documents to their employers as evidence of identity and employment authorization to satisfy Form I–9 requirements.

You may present any document from List A (which provides evidence of both identity and employment authorization) or one document from List B (which provides evidence of your identity) together with one document from List C (which provides evidence of employment authorization), or you may present an acceptable receipt as described in the Form I–9 Instructions. Employers may not reject a document based on a future expiration date. You can find additional information about Form I–9 on the I–9 Central web page at *https://www.uscis.gov/I-9Central.* An EAD is an acceptable document under List A.

If I have an EAD based on another immigration status, can I obtain a new TPS-based EAD?

Yes, if you are eligible for TPS, you can obtain a new TPS-based EAD, regardless of whether you have an EAD or work authorization based on another immigration status. If you want to obtain a new TPS-based EAD valid through June 24, 2025, then you must file Form I–765, Application for Employment Authorization, and pay the associated fee (unless USCIS grants your fee waiver request).

Can my employer require that I provide any other documentation such as evidence of my status or proof of my Nepalese citizenship or a Form I–797C showing that I registered for TPS for Form I–9 completion?

No. When completing Form I–9, employers must accept any documentation you choose to present from the Form I–9 Lists of Acceptable Documents that reasonably appears to be genuine and that relates to you, or an acceptable List A, List B, or List C receipt. Employers need not reverify List B identity documents. Employers may not request proof of Nepalese citizenship or proof of registration for TPS when completing Form I–9 for new hires or reverifying the employment authorization of current employees. Refer to the ''Note to Employees'' section of this **Federal Register** notice for important information about your rights if your employer rejects lawful documentation, requires additional documentation, or otherwise discriminates against you based on your citizenship or immigration status, or your national origin. Employers can refer to the compliance notice that DHS published on November 16, 2022, for information on how to complete the Form I–9 with TPS EADs that DHS extended through June 30, 2024.[72]

Note to All Employers

Employers are reminded that the laws requiring proper employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This **Federal Register** notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth reverification requirements. For general questions about the employment eligibility verification process, employers may call USCIS at 888–464–4218 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls and emails in English and many other languages. For questions about avoiding discrimination during the employment eligibility verification process (Form I–9 and E-Verify), employers may call the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section (IER) Employer Hotline at 800–255–8155 (TTY 800–237–2515). IER offers language interpretation in numerous languages. Employers may also email IER at *IER@usdoj.gov.*

Note to Employees

For general questions about the employment eligibility verification process, employees may call USCIS at 888–897–7781 (TTY 877–875–6028) or email USCIS at *I-9Central@uscis.dhs.gov.* USCIS accepts calls in English, Spanish and many other languages. Employees or job applicants may also call the IER Worker Hotline at 800–255–7688 (TTY 800–237–2515) for information regarding employment discrimination based on citizenship, immigration status, or national origin, including discrimination related to Form I–9 and E-Verify. The IER Worker Hotline provides language interpretation in numerous languages.

To comply with the law, employers must accept any document or combination of documents from the Lists of Acceptable Documents if the documentation reasonably appears to be genuine and to relate to the employee, or an acceptable List A, List B, or List C receipt as described in the Form I–9 Instructions. Employers may not require extra or additional documentation beyond what is required for Form I–9 completion. Further, employers participating in E-Verify who receive an E-Verify case result of ''Tentative Nonconfirmation'' (mismatch) must promptly inform employees of the mismatch and give such employees an opportunity to take action to resolve the mismatch. A mismatch result means that the information entered into E-Verify from Form I–9 differs from records available to DHS.

Employers may not terminate, suspend, delay training, withhold or lower pay, or take any adverse action against an employee because of a mismatch while the case is still pending with E-Verify. A Final Nonconfirmation (FNC) case result is received when E-Verify cannot confirm an employee's employment eligibility. An employer may terminate employment based on a case result of FNC. Work-authorized employees who receive an FNC may call USCIS for assistance at 888–897–7781 (TTY 877–875–6028). For more information about E-Verify-related discrimination or to report an employer for discrimination in the E-Verify process based on citizenship, immigration status, or national origin, contact IER's Worker Hotline at 800–255–7688 (TTY 800–237–2515). Additional information about proper nondiscriminatory Form I–9 and E-Verify procedures is available on the IER website at *https://www.justice.gov/crt/immigrant-and-employee-rights-section* and the USCIS and E-Verify websites at *https://www.uscis.gov/i-9-central* and *https://www.e-verify.gov.*

Note Regarding Federal, State, and Local Government Agencies (Such as Departments of Motor Vehicles)

This **Federal Register** Notice does not invalidate the compliance notice DHS issued on November 16, 2022, which extended the validity of certain TPS documentation through June 30, 2024 and does not require individuals to present a Form I–797, Notice of Action. While Federal Government agencies must follow the guidelines laid out by the Federal Government, State and local government agencies establish their own rules and guidelines when granting certain benefits. Each state may have different laws, requirements, and determinations about what documents you need to provide to prove eligibility for certain benefits. Whether you are applying for a Federal, State, or local government benefit, you may need to provide the government agency with documents that show you are a TPS beneficiary, show you are authorized to work based on TPS or other status, or that may be used by DHS to determine if you have TPS or another immigration status. Examples of such documents are:

- Your current EAD with a TPS category code of A–12 or C–19, even if your country of birth noted on the EAD does not reflect the TPS designated country of Nepal; or
- Your Form I–94, Arrival/Departure Record or Form I–797, Notice of Action, as shown in the **Federal Register** notice published at 87 FR 68717.

Check with the government agency requesting documentation regarding which document(s) the agency will accept. Some state and local government agencies use the SAVE program to confirm the current immigration status of applicants for public benefits.

While SAVE can verify that an individual has TPS, each state and local government agency's procedures govern whether they will accept an unexpired EAD, Form I–797, Form I–797C, or Form I–94. It may also assist the agency if you:

a. Give the agency a copy of the relevant **Federal Register** notice listing the TPS-related document, including any applicable auto-extension of the document, in addition to your recent TPS-related document with your A-number, USCIS number or Form I–94 number;

b. Explain that SAVE will be able to verify the continuation of your TPS using this information; and

c. Ask the agency to initiate a SAVE query with your information and follow

[72] *Continuation of Documentation for Beneficiaries of Temporary Protected Status Designations for El Salvador, Haiti, Nicaragua, Sudan, Honduras, and Nepal,* 87 FR 68717 (Nov. 16, 2022).

through with additional verification steps, if necessary, to get a final SAVE response verifying your TPS.

You can also ask the agency to look for SAVE notices or contact SAVE if they have any questions about your immigration status or any automatic extension of TPS-related documentation. In most cases, SAVE provides an automated electronic response to benefit-granting agencies within seconds, but occasionally verification can be delayed.

You can check the status of your SAVE verification by using CaseCheck at *https://save.uscis.gov/casecheck/.* CaseCheck is a free service that lets you follow the progress of your SAVE verification case using your date of birth and one immigration identifier number (A-number, USCIS number, or Form I–94 number) or Verification Case Number. If an agency has denied your application based solely or in part on a SAVE response, the agency must offer you the opportunity to appeal the decision in accordance with the agency's procedures. If the agency has received and acted on or will act on a SAVE verification and you do not believe the SAVE response is correct, the SAVE website, *www.uscis.gov/save,* has detailed information on how to correct or update your immigration record, make an appointment, or submit a written request to correct records.

[FR Doc. 2023–13019 Filed 6–20–23; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7071–N–07]

60-Day Notice of Proposed Information Collection: Manufactured Home Construction and Safety Standards Act Park Model RV Exemption, OMB Control No. 2502–0616

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, 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:* August 21, 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: 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* or telephone 202–402–3400. This is not a toll-free number. HUD welcomes and is prepared to receive calls from individuals who are deaf or hard of hearing, as well as individuals with speech or communication disabilities. To learn more about how to make an accessible telephone call, please visit: *https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs.*

Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Manufactured Home Construction and Safety Standards Act Park Model RV Exemption Notice.

OMB Approval Number: 2502–0616.

OMB Expiration Date: January 31, 2024.

Type of Request: Revision of a currently approved collection.

Form Number: None.

Description of the need for the information and proposed use: For recreational vehicles that are exempt from HUD regulation as manufactured homes, HUD requires certification with either the American National Standards Institute's (ANSI) standard for Park Model Recreational Vehicles (PMRV), A119.5–15 or the National Fire Protection Association's NFPA 1192, Standard on Recreational Vehicles, 2015 Edition. PMRVs built to ANSI A119.5–15 may exceed the RV exemption's 400 square foot threshold; a manufacturer must post notice in the home that the structure is only designed for recreational purposes and is not designed as a primary residence or for permanent occupancy. The Recreation Vehicle Industry Association's (RVIA) current seal does not satisfy HUD's standard for the manufacturer's notice. HUD requirements provide specifics regarding the content and prominence of the notice and which requires the notice to be prominently displayed in the unit and delivered to the consumer before the sale transaction is complete, regardless of whether the transaction occurs online or in-person. PMRV manufacturers will satisfy this requirement with two printed sheets of paper per PMRV: One in the kitchen, and one delivered to the consumer before the transaction.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 25.

Estimated Number of Responses: 4,480 per annum.

Frequency of Response: Approximately 179.

Average Hours per Response: 20 seconds.

Total Estimated Burden: 25 hours.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

HUD encourages interested parties to submit comment in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. chapter 35.

Jeffrey D. Little,

General Deputy Assistant Secretary for Housing.

[FR Doc. 2023–13126 Filed 6–20–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_AK_FRN_MO4500171970]

Filing of Plats of Survey: Alaska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of official filing.

SUMMARY: The plats of survey of lands described in this notice are scheduled to be officially filed in the Bureau of Land Management (BLM), Alaska State Office, Anchorage, Alaska. The surveys, which were executed at the request of the Bureau of Indian Affairs (BIA), and BLM, are necessary for the management of these lands.

DATES: The BLM must receive protests by July 21, 2023.

ADDRESSES: You may buy a copy of the plats from the BLM Alaska Public Information Center, 222 W 7th Avenue, Mailstop 13, Anchorage, AK 99513. Please use this address when filing written protests. You may also view the plats at the BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W 7th Avenue, Anchorage, Alaska, at no cost.

FOR FURTHER INFORMATION CONTACT: Thomas O'Toole, Chief, Branch of Cadastral Survey, Alaska State Office, Bureau of Land Management, 222 W 7th Avenue, Anchorage, AK 99513; 907–271–4231; *totoole@blm.gov.* People who use a telecommunications device for the deaf may call the Federal Relay Service (FRS) at 1–800–877–8339 to contact the BLM during normal business hours. The FRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lands surveyed are:

COPPER RIVER MERIDIAN, ALASKA

U.S. Survey No. 14513, accepted May 23, 2023, situated in T. 17 S., R. 8 W.

U.S. Survey No. 14514, accepted May 23, 2023, situated in T. 18 S., R. 8 W.

U.S. Survey No. 14517, accepted May 23, 2023, situated in T. 17 S., R. 8 W.

U.S. Survey No. 14522, accepted May 23, 2023, situated in T. 17 S., R. 7 W.

U.S. Survey No. 14523, accepted May 23, 2023, situated in T. 18 S., R. 7 W.

U.S. Survey No. 14524, accepted May 23, 2023, situated in T. 18 S., R. 8 W.

U.S. Survey No. 14512, accepted May 23, 2023, situated in T. 17 S., R. 8 W.

T. 13 S., R. 4 E., accepted May 23, 2023.

T. 15 S., R. 1 W., accepted May 23, 2023.

T. 16 S., R. 4 W., accepted May 23, 2023.

T. 15 S., R. 5 W., accepted May 23, 2023.

T. 16 S., R. 5 W., accepted May 23, 2023.

SEWARD MERIDIAN, ALASKA

U.S. Survey No. 4413, accepted May 24, 2023., situated in T. 17 N., R. 61 W.

U.S. Survey No. 14518, accepted May 23, 2023., situated in T. 4 S., R. 12 E.

U.S. Survey No. 14519, accepted May 30, 2023., situated in T. 3 N., R. 4 W.

U.S. Survey No. 14520, accepted May 24, 2023., situated in T. 4 N., R. 7 W.

U.S. Survey No. 14525, accepted May 23, 2023., situated in T. 9 N., R. 6 E.

U.S. Survey No. 14526, accepted May 23, 2023., situated in T. 6 N., R. 7 E.

U.S. Survey No. 14527, accepted May 23, 2023., situated in T. 8 N., R. 8 E.

U.S. Survey No. 14528, accepted May 23, 2023., situated in T. 3 N., R. 10 E.

U.S. Survey No. 14529, accepted May 23, 2023., situated in T. 5 N., R. 10 E.

U.S. Survey No. 14542, accepted May 23, 2023., situated in T. 4 N., R. 10 E.

U.S. Survey No. 14543, accepted May 23, 2023., situated in T. 1 S., R. 13 E.

U.S. Survey No. 14544, accepted May 23, 2023., situated in T. 1 N., R. 13 E.

U.S. Survey No. 14545, accepted May 23, 2023., situated in T. 5 N., R. 6 E.

U.S. Survey No. 14546, accepted May 23, 2023., situated in T. 5 N., R. 6 E.

U.S. Survey No. 14558, accepted May 24, 2023., situated in T. 8 N., R. 10 W.

U.S. Survey No. 14563, accepted May 24, 2023., situated in T. 3 S., R. 21 W.

T. 23 N., R. 32 W., accepted May 24, 2023.

T. 24 N., R. 32 W., accepted May 24, 2023.

T. 23 N., R. 33 W., accepted May 24, 2023.

T. 24 N., R. 33 W., accepted May 24, 2023.

T. 23 N., R. 34 W., accepted May 24, 2023.

T. 24 N., R. 34 W., accepted May 24, 2023.

T. 23 N., R. 35 W., accepted May 24, 2023.

T. 24 N., R. 35 W., accepted May 24, 2023.

T. 23 N., R. 36 W., accepted May 24, 2023.

A person or party who wishes to protest one or more plats of survey identified above must file a written notice of protest with the State Director for the BLM in Alaska. The protest may be filed by mailing to BLM State Director, Alaska State Office, Bureau of Land Management, 222 W 7th Avenue, Anchorage, AK 99513 or by delivering it in person to BLM Alaska Public Information Center, Fitzgerald Federal Building, 222 W 7th Avenue, Anchorage, Alaska. The notice of protest must identify the plat(s) of survey that the person or party wishes to protest. You must file the notice of protest before the scheduled date of official filing for the plat(s) of survey being protested. The BLM will not consider any notice of protest filed after the scheduled date of official filing. A notice of protest is considered filed on the date it is received by the State Director for the BLM in Alaska during regular business hours; if received after regular business hours, a notice of protest will be considered filed the next business day. A written statement of reasons in support of a protest, if not filed with the notice of protest, must be filed with the State Director for the BLM in Alaska within 30 calendar days after the notice of protest is filed.

If a notice of protest against a plat of survey is received prior to the scheduled date of official filing, the official filing of the plat of survey identified in the notice of protest will be stayed pending consideration of the protest. A plat of survey will not be officially filed until the dismissal or resolution of all protests of the plat.

Before including your address, phone number, email address, or other personally identifiable information in a notice of protest or statement of reasons, you should be aware that the documents you submit, including your personally identifiable information, may be made publicly available in their entirety at any time. While you can ask the BLM to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 U.S.C. chap. 3.

Thomas O'Toole,

Chief Cadastral Surveyor, Alaska.

[FR Doc. 2023–13121 Filed 6–20–23; 8:45 am]

BILLING CODE 4331–10–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NER–NEEN–FR00000057; PPNENEEN00/PPMPSAS1Z.Y00000]

Selection of the Route of the New England National Scenic Trail and Publication of the Land Protection Plan

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: Pursuant to the National Trails System Act, the National Park Service is publishing notice of its selection of the New England National Scenic Trail route and a Land Protection Plan for said route. Congress established the trail in 2009, which has been in use as a long-distance trail since the 1950s.

DATES: The effective date of this route selection is June 21, 2023.

ADDRESSES: This **Federal Register** notice announces the route for the New England National Scenic Trail following the routes generally depicted on the map referenced in the Act. The legislative map depicting this route is available for inspection at the following locations: National Park Service, Land Resources Program Center, Interior Region 1, 1234 Market Street, 20th Floor, Philadelphia, PA 19107 and National Park Service, Department of the Interior, 1849 C Street NW, 2nd Floor, Room 2342 (MIB 2340), Washington, DC 20240. The route is depicted in more detail in the National Park Service Geographic Information System database as the ''NEEN_BND_NationalScenicTrailCenterline_ln,'' updated April 7, 2023, and listed as the Authoritative Feature Layer, published, and managed by the National Park Service, which is available at *https://www.arcgis.com/home/item.html?id=2732c458d1d64bfda9b0bbc82de8cc7e.*

FOR FURTHER INFORMATION CONTACT: Kelly Fellner, Superintendent; New England National Scenic Trail; National Park Service; One Armory Square, Suite 2, Springfield, MA 01105; via email at *kelly_fellner@nps.gov;* or via phone at (413) 734–8551.

SUPPLEMENTARY INFORMATION: In 2009, Congress established the New England National Scenic Trail as a component of the National Trails System as part of Public Law 111–11, Sect. 5202 (Act) which amended the National Trails System Act to include the trail. The law references the trail route as generally depicted on legislated Map No. T06/80,000, dated October 2007. The map indicates an extension to the Long Island Sound, which was approved as part of the designation. Prior to designation, the New England Trail had been continuous in its entirety and in use as a long-distance trail since the 1950s. Post designation, the Long Island Sound extension was completed, as well as other minor relocations to comply with landowner requests. The trail route has been largely unchanged since its ten-year anniversary in 2019.

Pursuant to 16 U.S.C. 1244(a) and 1246(a)(2), the Secretary of the Interior must select the route for the trail and publish notice of the availability of appropriate maps or descriptions in the **Federal Register**.

To guide the protection of this trail route, legislated trail partners in Connecticut and Massachusetts, the Connecticut Forest & Park Association and Appalachian Mountain Club respectively, conducted various land protection planning efforts and held workshops with interested stakeholders between 2018 and 2022, resulting in a trail protection strategy in each state. Stakeholders participating included state and local government agencies, nonprofit organizations, land trusts, and private entities. The National Park Service has combined these two strategies, including additional information required by policy and various **Federal Register** notices into a trailwide Land Protection Plan. This Land Protection Plan provides the local criteria, data, and prioritization process for working with willing sellers and partners to protect the trail using various methods. The plan is available at *https://www.nps.gov/neen/learn/management/land-protection-plan.htm.*

Gay Vietzke,

Regional Director, Interior Region 1.

[FR Doc. 2023–13158 Filed 6–20–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NPS0035983; 23XP103905—PPWONRADE2–PMP00EI05.YP0000]

Programmatic Environmental Assessment for Use of Electric Bicycles in the National Park System

AGENCY: National Park Service, Interior.

ACTION: Notice of availability; request for comment.

SUMMARY: The National Park Service (NPS) announces the availability of a programmatic environmental assessment (PEA) that evaluates, on a nationwide scale, use of electric bicycles (e-bikes) within the National Park System. We invite comments from the public and local, State, Tribal, and Federal agencies.

DATES: We will accept comments received or postmarked on or before 11:59 p.m. ET on July 21, 2023.

ADDRESSES:

Document availability: The PEA is available online at: *https://parkplanning.nps.gov/e-bikes.*

Comment Submission: You may submit written comments by one of the following methods:

- *Electronically: https://parkplanning.nps.gov/e-bikes.*
- *Mail or hand deliver to:* Electric Bicycle Programmatic EA, National Park Service, 1849 C Street NW, MS–2472 Washington, DC 20240.

Instructions: Comments will not be accepted by fax, email, or in any way other than those specified above. Comments delivered on external electronic storage devices (flash drives, compact discs, etc.) will not be accepted. Bulk comments in any format (hard copy or electronic) submitted on behalf of others will not be accepted.

FOR FURTHER INFORMATION CONTACT: Jay Calhoun, Chief, Division of Regulations, Jurisdiction, and Special Park Uses, National Park Service; *waso_regulations@nps.gov;* (202) 513–7112.

SUPPLEMENTARY INFORMATION: On December 2, 2020, the NPS promulgated a final rule (rule) governing use of e-bikes within the National Park System (85 FR 69175). On May 24, 2022, the U.S. District Court for the District of Columbia issued an opinion finding that the NPS had improperly relied upon a categorial exclusion to comply with the National Environmental Policy Act (NEPA) for the rule. The Court remanded the rule to the NPS and directed the NPS to conduct additional NEPA analysis for the rule. *Pub Emps. For Env't Responsibility* v. *Nat'l Park Serv.,* 605 F. Supp. 3d 28 (D.D.C. 2022). The rule remains in place pending the outcome of the required NEPA analysis. The PEA has been prepared consistent with the Court's May 24, 2022 opinion.

The PEA evaluates the environmental impacts, on a nationwide scale, of a no-action alternative and the proposed action (the rule). The no-action alternative assumes that the rule has not been promulgated and that there is no nationwide policy about the use of e-bikes. Under the no-action alternative, superintendents would have no specific authority to allow e-bike use in System units and no policy direction about how to use existing authorities to manage e-bikes. This would result in inconsistent management of e-bikes use across the National Park System. In most System units, visitors would likely be allowed to use e-bikes on public roads and parking lots where motor vehicle use is allowed. In some System units, e-bike use also could occur on administrative roads and trails. Under the proposed action (the rule), e-bikes are defined uniformly and subject to a standard set of operating requirements, while superintendents have the discretion to allow e-bike use in National Park System units on a case-by-case basis, on public roads, parking lots, administrative roads, and trails where traditional bicycle use is allowed. The proposed action has been identified as the NPS preferred alternative. The PEA analyzes impacts to soils, vegetation, visitor use and experience, and wildlife.

Availability of Public Comments

You may submit comments by one of the methods shown under **ADDRESSES**. Before including your address, phone

number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including the personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee we would be able to do so.

Lauren S. Imgrund,

Associate Director, Partnerships and Civic Engagement.

[FR Doc. 2023–13141 Filed 6–20–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF JUSTICE

[CPCLO Order No. 003–2023]

Privacy Act of 1974; Systems of Records

AGENCY: United States Department of Justice.

ACTION: Notice of a new system of records.

SUMMARY: Pursuant to the Privacy Act of 1974 and Office of Management and Budget (OMB) Circular No. A–108, notice is hereby given that the Justice Management Division (hereinafter JMD), a component within the United States Department of Justice (DOJ or Department), proposes to develop a new system of records notice titled HAVANA Act Compensation Records, JUSTICE/DOJ–021. DOJ proposes to establish this system of records in connection with the provisions in the HAVANA Act to allow claimants to be compensated for qualifying physical injuries under the Act and the implementing regulations.

DATES: In accordance with 5 U.S.C. 552a(e)(4) and (11), this notice is effective upon publication, subject to a 30-day period in which to comment on the routine uses, described below. Please submit any comments by July 21, 2023.

ADDRESSES: The public, OMB, and Congress are invited to submit any comments by mail to the United States Department of Justice, Office of Privacy and Civil Liberties, ATTN: Privacy Analyst, 2 Constitution Square, 8W.300, 145 N St. NE, Washington, DC 20002; by facsimile at 202–307–0693; or by email at *privacy.compliance@usdoj.gov.* To ensure proper handling, please reference the above CPCLO Order No. on all correspondence.

FOR FURTHER INFORMATION CONTACT: Morton J. Posner, General Counsel, Justice Management Division, 2CON, 145 N St. NE, Washington, DC 20530, (202) 514–3452.

SUPPLEMENTARY INFORMATION: On October 8, 2021, President Biden signed the ''Helping American Victims Affected by Neurological Attacks'' (HAVANA) Act of 2021 (Pub. L. 117–46) (hereinafter, the HAVANA Act or the Act). In this statute, Congress authorized Federal agencies to make payments to certain affected current employees, former employees, and their dependents (hereinafter, ''claimants'') for qualifying injuries to the brain. This law requires the Department (and other agencies) to prescribe regulations implementing the HAVANA Act, and the Department intends to publish an interim final rule (IFR).

An individual wishing to make a claim under the HAVANA Act (hereinafter, a ''claimant'') will submit information about themselves and their claim to the Department. Those records will be used to determine a claimant's eligibility for payment under the HAVANA Act, track the progress of the claim, inform the claimant of the status of the claim, and to inform any decision arising out of an administrative appeal relating to the claim.

In accordance with 5 U.S.C. 552a(r), the Department has provided a report to OMB and Congress on this new system of records.

Dated: June 14, 2023.

Peter Winn,

Chief Privacy and Civil Liberties Officer, United States Department of Justice.

JUSTICE/DOJ–021

SYSTEM NAME AND NUMBER:

HAVANA Act Compensation Records, JUSTICE/DOJ–021.

SECURITY CLASSIFICATION:

The information in this system of records is unclassified.

SYSTEM LOCATION:

Original records will be kept at the Justice Management Division (JMD), 2CON, 145 N St. NE, Washington, DC 20530. The database(s) will be maintained internally and on the JMD server.

SYSTEM MANAGER(S):

Deputy Assistant Attorney General, Policy, Management, and Procurement, Justice Management Division, 950 Pennsylvania Avenue NW, Washington, DC 20530.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for maintaining this system exists under the HAVANA Act of 2021, Public Law 117–46.

PURPOSE(S) OF THE SYSTEM:

Records maintained in this system will be used to determine a claimant's eligibility for payment under the HAVANA Act, track the progress of the claim, inform the claimant of the status of the claim, and to inform any decision arising out of an administrative appeal relating to the claim.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former Department of Justice employees and their dependents, as defined in the HAVANA Act implementing regulations, who make claims under the Act (''claimants''), health care providers who submit supporting paperwork on behalf of the claimant, and other individuals appropriately submitting or referenced in supporting documentation, *e.g.,* witnesses to the associated incident and other health care providers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in the system may include names of claimants, claimants' dependents, health care providers, or other individuals covered in this system, dates of birth, contact information, employment information relating to the claim, date and location of the associated incident, medical information relating to the claim; and other records appropriately obtained or generated to process claims.

RECORD SOURCE CATEGORIES:

Information may be provided by individuals covered in this system, the Department of Justice or other United States Government agencies, physicians or other appropriate medical personnel, or medical board certification organizations.

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

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system of records may be disclosed as a routine use pursuant to 5 U.S.C. 552a(b)(3) under the circumstances or for the purposes described below, to the extent such disclosures are compatible with the purposes for which the information was collected:

A. To the claimant's listed physician or other appropriate health care providers to the extent necessary to gather information required for the processing of the claimant's claim.

B. To any Federal agency or entity that the Department of Justice has reason to believe possesses information pertinent to claimant's claim, or with

whom the Department of Justice must coordinate to process the claim, or as is otherwise appropriate to ensure fair and equitable implementation of the HAVANA Act.

C. Where a record, either alone or in conjunction with other information, indicates a violation or potential violation of law—criminal, civil, or regulatory in nature—the relevant records may be referred to the appropriate law enforcement authority or other appropriate entity charged with the responsibility for investigating or prosecuting such violation or charged with enforcing or implementing such law.

D. In an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when the Department of Justice determines that the records are arguably relevant to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant to the proceeding.

E. To an actual or potential party to litigation or the party's authorized representative for the purpose of negotiation or discussion of such matters as settlement, plea bargaining, or informal discovery proceedings.

F. To the news media and the public, including disclosures pursuant to 28 CFR 50.2, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

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

H. To appropriate officials and employees of a Federal agency or entity that requires information relevant to the issuance of a grant or benefit.

I. To a former employee of the Department for purposes of facilitating communications with a former employee where the Department requires information or consultation assistance from the former employee regarding a matter within that person's former area of responsibility.

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

K. To the White House, including the President, Vice President, their staffs, and other entities of the Executive Office of the President, for Executive Branch coordination of activities which relate to or have an effect upon the constitutional, statutory, or other official or ceremonial duties of the President or Vice-President, to the extent that release of the specific information in the context of a particular case does not constitute an unwarranted invasion of personal privacy.

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

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

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

O. To any agency, organization, or individual for the purpose of performing authorized audit or oversight operations of the JMD and meeting related reporting requirements.

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

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are maintained in restricted access folders, with access limited to those who have a need to know the information.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Data is retrieved by name of covered individuals, by case file identifier, by date or location of incident, or by claimant's Division or program office.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Files are retained in hard and electronic copies. The Department has drafted a Schedule for all DOJ Compensation programs, Compensation Programs Records, and has submitted the draft to NARA for review. The DOJ Compensation Programs Records schedule would include permanent records. Pending approval of that schedule, all HAVANA Act Compensation claim files and automated data pertaining to those claims will be retained in anticipation of a permanent retention schedule. If a more limited retention is approved, records will be handled accordingly.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Internet connections are protected by multiple firewalls. Security personnel conduct periodic vulnerability scans using DOJ-approved software to ensure security compliance and security logs are enabled for all computers to assist in troubleshooting and forensics analysis during incident investigations. Users of individual computers can only gain access to the data by a valid user identification and password or passcode. Access to electronic files is limited to personnel who have a need for the files to perform official duties.

Access to hard copy records is limited to personnel who have a need for the records to perform official duties and is safeguarded in access controlled areas. All files are maintained in a secure building.

RECORD ACCESS PROCEDURES:

All requests for access to records must be in writing and should be addressed to the Justice Management Division FOIA Contact, 950 Pennsylvania Avenue NW, Room 1111 RFK, Washington, DC 20530, or *JMDFOIA@usdoj.gov.* Any envelopes and letters should be clearly marked ''Privacy Act Access Request.'' The request must describe the records sought in sufficient detail to enable Department personnel to locate them with a reasonable amount of effort. The request must include a general description of the records sought and must include the requester's full name, current address, and date and place of birth. The request must be signed and either notarized or submitted under penalty of perjury.

Although no specific form is required, individuals may obtain forms for this purpose from the FOIA/Privacy Act Mail Referral Unit, United States Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530, or on the Department of Justice website at

https://www.justice.gov/oip/oip-request.html.

More information regarding the Department's procedures for accessing records in accordance with the Privacy Act can be found at 28 CFR part 16 Subpart D, ''Protection of Privacy and Access to Individual Records Under the Privacy Act of 1974.''

CONTESTING RECORD PROCEDURES:

Individuals seeking to contest or amend records maintained in this system of records must direct their requests to the address indicated in the ''RECORD ACCESS PROCEDURES'' paragraph, above. All requests to contest or amend records must be in writing and the envelope and letter should be clearly marked ''Privacy Act Amendment Request.'' All requests must state clearly and concisely what record is being contested, the reasons for contesting it, and the proposed amendment to the record.

More information regarding the Department's procedures for amending or contesting records in accordance with the Privacy Act can be found at 28 CFR 16.46, ''Requests for Amendment or Correction of Records.''

NOTIFICATION PROCEDURES:

Individuals may be notified if a record in this system of records pertains to them when the individuals request information utilizing the same procedures as those identified in the ''RECORD ACCESS PROCEDURES'' paragraph, above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

[FR Doc. 2023–13096 Filed 6–20–23; 8:45 am]

BILLING CODE 4410–NW–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 July 21, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0030 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0030.

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–2023–016–C.

Petitioner: Peter Shingara Jr. Mining, 315 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: No. 1 Slope Operation, MSHA ID No. 36–10008, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1202–1(a), Temporary notations, revisions, and supplements.

Modification Request: The petitioner requests a modification of 30 CFR 75.1202–1(a) to permit annual mine map revisions and supplements from the initial survey in lieu of the current interval of not more than 6 months.

The petitioner states that:

(a) The low production and slow rate of advance in anthracite mining make surveying on 6-month intervals impractical. In most cases, annual development is frequently limited to less than 500 feet of gangway advance with associated up-pitch development.

(b) The mine is non-mechanized and uses hand-loading methods of mining.

(c) Development above the active gangway is designed to mine into the level above the designated intervals thereby maintaining sufficient control between both surveyed gangways.

(d) Available mine engineering and surveying resources are limited in the mine area, making more than annual surveying difficult to achieve.

The petitioner proposes the following alternative method:

(a) The mine maps shall be revised and supplemented at intervals of not more than 12 months.

(b) The mine maps will continue to be updated by hand notations daily and subsequent surveys will be conducted prior to commencing retreat mining and whenever either a drilling program under 30 CFR 75.388 or plan for mining into inaccessible areas under 30 CFR 75.389 is required.

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. 2023–13175 Filed 6–20–23; 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 July 21, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0029 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0029.
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–2023–015–C.

Petitioner: Peter Shingara Jr. Mining, 315 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: No. 1 Slope Operation, MSHA ID No. 36–10008, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1400, Hoisting equipment; general.

Modification Request: The petitioner requests a modification of 30 CFR 75.1400 to permit operating the gunboat used to transport persons without safety catches or other no less effective devices.

The petitioner states that:

(a) Safety catches or devices are not available for gunboats operating in steeply pitching and undulating slopes with numerous curves and knuckles present in the main haulage slopes of Anthracite mines.

(b) The mine's slopes range in length from 30 to 4,200 feet and vary in pitch from 12 to 75 degrees.

(c) Since a functional safety catch has not been developed, makeshift devices, if installed, could be activated on knuckles and curves, causing a tumbling effect on the conveyance. Such tumbling would increase the hazard to miners.

The petitioner proposes the following alternative method:

(a) The cage or steel gunboat shall be operated with secondary safety connections that are securely fastened around the gunboat and to the hoisting rope above the main connecting device.

(b) Hoisting ropes shall be used with safety factors that are greater than the 4 to 8 to 1 ratio recommended by the American National Standard for Wire Rope for Mines.

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. 2023–13177 Filed 6–20–23; 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 July 21, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0031 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0031.
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–2023–017–C.

Petitioner: Peter Shingara Jr. Mining, 315 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: No. 1 Slope Operation, MSHA ID No. 36–10008, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1200, Mine map.

Modification Request: The petitioner requests a modification of 30 CFR 75.1200—specifically clauses (d) and (i). The petitioner requests that the substitution of cross-sections be permitted, in lieu of contour lines through the intake slope, at locations of rock tunnel connections between coal veins, and at 1,000 feet intervals of advance from the intake slope. The petitioner also requests for limiting the required mappings of mine workings above and below to those present within 100 feet of the vein(s) being mined unless these veins are interconnected to other veins beyond the 100 feet limit, through rock tunnels.

The petitioner states that:

(a) Due to steep pitch encountered in mining anthracite coal veins, contour lines of elevations provide no useful information, and their depiction would make portions of the map illegible.

(b) Mining activities at the mine are either second mining of remnant pillars from previous mining or the mining of coal veins of lower quality in proximity to inaccessible and frequently flooded abandoned mine workings which may or may not be mapped.

(c) The mine workings above and below are usually inactive and abandoned and not subject to change during the life of the mine.

The petitioner proposes the following alternative method:

(a) Cross-sections shall be used in lieu of contour lines on mine maps to provide critical information relative to the spacing between veins and proximity to other mine workings which fluctuate considerably.

(b) All mapping for mines above and below shall be researched by a contract engineer for the presence of interconnecting rock tunnels between coal veins in relation to the mine and a hazard analysis done when mapping indicates the presence of known or potentially flooded workings.

(c) Mine workings found beyond 100 feet from the mine, when no rock tunnel connections are found, shall be recognized as presenting no hazard to the mine due to the pitch of the vein and rock separation.

(d) Where evidence indicates prior mining was conducted on a coal vein above or below the mine and there is no available mine map, the vein shall be considered to be mined and flooded, and appropriate precautions shall be taken, as required by 30 CFR 75.388.

(e) Where potential hazards exist and in-mine drilling capabilities limit penetration, surface boreholes shall be used to intercept the workings and the results analyzed prior to the beginning of mining in the affected area.

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. 2023–13176 Filed 6–20–23; 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 July 21, 2023.

ADDRESSES: You may submit comments identified by Docket No. MSHA–2023–0028 by any of the following methods:

1. *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments for MSHA–2023–0028.
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–2023–014–C.

Petitioner: Peter Shingara Jr. Mining, 315 Shingara Lane, Sunbury, Pennsylvania 17801.

Mine: No. 1 Slope Operation, MSHA ID No. 36–10008, located in Northumberland County, Pennsylvania.

Regulation Affected: 30 CFR 75.1002(a), Installation of electric equipment and conductors; permissibility.

Modification Request: The petitioner requests a modification of 30 CFR 75.1002(a) to permit use of non-permissible electric equipment, including drags and battery locomotives, within 150 feet of the pillar line.

The petitioner states that:

(a) The mine is a pitching anthracite mine.

(b) The use of drags on less than moderate pitching veins (less than 20 degrees pitch) is the only practical system of mining for the mine.

(c) Permissible drags are not commercially available and permissible locomotives are not commercially available, partly due to their small size.

(d) Because of low daily production rates and full timbering support, in-rushes of methane resulting from pillar falls are unlikely to occur.

(e) Recovery of the pillars above the first miner heading is usually accomplished on the advance within 150 feet of the section intake (gangway) and the remaining minable pillars are recovered from the deepest point of penetration outby.

The petitioner proposes the following alternative method:

(a) The equipment shall be operated in the working section's only intake entry (gangway) which is regularly traveled and examined.

(b) Methane testing shall occur on an hourly basis and the test results shall be recorded in the on-shift examination record.

(c) Equipment operation shall be suspended if the methane concentration at the equipment reaches 0.5 percent methane when found during a pre-shift examination or during operation.

(d) The required intake air flow of 5,000 cubic feet per minute shall be measured just outby the non-permissible equipment, with the ventilating air passing over the equipment to ventilate the pillar being mined.

(e) The electrical equipment shall be monitored during operation and shall be de-energized at the intersection of the working gangway and intake slope.

(f) Where more than one active line of pillar breast recovery exists, the locomotive may travel to a point just outby the deepest active chute/breast (room) workings or last open crosscut in developing set of entries.

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. 2023–13174 Filed 6–20–23; 8:45 am]

BILLING CODE 4520–43–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[NOTICE: 23–065]

Name of Information Collection: Pilot Testing of Telephone Interviewing Approaches To Assess Community Response to New, Quieter Boom Experiences

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, 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.

DATES: Comments are due by August 21, 2023.

ADDRESSES: Written comments and recommendations for this information collection should be sent within 60 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Find this information collection by selecting ''Currently under 60-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Bill Edwards-Bodmer, NASA Clearance Officer, NASA Headquarters, 300 E Street SW, JF0000, Washington, DC 20546, 757–864–7998, or *b.edwards-bodmer@nasa.gov*.

SUPPLEMENTARY INFORMATION:

I. Abstract

This information collection enabled NASA to pre-test methods to collect information from individuals to determine community response to the new, quieter sonic booms, prior to the start of flight testing the X-plane. No public exposure to any form of sonic boom occurred during the pre-testing phase.

The pre-test was conducted by telephone interview. NASA wanted to evaluate telephone surveys to assess prompt public response associated with experiencing low amplitude sonic booms over multiple, geographically dispersed communities. Responses were voluntary.

The new X-plane is designed to produce low amplitude sonic booms. Ultimately, flight testing of the X-plane is intended to (1) demonstrate and validate the technology necessary for civil supersonic flights that create low amplitude sonic booms, and (2) assess community response to the new, quieter, sonic booms.

II. Methods of Collection

Telephone.

III. Data

Title: Pilot Testing of Telephone Interviewing Approaches to Assess Community Response to New, Quieter Boom Experiences.

OMB Number: 2700–0166.

Type of review: Reinstatement.

Affected Public: Individuals.

Estimated Annual Number of Activities: 5,000.

Estimated Number of Respondents per Activity: 1.

Annual Responses: 5,000.

Estimated Time per Response: 3 minutes.

Estimated Total Annual Burden Hours: 250.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) 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 automated collection techniques or the use of other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the request for OMB approval of this information collection. They will also become a matter of public record.

William Edwards-Bodmer,

NASA PRA Clearance Officer.

[FR Doc. 2023–13132 Filed 6–20–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Thursday, June 22, 2023.

PLACE: Board Room, 7th Floor, Room 7B, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Request for Comment, Operating Fee Schedule Methodology.

2. Board Briefing, New Charter Modernization.

3. Proposed Interpretative Ruling and Policy Statement, Minority Depository Institution Preservation Program.

CONTACT PERSON FOR MORE INFORMATION: Melane Conyers-Ausbrooks, Secretary of the Board, Telephone: 703–518–6304.

Melane Conyers-Ausbrooks,

Secretary of the Board.

[FR Doc. 2023–13225 Filed 6–16–23; 4:15 pm]

BILLING CODE 7535–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Computing & Communication Foundations; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Proposal Review Panel for Computing & Communication Foundations (#1192).

Date and Time: July 19, 2023–July 20, 2023, 8:00 a.m.–4:30 p.m. (Eastern).

Place: Halicioglu Data Science Institute, 234 Matthews Ln., La Jolla, CA 92093.

Type of Meeting: Part-Open.

Contact Persons: Dr. Sankar Basu, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; Telephone: (703) 292–8910.

Purpose of Meeting: To provide advice and recommendations concerning progress of the AI Institute for Learning-enabled Optimization at Scale (TILOS).

Agenda: To conduct an in-depth evaluation of performance, to assess progress towards goals, and to provide recommendations.

Day 1: July 19, 2023

8:00 a.m.—8:15 a.m. Introductions (Open)
8:15 a.m.–8:30 a.m. Welcome and Institute Overview (Open)
8:30 a.m.–10:00 a.m. Research Overview (Open)
10:00 a.m.–10:15 a.m. BREAK
10:15 a.m.–10:45 a.m. Executive Session for NSF Review Team (Closed)
10:45 a.m.–11:30 a.m. Education and Broad Impacts (Open)
11:30 a.m.–Noon Leadership and Collaboration (Open)
Noon–1:00 p.m. LUNCH, Poster Sessions in parallel (Open)
1:00 p.m.–1:45 p.m. NSF team meets w/ UCSD leadership (Closed) External visitors meet with Student (poster) Session (Open)
1:45 p.m.–2:15 p.m. Executive Session for NSF Review Team (Closed)
2:15 p.m.–3:00 p.m. Knowledge Transfer and Workforce Development (Open)
3:00 p.m.–3:15 p.m. Wrap up
3:15 p.m.–4:15 p.m. Executive Session for NSF Review Team (Closed)
4:15 p.m.–4:30 p.m. Written questions/ issues to TILOS by the Site Visit Team (Closed)

Day 2: July 20, 2023

8:00 a.m.–9:00 a.m. TILOS Response to issues raised by Site Visit Team (Closed)
9:30 a.m.–4:00 p.m. Site Visit Review Team prepares Site Visit Report (Closed)
4:00 p.m.–4:30 p.m. Presentation of Site Visit Report (Executive Summary) to TILOS team (Closed)
4:30 p.m. Site Visit concludes.

Reason for Closing: Topics to be discussed and evaluated during closed portions of the site review will include information of a proprietary or confidential nature, including technical information; and information on personnel. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: June 15, 2023.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2023–13182 Filed 6–20–23; 8:45 a.m.]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0111]

Draft Interim Staff Guidance: Use of the Decommissioning Trust Fund During Operations for Major Radioactive Component Disposal

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft Interim Staff Guidance (ISG) ''Use of the Decommissioning Trust Fund During Operations for Major Radioactive Component Disposal.'' The purpose of this proposed ISG is to provide the NRC staff's regulatory position to licensees of nuclear power reactors regarding the use of funds from the decommissioning trust fund dedicated to the radiological decommissioning of a reactor facility for the disposal of major radioactive components (MRCs) while the facility is in an operational status. This proposed ISG may be used in connection with requests for exemption from NRC regulations related to the withdrawal of funds from reactor decommissioning trust funds (DTFs).

DATES: Submit comments by August 21, 2023. Comments received after this date will be considered if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods; however, the NRC encourages electronic comment submission through the Federal rulemaking website.

- *Federal rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0111. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Shawn Harwell, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–1309; email: *Shawn.Harwell@nrc.gov* and Fred Miller, Office of Nuclear Material Safety and Safeguards, telephone: 301–415–6765; email: *Fred.Miller@nrc.gov.* Both are staff members of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2023–0111 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2023–0111.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at

https://www.nrc.gov/reading-rm/adams.html. To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ISG, ''Use of the Decommissioning Trust Fund During Operations for Major Radioactive Component Disposal,'' is available in ADAMS under Accession No. ML23150A051.

• *NRC's PDR:* You may examine and purchase copies of public documents, by appointment, at the NRC's PDR, Room P1 B35, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (*https://www.regulations.gov*). Please include Docket ID NRC–2023–0111 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *https://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

This proposed ISG is intended to provide clarifying guidance to facilitate stakeholder understanding of the NRC's position on the use of the decommissioning trust fund (DTF) during operations for major radioactive component (MRC) disposal.

The NRC's reactor licensing regulations in part 50 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities,'' establish requirements for providing assurance that funding will be available to radiologically decommission a reactor facility and terminate the part 50 license. Specifically, these requirements address, among other things, the amount of decommissioning funding to be provided, the methods to be used for assuring sufficient funding, and provisions restricting the use of the DTF during operations.

Two separate petitions for rulemaking (PRM) were submitted to the NRC for consideration in 2008 and 2019 requesting that the NRC revise the definition of *Decommissioning* in 10 CFR 50.2 and amend 10 CFR 50.82 to allow access to the DTF to pay for the cost of the disposal of MRCs prior to permanent cessation of operations at nuclear power plants. The Commission subsequently denied both petitions, noting that the subject is adequately covered by existing regulations, including the exemption process in 10 CFR 50.12, ''Specific exemptions.'' In the analysis recommending denial of the PRMs, the NRC staff notes that any withdrawal of funds from the DTF during operations, other than those allowed by NRC regulations, may challenge the underlying intent of the decommissioning funding regulations. Therefore, only under extraordinary circumstances would a withdrawal from the DTF prior to permanent cessation of operations be permissible. However, the NRC staff envisions certain circumstances, which could be stated in an exemption request, that may lead to the approval of the particular request, based on the totality of the facts. This draft ISG discusses the various ways and means by which the DTF could be used to cover the cost of MRC disposal during operations, including what information would assist the NRC staff in assessing a licensee's request for exemption from the regulations related to the activity.

Dated: June 14, 2023.

For the Nuclear Regulatory Commission.

John M. Moses,

Deputy Director, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2023–13093 Filed 6–20–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

707th Meeting of the Advisory Committee on Reactor Safeguards (ACRS)

In accordance with the purposes of sections 29 and 182b of the Atomic Energy Act (42 U.S.C. 2039, 2232(b)), the Advisory Committee on Reactor Safeguards (ACRS) will hold meetings on July 12–14, 2023. The Committee will be conducting meetings that will include some Members being physically present at the NRC while other Members participate remotely. Interested members of the public are encouraged to participate remotely in any open sessions via MS Teams or via phone at 301–576–2978, passcode 581992331#. A more detailed agenda including the MSTeams link may be found at the ACRS public website at *https://www.nrc.gov/reading-rm/doc-collections/acrs/agenda/index.html.* If you would like the MSTeams link forwarded to you, please contact the Designated Federal Officer as follows: *Quynh.Nguyen@nrc.gov,* or *Lawrence.Burkhart@nrc.gov.*

Wednesday, July 12, 2023

8:30 a.m.–8:35 a.m.: Opening Remarks by the ACRS Chairman (Open)—The ACRS Chairman will make opening remarks regarding the conduct of the meeting.

8:35 a.m.–10:30 a.m.: EPRI Data Validation Topical Report (Open/Closed)—The Committee will have presentations and discussions with representatives from EPRI and the NRC staff regarding the subject topic. [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

10:30 a.m.–11:30 a.m.: Committee Deliberation on EPRI Data Validation Topical Report (Open/Closed)—The Committee will have discussion and deliberation regarding the subject topic. [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

1:00 p.m.–2:30 p.m.: Vogtle License Amendment Request (LAR) on Loading Lead Test Assemblies (LTAs) with Increased Enrichment (RB/ZA) (Open)—The Committee will have presentations and discussions with representatives from Southern Nuclear and the NRC staff regarding the subject topic.

2:30 p.m.–3:30 p.m.: Committee Deliberation on Vogtle LAR on Loading LTAs with Increased Enrichment (Open)—The Committee will have

discussion and deliberation regarding the subject topic.

3:30 p.m.–5:00 p.m.: ARITA–ARTEMIS/RELAP Integrated Transient Analysis Methodology Topical Report (JM–L/KH) (Open/Closed)—The Committee will have presentations and discussions with representatives from Framatome and the NRC staff regarding the subject topic. [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

5:00 p.m.–6:00 p.m.: Committee Deliberation on ARITA–ARTEMIS/RELAP Integrated Transient Analysis Methodology Topical Report (JM–L/KH) (Open/Closed)—The Committee will have discussion and deliberation regarding the subject topic. [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

Thursday, July 13, 2023

8:30 a.m.–10:30 a.m.: LANCR02 Lattice Physics Model Description Topical Report/Preparation of Reports (JM–L/MS) (Open/Closed)—The Committee will have presentations and discussions with representatives from GE and the NRC staff regarding the subject topic. [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed in order to discuss and protect information designated as proprietary.]

10:30 a.m.–6:00 p.m.: Preparation of Reports (Open/Closed)—The Committee will continue its discussion of proposed ACRS reports. [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed to discuss and protect information designated as proprietary.]

Friday, July 14, 2023

8:30 a.m.–5:00 p.m.: Planning and Procedures Session/Future ACRS Activities/Reconciliation of ACRS Comments and Recommendations (Open/Closed)—The Committee will hear discussion of the recommendations of the Planning and Procedures Subcommittee regarding items proposed for consideration by the Full Committee during future ACRS meetings, and/or proceed to preparation of reports as determined by the Chairman. [NOTE: Pursuant to 5 U.S.C. 552b(c)(2), a portion of this session may be closed to discuss organizational and personnel matters that relate solely to internal personnel rules and practices of the ACRS.] [NOTE: Pursuant to 5 U.S.C. 552b(c)(4), a portion of this session may be closed to discuss and protect information designated as proprietary.]

Procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on June 13, 2019 (84 FR 27662). In accordance with those procedures, oral or written views may be presented by members of the public, including representatives of the nuclear industry. Persons desiring to make oral statements should notify Quynh Nguyen, Cognizant ACRS Staff and the Designated Federal Officer (DFO) (Telephone: 301–415–5844, Email: *Quynh.Nguyen@nrc.gov*), 5 days before the meeting, if possible, so that appropriate arrangements can be made to allow necessary time during the meeting for such statements. In view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with the cognizant ACRS staff if such rescheduling would result in major inconvenience.

An electronic copy of each presentation should be emailed to the cognizant ACRS staff at least one day before the meeting.

In accordance with Subsection 10(d) of Public Law 92–463 and 5 U.S.C. 552b(c), certain portions of this meeting may be closed, as specifically noted above. Use of still, motion picture, and television cameras during the meeting may be limited to selected portions of the meeting as determined by the Chairman. Electronic recordings will be permitted only during the open portions of the meeting.

ACRS meeting agendas, meeting transcripts, and letter reports are available through the NRC Public Document Room (PDR) at *pdr.resource@nrc.gov,* or by calling the PDR at 1–800–397–4209, or from the Publicly Available Records System component of NRC's Agencywide Documents Access and Management System, which is accessible from the NRC website at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/#ACRS/.*

Dated: June 14, 2023.

Russell E. Chazell,

Federal Advisory Committee Management Officer, Office of the Secretary.

[FR Doc. 2023–13114 Filed 6–20–23; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–171 and CP2023–175; MC2023–172 and CP2023–176]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* June 22, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance

with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–171 and CP2023–175; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 2 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 12, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Philip T. Abraham; *Comments Due:* June 22, 2023.

2. *Docket No(s).:* MC2023–172 and CP2023–176; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage® Contract 3 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 12, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Jennaca D. Upperman; *Comments Due:* June 22, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–13113 Filed 6–20–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2023–173 and CP2023–177]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* June 23, 2023.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2023–173 and CP2023–177; *Filing Title:* USPS Request to Add Priority Mail, First-Class Package Service & Parcel Select Contract 29 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* June 14, 2023; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* June 23, 2023.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2023–13172 Filed 6–20–23; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Privacy Act of 1974; Modified System of Records

AGENCY: Postal Service™.

ACTION: Notice of a modified system of records.

SUMMARY: The United States Postal Service® (USPS®) is proposing to revise one General Privacy Act Systems of Records (SOR) 500.000 Property Management Records. These updates are being made to support an initiative to track workroom floor assets and activities.

DATES: These revisions will become effective without further notice on July 21, 2023, unless comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*uspsprivacyfedregnotice@usps.gov*). Arrangements to view copies of any written comments received, to facilitate public inspection, will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

Records Management Officer, Privacy and Records Management Office, *uspsprivacyfedregnotice@usps.gov* and by phone at 202–268–2000.

SUPPLEMENTARY INFORMATION:

I. Background

The Postal Service is seeking to implement an initiative that will allow for the tracking of assets and activities on the workroom floor. This asset and activity tracking will use Bluetooth chip technology associated with ID badges for employees, contractors and visitors within a building or facility. This tracking functionality will facilitate the collection of workhour statistics, including time spent on various activities and duties, allow employees to perform clock rings, and help account for employees during an emergency evacuation from selected facilities.

II. Rationale for Changes to USPS Privacy Act Systems of Records

The Postal Service is proposing to modify SOR 500.000 Property Management Records, to allow for the tracking of assets and activities on the workroom floor. The SOR will be revised accordingly in the following manners:

—Add four new Purposes of the System: #s 13,14, 15, and 16.
—Add one new Category of Records in the System, # 14
—Add one new Policy and Practice for Retrieval of Records: # 7
—Add one new Policy and Practice for Retention and Disposal of Records: # 8

III. Description of the Modified System of Records

Pursuant to 5 U.S.C. 552a (e)(11), interested persons are invited to submit written data, views, or arguments on this proposal. A report of the proposed revisions has been sent to Congress and to the Office of Management and Budget for their evaluations. The Postal Service does not expect these amended systems of records to have any adverse effect on individual privacy rights.

The notice for modifications to USPS SOR 500.000, Property Management Records is provided below in its entirety:

SYSTEM NAME AND NUMBER:

USPS 500.000, Property Management Records.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

All USPS facilities and contractor sites.

SYSTEM MANAGER(S):

For records of accountable property, carpool membership, and use of USPS parking facilities: Vice President, Facilities, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260. For records of building access and Postal Inspector computer access authorizations: Chief Postal Inspector, Inspection Service, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260. For other records of computer access authorizations: Chief Information Officer and Executive Vice President, United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401.

PURPOSE(S) OF THE SYSTEM:

To ensure personal and building safety and security by controlling access to USPS facilities. To ensure accountability for property issued to persons. To assign computer logon IDs; to identify USPS computer users to resolve their computer access problems by telephone; and to monitor and audit the use of USPS information resources as necessary to ensure compliance with USPS regulations. To enable access to the USPS meeting and video web conferencing applications. To enhance your online meeting experience by utilizing enhanced features and functionality, including voluntary polling to gather responses from attendees to generate reports or the interactive chat feature. To facilitate team collaboration and communication through information sharing and cross-functional participation. To allow users to communicate through web-based applications. To facilitate and support cybersecurity investigations of detected or reported information security incidents. To share your personal image via your device camera during meetings and web conferences, if you voluntarily choose to turn the camera on, enabling virtual face-to-face conversations. To authenticate user identity for the purpose of accessing USPS information systems. To provide parking and carpooling services to individuals who use USPS parking facilities. To provide pre-registration for guest access to online meetings and web conferences. To provide visibility on unmeasured workroom floor activities. To enhance visibility into work hours used by product type, standard work management, and overtime status. To improve scheduling efficiency through visibility into the use of workroom floor assets and activities. To generate clock ring data based on employee workroom floor activities, assignments and/or duties.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are granted regular access to USPS facilities through the issuance of a building access badge, or who are assigned accountable property. Individuals with authorized access to USPS computers and information resources, including USPS employees, contractors, and other individuals; Individuals participating in web-based meetings, video conferences, collaboration, and communication applications. Individuals who are members of carpools with USPS employees or otherwise regularly use USPS parking facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Building access information: Records related to issuance of building access badges, including name, Social Security Number, Employee Identification Number, date of birth, photograph, postal assignment information, work contact information, finance number(s), duty location, and pay location. Property issuance information: Records related to issuance of accountable USPS property, equipment, and controlled documents, including name, Social Security Number, equipment description, equipment serial numbers, and issuance date. Computer access authorization information: Records related to computer users, including logon ID, Social Security Number, Employee Identification Number, or other assigned identifier, employment status information or contractor status information, and extent of access granted. Participant session data from web-based meetings and web conferences: Participant Name, Participant's Webcam-Generated Image (Including Presenters), Recorded Participant Audio, Video, And Shared Meeting Screen Content, Chat Interaction, Polling Questions And Associated Responses, Participant Join Time And Leave Time, Meeting Duration, Participant Location, Participant Media Hardware Information, Participant Job Information, Participant Stated Locale, Participant Connection Type, Participant Data Center, Participant Device Type, Participant Domain, Participant Full Data Center, Participant Hard Disk ID, Participant ID, Participant IP Address, Participant Join Time, Participant Camera Name, Participant MAC Address, Participant Microphone Name, Participant Network Type, Participant PC Name, Participant Role,

Participant Share Settings, Participant Speaker Name, Participant Status, Participant User ID, Participant User Name, Participant Zoom, Participant SIP URL, Participant Leave Reason, Participant AS Input, Participant AS Output, Participant Audio Input, Participant Audio Output, Participant CPU Usage, Participant Video Input, Participant Video Output, Participant Quality, Participant Sharing Details, Participant Recording Details, Web-Based Meeting And Web Conference Application Data: In-Meeting Messages, Meeting Transcriptions, Written Feedback Responses, Invitation Tails, Meeting Name, Chat Name, Meeting Agenda, Meeting Host, Meeting Department, Meeting Duration, Meeting Email, Meeting End Time, Meeting Media Settings, Meeting ID, Meeting Participants, Meeting Participants In Room, Meeting Start Time, Meeting Topic, Meeting Tracking Fields, Meeting User Type, Meeting UU ID, Meeting Audio Quality, Meeting Video Quality, Meeting Screen Share Quality, Meeting Duration, Meeting Contacts, Meeting Contact Email, Meeting Settings, Web Conferences Custom Keys, Web Conferences Department, Web Conferences Duration, Web Conferences Email, Web Conferences End Time, Web Conferences Settings, Web Conferences ID, Web Conferences Participants, Web Conference Start Time, Web Conferences Topic, Web Conferences User Type, Web Conferences UU ID, Web Conferences Audio Quality, Web Conferences Video Quality, Web Conferences Screen Share Quality, Web Conferences Host Name, Web Conferences Participant Camera Name, Web Conferences Participant Connection Type, Web Conferences Participant Data Center, Web Conferences Participant Device Type, Web Conferences Participant Domain, Web Conferences Participant From SIP Uri, Web Conferences Participant Full Data Center, Web Conferences Participant Hard Disk ID, Web Conferences Participant ID, Web Conferences Participant IP Address, Web Conferences Participant Join Time, Web Conferences Participant Leave Reason, Web Conferences Participant Leave Time, Web Conferences Participant Location, Web Conferences Participant MAC Address, Web Conferences Participant Microphone Name, Web Conferences Participant Network Type, Web Conferences Participant PC Name, Web Conferences Participant Role, Web Conferences Participant Share Settings, Web Conferences Participant SIP URI, Web Conferences Participant Speaker Name, Web Conferences Participant Status, Web Conferences Participant User ID, Web Conferences Participant User Name, Web Conferences Participant Version, Web Conferences Participant AS Input, Web Conferences Participant AS Output, Web Conferences Participant Audio Input, Web Conferences Participant Audio Output, Web Conferences Participant CPU Usage, Web Conferences Participant Video Input, Web Conferences Participant Video Output, Web Conferences Participant Recording Details, Web Conferences Participant Sharing Details, Web Conferences Participant Customer Key, Web Conferences Poll Title, Web Conferences Poll Status, Web Conferences Poll Start Time, Web Conferences Q&A Question Email, Web Conferences Q&A Question Name, Web Conferences Q&A Question Details, Web Conferences Q&A Question Start Time, Web Conferences Registrant Address, Web Conferences Registrant City, Web Conferences Registrant Comments, Web Conferences Registrant Country, Web Conferences Registrant Create Time, Web Conferences Registrant Custom Questions, Web Conferences Registrant Email, Web Conferences Registrant Name, Web Conferences Registrant ID, Web Conferences Registrant Industry, Web Conferences Registrant Join URL, Web Conferences Registrant Job Title, Web Conferences Registrant Number Of Employees, Web Conferences Registrant Organization, Web Conferences Registrant Phone, Web Conferences Registrant Purchasing Time Frame, Web Conferences Registrant State, Web Conferences Registrant Status, Web Conferences Registrant ZIP Code, Web Conferences Poll Results, Web Conferences Panelist Email, Web Conferences Panelist Name, Meeting Registrant Name, Meeting Registrant Email, Meeting Invitation Text, Meeting Attendee Name, Meeting Attendee Join URL, Meeting Registrant Address, Meeting Registrant City, Meeting Registrant Comments, Meeting Registrant Country, Meeting Registrant Create Time, Meeting Registrant Custom Questions, Meeting Registrant Email, Meeting Registrant Name, Meeting Registrant ID, Meeting Registrant Industry, Meeting Registrant Job Title, Meeting Registrant Number Of Employees, Meeting Registrant Organization, Meeting Registrant Phone Number, Meeting Registrant Purchasing Time Frame, Meeting Registrant Role In Purchase Process, Meeting Registrant State, Meeting Registrant Status, Meeting Registrant ZIP Code, Meeting Registrant Language, Meeting Registrant Join URL, Meeting Attendee Poll Response, Meeting Attendee Department, Cloud Recording Registrant City, Cloud Recording Registrant Comments, Cloud Recording Registrant Country, Cloud Recording Registrant Create Time, Cloud Recording Registrant Custom Questions, Cloud Recording Registrant Email, Cloud Recording Registrant Name, Cloud Recording Registrant ID, Cloud Recording Registrant Industry, Cloud Recording Registrant Job Title, Cloud Recording Registrant Number of Employees, Cloud Recording Registrant Organization, Cloud Recording Registrant Phone, Cloud Recording Registrant Purchasing Time Frame, Cloud Recording Registrant Role in Purchase Process, Cloud Recording Registrant Share URL, Cloud Recording Registrant Status, Cloud Recording Registrant ZIP Code, Cloud Recording Registrant Address, Cloud Recording Registrant State, Cloud Recording Registrant Meeting ID, Cloud Recording Registrant Field Name, Cloud Recording Registrant List of Registrants. Device Data From Web-Based Meetings And Web Conferences: Device type (such as mobile, desktop, or tablet), Device Operating System, Number of users of related Operating Systems, Operating System Version, Operating System Type, MAC address, IP address, hard disk ID, PC Name, Bluetooth Information, Packet Loss, internet Connection Type, Bluetooth Device Name, Bluetooth Device Type, Device Architecture, Central Processing Unit (CPU) Core Type, CPU core frequency, CPU Brand, Available Memory, Total CPU Capacity, Total Capacity Utilized by Application, Memory Used by Application, API Permissions, API Authentication, Authentication Secret Key, Graphics Processing Unit (GPU) Brand, GPU Type, Custom Attributes Defined by Organization, Archived Meeting Files, Archive Meeting Account Name, Archived Meeting File Download User, Archived Meeting File Extension, Archived Meeting File Size, Archived Meeting File Type, Archived Meeting File ID, Archived Meeting File Participant Email, Archived Meeting Participant Join Time, Archived Meeting Participant Leave Time, Archived Meeting File Recording Type, Archived Meeting File Status, Archived Meeting Complete Time, Archived Meeting Complete Time Duration, Archived Meeting Duration, Archived Meeting Duration In Seconds, Archived Meeting Host ID, Archived Meeting ID, Archived Meeting Settings, Archived Meeting Type, Archived Meeting Recording Count, Archived Meeting Start Time,

Archived Meeting Topic, Archived Meeting Total Size, Archived Meeting UU ID, Past Meeting Participant ID, Past Meeting Participant Name, Past Meeting Participant Email, SIP Phone Authorization Name, SIP Phone Domain, SIP Phone ID, SIP Phone Password, SIP Phone Proxy Servers, SIP Phone Register Servers, SIP Phone Registration Expire Time, SIP Phone Transport Protocols, SIP Phone User Email, SIP Phone User Name, SIP Phone Voice Voicemail. User Data From Web-Based Meetings And Web Conferences: User Creation Date, User Department, User Email Address, User Employee ID, User Name, User System ID, User Chat Group Ids, User System Client Version, User Last Login Time, User Picture URL, User PMI, User Status, User Timezone, User Type, User Verified Status, User Password, User JID, User Language, User Manager, User Personal Meeting URL, User Role ID, User Role Name, User Use PMI Status, User Phone Country, User Company, User Custom Attributes, User CMS User ID, User Pronouns, User Vanity Name, User Assistant Email, User Assistant ID, User Permissions, User Presence Status, User Scheduler Email, User Scheduler ID, User Settings, User Token, User Meeting Minutes, User Number Of Meetings, User Participant Number, User's Web Conferences Template, User Scheduled Web Conferences, User Web Conferences Settings, User Web Conferences Recurrence Settings, User Web Conferences Password, User Web Conferences Agenda, User Web Conferences Duration, User Web Conferences Start Time, User Web Conferences Template ID, User Web Conferences Topic. User Web Conferences Tracking Fields, User Web Conferences Time zone User Web Conferences Created Date, User Web Conferences Host ID, User Web Conferences Type, User Web Conferences UU ID, User Web Conferences Start URL, User TSP Account Conference Code, User TSP Account Dial-In Numbers, User TSP Account ID, User TSP Account Leader PIN, User TSP account TSP Bridge, User TSP Audio URL, Chat Messaging Content, Web-Based Meeting And Web Conference Administration Data: Account Administrator Name, Account Contact Information Account ID, Account Billing Information, Account Plan Information, Conference Room Account type, Conference Room calendar name, conference room camera name, conference room device IP address, conference room email address, conference room health, conference room ID, conference room issues, conference room last start time, conference room microphone name, conference room name, conference room speaker name, conference room status, Conference Room live meeting, Conference Room past meetings, conference room activation code, conference room support email, conference room support phone, conference room passcode, conference room settings, conference room location description, conference room location name, User Sign In And Sign Out Times, Group admin name, Group admin email, group admin ID, group member email, group member first name, group member last name, group member ID, group member type, chat group ID, chat group name, chat croup total members, chat group, Files sent through chat, GIPHYs sent through chat, groups sent through chat, p2p sent through chat, text sent through chat, total sent through chat, audio sent through chat, code snippet sent through chat, Operation Log action, operation log category type, operation log operation detail, operation log user, operation log time, Role member department, role member email, role member first name, role member ID, role member type, client feedback detail email, client feedback detail meeting ID, client feedback detail participant name, client feedback detail time, Web-Based Meeting And Web Conference Telemetry Data: Event Time, Client Type, Event Location, Event, Subevent, UUID, Client Version, UserID, Client OS, Meeting ID. Persistent Message Application Telemetry Data: User Email, Group Chat, Message Type, In Meeting Message, Status, Do Not Disturb Time, Notification Setting, Show Group On Contact List, File Type, File Location, Link URL, Keywords, GIF Keywords, Emoji Code, Audio Setting, Video Setting, Is E2E Enabled, Message ID, IP Address. Communication Data: Deleted Persistent Message Sender, Deleted Persistent Message Time, Deleted Persistent Message ID, Deleted Persistent Message Text, Deleted Persistent Message Main Message ID, Deleted Persistent Message Main Message Timestamp, Deleted Persistent Message File Name, Deleted Persistent Message File Size, Edited Persistent Message Sender, Edited Persistent Message Time, Edited Persistent Message ID, Edited Persistent Message Text, Edited Persistent Message Main Message ID, Edited Persistent Message Main Message Timestamp, Edited Persistent Message File Name, Edited Persistent Message File Size, Persistent Message Sender, Persistent Message Time, Persistent Message ID, Persistent Message Main Message ID, Persistent Message Main Message Timestamp, Persistent Message File, Persistent Message File Size, Persistent Message Images Exchanged, Persistent Message Files Exchanged, Persistent Message Videos Exchanged, Persistent Message Channel Title, Persistent Message Whiteboard Annotations, Persistent Message Text, Deleted Message Sender, Deleted Message Time, Deleted Message ID, Deleted Message Text, Deleted Message Main Message ID, Deleted Message Main Message Timestamp, Deleted Message File Name, Deleted Message File Size, Edited Message Sender, Edited Message Time, Edited Message ID, Edited Message Text, Edited Message Main Message ID, Edited Message Main Message Timestamp, Edited Message File Name, Edited Message File Size, Message Sender, Message Time, Message ID, Message Main Message ID, Message Main Message Timestamp, Message File, Message File Size, Message Text. Identity verification information: Question, answer, and email address. Carpool and parking information: Records related to membership in carpools with USPS employees or about individuals who otherwise regularly use USPS parking facilities, including name, space number, principal's and others' license numbers, home address, and contact information. Workroom Floor Access and Activity Information: Records related to issuance of building access badges supporting time keeping functions, including name, Bluetooth Device ID, Employee Identification Number, postal assignment information, workroom floor activities, assignments and/or duties, work contact information, finance number(s), duty location, clock ring data, and pay location.

RECORD SOURCE CATEGORIES:

Employees; contractors; subject individuals; and other systems of records.

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

Standard routine uses 1. through 9. apply.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, and paper.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records about building access and issuance of accountable property are retrieved by name, Social Security Number, or Employee Identification Number. Records about authorized

access to computer and information resources are retrieved by name, logon ID, Employee Identification Number, or other unique identifier of the individual. Report and tracking data created during web-based meetings and video conferences that pertain to individual participants, content shared, conference codes and other relevant session data and historical device usage data are retrieved by meeting ID, host name or host email address. Records pertaining to web-based collaboration and communication applications are retrieved by organizer name and other associated personal identifiers. Media recordings created during web-based meetings and video conferences are retrieved by meeting ID, host name or host email address. Records of carpools and parking facilities are retrieved by name, ZIP Code, space number, or parking license number. Records pertaining to workhour data derived from RFID and Bluetooth technologies are retrieved by name, Employee Identification Number, and Bluetooth Device ID.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Building access and accountable property records are retained until termination of access or accountability. Records of computer access privileges are retained 1 year after all authorizations are cancelled. Report and tracking data created during web-based meeting and video conferences, such as other relevant session data and historical device usage data, are retained for twenty-four months. Records pertaining to web-based collaboration and communication applications are retained for twenty-four months. Web-based meeting or video session recordings are retained for twenty-four months. Records of carpool membership and use of USPS parking facilities are retained 6 years. Records existing on paper are destroyed by burning, pulping, or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice. Records pertaining to workhour data derived from RFID and Bluetooth technologies may be retained up to 90 days.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to these areas is limited to authorized personnel, who must be identified with a badge. Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections. Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD PROCEDURES:

See Notification Procedure and Record Access Procedures above.

NOTIFICATION PROCEDURES:

Inquiries for records about building access, accountable property, carpool membership, and use of USPS parking facilities must be addressed to the facility head. Inquiries about computer access authorization records must be directed to the Manager, Corporate Information Security, 475 L'Enfant Plaza SW, Suite 2141, Washington, DC 20260. For Inspection Service computer access records, inquiries must be submitted to the Inspector in Charge, Information Technology Division, 2111 Wilson Blvd., Suite 500, Arlington, VA 22201. Inquiries must include full name, Social Security Number or Employee Identification Number, and period of employment or residency at the location.

EXEMPTIONS PROMULGATED FROM THIS SYSTEM:

None.

HISTORY:

December 23, 2022, 87 FR 79006; August 4, 2020, 85 FR 47258; June 1, 2020, 85 FR 33210; April 11, 2014, 79 FR 20249; June 27, 2012, 77 FR 38342; June 17, 2011, 76 FR 35483; April 29, 2005, 70 FR 22516.

Sarah Sullivan,

Attorney, Ethics & Legal Compliance.

[FR Doc. 2023–12616 Filed 6–20–23; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97726; File No. SR–MRX–2023–10]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Complex Order Rules

June 14, 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 June 6, 2023, Nasdaq MRX, LLC (''MRX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Options 3, Section 7, Types of Orders and Order and Quote Protocols; Options 3, Section 11, Auction Mechanisms; Options 3, Section 12, Crossing Orders, Section 13, Price Improvement Mechanisms for Crossing Transactions; Options 3, Section 14, Complex Orders; Options 3, Section 15, Simple Order Risk Protections; and Options 3, Section 16, Complex Order Risk Protections.

The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/mrx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In connection with a technology migration to an enhanced Nasdaq, Inc. (''Nasdaq'') functionality, the Exchange intends to adopt certain trading functionality currently utilized at Nasdaq affiliate exchanges. Also, the Exchange intends to remove certain functionality. Specifically, the following sections would be amended: Options 3, Section 7, Types of Orders and Order and Quote Protocols; Options 3, Section 11, Auction Mechanisms; Options 3, Section 12, Crossing Orders, Section 13, Price Improvement Mechanisms for Crossing Transactions; Options 3, Section 14, Complex Orders; Options 3, Section 15, Simple Order Risk Protections; and Options 3, Section 16, Complex Order Risk Protections. Each change will be described below.

Re-Introduction of Stock-Related Strategies and Elimination of Trade Value

Allowance

Before the migration of MRX to an enhanced technology platform,[3] MRX Members were able to trade certain Stock-Option Orders as described in MRX Options 3, Section 14(a)(2),[4] Stock-Complex Orders as described in MRX Options 3, Section 14(a)(3),[5] Complex QCC with Stock Orders as described in MRX Options 3, Section 14(b)(15),[6] QCC with Stock Orders[7] as described in Options 3, Section 7(t) and 12(e), as described in Supplementary Material .03 of MRX Options 3, Section 14 (''Delayed Functionalities'').[8] Separately, prior to the MRX migration, the Exchange offered a Trade Value Allowance,[9] which was also delayed.

At the time the Exchange issued an Options Trader Alert announcing migration details, the Exchange noted that these Delayed Functionalities would not be available for symbols that migrated to the platform and thereafter, until such time as the Exchange recommenced their availability by announcing a date in an Options Trader Alert, which date would be prior to one year from the start of the migration of the symbols to the platform.[10] The Exchange further noted that it was contemplating amendments to its stock-tied functionality and desired additional time to draft and code those changes before reintroducing stock-tied functionality on MRX.[11] MRX's technology migration commenced on November 7, 2022 and was completed on December 5, 2022.[12] At this time, the Exchange proposes to re-introduce stock-tied functionality and remove the delayed implementation language within Options 3, Sections 7, 11, 12, 13, and 14.

Stock-Tied Functionality

MRX proposes to: (1) re-introduce stock-tied functionality; and (2) amend the stock-tied functionality that was available before the migration. Before the migration of MRX to an enhanced technology platform when the Exchange was offering stock-tied functionality, MRX Members desiring to execute an order with stock or an ETF component were required to enter into a brokerage agreement with a broker-dealer designated by the Exchange and were permitted to enter into such an agreement with one or more other broker-dealers to which the Exchange is able to route stock orders.[13]

The Exchange proposes to amend its rules to instead require that a Member desiring to execute a Stock-Option Order or a Stock-Complex Order enter into a brokerage agreement with Nasdaq Execution Services, LLC (''NES'') which will execute the stock or ETF component of the order.[14] The stock component of a Qualified Contingent Cross (''QCC'') with Stock Order or a Complex QCC with Stock Order will continue to be handled by a third-party broker as provided in Options 3, Sections 12(e) and (f).[15] NES is a broker-dealer owned and operated by Nasdaq, Inc. NES, an affiliate of the Exchange, has been approved by the Commission to become a Member of the Exchange and perform inbound routing on behalf of the Exchange.[16] Additionally, NES is permitted to route outbound orders either directly or indirectly through a third party routing broker-dealer to other market centers and perform other functions regarding the cancellation of

[3] *See* Securities Exchange Act Release No. 95854 (September 21, 2022), 87 FR 58571 (September 27, 2022) (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 Its Rules Relating to Single-Leg and Complex Orders in Connection With a Technology Migration).

[4] The term ''Stock-Option Order'' refers to an order for a Stock-Option Strategy as defined in Options 3, Section 14(a)(2). A Stock-Option Strategy is the purchase or sale of a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with the purchase or sale of options contract(s) on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight-to-one (8.00), where the ratio represents the total number of units of the underlying stock or convertible security in the option leg to the total number of units of the underlying stock or convertible security in the stock leg. *See* MRX Options 3, Section 14(a)(2).

[5] The term ''Stock-Complex Order'' refers to an order for a Stock-Complex Strategy as defined in Options 3, Section 14(a)(3). A Stock-Complex Strategy is the purchase or sale of a stated number of units of an underlying stock or a security convertible into the underlying stock (''convertible security'') coupled with the purchase or sale of a Complex Options Strategy on the opposite side of the market representing either (A) the same number of units of the underlying stock or convertible security, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight-to-one (8.00), where the ratio represents the total number of units of the underlying stock or convertible security in the option legs to the total number of units of the underlying stock or convertible security in the stock leg. Only those Stock-Complex Strategies with no more than the applicable number of legs, as determined by the Exchange on a class-by-class basis, are eligible for processing. *See* MRX Options 3, Section 14(a)(3).

[6] A Complex QCC with Stock Order is a Qualified Contingent Cross Complex Order, as defined in subparagraph (b)(6) of Options 3, Section 14, entered with a stock component to be communicated to a designated broker-dealer for execution pursuant to MRX Options 3, Section 12(f).

[7] A QCC with Stock Order is a Qualified Contingent Cross Order, as defined in Options 3, Section 7(j), entered with a stock component to be communicated to a designated broker-dealer for execution pursuant to Options 3, Section 12(e). *See* Options 3, Section 7(t).

[8] *See* note 3 above.

[9] The Trade Value Allowance permits Stock-Option Strategies and Stock-Complex Strategies at valid increments Options 3, Section 14(c)(1), Stock-Option Strategies and Stock-Complex Strategies to trade outside of their expected notional trade value by a specified amount, in order to facilitate the execution of the stock leg and options leg(s). The Trade Value Allowance is the percentage difference between the expected notional value of a trade and the actual notional value of the trade. The amount of Trade Value Allowance permitted may be determined by the Member, or a default value determined by the Exchange and announced to Members; provided that any amount of Trade Value Allowance is permitted in mechanisms pursuant to Options 3, Sections 11 and 13 when auction orders do not trade solely with their contra-side order. *See* Supplementary Material .03 of MRX Options 3, Section 14.

[10] *See* note 3 above.

[11] *See* note 3 above. MRX indicated that it would also need time to file any related rule changes with the Commission prior to reintroducing stock-tied functionality.

[12] *See* Options Trader Alert #2022–34.

[13] *See* Supplementary Material .02 to Options 3, Section 14.

[14] *Id.*

[15] MRX members may also trade QCC Orders and complex [sic] QCC Orders. *See* Options 3, Section 12(c) and (d). For those orders, the parties to the trade will arrange for the execution of the stock component of the order.

[16] *See* Securities Exchange Act Release No. 79995 (February 9, 2017), 82 FR 10811 (February 15, 2017) (SR–ISEMercury–2016–22) (Order Granting Approval of Proposed Rule Changes, as Modified by Amendment Nos. 1 and 2 Thereto, To Permit Nasdaq Execution Services, LLC To Become an Affiliated Member of Each Exchange To Perform Certain Routing and Other Functions).

orders and the maintenance of a NES error account.[17]

NES currently acts as agent for orders to buy and sell the underlying stock or ETF component of a Complex Order on Nasdaq Phlx LLC (''Phlx'').[18] The functions performed by NES on Phlx today are identical to the functions that MRX proposes for NES to perform for MRX Members.[19] Identical to Phlx, after MRX's System determines that a Complex Order execution is possible and identifies the prices for each component of such Complex Order, MRX will electronically communicate the stock or ETF component of the Complex Order to NES for execution.[20] NES, acting as agent for the orders to buy and sell the underlying stock or ETF, will execute the orders in the over-the-counter (''OTC'') market and will handle the orders pursuant to applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs, and short sales. Before the migration of MRX to an enhanced technology platform when the Exchange was offering stock-tied functionality, this function was performed by a third-party broker-dealer.

The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report the stock or ETF component of a Complex Order. However, there are two differences in the way Phlx and MRX handle stock-tied option orders.

First, while both Phlx and MRX have certain risk protections for complex orders, they differ. With respect to MRX, the execution price of the Complex Order must be within a certain price from the current market, as determined by the Exchange pursuant to Options 3, Section 16(a). Specifically, today, MRX Options 3, Section 16(a) provides that the System will not permit any leg of a complex strategy to trade-through the NBBO for the series or any stock component by a configurable amount calculated as the lesser of (i) an absolute amount not to exceed $0.10, and (ii) a percentage of the NBBO not to exceed 500%, as determined by the Exchange on a class, series or underlying basis. In contrast, Phlx Options 3, Section 16(b)(i) describes Phlx's Acceptable Complex Execution (''ACE'') Parameter which defines a price range outside of which a complex order will not be executed. On Phlx, a complex order to sell is not executed at a price that is lower than the cNBBO[21] bid by more than the ACE Parameter. Conversely, on Phlx, a complex order to buy will not be executed at a price that is higher than the cNBBO offer by more than the ACE Parameter. While MRX's and Phlx's price checks differ, both markets seek to prevent executions from occurring at certain prices and at certain percentages from the NBBO. MRX's proposal would require NES to apply the same price check for stock-tied functionality that was being applied previously by a third-party broker-dealer that executed the stock or ETF component of a complex strategy on behalf of MRX Members prior to MRX's technology migration. MRX Members would continue to be subject to the same price check which is applied to all Complex Orders executed on MRX.

Second, MRX and Phlx differ with respect to the manner in which their systems handle Stock-Option Strategies and Stock-Complex Strategies that would execute against interest on the Complex Order Book at a price that does not meet the price checks in their respective rules or do not meet Regulation SHO provisions as provided for in proposed Options 3, Section 16(e)[22] are handled by their respective systems. As proposed, MRX will hold orders on the Complex Order book that cannot be executed because of Regulation SHO or price check restrictions, unless the Member requests the order to be cancelled. If an MRX Member elects to have the order held on the Complex Order Book, the order would await other matching opportunities, otherwise at the Member's election the order would be returned to the Member. In contrast, Phlx only provides for a cancellation of the order. MRX's proposed approach would provide the Member with optionality as to the handing of the order. The Exchange believes providing the choice to have the order held on the Complex Order Book provides Members with an opportunity for an execution.

NES

NES is a registered broker-dealer and member of various exchanges and the Financial Industry Regulatory Authority (''FINRA''). NES will be responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order.[23] Because these trades will occur off-exchange, the principal regulator is FINRA. Furthermore, today, NES is responsible for compliance with FINRA rules generally and is subject to examination by FINRA. Specifically, NES is subject to FINRA Rule 3110, which generally requires that the policies and procedures and supervisory systems of a broker-dealer be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including those relating to the misuse of material non-public information. To this end, today, NES has in place policies related to confidentiality and the potential for informational advantages relating to its affiliates, intended to protect against the misuse of material nonpublic information.[24] In particular, NES will

[17] *Id.* MRX is subject to certain limitations and conditions such as maintaining a Regulatory Services Agreement with FINRA, as well as an agreement pursuant to Rule 17d–2 under the Act, among other limitations and conditions.

[18] *See* Phlx Options 3, Sections 13(b), 14(a) and 16(b).

[19] *See* Securities Exchange Act Release No. 63777 (January 26, 2011), 76 FR 5630 (February 1, 2011) (SR–Phlx–2010–157) (Order Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to Complex Orders) (''Phlx Complex Order Approval''). NES assumed the stock execution functionalities that were previously performed by NOS. Phlx subsequently filed to permit both inbound and outbound orders to be routed through NES instead of Nasdaq Options Services LLC (''NOS''). *See* Securities Exchange Act Release No. 71417 (January 28, 2014), 79 FR 6253 (February 3, 2014) (SR–Phlx–2014–04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Outbound Routing) and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Inbound Routing of Options Orders).

[20] *See* proposed Supplementary Material .08(b) to Options 3, Section 11, proposed Options 3, Section 12(b)(2), proposed Supplementary Material .09(b) to Options 3, Section 13, proposed Supplementary Material .02 to Options 3, Section 14 and proposed Options 3, Section 16(d). *See also* Phlx Options 3, Section 13(b)(10)(ii), Options 3, Section 16(b).

[21] The term ''cNBBO'' means the best net debit or credit price for a Complex Order Strategy based on the NBBO for the individual options components of a Complex Order Strategy, and, where the underlying security is a component of the Complex Order, the National Best Bid and/or Offer for the underlying security. *See* Phlx Options 3, Section 14(a)(vi).

[22] As proposed, NES will only execute Stock-Option Strategies and Stock-Complex Strategies if the underlying covered security component is in accordance with Rule 201 of Regulation SHO.

[23] The Commission's approval order for Phlx stated that NOS (now NES) ''. . . as a facility of the Phlx, NOS is subject to oversight by the Commission and by the Phlx. In addition, NOS, a member of FINRA, is responsible for compliance with applicable rules regarding equity trading, including rules governing trade reporting, trade-throughs and short sales, and is subject to examination by FINRA. Because NOS will execute the stock or ETF component of a Complex Order in the OTC market, the principal regulator of these trades will be FINRA, rather than the Phlx or Nasdaq.'' *See* SR–Phlx–2010–157 76 FR 5630 at 5625, footnote 20. Phlx originally set up its affiliated broker-dealers as two separate entities, NES and NOS. When Phlx replaced NOS with NES, it noted in the rule change that NES will operate the same way as NOS operated, in terms of routing options orders to destination options exchanges. *See* SR–Phlx–2014–04, 79 FR 6253 at 6254.

[24] Similarly, the Exchange does establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and NES. Additionally NES undertook all NOS' responsibilities with respect to

have in place policies and procedures designed to prevent the misuse of material non-public information related to stock-tied executions. Of note, NES only receives information about the stock or ETF portion of the order from the Exchange. As mentioned herein, today, NES is responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order on Phlx. MRX will adopt identical policies and procedures for its stock-tied functionality as are in place on Phlx today.

In addition, because the execution and reporting of the stock/ETF piece will occur otherwise than on MRX or any other exchange, it will be handled by NES pursuant to applicable rules regarding equity trading,[25] including the rules governing trade reporting, trade-throughs and short sales. Specifically, NES will report the trades to the Trade Reporting Facility.[26] Firms that are members of FINRA are required to have a Uniform Service Bureau/Executing Broker Agreement (''AGU'') with NES in order to trade Complex Orders containing a stock/ETF component. Firms that are not members of FINRA are required to have a Qualified Special Representative (''QSR'') arrangement with NES in order to trade Complex Orders containing a stock/ETF component. This requirement is codified in proposed Supplementary Material .08 to Options 3, Section 11, proposed Options 3, Section 12(b)(1), proposed Supplementary Material .09 to Options 3, Section 13 and proposed Supplementary Material .07 to Options 3, Section 14. Accordingly, this process is available to all MRX Members and the stock/ETF component of a Complex Order, once executed, will be properly processed for trade reporting purposes. Phlx has identical requirements within its Options 3, Sections 13(b)(10) and 14(a)(i).

With respect to trade-throughs, the Exchange believes that the stock/ETF component of a Complex Order is eligible for the Qualified Contingent Trade Exemption from Rule 611(a) of Regulation NMS. A Qualified Contingent Trade is a transaction consisting of two or more component orders, executed as agent or principal, that satisfy the six elements in the Commission's order exempting Qualified Contingent Trades (''QCTs'') from the requirements of Rule 611(a),[27] which requires trading centers to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs.[28] The Exchange believes that the stock/ETF portion of a Complex Order under this proposal complies with all six requirements. Moreover, as explained below, MRX's System will validate compliance with each requirement such that any matched order received by NES under this proposal has been checked for compliance with the exemption, as follows:

(1) At least one component order is in an NMS stock: The stock/ETF component must be an NMS stock, which is validated by the System;

(2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: A Complex Order, by definition consists of a single net/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to NES allows the stock/ETF order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the MRX System;

(3) the execution of one component is contingent upon the execution of all other components at or near the same time: Once a Complex Order is accepted and validated by the System, the entire package is processed as a single transaction and each of the option leg and stock/ETF components are simultaneously processed;

(4) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined at the time the contingent order is placed: Complex Orders, upon entry, must have a size for each component and a net debit/credit, which the System validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price and size are not provided on the order;

(5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: under this proposal, the stock/ETF component must be the underlying security respecting the option legs, which is validated by the System; and

(6) the transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: Under this proposal, the ratio between the options and stock/ETF must be a conforming ratio (8 contracts per 100 shares), which the System validates, and which under reasonable risk valuation methodologies, means that the stock/ETF position is fully hedged.[29]

Furthermore, proposed Supplementary Material .08 to Options 3, Section 11, proposed Options 3, Section 12(b)(1), proposed Supplementary Material .09 to Options 3, Section 13 and proposed Supplementary Material .07 to Options 3, Section 14 provide that Members may only submit Complex Orders with a stock/ETF component if such orders

the execution and reporting of the underlying security component of a Complex Order. *See* SR–Phlx–2014–04 at note 20. Therefore, members of FINRA or the NASDAQ Stock Market (''NASDAQ'') who were required to have a Uniform Service Bureau/Executing Broker Agreement (''AGU'') with NOS in order to trade Complex Orders containing a stock/ETF component and firms that are not members of FINRA or NASDAQ who were required to have a Qualified Special Representative (''QSR'') arrangement with NOS in order to trade Complex Orders containing a stock/ETF component were required to have such arrangements with NES. *See* Securities Exchange Act Release No. 71417 (January 28, 2014), 79 FR 6253 (February 3, 2014) (SR–Phlx–2014–04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Outbound Routing) and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Inbound Routing of Options Orders).

[25] Once the orders are communicated to the broker-dealer for execution, the broker-dealer has complete responsibility for determining whether the orders may be executed in accordance with all of the rules applicable to execution of equity orders.

[26] Specifically, the trades will be reported to the FINRA/Nasdaq TRF which is a facility of FINRA that is operated by Nasdaq, Inc. and utilizes Automated Confirmation Transaction (''ACT'') Service technology.

[27] 17 CFR 242.611(a).

[28] *See* Securities Exchange Act Release Nos. 57620 (April 4, 2008), 73 FR 19271 (April 9, 2008) (''QCT Exemptive Order''). *See also* Securities Exchange Act Release No. 54389 (August 31, 2006), 71 FR 52829 (September 7, 2006). The QCT Exemption applies to trade-throughs caused by the execution of an order involving one or more NMS stocks that are components of a ''qualified contingent trade.'' As described more fully in the QCT Exemptive Order, a qualified contingent trade is a transaction consisting of two or more component orders, executed as principal or agent, where: (1) At least one component order is an NMS stock; (2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent; (3) the execution of one component is contingent upon the execution of all other components at or near the same time; (4) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined at the time the contingent order is placed; (5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled; and (6) the Exempted NMS Stock Transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade.

[29] A trading center may demonstrate that an Exempted NMS Stock Transaction is fully hedged under the circumstances based on the use of reasonable risk-valuation methodologies. The release approving the original exemption stated: To effectively execute a contingent trade, its component orders must be executed in full or in ratio at its predetermined spread or ratio. ''In ratio'' clarifies that component orders of a contingent trade do not necessarily have to be executed in full, but any partial executions must be in a predetermined ratio.

comply with the Qualified Contingent Trade Exemption. Members submitting such Complex Orders with a stock/ETF component represent that such orders comply with the Qualified Contingent Trade Exemption. Thus, the Exchange believes that Complex Orders consisting of a stock/ETF component will comply with the exemption and that MRX's System will validate such compliance to assist NES in carrying out its responsibilities as agent for these orders.

With respect to short sale regulation, the proposed handling of the stock/ETF component of a Complex Order under this proposal should not raise any issues of compliance with the currently operative provisions of Regulation SHO.[30] When a Complex Order has a stock/ETF component, Members must indicate, pursuant to Regulation SHO, whether that order involves a long or short sale. The System will accept Complex Orders with a stock/ETF component marked to reflect either a long or short position; specifically, orders not marked as buy, sell or sell short will be rejected by MRX's System.[31] The System will electronically deliver the stock/ETF component to NES for execution. Simultaneous to the options execution on MRX's System, NES will execute and report the stock/ETF component, which will contain the long or short indication as it was delivered by the Member to MRX's System. Accordingly, NES, as a trading center under Rule 201, will be compliant with the requirements of Regulation SHO. Of course, broker-dealers, including both NES and the Members submitting orders to MRX with a stock/ETF component, must comply with Regulation SHO. NES' compliance team updates, reviews and monitors NES' policies and procedures including those pertaining to Regulation SHO on an annual basis.

Further, proposed Supplementary Material .08(c) to Options 3, Section 11, and proposed Options 3, Section 12(b)(3), proposed Supplementary Material .09(c) to Options 3, Section 13, and proposed Options 3, Section 16(e) provide that when the short sale price test in Rule 201 of Regulation SHO[32] is triggered for a covered security, NES will not execute a short sale order in the underlying covered security component[33] of a Complex Order if the price is equal to or below the current national best bid. However, NES will execute a short sale order in the underlying covered security component of a Complex Order if such order is marked ''short exempt,'' regardless of whether it is at a price that is equal to or below the current national best bid. If NES cannot execute the underlying covered security component of a Complex Order in accordance with Rule 201 of Regulation SHO, the Exchange will hold the Complex Order on the Complex Order Book, if consistent with Member instructions (Members may always elect to cancel the order).[34] The order may execute at a price that is not equal to or below the current national best bid.[35] This proposed rule is similar to Phlx Options 3, Section 16(b) except that unlike Phlx, MRX will not cancel back the Complex Order to the entering Member unless the Member requests that the order be cancelled. As noted above, MRX and Phlx differ with respect to the manner in which their systems handle Stock-Option Strategies and Stock-Complex Strategies that do not meet requisite price checks in their respective rules or do not meet the requirements of Regulation SHO. As proposed, MRX will hold orders on the Complex Order book that cannot be executed pursuant to Regulation SHO restrictions, unless the Member requests the order to be cancelled.[36] If an MRX Member elects to have the order held, the order would await other matching opportunities, otherwise at the Member's election the order would be returned to the Member. In contrast, Phlx only provides for a cancellation of the order. MRX's proposed approach would the Member with optionality as to the handing of the order. The Exchange believes providing the choice to have the order held provides Members with an opportunity for an execution.

For these reasons, the processing of the stock/ETF component of a Complex Order under this proposal will comply with applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs and short sales. NES's responsibilities respecting these equity trading rules will be documented in NES's written policies and procedures. NES' compliance team updates, reviews and monitors NES' policies and procedures regarding equity trading rules on an annual basis. NES is regulated by FINRA and as such, NES policies and procedures are subject to review and examinations by FINRA.

As part of the execution of the stock/ETF component, NES will ensure that the execution price is within the intra-day high-low range for the day in that stock at the time the Complex Order is processed and within a certain price range from the current market pursuant to Options 3, Section 16(a),[37] which the Exchange will establish in an Options Trader Alert. If the stock price is not within these parameters, the Complex Order is not executable and would be held on the order book or cancelled, consistent with Member instructions.[38] Before the migration of MRX to enhanced technology platform when the Exchange was offering stock-tied functionality, the third-party broker-dealer would ensure the execution price was within the intra-day high-low range. With the transition to NES, the Exchange would commence performing this check. Members who transact stock-tied functionality on MRX would therefore continue to be subject to the same execution price check with NES as they were before the migration.

The Exchange believes that the continued electronic submission of the stock/ETF piece of the Complex Order to NES for execution should help ensure that the Complex Order, as a whole, is executed timely and at the desired price. In addition, the Exchange's electronic communication of the stock or ETF component to NES for execution eliminates the need for each party to separately submit the stock component to a broker-dealer for execution. The execution of the stock/ETF portion of a Complex Order will be immediate; the Exchange's System will calculate the stock price based on the net debit/credit price of the Complex Order,[39] while also calculating and determining the appropriate options price(s), all electronically. The Exchange continues to believe that this practice would not

[30] 17 CFR 242.200 *et seq.*

[31] The Exchange also accepts short sell exempt orders as described herein.

[32] *See* Securities Exchange Act Release No. 61595 (February 26, 2010), 75 FR 11232 (March 10, 2010) (''Rule 201 Adopting Release'').

[33] For purposes of this paragraph, the term ''covered security'' shall have the same meaning as in Rule 201(a)(1) of Regulation SHO.

[34] *See* proposed Options 3, Section 16(e). In contrast, Complex Orders in an auction mechanism that cannot be executed in accordance with Regulation SHO will be cancelled back and will not rest on the Complex Order Book as provided in Supplementary Material .08 to Options 3, Section 11 and Supplementary Material .09 to Options 3, Section 13.

[35] *See* proposed Options 3, Section 16(e).

[36] *See* proposed Options 3, Section 16(e).

[37] This intra-day high-low range check does not occur for Complex PIM Orders, Complex Facilitation Orders and Complex SOM Orders, and also does not occur for Complex Customer Cross Orders.

[38] *See* proposed Options 3, Section 16(d). In contrast, Complex Orders in an auction mechanism that cannot be executed in accordance with Regulation SHO will be cancelled back and will not rest on the Complex Order Book as provided in Supplementary Material .08 to Options 3, Section 11 and Supplementary Material .09 to Options 3, Section 13.

[39] The stock/ETF price is, of course, included within the net debit/credit price of the Complex Order.

require the Exchange to later nullify options trades if the stock price cannot be achieved. Accordingly, like Phlx, the Exchange is not proposing to adopt a rule permitting such option trade nullifications because the trade would not occur at a price that later required nullification due to the unavailability of the stock/ETF price. The Exchange further believes that the certainty associated with such electronic calculations and processing will continue to be an attractive feature for Members transacting Complex Orders with a stock or ETF component. Likewise, Phlx does not have a rule for options trade nullification for similar transactions. Phlx reasoned in its proposal to similarly use an affiliate to execute the stock or ETF component of a Complex Order that because such execution would be immediate, with Phlx's system calculating the stock or ETF price based on the net debit/credit price of the Complex Order while also calculating and determining the appropriate options price(s), that it believed that its approach would not require Phlx to later nullify options trades if the stock price cannot be achieved.[40]

The Exchange also believes that it is appropriate to construct a program wherein its affiliate, NES, is the exclusive conduit for the execution of the stock/ETF component of a Complex Order under this proposal, similar to Phlx.[41] As a practical matter, complex order programs on other exchanges involve specific arrangements with a broker-dealer to facilitate prompt execution. NES does not intend to charge a fee for the execution of the stock/ETF component of a Complex Order.[42] The Exchange believes that is consistent with the Act for such an arrangement to involve one broker-dealer, even one that is an affiliate, particularly to offer the aforementioned benefits of a prompt, electronic execution for Complex Orders involving stock/ETFs. Specifically, offering a seamless, automatic execution for both the options and stock/ETF components of a Complex Order is an important feature that should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by deeply enhancing the sort of complex order processing available on options exchanges today. Nevertheless, Members could, in lieu of this proposed arrangement with NES, choose, instead, the following alternatives: (i) avoid using Complex Orders that involve stock/ETFs, (ii) use a trading floor to execute Complex Order with stock, or (iii) go to another options venue, several of which offer a similar feature.[43]

In line with the proposed amendments, the Exchange proposes to remove language within Supplementary Material .02 of Options 3, Section 14 which states,

> Members may also indicate preferred execution brokers, and such preferences will determine order routing priority whenever possible. A trade of a Stock-Option Order or a Stock-Complex Order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price. When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed.

As noted herein, Members will no longer be able to indicate preferred execution brokers which makes the first sentence within Supplementary Material .02 of Options 3, Section 14 unnecessary. The second sentence within Supplementary Material .02 of Options 3, Section 14 is being removed because the Exchange is replacing this rule text with proposed Options 3, Section 16(d) and (e) which describes price checks that will be performed for Stock-Option Orders or Stock-Complex Orders by NES. The third sentence within Supplementary Material .02 of Options 3, Section 14 is being removed because the Exchange's proposal to replace the third-party broker with NES will remove a delay that currently exists in the workflow to process a Stock-Option Order or Stock-Complex Order. NES will perform the stock leg validations proposed in Options 3, Sections 16(d) and (e) for Stock-Option Orders or Stock-Complex Orders. Thereafter, NES would print the stock components onto the Trade Reporting Facility and MRX would print the option component executions. This new workflow in which the stock or ETF component of the order will be routed to NES for execution instead of a third-party broker-dealer will obviate the possibility that the stock execution venue will be unavailable for trading while the order is being processed because MRX would no longer be reliant on a third-party broker-dealer to conduct the appropriate checks and, thereafter, relay information to MRX. With the proposed change, NES, the Exchange's affiliate, would conduct the necessary price checks and would make Stock-Option Orders or Stock-Complex Orders available to MRX in the same way that it does for Phlx. The Exchange believes that this new workflow would increase the efficiency of the entire transaction, including stock component validation and reporting.

Complex Opening Process

Similarly, the Exchange proposes to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14 instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14. Similar to the discussion above, the applicable price checks for the stock/ETF component of a Stock-Option Strategy and Stock-Complex Strategy were being performed by a third-party broker-dealer before the migration, which caused a delay that prevented these strategies from participating in the Complex Opening Process. With the proposed change to utilize NES in lieu of a third-party broker-dealer, Stock-Option Strategies and Stock-Complex Strategies would be able to participate in the Complex Opening Process because there would be no delay as NES, the Exchange's affiliate, would conduct the necessary checks (*i.e.,* the price checks Options 3, Section 16(d) and (e)). Thereafter, NES would make Stock-Option Order or Stock-Complex Order available to participate in the Complex Opening Process.

For example, assume that an underlying equity is in a Regulation

[40] *See* Phlx Complex Order Approval *supra* at 5633.

[41] *See* MRX General 2, Section 4(b) which provides that Nasdaq, Inc., which owns NASDAQ Execution Services, LLC and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange Members in connection with the provision of inbound routing to the Exchange.

[42] However, Trade Reporting Facility and clearing fees, not charged by MRX or NES, may result. National Securities Clearing Corporation (''NSCC'') and ACT will bill firms directly for their use of the NSCC and ACT systems, respectively. To the extent that NES is billed by NSCC or ACT, it will not pass through such fees to firms for the stock/ETF portion of a Complex Order under this proposal. MRX's fees applicable to Complex Orders appear in its Fee Schedule and may change from time to time.

[43] Existing Complex Order mechanisms at Cboe, Inc. (''Cboe'') offers a similar end result. *See* Cboe 5.33(l).

SHO State, the underlying equity component is open on the primary underlying market, and the following strategy is created prior to the option leg being opened on MRX:

- Assume Stock Option Strategy: Buy 8 puts and buy 100 shares
- Stock Leg NBBO: 50.00 × 50.20
- Option leg opens on MRX and the NBBO is 2.00 × 2.10
- Stock-Option Strategy derived NBBO: 16.50 × 16.75 [44]
- Firm A Customer Stock-Option Order to buy 5 strategies for 16.50 arrives
- Firm B Stock-Option Order to buy 5 strategies for 16.50 arrives
- Firm C Stock-Option Order to sell 7 strategies for 16.50 arrives with instructions to short the stock component
- Firm D Stock-Option Order to sell 3 strategies for 16.50 arrives with instructions to Sell the Stock component

In the above scenario, only Firm A (buying 5 strategies) and Firm D (not shorting 3 strategies) can actually trade at the Opening Price despite it appearing there is a fully matched cross. Firm C (selling 7 strategies) cannot trade because the underlying is in a Regulation SHO state and the only price the stock leg can be matched at, is on the National Best Bid, which is not a permissible price to short sell for an underlying in a Regulation SHO state.

Prior to the migration, MRX did not attempt to match Stock-Option Orders and Stock-Complex Orders during the Complex Opening Price Determination because the Exchange could not ensure that all parties in the cross would be able to match at the proposed stock leg price because the checks were performed by a third party. If the third party was unable to match part of the cross, executions on the options components would need to be busted, therefore the Exchange did not consider Stock-Option Orders and Stock-Complex Orders in the Complex Opening prior to the migration.

With this proposal, the price checks would be conducted by NES, an affiliate of the Exchange. Once MRX determines the stock and option leg prices, MRX will communicate the stock price and quantity to NES, who will conduct the necessary price checks. The proposed workflow provides efficiencies for the stock component execution as compared to the current process which involves a third-party broker-dealer. With this process, MRX would be able to process the option component and match the strategies during the Complex Opening Price Determination without the need for MRX to await a response from a third-party broker-dealer.

The ability to attempt this match opportunity earlier in the Complex Opening Price Determination is critical because the market can move between the Complex Opening Price Determination and the Complex Uncrossing Process [45] in such a way that the trade could no longer be possible. By way of example, prior to the migration, if the Stock Component adjusts to 53.00 × 54.00 before this strategy can attempt a Complex Uncrossing Process, the Stock Option Strategy derived NBBO would be 17.25 × 17.70 and there would no longer be a match possible for the interest willing to buy and sell at 16.50. If the System instead had utilized the Opening Price Determination, the execution would have occurred in this instance.

Trade Value Allowance

Trade Value Allowance is a functionality that allows Stock-Option Strategies and Stock-Complex Strategies to trade outside of their expected notional trade value by a specified amount (the ''Trade Value Allowance'').[46] After calculating the appropriate options match price for a Stock-Option or Stock-Complex Order expressed in a valid one cent increment, the System calculates the corresponding stock match price rounded to the increment supported by the equity market.

The Exchange no longer desires to offer the Trade Value Allowance. The Exchange has issued an Options Trader Alert indicating its intent to decommission this functionality to provide notice to Members.[47] Very few Members have opted to utilize the Trade Value Allowance and even a smaller percentage of trades were subject to the allowance. Phlx does not have a similar allowance today. In an effort to harmonize its complex order functionality across its Nasdaq affiliated markets, the Exchange proposes to no longer offer the Trade Value Allowance functionality. With the proposed change to utilize NES, the Exchange would determine the stock leg prices, and NES would be able to execute the stock leg at two different prices to ensure that the net price of the execution is within the notional value of the original order, thus eliminating the need for the allowance.

Options 3, Section 7

The Exchange proposes to make a clarifying change to MRX Options 3, Section 7, Types of Orders and Order and Quote Protocols. The Exchange proposes to amend MRX Options 3, Section 7(t) related to QCC with Stock Orders to make clear that QCC with Stock Orders may only be entered through FIX.[48] MRX has 2 order entry protocols, FIX and OTTO.[49] Members are required to have an order entry protocol to enter orders onto MRX. MRX offers each Member one FIX port at no cost.[50] All Members would have the ability to enter QCC with Stock Orders. QCC with Stock Orders may not be entered through OTTO.

Additionally, the Exchange proposes to amend Supplementary Material .02(d) to Options 3, Section 7 related to Immediate-or-Cancel Orders. The Exchange proposes to specifically amend Supplementary Material .02(d)(3) to Options 3, Section 7 to add QCC with Stock Orders and Complex QCC with Stock to the list of order types that have a Time in Force or ''TIF'' of Immediate-or-Cancel or ''IOC''. Because QCC with Stock Orders and Complex QCC with Stock have a TIF of IOC, these order types will either execute on entry or cancel. Adding these order types to Supplementary Material .02(d)(3) to Options 3, Section 7 will make this clear.

[44] The derived NBBO for the Stock Option Strategy was calculated as follows: Stock Option Strategy Derived Bid = ¼(2.00 × 8) + ¼(50) = 16.50 and Stock Option Strategy Derived Offer = ¼(2.10 × 8) + ¼(50.20) = 16.75. The Stock Option Strategy is normalized by MRX's System by dividing the legs by the greatest common denominator of four (4). The normalized ratio was applied to the option leg price and stock leg price to determine the net price strategy.

[45] *See* Supplementary Material .06 to MRX Options 3, Section 14.

[46] The Trade Value Allowance is the percentage difference between the expected notional value of a trade and the actual notional value of the trade. *See* Supplementary Material .03 of MRX Options 3, Section 14.

[47] *See* Options Trader Alert # 2023–3. No Member has expressed concern with this functionality being eliminated.

[48] ''Financial Information eXchange'' or ''FIX'' is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders to the Exchange. Features include the following: (1) execution messages; (2) order messages; (3) risk protection triggers and cancel notifications; and (4) post trade allocation messages. *See* Supplementary Material .03(a) to Options 3, Section 7.

[49] ''Ouch to Trade Options'' or ''OTTO'' is an interface that allows Members and their Sponsored Customers to connect, send, and receive messages related to orders, auction orders, and auction responses to the Exchange. Features include the following: (1) options symbol directory messages (*e.g.,* underlying and complex instruments); (2) system event messages (*e.g.,* start of trading hours messages and start of opening); (3) trading action messages (*e.g.,* halts and resumes); (4) execution messages; (5) order messages; (6) risk protection triggers and cancel notifications; (7) auction notifications; (8) auction responses; and (9) post trade allocation messages. *See* Supplementary Material .03(b) to Options 3, Section 7.

[50] *See* Options 7, Section 6, Ports and Other Services.

Options 3, Section 12

The Exchange proposes to amend Options 3, Section 12(e)(4) to clarify the manner in which a Member may submit a QCC with Stock Order.[51] Today, Options 3, Section 12(e)(4) provides that, ''QCC with Stock Orders can be entered with separate prices for the stock and options components, or with a net price for both.'' The Exchange proposes to amend this rule text to instead reflect the current manner in which QCC with Stock Orders may be entered into MRX's System. The proposed rule text would provide, ''QCC with Stock Orders must be entered with a net price for the stock and options components through FIX. The System will calculate the individual component prices.'' The current language of Options 3, Section 12(e)(4) is not correct. The Exchange proposes to amend this language to make clear the current System functionality. The proposed language does not result in a change to the Exchange's System. As noted above, QCC with Stock Orders may not be entered through OTTO. The Exchange notes that requiring QCC with Stock Orders to be submitted through FIX is consistent with proposed Options 3, Section 7(t) which currently requires Members to enter QCC Orders through FIX. Additionally, the Exchange is specifying the System calculates the individual component prices.

Options 3, Section 15

The Exchange proposes to amend its Market Wide Risk Protection within Options 3, Section 15(a)(1)(C) to add certain additional information concerning the current Market Wide Risk Protection along with new language that would apply as a result of the proposed changes to stock-tied functionality.

Today, the Exchange offers a Market Wide Risk Protection which is comprised of an ''Order Entry Rate Protection'' which protects Members against entering orders at a rate that exceeds predefined thresholds, and an ''Order Execution Rate Protection,'' which protects Members against executing orders at a rate that exceeds their predefined risk settings. Both of these risk protections are detailed in the ''Market Wide Risk Protection.'' Today, pursuant to the proposed Market Wide Risk Protection rule, the Exchange's System maintains one or more counting programs for each Member that count orders entered and contracts traded on MRX. Members can use multiple counting programs to separate risk protections for different groups established within the Member.

MRX Options 3, Section 15(a)(1)(C) currently states, that the counting programs will maintain separate counts, over rolling time periods specified by the Member for each count of: (1) the total number of orders entered; (2) the total number of contracts traded. The Exchange proposes to amend MRX Options 3, Section 15(a)(1)(C) to instead provide,

> [t]he counting programs will maintain separate counts, over rolling time periods specified by the Member for each count, of: (1) the total number of orders entered in the regular order book; (2) the total number of orders entered in the complex order book with only options legs; (3) the total number of Stock-Option Orders and Stock-Complex Orders entered in the complex order book with both stock and options legs ; (4) the total number of contracts traded in regular orders; (5) the total number of contracts traded in complex orders with only options legs; and (6) the total number of Stock-Option Order and Stock-Complex Order contracts traded in complex orders with both stock and option legs).

Today, the counting programs maintain separate counts over rolling time period for the total number of orders entered in the regular order book, complex order book with only options legs; and the complex order book with both stock and options legs. Additionally, the risk protection counts the total number of contracts traded in regular orders and Complex Orders with only options legs.[52] The current rule text does not provide for each of these counts today.

The Exchange proposes a technical amendment to the first provision of MRX Options 3, Section 15(a)(1)(C) to add ''in the regular order book'' to the sentence to distinguish the single-leg order book from the complex order book.

At the time that MRX adopted Complex Order rules, those rules were intended to be identical to Nasdaq ISE, LLC (''ISE'') complex order rules.[53] MRX should have amended MRX Options 3, Section 15(a)(1)(C) to include the rule text within (2) through (5), as noted above, to mirror the rules of ISE Options 3, Section 15(a)(1)(C) as it pertains to Complex Orders. The Exchange proposes to mirror the rules of ISE Options 3, Section 15(a)(1)(C) within (2) through (5) except that the rules will use the defined terms Stock-Option Order, Stock-Complex Order, and Complex Option Order.[54] The Exchange notes that the stock portion of QCC Orders, Complex Qualified QCC Orders, QCC with Stock Orders, and Complex QCC with Stock Orders are not counted in (3) because MRX's System does not handle the stock portion of these orders. MRX would not represent the stock leg through NES as it would for other Stock-Option Orders and Stock-Complex Orders as described herein. The Exchange inadvertently did not amend its rules similar to ISE today. Today, the Market Wide Risk Protection includes Complex Orders, where applicable. At this time, MRX proposes to mirror ISE's rules related to the counting functionality for Complex Orders to reflect the manner in which the System operates. The Exchange notes that QCC Orders, Complex Qualified QCC Orders, QCC with Stock Orders, and Complex QCC with Stock Orders are considered, where applicable, in Options 3, Section 15(a)(1)(C)(1), (2), (4) and (5).

Today, the Exchange does not include a complex execution count for Complex Orders with a stock component as the execution counts maintained by the Order Execution Rate Protection are based solely on options contracts traded. At this time, as a result of amending the stock-tied functionality, the Exchange proposes to add a new number (6) to MRX Options 3, Section 15(a)(1)(C) to note that the counting programs will maintain separate counts, over rolling time periods specified by the Member for each count, of the total number of Stock-Option Order and Stock-Complex Order contracts traded in Complex Order with both stock and option legs. The Exchange is adding new number (6) because it is introducing NES in place of a third-party broker-dealer. As a result, the Exchange will guarantee a stock-tied execution. Before the migration, the stock-tied execution was not guaranteed by the third-party broker-dealer. Because of the ability to guarantee the execution, the Exchange is amending Options 3, Section 15(a)(1)(C) to add (6) to the list of contracts counted by the Market Wide Risk Protection because the Exchange is able to perform the risk check since NES will be handling the stock for Stock-Option Orders and Stock-Complex Orders. This risk protection will reduce risk associated with system errors or market events that

[51] QCC with Stock Orders are processed in accordance with Options 3, Section 12(e).

[52] The Member's allowable order rate for the Order Entry Rate Protection is comprised of the parameters defined in (1) to (3), while the allowable contract execution rate for the Order Execution Rate Protection is comprised of the parameters defined in (4) and (5).

[53] *See* Securities Exchange Act Release No. 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR–MRX–2019014) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Complex Order Pricing).

[54] A similar change will be made to ISE to utilize the defined terms ''Stock-Option Order,'' ''Stock-Complex Order'' and ''Complex Option Order.''

may cause Members to send a large number of orders, or receive multiple, automatic executions, before they can adjust their exposure in the market. Without adequate risk management tools, such as those proposed in this filing, Members could reduce the amount of order flow and liquidity that they provide on MRX. As a result, the functionality promotes just and equitable principles of trade.

Finally, the Exchange proposes to add the defined term ''DNTT'' to the end of Options 3, Section 16(a) to define the instruction on a Complex Order to price each leg of the Complex Order to be executed equal to or better than the NBBO for the options series or any stock component, as applicable as a ''Do-Not-Trade-Through'' or ''DNTT.'' This is not a substantive amendment, rather this change is meant to assist Members in locating this functionality within MRX's rules.

Implementation

The Exchange will issue an Options Trader Alert to Members to provide notification of the implementation date for MRX's Delayed Functionalities, except Trade Value Allowance. MRX will announce the day it will recommence the Delayed Functionalities, except Trade Value Allowance, before November 7, 2023, which is one year from the day MRX's technology migration commenced. Separately, MRX informed Members that it will not recommence the Trade Value Allowance functionality in a separate Options Trader Alert.[55] As discussed above, the Trade Value Allowance will no longer be necessary.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[56] in general, and furthers the objectives of Section 6(b)(5) of the Act,[57] in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest for the reasons discussed below.

Re-Introduction of Stock-Related Strategies and Elimination of Trade Value Allowance

Stock-Tied Functionality

The Exchange's proposal to amend its stock-tied functionality that the Exchange used prior to the technology migration and recommence offering this functionality as described above promotes just and equitable principles of trade and removes impediments to and perfect the mechanism of a free and open market and a national market system because it will permit the Exchange to streamline its stock-tied processes as discussed more fully below. Further, the amendments to require that a Member desiring to execute an order with stock or an ETF component enter into a brokerage agreement with NES, a broker-dealer owned and operated by Nasdaq, Inc., protects investors and the general public because Members will be required to comply with NES' requirements and those requirements will be uniform for all MRX Members.

The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report stock-tied functionality with two differences.

First, while both Phlx and MRX have certain risk protections for complex orders, they differ. With respect to MRX, the execution price of the Complex Order must be within a certain price from the current market, as determined by the Exchange pursuant to Options 3, Section 16(a). Specifically, today, MRX Options 3, Section 16(a) provides that the System will not permit any leg of a complex strategy to trade-through the NBBO for the series or any stock component by a configurable amount calculated as the lesser of (i) an absolute amount not to exceed $0.10, and (ii) a percentage of the NBBO not to exceed 500%, as determined by the Exchange on a class, series or underlying basis. Phlx Options 3, Section 16(b)(i) describes Phlx's ACE Parameter which defines a price range outside of which a complex order will not be executed. On Phlx, a complex order to sell is not executed at a price that is lower than the cNBBO bid by more than the ACE Parameter. Conversely, on Phlx, a complex order to buy will not be executed at a price that is higher than the cNBBO offer by more than the ACE Parameter. While MRX's and Phlx's price checks differ, both markets seek to prevent executions from occurring at certain prices and at certain percentages from the NBBO. The Exchange believes that this proposal promotes just and equitable principles of trade because NES would apply the same price check for stock-tied functionality that was being applied previously by a third party that executed the stock or ETF component of a complex strategy on behalf of MRX Members. Additionally, MRX Members would continue to be subject to the same price check which is applied to all Complex Orders executed on MRX.

Second, MRX and Phlx differ with respect to the manner in which their systems handle Stock-Option Strategies and Stock-Complex Strategies that would execute against interest on the Complex Order Book at a price that do not meet price checks as provided for in proposed Options 3, Section 16(d)[58] or do not meet Regulation SHO provisions as provided for in proposed Options 3, Section 16(e)[59] are handled by their respective systems. As proposed, MRX will hold orders on the Complex Order book that cannot be executed because of Regulation SHO or price check restrictions, unless the Member requests the order to be cancelled. If an MRX Member elects to have the order held on the Complex Order Book, the order would await other matching opportunities, otherwise at the Member's election the order would be returned to the Member. In contrast, Phlx only provides for a cancellation of the order. The Exchange believes that this proposal promotes just and equitable principles of trade because MRX's proposed approach would provide the Member with optionality as to the handing of the order. The Exchange believes providing the choice to have the order held on the Complex Order Book provides Members with an opportunity for an execution.

NES, an affiliate of the Exchange and a registered broker-dealer, has been approved by the Commission to become a Member of the Exchange and perform inbound routing on behalf of the Exchange.[60] Additionally, NES is permitted to route outbound orders either directly or indirectly through a third party routing broker-dealer to other market centers and perform other functions regarding the cancellation of orders and the maintenance of a NES error account.[61] The functions performed by NES on Phlx today are identical to the functions that MRX proposes for NES to perform for MRX Members.[62] Identical to Phlx, after

[55] *See supra* note 12.

[56] 15 U.S.C. 78f(b).

[57] 15 U.S.C. 78f(b)(5).

[58] As proposed, the execution price of Stock-Option Strategies and Stock-Complex Strategies must be within the high-low range for the day in that stock at the time the Complex Order is processed and within a certain price from the current market pursuant to Options 3, Section 16(a), as determined by the Exchange.

[59] *See supra* note 22.

[60] *See supra* note 16.

[61] *See supra* note 17.

[62] *See* Securities Exchange Act Release No. 63777 (January 26, 2011), 76 FR 5630 (February 1, 2011) (SR–Phlx–2010–157) (Order Approving a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to Complex Orders) (''Phlx Complex Order Approval''). NES assumed the stock execution functionalities that were previously performed by NOS. Phlx subsequently filed to permit both inbound and outbound orders to be routed through NES instead of Nasdaq Options

MRX's System determines that a Complex Order is possible and identifies the prices for each component of such Complex Order, MRX will electronically communicate the stock or ETF component of the Complex Order to NES for execution.[63]

NES, acting as agent for the orders to buy and sell the underlying stock or ETF, will execute the orders in the OTC market and will handle the orders pursuant to applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs, and short sales. Before the migration, this function was performed by a third-party broker-dealer that executed the stock or ETF component of a complex strategy on behalf of MRX Members. As proposed, this structure will promote just and equitable principles of trade because NES will be responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order.[64] Furthermore, today, NES is responsible for compliance with FINRA rules generally and is subject to examination by FINRA.[65] Finally, today, NES has in place policies related to confidentiality and the potential for informational advantages relating to its affiliates, intended to protect against the misuse of material nonpublic information.[66] In particular, NES will have in place policies and procedures designed to prevent the misuse of material non-public information related to stock-tied executions which will protect investors and the public interest. NES only receives information about the stock or ETF portion of the order from the Exchange. As mentioned herein, today, NES is responsible for the proper execution, trade reporting, and submission to clearing of the underlying stock or ETF component of a Complex Order on Phlx. MRX will adopt identical policies and procedures for its stock-tied functionality as are in place on Phlx today.

In addition, the execution and reporting of the stock/ETF piece will occur otherwise than on MRX or any other exchange, and will be handled by NES pursuant to applicable rules regarding equity trading,[67] including the rules governing trade reporting, trade-throughs and short sales. The Exchange's proposal also promotes just and equitable principles of trade as NES will report the trades to the Trade Reporting Facility.[68] Further, all MRX Members may execute stock-tied transactions. All stock-tied transactions will have the stock/ETF component of a Complex Order, once executed, properly processed for trade reporting purposes. Phlx has identical rules for processing and reporting.[69]

With respect to trade-throughs, the Exchange believes that the stock/ETF component of a Complex Order is eligible for the Qualified Contingent Trade Exemption from Rule 611(a) of Regulation NMS. The Exchange believes that the stock/ETF portion of a Complex Order under this proposal complies with all six requirements of the Qualified Contingent Trade Exemption.[70] In order to promote just and equitable principles of trade, MRX's System will validate compliance with each requirement such that any matched order received by NES under this proposal has been checked for compliance with the exemption. Members may only submit Complex Orders with a stock/ETF component if such orders comply with the Qualified Contingent Trade Exemption.[71] Members submitting such Complex Orders with a stock/ETF component represent that such orders comply with the Qualified Contingent Trade Exemption. Thus, the Exchange believes that Complex Orders consisting of a stock/ETF component will comply with the exemption and that MRX's System will validate such compliance to assist NES in carrying out its responsibilities as agent for these orders.

With respect to short sale regulation, the proposed handling of the stock/ETF component of a Complex Order under this proposal should not raise any issues of compliance with the currently operative provisions of Regulation SHO[72] and therefore promote just and equitable principles of trade. When a Complex Order has a stock/ETF component, Members must indicate, pursuant to Regulation SHO, whether that order involves a long or short sale. The System will accept Complex Orders with a stock/ETF component marked to reflect either a long or short position; specifically, orders not marked as buy, sell or sell short will be rejected by MRX's System.[73] The System will electronically deliver the stock/ETF component to NES for execution. Simultaneous to the options execution on MRX's System, NES will execute and report the stock/ETF component, which will contain the long or short indication as it was delivered by the Member to MRX's System. Accordingly, NES, as a trading center under Rule 201, will be compliant with the requirements of Regulation SHO. Of course, broker-dealers, including both NES and the Members submitting orders to MRX with a stock/ETF component, must comply with Regulation SHO. NES'

Services LLC (''NOS''). *See* Securities Exchange Act Release No. 71417 (January 28, 2014), 79 FR 6253 (February 3, 2014) (SR–Phlx–2014–04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Outbound Routing) and 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR–Phlx–2014–05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Inbound Routing of Options Orders).

[63] *See* proposed Supplementary Material .08(b) to Options 3, Section 11, proposed Options 3, Section 12(b)(2), proposed Supplementary Material .09(b) to Options 3, Section 13, proposed Supplementary Material .02 to Options 3, Section 14 and proposed Options 3, Section 16(d). *See also* Phlx Options 3, Section 13(b)(10)(ii), Options 3, Section 16(b).

[64] *See supra* note 23.

[65] NES is subject to FINRA Rule 3110, which generally requires that the policies and procedures and supervisory systems be reasonably designed to achieve compliance with applicable securities laws and regulations and with applicable FINRA rules, including those relating to the misuse of material non-public information.

[66] *See supra* note 24.

[67] *See supra* note 25.

[68] *See supra* note 26.

[69] *See* Phlx Options 3, Sections 13(b)(10) and 14(a)(i).

[70] The six requirements include: (1) At least one component order is in an NMS stock: The stock/ETF component must be an NMS stock, which is validated by the System; (2) all components are effected with a product or price contingency that either has been agreed to by the respective counterparties or arranged for by a broker-dealer as principal or agent: A Complex Order, by definition consists of a single net/debit price and this price contingency applies to all the components of the order, such that the stock price computed and sent to NES allows the stock/ETF order to be executed at the proper net debit/credit price based on the execution price of each of the option legs, which is determined by the MRX System; (3) the execution of one component is contingent upon the execution of all other components at or near the same time: Once a Complex Order is accepted and validated by the System, the entire package is processed as a single transaction and each of the option leg and stock/ETF components are simultaneously processed; (4) the specific relationship between the component orders (*e.g.,* the spread between the prices of the component orders) is determined at the time the contingent order is placed: Complex Orders, upon entry, must have a size for each component and a net debit/credit, which the System validates and processes to determine the ratio between the components; an order is rejected if the net debit/credit price and size are not provided on the order; (5) the component orders bear a derivative relationship to one another, represent different classes of shares of the same issuer, or involve the securities of participants in mergers or with intentions to merge that have been announced or since cancelled: under this proposal, the stock/ETF component must be the underlying security respecting the option legs, which is validated by the System; and (6) the transaction is fully hedged (without regard to any prior existing position) as a result of the other components of the contingent trade: Under this proposal, the ratio between the options and stock/ETF must be a conforming ratio (8 contracts per 100 shares), which the System validates, and which under reasonable risk valuation methodologies, means that the stock/ETF position is fully hedged.

[71] *See* Supplementary Material .07 to Options 3, Section 14.

[72] 17 CFR 242.200 *et seq.*

[73] The Exchange also accept short sell exempt orders as described herein.

compliance team updates, reviews and monitors NES' policies and procedures including those pertaining to Regulation SHO on an annual basis.

Further, proposed Options 3, Section 16(e) provides that when the short sale price test in Rule 201 of Regulation SHO [74] is triggered for a covered security, NES will not execute a short sale order in the underlying covered security component of a Complex Order if the price is equal to or below the current national best bid. However, NES will execute a short sale order in the underlying covered security component of a Complex Order if such order is marked ''short exempt,'' regardless of whether it is at a price that is equal to or below the current national best bid. If NES cannot execute the underlying covered security component of a Complex Order in accordance with Rule 201 of Regulation SHO, the Exchange will hold the Complex Order on the Complex Order Book, if consistent with Member instructions (Members may always elect to cancel the order).[75] The order may execute at a price that is not equal to or below the current national best bid. This proposed rule is similar to Phlx Options 3, Section 16(b) except that unlike Phlx, MRX will not cancel back the Complex Order to the entering Member unless the Member requests that the order be cancelled back.

For these reasons, the processing of the stock/ETF component of a Complex Order under this proposal will comply with applicable rules regarding equity trading, including the rules governing trade reporting, trade-throughs and short sales and is consistent with the Act. NES's responsibilities respecting these equity trading rules will be documented in NES's written policies and procedures. NES' compliance team updates, reviews and monitors NES' policies and procedures. NES is regulated by FINRA and as such, NES policies and procedures are subject to review and examinations by FINRA.

Further, as part of the execution of the stock/ETF component, the Exchange will ensure that the execution price is within the intra-day high-low range for the day in that stock at the time the Complex Order is processed and within a certain price range from the current market pursuant to Options 3, Section 16(a) which will protect investors and the general public.[76] If the stock price is not within these parameters, the Complex Order is not executable and would be held on the order book or cancelled, consistent with Member instructions.[77] Before the migration of MRX to enhanced technology platform when the Exchange was offering stock-tied functionality, the third-party broker-dealer would ensure the execution price was within the intra-day high-low range. With the transition to NES, the Exchange would commence performing this check. Members who transact stock-tied functionality on MRX would therefore continue to be subject to the same execution price check with NES as they were before the migration. This intra-day high-low range check does not occur for certain Complex Orders auctions (*e.g.* Complex PIM Orders,[78] Complex Facilitation Orders [79] and Complex SOM Orders [80]) and also does not occur for Complex Customer Cross Orders [81] or Complex QCC Orders.[82] The Exchange believes that this exception for auctions is consistent with the Act because these auctions have their own rules for auction eligibility, entry checks, and offer price improvement all of which are distinguishable from execution of orders on the Complex Order Book. Complex Customer Cross Orders are automatically executed upon entry so long as: (i) the price of the transaction is at or within the best bid and offer for the same complex strategy on the Complex Order Book; (ii) there are no Priority Customer Complex Orders for the same strategy at the same price on the Complex Order Book; and (iii) the options legs can be executed at prices that comply with the provisions of Options 3, Section 14(c)(2). Complex Customer Cross Orders will be rejected if they cannot be executed.[83]

Finally, the Exchange also believes that it is appropriate to construct a program wherein its affiliate, NES, is the exclusive conduit for the execution of the stock/ETF component of a Complex Order under this proposal, identical to Phlx.[84] As a practical matter, complex order programs on other exchanges involve specific arrangements with a broker-dealer to facilitate prompt execution. NES does not intend to charge a fee for the execution of the stock/ETF component of a Complex Order.[85] The Exchange believes that is consistent with the Act for such an arrangement to involve one broker-dealer, even one that is an affiliate, particularly to offer the aforementioned benefits of a prompt, electronic execution for Complex Orders involving stock/ETFs. Specifically, offering a seamless, automatic execution for both the options and stock/ETF components of a Complex Order is an important feature that should promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system by deeply enhancing the sort of complex order processing available on options exchanges today. Nevertheless, Members could, in lieu of this proposed arrangement with NES, choose, instead, the following alternatives: (i) avoid using Complex Orders that involve stock/ETFs, (ii) use a trading floor to execute Complex Order with stock, or (iii) go to another options venue, several of which offer a similar feature.[86]

The Exchange's proposal to remove the second and third sentences within Supplementary Material .02 of Options 3, Section 14 [87] is consistent with the Act in that it protects investors and the general public because this new workflow in which the stock or ETF

[74] *See supra* note 32.

[75] *See* proposed Options 3, Section 16(e). In contrast, Complex Orders in an auction mechanism that cannot be executed in accordance with Regulation SHO will be cancelled back and will not rest on the Complex Order Book as provided in Supplementary Material .08 to Options 3, Section 11 and Supplementary Material .09 to Options 3, Section 13.

[76] *See supra* note 37.

[77] Similar to other order types, the Member may elect to enter the order as an Immediate-or-Cancel to avoid resting on the order book or as Day order which could rest on the order book.

[78] A Complex PIM Order is an order entered into the Complex Price Improvement Mechanism as described in Options 3, Section 13(e). *See* MRX Options 3, Section 14(b)(18).

[79] A Complex Facilitation Order is an order entered into the Complex Facilitation Mechanism as described in Options 3, Section 11(c). *See* MRX Options 3, Section 14(b)(16).

[80] A Complex SOM Order is an order entered into the Complex Solicited Order Mechanism as described in Options 3, Section 11(e). *See* MRX Options 3, Section 14(b)(17).

[81] *See* Options 3, Section 12(b).

[82] *See* Options 3, Section 12(d).

[83] Supplementary Material .01 to Options 3, Section 22 applies to Complex Customer Cross Orders.

[84] *See supra* note 41. *See* proposed Supplementary Material .02 to MRX Options 3, Section 14. In addition to amending Supplementary Material .02 to MRX Options 3, Section 14 to require Members to enter into a brokerage agreement, the Exchange proposes to make conforming changes to Supplementary Material .02 to MRX Options 3, Section 14 to delete provisions that allow Members to enter into a brokerage agreement with one or more brokers to route stock orders.

[85] *See supra* note 42.

[86] *See supra* note 43.

[87] The second and third sentences of Supplementary Material .02 of MRX Options 3, Section 14 states, ''A trade of a Stock-Option Order or a Stock-Complex Order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price. When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed.''

component of the order will be routed to NES for execution instead of a third-party broker-dealer will obviate the possibility that the stock execution venue will be unavailable for trading while the order is being processed because of the efficiency created in executing the entire transaction, including stock component validation and reporting, without the need for MRX to utilize a third-party broker-dealer and await a response from the third-party broker-dealer. MRX would no longer be reliant on a third-party broker-dealer to conduct the appropriate checks and, thereafter, relay information to MRX. With the proposed change, NES, the Exchange's affiliate, would conduct the necessary checks and thereafter the Stock-Option Order or Stock-Complex Order would be available for execution. Proposed Options 3, Sections 16(d) and (e) describe the System price checks that will be performed for Stock-Option Orders or Stock-Complex Orders by NES.

Similarly, the Exchange's proposal to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14, instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14, is consistent with the Act. Similar to the discussion above, previously the applicable checks for the stock/ETF component of a Stock-Option Strategy and Stock-Complex Strategy were being performed by a third-party broker-dealer before the migration, which caused a delay that prevented these strategies from participating in the Complex Opening Process. With the proposed change to utilize NES, in lieu of a third-party broker-dealer, Stock-Option Strategies and Stock-Complex Strategies would be able to participate in the Complex Opening Process as NES, the Exchange's affiliate, would conduct the necessary price checks and would be able to make Stock-Option Order or Stock-Complex Order available to participate in the Complex Opening Process without the need for MRX to await a response from a third-party broker-dealer. This amendment is consistent with the Act as it serves to protect investors and the general public by improving the Exchange's processes to make Stock-Option Strategies and Stock-Complex Strategies subject to the Complex Opening Price Determination similar to other order types. The Complex Opening Process seeks to maximize the interest which is traded during the Complex Opening Price Determination process and deliver a rational price for the available interest at the opening. The Complex Opening Price Determination process maximizes the number of contracts executed during the Complex Opening Process and ensures that residual contracts of partially executed orders or quotes are at a price equal to or inferior to the Opening Price.

Trade Value Allowance

The Exchange's proposal to no longer offer Trade Value Allowance is consistent with the Act because very few Members have opted to utilize the Trade Value Allowance and even a smaller percentage of trades were subject to the allowance. Phlx does not have a similar allowance today. In an effort to harmonize its complex order functionality across its Nasdaq affiliated markets, the Exchange proposes to no longer offer the Trade Value Allowance functionality. In addition, the Exchange believes that this proposal removes impediments to and perfect the mechanism of a free and open market and a national market system because the proposal removes an allowance that is no longer necessary; other options exchanges, like Phlx, do not offer such an allowance. With the proposed change to utilize NES, the Exchange would be able to determine stock leg prices, and NES would be able to execute the stock leg at two different prices to ensure that the net price of the execution is within the notional value of the original order, thus eliminating the need for the allowance.

Options 3, Section 7

The Exchange's proposal to make a clarifying change to MRX Options 3, Section 7, Types of Orders and Order and Quote Protocols is consistent with the Act. The Exchange proposes to amend MRX Options 3, Section 7(t) related to QCC with Stock Orders to make clear that QCC with Stock Orders may only be entered through FIX. MRX has 2 order entry protocols, FIX and OTTO. QCC with Stock Orders may not be entered through OTTO. Members are required to have an order entry protocol to enter orders onto MRX.[88] The Exchange's proposal to add rule text to Options 3, Section 7(t) will clarify the functionality, thereby protecting investors and the general public.

Additionally, the Exchange's proposal to amend Supplementary Material .02(d) to Options 3, Section 7 related to Immediate-or-Cancel Orders is consistent with the Act. The Exchange proposes to specifically amend Supplementary Material .02(d)(3) to Options 3, Section 7 to add QCC with Stock Orders and Complex QCC with Stock to the list of order types that have a Time in Force or ''TIF'' of Immediate-or-Cancel or ''IOC.'' Because QCC with Stock Orders and Complex QCC with Stock have a TIF of IOC, these order types will execute either execute on entry or cancel. This amendment will make clear the manner in which the aforementioned order types trade, thereby protecting investors and the general public.

Options 3, Section 12

The Exchange's proposal to amend Options 3, Section 12(e)(4) to clarify that a Member may submit a QCC with Stock Order with a net price for the stock and options components through FIX and may not submit QCC with Stock Orders with separate prices for the stock and options components and that the System will perform the calculation is consistent with the Act because the amended rule text makes clear the format in which these orders may be submitted to the System. Today, the Exchange does not allow FIX to accept QCC with Stock Orders with separate prices for the stock and options components. Each exchange may specify the manner in which certain order types may be submitted to an exchange and the format for submitting those orders. The proposal protects investors and the general public by clarifying the manner in which Members may submit QCC with Stock Orders. The proposed language does not result in a change to the Exchange's System. As noted above, QCC with Stock Orders may not be entered through OTTO. The Exchange notes that requiring QCC with Stock Orders to be submitted through FIX is consistent with proposed Options 3, Section 7(t) which requires Members to enter QCC Orders through FIX.

Options 3, Section 15

The Exchange's proposal to amend its Market Wide Risk Protection within Options 3, Section 15(a)(1)(C) to add certain additional information concerning the current Market Wide Risk Protection along with new language that would apply as a result of the proposed changes to stock-tied functionality is consistent with the Act. The first provision, the total number of orders entered is being amended to simply add ''in the regular order book'' to distinguish the single-leg order book

[88] MRX offers each Member one FIX port at no cost. *See* Options 7, Section 6.

from the complex order book. This amendment is non-substantive and would serve to clarify which order book is impacted.

The proposed changes to MRX Options 3, Section 15(a)(1)(C) protect investors and the public interest by clearly describing the operation of the Market Wide Risk Protection. As discussed above, the functionality of proposed MRX Options 3, Section 15(a)(1)(C)(2) through (5) is consistent with functionality that currently exists on ISE.[89] Proposed MRX Options 3, Section 15(a)(1)(C)(6) adds the total number of contracts traded in Stock-Option Orders and Stock-Complex Orders to the Market Wide Risk Protection. This change protects investors and the general public because this risk protection by expanding the scope of the Market Wide Risk Protection to include additional contracts which will reduce risk associated with system errors or market events that may cause Members to send a large number of orders, or receive multiple, automatic executions, before they can adjust their exposure in the market. The Exchange notes that QCC Orders, Complex Qualified QCC Orders, QCC with Stock Orders, and Complex QCC with Stock Orders are considered, where applicable, in Options 3, Section 15(a)(1)(C)(1), (2), (4) and (5). Members will continue to be provided with the flexibility needed to appropriately tailor the Market Wide Risk Protection to their respective risk management needs.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Re-Introduction of Stock-Related Strategies and Elimination of Trade Value Allowance

Stock-Tied Functionality

The Exchange's proposal to amend its stock-tied functionality and recommence offering this functionality does not impose an intra-market undue burden on competition as all Members may utilize the stock-tied functionality and would be uniformly subject to the requirements associated with executing a stock-tied transaction. Also, in lieu of this proposed arrangement with NES, Members could choose, instead, the following alternatives: (i) avoid using Complex Orders that involve stock/ETFs, (ii) use a trading floor to execute Complex Order with stock, or (iii) go to another options venue, several of which offer a similar feature.[90] The Exchange's proposal to amend its stock-tied functionality and recommence offering this functionality does not impose an inter-market undue burden on competition as other options exchanges today may offer a similar process for handling stock-tied transactions. Today, Phlx offers an identical process for handling stock-tied transactions.[91]

The Exchange's proposal to remove rule text from Options 3, Section 14 that states, ''When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed,'' does not impose an undue burden on intra-market competition because the proposed new functionality will apply equally to all Members transacting Complex Orders on MRX. All Stock-Option Orders and Stock-Complex Orders will be handled in the same manner by the System. The Exchange's proposal to remove rule text from Options 3, Section 14 does not impose an undue burden on inter-market competition as the scope of this change is limited to MRX and its relationship with a broker-dealer handling the stock component of the order.

The Exchange's proposal to remove the rule text within Supplementary Material .02 of Options 3, Section 14 [92] does not impose an undue burden on intra-market competition because all Members will have the ability to use the new workflow in which the stock or ETF component of the order will be routed to NES for execution instead of a third-party broker-dealer. The proposed new functionality will apply equally to all Members transacting Complex Orders on MRX. All Stock-Option Orders and Stock-Complex Orders will be handled in the same manner by the System. Additionally, this proposed amendment will not impose an undue burden on inter-market competition because all market participants that direct orders to MRX will have their orders handled in a similar manner. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report the stock or ETF component of a Complex Order.

Similarly, the Exchange's proposal to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14, instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14, does not impose an undue burden on intra-market competition because all Stock-Option Strategies and Stock-Complex Strategies will be subject to the same process. All Stock-Option Orders and Stock-Complex Orders will be transacted in the Complex Opening by the System. The Exchange's proposal to amend Supplementary Material .04 to Options 3, Section 14 to provide that Stock-Option Strategies and Stock-Complex Strategies will open pursuant to the Complex Opening Price Determination described in Supplementary Material .05 to Options 3, Section 14, instead of the Complex Uncrossing Process described in Supplementary Material .06(b) to Options 3, Section 14 does not impose an undue burden on inter-market competition because other options markets may also elect to permit similar order types to trade in their complex opening process.

Trade Value Allowance

The Exchange's proposal to no longer offer Trade Value Allowance does not impose an undue burden on intra-market competition because no Member would be able to utilize the Trade Value Allowance. The proposed stock-tied functionality is identical to Phlx Options 3, Sections 13(b)(10)(ii) and 14(a)(i) with respect to utilizing NES to process and report the stock or ETF component of a Complex Order.

The Exchange's proposal to no longer offer Trade Value Allowance does not impose an undue burden on inter-market competition because other

[89] *See* ISE Options 3, Section 15(a)(1)(C)(2) through (5).

[90] *See supra* note 43.

[91] *See* Phlx Options 3, Sections 13(b)(10) and 14(a)(i).

[92] Supplementary Material .02 of Options 3, Section 14 states that, ''Members may also indicate preferred execution brokers, and such preferences will determine order routing priority whenever possible. A trade of a Stock-Option Order or a Stock-Complex Order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price. When a Stock-Option Order or Stock-Complex Order has been matched with another Stock-Option Order or Stock-Complex Order that is for less than the full size of the Stock-Option Order or Stock-Complex Order, the full size of the Stock-Option Order or Stock Complex Order being processed by the stock execution venue will be unavailable for trading while the order is being processed.''

options exchanges could choose to offer a similar functionality.

Options 3, Section 7

The Exchange's proposal to make a clarifying change to MRX Options 3, Section 7, Types of Orders and Order and Quote Protocols does not impose an undue burden on intra-market competition because all Members may enter QCC with Stock Orders through FIX and the Exchange provides each Member with one FIX Port at no cost.

The Exchange's proposal to make a clarifying change to MRX Options 3, Section 7, Types of Orders and Order and Quote Protocols does not impose an undue burden on inter-market competition because other options exchanges may also create order entry protocols for their markets.

Additionally, the Exchange's proposal to amend Supplementary Material .02(d) to Options 3, Section 7 to add QCC with Stock Orders and Complex QCC with Stock to the list of order types that have a Time in Force or ''TIF'' of Immediate-or-Cancel or ''IOC'' does not impose an undue burden on intra-market competition because this amendment reflects the description of these particular order types which will either execute on entry or cancel. All QCC with Stock Orders and Complex QCC with Stock that are entered on MRX will be handled in the same manner. Further, all Members may trade QCC with Stock Orders and Complex QCC with Stock Orders. Additionally, the Exchange's proposal to amend Supplementary Material .02(d) to Options 3, Section 7 related to Immediate-or-Cancel Orders does not impose an undue burden on inter-market competition because other options markets may adopt a similar requirement for such orders.

Options 3, Section 12

The Exchange's proposal to amend Options 3, Section 12(e)(4) to clarify that a Member may submit a QCC with Stock Order with a net price for the stock and options components through FIX and may not submit QCC with Stock Orders with separate prices for the stock and options components and the System will calculate the individual component prices does not impose an intra-market burden on competition because all Members are required to uniformly submit QCC with Stock Orders in this fashion.

The Exchange's proposal to amend Options 3, Section 12(e)(4) to clarify that a Member may submit a QCC with Stock Order with a net price for the stock and options components through FIX and may not submit QCC with Stock Orders with separate prices for the stock and options components and the System will calculate the individual component prices does not impose an inter-market burden on competition because each exchange may specify the manner in which certain order types may be submitted to an exchange and the format for submitting those orders. Also, requiring QCC with Stock Orders to be submitted through FIX is consistent with proposed Options 3, Section 7(t) which requires Members to enter QCC Orders through FIX.

Options 3, Section 15

The Exchange's proposal to amend its Market Wide Risk Protection within Options 3, Section 15(a)(1)(C) to add certain additional information concerning the current Market Wide Risk Protection along with new language does not impose an undue burden on intra-market competition because the counting programs within the Market Wide Risk Protections will apply equally to all Members. The proposal to amend the Market Wide Risk Protection does not impose an undue burden on inter-market competition because other options exchanges may adopt similar risk protections for their members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act[93] and subparagraph (f)(6) of Rule 19b–4 thereunder.[94]

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 shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–MRX–2023–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MRX–2023–10. 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 (*https://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 a.m. and 3 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

[93] 15 U.S.C. 78s(b)(3)(A)(iii).

[94] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

SR–MRX–2023–10 and should be submitted on or before July 12, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[95]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–13108 Filed 6–20–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97723; File No. SR–BOX–2023–16]

Self-Regulatory Organizations; BOX Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule for Trading on the BOX Options Market LLC Facility To Offer Ad-Hoc Historical Requests for the Intraday Open-Close Data Report and Adopt Fees for This Data

June 14, 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 June 12, 2023, BOX Exchange LLC (''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to section 19(b)(3)(A)(ii) of the Act,[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. 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 the Substance of the Proposed Rule Change

The Exchange is filing with the Securities and Exchange Commission (''Commission'') a proposed rule change to amend the Fee Schedule to amend the Fee Schedule [sic] on the BOX Options Market LLC (''BOX'') options facility to offer ad-hoc historical requests for the Intraday Open-Close Data Report and adopt fees for this data. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's internet website at *http://boxexchange.com.*

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 recently adopted a new data product on BOX known as the Intraday Open-Close Data Report.[5] When the Exchange established the Intraday Open-Close Data Report data, it did not include ad-hoc requests for the Intraday Open-Close historical data. Since establishing the Intraday Open-Close Data Report, Participants and non-Participants have expressed interest in ad-hoc historical requests for the Intraday Open-Close Data Report. As such, the Exchange now proposes to offer ad-hoc historical requests for the Intraday Open-Close Data Report and adopt fees for this data. Specifically, the Exchange proposes to assess a $1,000 fee per request per month for the historical data.

Similar to the ad-hoc requests for the End-of-Day Open Close Data Report, ad-hoc requests for the Intraday Open-Close Data Report can be for any number of months beginning with January 2018 for which the data is available.[6] The proposed fee will apply to both Participants and non-Participants. The Exchange notes that another exchange provides similar data that may be purchased on an ad-hoc basis and is similarly priced.[7]

By way of background, the Exchange currently offers the Intraday Open-Close Data Report to Participants and non-Participants, which is a volume summary file for trading activity on BOX. The Exchange notes that the file contains proprietary BOX trade data and does not include trade data from any other exchanges. It is also a historical data product and not a real time data feed. The Intraday Open-Close Data Report is produced and updated every 10 minutes during the trading day. Data is captured in ''snapshots'' taken every 10 minutes throughout the trading day and available to subscribers within five minutes of the conclusion of each 10-minute period. Each update will represent combined data captured from the current ''snapshot'' and all previous ''snapshots'' and thus will provide open-close data on an aggregate basis. The Intraday Open-Close Data Report aggregates the volume by origin (Public Customer, Professional Customer, Broker Dealer, and Market Maker), buying/selling, and opening/closing criteria. Public Customer and Professional Customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). Ad-hoc requests for Intraday Open-Close Data Report will provide the same information for a requested historical time period for any number of months beginning with January 2018.[8]

This product is offered to Participants on a completely voluntary basis in that the Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase the Intraday Open-Close Data Report or

[95] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] *See* Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR–BOX–2023–09).

[6] For example, a Participant or non-Participant that requests historical Intraday Open-Close Data for the months of January 2018 and February 2018, would be assessed a total of $2,000. Participants and non-Participants are permitted to make ad-hoc requests for any number of days within a month for the Intraday Open-Close Data Report. For example, a Participant or non-Participant may make an ad-hoc request for the Intraday Open-Close Data Report from May 1st to May 20th. The accounting will be prorated based on the number of trading days in the month versus the number of trading days received. The Participant or non-Participant will be charged for the request on a prorated basis. The Exchange is proposing to allow ad-hoc requests for the Intraday Open-Close Data Report for any month starting January 2018, as this is what is currently offered for End-of-Day historical data requests. The Exchange notes that it may make historical data prior to January 2018 available in the future and that such historical data would be available to all Participants or non-Participants.

[7] *See* Miami International Securities Exchange, LLC (''MIAX'') Fee Schedule. MIAX assesses $1,000 per request per month for the Intra-Day Ad-Hoc Request for historical data.

[8] The historical monthly reports of the Intraday Open-Close Data Report will contain all series in an underlying security if the security had volume on BOX during that month. The Intraday Open-Close Data Report file format specifications can be found at *www.boxoptions.com.*

make ad-hoc requests for the Intraday Open-Close Data Report only if they voluntarily choose to do so. It is a business decision of each potential subscriber whether to subscribe to the Intraday Open-Close Data Report and/or make ad-hoc requests for the Intraday Open-Close Data Report.

The Exchange also proposes to make a clarifying change to the End-of-Day Ad-hoc Request (historical data) section of the BOX Fee Schedule. Specifically, the Exchange proposes to add that mid-month requests for End-of Day historical data will be prorated based on the number of trading days in the month versus the number of trading days received. The Exchange notes that it is not proposing to change an existing practice, as this is how mid-month requests for End-of-Day historical data are currently processed. The Exchange believes this will add transparency and clarity to the Fee Schedule with respect to how fees are assessed for End-of-Day Ad-hoc Requests.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of section 6(b) of the Act,[9] in general, and section 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among BOX Participants and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange also believes that its proposed changes to its Fee Schedule concerning fees for the Intraday Ad-hoc Open-Close Data Report is consistent with section 6(b) of the Act,[11] in general, and furthers the objectives of section 6(b)(4) of the Act,[12] in particular, in that it is an equitable allocation of dues, fees and other charges among its Participants and other recipients of Exchange data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, the Intraday Open-Close Data Report further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. The data product also promotes increased transparency through the dissemination of the Intraday Ad-hoc Open-Close Data Report. Particularly, information regarding opening and closing activity across different option series during the trading day may indicate investor sentiment, which may allow market participants to make better informed trading decisions throughout the day. Subscribers to the data may also be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes the Intraday Open-Close Data Report provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and completely optional. Moreover, another exchange offers a similar data product.[13] This proposal seeks to respond to Participant requests for ad-hoc Intraday Open-Close data and adopt a fee of $1,000 per request per month for such requests.

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. Based on publicly available information, for the month of March 2023, no single options exchange had more than approximately 16% of the equity options market share and the Exchange represented only approximately 6.19% of the equity options market share for the month of May 2023.[14] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.'' [15] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products.

The Exchange believes the proposed fee is reasonable as the proposed fee is similar to a fee currently assessed by another exchange that provides a similar data product.[16] Further, the Exchange notes that an ad-hoc request for the Intraday Day Open-Close Data Report is entirely optional and if a market participant views another exchange's data as more attractive than the proposed Intraday Open-Close data product, then such market participant can choose not to purchase BOX's data and instead purchase another exchange's data product, which offer similar data points, albeit based on that other market's trading activity.

The Exchange also believes that its proposal to respond to market participant requests and adopt fees for ad-hoc requests for the Intraday Open-Close Data Report is reasonable as this would further support the current offering of the Intraday Open-Close Data Report that is designed to aid investors by providing insight into trading on BOX. The proposed ad-hoc requests for Intraday Open-Close Data Report would provide interested options market participants with valuable information about opening and closing transactions executed on BOX, similar to other historical trade data products offered by competing options exchanges. In turn, this data would assist market participants in gauging investor sentiment and trading activity, resulting in potentially better-informed trading decisions. As noted above, users may also use such data to create and test trading models and analytical strategies.

Providing market data, such as the Intraday Open-Close Data Report, is also a means by which exchanges compete to attract business. Subscribers that receive the Intraday Open-Close Data Report in response to an ad hoc request, may use such data to evaluate the usefulness of BOX's Intraday Open-Close Data Report and decide, based on that data, whether to subscribe to the Intraday Open-Close Data Report on a monthly basis. To the extent that the Exchange is successful in attracting subscribers for the Intraday Open-Close Data Report through this proposal, it may earn trading revenues and further enhance the value of its data products. If the market deems the proposal to be unfair or inequitable, firms can diminish or discontinue their use of the data and/or avail themselves

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

[13] *See supra* note 7.

[14] *See* Cboe Global Markets U.S. Options Market Month-to-Date Volume Summary (May 5, 2023), available at *https://markets.cboe.com/us/options/market_statistics/*.

[15] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[16] *See supra* note 7.

of similar products offered by other exchanges.[17]

The Exchange believes the proposed fee is equitable and not unfairly discriminatory as the fee would apply equally to all users who choose to purchase the historical data. The Exchange's proposed fee would not differentiate between subscribers that purchase the ad-hoc Intraday Open-Close Data Report and is set at a modest level that would allow any interested Participant or non-Participant to purchase such data based on their business needs.

The Exchange reiterates that the decision as to whether or not to purchase the ad-hoc Intraday Open-Close Data Report is entirely optional for all potential subscribers. Indeed, no market participant is required to purchase the ad-hoc Intraday Open-Close Data Report, and the Exchange is not required to make the ad-hoc Intraday Open-Close Data Report available to all investors. Rather, the Exchange is voluntarily making the ad-hoc Intraday Open-Close Data Report available, as requested by customers, and market participants may choose to receive (and pay for) this data based on their own business needs. Potential purchasers may request the data at any time if they believe it to be valuable or may decline to purchase such data.

Lastly, the Exchange believes that the proposed change to the End-of-Day Ad-Hoc request is reasonable and appropriate as the added language will provide clarity and transparency with respect to mid-month requests for this End-of-Day Ad-hoc Requests.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell a data product similar to those offered by another competitor options exchange.[18] The Exchange also does not believe the proposed fees would cause any unnecessary or in appropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed fee applies uniformly to any purchaser, in that it does not differentiate between subscribers that purchase Intraday Open-Close Data Report. The proposed fees are set at a modest level that would allow any interested Participant or non-Participant to purchase such data based on their business needs.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Exchange Act[19] and Rule 19b–4(f)(2) thereunder,[20] because it establishes or changes a due, or fee.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend the rule change if it appears to the Commission that the action is necessary or appropriate in the public interest, for the protection of investors, or would otherwise further the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–BOX–2023–16 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–BOX–2023–16. 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 (*https://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 a.m. and 3 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–BOX–2023–16 and should be submitted on or before July 12, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–13105 Filed 6–20–23; 8:45 am]

BILLING CODE 8011–01–P

[17] *Id.*

[18] *Id.*

[19] 15 U.S.C. 78s(b)(3)(A)(ii).

[20] 17 CFR 240.19b–4(f)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97724; File No. SR–MEMX–2023–10]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the Method by Which the Exchange Provides Certain Rebates

June 14, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 1, 2023, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members [3] (the ''Fee Schedule'') pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on June 1, 2023. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Rule 1.5(p).

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to modify the method by which the Exchange provides the rebate under Liquidity Provision Tiers 4, 5, and 6 such that if a Member achieves any of the criteria under Liquidity Provision Tiers 4, 5, or 6 in a given month, it would receive that rebate for that month and in the following month. As described further below, this differs from the current practice, whereby a Member receives the applicable rebate at the end of the month if it achieved the applicable criteria during that month, and the process resets the following month.

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, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading.[4] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 3% of the overall market share.[5] The Exchange in particular operates a ''Maker-Taker'' model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower 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.

[4] Market share percentage calculated as of June 1, 2023. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[5] *Id.*

Liquidity Provision Tiers

The Exchange currently provides a base rebate of $0.0018 per share for executions of Added Displayed Volume.[6] The Exchange also currently offers Liquidity Provision Tiers 1–6 under which a Member may receive an enhanced rebate for executions of Added Displayed Volume by achieving the corresponding required volume criteria for each such tier. The Exchange now proposes to modify the method by which it provides the rebate under Liquidity Provision Tiers 4, 5, and 6, as further described below.

With respect to Liquidity Provision Tier 4, the Exchange currently provides an enhanced rebate of $0.0029 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving: (1) an ADAV [7] that is equal to or greater than 0.15% of the TCV; [8] or (2) a Displayed ADAV [9] that is equal to or greater than 0.02% of the TCV and a Step-Up Displayed ADAV [10] of the TCV from April 2023 that is equal to or greater than 50% of the Member's April 2023 Displayed ADAV of the TCV.[11]

With respect to Liquidity Provision Tier 5, the Exchange currently provides an enhanced rebate of $0.0027 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving an ADAV that is

[6] The base rebate for executions of Added Displayed Volume is referred to by the Exchange on the Fee Schedule under the existing description ''Added displayed volume'' with a Fee Code of ''B'', ''D'' or ''J'', as applicable, on execution reports.

[7] As set forth on the Fee Schedule, ''ADAV'' means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis, and ''Displayed ADAV'' means ADAV with respect to displayed orders.

[8] As set forth on the Fee Schedule, ''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.

[9] As set forth on the Fee Schedule, ''Non-Displayed ADAV'' means ADAV with respect to non-displayed orders (including orders subject to Display-Price Sliding that receive price improvement when executed and Midpoint Peg orders).

[10] As set forth on the Fee Schedule, ''Step-Up Displayed ADAV'' means Displayed ADAV in the relevant baseline month subtracted from current Displayed ADAV.

[11] The pricing for Liquidity Provision Tier 4 is referred to by the Exchange on the Fee Schedule under the existing description ''Added displayed volume, Liquidity Provision Tier 4'' with a Fee Code of ''B4'', ''D4'' or ''J4'', as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

equal to or greater than 0.075% of the TCV.[12] With respect to Liquidity Provision Tier 6, the Exchange currently provides an enhanced rebate of $0.0024 per share for executions of Added Displayed Volume for Members that qualify for such tier by achieving a Displayed ADAV that is equal to or greater than 0.007% of the TCV and has a Step-Up Displayed ADAV of the TCV from May 2023 that is equal to or greater than 50% of the Member's May 2023 Displayed ADAV of the TCV.[13]

The Exchange is not proposing to modify the rebates provided or qualification criteria of Liquidity Provision Tiers 4, 5, and 6 as described above. However, the Exchange now proposes to modify the method by which it will provide the rebates under Liquidity Provision Tiers 4, 5, and 6 and it will indicate this in a note under the Liquidity Provision Tiers pricing table on the Fee Schedule. Specifically, the Exchange will note: ''*Members that qualify for Tier 4, 5, or 6 based on activity in a given month will also receive the associated Tier 4, 5, or 6 rebate during the following month.*'' Effectively, this means that if a Member achieves the applicable criteria under any of the Liquidity Provision Tiers 4, 5, or 6 during a given month, that Member will receive that rebate for the total amount of Added Displayed Volume executed during that month and in the following month, even if they do not achieve the applicable criteria under that same Liquidity Provision Tier during that following month. This is different from the current practice, whereby the Exchange calculates Members' overall ADAV on a monthly basis, and Members that qualify for a Liquidity Provision Tier by achieving the applicable criteria receive the applicable enhanced rebate per share for all executions of Added Displayed Volume in that previous month. Accordingly, Members do not know whether they will receive the enhanced rebate at the time of execution, but rather, receive it at the end of the month based on their activity during that month.

To illustrate, the Exchange offers the following example: Under the current method, at the end of June 2023, the Exchange would calculate a Member's total ADAV for June 2023 and if that Member met either of the criteria under Liquidity Provision Tier 4, the Member would receive the enhanced rebate of $0.0029 per share for the Added Displayed Volume it executed in June 2023. Under the new model, the Exchange will continue to calculate a Member's total ADAV at the end of June 2023, and will continue to provide $0.0029 per share for the Member's Added Displayed execution volume in June 2023, but it will also provide $0.0029 per share for the Added Displayed Volume the Member executes in July 2023 (regardless of the Member's activity in July 2023). Accordingly, in this example, the Member will be aware of the rebate it will receive under Liquidity Provision Tier 4 during the month of July 2023, regardless of what their July 2023 ADAV is, because it is awarded based on its June 2023 ADAV. The Exchange notes that although the enhanced rebate of $0.0029 per share would be provided to the Member in July of 2023, if the Member in the example above did not qualify for Liquidity Provision Tier 4 based on their July 2023 ADAV, the Member would no longer qualify for the enhanced rebate of $0.0029 per share for the Added Displayed Volume the Member executes in August 2023.

The tiered pricing structure for executions of Added Displayed Volume under the Liquidity Provision Tiers provides an incremental incentive for Members to strive for higher volume thresholds to receive higher enhanced rebates for such executions and, as such, is intended to encourage Members to maintain or increase their order flow, primarily in the form of liquidity-adding volume, to the Exchange, thereby contributing to a deeper and more liquid market to the benefit of all Members and market participants. The Exchange believes that the Liquidity Provision Tiers reflect a reasonable and competitive pricing structure that is right-sized and consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity. The proposed change does not modify any criteria or rebate provided under any of the Liquidity Provision Tiers, rather, it modifies the process by which rebates paid under Liquidity Provision Tier 4, 5, and 6 are awarded to Members, allowing Members to anticipate whether such rebate will apply at the time of execution based on whether the criteria was achieved in the prior month. The Exchange believes this method will provide Members with additional certainty when trading on the Exchange, which in turn, will incentivize Members to achieve certain volume thresholds on the Exchange on an ongoing basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of section 6 of the Act,[14] in general, and with sections 6(b)(4) and 6(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. The Exchange believes the proposal continues to reflect a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants.

The Exchange notes that volume-based incentives and discounts (such as tiers) have been widely adopted by exchanges (including the Exchange), and are reasonable, equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes that the proposed modification of the way it provides the rebate under Liquidity Provision Tiers 4, 5, and 6 is reasonable, equitable and not unfairly discriminatory for these same reasons, as the tiers continue to provide Members with incremental incentives to achieve certain volume thresholds on the Exchange, are available to all Members on an equal

[12] The pricing for Liquidity Provision Tier 5 is referred to by the Exchange on the Fee Schedule under the existing description ''Added displayed volume, Liquidity Provision Tier 5'' with a Fee Code of ''B5'', ''D5'' or ''J5'', as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

[13] The pricing for Liquidity Provision Tier 6 is referred to by the Exchange on the Fee Schedule under the existing description ''Added displayed volume, Liquidity Provision Tier 6'' with a Fee Code of ''B6'', ''D6'' or ''J6'', as applicable, to be provided by the Exchange on the monthly invoices provided to Members.

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(4) and (5).

basis, and, as described above, are reasonably designed to encourage Members to maintain or increase their order flow to the Exchange with an added layer of certainty in the rebate they will receive, if applicable.

The Exchange also believes that the proposed modification is appropriate to apply only to Liquidity Provision Tiers 4, 5, and 6 at this time given that the enhanced rebates provided under those specific Liquidity Provision Tiers (as opposed to Liquidity Provision Tiers 1, 2, and 3 [16]) are each less than $0.0030 per share, which is the standard fee charged by the Exchange for orders that remove liquidity and also the highest transaction fee allowed by the Commission under Rule 610(c)(1) of Regulation NMS.[17] The Exchange considers this distinction relevant in light of the fact that this is the first time the Exchange will be providing rebates in this manner, and as such, would like to initiate this change under Liquidity Provision Tiers that provide rebates below the aforementioned standard fee for removing liquidity. Again, the Exchange believes that the application of its methodology of awarding rebates under Liquidity Provision Tiers 4, 5, and 6 is reasonable, equitable, and not unfairly discriminatory, as there is a legitimate distinction between the rebates provided under these Liquidity Provision Tiers as opposed to Liquidity Provision Tiers 1, 2, and 3, and the opportunity to qualify for the Liquidity Provision Tiers is available equally to all Members of the Exchange.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of sections 6(b)(4) and 6(b)(5) of the Act [18] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow to the Exchange, which the Exchange believes would promote price discovery and enhance liquidity and market quality on the Exchange to the benefit of all Members and market participants. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers 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.'' [19]

Intramarket Competition

As discussed above, the Exchange believes that the proposal would maintain a tiered pricing structure that is still consistent with the Exchange's overall pricing philosophy of encouraging added and/or displayed liquidity and would incentivize market participants to direct additional order flow to the Exchange through volume-based tiers, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants.

The Exchange does not believe that the proposed change would impose any burden on intramarket competition because such change will incentivize members to submit additional order flow, thereby contributing to a more robust and well-balanced market ecosystem on the Exchange to the benefit of all Members as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for each of the Liquidity Provision Tiers is still available to all Members that meet the associated volume requirements in any month. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted 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. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels and processes at those other venues to be more favorable. As described above, the proposed change represents a competitive proposal through which the Exchange is seeking to incentivize market participants to direct additional order flow to the Exchange through volume-based tier rebates that are awarded based on a prior month's activity, thus allowing Members to have greater certainty of the rebate that they will receive when trading on the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing structures and incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities

[16] Currently, the rebates provided under Liquidity Provision Tiers 1, 2, and 3 are $0.00335, $0.00325, and $0.0031 per share, respectively.

[17] 17 CFR 242.610.

[18] 15 U.S.C. 78f(b)(4) and (5).

[19] *See supra* note 18.

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.'' [20] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *SEC,* 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'. . . .''.[21] Accordingly, the Exchange does not believe its proposed rule 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)(ii) of the Act [22] and Rule 19b–4(f)(2) [23] 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 shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

[20] *Id.*

[21] *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–NYSE–2006–21)).

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

[23] 17 CFR 240.19b–4(f)(2).

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 (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–MEMX–2023–10 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MEMX–2023–10. 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 (*https://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 a.m. and 3 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–MEMX–2023–10 and should be submitted on or before July 12, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–13106 Filed 6–20–23; 8:45 am]

BILLING CODE 8011–01–P

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97725; File No. SR–NYSE–2023–22]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 308

June 14, 2023.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on June 5, 2023, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 308 to correct an obsolete reference. The proposed rule change is available on the Exchange's website at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to proposes to amend Rule 308 (Acceptability Proceedings) to correct an obsolete reference.

In March 2023, the Exchange amended Rule 308 to reflect the consolidation of the Acceptability Board with the Hearing Board as defined in Rule 9232(b) (Criteria for Selection of Panelists, Replacement Panelists, and Floor-Based Panelists).[4] At the same time, the Exchange removed the reference to offices of a member in the second paragraph of Rule 308(d) by deleting ''member or'' from the final sentence of that paragraph.[5] In an omission, it did not delete ''member or'' from the final sentence of the first paragraph of Rule 308(d). It proposes to do so now.

The Exchange proposes to delete the reference because under Rule 2(a) (''Member,'' ''Membership,'' ''Member Firm,'' etc.), a member is a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the trading floor of the Exchange or any facility thereof. As such, a member cannot be a license holder or a registered broker-dealer, and thus would not have an office that ''engages in a business involving substantial direct contact with securities customers'' as set forth in Rule 308(d), unlike member organizations.[6]

The proposed change would be consistent with both the change made to the second paragraph of Rule 308(d) in the March Filing and with changes made to Rule 308-Equities(d) (Acceptability Proceedings) of the Exchange's affiliate NYSE American LLC.[7]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that deletion of the obsolete reference to a member in Rule 308(d) would increase the clarity and transparency of the Exchange's rules and remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public could more easily navigate and understand the Exchange rules. The Exchange believes that it would alleviate any possible confusion that could result from the current reference to the offices of a member or member organization in paragraph one of Rule 308(d) and the offices of a member organization in paragraph two of Rule 308(d). The Exchange further believes that the proposed change would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change does not address competitive issues but rather proposes the deletion of an obsolete reference in Rule 308(d).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[12] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[14] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[4] *See* Securities Exchange Act Release No. 97206 (March 27, 2023), 88 FR 19334 (March 31, 2023) (SR–NYSE–2023–19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 308 as Defined in Rule 9232(b) and Delete and Replace Certain Obsolete References). The rule change included the deletion and, where applicable, replacement of obsolete references in the NYSE rules and Listed Company Manual.

[5] *See* Exhibit 5 of SR–NYSE–2023–19 (March 17, 2023), p. 37 (''March Filing'').

[6] *See* Rules 2(a) (definition of member); 2(b)(i) (defining a member organization as a registered broker or dealer); & 300(a) (providing that trading licenses are issued to member organizations). Accordingly, references to offices of a Member Organization are not proposed to be deleted.

[7] *See* Exhibit 5 of SR–NYSEAmer–2023–29 (May 16, 2023), p. 30. *See also* Securities Exchange Act Release No. 97581 (May 25, 2023), 88 FR 35968 (June 1, 2023) (SR–NYSEAmer–2023–29) (Notice of Filing and Immediate Effectiveness of Proposed Change to Amend Rule 9232 and Rule 308-Equities).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A)(iii).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] 15 U.S.C. 78s(b)(2)(B).

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include file number SR–NYSE–2023–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSE–2023–22. 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 (*https://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 a.m. and 3 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–NYSE–2023–22 and should be submitted on or before July 12, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–13107 Filed 6–20–23; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97727; File No. SR–MIAX–2023–19]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change To Amend Exchange Rule 307, Position Limits

June 14, 2023.

On April 21, 2023, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 307, Position Limits, to establish a process for adjusting option position limits following a stock split or reverse stock split in the underlying security. The proposed rule change was published for comment in the **Federal Register** on May 8, 2023.[3] The Commission has received no comment letters regarding the proposed rule change.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is June 22, 2023.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, pursuant to section 19(b)(2) of the Act,[5] the Commission designates August 6, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–MIAX–2023–19).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–13109 Filed 6–20–23; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 97421 (May 2, 2023), 88 FR 29725.

[4] 15 U.S.C. 78s(b)(2).

[5] *Id.*

[6] 17 CFR 200.30–3(a)(31).

DEPARTMENT OF STATE

[Public Notice: 12102]

Notice of Determinations; Culturally Significant Objects Being Imported for Exhibition—Determinations: ''Remedios Varo: Science Fictions'' Exhibition

SUMMARY: Notice is hereby given of the following determinations: I hereby determine that certain objects being imported from abroad pursuant to an agreement with their foreign owner or custodian for temporary display in the exhibition ''Remedios Varo: Science Fictions'' at The Art Institute of Chicago, in Chicago, Illinois, and at possible additional exhibitions or venues yet to be determined, are of cultural significance, and, further, that their temporary exhibition or display within the United States as aforementioned is in the national interest. I have ordered that Public Notice of these determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Reed Liriano, Program Coordinator, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6471; email: *section2459@state.gov*). The mailing address is U.S. Department of State, L/PD, 2200 C Street NW (SA–5), Suite 5H03, Washington, DC 20522–0505.

SUPPLEMENTARY INFORMATION: The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28,

2000, and Delegation of Authority No. 523 of December 22, 2021.

Nicole L. Elkon,

Deputy Assistant Secretary for Professional and Cultural Exchanges, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2023–13139 Filed 6–20–23; 8:45 am]

BILLING CODE 4710–05–P

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1333X]

Cleveland & Cuyahoga Railway, LLC—Discontinuance of Service Exemption—in Cuyahoga County, Ohio

On June 1, 2023, Cleveland & Cuyahoga Railway, LLC (CCR), a Class III rail carrier, filed a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to discontinue service over approximately 10.4 miles of rail line owned by Wheeling & Lake Erie Railway Company (WLER) in Cuyahoga County, Ohio, extending from milepost 15.5 at Falls Junction in Glenwillow, Ohio, to milepost 5.1 in Cleveland, Ohio (the Line). The Line traverses U.S. Postal Service Zip Codes 44105, 44113, 44127, 44128, 44131, 44137, 44139, and 44146.

CCR states that it provided service on the Line pursuant to a lease with WLER,[1] which the parties terminated by mutual agreement effective May 31, 2023. (Pet. 4.) According to CCR, WLER has resumed rail operations over the Line as a common carrier. (*Id.*) CCR states that there currently is one shipper on the Line, which will continue to be served by WLER. (*Id.* at 8.)

CCR states that, based on the information in its possession, the Line does not contain federally granted rights-of-way and that any documentation in its possession will be made available to those requesting it. (*Id.* at 4.)

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by September 19, 2023.

Because this is a discontinuance proceeding and not an abandonment, interim trail use/rail banking and public use conditions are not appropriate. Because there will be environmental review during any subsequent abandonment, this discontinuance does not require an environmental review. *See* 49 CFR 1105.6(c)(5), 1105.8(b).

Any offer of financial assistance (OFA) for subsidy under 49 CFR 1152.27(b)(2) will be due no later than 120 days after the filing of the petition for exemption, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner.[2] Persons interested in submitting an OFA must first file a formal expression of intent to file an offer by June 30, 2023, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(1)(i).

All filings in response to this notice must refer to Docket No. AB 1333X and must be filed with the Surface Transportation Board either via e-filing on the Board's website or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on CCR's representative, Karl Morell, Karl Morell & Associates, 440 1st Street NW, Suite 440, Washington, DC 20001. Replies to the petition are due on or before July 11, 2023.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment and discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis at (202) 245–0294. If you require accommodation under the Americans with Disabilities Act, please call (202) 245–0245.

Board decisions and notices are available at *www.stb.gov.*

Decided: June 15, 2023.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Tammy Lowery,

Clearance Clerk.

[FR Doc. 2023–13178 Filed 6–20–23; 8:45 am]

BILLING CODE 4915–01–P

[1] *See Cleveland & Cuyahoga Ry.—Change in Operator Exemption Containing Interchange Commitment—Cleveland Com. R.R.,* FD 36287 (STB served Aug. 15, 2019) (authorizing CCR to replace Cleveland Commercial Railroad Company, LLC, as lessee and operator of the Line).

[2] The filing fee for OFAs can be found at 49 CFR 1002.2(f)(25).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent of Waiver With Respect to Land; Indy South Greenwood Airport, Greenwood, Indiana

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: The FAA is considering a proposal to change approximately 3.2 acres of airport land from aeronautical use to non-aeronautical use and to authorize the sale of airport property located at Indy South Greenwood Airport, Greenwood, IN. The aforementioned land is not needed for aeronautical use. The subject property is located on the north end of the airport on the west side of Runway 19 and is proposed to be sold for the development of a restaurant facility.

DATES: Comments must be received on or before July 21, 2023.

ADDRESSES: Documents are available for review by appointment at the FAA Chicago Airports District Office, Melanie Myers, Program Manager, 2300 East Devon Avenue, Des Plaines, IL 60018, Telephone: (847) 294–7525/Fax: (847) 294–7046.

Written comments on the Sponsor's request may be submitted using any of the following methods:

- *Federal eRulemaking Portal:* Go to *https://www.regulations.gov,* and follow the instructions for sending your comments electronically.
- *Mail:* Melanie Myers, Program Manager, Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, Des Plaines, IL 60018.
- *Hand Delivery:* Deliver to mail address above between 8 a.m. and 5 p.m. Monday through Friday, excluding Federal holidays.
- *Fax:* (847) 294–7046.

FOR FURTHER INFORMATION CONTACT: Melanie Myers, Program Manager, Federal Aviation Administration, Chicago Airports District Office, 2300 East Devon Avenue, Des Plaines, IL 60018. Telephone Number: (847) 294–7525/FAX Number: (847) 294–7046.

SUPPLEMENTARY INFORMATION: In accordance with section 47107(h) of Title 49, United States Code, this notice is required to be published in the **Federal Register** 30 days before modifying the land-use assurance that requires the property to be used for an aeronautical purpose.

The subject 3.2 acre parcel contains foundations and parking pads from hangars that were removed in 2016 and

2017. This land was part of the initial purchase of the airport and was funded by Airport Improvement Program (AIP) grant 03–18–0097–02. The Greenwood Board of Aviation Commissioners, Airport Sponsor of the Indy South Greenwood Airport proposes to sell this land for the development of a restaurant facility. The Airport Sponsor has obtained an appraisal and will receive fair market value for the sale of the land.

The disposition of proceeds from the sale of the airport property will be in accordance with FAA's Policy and Procedures Concerning the Use of Airport Revenue, published in the **Federal Register** on February 16, 1999 (64 FR 7696).

This notice announces that the FAA is considering the release of the subject airport property at the Indy South Greenwood Airport, Greenwood, Indiana from federal land covenants, subject to a reservation for continuing right of flight as well as restrictions on the released property as required in FAA Order 5190.6B section 22.16. Approval does not constitute a commitment by the FAA to financially assist in the disposal of the subject airport property nor a determination of eligibility for grant-in-aid funding from the FAA.

Survey Description

PART OF THE NORTHEAST QUARTER OF SECTION 28, TOWNSHIP 14 NORTH, RANGE 4 EAST, PLEASANT TOWNSHIP, JOHNSON COUNTY, INDIANA, DESCRIBED AS FOLLOWS:

COMMENCING AT A HARRISON MONUMENT AT THE NORTHEAST CORNER OF SAID NORTHEAST QUARTER; THENCE SOUTH 88 DEGREES 11 MINUTES 14 SECONDS WEST ALONG THE NORTH LINE OF SAID NORTHEAST QUARTER A DISTANCE OF 1598.94 FEET TO THE PLACE OF BEGINNING; THENCE SOUTH 00 DEGREES 29 MINUTES 33 SECONDS WEST A DISTANCE OF 748.60 FEET; THENCE SOUTH 88 DEGREES 19 MINUTES 33 SECONDS WEST A DISTANCE OF 446.64 FEET; THENCE NORTH 00 DEGREES 28 MINUTES 22 SECONDS EAST A DISTANCE OF 185.00 FEET; THENCE NORTH 88 DEGREES 19 MINUTES 33 SECONDS EAST A DISTANCE OF 283.50 FEET; THENCE NORTH 54 DEGREES 19 MINUTES 40 SECONDS EAST A DISTANCE OF 78.14 FEET; THENCE NORTH 00 DEGREES 29 MINUTES 33 SECONDS EAST A DISTANCE OF 519.63 FEET TO THE NORTH LINE OF SAID NORTHEAST QUARTER; THENCE NORTH 88 DEGREES 11 MINUTES 14 SECONDS EAST ALONG SAID NORTH LINE A DISTANCE OF 100.08 FEET TO THE PLACE OF BEGINNING. CONTAINING 3.221 ACRES, MORE OR LESS.

Issued in Des Plaines, IL on June 7, 2023.

Debra L. Bartell,

Manager, Chicago Airports District Office, FAA, Great Lakes Region.

[FR Doc. 2023–13095 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2023–0143]

Truck Leasing Task Force (TLTF); Notice of Public Meeting

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), Department of Transportation (DOT).

ACTION: Notice of public meeting.

SUMMARY: This notice announces a meeting of the TLTF.

DATES: The meeting will be held on Tuesday, July 11, 2023, from 10 a.m. to 3:30 p.m. ET. Requests for accommodations for a disability must be received by Friday, June 30. Requests to submit written materials for consideration during the meeting must be received no later than Friday, June 30.

ADDRESSES: The meeting will be held virtually for its entirety. Please register in advance of the meeting at *www.fmcsa.dot.gov/tltf.* A copy of the agenda for the entire meeting will be made available at *www.fmcsa.dot.gov/tltf* at least 1 week in advance of the meeting. Once approved, copies of the meeting minutes will be available at the website following the meeting. You may visit the TLTF website at *www.fmcsa.dot.gov/tltf* for further information on the committee and its activities.

FOR FURTHER INFORMATION CONTACT: Ms. Shannon L. Watson, Deputy Designated Federal Officer, TLTF, FMCSA, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 360–2925,*tltf@dot.gov.* Any committee-related request should be sent to the person listed in this section.

SUPPLEMENTARY INFORMATION:

I. Background

The TLTF was created under the Federal Advisory Committee Act (FACA) in accordance with section 23009 of the Bipartisan Infrastructure Law (BIL) (Pub. L. 117–58), which requires the Federal Motor Carrier Safety Administration (FMCSA) to establish the TLTF. The TLTF will examine the terms, conditions, and equitability of common truck leasing arrangements, particularly as they impact owner-operators and trucking businesses subject to such agreements and submit a report on the task force's identified issues and conclusions regarding truck leasing arrangements, including recommended best practices, to the Secretary, the Secretary of Labor, and the appropriate committees of Congress. The TLTF will work in coordination with, and be informed by, the United States Department of Labor.

The TLTF operates in accordance with FACA under the terms of the TLTF charter, filed February 11, 2022.

II. Agenda

The agenda will cover the following topics:

- An ethics briefing for FACA members;
- A discussion of ground rules for meetings (including logistics and meeting etiquette);
- A review of BIL requirements for topics/issues the TLTF must discuss;
- A discussion of the schedule for future meetings (virtual and hybrid, possibly), data needs/requests to support deliberations, guest presenters, etc.;
- Initial deliberations and discussion on the required list of BIL items.

III. Public Participation

The meeting will be open to the public via virtual platform. Advance registration via the website is required.

DOT is committed to providing equal access to this meeting for all participants. If you need alternative formats or services due to a disability, such as sign language interpretation or other ancillary aids, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section by Friday, June 30, 2023.

Oral comments from the public will be heard during designated comment periods at the discretion of the TLTF chair and Designated Federal Officer. To accommodate as many speakers as possible, the time for each commenter may be limited. Speakers are requested to submit a written copy of their remarks for inclusion in the meeting records and for circulation to TLTF members. All prepared remarks submitted on time will be accepted and considered as part of the record. Any member of the public may present a

written statement to the committee at any time.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2023–13102 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–11]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On March 24, 2023, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before July 21, 2023.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908 or *arlette.mussington@dot.gov* or telephone: (571) 609–1285.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On March 24, 2023, FRA published a 60-day notice in the **Federal Register** soliciting public comment on the ICR for which it is now seeking OMB approval. *See* 88 FR 17919. FRA has received one comment related to the proposed collection of information. This commenter expressed concerns about FRA's estimated paperwork burdens with respect to the Risk Reduction Program (RRP), but did not articulate in detail which burdens were of concern. While FRA notes this feedback, FRA's stakeholder-informed process re-evaluates the estimated paperwork burdens periodically to ensure accuracy and FRA's subject matter experts also analyze the updated data to determine accurate estimates.

Before OMB decides whether to approve this proposed collection of information, it must provide 30-days' notice for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); see also 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Risk Reduction Program.

OMB Control Number: 2130–0610.

Abstract: In 2020, FRA issued a final rule [1] that requires each Class I freight railroad and each freight railroad with inadequate safety performance (ISP) to develop and implement a RRP to improve the safety of its operations. RRP is a comprehensive, system-oriented approach to safety that determines a railroad operation's level of risk by identifying and analyzing applicable hazards, and develops plans to mitigate, if not eliminate, that risk.

The information collected under this regulation will be used by railroads, and FRA, to improve safety through structured, proactive processes that systematically evaluate railroad safety hazards on their systems and manage the risks associated with those hazards to help reduce the number and rates of railroad accidents/incidents, injuries, and fatalities. Each railroad has flexibility to tailor an RRP to its specific railroad operations. Each railroad must implement its RRP under a written, FRA-approved RRP plan and conduct an annual internal assessment of its RRP, with FRA also auditing railroads' RRPs.

The primary reason for the reduction in the estimated paperwork burden is the expected decrease in the number of responses. Specifically, all Class I freight railroads have already submitted their RRP plans, leading to a decrease in the overall PRA burden, resulting in no anticipated submissions under certain regulatory sections.

As a result of the merger between the Canadian Pacific and Kansas City Southern railroads, Class I the respondent universe was reduced from seven to six Class I railroads. While the individual burden remains the same, for transparency, the burden table is being re-published in this 30-day notice to illustrate the updates made.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 6 Class I railroads and 15 Class II or Class III freight railroads demonstrating inadequate safety performance.

Frequency of Submission: On occasion.

Reporting Burden:

[1] 85 FR 9262 (Feb. 18, 2020).

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C = A * B)	Total cost equivalent in U.S. dollar (D = C * wage rates)
271.13(c)—Determination of inadequate safety performance (ISP)—Qualitative assessment—Notice to employees of possible ISP identification by FRA.	15 railroads	5.00 notices	3 hours	15.00	$1,168.65
—(i)Employee confidential comments to FRA regarding RR possible ISP identification.	125 employees	5.00 comments	30 minutes	2.50	194.78
—(ii)RR Documentation to FRA refuting possible ISP identification.	15 railroads	5.00 documents	8 hours	40.00	3,116.40
—(f) and (g) Petition for reconsideration of ISP determination and petition to discontinue compliance with this part.	15 railroads	0.67 petition	16 hours	10.72	835.20
271.101—Risk Reduction Programs (RRPs)—Class I railroads.	The estimated paperwork burden for this regulatory requirement is covered under § 271.103, 271.105, 271.107, 271.109, and 271.111.				
271.103—RRP hazard management program (HMPs) Class I.	6 railroads	2.33 HMPs analyses	3,360 hours	7,828.80	609,941.81
271.105—RRP safety performance evaluation (SPEs): evaluation/assessments—Class I.	6 railroads	2.33 SPEs evaluation	147 hours	342.51	26,684.95
	6 railroads	2.33 assessments	1,060 hours	2,470.15	192,449.39
271.107—Safety Outreach—communications/reporting to senior management—Class I.	6 railroads	44,333.00 communications.	1 hour	44,333.00	2,636,040.18
	6 railroads	28.00 communications	30 minutes	14.00	1,090.74
271.109—Technology analysis and technology implementation plans—Class I.	6 railroads	2.33 reports	10 hours	23.30	1,815.30
271.111—RRP implementation training—programs/training. employees/records.—Class I.	6 railroads	1,400.00 records of trained employees.	3 minutes	70.00	5,453.70
271.113—Involvement of RR employees—Class I	The estimated paperwork burden for this regulatory requirement is covered under § 271.401 and 271.405.				
271.101(c)—Communication by Class I that host passenger train services with RRs subject to FRA System Safety Program Requirements.	6 railroads	40.00 communications/ consultations.	2 hours	80.00	6,232.80
—(d) Identification/communication w/entities performing/utilizing significant safety-related services—Class I.	6 railroads	212.00 communications/ consultations.	1 hour	212.00	16,516.92
—RR Identification/further communication with contractors performing/utilizing significant safety related services—Class I.	6 railroads	1,488.00 communications/consultations.	1 hour	1,488.00	115,930.08
271.101(a)—Risk Reduction Programs (RRPs)—ISP	The estimated paperwork burden for this regulatory requirement is covered under § 271.103, 271.105, 271.107, 271.109, and 271.111.				
271.103—RRP hazard management program (HMPs) ISP.	15 railroads	5.00 HMPs	240 hours	1,200.00	93,492.00
271.105—RRP safety performance evaluation (SPEs): survey/evaluation—ISP.	15 railroads	5.00 surveys	15 hours	73.65	5,738.07
	15 railroads	5.00 SPEs	51 hours	255.55	19,909.90
271.107—Safety Outreach—communications/reporting to management—ISP.	15 railroads	5.00 communications	1 hour	5.00	297.30
	15 railroads	5.00 reports	3 hours	15.00	1,168.65
271.109—Technology analysis and technology implementation plans—ISP.	15 railroads	5.00 plans	5 hours	25.00	1,947.75
271.111—RRP implementation training—Records ISP RRs (Note: The associated burdens related to training were appropriately calculated as economic costs of the regulatory requirement.).	15 railroads	50.00 records of trained employees.	3 minutes	2.50	194.78
271.113—Involvement of RR employees	The estimated paperwork burden for this regulatory requirement is covered under subparts B and E of part 271.				
271.101(d)—ISPs—Identification/communication w/entities performing significant safety-related services.	15 railroads	5.00 communications/ consultations.	2 hours	10.00	779.10
271.201/203—Written risk reduction program plans (RRP plans)—Adoption and implementation of RRP plans—Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Written RRP plans—ISP	15 railroads	5.00 RRP plans	96 hours	480.00	37,396.80
271.207—RR Good faith consultation w/directly affected employees—Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—RR Notification to non-represented employees of consultation meeting—Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—RR Good faith consultations/notices: ISP	15 railroads	5.00 consults/notices	20 hours	100.00	7,791.00
(d)—Submission of detailed consultation statement along w/RRP plan by Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Submission of detailed consultation statement along w/RRP plan by ISPs (Burden for plan copies included).	15 railroads	5.00 consults/statements	40 hours	200.00	15,582.00
—Copy of RRP Plan—Class I	The PRA burden associated with this requirement for Class I railroads has been completed.				

CFR section	Respondent universe	Total annual responses	Average time per responses	Total annual burden hours	Total cost equivalent in U.S. dollar
		(A)	(B)	(C = A * B)	(D = C * wage rates)
—Consultation Statement to Service List Individuals—Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Statements from directly affected employees—Class I railroads.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Statements from directly affected employees—ISP	15 railroads	12.00 statements	1 hour	12.00	934.92
271.209—Substantive amendments to RRP plan—Class I.	6 railroads	1.00 amended written plan.	8 hours	8.00	623.28
—Substantive amendments to RRP plan—ISP railroads	15 railroads	0.67 amended written plan.	8 hours	5.36	417.60
271.301—Filing of RRP plan w/FRA—Class I	The PRA burden associated with this requirement for Class I RRs has been completed.				
—Filing of RRP plan w/FRA—ISP railroads	15 railroads	5.00 filed plans	2 hours	10.00	779.10
—Class I RR corrected RRP plan	The PRA burden associated with this requirement for Class I railroads has been completed.				
—FRA requested Class I consultation with directly affected employees regarding substantive corrections/changes to RRP plan.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—ISP railroad corrected RRP plan	15 railroads	1.00 RRP plan	2 hours	2.00	155.82
—FRA requested ISP railroad further consultation with directly affected employees regarding substantive amendment to RRP plan.	15 railroads	1.00 consult/statement	1 hour	1.00	77.91
271.303—Amendments consultation w/directly affected employees on substantive amendments to RRP plan—Class I + ISP.	21 railroads (Class I + ISP).	2.00 consults	1 hour	2.00	155.82
—Employee statement to FRA on railroad RRP plan substantive amendment where agreement could not be reached Class I + ISP.	21 railroads (Class I + ISP).	2.00 employee statements.	30 minutes	1.00	77.91
271.303—Filed amended RRP plan—Class I railroads	6 railroads	1.00 plan	30 minutes	0.50	38.96
—Filed amended RRP plan—ISP	15 railroads	0.67 plan	30 minutes	0.34	26.49
—Amended RRP plan disapproved by FRA & requested correction—Class I and ISPs.	21 railroads (Class I + ISP).	1.00 corrected RRP plan	2 hours	2.00	155.82
271.307—Retention of RRP plans—Copies of RRP Plan/Amendments by railroad at system/division headquarters —Class I + ISP.	21 railroads (Class I + ISP).	2.00 plan copies	10 minutes	0.33	25.71
217.401/403—Annual internal assessment/improvement plans—Class I.	6 railroads	7.00 assessments/improvement plans.	120 hours	840.00	65,444.40
—Annual internal assessment/improvement plans—ISP	15 railroads	5.00 assessments/improvement plans.	32 hours	160.00	12,465.60
271.405—Copy of Internal assessment to FRA—Class I	6 railroads	7.00 reports	8 hours	56.00	4,362.96
—Copy of Internal assessment report to FRA—ISP	15 railroads	5.00 reports	2 hours	10.00	779.10
271.501/.503—External audits—Response to FRA's written notice (Note: The associated burdens related to audit were appropriately calculated as economic costs of the regulatory requirement.).	21 railroads	7.33 responses	4 hours	29.32	2,284.32
Appendix A—Request by FRA for additional information/documents to determine whether railroad has met good faith and best efforts consultation requirements of section 271.207—Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Further railroad consultation w/employees after determination by FRA that railroad did not use good faith/best efforts—Class I.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Meeting to discuss administrative details of consultation process during the time between initial meeting and applicability date—Class I s.	The PRA burden associated with this requirement for Class I railroads has been completed.				
—Meeting to discuss administrative details of consultation process during the time between initial meeting and applicability date—ISP.	15 railroads	7.00 meetings/consults	1 hour	7.00	545.37
—Notification to non-represented employees of good faith consultation process –ISP.	15 railroads	600.00 notices	15 minutes	150.00	11,686.50
—Draft RRP plan proposal to employees—ISP	15 railroads	20.00 proposals/copies	2 hours	40.00	3,116.40
—Employee comments on RRP plan draft proposal—ISP RRs.	2,000 employees	60.00 comments	1 hour	60.00	4,674.60
Appendix B—Request to FRA for electronic submission or FRA review of written materials.	FRA anticipates zero railroad submissions during this 3-year ICR period.				
Totals	21 railroads	48,374 responses	N/A	60,694	3,910,597

Total Estimated Annual Responses: 48,374.

Total Estimated Annual Burden: 60,694.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $3,910,597.

FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information that does not display a currently valid OMB control number.

(Authority: 44 U.S.C. 3501–3520)

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2023–13133 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–10]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of information collection; request for comment.

SUMMARY: Under the Paperwork Reduction Act of 1995 (PRA) and its implementing regulations, this notice announces that FRA is forwarding the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and comment. The ICR describes the information collection and its expected burden. On March 24, 2023, FRA published a notice providing a 60-day period for public comment on the ICR.

DATES: Interested persons are invited to submit comments on or before July 21, 2023.

ADDRESSES: Written comments and recommendations for the proposed ICR should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find the particular ICR by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Arlette Mussington, Information Collection Clearance Officer, at email: *arlette.mussington@dot.gov* or telephone: (571) 609–1285 or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: *joanne.swafford@dot.gov* or telephone: (757) 897–9908.

SUPPLEMENTARY INFORMATION: The PRA, 44 U.S.C. 3501–3520, and its implementing regulations, 5 CFR part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. On March 24, 2023, FRA published a 60-day notice in the **Federal Register** soliciting public comment on the ICR for which it is now seeking OMB approval. *See* 88 FR 17917. FRA received no comments related to the proposed collection of information.

Before OMB decides whether to approve this proposed collection of information, it must provide 30-days' notice for public comment. Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30-day notice is published. 44 U.S.C. 3507(b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes the 30-day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect.

Comments are invited on the following ICR regarding: (1) Whether the information collection activities are necessary for FRA to properly execute its functions, including whether the information will have practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection activities, including the validity of the methodology and assumptions used to determine the estimates; (3) ways for FRA to enhance the quality, utility, and clarity of the information being collected; and (4) ways to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of information technology.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: System Safety Program Plan.

OMB Control Number: 2130–0599.

Abstract: In 2020, FRA issued a final rule [1] that requires passenger rail operations to develop and implement a system safety program (SSP) to improve the safety of their operations.

FRA uses the information collected to help ensure that commuter and intercity passenger rail operations establish and implement SSPs to improve the safety of their operations and to confirm compliance with the rule. Each passenger rail operation should use its SSP to proactively identify and mitigate or eliminate hazards and the resulting risk on its system at an early stage to reduce the number of railroad accidents, incidents, and associated injuries, fatalities, and property damage. A passenger rail operation has the flexibility to tailor an SSP to its specific operations. An SSP must be fully implemented within 36 months of FRA's approval of a passenger rail operation's submitted SSP plan. Under the SSP regulation, FRA will audit a passenger rail operation's compliance with its SSP plan and will use the information collected to ensure compliance with this regulation.

Type of Request: Extension without change (with changes in estimates) of a currently approved collection.

Affected Public: Businesses.

Form(s): N/A.

Respondent Universe: 33 passenger rail operations + 1 new passenger rail operation.

Frequency of Submission: On occasion.

Total Estimated Annual Responses: 767.

Total Estimated Annual Burden: 1,891 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: $153,019.

FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information that does not display a currently valid OMB control number.

(Authority: 44 U.S.C. 3501–3520)

Brett A. Jortland,

Deputy Chief Counsel.

[FR Doc. 2023–13131 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–06–P

[1] 85 FR 12826 (Mar. 4, 2020).

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2023–0007 (Notice No. 2023–08)]

Hazardous Materials: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995,

PHMSA invites comments on information collections pertaining to hazardous materials transportation for which PHMSA intends to request renewal and extension from the Office of Management and Budget. PHMSA published a 60-day comment period soliciting comments on these information collections in the **Federal Register** on March 22, 2023, and did not receive any comments.

DATES: Interested persons are invited to submit comments on or before July 21, 2023.

ADDRESSES: Written comments and recommendations for the information collections should be sent within 30 days of publication of this notice to *https://www.reginfo.gov/public/do/PRAMain.*

Information collections can be found by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

We invite comments on: (1) whether the collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the Department's estimate of the burden of the information collections; (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 the use of automated collection techniques or other forms of information technology.

Docket: For access to the Dockets to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Steven Andrews or Nina Vore, Standards and Rulemaking Division, (202) 366–8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), title 5, Code of Federal Regulations (CFR) requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies information collection requests that PHMSA previously published on March 22, 2023,[1] in a 60-day **Federal Register** notice seeking comments and is now submitting to the Office of Management and Budget (OMB) for renewal and extension. These information collections are contained in 49 CFR 171.6 of the Hazardous Materials Regulations (HMR; 49 CFR parts 171 through 180). PHMSA has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on changes in proposed or final rules published since the information collections were last approved. The following information is provided for each information collection: (1) title of the information collection, including former title if a change is being made; (2) OMB control number; (3) summary of the information collection activity; (4) description of affected public; (5) estimate of total annual reporting and recordkeeping burden; and (6) frequency of collection. PHMSA will request a 3-year term of approval for the information collection activity and will publish a notice in the **Federal Register** alerting the public upon OMB's approval. PHMSA requests comments on the following information collections:

Title: Hazardous Materials Incident Reports.

OMB Control Number: 2137–0039.

Summary: This information collection is applicable upon occurrence of an incident as prescribed in 49 CFR 171.15 and 171.16. A Hazardous Materials Incident Report, DOT Form F 5800.1, must be completed by a person in physical possession of a hazardous material at the time a hazardous material incident occurs in transportation, such as a release of materials, serious accident, evacuation, or closure of a main artery. Incidents meeting criteria in 49 CFR 171.15 also require a telephonic report. This information collection enhances the Agency's ability to evaluate the effectiveness of its regulatory program, determine the need for regulatory changes, and address emerging hazardous materials transportation safety issues. The requirements apply to all interstate and intrastate carriers engaged in the transportation of hazardous materials by rail, air, water, and highway. The following information collections and their burdens are associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Telephone Notifications	180	716	0.08	57
Incident Reports Paper—Written	172	2,888	1.6	4,621
Incident Reports—Electronic	166	19,720	0.8	15,776

Affected Public: Shippers and carriers of hazardous materials.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 518.

Total Annual Responses: 23,324.

Total Annual Burden Hours: 20,454.

Frequency of Collection: On occasion.

Title: Cargo Tank Motor Vehicles in Liquefied Compressed Gas Service.

OMB Control Number: 2137–0595.

Summary: This information collection and recordkeeping burden pertains to the requirements applicable to the manufacture, certification, inspection, repair, maintenance, and operation of certain DOT specification and non-specification cargo tank motor vehicles used to transport liquefied compressed gases. These requirements are intended to ensure cargo tank motor vehicles used to transport liquefied compressed gases are operated safely, and to minimize the potential for catastrophic releases during unloading and loading operations. They include: (1) requirements for operators of cargo tank motor vehicles in liquefied compressed gas service to develop operating procedures applicable to unloading operations and carry the operating procedures on each vehicle; (2) inspection, maintenance, marking, and testing requirements for the cargo tank discharge system, including delivery hose assemblies; and (3) requirements for emergency discharge control equipment on certain cargo tank motor vehicles transporting liquefied compressed gases that must be installed and certified by a Registered Inspector.

The following information collections and their burdens are associated with this OMB Control Number:

[1] 88 FR 17295.

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Marking New/Repaired Hoses with Unique Identifier	6800	12,172	0.083	1,010
Monthly Hose Inspections Record	6800	439,960	0.1	43,996
Record of Monthly Piping Tests Record	6800	400,112	0.2	80,022
Hose Pressure Test Marking Record	6800	12,172	0.083	1,010
Annual Hose Test Record	6800	36,652	0.42	15,394
Cargo Tanks in Other Than Metered Delivery Service—Design Certification for Automatic Shutoff	150	900	8	7,200
Cargo Tanks in Other Than Metered Delivery Service—Instillation of Shutoff System by a Registered Inspector	150	900	8	7,200
Cargo Tank Motor Vehicles in Metered Delivery Service—Certification of Remote-Control Equipment by a Registered Inspector	150	3300	8	26,400

Affected Public: Carriers in liquefied compressed gas service, manufacturers and repairers.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 34,450.

Total Annual Responses: 906,168.

Total Annual Burden Hours: 182,232.

Frequency of Collection: On occasion.

Title: Inspection and Testing of Meter Provers.

OMB Control Number: 2137–0620.

Summary: This information collection and recordkeeping burden results from the requirements pertaining to the use, inspection, and maintenance of mechanical displacement meter provers (meter provers) used to check the accurate flow of liquid hazardous materials into bulk packagings, such as portable tanks and cargo tank motor vehicles, under the HMR. These meter provers are used to ensure that the proper amount of liquid hazardous materials is being loaded and unloaded. These meter provers consist of a gauge and several pipes that always contain small amounts of the liquid hazardous material in the pipes as residual material and, therefore, must be inspected and maintained in accordance with the HMR to ensure they are in proper calibration and working order. These meter provers are not subject to the specification testing and inspection requirements in 49 CFR part 178. However, these meter provers must be visually annually inspected and hydrostatic pressure tested every five years in order to ensure they are properly working as specified in 49 CFR 173.5a of the HMR. Therefore, this information collection requires that:

(1) Each meter prover must undergo and pass an annual external visual inspection to ensure that the meter provers used in the flow of liquid hazardous materials into bulk packagings are accurate and in conformance with the performance standards in the HMR.

(2) Each meter prover must undergo and pass a hydrostatic pressure test at least every 5 years to ensure that the meter provers used in the flow of liquid hazardous materials into bulk packagings are accurate and in conformance with the performance standards in the HMR.

(3) Each meter prover must successfully complete the test and inspection and must be marked in accordance with 49 CFR 180.415(b) and 173.5a.

(4) Each owner must retain a record of the most recent visual inspection and pressure test until the meter prover is requalified.

The following information collections and their burdens are associated with this OMB Control Number:

Information collection	Respondents	Total annual responses	Hours per response	Total annual burden hours
Annual Visual Inspection	250	250	0.5	125
Hydrostatic Pressure Test (Every 5 Years)	250	250	0.2	50

Affected Public: Owners of meter provers used to measure liquid hazardous materials flow into bulk packagings such as cargo tanks and portable tanks.

Annual Reporting and Recordkeeping Burden:

Number of Respondents: 500.

Total Annual Responses: 500.

Total Annual Burden Hours: 175.

Frequency of Collection: On occasion.

Issued in Washington, DC, on June 14, 2023.

T. Glenn Foster,

Chief, Regulatory Review and Reinvention Branch, Office of Hazardous Materials Safety, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2023–13097 Filed 6–20–23; 8:45 am]

BILLING CODE 4910–60–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. OFAC is also publishing an update to the identifying information of one person currently included on the SDN List.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: 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 Actions

A. On May 19, 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.

Individuals:

1. KOSTIOUK, Evgueni, Alzey, Germany; Poland; DOB 13 Jun 1954; nationality Belarus; Gender Male (individual) [RUSSIA-EO14024].

   Designated pursuant to sections 1(a)(i) of Executive Order 14024 of April 15, 2021, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024) for operating or having operated in the technology sector of the Russian Federation economy.

2. SWINIARSKI, Jacek Romuald, Poland; DOB 07 Feb 1967; nationality Poland; Gender Male; National ID No. 67020701814 (Poland) (individual) [RUSSIA-EO14024] (Linked To: INTER-TRANS SPOLKA Z OGRANICZONA ODPOWIEDZIALNOSCIA).

   Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Inter-Trans Spolka Z Ograniczona Odpowiedzialnoscia, a person whose property and interests in property are blocked pursuant to E.O. 14024.

3. EFIMOV, Anton Anatolyevich (a.k.a. EFIMOV, Anton Anatolevich), Spain; Estonia; Russia; DOB 31 Aug 1975; alt. DOB 08 Aug 1975; nationality Russia; Gender Male (individual) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

4. LITVINENKO, Vladimir Stefanovich (Cyrillic: ЛИТВИНЕНКО, Владимир Стефанович) (a.k.a. LITVINENKO, Vladimir Stefanovic), St. Petersburg, Russia; DOB 14 Aug 1955; POB Krasnodar territory, Russia; nationality Russia; Gender Male; Tax ID No. 780151794940 (Russia) (individual) [RUSSIA-EO14024] (Linked To: FEDERAL STATE BUDGET EDUCATIONAL INSTITUTION OF HIGHER EDUCATION SAINT PETERSBURG MINING UNIVERSITY).

Designated pursuant to sections 1(a)(i) and 1(a)(iii)(C) and of E.O. 14024 for operating or having operated in the metals and mining sector of the Russian Federation economy and for being or having been a leader, official, senior executive officer, or member of the board of directors of Federal State Budget Educational Institution of Higher Education Saint Petersburg Mining University, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

5. TROENDLE, Dirk, Germany; DOB 11 Mar 1956; nationality Germany; Gender Male; Passport C93XHRVNT (Germany) (individual) [RUSSIA-EO14024] (Linked To: MORETTI, Walter).

Designated pursuant to section 1(a)(vi)(B) of E.O. 14024 for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of Walter Moretti, a person whose property and interests in property are blocked pursuant to E.O. 14024.

6. VAN INGEN, Edwin Onno, Netherlands; DOB 17 Aug 1964; nationality Netherlands; Gender Male; Passport NWR0J8669 (Netherlands) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

7. BUECHEL, Pascal Dominik (a.k.a. BUCHEL, Pascal Dominik), Liechtenstein; DOB 23 Sep 1974; POB Liechtenstein; nationality Liechtenstein; Gender Male (individual) [RUSSIA-EO14024] (Linked To: TRADE INITIATIVE ESTABLISHMENT).

Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of Trade Initiative Establishment, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

8. LESTAFYE, Anton Yuryevich (a.k.a. KUZMIN, Anton Yuryevich; a.k.a. LESTAFIER, Anton), Russia; DOB 08 Mar 1983; nationality Russia; Gender Male; Passport 763579648 (Russia); Tax ID No. 503611829859 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

9. TIMOSHIN, Andrey Vladimirovich (a.k.a. TIMOSHIN, Andrei Vladimirovich), Russia; DOB 03 Dec 1978; POB Moscow, Russia; nationality Russia; Gender Male; Identification Number 771574784272 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

10. VINOGRADOVA, Natalya Yuryevna, Russia; DOB 23 Feb 1972; nationality Russia; Gender Female; Tax ID No. 509153587 (Russia) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

11. GARSHIN, Vadim Veniaminovich, Russia; DOB 01 May 1961; POB Yevpatoriya, Ukraine; nationality Russia; Gender Male; Passport 736240066 (Russia) issued 13 Oct 2014 expires 13 Oct 2024 (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

12. RAZORENOV, Aleksandr Gennadievich (a.k.a. RAZORENOV, Alexander Gennadiyevich), Russia; DOB 26 Dec 1950; POB Moscow, Russia; nationality Russia; Gender Male; Passport 736076110 (Russia) expires 16 Sep 2024; alt. Passport 761699993 (Russia) expires 07 Oct 2029 (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

13. SERGEEVA, Yulia Aleksandrovna (a.k.a. SERGEEVA, Julia), Russia; DOB 22 Jan 1978; POB Moscow, Russia; nationality Russia; Gender Female; Passport 530329881 (Russia) issued 14 Feb 2013 expires 10 Nov 2021; National ID No. 4503550173 (Russia) (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

14. VELICHKO, Sergey Yevgenyevich, Russia; DOB 22 May 1973; POB Moscow, Russia; nationality Russia; Gender Male; Passport 752332056 (Russia) issued 24 Sep 2015 expires 24 Sep 2025; National ID No. 4502258245 (Russia) (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

15. AKIFYEV, Pavel Viktorovich (a.k.a. AKIFEV, Pavel Viktorovich), Russia; DOB 19 Dec 1985; nationality Russia; Gender Male; Tax ID No. 773365062478 (Russia) (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

16. VERKHOVTSEVA, Svetlana Yuryevna (Cyrillic: ВЕРХОВЦЕВА, Светлана Юрьевна), Sjatoozerskaja 28-24, Moscow, Russia; Czech Republic; DOB 02 Dec 1961; nationality Russia; Gender Female; Tax ID No. 110200499266 (Russia) (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

17. DREMOVA, Evgenia, Finland; DOB 26 Aug 1977; nationality Finland; Gender Female; Identification Number 260877 (Finland) (individual) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

18. SAKULIN, Alexander (a.k.a. SAKOULINE, Alexandre), Finland; DOB 15 Mar 1955; nationality Russia; Gender Male; Identification Number 150355 (Finland) (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

19. SCHMUCKI, Anselm Oskar (a.k.a. SCHMUCKI, Oskar Anselm; a.k.a. SHMUKKI, Anselm Oskar), RB 3-220, Royal Breeze, Sofia Street, Ras al Khaimah, United Arab Emirates; Switzerland; Moscow, Russia; Singapore; DOB 21 Nov 1969; nationality Switzerland; Gender Male; Passport X7594510 (Switzerland) (individual) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

20. DUTTA, Surya Visesh, 67 Purvi Marg, Vasant Vihar, New Delhi 110057, India; DOB 08 Jul 1994; POB India; nationality India; Gender Male; Passport J6705777 (India) issued 26 Apr 2011 expires 25 Apr 2021 (individual) [RUSSIA-EO14024] (Linked To: MORETTI, Walter).

    Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Walter Moretti, a person whose property and interests in property are blocked pursuant to E.O. 14024.

21. SUBRAMANIAM, Sharda, C 5C/22-B, Janakpuri, Delhi 110058, India; D-248, PH1, Sushant Lok, Gurgaon 122001, India; DOB 23 May 1966; POB New Delhi, India; nationality India; Gender Female; Passport Z3012452 (India) issued 19 Dec 2014 expires 18 Dec 2024 (individual) [RUSSIA-EO14024] (Linked To: MORETTI, Walter).

    Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Walter Moretti, a person whose property and interests in property are blocked pursuant to E.O. 14024.

22. HANAFIN, John Desmond, United Arab Emirates; DOB 10 Jul 1974; nationality Ireland; Gender Male; Digital Currency Address - USDT 0x38735f03b30FbC022DdD06ABED01F0Ca823C6a94; Passport LT8338945 (Ireland) (individual) [RUSSIA-EO14024] (Linked To: HURIYA PRIVATE FZE LLE).

    Designated pursuant to section 1(a)(i) and 1(a)(iii)(C) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy and for being or having been a leader, official, senior executive officer, or

member of the board of directors of Huriya Private FZE LLE, an entity whose property and interests in property are blocked pursuant to E.O. 14024.

Entities:

1. GAZPROM VNIIGAZ, OOO (Cyrillic: ООО ГАЗПРОМ ВНИИГАЗ) (a.k.a. GAZPROM VNIIGAZ; a.k.a. LLC VNIIGAZ; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU 'NAUCHNO-ISSLEDOVATELSKI INSTITUT PRIRODNYKH GAZOV I GAZOVYKH TEKHNOLOGI - GAZPROM VNIIGAZ' (Cyrillic: НАУЧНО-ИССЛЕДОВАТЕЛЬСКИЙ ИНСТИТУТ ПРИРОДНЫХ ГАЗОВ И ГАЗОВЫХ ТЕХНОЛОГИЙ – ГАЗПРОМ ВНИИГАЗ); f.k.a. "ALL UNION SCIENTIFIC RESEARCH INSTITUTE OF NATURAL GASES AND GAS TECHNOLOGIES"; a.k.a. "LIMITED LIABILITY COMPANY SCIENTIFIC RESEARCH INSTITUTE OF NATURAL GASES AND GAS TECHNOLOGIES"; a.k.a. "VNIGAZ"), 15 Gazovikov St., bld. 1, Razvilka, Leninski Raion, Moskovskaya obl. 142717, Russia; Sevastopolskaya St. 1A, Ukhta, Komi Republic, Russia; Website www.vniigaz.ru; Email Address adm@vniigaz.gazprom.ru; Executive Order 13662 Directive Determination - Subject to Directive 4; Secondary sanctions risk: Ukraine-/Russia-Related Sanctions Regulations, 31 CFR 589.201 and/or 589.209; Organization Established Date 30 Jun 1999; Registration ID 1025000651598; Tax ID No. 5003028155; Government Gazette Number 31323949; For more information on directives, please visit the following link: http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives [UKRAINE-EO13662] [RUSSIA-EO14024] (Linked To: PUBLIC JOINT STOCK COMPANY GAZPROM).

   Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

2. STATE BUDGETARY EDUCATIONAL INSTITUTION OF HIGHER EDUCATION ALMETYEVSK STATE OIL INSTITUTE (Cyrillic: ГОСУДАРСТВЕННОЕ БЮДЖЕТНОЕ ОБРАЗОВАТЕЛЬНОЕ УЧРЕЖДЕНИЕ ВЫСШЕГО ОБРАЗОВАНИЯ АЛЬМЕТЬЕВСКИЙ ГОСУДАРСТВЕННЫЙ НЕФТЯНОЙ ИНСТИТУТ) (a.k.a. ALMETYEVSK STATE OIL INSTITUTE; a.k.a. "GBOU VO AGNI"), ul. Lenina, d. 2, Almetyevsk, Republic of Tatarstan 423450, Russia; Tax ID No. 1644005183 (Russia); Government Gazette Number 33861852 (Russia); Registration Number 1021601629642 (Russia) [RUSSIA-EO14024].

   Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

3. THE FEDERAL STATE UNITARY ENTERPRISE V.A. KARGIN SCIENTIFIC RESEARCH INSTITUTE OF CHEMISTRY AND TECHNOLOGY OF POLYMERS WITH A PILOT PRODUCTION PLANT (a.k.a. AKTSIONERNOE OBSHCHESTVO NAUCHNO ISSLEDOVATELSKI INSTITUT KHIMII I TEKHNOLOGII POLIMEROV IMENI AKADEMIKA V.A. KARGINA S OPYTNYM ZAVODOM; a.k.a. NII POLYMEROV AO; a.k.a. V.A. KARGIN POLYMER CHEMISTRY AND TECHNOLOGY RESEARCH INSTITUTE WITH A PILOT-PRODUCTION PLANT), korp. ZD. 63, ter. Vostochny Promraion

Orgsteklo, Dzerzhinsk, Nizhni Novgorod region 606000, Russia; Tax ID No. 5249164736 (Russia); Government Gazette Number 33947252 (Russia); Registration Number 1185275058044 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

4. BELMAGISTRALAVTOTRANS SPEDITIONS GMBH (f.k.a. BMA SPEDITION GMBH), Justus-von-Liebig-Str. 21, Alzey 55232, Germany; Am Fuchsbau 1, Bad Saarow 15526, Germany; Siedlce, Poland; Smolensk, Russia; Pavlodar, Kazakhstan; Minsk, Belarus; Organization Established Date 20 Jan 1995; V.A.T. Number DE171692719 (Germany); Tax ID No. 08/666/09768 (Germany); Registration Number HRB 32490 (Mainz) (Germany) [RUSSIA-EO14024] (Linked To: KOSTIOUK, Evgueni).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Evgueni Kostiouk, a person whose property and interests in property are blocked pursuant to E.O. 14024.

5. INTER-TRANS SPOLKA Z OGRANICZONA ODPOWIEDZIALNOSCIA (a.k.a. INTER-TRANS SP Z OO), Brzeska 97, lok. 211, Siedlce 08-110, Poland; Organization Established Date 10 Nov 2017; V.A.T. Number 8212655098 (Poland); Tax ID No. 368738723 (Poland); Registration Number 0000724475 (Poland) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

6. AVESTO OOO, ul. Gelsingforsskaya d. 3, lit. Z, pomeshch. 411-416, Saint Petersburg 194044, Russia; Tax ID No. 7813618950 (Russia); Registration Number 1187847245520 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

7. ELFARO OU (f.k.a. OU INELSO), Vesse Poik 4D, Tallinn 11415, Estonia; V.A.T. Number EE102018071 (Estonia); Registration Number 14329778 (Estonia) [RUSSIA-EO14024] (Linked To: EFIMOV, Anton Anatolyevich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anton Anatolyevich Efimov, a person whose property and interests in property are blocked pursuant to E.O. 14024.

8. INELSO OOO, ul. Gelsingforsskaya d. 3, lit. Z, pomeshch. 412, Saint Petersburg 194044, Russia; Tax ID No. 7813635698 (Russia); Registration Number 1197847128478 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

9. LLC TELLUR ELEKTRONIKS (a.k.a. TELLUR ELECTRONICS), ul. Butlerova d. 17, floor/komn 4/49, Moscow 117342, Russia; Tax ID No. 7720355306 (Russia); Registration Number 1167746991312 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

10. MATRIKS ELEKTRONIKA, ul. Lineinaya d. 227, office 201, Novosibirsk 630111, Russia; Tax ID No. 5402035309 (Russia); Registration Number 1175476088897 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

11. MIKROSAN OOO (a.k.a. "MICROSUN"), Pr-kt Krasnyi d. 54, pom. 433, Novosibirsk 630000, Russia; Tax ID No. 5407216683 (Russia); Registration Number 1025403209182 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

12. NAUCHNO-PROIZVODSTVENNOE PREDPRIYATIE GURAMI ELEKTRONIKS (a.k.a. NPP GURAMI ELEKTRONIKS), ul. Profsoyuznaya d. 37A, floor/office 4/412, Naro-Fominsk 143306, Russia; Tax ID No. 5030098049 (Russia); Registration Number 1205000027770 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

13. PROISTOK OOO (a.k.a. PROISTOCK), ul. Aerodromnaya d. 8, lit. A, pomeshch. 235, Saint Petersburg 197348, Russia; Tax ID No. 7814646621 (Russia); Registration Number 1167847164605 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

14. RSV-EKSPERT OOO (a.k.a. "EKSPERT"; a.k.a. "NPK EXPERT"), ul. Voskhod d. 26/1, kabinet 101, Novosibirsk 630102, Russia; Festivalnaya d. 41, k. 2, 1 etazh, Moscow, Russia; Tax ID No. 5405979190 (Russia); Registration Number 1165476124395 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

15. SIBELKOM-LOGISTIK OOO (a.k.a. "FT-LOGISTIC"), d. 58 ofis 607, ul. Dostoevskogo, Novosibirsk 630005, Russia; ul. Mendeleeva d. 5, kvartira 30, Novosibirsk 630110, Russia; Tax ID No. 5404462899 (Russia); Registration Number

1125476094567 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

16. TARGET ELECTRONICS (a.k.a. TARGET ELEKTRONIKS), Proezd Kolomenskii d. 14, floor 5, kom. 5, Moscow 115446, Russia; Tax ID No. 7714472298 (Russia); Registration Number 1217700243364 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

17. FEDERAL STATE BUDGETARY EDUCATIONAL INSTITUTION OF HIGHER EDUCATION GROZNY STATE OIL TECHNICAL UNIVERSITY NAMED AFTER ACADEMICIAN M.D. MILLIONSHCHIKOV (a.k.a. FEDERALNOE GOSUDARSTVENNOE BYUDZHETNOE OBRAZOVATELNOE UCHREZHDENIE VYSSHEGO OBRAZOVANIYA GROZNENSKI GOSUDARSTVENNY NEFTYANOI TEKHNICHESKI UNIVERSITET IMENI AKADEMIKA M.D. MILLIONSHCHIKOVA; a.k.a. GGNTU IM. AKAD. M.D. MILLIONSHCHIKOVA FGBOU VO GGNTU IM. AKAD. M. D. MILLIONSHCHIKOVA FGBU; a.k.a. GROZNY STATE OIL TECHNICAL UNIVERSITY; a.k.a. GROZNY STATE OIL TECHNICAL UNIVERSITY NAMED AFTER M.D. MILLIONSHIKOVA), 100, Isaeva av., Grozny 364024, Russia; 100, prospekt Imeni Khuseina Abubakarovicha Isaeva, Grozny, Chechnya Republic 364051, Russia; Organization Established Date 02 Jun 2000; Organization Type: Higher education; Tax ID No. 2020000531 (Russia); Government Gazette Number 45267841 (Russia); Registration Number 1022002549580 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

18. FOREIGN INTELLIGENCE SERVICE OF THE RUSSIAN FEDERATION (a.k.a. SLUZHBA VNESHNEI RAZVEDKI ROSSISKOI FEDERATSII; a.k.a. SLUZHBA VNESHNEY RAZVEDKI; a.k.a. SVR ROSSII FKU; a.k.a. "SVR"), Building 1, 51 Ostozhenka st., Moscow 119034, Russia; Yasenevo 11 Kolpachny, Moscow 010100, Russia; Organization Established Date 09 Oct 2003; Target Type Government Entity; Tax ID No. 7728302546 (Russia); Government Gazette Number 00035837 (Russia); Registration Number 1037728048973 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(iv) of Executive Order 14024 for being a political subdivision, agency, or instrumentality of the Government of the Russian Federation.

19. FEDERAL STATE BUDGETARY EDUCATIONAL INSTITUTION OF HIGHER EDUCATION SERGO ORDZHONIKIDZE RUSSIAN STATE UNIVERSITY FOR GEOLOGICAL PROSPECTING (a.k.a. FEDERALNOE GOSUDARSTVENNOE BYUDZHETNOE OBRAZOVATELNOE UCHREZHDENIE VYSSHEGO OBRAZOVANIYA ROSSISKI GOSUDARSTVENNY GEOLOGORAZVEDOCHNY UNIVERSITET IMENI SERGO ORDZHONIKIDZE; a.k.a. MOSCOW GEOLOGICAL PROSPECTING INSTITUTE; a.k.a. SERGO ORDZHONIKIDZE GEO UNIVERSITY; a.k.a.

"MGRI-RSGPU"), Miklouho-Maclay St. 23., Moscow 117997, Russia; Tax ID No. 7728028967 (Russia); Government Gazette Number 02068835 (Russia); Registration Number 1027739347723 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

20. VYGON CONSULTING (f.k.a. ENERGETICHESKI TSENTR OOO; a.k.a. LLC VYGON CONSULTING; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU VYGON KONSALTING; a.k.a. VYGON KONSALTING OOO), d. 12 pod/et/pom 3/16/1609, Naberezhnaya Krasnopresnenskaya, Moscow 123610, Russia; Organization Established Date 02 Sep 2013; Organization Type: Management consultancy activities; Tax ID No. 7717761234 (Russia); Residency Number 1137746787705 (Russia); Government Gazette Number 18141830 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the management consulting sector of the Russian Federation economy.

21. URALMASH OIL AND GAS EQUIPMENT HOLDING LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU URALMASH NEFTEGAZOVOE OBORUDOVANIE KHOLDING; a.k.a. URALMASH NGO KHOLDING OOO; a.k.a. URALMASH OIL AND GAS EQUIPMENT HOLDING), Pr. 60-Letiya Oktyabrya Dom 21, Korp. 4, Moscow 117036, Russia; Organization Established Date 16 Jun 2010; Tax ID No. 7707727918 (Russia); Government Gazette Number 66471557 (Russia); Registration Number 1107746487848 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the manufacturing sector of the Russian Federation economy.

22. ALL RUSSIA PETROLEUM RESEARCH EXPLORATION INSTITUTE JOINT STOCK COMPANY (a.k.a. AKTSIONERNOE OBSHCHESTVO VSEROSSISKI NEFTYANOI NAUCHNO ISSLEDOVATELSKI GEOLOGORAZVEDOCHNY INSTITUT; a.k.a. VNIGRI JSC; a.k.a. VNIGRI PAO), d. 20 k. 2 litera A pom. 208, ul. Fayansovaya, St. Petersburg 192019, Russia; Organization Established Date 01 Aug 2016; Target Type State-Owned Enterprise; Tax ID No. 7816334628 (Russia); Government Gazette Number 01423435 (Russia); Registration Number 1167847310916 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

23. ALL RUSSIAN SCIENTIFIC RESEARCH INSTITUTE OF GEOPHYSICAL PROSPECTING JOINT STOCK COMPANY (a.k.a. ALL RUSSIAN RESEARCH INSTITUTE OF GEOPHYSICAL EXPLORATION METHODS JSC; a.k.a. AO ALL RUSSIAN SCIENTIFIC RESEARCH INSTITUTE OF GEOPHYSICAL PROSPECTING (Cyrillic: АО ВСЕРОССИЙСКИЙ НАУЧНО ИССЛЕДОВАТЕЛЬСКИЙ ИНСТИТУТ ГЕОФИЗИЧЕСКИХ МЕТОДОВ

РАЗВЕДКИ); a.k.a. VNIIGEOFIZIKA JSC), Nizhnyaya Krasnoselskaya Street 4, Moscow 107140, Russia; Organization Established Date 06 Dec 2013; Target Type State-Owned Enterprise; Tax ID No. 7708802773 (Russia); Government Gazette Number 01424392 (Russia); Registration Number 5137746162945 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

24. SIBERIAN SCIENTIFIC RESEARCH INSTITUTE OF GEOLOGY GEOPHYSICS AND MINERAL RAW MATERIAL JOINT STOCK COMPANY (a.k.a. AKTSIONERNOE OBSHCHESTVO SIBIRSKI NAUCHNO ISSLEDOVATELSKI INSTITUT GEOLOGII, GEOFIZIKI I MINERALNOGO SYRYA; a.k.a. SNIIGGIMS AO; a.k.a. SNIIGGIMS JSC), Prospekt Krasny 67, Novosibirsk, Novosibirskaya Obl 630091, Russia; Organization Established Date 07 Jul 2015; Target Type State-Owned Enterprise; Tax ID No. 5406587935 (Russia); Government Gazette Number 01423607 (Russia); Registration Number 1155476074390 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

25. INSTITUTE OF PETROLEUM CHEMISTRY SIBERIAN BRANCH OF THE RUSSIAN ACADEMY OF SCIENCES (a.k.a. IPC SB RAS (Cyrillic: ИХН СО РАН); a.k.a. IPCH SB RAS), Pr-T Akademicheskii D.4, Tomsk 634021, Russia; 3, Academichesky Ave., Tomsk 634021, Russia; Organization Established Date 05 Aug 1968; Tax ID No. 7021001022 (Russia); Government Gazette Number 03534067 (Russia); Registration Number 1027000876374 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

26. THE ENERGY RESEARCH INSTITUTE OF THE RUSSIAN ACADEMY OF SCIENCES (a.k.a. "INEI RAN"), Ul Nagornaya D 31, Korp 2, Moscow 117186, Russia; Organization Established Date 06 Jun 1994; Tax ID No. 7727083080 (Russia); Government Gazette Number 04813131 (Russia); Registration Number 1037739092643 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

27. FEDERAL STATE BUDGET EDUCATIONAL INSTITUTION OF HIGHER EDUCATION SAINT PETERSBURG MINING UNIVERSITY (a.k.a. FEDERALNOE GOSUDARSTVENNOE BYUDZHETNOE OBRAZOVATELNOE UCHREZHDENIE VYSSHEGO OBRAZOVANIYA SANKT PETERBURGSKI GORNY UNIVERSITET; f.k.a. NATSIONALNY MINERALNOSYREVOI UNIVERSITET GORNY, UCH; a.k.a. SAINT PETERSBURG MINING UNIVERSITY (Cyrillic: САНКТ ПЕТЕРБУРГСКИЙ ГОРНЫЙ

УНИВЕРСИТЕТ); a.k.a. SPGU GORNY UNIVERSITET FGBU; a.k.a. "NATIONAL MINERAL RESOURCES UNIVERSITY"; a.k.a. "SPMI"), 2, 21st Line, St Petersburg 199106, Russia; Tax ID No. 7801021076 (Russia); Government Gazette Number 02068508 (Russia); Registration Number 1027800507591 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

28. DELTA TECHNICAL AND SCIENTIFIC INSTRUMENTS B.V., Leidsestraat 130 B, Gemeente Hillegom 2182 DS, Netherlands; Organization Established Date 15 Apr 2014; Tax ID No. 853931781 (Netherlands); Registration Number 60486716 (Netherlands) [RUSSIA-EO14024] (Linked To: VAN INGEN, Edwin Onno).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Edwin Onno Van Ingen, a person whose property and interests in property are blocked pursuant to E.O. 14024.

29. PRO RATA SOLUTIONS B.V. (a.k.a. PRO RATA CONSULTING; a.k.a. PRO RATA INCASSO; a.k.a. PRO RATA MANAGEMENT; a.k.a. PRO RATA TRADING), Haarlemmerstraat 5 Kamer 0.3, Gemeente Hillegom 2182 HA, Netherlands; Organization Established Date 01 Jan 2005; Tax ID No. 814172556 (Netherlands); Registration Number 34217974 (Netherlands) [RUSSIA-EO14024] (Linked To: VAN INGEN, Edwin Onno).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Edwin Onno Van Ingen, a person whose property and interests in property are blocked pursuant to E.O. 14024.

30. RONIN MANAGEMENT B.V. (a.k.a. RONIN CONSULTANCY; a.k.a. RONIN TRADING), Haarlemmerstraat 5 K.03-1, Gemeente Hillegom 2182 HA, Netherlands; Organization Established Date 24 May 2004; Tax ID No. 813234815 (Netherlands); Registration Number 34207537 (Netherlands) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

31. IGT INTERGESTIONS TRUST REG., Aeulestrasse 2, Vaduz 9490, Liechtenstein; Aeulestrasse 30, Vaduz 9490, Liechtenstein; Organization Established Date 20 Aug 1993; Identification Number JB8LS5.99999.SL.438 (Liechtenstein); Legal Entity Number 391200PWMHBZMLPKTA05; Registration Number FL-0001.513.056-8 (Liechtenstein) [RUSSIA-EO14024] (Linked To: TRADE INITIATIVE ESTABLISHMENT).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Trade Initiative Establishment, a person whose property and interests in property are

blocked pursuant to E.O. 14024.

32. LIMITED LIABILITY COMPANY TBS (a.k.a. TBS SEMI), Ul. Kievskaya D. 7, Et 4, Komnata 8, Moscow 121059, Russia; Nizhny Susalny Lane 5, Building 4, Moscow 105064, Russia; Organization Established Date 22 Feb 2012; Tax ID No. 7730660563 (Russia); Registration Number 1127746120622 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

33. TRADE INITIATIVE ESTABLISHMENT, C/O IGT Intergestions Trust Reg., Aeulestrasse 30, Vaduz 9490, Liechtenstein; Organization Established Date 27 Nov 1968; Registration Number FL-0001.026.862-1 (Liechtenstein) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

34. FEDERAL STATE BUDGETARY EDUCATIONAL INSTITUTION OF HIGHER VOCATIONAL EDUCATION GUBKIN RUSSIAN STATE UNIVERSITY OF OIL AND GAS (a.k.a. GUBKIN UNIVERSITY; a.k.a. NATIONAL UNIVERSITY OF OIL AND GAS GUBKIN UNIVERSITY; a.k.a. RGU NEFTI I GAZA NIU IMENI IM GUBKINA FGU), 65 Leninsky Prospekt, Moscow 119991, Russia; Organization Established Date 24 Sep 1997; Tax ID No. 7736093127 (Russia); Government Gazette Number 02066612 (Russia); Registration Number 1027739073845 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

35. GAZPROMNEFT NOYABRSK OIL AND GAS GEOPHYSICS LIMITED LIABILITY COMPANY (a.k.a. GAZPROMNEFT NGGF OOO (Cyrillic: ГАЗПРОМНЕФТЬ ННГГФ ООО); a.k.a. GAZPROMNEFT NOYABRSKNEFTEGAZGEOFIZIKA; a.k.a. GAZPROMNEFT NOYABRSKNEFTEGAZGEOPHYSICS OOO (Cyrillic: ГАЗПРОМНЕФТЬ НОЯБРЬСКНЕФТЕГАЗГЕОФИЗИКА ООО)), ter. Promuzel Pelei, Panel Xv 24, Noyabrsk, Yamalo-Nenetski A.O. 629809, Russia; Organization Established Date 01 Jun 2016; Tax ID No. 8905062456 (Russia); Government Gazette Number 04779032 (Russia); Registration Number 1168901053562 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

36. AKTSIONERNOE OBSHCHESTVO PROTON-ELEKTROTEKS (a.k.a. AO PROTON-ELEKTROTEKS; a.k.a. JSC PROTON-ELECTROTEX), ul. Leskova d. 19, pom. 27, of. 14, Orel 302040, Russia; Tax ID No. 5753020414 (Russia); Registration Number 1025700825248 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

37. AKTSIONERNOE OBSHCHESTVO TESTPRIBOR (a.k.a. AO TESTPRIBOR; a.k.a. JSC TESTPRIBOR), ul. Planernaya d. 7A, Moscow 125480, Russia; Tax ID No. 7733627211 (Russia); Registration Number 1077761778423 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

38. AKTSIONERNOE OBSHCHESTVO TORGOVYI DOM PROTON-ELEKTROTEKS (a.k.a. AO TD PROTON-ELEKTROTEKS; a.k.a. TRADING HOUSE PROTON-ELECTROTEX), ul. Leskova d. 19, pomeshchenie 27, office 14, Orel 302040, Russia; Tax ID No. 5753039510 (Russia); Registration Number 1065753010641 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

39. BRAND SERVER OPTIONS (a.k.a. "BSO"), ul. Butlerova d. 17B, et/p/kom/of/k 3/XII/86/1/55, Moscow 117342, Russia; Smirnovskaya ultisa, 25s2, Moscow, Russia; Tax ID No. 7724317936 (Russia); Registration Number 1157746419082 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

40. LLC TESTKOMPLEKT, ul. Verkhnyaya Krasnoselskaya d. 2/1, str. 1, floor 3, pomeshch. 317, Moscow 107140, Russia; ul. Kolpakova, d. 24A, ofis 5.06, Mytishchi, Moscow oblast, Russia; Tax ID No. 5029208152 (Russia); Registration Number 1165029051472 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

41. LLC T-KOMPONENT SP (a.k.a. "T-COMPONENT"), Pr-kt Leninskii d. 153, floor 2 pom. 60N office 215, Saint Petersburg 196247, Russia; Tax ID No. 7810656900 (Russia); Registration Number 1177847066990 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

42. LLC VEST-OST (a.k.a. "WEST-OST"), Gotvalda ul d. 21/2, Yekaterinburg 620107, Russia; Tax ID No. 6670249749 (Russia); Registration Number 1096670008434 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

43. LOGAID, ul. 1-ya Volskaya d. 26, floor 2, kom #9, Moscow 111674, Russia; Ryazanskiy prospekt, dom 10, stroenie 2, Moscow 109428, Russia; ul. Svobody 95k2, 1 podyezd, 1 etazh, Moscow 125481, Russia; Tax ID No. 7721831364

(Russia); Registration Number 1147746464095 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

44. PETERSBURG INTELLIGENT TRANSPORT LOGISTICS (a.k.a. PIT LOGISTICS; a.k.a. PIT LOGISTIKS), Pr-kt Leninskii d. 153, pomeshch. 233N office 718, Saint Petersburg 196247, Russia; Tax ID No. 7810639510 (Russia); Registration Number 1167847504219 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

45. PHOENIX ELECTRONICS (a.k.a. FENIKS ELEKTRONIKS), ul. 8 Marta d. 16, Izhevsk 426035, Russia; Tax ID No. 1840028437 (Russia); Registration Number 1141840005768 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

46. AKTSIONERNOE OBSHCHESTVO PROTON (a.k.a. AO PROTON; a.k.a. JSC PROTON), ul. Leskova 19, Orel 302040, Russia; Moscow, Russia; Saratov, Russia; Tax ID No. 5753018359 (Russia); Registration Number 1025700827283 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

47. ELITAN TRADE OOO (a.k.a. ELITAN TREID), ul. Melnichnaya d. 34A, Izhevsk 426063, Russia; Tax ID No. 1831096455 (Russia); Registration Number 1041800258444 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

48. LIMITED LIABILITY COMPANY BSP GLOBAL (a.k.a. BSP SECURITY; a.k.a. LLC BSP GLOBAL), ul. Im. Selezneva d. 2, k. 5, pomeshch. 5/1, Krasnodar 350059, Russia; ul. Im Shevchenko, d. 152/4, pomeshchenie 204/2, Krasnodar 350001, Russia; Tax ID No. 2309154426 (Russia); Registration Number 1172375014470 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

49. LLC ELSITON KOMPONENT, ul. Nikitina d. 20, office 409, Novosibirsk 630009, Russia; Tax ID No. 5405453030 (Russia); Registration Number 1125476064779 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

50. LLC EVROMIKROTEKH (a.k.a. EUROMICROTECH; a.k.a. "EMT OOO"), ul. Vaneeva d. 205, office 506, Nizhniy Novgorod 603122, Russia; Tax ID No. 5262367076 (Russia); Registration Number 1195275054523 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

51. LLC MINATEKH (a.k.a. MINATEH), ul. Tkatskaya d. 5, str. 1, floor 3, Moscow 105318, Russia; Tax ID No. 7719404005 (Russia); Registration Number 1157746133654 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

52. NEOTEKHNIKA OOO, ul. Dorogobuzhskaya d. 14, floor 3 pom. 304, Moscow 121354, Russia; Tax ID No. 7731327678 (Russia); Registration Number 1167746842680 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

53. OOO TITAN-MICRO (a.k.a. TITAN-MIKRO), ul. Svobody d. 103, str. 8, floor 2, kom. 4, Moscow 125481, Russia; 11th Floor, 65 Profsoyuznaya Street, Moscow, Russia; Tax ID No. 6230119259 (Russia); Registration Number 1216200001533 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

54. PUBLICHNOE AKTSIONERNOE OBSCHESTVO ELECTROVIPRYAMITEL (a.k.a. JSC ELECTROVIPRYAMITEL; f.k.a. OTKRYTOE AKTSIONERNOE OBSCHESTVO ELECTROVIPRYAMITEL), 126, Proletarskaya Str, Saransk 430001, Russia; Tax ID No. 1325013893 (Russia); Registration Number 1021301064950 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

55. SIMMETRON ELEKTRONNYE KOMPONENTY (a.k.a. SIMMETRON EK; a.k.a. "SYMMETRON"), ul. Tallinskaya d. 7, Saint Petersburg 195196, Russia; Leningradskoye shosse, 69, build. 1, Moscow 125445, Russia; Bluchera ul. 71b, Novosibirsk 630073, Russia; Very Khoruzhey ul., 1a, office 403, Minsk 220005, Belarus; Tax ID No. 7806296652 (Russia); Registration Number 1187847001341 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

56. TORGOVYI DOM SIMMETRON ELEKTRONNYE KOMPONENTY (a.k.a. TD SIMMETRON EK OOO; a.k.a. TH SYMMETRON ELECTRONIC

COMPONENTS), Sh. Leningradskoe d. 69, korp. 1, Moscow 125445, Russia; Tax ID No. 7743581260 (Russia); Registration Number 1057749709380 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

57. ELMEC TRADE OU, Katusepapi Tn 6-502, Tallinn 11412, Estonia; V.A.T. Number EE102280812 (Estonia); Registration Number 14291975 (Estonia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

58. LIMITED LIABILITY COMPANY KVAZAR (a.k.a. KVAZAR OOO), ul. Promyshlennaya d. 19, lit. R, office 304, Saint Petersburg 198095, Russia; Tax ID No. 7805753313 (Russia); Registration Number 1197847145748 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

59. LIMITED LIABILITY COMPANY SPETSVOLTAZH (a.k.a. OOO SPETSVOLTAZH; a.k.a. SPECVOLT), ul. Kantemirovskaya d. 12, lit. A, pomeshch. # 19-N office 18, Saint Petersburg 194100, Russia; Tax ID No. 7802634149 (Russia); Registration Number 1177847317306 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the electronics sector of the Russian Federation economy.

60. JSC NGT (a.k.a. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO NGT; a.k.a. "NGT AO"), Ul. Fominskaya D.54, Perm 614058, Russia; Organization Established Date 02 Oct 2002; Tax ID No. 5902186000 (Russia); Government Gazette Number 52275083 (Russia); Registration Number 1025900513935 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the metals and mining sector of the Russian Federation economy.

61. UT IT NOVAYA INDUSTRIYA OOO (a.k.a. "NEW INDUSTRY VENTURES"), ul. Leninskie Gory d. 1, str. 77, office 1041B, Moscow 119234, Russia; Organization Established Date 19 Feb 2019; Tax ID No. 7728461088 (Russia); Registration Number 1197746126071 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy and for operating or having operated in the technology sector of the Russian Federation economy.

62. OIL ENERDZHI LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU OIL ENERDZHI; a.k.a. OIL

ENERDZHI OOO; a.k.a. "OIL ENERGY"), Ul. Butlerova D. 17, Blok A, Moscow 117342, Russia; d. 1 str. 8 kom. 40, 41, proezd 1-I Veshnyakovski Moscow, Moscow 109456, Russia; Organization Established Date 07 Oct 2010; Tax ID No. 7721704983 (Russia); Government Gazette Number 68836796 (Russia); Registration Number 1107746819366 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the metals and mining sector of the Russian Federation economy.

63. GEFESD LTD (a.k.a. PO GEFESD), ul. Sovetskaya d. 15, Lyulikh 601362, Russia; Organization Established Date 09 Nov 2010; Tax ID No. 3324123093 (Russia); Registration Number 1103337000524 (Russia) [RUSSIA-EO14024] (Linked To: GARSHIN, Vadim Veniaminovich; Linked To: RAZORENOV, Aleksandr Gennadievich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Vadim Veniaminovich Garshin and Aleksandr Gennadievich Razorenov, persons whose property and interests in property are blocked pursuant to E.O. 14024.

64. LIMITED LIABILITY COMPANY BUSINESSPROMESTATE (a.k.a. BIZNESPROMESTEIT), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731481060 (Russia); Registration Number 5147746189069 (Russia) [RUSSIA-EO14024] (Linked To: GARSHIN, Vadim Veniaminovich; Linked To: RAZORENOV, Aleksandr Gennadievich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Vadim Veniaminovich Garshin and Aleksandr Gennadievich Razorenov, persons whose property and interests in property are blocked pursuant to E.O. 14024.

65. OSTEC ENTERPRISE LTD (a.k.a. PREDPRIYATIE OSTEK), ul. Moldavskaya d. 5, korp. 2, Moscow 121467, Russia; Organization Established Date 19 Jan 1994; Tax ID No. 7731480806 (Russia); Registration Number 5147746169951 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

66. OSTEC-ARTTOOL LTD (a.k.a. OSTEK-ARTTUL), ul. Moldavskaya d. 5/2, Moscow 121467, Russia; ul. Barklaya d. 6, str. 3, et/kom 5/1-17, Moscow 121087, Russia; Organization Established Date 02 Apr 2007; Tax ID No. 7731481038 (Russia); Registration Number 5147746189036 (Russia) [RUSSIA-EO14024] (Linked To: GARSHIN, Vadim Veniaminovich; Linked To: RAZORENOV, Aleksandr Gennadievich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Vadim Veniaminovich Garshin and Aleksandr Gennadievich Razorenov, persons whose property and interests in property are blocked pursuant to E.O. 14024.

67. OSTEC-EC LTD (a.k.a. OSTEK-EK), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731481077 (Russia); Registration Number 5147746189070 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

68. OSTEC-ELECTRO LTD (a.k.a. OSTEK-ELEKTRO), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731483966 (Russia); Registration Number 5147746324754 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

69. OSTEC-ETC LTD (a.k.a. OSTEK-ETK), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; Nab. Luzhnetskaya d. 2/4, str. 16, et/pom. 3/303, Moscow 119270, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731481052 (Russia); Registration Number 5147746189058 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

70. OSTEC-INTEGRA LTD (a.k.a. OSTEK-INTEGRA OOO), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; ul. Partizanskaya d. 25, et/pom/kom 4/I/8, 8A 8B 9 9A 9B 9V 10-20 33, Moscow 121351, Russia; Organization Established Date 17 Nov 2011; Tax ID No. 7731416984 (Russia); Registration Number 1117746929717 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

71. OSTEC-SMT LTD (a.k.a. OSTEK-SMT), ul. Kulakova d. 20, str. 1G, Moscow 123592, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731481045 (Russia); Registration Number 5147746189047 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

72. OSTEC-ST LTD (a.k.a. OSTEK-ST), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; Organization Established Date 24 Jun 2009; Tax ID No. 7731630120 (Russia); Registration Number 1097746369820 (Russia) [RUSSIA-EO14024].

    Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

73. OSTEC-TEST LTD (a.k.a. OSTEK-TEST), ul. Moldavskaya d. 5, str. 2, Moscow 121467, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731481020 (Russia); Registration Number 5147746189025 (Russia) [RUSSIA-

EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

74. RIIT LTD (a.k.a. "NIIIT"), ul. Kulakova d. 20, str. 1G, pom. XIV et 3, kom 10, 11, 52-57, Moscow 123592, Russia; Organization Established Date 23 Apr 2013; Tax ID No. 7731481013 (Russia); Registration Number 5147746189014 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

75. AQUILA CAPITAL GROUP (a.k.a. ACG FINANCE LIMITED; a.k.a. EI SI DZHI FAINENS LIMITED PREDSTAVITELSTVO), Elenion Building, Floor No: 2, Themistokli Dervi 5, Nicosia 1066, Cyprus; d. 23 Str. 1 of 2, Naberezhnaya Savvinskaya, Moscow 119435, Russia; Organization Established Date 24 Oct 2005; Tax ID No. 9909197551 (Russia); Registration Number C167057 (Cyprus) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

76. LLC SYMPHONY (Cyrillic: ООО СИМФОНИЯ), Lane Yakovoapostolsky, 15, Moscow 105064, Russia; Organization Established Date 02 Nov 2022; Tax ID No. 9709087135 (Russia); Registration Number 1227700713217 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

77. OOO TRAST LODZHISTIKS GRUPP (a.k.a. TRUST LOGISTICS GROUP LLC), u. Yurovskaya D. 92, pom.I komn. 40, Moscow 125466, Russia; ul. Baryshikha, 32 korp. 1, pomeshch. 1/1, Moscow 125368, Russia; Organization Established Date 22 Oct 2014; Tax ID No. 7733899720 (Russia); Registration Number 5147746261823 (Russia) [RUSSIA-EO14024] (Linked To: AKIFYEV, Pavel Viktorovich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Pavel Viktorovich Akifyev, a person whose property and interests in property are blocked pursuant to E.O. 14024.

78. TRUST LOGISTIC (a.k.a. LOGISTIKA DOVERIYA OOO; a.k.a. OOO LOGISTIKA DOVERIIA; a.k.a. TRUST LOGISTICS LLC), Vladenie 5 Etazh/Pom.3/321, Khimki 141402, Russia; ul. Engelsa, 27, et. 2 pomeshch. 89, Khimki, Moscow 141402, Russia; Organization Established Date 24 May 2012; Tax ID No. 7721758555 (Russia); Registration Number 1127746399098 (Russia) [RUSSIA-EO14024] (Linked To: AKIFYEV, Pavel Viktorovich).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Pavel

Viktorovich Akifyev, a person whose property and interests in property are blocked pursuant to E.O. 14024.

79. VERSVET SRO, Belehradska 1111/3, Karlovy Vary 36001, Czech Republic; Organization Established Date 18 Apr 2009; Registration Number 28057953 (Czech Republic) [RUSSIA-EO14024] (Linked To: VERKHOVTSEVA, Svetlana Yuryevna).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Svetlana Yuryevna Verkhovtseva, a person whose property and interests in property are blocked pursuant to E.O. 14024.

80. HI-TECH KONEISTO INTERNATIONAL OY, Hirsalantie 11, Jorvas 02420, Finland; Organization Established Date 21 Jul 2021; V.A.T. Number FI32114731 (Finland); Identification Number 3211473-1 (Finland) [RUSSIA-EO14024] (Linked To: DREMOVA, Evgenia).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Evgenia Dremova, a person whose property and interests in property are blocked pursuant to E.O. 14024.

81. KONEISTO INTERNATIONAL OY (a.k.a. KONEISTO CONSULTING; a.k.a. KONEISTO TECHNOLOGY), Hirsalantie 11, Jorvas 02420, Finland; Salmitie 3, Masala 02430, Finland; Organization Established Date 27 Jan 1993; V.A.T. Number FI09221256 (Finland); Identification Number 0922125-6 (Finland); Registration Number 554.917 (Finland) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the technology sector of the Russian Federation economy.

82. MASHOIL LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU MASHOIL), d. 5 str. 1 pom. 1 kom. 1, per. Pyzhevski Moscow, Moscow 119017, Russia; Organization Established Date 25 Dec 2009; Tax ID No. 3315095756 (Russia); Government Gazette Number 63460412 (Russia); Registration Number 1093336001857 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the metals and mining sector of the Russian Federation economy.

83. CRYPTANET OU (f.k.a. BULLIONSWIFT OU), Narva Mnt 7-634, Tallinn 10117, Estonia; Organization Established Date 08 Feb 2019; Tax ID No. 14658163 (Estonia) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

84. CRYPTOVENIENCE OU, Vabaduse Pst 174B, Tallinn 10917, Estonia; Pollu tn 135-11, Tallinn 10917, Estonia; Organization Established Date 03 Jul 2018; V.A.T. Number EE102105942 (Estonia); Tax ID No. 14518456 (Estonia) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

85. DULAC CAPITAL LTD (a.k.a. AK DYULAK KEPITAL LTD PREDSTAVITELSTVO; a.k.a. PREDSTAVITELSTVO AKTSIONERNOGO OBSHCHESTVA DYULAK KEPITAL LTD SHVEITSARIYA V G MOSCOW; a.k.a. PREDSTAVITELSTVO AKTSIONERNOGO OBSHCHESTVA DYULAK KEPITAL LTD SHVEITSARIYA V G SANKT PETERBURGE), Arosastrasse 7, Zurich 8008, Switzerland; Pr-kt Morskoi pom. 12-N, Saint Petersburg 197110, Russia; Pr-kt Leningradskii, Moscow 125167, Russia; Organization Established Date 14 Dec 2007; Tax ID No. 113974567 (Switzerland); alt. Tax ID No. 9909354395 (Russia); Identification Number SRWNNB.99999.SL.756 (Switzerland); Legal Entity Number 529900E3569EJW938341; Registration Number CH-020.3.031.775-0 (Switzerland) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

86. EAST STAR INVESTMENTS LIMITED, d. 3A str. 1 pom 10/3, ul. Solnechnaya, Moskovsky, Moscow 108813, Russia; Organization Established Date 23 Dec 2020; Tax ID No. 7751190171 (Russia); Registration Number 1207700492900 (Russia) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

87. KRAVERTON CONSTRUCTION AND DEVELOPMENT LIMITED, Unit 1405B 14/F, The Belgian Bank Building, Nos. 721-725 Nathan Road, Mongkok, Kowloon, Hong Kong, China; Organization Established Date 06 Mar 2018; Registration Number 2662339 (Hong Kong) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

88. KRAVERTON LP (f.k.a. KRAVERTON CONSTRUCTION AND DEVELOPMENT LP), Suite 1, 4 Queen Street, Edinburgh, Scotland EH2 1JE, United Kingdom; 101 Rose Street South Lane, Edinburgh, Scotland EH2 3JG, United Kingdom; Organization Established Date 24 May 2016; UK Company Number

SL026856 (United Kingdom) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

89. LIMITED LIABILITY COMPANY NOVENKO RUSSLEND (a.k.a. NOVENCO RUSSIA), Sh. Varshavskoe d. 17, et 3 kab 309, Moscow 117105, Russia; Organization Established Date 07 Mar 2018; Tax ID No. 7726424450 (Russia); Registration Number 1187746252803 (Russia) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

90. RB CONSULTING LIMITED, Room 4, Office 18, Block 19 Vincenti Bld, Strait Street, Valletta VLT 1432, Malta; Organization Established Date 06 Jun 2014; Registration Number C 65488 (Malta) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

91. RB HOLDING LIMITED, Room 4, Office 18, Block 19 Vincenti Bld, Strait Street, Valletta VLT 1432, Malta; Organization Established Date 04 Jun 2014; Registration Number C 65463 (Malta) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

92. ROBARIN LTD, Vanezis Business Center, Flat No: 401S, Floor No: 4, Archiepiskopou Makariou III 171, Limassol 3027, Cyprus; Organization Established Date 15 Jun 2018; Registration Number C385226 (Cyprus) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

93. SALING DEVELOPMENT LP, Suite 1, 4 Queen Street, Edinburgh, Scotland EH2 1JE, United Kingdom; Organization Established Date 24 May 2016; UK Company

Number SL026857 (United Kingdom) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

94. SCHLOSS HOLDING OU, Tekhnika Tn 33-9, Tallinn 10613, Estonia; Organization Established Date 15 Aug 2019; Tax ID No. 14783081 (Estonia) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

95. WEALTHING HOLDING PTE LTD, 1 George Street #10-01, Singapore 049145, Singapore; Organization Established Date 19 Jun 2019; Tax ID No. 201919688W (Singapore) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

96. WELMART GROUP LIMITED, Unit 1405B 14/F, The Belgian Bank Building, Nos. 721-725 Nathan Road, Mongkok, Kowloon, Hong Kong, China; Organization Established Date 06 Mar 2018; Registration Number 2662335 (Hong Kong) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

97. WELMART GROUP LP, Suite 1, 4 Queen Street, Edinburgh, Scotland EH2 1JE, United Kingdom; 101 Rose Street South Lane, Edinburgh, Scotland EH2 3JG, United Kingdom; Organization Established Date 25 May 2016; UK Company Number SL026873 (United Kingdom) [RUSSIA-EO14024] (Linked To: SCHMUCKI, Anselm Oskar).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, Anselm Oskar Schmucki, a person whose property and interests in property are blocked pursuant to E.O. 14024.

98. INNOEDGE CLOUDSERVE PRIVATE LIMITED, 944, Block C, Sushant Lok Phase 1 Gurugram, Gurgaon 122001, India; Organization Established Date 18 Jul 2022; Registration Number U72900HR2022PTC105231 (India) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

99. MAVASAL IMPEX PRIVATE LIMITED, Plot No. 11, Sector 33, Gurgaon 122004, India; Organization Established Date 14 Jul 2022; Registration Number U51909HR2022PTC105163 (India) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(vii) of Executive Order 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation.

100. TATBURNEFT LIMITED LIABILITY COMPANY (a.k.a. MANAGING COMPANY TATBURNEFT LLC), Ul. Musy Dzhalilya D. 51, Almetevsk 423450, Russia; Organization Established Date 12 Feb 2008; alt. Organization Type: Support activities for petroleum and natural gas extraction; Tax ID No. 1644047828 (Russia); Government Gazette Number 83471332 (Russia); Registration Number 1081644000492 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the metals and mining sector of the Russian Federation economy.

101. PUBLIC JOINT STOCK COMPANY TYAZHPRESSMASH CONSULTING (a.k.a. PUBLICHNOE AKTSIONERNOE OBSHCHESTVO TYAZHPRESSMASH; a.k.a. TYAZHPRESSMASH OAO; a.k.a. TYAZHPRESSMASH OJSC; f.k.a. TYAZHPRESSMASH OTKRYTOE AKTSIONERNOE OBSHCHESTVO; a.k.a. TYAZHPRESSMASH PAO; a.k.a. TYAZHPRESSMASH PUBLIC JOINT STOCK COMPANY), D. 5, ul Promyshlennaya Ryazan, Ryazan Region 390042, Russia; Organization Established Date 04 Dec 1992; Tax ID No. 6229009163 (Russia); Government Gazette Number 6229009163 (Russia); Registration Number 1026201074657 (Russia) [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the metals and mining sector of the Russian Federation economy.

102. GOLD MILES LIMITED, 9B Shun Pont Commerical Building, 5 Thomson Road, Wanchai, Hong Kong, China; Suite 1601 Lake Central Tower, Marasi Drive, Business Bay, PO Box 417761, Dubai, United Arab Emirates; Organization Established Date 05 May 2011; Target Type Private Company; Registration Number 1596444 (Hong Kong) [RUSSIA-EO14024] (Linked To: HANAFIN, John Desmond).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, John Desmond Hanafin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

103. HURIYA PRIVATE CYPRUS LTD, 157 Athalassas, Strovolos 2015, Cyprus; Organization Established Date 26 Feb 2021; Target Type Private Company;

Registration Number C418778 (Cyprus) [RUSSIA-EO14024] (Linked To: HANAFIN, John Desmond).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, John Desmond Hanafin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

104. HURIYA PRIVATE FZE LLE, Suite 1601 Lake Central Tower, Business Bay, Dubai, United Arab Emirates; Nuschelerstrasse 31, PO Box 8022, Zurich, Switzerland; Office 1919, 19 floor, The E18hteen Tower, Lusail, Doha, Qatar; Fujairah, United Arab Emirates; Albania; Cyprus; Organization Established Date 2018; Organization Type: Other financial service activities, except insurance and pension funding activities, n.e.c. [RUSSIA-EO14024].

Designated pursuant to section 1(a)(i) of Executive Order 14024 for operating or having operated in the financial services sector of the Russian Federation economy.

B.On June 15, 2023 OFAC updated the entry on the SDN List for the following person, whose property and interests in property subject to U.S. jurisdiction continue to be blocked under the relevant sanctions authority listed below.

1. GOLD MILES LIMITED, 9B Shun Pont Commerical Building, 5 Thomson Road, Wanchai, Hong Kong, China; Suite 1601 Lake Central Tower, Marasi Drive, Business Bay, P.O. Box 417761, Dubai, United Arab Emirates; Organization Established Date 05 May 2011; Target Type Private Company; Registration Number 1596444 (Hong Kong) [RUSSIA-EO14024] (Linked To: HANAFIN, John Desmond).

-to-

GOLD MILES LIMITED, 9B Shun Pont Commercial Building, 5 Thomson Road, Wanchai, Hong Kong, China; Suite 1601 Lake Central Tower, Marasi Drive, Business Bay, P.O. Box 417761, Dubai, United Arab Emirates; Organization Established Date 05 May 2011; Target Type Private Company; Registration Number 1596444 (Hong Kong) [RUSSIA-EO14024] (Linked To: HANAFIN, John Desmond).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, John Desmond Hanafin, a person whose property and interests in property are blocked pursuant to E.O. 14024.

Dated: June 15, 2023

Andrea M. Gacki,

OFAC Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–13138 Filed 6–20–23; 8:45 am]

BILLING CODE 4810–AL–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 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 applicable 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 Compliance, 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 Actions

On June 15, 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.

Individuals

1. CHOE, Chol Min (Chinese Simplified: 崔哲民; Korean: 최철민) (a.k.a. CHOE, Chol-min), Beijing, China; DOB 03 Apr 1978; nationality Korea, North; Gender Male; 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; Passport 108410050 (Korea, North) expires 19 Oct 2023 (individual) [NPWMD] (Linked To: SECOND ACADEMY OF NATURAL SCIENCES).

   Designated pursuant to section 1(a)(iv) of Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters," (E.O. 13382) for being owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, SECOND ACADEMY OF NATURAL SCIENCES, a person whose property or interests in property are blocked pursuant to E.O. 13382.

2. CHOE, Un Jong (a.k.a. CH'OE, U'n-cho'ng; a.k.a. CHOE, Unjong), Beijing, China; DOB 10 May 1978; nationality Korea, North; Gender Female; 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; Passport 108410051 (Korea, North) (individual) [DPRK4].

   Designated pursuant to section 1(a)(iv) of Executive Order 13810 of September 21, 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.

Authorities: E.O. 13382, 70 FR 38567, 3 CFR 2005 Comp., p. 170; E.O. 13810, 82 FR 44705, 3 CFR 2017 Comp., p. 379.

Dated: June 15, 2023.

Andrea Gacki,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2023–13179 Filed 6–20–23; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Credit for Renewable Electricity Production and Publication of Inflation Adjustment Factor and Reference Price for Calendar Year 2023

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of publication.

SUMMARY: The 2023 inflation adjustment factor and reference price are used in determining the availability of the credit for renewable electricity production under section 45 (section 45 credit).

FOR FURTHER INFORMATION CONTACT: Charles Hyde, CC:PSI:6, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, (202) 317–6853 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The 2023 inflation adjustment factor and reference price apply to calendar year 2023 sales of kilowatt hours of electricity produced in the United States or a possession thereof from qualified energy resources.

Inflation Adjustment Factor: The inflation adjustment factor for calendar year 2023 for qualified energy resources is 1.8909.

Reference Price: The reference price for calendar year 2023 for facilities producing electricity from wind is 3.74 cents per kilowatt hour. The reference prices for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, solar energy, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy have not been determined for calendar year 2023.

Phaseout Calculation: Because the 2023 reference price for electricity produced from wind (3.74 cents per kilowatt hour) does not exceed 8 cents multiplied by the inflation adjustment factor (1.8909), the phaseout of the credit provided in section 45(b)(1) does not apply to such electricity sold during calendar year 2023. For electricity produced from closed-loop biomass, open-loop biomass, geothermal energy, solar energy, municipal solid waste, qualified hydropower production, and marine and hydrokinetic renewable energy, the phaseout of the credit provided in section 45(b)(1) does not apply to such electricity sold during calendar year 2023.

Inflation Reduction Act Amendments: Section 45 was amended by section 13101 of Public Law 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA). The IRA changed the manner in which the section 45 credit amounts are calculated for any qualified facility placed in service after December 31, 2021. The IRA also removed the one-

half reduction of the credit amount under section 45(b)(4)(A) for qualified hydropower facilities and marine and hydrokinetic renewable energy facilities placed in service after December 31, 2022. In the case of any qualified facility placed in service before January 1, 2022, the section 45 credit amounts are determined under the calculation rules provided by the prior version of section 45.

As amended by the IRA, section 45(b)(6)(A) provides that, in the case of any qualified facility that satisfies the requirements of section 45(b)(6)(B), the credit amount determined under section 45(a) (determined after the application of section 45(b)(1) through (5) and without regard to section 45(b)(6)) is equal to such amount multiplied by 5. A qualified facility satisfies the requirements of section 45(b)(6)(B) if it is placed in service after December 31, 2021, and it is one of the following: (i) a facility with a maximum net output of less than 1 megawatt (as measured in alternating current); (ii) a facility the construction of which began prior to January 29, 2023, which is the date that is 60 days after the publication of the guidance with respect to the requirements of section 45(b)(7)(A) (prevailing wage requirements) and section 45(b)(8) (apprenticeship requirements);[1] or (iii) a facility that satisfies the requirements of section 45(b)(7)(A) and (8). The IRA also added bonus credit amounts with respect to qualified facilities placed in service after December 31, 2022, that meet domestic content requirements under section 45(b)(9)[2] or energy community requirements under section 45(b)(11).[3]

The IRA amended the phaseout of the section 45 credit for wind facilities under section 45(b)(5) such that it does not apply to facilities placed in service after December 31, 2021. The IRA also added a new phaseout of the section 45 credit under section 45(b)(10) in the case of qualified facilities placed in service after December 31, 2022, for taxpayers making an elective payment election under section 6417. The IRA also amended the credit amount reduction under section 45(b)(3) in the case of qualified facilities the construction of which began after August 16, 2022.

The IRA amended section 45(d)(4) to restore the section 45 credit for electricity produced in solar energy facilities in the case of qualified facilities placed in service after December 31, 2021, and the construction of which begins before January 1, 2025. Effective for facilities placed in service after December 31, 2022, the IRA amended the definition of marine and hydrokinetic renewable energy under section 45(c)(10) and the definition of a marine and hydrokinetic renewable energy facility under section 45(d)(11). The IRA extended certain deadlines in the definitions under section 45(d) for wind facilities, closed-loop biomass facilities, open-loop biomass facilities, geothermal facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities.

Credit Amount for a Qualified Facility Placed in Service before January 1, 2022: As required by section 45(b)(2), the 1.5 cent amount provided in section 45(a)(1) is adjusted by multiplying such amount by the inflation adjustment factor for the calendar year in which the sale occurs. If any amount as increased under section 45(b)(2) is not a multiple of 0.1 cent, such amount is rounded to the nearest multiple of 0.1 cent. In the case of electricity produced in open-loop biomass facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities, section 45(b)(4)(A) requires the amount in effect under section 45(a)(1) (before rounding to the nearest 0.1 cent as required by section 45(b)(2)) to be reduced by one-half.

Under the calculation required by section 45(b)(2), the credit for renewable electricity production for calendar year 2023 determined under section 45(a) is 2.8 cents per kilowatt hour on the sale of electricity produced in any qualified facility placed in service before January 1, 2022, from the qualified energy resources of wind, closed-loop biomass, and geothermal energy, and 1.4 cents per kilowatt hour on the sale of electricity produced in any qualified facility placed in service before January 1, 2022, from the qualified energy resources of open-loop biomass, landfill gas, trash, qualified hydropower, and marine and hydrokinetic renewable energy.

Credit Amount for a Qualified Facility Placed in Service after December 31, 2021: As required by section 45(b)(2), the 0.3 cent amount provided in section 45(a)(1) is adjusted by multiplying such amount by the inflation adjustment factor for the calendar year in which the sale occurs. If the 0.3 cent amount as adjusted for inflation is not a multiple of 0.05 cent, the amount is rounded to the nearest multiple of 0.05 cent. In the case of electricity produced in open-loop biomass facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities, section 45(b)(4)(A) requires the amount in effect under section 45(a)(1) (determined before rounding as required by section 45(b)(2)) to be reduced by one-half.

Under the calculation required by section 45(b)(2), the credit for renewable electricity production for calendar year 2023 determined under section 45(a) is 0.55 cents per kilowatt hour on the sale of electricity produced in any qualified facility placed in service after December 31, 2021, from the qualified energy resources of wind, closed-loop biomass, geothermal energy, and solar energy, and 0.3 cents per kilowatt hour on the sale of electricity produced in any qualified facility placed in service after December 31, 2021, from the qualified energy resources of open-loop biomass, landfill gas, trash, qualified hydropower, and marine and hydrokinetic renewable energy.

Credit Amount for Qualified Hydropower Facilities and Marine and Hydrokinetic Renewable Energy Facilities Placed in Service after December 31, 2022: Under the calculation required by section 45(b)(2), the credit for renewable electricity production for calendar year 2023 determined under section 45(a) is 0.55 cents per kilowatt hour on the sale of electricity produced in any qualified facility placed in service after December 31, 2022, from the qualified energy resources of qualified hydropower and marine and hydrokinetic renewable energy.

(Authority: 45(e)(2)(A) (26 U.S.C. 45(e)(2)(A)) of the Internal Revenue Code.)

Christopher T. Kelley,

Special Counsel to the Associate Chief Counsel (Passthroughs and Special Industries).

[FR Doc. 2023–13191 Filed 6–20–23; 8:45 am]

BILLING CODE 4830–01–P

[1] *See* Notice 2022–61, 2022–52 I.R.B. 560 (Dec. 27, 2022), for additional information regarding the prevailing wage and apprenticeship requirements.

[2] *See* Notice 2023–38, 2023–22 I.R.B. 872 (May 12, 2023), for additional information regarding the domestic content bonus credit.

[3] *See* Notice 2023–45, released in IR–2023–118, for additional information regarding the energy community bonus credit.

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0160]

Agency Information Collection Activity: State Home Programs for Veterans

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before August 21, 2023.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Grant Bennett, Office of Regulations, Appeals, and Policy (10BRAP), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *Grant.Bennett@va.gov*. Please refer to ''OMB Control No. 2900–0160'' 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. 2900–0160'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: Public Law 104–13; 44 U.S.C. 3501–3521.

Title: State Home Programs for Veterans (VA Forms 10–5588, 10–5588A, and 10–10SH).

OMB Control Number: 2900–0160.

Type of Review: Revision of a currently approved collection.

Abstract: Authority for this information collection can be found in two public laws affecting State homes: Public Law 115–159, the State Veterans Home Adult Day Health Care Improvement Act of 2017, which requires VA to pay State Veteran Homes (SVHs) for medical model adult day health care provided to certain eligible Veterans; and Public Law 116–315, Section 3007, Waiver of Requirements of Department of Veterans Affairs for Receipt of Per Diem Payments for Domiciliary Care at State Homes and Modification of Eligibility for such Payments. This information collection also enables the payment of per diem to State homes that provide care to eligible Veterans in accordance with Title 38 CFR part 51. The intended effect of these provisions is to create a safeguard that Veterans are receiving a high quality of care in SVHs.

To ensure that high quality care is furnished to Veterans, VA requires those facilities providing nursing home care, domiciliary care, and adult day health care programs to Veterans to supply various kinds of information. The information required includes an application and justification for payment; records and reports that facility management must maintain regarding payment activities of residents or participants; and records and reports that facilities management and health care professionals must maintain regarding eligible residents or participants. The following three forms are included in this information collection:

a. VA Form 10–5588: State Home Report and Statement of Federal Aid Claimed—38 CFR 51, 52 and title 38, U.S.C., sections 1741, 1742, 1743 and 1745—is used to assess and provide per diem to State homes. This collection instrument is used by the State home employees and VA Staff.

b. VA Form 10–5588A: Claim for Increased Per Diem Payment for Veterans Awarded Retroactive Service Connection—38 CFR 51, 52 and title 38, U.S.C. 1741, 1742, 1743 and 1745—is used to assess and provide per diem to State homes retroactively. This collection instrument is used by the State home employees and VA Staff.

c. VA Form 10–10SH: State Home Program Application for Veterans Care Medical Certification—38 CFR 51, 52 and title 38, U.S.C. 1741, 1742, 1743 and 1745—provides for the collection of information to apply for the benefits of this program.

The State Home Per Diem (SHPD) Program recently automated the 10–10SH form. The form was converted into a web-based, fillable form that can be electronically submitted from the SVH to the appropriate VAMC. It includes data field validation, assuring that all required fields have been filled before the user can electronically submit the 10–10SH form. The VA portion of the application also includes business rules to assist the VA representatives in making uniform determinations, allow the VA representative to return incomplete applications to the SVH along with a notification to them, and record receipt of the completed application.

Total Annual Burden: 4,816 hours.

Total Annual Responses: 13,614.

VA Form 10–5588

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 834 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 139.

VA Form 10–5588A

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 180 hours.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: Monthly.

Estimated Number of Respondents: 45.

VA Form 10–10SH

Affected Public: State, Local, and Tribal Governments.

Estimated Annual Burden: 3,802 hours.

Estimated Average Burden Per Respondent: 20 minutes.

Frequency of Response: Once annually.

Estimated Number of Respondents: 11,406.

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. 2023–13159 Filed 6–20–23; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Part II

Department of Energy

10 CFR Parts 429, 430, and 431
Energy Conservation Program: Test Procedure for Consumer Water Heaters and Residential-Duty Commercial Water Heaters; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 429, 430, and 431

[EERE–2019–BT–TP–0032]

RIN 1904–AE77

Energy Conservation Program: Test Procedure for Consumer Water Heaters and Residential-Duty Commercial Water Heaters

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

ACTION: Final rule.

SUMMARY: This final rule incorporates by reference the latest version of the industry testing standard for consumer water heaters and residential-duty commercial water heaters and adopts relevant portions of those standards into the Federal test procedure. In this final rule, the U.S. Department of Energy (DOE) is also expanding the scope of coverage of the test procedure to apply to certain consumer water heater designs (including circulating water heaters and low-temperature water heaters), adding definitions for certain specialty water heaters, updating test conditions and tolerance requirements to reduce burden, clarifying test set-up and installation methods, addressing the test conduct for products which can store water at temperatures above the delivery setpoint, establishing an effective volume calculation, and extending untested provisions to electric instantaneous water heaters.

DATES: The effective date of this rule is July 21, 2023. The final rule changes will be mandatory for consumer water heater testing starting December 18, 2023 and for residential-duty commercial water heater testing starting June 17, 2024. The incorporation by reference of certain material listed in this rule is approved by the Director of the Federal Register on July 21, 2023.

ADDRESSES: The docket, 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 those containing information that is exempt from public disclosure.

A link to the docket web page can be found at: *www.regulations.gov/docket/EERE-2019-BT-TP-0032.* 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: (202) 597–6737. Email: *ApplianceStandardsQuestions@ee.doe.gov.*

Mr. Eric Stas, U.S. Department of Energy, Office of the General Counsel, GC–33, 1000 Independence Avenue SW, Washington, DC 20585–0121. Telephone: (202) 586–5827. Email: *Eric.Stas@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: DOE incorporates by reference the following industry standards into part 430:

ANSI/ASHRAE Standard 41.1–2020, ''Standard Methods for Temperature Measurement,'' ANSI-approved June 30, 2020 (''ASHRAE 41.1–2020'').

ANSI/ASHRAE Standard 41.6–2014, ''Standard Method for Humidity Measurement,'' ANSI-approved July 3, 2014 (''ASHRAE 41.6–2014'').

ANSI/ASHRAE Standard 118.2–2022, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,'' ANSI-approved March 1, 2022 (''ASHRAE 118.2–2022'').

Copies of ASHRAE 41.1–2020, ASHRAE 41.6–2014, and ASHRAE 118.2–2022 can be obtained from the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., (ASHRAE), 180 Technology Parkway NW, Peachtree Corners, GA 30092, (800) 527–4723 or (404) 636–8400, or online at: *www.ashrae.org.*

ASTM D2156–09 (Reapproved 2018) ''Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels,'' approved October 1, 2018 (''ASTM D2156–09 (RA 2018)'').

ASTM E97–82 (Reapproved 1987) ''Standard Test Methods for Directional Reflectance Factor, 45-Deg 0-Deg, of Opaque Specimens by Broad-Band Filter Reflectometry,'' approved October 29, 1982 and withdrawn 1991 (''ASTM E97–1987 (W1991)'').

Copies of ASTM D2156–09 (RA 2018) can be obtained from ASTM International (ASTM), 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 or online at: *www.astm.org.*

Copies of ASTM E97–1987 (W1991) are reasonably available from standards resellers including GlobalSpec's Engineering 360 (*https://standards.globalspec.com/std/3801495/astm-e97-82-1987*) and IHS Markit (*https://.global.ihs.com/doc_detail.cfm?document_name=ASTM%20E97&item_s_key=00020483*).

See section IV.N of this document for a further discussion of these industry standards.

Table of Contents

I. Authority and Background

Consumer water heaters are included in the list of ''covered products'' for which DOE is authorized to establish and amend energy conservation standards and test procedures. (42 U.S.C. 6292(a)(4)) DOE's energy conservation standards and test procedures for consumer water heaters are currently prescribed respectively at title 10 of the Code of Federal Regulations (CFR), part 430, section 32(d), and 10 CFR part 430, subpart B, appendix E ((appendix E), *Uniform Test Method for Measuring the Energy Consumption of Water Heaters.* Residential-duty commercial water heaters, for which DOE is also authorized to establish and amend energy conservation standards and test procedures (42 U.S.C. 6311(1)(K)), must also be tested according to appendix E. 10 CFR 431.106(b)(1) (*See* 42 U.S.C. 6295(e)(5)(H)). DOE's energy conservation standards for residential-duty commercial water heaters are currently prescribed at 10 CFR 431.110(b)(1). The following sections discuss DOE's authority to establish and amend test procedures for consumer water heaters and residential-duty commercial water heaters, as well as relevant background information regarding DOE's consideration of test procedures for these products and equipment.

A. Authority

The Energy Policy and Conservation Act, as amended (EPCA),[1] authorizes DOE to regulate the energy efficiency of a number of consumer products and certain industrial equipment. (42 U.S.C. 6291–6317, as codified) Title III, Part B [2] of EPCA established the Energy Conservation Program for Consumer Products Other Than Automobiles, which sets forth a variety of provisions designed to improve energy efficiency. (42 U.S.C. 6291–6309, as codified) These products include consumer water heaters, one of the subjects of this document. (42 U.S.C. 6292(a)(4)) Title III, Part C [3] of EPCA, added by Public Law 95–619, Title IV, section 441(a), established the Energy Conservation Program for Certain Industrial Equipment, which again sets forth a variety of provisions designed to improve energy efficiency. (42 U.S.C. 6311–6317, as codified) This equipment includes residential-duty commercial water heaters, which are also the subject of this document. (42 U.S.C. 6311(1)(K))

The energy conservation program under EPCA consists essentially of four parts: (1) testing, (2) labeling, (3) Federal energy conservation standards, and (4) certification and enforcement procedures. Relevant provisions of EPCA specifically include definitions (42 U.S.C. 6291; 42 U.S.C. 6311), test procedures (42 U.S.C. 6293; 42 U.S.C. 6314), labeling provisions (42 U.S.C. 6294; 42 U.S.C. 6315), energy conservation standards (42 U.S.C. 6295; 42 U.S.C. 6313), and the authority to require information and reports from manufacturers (42 U.S.C. 6296; 42 U.S.C. 6316).

The Federal testing requirements consist of test procedures that manufacturers of covered products and commercial equipment must use as the basis for: (1) certifying to DOE that their products/equipment comply with the applicable energy conservation standards adopted pursuant to EPCA (42 U.S.C. 6295(s); 42 U.S.C. 6296; 42 U.S.C. 6316(a)-(b)), and (2) making other representations about the efficiency of those products/equipment (42 U.S.C. 6293(c); 42 U.S.C. 6314(d)). Similarly, DOE must use these test procedures to determine whether the products comply with any relevant standards promulgated under EPCA. (42 U.S.C. 6295(s))

Federal energy efficiency requirements for covered products and equipment established under EPCA generally supersede State laws and regulations concerning energy conservation testing, labeling, and standards. (42 U.S.C. 6297(a)-(c); 42 U.S.C. 6316(a)-(b)) DOE may, however, grant waivers of Federal preemption in limited circumstances for particular State laws or regulations, in accordance with the procedures and other provisions of EPCA. (42 U.S.C. 6297(d); 42 U.S.C. 6316(a); 42 U.S.C. 6316(b)(2)(D))

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. Specifically, EPCA requires that any test procedures prescribed or amended shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) Under 42 U.S.C. 6314, the statute sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered equipment, reciting similar requirements at 42 U.S.C. 6314(a)(2).

In addition, the Energy Independence and Security Act of 2007 amended EPCA to require that DOE amend its test procedures for all covered consumer products to integrate measures of standby mode and off mode energy consumption. (42 U.S.C. 6295(gg)(2)(A)) Standby mode and off mode energy consumption must be incorporated into the overall energy efficiency, energy consumption, or other energy descriptor for each covered product, unless the current test procedure already accounts for and incorporates the standby mode and off mode energy consumption, or if such integration is technically infeasible. (42 U.S.C. 6295(gg)(2)(A)(i)–(ii)) If an integrated test procedure is technically infeasible, DOE must prescribe separate standby mode and off mode energy use test procedures for the covered product, if a separate test is technically feasible. (42 U.S.C. 6295(gg)(2)(A)(ii))) Any such amendment must consider the most current versions of the International Electrotechnical Commission (IEC) Standard 62301 [4] and IEC Standard 62087,[5] as applicable. (42 U.S.C. 6295(gg)(2)(A))

The American Energy Manufacturing Technical Corrections Act (AEMTCA), Public Law 112–210, further amended

[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] For editorial reasons, upon codification in the U.S. Code, Part C was redesignated Part A–1.

[4] IEC 62301, *Household electrical appliances—Measurement of standby power* (Edition 2.0, 2011–01).

[5] IEC 62087, *Audio, video and related equipment—Methods of measurement for power consumption* (Edition 1.0, Parts 1–6: 2015, Part 7: 2018).

EPCA to require that DOE establish a uniform efficiency descriptor and accompanying test methods to replace the energy factor (EF) metric for covered consumer water heaters and the thermal efficiency (TE) and standby loss (SL) metrics for commercial water-heating equipment [6] within one year of the enactment of AEMTCA. (42 U.S.C. 6295(e)(5)(B)–(C)) The uniform efficiency descriptor and accompanying test method were required to apply, to the maximum extent practicable, to all water-heating technologies in use at the time and to future water-heating technologies, but could exclude specific categories of covered water heaters that do not have residential uses, can be clearly described, and are effectively rated using the TE and SL descriptors. (42 U.S.C. 6295(e)(5)(F) and (H)) In addition, beginning one year after the date of publication of DOE's final rule establishing the uniform descriptor, the efficiency standards for covered water heaters were required to be denominated according to the uniform efficiency descriptor established in the final rule (42 U.S.C. 6295(e)(5)(D)); and for affected covered water heaters tested prior to the effective date of the test procedure final rule, DOE was required to develop a mathematical factor for converting the measurement of their energy efficiency from the EF, TE, and SL metrics to the new uniform energy descriptor. (42 U.S.C. 6295(e)(5)(E)(i)–(ii))

EPCA also requires that, at least once every seven years, DOE evaluate test procedures for each type of covered product and covered equipment, including consumer water heaters and residential-duty commercial water heaters, to determine whether amended test procedures would more accurately or fully comply with the requirements for the test procedures to not be unduly burdensome to conduct and be reasonably designed to produce test results that reflect energy efficiency, energy use, and estimated operating costs during a representative average use cycle (or additionally, period of use for consumer products). (42 U.S.C. 6293(b)(1)(A); 42 U.S.C. 6314(a)(1)(A))

If the Secretary determines, on her own behalf or in response to a petition by any interested person, that a test procedure should be prescribed or amended, the Secretary shall promptly publish in the **Federal Register** proposed test procedures and afford interested persons an opportunity to present oral and written data, views, and arguments with respect to such procedures. (42 U.S.C. 6293(b)(2); 42 US.C. 6314(b)) The comment period on a proposed rule to amend a test procedure shall be at least 60 days [7] and may not exceed 270 days. (42 U.S.C. 6293(b)(2)) In prescribing or amending a test procedure, the Secretary shall take into account such information as the Secretary determines relevant to such procedure, including technological developments relating to energy use or energy efficiency of the type (or class) of covered products involved. (42 U.S.C. 6293(b)(2)) If DOE determines that test procedure revisions are not appropriate, DOE must publish in the **Federal Register** its determination not to amend the test procedures. (42 U.S.C. 6293(b)(1)(A)(ii); 42 U.S.C. 6314(a)(1)(A)(ii)) DOE is publishing this final rule in satisfaction of the 7-year review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A) and 42 U.S.C. 6314(a)(1)(A))

B. Background

The following discussion provides a brief history of the current rulemaking, which considers potential amendments to the test procedure for consumer water heaters and residential-duty commercial water heaters.[8] On April 16, 2020, DOE published in the **Federal Register** a request for information (April 2020 RFI) seeking comments on the existing DOE test procedure for consumer water heaters and residential-duty commercial water heaters. 85 FR 21104. The April 2020 RFI discussed a draft version of the American National Standards Institute (ANSI)/American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) Standard 118.2, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,'' published in March 2019 (March 2019 ASHRAE Draft 118.2), which is very similar to the existing DOE test procedure for consumer water heaters and residential-duty commercial water heaters. 85 FR 21104, 21108–21110 (April 16, 2020).

In the April 2020 RFI, DOE requested comments, information, and data about a number of issues, including: (1) differences between the March 2019 ASHRAE Draft 118.2 and the existing DOE test procedure; (2) test tolerances for supply water temperature, ambient temperature, relative humidity, voltage, and gas pressure; (3) the location of the instrumentation that measures water volume or mass; and (4) how to test certain types of consumer water heaters that cannot be easily tested to the existing DOE test procedure (*i.e.,* recirculating gas-fired instantaneous water heaters, water heaters that cannot deliver water at 125 degrees Fahrenheit (°F) ±5 °F, and water heaters with storage volumes greater than 2 gallons that cannot have their internal tank temperatures measured). *Id.* at 85 FR 21109–21114.

DOE subsequently published in the **Federal Register** a notice of proposed rulemaking on January 11, 2022 (January 2022 NOPR) in which the Department proposed to update appendix E, and related sections of the CFR, as follows:

(1) Incorporate by reference current versions of industry standards referenced by the current and proposed DOE test procedures: ASHRAE Standard 41.1,[9] ASHRAE Standard 41.6,[10] the pending update to ASHRAE Standard 118.2 [11] (contingent on it being substantively the same as the draft which was under review), ASTM International (ASTM) Standard D2156,[12] and ASTM Standard E97.[13]

[6] The initial thermal efficiency and standby loss test procedures for commercial water heating equipment (including residential-duty commercial water heaters) were added to EPCA by the Energy Policy Act of 1992 (EPACT 1992), Public Law 102–486, and corresponded to those referenced in the ASHRAE and Illuminating Engineering Society of North America (IESNA) Standard 90.1–1989 (*i.e.,* ASHRAE Standard 90.1–1989). (42 U.S.C. 6314(a)(4)(A)) DOE subsequently updated the commercial water heating equipment test procedures on two separate occasions—once in a direct final rule published on October 21, 2004, and again in a final rule published on May 16, 2012. These rules incorporated by reference certain sections of the latest versions of American National Standards Institute (ANSI) Standard Z21.10.3, *Gas Water Heaters, Volume III, Storage Water Heaters with Input Ratings Above 75,000 Btu Per Hour, Circulating and Instantaneous,* available at the time (*i.e.,* ANSI Z21.10.3–1998 and ANSI Z21.10.3–2011, respectively). 69 FR 61974, 61983 (Oct. 21, 2004) and 77 FR 28928, 28996 (May 16, 2012).

[7] For covered equipment, if the Secretary determines that a test procedure amendment is warranted, the Secretary must publish proposed test procedures in the **Federal Register** and afford interested persons an opportunity (of not less than 45 days' duration) to present oral and written data, views, and arguments on the proposed test procedure. (42 U.S.C. 6314(b))

[8] For a more complete history of earlier rulemaking efforts to develop the energy conservation standards and test procedure for consumer water heaters and residential-duty commercial water heaters, please consult the January 11, 2022 NOPR. *See* 87 FR 1554, 1556–1558.

[9] ASHRAE Standard 41.1–2020, ''Standard Methods for Temperature Measurement,'' approved June 30, 2020.

[10] ASHRAE Standard 41.6–2014, ''Standard Method for Humidity Measurement,'' ANSI approved July 3, 2014.

[11] ASHRAE Standard 118.2–2022, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,'' ANSI approved March 1, 2022.

[12] ASTM Standard D2156–09 (RA 2018), ''Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels,'' reapproved October 1, 2018.

[13] ASTM Standard E97–1987 (W 1991), ''Standard Test Methods for Directional Reflectance Factor, 45-

(2) Add definitions for ''circulating water heater,'' ''low temperature water heater,'' and ''tabletop water heater.''

(3) Specify how a mixing valve should be installed when the water heater is designed to operate with one.

(4) Modify flow rate requirements during the first-hour rating (FHR) test for water heaters with a rated storage volume less than 20 gallons.

(5) Modify timing of the first measurement in each draw of the 24-hour simulated-use test.

(6) Clarify the determination of the first recovery period.

(7) Clarify the mass of water to be used to calculate recovery efficiency.

(8) Modify the terminology throughout appendix E to explicitly state ''non-flow activated'' and ''flow-activated'' water heater, where appropriate.

(9) Clarify the descriptions of defined measured values for the standby period measurements.

(10) Modify the test condition specifications and tolerances, including electric supply voltage tolerance, ambient temperature, ambient dry-bulb temperature, ambient relative humidity, standard temperature and pressure definition, gas supply pressure, and manifold pressure.

(11) Add provisions to address gas-fired water heaters with measured fuel input rates that deviate from the certified input rate.

(12) Clarify provisions for calculating the volume or mass delivered.

(13) Add specifications for testing for the newly defined ''low temperature water heaters.''

(14) Clarify testing requirements for the heat pump part of a split-system heat pump water heater.

(15) Define the use of a separate unfired hot water storage tank for testing water heaters designed to operate with a separately sold hot water storage tank.

(16) Clarify that any connection to an external network or control be disconnected during testing.

(17) Add procedures for estimating internal stored water temperature for water heater designs in which the internal tank temperature cannot be directly measured.

(18) Modify the provisions for untested water heater basic models within 10 CFR 429.70(g) to include electric instantaneous water heaters.

87 FR 1554, 1558.[14]

DOE held a public meeting related to the January 2022 NOPR on January 27, 2022 (hereinafter, the NOPR public meeting).

On July 14, 2022, DOE published a supplemental notice of proposed rulemaking in the **Federal Register** (July 2022 SNOPR), that proposed to maintain the proposals from the January 2022 NOPR but with modifications discussed in the July 2022 SNOPR. 87 FR 42270. Specifically, the July 2022 SNOPR proposed to further update appendix E and related sections of the CFR by:

(1) Additionally requiring that, for water heaters with rated storage volume less than 2 gallons and a rated maximum gallons per minute (Max GPM or maximum GPM) of less than 1 gallon per minute, the flow rate tolerance shall be ±25 percent of the rated Max GPM.

(2) Allowing optional efficiency representations at alternative test conditions for heat pump water heaters.

(3) Adding a definition for ''split-system heat pump water heaters'' to distinguish these from circulating heat pump water heaters (*i.e.,* ''heat pump-only'' water heaters).

(4) Requiring gas-fired circulating water heaters to be tested using an unfired hot water storage tank (UFHWST) with a storage volume between 80 and 120 gallons and meets but does not exceed the minimum energy conservation standards (based on R-value) required at 10 CFR 431.110(a), and that circulating heat pump water heaters be tested using a 40-gallon electric resistance water heater at the minimum UEF standard required at 10 CFR 430.32(d).

(5) Requiring that water heaters (with the exception of demand-response water heaters) with user-selectable modes to ''overheat'' the water stored in the tank to increase effective capacity be tested at the highest internal tank temperature that can be achieved while maintaining the outlet water temperature at 125 °F ±5 °F. (If no such overheated mode exists, the unit is to be tested in a default mode.)

(6) Defining ''demand-response water heater'' based on the U.S. Environmental Protection Agency (EPA) ENERGY STAR Product Specification for Residential Water Heaters Version 5.0 (ENERGY STAR Water Heaters Specification v5.0) [15] definition for ''connected water heating product,'' with the additional requirement that demand-response water heaters cannot overheat as a result of user-initiated operation.

(7) Establishing a metric and method for determining the effective storage volume.

(8) Adopting a method of determining the internal storage tank temperature for certain water heaters which cannot be directly measured using draws at the beginning and end of the 24-hour simulated-use test. 87 FR 42270, 42273–42274 (July 14, 2022).

This final rule responds to comments received in response to the January 2022 NOPR that were not addressed in the July 2022 SNOPR and comments received in response to the July 2022 SNOPR. Table I.1 presents the list of commenters who provided written submissions and/or oral statements at the NOPR public meeting which are addressed in this final rule.

TABLE I.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS ADDRESSED IN THIS FINAL RULE

Commenter(s)	Reference in this final rule	Comment No. in the docket	Commenter type
A.O. Smith Corporation	A.O. Smith	NOPR No. 37; Transcript*; SNOPR No. 51*.	Manufacturer.
Air Conditioning, Heating, and Refrigeration Institute	AHRI	NOPR No. 40; Transcript; SNOPR No. 55.	Manufacturer Trade Association.
American Public Gas Association	APGA	NOPR No. 38	Utility Trade Association.
Appliance Standards Awareness Project	ASAP	Transcript	Efficiency Advocacy Organization.
Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, National Consumer Law Center (on behalf of its low-income clients).	ASAP, ACEEE, and NCLC	NOPR No. 34	Efficiency Advocacy Organizations.

Deg 0-Deg, of Opaque Specimens by Broad-Band Filter Reflectometry,'' approved January 1987, withdrawn 1991. Referenced by ASTM Standard D2156–09 (RA 2018).

[14] A correction was published in the **Federal Register** on January 19, 2022, to properly reflect the date of the public meeting to discuss the January 2022 NOPR. 87 FR 2731.

[15] EPA published the ENERGY STAR Water Heater Specification v5.0 on July 18, 2022. The ENERGY STAR Water Heater Specification v5.0 is available online at: *www.energystar.gov/products/spec/residential_water_heaters_specification_version_5_0_pd* (Last accessed on July 25, 2022).

TABLE I.1—LIST OF COMMENTERS WITH WRITTEN SUBMISSIONS ADDRESSED IN THIS FINAL RULE—Continued

Commenter(s)	Reference in this final rule	Comment No. in the docket	Commenter type
Appliance Standards Awareness Project, American Council for an Energy-Efficient Economy, Natural Resources Defense Council.	ASAP, ACEEE, and NRDC	SNOPR No. 54	Efficiency Advocacy Organizations.
Applied Energy Technology Company	AET	NOPR No. 29	Testing Laboratory.
Bradford White Corporation	BWC	NOPR No. 33; SNOPR No. 48	Manufacturer.
Edison Electric Institute	EEI	Transcript	Utility Trade Association.
GE Appliances	GEA	SNOPR No. 53	Manufacturer.
Jim Lutz	Lutz	NOPR No. 35	Individual.
Nathan Dyson	Dyson	NOPR No. 28	Individual.
New York State Energy Research and Development Authority	NYSERDA	NOPR No. 32; SNOPR No. 50	State Agency.
Northwest Energy Efficiency Alliance	NEEA	NOPR No. 30; SNOPR No. 56	Efficiency Advocacy Organization.
Nyle Water Heating Systems, LLC	Nyle	SNOPR No. 57	Manufacturer.
Pacific Gas and Electric Company, San Diego Gas and Electric, and Southern California Edison, collectively referred to as the ''California Investor-Owned Utilities''.	CA IOUs	NOPR No. 36; SNOPR No. 52	Utilities.
Rheem Manufacturing Company	Rheem	NOPR No. 31; Transcript; SNOPR No. 47.	Manufacturer.
SEA Groups, Ltd	SEA	NOPR No. 24	Manufacturer.
Stone Mountain Technologies, Inc	SMTI	SNOPR No. 49	Manufacturer.

* **Note:** The January 27, 2022 TP NOPR Pubic Meeting Transcript can be found in the docket for this rulemaking at *www.regulations.gov* under entry number EERE–2019–BT–TP–0032–0027. Comments arising from the public meeting will be cited as follows: (Commenter name, Jan. 27, 2022 Public Meeting Transcript, No. 27 at p. X).

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 similar to any oral comments provided during the NOPR public meeting, DOE cites the written comments throughout this final rule. Any oral comments provided during the webinar that are substantively distinct from a submitter's written comments are summarized and cited separately throughout this final rule.

APGA commented that DOE should adopt changes to its rulemaking process as outlined in a report by National Academies of Sciences, Engineering, and Medicine (NASEM) for both test procedures and standards. (APGA, No. 38 at p. 2) In response, the Department notes that the rulemaking process for test procedures of covered products and equipment are outlined at appendix A to subpart C of 10 CFR part 430, and DOE periodically examines and revises these provisions in separate rulemaking proceedings.

Section II of this document provides a synopsis of this final rule, and section III of this document discusses each amendment to the test procedure for consumer water heaters and residential-duty commercial water heaters in detail.

II. Synopsis of the Final Rule

In this final rule, DOE amends appendix E and related sections of the CFR. In summary, the final rule:

1. Incorporates by reference current versions of industry standards: ASHRAE 41.1, ASHRAE 41.6, ASHRAE 118.2, ASTM D2156, and ASTM E97.

2. Adds definitions for ''circulating water heater, ''tabletop water heater, and ''low-temperature water heater.

3. Harmonizes various aspects of the DOE test procedure with industry test procedures ASHRAE 118.2–2022 and NEEA Advanced Water Heating Specification v8.0.

4. Modifies the test condition specifications and tolerances, including electric supply voltage tolerance, ambient conditions (ambient dry-bulb temperature and ambient relative humidity), standard temperature and pressure definition, gas supply pressure, manifold pressure, inlet water temperature, and flow rate tolerances, and adds optional test conditions for heat pump water heaters.

5. Specifies and clarifies methods for mixing valve installation for affected water heaters, orifice modification, and calculation of volume or mass delivered.

6. Defines the use of a separate unfired hot water storage tank or separate electric storage water heater for testing water heaters designed to operate with a separately sold tank.

7. Adds procedures for estimating internal stored water temperature for water heater designs in which the internal tank temperature cannot be directly measured.

8. Clarifies test procedures for water heaters with network connection capabilities.

9. Clarifies test procedures for flow-activated water heaters and water heaters that are not flow-activated by aligning terminology.

10. Includes additional testing provisions for electric resistance water heaters undergoing optional high temperature testing.

11. Includes a calculation for determining the effective storage volume of a water heater.

The adopted amendments are summarized in Table II.1 compared to the test procedure provision prior to the amendment, as well as the reason for the adopted change.

TABLE II.1—SUMMARY OF CHANGES IN THE AMENDED TEST PROCEDURE

DOE test procedure prior to amendment	Amended test procedure	Attribution
References the 1986 (Reaffirmed 2006) version of ASHRAE 41.1 for methods for temperature measurement.	References the updated 2020 version of ASHRAE 41.1	Industry TP Update to ASHRAE 41.1.
The 1982 version of ASHRAE 41.6 for methods for humidity measurement is referenced within the 1986 version of ASHRAE 41.1.	References the 2014 version of ASHRAE 41.6, which is referenced by ASHRAE 41.1–2020.	Industry TP Update to ASHRAE 41.6.

[16] The parenthetical reference provides a reference for information located in the docket of DOE's rulemaking to develop test procedures for consumer water heaters and residential-duty commercial water heaters. (Docket No. EERE–2019–BT–TP–0032, which is maintained at *www.regulations.gov*). The references are arranged as follows: (commenter name, comment docket ID number, page of that document).

TABLE II.1—SUMMARY OF CHANGES IN THE AMENDED TEST PROCEDURE—Continued

DOE test procedure prior to amendment	Amended test procedure	Attribution
References the 2009 version of ASTM D2156 for testing smoke density in flue gases from burning distillate fuels.	References the version of ASTM D2156 that was reaffirmed in 2018.	Industry TP Update to ASTM D2156.
The 1987 version of ASTM E97 for testing directional reflectance factor, 45-deg 0-deg, of opaque specimens by broad-band filter reflectometry is referenced within ASTM D2156–09.	References the 1987 version of ASTM E97, which is referenced by ASTM D2156–09 (RA 2018).	Industry TP Update to ASTM E97.
Does not define a ''circulating water heater'' as used in 10 CFR 430.2.	Adds a definition for ''circulating water heater'' to 10 CFR 430.2.	Allow for testing certain consumer water heaters.
Does not define a ''tabletop water heater'' as used as a product class distinction at 10 CFR 430.32(d).	Adds a definition for ''tabletop water heater'' to 10 CFR 430.2.	Reinstate definition inadvertently removed by previous final rule.
Interprets the upper limit for consumer electric heat pump water heaters to be 12 kW of input, with ''commercial heat pump water heater'' defined at 10 CFR 431.102 as having rated electric power input greater than 12 kW.	Corrects the upper limit for consumer electric heat pump water heaters to 24 amperes at 250 volts of input and amends the definition for ''commercial heat pump water heater'' accordingly.	Make consistent with statutory definition.
Does not address how to configure a water heater for test when a mixing valve is required for proper operation.	Specifies how a mixing valve should be installed when the water heater is designed to operate with one.	Method added by DOE to improve repeatability.
Requires the flow rate during the FHR test to be 1.0 ± 0.25 gpm (3.8 ± 0.95 L/min) for water heaters with a rated storage volume less than 20 gallons.	Requires the flow rate during the FHR test to be 1.5 ± 0.25 gpm (5.7 ± 0.95 L/min) for water heaters with a rated storage volume less than 20 gallons.	Harmonization with industry TP ASHRAE 118.2–2022.
Does not address the situation in which the first recovery ends during a draw when testing to the 24-hour simulated-use test.	Clarifies that the first recovery period will extend to the end of the draw in which the first recovery ended, and that if a second recovery initiates prior to the end of the draw, that the second recovery is part of the first recovery period as well.	Harmonization with industry TP ASHRAE 118.2–2022.
The recovery efficiency equation for storage-type water heaters refers to the mass of water removed from the start of the test to the end of the first recovery period.	Clarifies that, for the calculation of recovery efficiency, the mass of water removed during the first recovery period includes water removed during all draws from the start of the test until the end of the first recovery period.	Harmonization with industry TP ASHRAE 118.2–2022.
The procedures for the standby period after the last draw of the 24-hour simulated-use test allow for a recovery to occur at the end of the 8-hour standby period, which indicates that the power to the main burner, heating element, or compressor is not disabled.	Clarifies the alternate approach to determine the energy consumed during the 24-hour simulated use test if a standby period occurs after the final draw of the test.	Harmonization with industry TP ASHRAE 118.2–2022.
Appendix E uses the phrases ''storage-type'' and ''instantaneous-type'' to refer to ''non-flow activated'' and ''flow-activated'' water heaters, respectively.	Uses the terms ''non-flow activated'' and ''flow-activated'' water heater, where appropriate.	Clarification.
The descriptions for $Q_{su,0}$, $Q_{su,f}$, $\overline{T}_{su,0}$, $\overline{T}_{su,f}$, $\tau_{stby,1}$, $\overline{T}_{t,stby,1}$, and $\overline{T}_{a,stby,1}$ only address when the standby period occurs between draw clusters 1 and 2.	The descriptions for $Q_{su,0}$, $Q_{su,f}$, $\overline{T}_{su,0}$, $\overline{T}_{su,f}$, $\tau_{stby,1}$, $\overline{T}_{t,stby,1}$, and $\overline{T}_{a,stby,1}$ are generalized to refer to the section where the standby period is determined.	Clarification.
Specifies that the first required measurement for each draw of the 24-hour simulated-use test is 5 seconds after the draw is initiated.	Specifies that the first required measurement for each draw of the 24-hour simulated-use test is 15 seconds after the draw is initiated.	Method updated by DOE to reduce burden.
Requires the electric supply voltage to be within ±1 percent of the rated voltage for the entire test.	Requires the electric supply voltage to be within ±2 percent of the rated voltage beginning 5 seconds after the start of a recovery and ending 5 seconds before the end of a recovery.	Method updated by DOE to reduce burden.
Requires maintaining ambient temperature for non-heat pump water heaters within a range of 67.5 °F ± 2.5 °F.	Requires maintaining the ambient temperature for non-heat pump water heaters within a range of 67.5 °F ± 5 °F, and with an average of 67.5 °F ± 2.5 °F.	Method updated by DOE to reduce burden.
Requires maintaining the dry-bulb temperature for heat pump water heaters within a range of 67.5 °F ± 1 °F.	Requires maintaining the dry-bulb temperature for heat pump water heaters within a range of 67.5 °F ± 5 °F, and with an average of 67.5 °F ± 1 °F during recoveries and an average of 67.5 °F ± 2.5 °F when not recovering.	Method updated by DOE to reduce burden.
Requires maintaining the relative humidity for heat pump water heaters within a range of 50 percent ±2 percent.	Requires maintaining the relative humidity for heat pump water heaters within a range of 50 percent ±5 percent, and at an average of 50 percent ±2 percent during recoveries.	Method updated by DOE to reduce burden
Requires that the heating value be corrected to a standard temperature and pressure, but does not state what temperature and pressure is standard or how to correct the heating value to the standard temperature and pressure.	States that the standard temperature is 60 °F (15.6 °C) and the standard pressure is 30 inches of mercury column (101.6 kPa). Provides a method for converting heating value from the measured to the standard conditions via incorporation by reference of ASHRAE 118.2–2022.	Harmonization with industry TP ASHRAE 118.2–2022.
Requires that the manifold pressure be within ±10 percent of the manufacturer recommended value.	Clarifies that the manifold pressure tolerance applies only to water heaters with a pressure regulator that can be adjusted. Requires that the manifold pressure be within the greater of ±10 percent of the manufacturer recommended value or ±0.2 inches water column.	Method updated by DOE to reduce burden.
Does not specify the input rate at which the gas supply pressure tolerance is determined.	Specifies that the gas supply pressure tolerance is to be maintained when operating at the maximum input rate.	Method added by DOE to clarify enforcement test procedure.
Does not contain procedures for modifying the orifice of a water heater that is not operating at the manufacturer specified input rate.	Adds provisions regarding the modification of the orifice	Method added by DOE to clarify enforcement test procedure.
Does not specify how to calculate the mass removed from the water heater when mass is calculated indirectly using density and volume measurements.	Specifies how to calculate the mass of water indirectly using density and volume measurements.	Method added by DOE to improve repeatability.
Does not accommodate testing of ''low-temperature water heaters'' in appendix E.	Adds a definition of ''low-temperature water heater'' in 10 CFR 430.2 and requires low temperature water heaters to be tested to their maximum possible delivery temperature in appendix E.	Allow for testing certain consumer water heaters.

TABLE II.1—SUMMARY OF CHANGES IN THE AMENDED TEST PROCEDURE—Continued

DOE test procedure prior to amendment	Amended test procedure	Attribution
Does not explicitly define the test conditions required for each part of a split-system heat pump water heater.	Explicitly states that the heat pump part of a split-system heat pump water heater is tested at the dry-bulb temperature and relative humidity conditions required for heat pump water heaters, and that the storage tank is tested at the ambient temperature and relative humidity conditions required for non-heat pump water heaters.	Method added by DOE to improve representativeness and repeatability.
Does not accommodate testing of water heaters that require a separately-sold hot water storage tank to properly operate.	Requires that gas-fired circulating water heaters be tested using a UFHWST with a storage volume between 80 and 120 gallons and that meets but does not exceed the minimum energy conservation standards required according to 10 CFR 431.110(a), and that heat pump circulating water heaters be tested using a 40-gallon electric storage water heater at the minimum UEF standard required at 10 CFR 430.32(d).	Allow for testing certain consumer water heaters.
Does not address water heaters with network connection capabilities.	Explicitly states that any connection to an external network or control be disconnected during testing.	Clarification.
Does not accommodate certain water heaters for which the mean tank temperature cannot be directly measured.	Establishes a method of determining the internal storage tank temperature using draws at the beginning and end of the 24-hour simulated use test.	Allow for testing certain consumer water heaters.
10 CFR 429.70(g) does not allow untested electric instantaneous water heaters to be certified, but does allow untested electric storage water heaters to be certified.	Extends the untested provisions within 10 CFR 429.70(g) to include electric instantaneous water heaters.	AEDM allowed by DOE to reduce burden.
Does not specify flow rate tolerance for water heaters with rated storage volume less than 2 gallons.	Specifies that flow rates for all water heaters with rated storage volume less than 2 gallons must be maintained within a tolerance of ±0.25 gallons per minute. Additionally proposes that for water heaters with rated storage volume less than 2 gallons and a rated Max GPM of less than 1 gallon per minute, the flow rate tolerance shall be ±25 percent of the rated Max GPM.	Method added by DOE to improve repeatability and reproducibility.
Does not include optional efficiency representations at alternative test conditions for heat pump water heaters.	Allows for optional efficiency representations at alternative test conditions for heat pump water heaters.	Harmonization with industry TP NEEA Advanced Water Heating Specification v8.0.
Does not include a definition for ''split-system heat pump water heater.''.	Adds a definition for ''split-system heat pump water heater'' to distinguish these from heat pump-only water heaters.	Harmonization with industry TP NEEA Advanced Water Heating Specification v8.0.
Specifies that water heaters with multiple modes of operation be tested in the ''default'' or other similarly named mode.	Provides a test method for electric resistance water heaters subject to high temperature testing (setting the water heater to the highest storage tank temperature and using a mixing valve to temper the delivery water to be within 125 ± 5 °F). Does not require the use of this type of testing for any water heaters, however, until compliance with amended standards is required.	Method added by DOE to improve representativeness.
Does not include any method to determine effective storage volume of storage-type water heaters or circulating water heaters.	Establishes a metric and method for determining the effective storage volume of storage-type water heaters and circulating water heaters.	Method added by DOE which adopts a metric for additional consumer information.
Does not include a definition for ''thermal break.''	Adopts a definition for ''thermal break'' but does not mandate the use of this component in test set-up.	Harmonization with industry TP ASHRAE 118.2–2022.

DOE has determined that the amendments described in section III and adopted in this document will not alter the measured efficiency of consumer water heaters and residential-duty commercial water heaters, or require retesting or recertification solely as a result of DOE's adoption of the amendments to the test procedures. Discussion of DOE's actions are addressed in detail in section III of this document.

The effective date for the amended test procedures adopted in this final rule is 30 days after publication of this document in the **Federal Register**. Representations of energy use or energy efficiency must be based on testing in accordance with the amended test procedures beginning 180 days after the publication of this final rule for consumer water heaters and 360 after the publication of this final rule for residential-duty commercial water heaters.

III. Discussion

A. Scope of Applicability and Definitions

This document covers those products that meet the definition of consumer ''water heaters,'' as defined in the statute at 42 U.S.C. 6291(27), as codified at 10 CFR 430.2. This document also covers commercial water heating equipment with residential applications ((*i.e.,* those water heaters which meet the definition of ''residential-duty commercial water heater'' at 10 CFR 431.102).

In the context of covered consumer products, EPCA defines ''water heater'' as a product which utilizes oil, gas, or electricity to heat potable water for use outside the heater upon demand, including—

(a) Storage type units which heat and store water at a thermostatically controlled temperature, including gas storage water heaters with an input of 75,000 Btu per hour or less, oil storage water heaters with an input of 105,000 Btu per hour or less, and electric storage water heaters with an input of 12 kilowatts or less;

(b) Instantaneous type units which heat water but contain no more than one gallon of water per 4,000 Btu per hour of input, including gas instantaneous water heaters with an input of 200,000 Btu per hour or less, oil instantaneous water heaters with an input of 210,000 Btu per hour or less, and electric instantaneous water heaters with an input of 12 kilowatts or less; and

(c) Heat pump type units, with a maximum current rating of 24 amperes at a voltage no greater than 250 volts, which are products designed to transfer thermal energy from one temperature level to a higher temperature level for the purpose of heating water, including all ancillary equipment such as fans, storage tanks, pumps, or controls

necessary for the device to perform its function.

(42 U.S.C. 6291(27); 10 CFR 430.2)

In addition, at 10 CFR 430.2, DOE defines several specific categories of consumer water heaters, as follows:

(1) ''Electric instantaneous water heater'' means a water heater that uses electricity as the energy source, has a nameplate input rating of 12 kW or less, and contains no more than one gallon of water per 4,000 Btu per hour of input.

(2) ''Electric storage water heater'' means a water heater that uses electricity as the energy source, has a nameplate input rating of 12 kW or less, and contains more than one gallon of water per 4,000 Btu per hour of input.

(3) ''Gas-fired instantaneous water heater'' means a water heater that uses gas as the main energy source, has a nameplate input rating less than 200,000 Btu/h, and contains no more than one gallon of water per 4,000 Btu per hour of input.

(4) ''Gas-fired storage water heater'' means a water heater that uses gas as the main energy source, has a nameplate input rating of 75,000 Btu/h or less, and contains more than one gallon of water per 4,000 Btu per hour of input.

(5) ''Grid-enabled water heater'' means an electric resistance water heater that—

(a) Has a rated storage tank volume of more than 75 gallons;

(b) Is manufactured on or after April 16, 2015;

(c) Is equipped at the point of manufacture with an activation lock and;

(d) Bears a permanent label applied by the manufacturer that—

(i) Is made of material not adversely affected by water;

(ii) Is attached by means of non-water-soluble adhesive; and

(iii) Advises purchasers and end-users of the intended and appropriate use of the product with the following notice printed in 16.5 point Arial Narrow Bold font: ''IMPORTANT INFORMATION: This water heater is intended only for use as part of an electric thermal storage or demand response program. It will not provide adequate hot water unless enrolled in such a program and activated by your utility company or another program operator. Confirm the availability of a program in your local area before purchasing or installing this product.''

(6) ''Oil-fired instantaneous water heater'' means a water heater that uses oil as the main energy source, has a nameplate input rating of 210,000 Btu/h or less, and contains no more than one gallon of water per 4,000 Btu per hour of input.

(7) ''Oil-fired storage water heater'' means a water heater that uses oil as the main energy source, has a nameplate input rating of 105,000 Btu/h or less, and contains more than one gallon of water per 4,000 Btu per hour of input.

The definition for ''grid-enabled water heater'' includes the term ''activation lock,'' which is defined to mean a control mechanism (either by a physical device directly on the water heater or a control system integrated into the water heater) that is locked by default and contains a physical, software, or digital communication that must be activated with an activation key to enable the product to operate at its designed specifications and capabilities and without which the activation of the product will provide not greater than 50 percent of the rated first-hour delivery of hot water certified by the manufacturer. 10 CFR 430.2. As specified in this definition, the control mechanism must be physically incorporated into the water heater or, if a control system, integrated into the water heater to qualify as an activation lock. DOE is aware of certain State programs that encourage water heaters to be equipped with communication ports that allow for demand-response communication between the water heater and the utility.[17] DOE notes that presence of such a communication port, in and of itself, would not qualify as an activation lock for the purpose of classifying a water heater as a grid-enabled water heater. Demand-response water heaters are discussed separately in section III.A.1 of this final rule.

Additionally, as discussed further in section III.A.3 of this document, the appendix E test procedure also applies to residential-duty commercial water heaters. (*See* 10 CFR 431.106(b)(1)) DOE defines these equipment categories at 10 CFR 431.102 as any gas-fired storage, oil-fired storage, or electric instantaneous commercial water heater that meets the following conditions:

(1) For models requiring electricity, uses single-phase external power supply;

(2) Is not designed to provide outlet hot water at temperatures greater than 180 °F; and

(3) Does not meet any of the following criteria:

Water heater type	Indicator of non-residential application
Gas-fired Storage	Rated input >105 kBtu/h; Rated storage volume >120 gallons.
Oil-fired Storage	Rated input >140 kBtu/h; Rated storage volume >120 gallons.
Electric Instantaneous	Rated input >58.6 kW; Rated storage volume >2 gallons.

In the January 2022 NOPR, DOE discussed definitions and the scope of appendix E for heat pump water heaters (electric as well as gas-fired), gas-fired instantaneous water heaters (specifically circulating gas-fired water heaters), tabletop water heaters, and residential-duty commercial water heaters. 87 FR 1554, 1560–1567 (Jan. 11, 2022). Additionally, DOE proposed a new definition for ''demand-response water heater'' in the July 2022 SNOPR. 87 FR 42270, 42280 (July 14, 2022).

BWC generally agreed with DOE's determinations regarding product and equipment definitions and classifications. (BWC, No. 33 at p. 1) AET generally commented that DOE's test procedures should be appropriate for all consumer water heaters within the scope of standards, especially for electric instantaneous water heaters. (AET, No. 29 at pp. 11–12)

[17] On May 7, 2019, the State of Washington signed House Bill 1444 which amended the Revised Code of Washington (RCW) (*i.e.,* the statutory code in the State of Washington), Title 19, Chapter 19.260 (RCW 19.260). On January 6, 2020, the State of Washington amended the Washington Administrative Code (WAC) (*i.e.,* the regulatory code in the State of Washington), Title 194, Chapter 194–24 (WAC 194–24) (Washington January 2020 Amendment) to align with RCW 19.260. Similarly, the State of Oregon published a final rule (Oregon August 2020 final rule) on August 8, 2020, which amended the Oregon Administrative Rules (OAR), Chapter 330, Division 92 (OAR–330–092). The Washington House Bill 1444 and the Oregon August 2020 final rule established a definition for electric storage water heater (RCW 19.260.020(14); OAR–330–092–0010(10)), an effective date of January 1, 2021 in Washington and January 1, 2022 in Oregon (RCW 19.260.080(1); OAR–330–092–0015(17)), a requirement that electric storage water heaters must have a modular demand response communications port compliant with the March 2018 version of the ANSI/CTA–2045–A communication interface standard, or a standard determined to be equivalent (RCW 19.260.080(1)(a)–(b); OAR–330–092–0020(17)), and, in Oregon, must bear a label or marking on the products stating either ''DR-ready: CTA–2045–A'' or ''DR-ready: CTA–2045–A and [equivalent DR system protocol]'' (OAR–330–092–0045(17)).

As discussed throughout this rulemaking, it is DOE's intention to ensure that the appendix E test procedure amended by this final rule is appropriate and applicable to all consumer water heaters and residential-duty commercial water heaters. Sections III.A.1 through III.A.4 of this document address specific issues related to scope and definitions that either DOE requested comment on in the January 2022 NOPR or July 2022 SNOPR, or that were identified by commenters in response to those documents.

1. Demand-Response Water Heaters

Storage-type water heaters that have ''connected'' capability, often referred to as ''demand-response'' water heaters, can be remotely activated and/or deactivated by signals from a utility company or another program operator, and are able to serve as a thermal energy storage device. DOE considered whether specific testing requirements would be appropriate for demand-response water heaters (such as requiring measurement of the energy consumed by connected features, or providing a method for calculating the amount of thermal energy storage available); however, DOE had tentatively determined that additional test procedure provisions (such as the calculation of a thermal energy storage metric) are premature and unnecessary to specify at this time as the market continues to develop and evolve. DOE proposed only that a provision be added to the test procedure to require that if a water heater can connect to an external network or controller, that communication shall be disabled during testing. 87 FR 1554, 1585–1586 (Jan. 11, 2022). Several stakeholders provided input on this tentative determination.

NEEA encouraged DOE to adopt definitions and test methods for ''connectable'' water heaters in the test procedure. The commenter pointed to the following existing and emerging standards as references: Consumer Technology Association (CTA) Standard 2045 (ANSI/CTA–2045)/EcoPort,[18] U.S. Environmental Protection Agency (EPA) ENERGY STAR connected device requirements, and AHRI 1430, *Standard for Demand Response for Electric Water Heaters.*[19] NEEA stated that definitions of connectivity have already been adopted by the States of Washington, Oregon, and California as part of their water heating appliance standards. (NEEA, No. 30 at pp. 2–3) The CA IOUs recommended the adoption of a definition for the communication capability for grid-enabled water heaters that is consistent with the Connected Product Criteria in the ENERGY STAR Product Specification for Residential Water Heaters.[20] The CA IOUs also recommended that DOE incorporate the associated ENERGY STAR connected products test procedure into the appendix E test procedure. (CA IOUs, No. 36 at pp. 2–3)

In response, DOE considered these comments and also assessed the operation of demand-response water heaters as grid thermal energy storage devices using specific communication protocols in order to determine how to distinguish these products from other water heaters capable of storage tank overheating. On July 18, 2022, EPA published an ENERGY STAR Version 5.0 Residential Water Heater Specification, which included definitions for ''connected water heater product'' and ''demand response.'' These definitions included references to Consumer Technology Association (CTA) Standard 2045 (ANSI/CTA–2045),[21] a design standard for a communications module that allows a water heater to receive signals from a utility company (*e.g.,* a curtailment request). As indicated by NEEA and the CA IOUs, the presence of a CTA–2045 port uniquely enables a water heater to be able to participate in any demand-response program, and DOE has additionally determined that products with these features are increasing in number.

In the July 2022 SNOPR, DOE noted that certain new water heaters were available on the market that are shipped from the point of manufacture with a mixing valve installed and intentionally ''overheat'' [22] the water to a stored temperature that is higher than the delivery temperature setpoint to provide additional capacity.[23] 87 FR 42270, 42279–42280 (July 14, 2022). DOE proposed specific test requirements for such products (see section III.E.1 of this document for discussion). DOE also noted that water heaters with demand-response capabilities may undergo utility-initiated overheating during certain periods to store additional energy in the water heater during peak demand periods, and tentatively determined that the test provisions proposed for water heaters that overheat may not be appropriate for demand-response water heaters that overheat. *Id.* To distinguish demand-response water heaters from other types capable of overheating, DOE proposed to define a ''demand-response water heater'' as follows:

Demand-response water heater means a storage-type water heater that—

1. Has integrated communications hardware and additional hardware and software required to enable connected functionality with a utility or third party, that dispatches signals with demand response instructions and/or price signals to the product and receives messages from the demand-response water heater;

2. Meets the communication and equipment standards for Consumer Technology Association (CTA) Standard 2045–B (ANSI/CTA–2045–B); [24]

3. Automatically heats the stored water above the delivery temperature setpoint only in response to instructions received from a utility or third party.

87 FR 42270, 42280 (July 14, 2022). DOE sought comment on this proposed definition. *Id.*

[18] Available online at: *shop.cta.tech/products/https-cdn-cta-tech-cta-media-media-ansi-cta-2045-b-final-2022-pdf* (Last accessed on Sept. 17, 2022).

[19] AHRI Standard 1430, ''Standard for Demand Response for Electric Water Heaters,'' was published in December 2022. It is an industry consensus standard developed by an AHRI Consensus Standards Project Committee that includes definitions, test requirements, operating and physical requirements, minimum data requirements for published ratings, marking and nameplate, and data and conformance conditions for demand-response electric water heaters. For more information, see *www.ahrinet.org/search-standards/ahri-1430-demand-flexible-electric-storage-water-heaters* (Last accessed on Feb. 17, 2023).

[20] According to version 5.0 of the ENERGY STAR Program Requirements for Residential Water Heaters Eligibility Criteria, a ''connected water heater product (CWHP)'' includes the ENERGY STAR certified water heater, integrated or separate communications hardware, and additional hardware and software required to enable connected functionality. ''Demand Response'' is also defined by that source to mean changes in electric or gas usage by end-use customers from their normal consumption patterns in response to changes in the price of electricity or gas over time, or to incentive payments designed to induce lower electricity or gas use at times of high wholesale market prices or when system reliability is jeopardized. Version 5.0 of the ENERGY STAR specification is available online at: *www.energystar.gov/products/spec/residential_water_heaters_specification_version_5_0_pd* (Last accessed on July 25, 2022).

[21] *See* section 4.D.a of the ENERGY STAR Version 5.0 specification.

[22] The term ''overheating'' refers to raising the tank temperature above the outlet water setpoint and does not denote performance outside of the normal operating range of the water heater.

[23] While typical water heaters do not store water warmer than the outlet temperature setpoint (which is, on average, 125 ± 5 °F), water heaters designed to increase energy storage capacity may overheat the tank to temperatures such as 140–150 °F and use a mixing valve to temper the outlet water down to the setpoint condition. The energy storage capacity is proportional to both the size of the tank and the temperature of the water within.

[24] ANSI/CTA–2045–B, ''Modular Communications Interface for Energy Management,'' published February 2021. (Available at: *shop.cta.tech/products/https-cdn-cta-tech-cta-media-media-ansi-cta-2045-b-final-2022-pdf*) (Last accessed Sept. 17, 2022).

In response to the July 2022 SNOPR, AHRI, A.O. Smith, BWC, and Rheem recommended that DOE change its definition of ''demand-response water heater'' to be consistent with ENERGY STAR and AHRI Standard 1430.[25] (AHRI, No. 55 at p. 7; A.O. Smith, No. 51 at pp. 6–7; BWC, No. 48 at p. 2; Rheem, No. 47 at p. 6) Specifically, AHRI and A.O. Smith requested that DOE define ''demand-flexible water heater'' as ''an electric resistance storage water heater or heat pump water heater with the capability to reduce, shed, shift, load up, and modulate energy consumption in response to a command or instructions received from a utility or third party.'' (AHRI, No. 55 at p. 7; A.O. Smith, No. 51 at pp. 6–7) BWC requested that DOE use the ENERGY STAR and AHRI Standard 1430 definitions of ''demand-response'' to avoid manufacturer burden and allow for easier future development of these products. (BWC, No. 48 at p. 2) Rheem further recommended that DOE seek direct feedback from EPA's ENERGY STAR program. (Rheem, No. 47 at p. 6)

NYSERDA pointed out that DOE's proposed definition for ''demand-response water heater,'' which states that it cannot overheat as a result of user-initiated operation, is an additional requirement beyond ENERGY STAR's definitions. Accordingly, NYSERDA urged DOE to define ''overheating test exempt water heaters'' so as to avoid creating market confusion, and the commenter recommended that DOE consider the power usage for connectedness as included in the ENERGY STAR water heater specification, as it would allow utilities to plan more effectively, encourage the additional load to be minimal, and inform consumers regarding anticipated operating costs. (NYSERDA, No. 50 at p. 2)

NEEA indicated support for DOE's proposed definition of ''demand-response water heater'' and the proposal for demand-response water heaters to meet the communication and equipment standards for ANSI/CTA–2045. (NEEA, No. 56 at pp. 2–3) AHRI, however, indicated that DOE's definition would require compliance with the demand-response program the water heater is enrolled in, whereas other, non-DOE definitions allow consumers to opt out. (AHRI, No. 55 at p. 7) BWC and Rheem requested that DOE remove the requirement to comply with CTA–2045. (BWC, No. 48 at pp. 1–2, Rheem, No. 47 at p. 6) BWC stated that requiring compliance with CTA–2045 may prevent manufacturers from designing their products around separate and future protocols. (BWC, No. 48 at pp. 1–2)

Rheem recommended that DOE's definition acknowledge the fact that many water heaters with demand-response capability are currently shipped without all necessary hardware to participate in a demand-response program. Rheem also suggested that DOE's definition does not cover most demand-response water heaters because it excludes water heaters without the ability to heat water above the setpoint. (Rheem, No. 47 at p. 6)

After reviewing these comments from stakeholders, DOE understands that, for the purpose of demand-response programs, utilities and manufacturers would benefit from a standardized definition of ''demand-response water heater,'' specifically one that requires certain communications protocols to be present in order to be compatible with the demand-response signals from the utility or third-party. Stakeholders have indicated that, in order to be deemed a ''demand-response water heater,'' a product must demonstrate that it is capable of executing the commands from the demand-response signals (*i.e.,* pass the verification tests in the ENERGY STAR Test Method to Validate Demand Response or in AHRI Standard 1430). However, DOE proposed a more limited definition for ''demand-response water heater'' in the July 2022 SNOPR, seeking only to describe the types of water heaters that could temporarily increase the storage tank temperature as a means to perform a load up [26] such that this particular operation would not be considered ''overheating'' in the appendix E test procedure (*see* 87 FR 42270, 42280 (July 14, 2022)). This led DOE to revisit its proposed definition and to reassess its planned approach.

As a result, in this final rule, DOE has decided not to establish a definition for ''demand-response water heater.'' DOE has considered the various requirements which stakeholders suggested should be criteria for a product to be called a ''demand-response water heater'' and has determined that, while standardization of these requirements may be beneficial to utilities and industry, it is unnecessary at this time because DOE can instead describe the types of water heaters that can temporarily increase the storage tank temperature only in response to instructions from a utility or third-party demand response program without defining ''demand-response water heater''. Additionally, as discussed in section III.E.1.b of this document, this final rule only amends the test procedure to provide a means for testing water heaters in the highest tank temperature setting, and DOE is adopting it as a voluntary measure in this test procedure for certain electric storage water heaters. As such, it is no longer necessary to establish a definition for ''demand-response water heater'' in this test procedure rulemaking.

2. Heat Pump Water Heaters

As discussed in section III.A of this document, EPCA defines ''water heater'' to include, in relevant part, (A) storage type units which heat and store water at a thermostatically controlled temperature, including . . . electric storage water heaters with an input of 12 kilowatts or less; (B) instantaneous type units which heat water but contain no more than one gallon of water per 4,000 Btu per hour of input, including . . . electric instantaneous water heaters with an input of 12 kilowatts or less; and (C) heat pump type units, with a maximum current rating of 24 amperes at a voltage no greater than 250 volts, which are products designed to transfer thermal energy from one temperature level to a higher temperature level for the purpose of heating water, including all ancillary equipment such as fans, storage tanks, pumps, or controls necessary for the device to perform its function. (42 U.S.C. 6291(27))

Because the maximum current and voltage ratings for consumer heat pump type units are 24 amperes at no more than 250 volts, the maximum electrical input for this type of product is determined to be 6 kilowatts.[27] In this final rule, DOE is providing clarifications on how these definitions apply to electric and gas-fired heat pump storage water heaters.

a. Electric Heat Pump Storage Water Heaters

EPCA is not explicit as to whether heat pump type units are considered a subcategory of storage type units and

[25] AHRI Standard 1430–2022 (I–P), ''2022 Standard for Demand Flexible Water Heaters,'' published December 2022. (Available at: *https://www.ahrinet.org/search-standards/ahri-1430-demand-flexible-electric-storage-water-heaters.*) (Last accessed Feb. 17, 2023)

[26] According to the ENERGY STAR Test Method to Validate Demand Response v1.2, a connected water heating product is required to use and/or store additional thermal energy that the device otherwise would not have used/stored under normal operation in response to a load up request. This allows the stored thermal energy to increase within the safety parameters determined by the manufacturer, and, for installations with a mixing valve, the device may exceed the user set point temperature.

[27] Power equals current times voltage, so the definition of consumer heat pump type unit corresponds to a maximum power rating of 6,000 W, or 6 kW (*i.e.,* 24 A times 250 V equals 6,000 W).

instantaneous type units. ''Storage type units'' and ''instantaneous type units'' are not exclusive of ''heat pump type units.'' Based on the statute's ''water heater'' definition, an electric heat pump type unit could be covered under the ''water heater'' definition's description of storage type units (if it heats and stores water at a thermostatically controlled temperature with an input of 12 kilowatts or less) or instantaneous type unit (if it heats water and contains no more than one gallon of water per 4,000 Btu per hour of input and has an input of 12 kilowatts or less).

On November 10, 2016, DOE published a final rule in the **Federal Register** (the November 2016 Final Rule) that treated heat pump-type units as a subcategory of the other two types of units listed in the definition of water heater. Specifically, DOE stated in the November 2016 final rule that a heat pump water heater with a total rated input of less than 12 kilowatts would be a consumer water heater because EPCA classifies electric water heaters with less than 12 kilowatts rated electrical input as consumer water heaters. 81 FR 79261, 79301–79302. In the January 2022 NOPR, DOE responded to comments requesting clarification on whether electric heat pump water heaters between 6 kilowatts and 12 kilowatts of input should be classified as consumer water heaters or commercial water heaters. 87 FR 1554, 1561–1563 (Jan. 11, 2022). Upon further review of EPCA and the water heater market, DOE initially determined in the January 2022 NOPR that the interpretation presented in the November 2016 Final Rule was not the best reading of EPCA. *Id.*

In the January 2022 NOPR, DOE explained that the structure of the statutory definition of ''water heater'' in the Energy Conservation Program for Consumer Products in Part A of EPCA lists each type of water heater at equal subparagraph designations. Therefore, when defining ''water heater'' for the purpose of determining whether a water heater is a consumer water heater, the energy use criteria specified for heat pump-type units is to be applied separately and distinctly from the criteria specified for the categorizations of storage-type units and instantaneous-type units. Therefore, DOE had tentatively determined that heat pump water heaters, which operate with a maximum current rating greater than 24 amperes or at a voltage greater than 250 volts, are more appropriately covered as commercial water heaters than consumer water heaters. 87 FR 1554, 1561–1562 (Jan. 11, 2022).

As explained in the January 2022 NOPR, there are three other reasons why DOE tentatively concluded that the revised interpretation would be more applicable to the residential water heater market.

First, heat pump technology is capable of providing heat output which exceeds the energy input. A heat pump type unit with an input rate of 12 kilowatts could have a heating capacity (*i.e.,* output capacity) of approximately 42 kilowatts, which is 3.6 times the output heating capacity provided by the largest possible consumer electric storage type water heater (*i.e.,* 11.8 kilowatts).[28] While a heat pump-type unit with a 12 kilowatt input capacity could theoretically be designed and installed in a residential application, its water heating capacity (*i.e.,* output capacity) would far exceed the water heating demand of any residential installation. 87 FR 1554, 1562 (Jan. 11, 2022).

Second, the DOE test procedure for consumer water heaters at the time of the November 2016 Final Rule only covered heat pump water heaters which have ''a maximum current rating of 24 amperes (including the compressor and all auxiliary equipment such as fans, pumps, controls, and, if on the same circuit, any resistive elements) for an input voltage of 250 volts or less,'' and, therefore, electric heat pump water heaters with greater than 24 amperes at 250 volts were not considered at the time when the current energy conservation standards for consumer water heaters were established (April 2010). As a result, these current standards do not reflect energy usage for heat pump water heaters between 6 kilowatts and 12 kilowatts, and such products are more appropriately rated to the commercial water heater test procedure (10 CFR 431.106) and evaluated against the maximum standby loss standards for this equipment (10 CFR 431.110(a)). 87 FR 1554, 1562 (Jan. 11, 2022).

Third, based on its review of the market, DOE is aware of integrated heat pump water heaters, split-system heat pump water heaters, and heat pump-only water heaters (*i.e.,* circulating heat pump water heaters) which are designed for use in residential applications, and all such products are rated at or below 24 A/250 V of input. Integrated heat pump water heaters, which consist of an air-source heat pump in one assembly with a storage tank, typically operate with 240-volt input. Although integrated heat pump water heaters usually have backup 4.5-kilowatt electric resistance heating elements, the elements do not operate simultaneously, which ensures that these products do not surpass 6 kilowatts of input or 24 A/250 V at any given time. Some integrated heat pump water heaters are designed to operate at only 120 volts of input (*i.e.,* ''retrofit-ready,'' ''plug-in,'' or ''120-volt'' heat pump water heaters). Split-system heat pump water heaters, which consist of a separate heat pump and storage tank that are sold together (where the heat pump components are usually situated outdoors), are also covered by the currently applicable appendix E test procedure and have electrical input ratings which do not exceed 24 A/250 V. Circulating heat pump water heaters (or ''heat pump-only'' water heaters), which consist of only a heat pump module and must be installed with a separate storage tank, similarly do not exceed this limit, and there are models of circulating heat pump water heaters which are intended to operate on 120 volts of input. Alternative source heat pump water heaters (*e.g.,* ground-source or water-source), were not considered in this rulemaking due to their predominant use as commercial products. 87 FR 1554, 1563 (Jan. 11, 2022).

In this final rule, DOE maintains the revised interpretation as discussed in the January 2022 NOPR. To clarify this interpretation in the regulatory definitions, DOE is amending the definition of ''commercial heat pump water heater'' at 10 CFR 431.102 to reflect this revised interpretation. The revised definition reads: ''*Commercial heat pump water heater (CHPWH)* means a water heater (including all ancillary equipment such as fans, blowers, pumps, storage tanks, piping, and controls, as applicable) that uses a refrigeration cycle, such as vapor compression, to transfer heat from a low-temperature source to a higher-temperature sink for the purpose of heating potable water, and operates with a current rating greater than 24 amperes or a voltage greater than 250 volts. Such equipment includes, but is not limited to, air-source heat pump water heaters, water-source heat pump water heaters, and direct geo-exchange heat pump water heaters.''

In the April 2020 RFI, DOE requested feedback on the need for creating a separate definition for ''electric heat pump storage water heater,'' similar to the definition in the March 2019

[28] A 12-kW electric resistance water heater with an assumed recovery efficiency of 98 percent would have an output heating capacity of 11.8 kW (12 kW × 0.98 = 11.8 kW). An electric heat pump-type water heater with a 12-kW input capacity, with an assumed recovery efficiency of 350 percent, would have an output heating capacity of 42 kW (12 kW × 3.5 = 42 kW), which is 3.6 times greater than the 11.8 kW output heating capacity of an electric resistance water heater with equivalent input capacity.

ASHRAE Draft 118.2, or whether the current DOE definitions in 10 CFR 430.2 for ''electric storage water heater'' and ''water heater,'' which include ''heat pump type units,'' would adequately cover such products for the purpose of performing the DOE test procedure. 85 FR 21104, 21110 (April 16, 2020). The Department's tentative determination in the January 2022 NOPR was that a separate definition would not be needed because the current definitions were sufficient to describe these products. 87 FR 1554, 1563–1564 (Jan. 11, 2022). In response to the January 2022 NOPR, Rheem requested that the product class-specific definitions include or refer to the ''heat pump type'' requirements in EPCA. (Rheem, No. 31 at p. 2) BWC agreed with DOE's assessment that consumer heat pump water heaters operate at no greater than 24 amperes at 250 volts. (BWC, No. 33 at pp. 1–2)

Additionally, DOE received several comments on the January 2022 NOPR regarding definitions for specific types of heat pump water heaters used in residential applications.

The CA IOUs recommended that DOE should supplement its test procedure definitions to address heat pump water heaters rated to operate at 120 volts of input. More specifically, the CA IOUs recommended that DOE develop a separate definition for 120-volt heat pump water heaters in the test procedure and consider any distinguishing characteristics that might require changes to the test procedure to represent their real-world performance accurately. These commenters argued that a separate definition would allow for the possibility of separate energy conservation standards for these products. The CA IOUs stated that they expect the first 120-volt heat pump water heaters to appear on the retail market in 2022 and noted that the California Energy Commission recently adopted a goal to install six million heat pumps (for space and water heating) by 2030, many of which they anticipate will be 120-volt heat pump water heaters. (CA IOUs, No. 36 at p. 4)

AET expressed support for the inclusion of heat pump-only water heaters within the scope of the DOE test procedure but suggested revising the terminology so as to differentiate a ''heat pump water heater without a tank'' from a ''heat pump water heater with a tank.'' (AET, No. 29 at p. 2) On this point, DOE notes that there is not yet a particular term for these products defined at 10 CFR 430.2 or in appendix E. These products may be referred to using any of the terms mentioned by AET, but the clearest description of these products is ''circulating heat pump water heaters.'' Circulating water heaters are discussed further in section III.A.4.a of this document. DOE is adopting a definition for ''circulating water heater'' in this final rule, which will include these products.

Rheem recommended that DOE include split-system heat pump water heaters in the ''water heaters requiring a storage tank'' definition proposed in the January 2022 NOPR and that DOE define ''integrated heat pump water heater'' to distinguish them from split-system water heaters. (Rheem, No. 47 at p. 4) AHRI stated that a definition of ''split-system water heater'' is not required if DOE does not include the proposed optional additional test conditions in this rulemaking. (AHRI, No. 55 at p. 5)

In response to Rheem's comments, a split-system water heater is not necessarily a ''water heater requiring a storage tank,'' as proposed in the January 2022 NOPR, because for a water heater to meet the proposed definition of ''water heater requiring a storage tank'' would mean there is no storage tank specified or supplied by the manufacturer but that it requires one for testing and operation. A split-system water heater, however, may have a manufacturer supplied or specified tank and, as such, would not necessarily fall under the definition of a ''water heater requiring a storage tank.'' When the tank is specified or supplied by the manufacturer, that tank should be used for testing, rather than a water heater or storage tank that meets the default conditions that were proposed to be added in section 4.10 of appendix E. Additionally, in response to the suggestion that DOE define ''integrated heat pump water heater,'' DOE notes that, as discussed later in this section, it is modifying the definition of a ''split-system water heater'' based on comments to mean a heat pump-type water heater in which at least the compressor, which may be installed outdoors, is separate from the storage tank. Therefore, heat pump water heaters that do not fall under the definition of ''split-system water heater'' adopted in this final rule would be integrated heat pump water heaters, as the refrigeration components would be integrated with the tank. Thus, it is unnecessary to separately define ''integrated heat pump water heaters,'' and the term would not be used in the test method. Creating additional definitions for this configuration may lead to confusion. In response to AHRI's comment, as discussed and for the reasons explained in section III.C.7 of this document, DOE has decided to include the proposed optional additional test conditions in this rulemaking, and, thus, the Department has defined the term ''split-system water heater.''

A.O. Smith requested that DOE clearly define ''heat pump-only water heater'' and elucidate how appendix E applies to them. (A.O. Smith, No. 51 at p. 5) BWC requested that DOE clarify in its definitions the difference between split-system and heat pump-only water heaters. (BWC, No. 48 at p. 1)

In response, a heat pump-only water heater is considered a circulating water heater, which is a type of heat pump water heater, falls under the circulating water heater product classes, and is covered under the associated provisions of appendix E. Such distinctions were previously discussed in the January 2022 NOPR. 87 FR 1554, 1565 (Jan. 11, 2022). These units have an input greater than or equal to 4,000 Btu per hour per gallon, and accordingly, they are considered instantaneous water heaters. In contrast, split-system heat pump water heaters (which, unlike heat pump-only units, are distributed with a storage tank) are considered storage water heaters.

After considering these comments, DOE has decided to affirm coverage in this test procedure final rule for all of the aforementioned types of consumer heat pump water heaters. In particular, DOE has determined that the current definitions of ''heat pump-type'' and ''electric storage water heater'' adequately cover the electric heat pump water heaters on the market that are representative of residential use (including, but not limited to, integrated 240-volt and 120-volt heat pump water heaters, split-system heat pump water heaters, and circulating heat pump water heaters), and that a separate definition for ''electric heat pump water heaters'' is not needed in order to appropriately characterize the test procedure for consumer water heaters and residential-duty commercial water heaters.

At the time of this final rule, DOE is only aware of a small number of 120-volt integrated heat pump water heaters and circulating heat pump water heaters on the market. Therefore, DOE has limited information to determine whether there are any distinguishing characteristics of these products which would necessitate tailored test procedure requirements in order to produce ratings that are representative, reproducible, and repeatable. One manufacturer has publicly certified

ratings [29] for 120-volt electric storage heat pump models using the currently applicable appendix E test procedure (without the use of a test procedure waiver), so DOE, therefore, concludes that the appendix E test procedure is appropriate and representative for these models. DOE is aware, however, that default mode operation of 120-volt electric storage heat pump water heaters may require raising the tank temperature above the delivery setpoint in order to meet consumer expectations of first hour rating (FHR), and further discussion of potential impacts of storage tank overheating on ratings for 120-volt electric storage heat pump water heaters as a result of this final rule's action can be found in section III.E.1 and III.J.3 of this document.

In response to the July 2022 SNOPR, which proposed optional ambient test conditions and new definitions for ''split-system water heaters,'' AHRI and A.O. Smith requested that DOE change its definition of ''split-system water heater'' to the definition used by ENERGY STAR, which specifies that the compressor, evaporator, and/or condenser are separated from a storage tank that is specified by the manufacturer and rated as a single system. (AHRI, No. 55 at p. 5; A.O. Smith, No. 51 at p. 4) A.O. Smith offered an alternative definition to DOE's earlier definition of ''split-system heat pump water heater'' which specified the heat pump as being an outdoor component. (A.O. Smith, No. 51 at pp. 4–5)

A.O. Smith, NEEA, and the CA IOUs stated that it is unnecessary for the definition of ''split-system water heater'' to specify the location of specific components and requested that DOE eliminate the distinction between indoor and outdoor components. (A.O. Smith, No. 51 at p. 5; CA IOUs, No. 52 at pp. 4–5; NEEA, No. 56 at p. 2) The CA IOUs stated that the compressor should be specified as the component separate from the storage tank, rather than the heat pump, to more generally reflect split-system water heaters. (CA IOUs, No. 52 at pp. 4–5)

NEEA additionally recommended that DOE should not include references to ''indoor'' or ''outdoor'' in its proposed definition of ''split-system heat pump water heater,'' as outdoor installation of the heat pump component does not necessarily follow the splitting of heating and storage functions into separate components, and an all-indoor split-system HPWH has the potential to provide significant benefits to consumers. NEEA added that adopting a split-system definition that excludes such products could hinder manufacturers in bringing them to market. (NEEA, No. 56 at p. 2) Similarly, Nyle commented that the proposed definition is problematic because not all split-system heat pump water heaters contain an outdoor component, noting that it manufactures a 120-volt heat pump water heater for indoor use only. Nyle suggested revising the definition to indicate that a split-system heat pump water heater means a heat pump-type water heater where the storage unit and heat pump components are independent from one another but must be connected to operate (*i.e.,* through refrigerant lines, water piping, or via a thermal storage device). (Nyle, No. 57 at p. 1)

In order to address the need for separate test conditions for split-system water heaters (see section III.C.7 of this document for a discussion on optional test conditions, which simulate different indoor and outdoor air conditions for the different components of a split-system water heater), DOE is adopting a definition for this subset of heat pump water heaters at 10 CFR part 430, subpart B, appendix E, section 1.14.

In response to these comments, DOE acknowledges that it is not necessary to specify the location of the components and/or the storage tank in the definition of ''split-system heat pump water heater'' as long as they are separate. Therefore, DOE has changed the definition of ''split-system heat pump water heater'' to mean a heat pump-type water heater in which at least the compressor, which may be installed outdoors, is separate from the storage tank. This definition still reflects that which is used in NEEA's Advanced Water Heating Specification (AWHS) version 8.0 (AWHS v8.0),[30] with minor modifications.

Additionally, a new definition for ''circulating water heater'' is being established in this final rule at 10 CFR 430.2, as discussed in section III.A.4.a of this document. This product category includes heat pump-only water heaters, which is also discussed in section III.A.4.a of this document. Specific testing provisions for circulating water heaters are being newly established in this final rule, as discussed in section III.D.4 of this document.

b. Gas-Fired Heat Pump Storage Water Heaters

The statutory definition for a ''heat pump type'' water heater (*see* 42 U.S.C. 6291(27)(C)) is not specific to electric heat pump type water heaters. Gas-fired heat pump storage water heaters typically use an absorption or adsorption refrigeration cycle, driven by a gas burner, to transfer heat from the surrounding air to the water inside the water heater.

In the July 2014 Final Rule, DOE codified a definition for ''gas-fired heat pump water heater'' as follows:

Gas-fired heat pump water heater means a water heater that uses gas as the main energy source, has a nameplate input rating of 75,000 Btu/h (79 MJ/h) or less, has a maximum current rating of 24 amperes (including all auxiliary equipment such as fans, pumps, controls, and, if on the same circuit, any resistive elements) at an input voltage of no greater than 250 volts, has a rated storage volume not more than 120 gallons (450 liters), and is designed to transfer thermal energy from one temperature level to a higher temperature level to deliver water at a thermostatically controlled temperature less than or equal to 180 °F (82 °C). 79 FR 40542, 40567 (July 11, 2014).

Then, in the November 2016 Final Rule, DOE reasoned that even though gas-fired heat pump water heaters were covered by the existing test procedure, this definition was extraneous because it is not specifically referenced in any part of DOE's test procedures or energy conservation standards for consumer water heaters. 81 FR 79261, 79261, 79287 (Nov. 10, 2016). The definition for ''gas-fired heat pump water heater'' was deleted, and the current definition for ''gas-fired storage water heater'' was added instead. *Id.* at 81 FR 79320–79321.

Since the deletion of the definition in the November 2016 Final Rule, ASHRAE published an updated version of the test standard 118.2, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,'' in January 2022 (ASHRAE 118.2–2022) (*see* section III.B.2 for further discussion of this standard). The January 2022 NOPR issued prior to publication of ASHRAE 118.2–2022 and assessed public review drafts of ASHRAE 118.2–2022—all of which still included a definition for

[29] DOE reviewed public certification data in its Compliance Certification Management System (CCMS) database, found online at *www.regulations.doe.gov/certification-data/#q=Product_Group_s%3A**.

[30] AWHS v8.0 was published by NEEA on March 1, 2022. Although early editions of the AWHS focused primarily on providing more representative performance metrics for heat pump water heaters in cold climates, the latest editions are now more broadly focused on providing representative performance metrics for heat pump water heaters across all climates. AWHS v8.0 includes separate test condition requirements for integrated and split-system heat pump water heaters. These test conditions are discussed further in detail in section III.C.1 of this final rule. (Available at: *neea.org/resources/advanced-water-heating-specification-v8.0*) (Last accessed on Sept. 19, 2022).

''gas-fired heat pump storage water heater.'' The definition for ''gas-fired heat pump storage water heaters'' in the public review drafts of ASHRAE 118.2–2022 was adopted in section 2.4 of the final published version, which defines the term as follows:

(a) Use gas as the main energy source,

(b) Have a nameplate input rating of 20,000 Btu/h (26.4 MJ/h) or less,

(c) Have a maximum current rating of 24 amp (including all auxiliary equipment, such as fans, pumps, controls, and, if on the same circuit, any resistive elements) at an input voltage of no greater than 250 V,

(d) Have a rated storage volume not more than 120 gal (450 L), and

(e) Are designed to transfer thermal energy from one temperature level to a higher temperature level to deliver water at a thermostatically controlled temperature less than or equal to 180 °F (82 °C).

In the January 2022 NOPR, DOE stated that, currently, a water heater that uses gas as the main energy source, has a nameplate input rating of 75,000 Btu/h or less, and contains more than one gallon of water per 4,000 Btu per hour of input is a gas-fired storage water heater. (10 CFR 430.2) If the gas-fired storage water heater also has a heat pump with a maximum current rating of 24 amperes at a voltage no greater than 250 volts, is designed to transfer thermal energy from one temperature level to a higher temperature level for the purpose of heating water, including all ancillary equipment such as fans, storage tanks, pumps, or controls necessary for the device to perform its function, it would be a heat pump type unit (see 10 CFR 430.2). 87 FR 1554, 1564 (Jan. 11, 2022).

DOE also noted in the January 2022 NOPR that this industry definition establishes the scope of coverage for these products more narrowly than the current definitions for ''gas-fired storage water heater'' and ''heat pump type'' water heater together. Specifically, the ASHRAE 118.2–2022 definition limits the input rate at 20,000 Btu/h—presumably because the input rates of models currently in development for residential applications are less than 20,000 Btu/h—whereas the current definitions at 10 CFR 430.2 accommodate potential future products up to 75,000 Btu/h. In recognition of the developing market for gas-fired heat pump water heaters, DOE had tentatively determined not to limit scope of coverage to only 20,000 Btu/h. 87 FR 1554, 1564 (Jan. 11, 2022).

In response to the January 2022 NOPR, BWC suggested DOE re-evaluate whether current consumer water heater definitions adequately cover gas-fired heat pump water heaters (as defined by ASHRAE) in light of questions as to whether features related to these products depart from the current consumer water heater definitions. (BWC, No. 33 at p. 2) However, the commenter did not provide further details.

DOE did not receive any additional comments elucidating which features may be of concern, and as a result, DOE is not able to identify reasons to justify redefining gas-fired heat pump storage water heaters in a way that departs from the current definitions. At the time of this final rule, such products are still mostly in the field trial stage in the United States, and, thus, they are not mass-produced, nor are they widely distributed in the commercial market. However, DOE is aware that products currently under development consist of a modulating gas-fired burner that powers an absorption cycle using a design which would meet the definition for a ''split-system heat pump water heater'' (discussed in section III.A.2.a of this document). Nonetheless, because the current definitions for ''gas-fired storage water heater'' and ''heat pump type'' water heater are sufficiently broad, such products would remain appropriately encompassed within the current scope of coverage. Should more designs of gas-fired heat pump water heaters (either storage type or instantaneous type) emerge into the water heaters market, DOE would evaluate the definitions and appropriateness of its test methods for gas-fired and heat pump products as they would apply to this novel technology.

Moreover, while ASHRAE 118.2–2022 does define gas-fired heat pump storage water heaters, there are no unique test methods for these products outlined in the industry test standards. Similar to the determination in the November 2016 Final Rule, DOE has concluded that the definition in ASHRAE 118.2–2022 is extraneous. Furthermore, given that no concrete concerns regarding the applicability of the current methods to gas-fired heat pump water heaters have been identified, DOE has determined not to adopt any specific provisions for these in its amended appendix E test procedure at this time.

3. Residential-Duty Commercial Water Heaters

In this rulemaking, DOE has sought comment on the definition for ''residential-duty commercial water heater,'' which defines a category of commercial water heaters that are subject to the appendix E test procedure due to their residential applications. 85 FR 21104, 21108 (April 16, 2020).

In the January 2022 NOPR, DOE acknowledged that some water heaters intended for commercial use are covered by the residential-duty commercial water heater definition and tested and rated to the appendix E test procedure and residential-duty commercial water heater energy conservation standards in terms of UEF. DOE explained that these water heaters have characteristics that are similar to water heaters with residential applications and, as such, under 42 U.S.C. 6295(e)(5)(F), cannot be excluded from being tested and rated using the consumer water heaters test procedure and residential-duty commercial water heater energy conservation standards. Thus, DOE did not propose amendments to this definition. 87 FR 1554, 1566 (Jan. 11, 2022).

DOE has determined that whether a product is marketed as commercial or residential may not always be indicative of the intended installation location. The January 2022 NOPR provided the example of water heaters that are intended for residential use but sometimes marketed as ''commercial-grade'' as a means to convey an expectation of reliability. 87 FR 1554, 1566–1567 (Jan. 11, 2022).

In commenting on the January 2022 NOPR, with regards to residential-duty commercial water heaters, AET commented that the method used to evaluate consumer electric instantaneous and residential-duty commercial electric instantaneous water heaters in the December 2016 Conversion Factor Final Rule was not approved for these products, and the energy conservation standards DOE issued for consumer water heaters could not be met by them. AET argued that the energy conservation standards for residential-duty commercial electric instantaneous water heaters were based on performance for fossil fuel-fired commercial tankless water heaters as opposed to actual product testing, and, therefore, the commenter asserted that the minimum efficiency requirements for residential-duty commercial electric instantaneous water heaters are too low and should be updated. (AET, No. 29 at pp. 14–15)

DOE understands that the commenter's discussion of the ''method used to evaluate consumer electric instantaneous and residential-duty commercial electric instantaneous water heaters'' refers to the analytical approach in 2016 that was used to predict the UEF values of these water heaters from existing representations of maximum GPM (*see* 81 FR 96204,

92616–92617 (Dec. 29, 2016)) and thermal efficiency (*see* 81 FR 96204, 96218 (Dec. 29, 2016)). At this time, however, the current appendix E test procedure does provide a method to test and rate these water heaters.[31] DOE notes that there are currently consumer and residential-duty commercial electric instantaneous water heaters certified to meet the applicable energy conservation standards.

Otherwise, DOE did not receive any comments specifically pertaining to the definition for residential-duty commercial water heaters. Therefore, DOE is not amending the definition for ''residential-duty commercial water heater'' in this final rule for the reasons previously discussed. DOE may consider potential amended standards for residential-duty commercial electric instantaneous water heaters in a separate rulemaking addressing the energy conservation standards for commercial water heaters.[32]

4. Specialty Water Heaters

As first proposed in the January 2022 NOPR, this final rule expands the scope of coverage of the appendix E test procedure to include low-temperature water heaters and circulating water heaters, which both fall under the statutory definition of consumer ''water heater'' but did not previously have test methods appropriate for their unique operation. DOE is also re-instating an inadvertently omitted definition for ''tabletop water heater'' at 10 CFR 430.2. In addition, DOE has considered whether to address solar water heaters in the consumer water heaters test procedure, but the Department has determined not to expand the scope of coverage of the appendix E to these products at this time. DOE may further consider solar water heaters in a separate rulemaking in the future. Each of these categories of water heaters is discussed in the following subsections.

Dyson generally commented that indirect circulation systems especially have an extraordinarily flexible use case and can be implemented in both warm and cool regions. (Dyson, No. 28 at p. 1) DOE understands this comment to refer to systems which use a separate boiler to provide the heat source for domestic water heating. However, consumer boilers are not within the scope of this rulemaking.

a. Circulating Water Heaters

As discussed in section III.A of this document, a gas-fired instantaneous water heater is a water heater that uses gas as the main energy source, has a nameplate input rating less than 200,000 Btu per hour, and contains no more than one gallon of water per 4,000 Btu per hour of input. 10 CFR 430.2.

In the April 2020 RFI, DOE requested feedback on the typical application of a specific configuration of gas-fired instantaneous water heaters, commonly referred to as ''circulating gas-fired instantaneous water heaters.'' 85 FR 21104, 21113 (April 16, 2020). As explained in the April 2020 RFI, DOE has found that several manufacturers produce consumer gas-fired instantaneous water heaters that are designed to be used with a volume of stored water (usually in a tank, but sometimes in a recirculating hot water system of sufficient volume, such as a hydronic space heating or designated hot water system) in which the water heater does not provide hot water directly to fixtures, such as a faucet or shower head, but rather replenishes heat lost from the tank or system through hot water draws or standby losses by circulating water to and from the tank or other system. These circulating gas-fired instantaneous water heaters are typically activated by an aquastat [33] installed in a storage tank that is sold separately or by an inlet water temperature sensor. DOE further stated that while the products identified by DOE are within the statutory and regulatory definition of a consumer ''water heater'' and, therefore, a covered product, the design and application of circulating gas-fired instantaneous water heaters make testing to the currently applicable Federal test procedure for consumer water heaters difficult, if not impossible, as these products are not capable of delivering water at the temperatures and flow rates specified in the UEF test method contained therein. *Id.* As a result, the currently applicable appendix E test procedure does not sufficiently cover circulating water heaters.

DOE received several comments on the April 2020 RFI recommending generally that DOE amend the regulatory definitions of gas-fired instantaneous water heaters to exclude models designed exclusively for commercial use even though they have input rates below the consumer water heater input rate limit (*i.e.,* ≤200,000 Btu/h). AHRI and individual manufacturers commented that these products are used in commercial applications even though they may in certain cases meet the statutory definition for a consumer water heater, and that the residential draw pattern profiles may not be applicable. These comments are discussed in detail in the January 2022 NOPR. 87 FR 1554, 1565 (Jan. 11, 2022).

In the January 2022 NOPR, DOE noted that 42 U.S.C. 6291(1) states that a ''consumer product'' means any article of a type which, to any significant extent, is distributed in commerce for personal use or consumption by individuals. DOE also stated that its examination of product literature has found that circulating water heaters are predominately marketed for commercial applications. However, the input rates of many of the available models are below the maximum input rate of a consumer water heater and can, therefore, be suitable for residential applications. DOE noted that there exist circulating heat pump water heaters (heat pump-only water heaters) which operate in the same manner as gas-fired circulating water heaters but are clearly marketed for residential applications. Consequently, it is foreseeable that there could be the potential for product substitution into the consumer market. For these reasons, DOE tentatively determined that circulating water heaters are covered ''consumer products.'' 87 FR 1554, 1565 (Jan. 11, 2022).

In the January 2022 NOPR, DOE proposed to include the following definition at 10 CFR 430.2: ''*Circulating water heater* means an instantaneous or heat pump-type water heater that does not have an operational scheme in which the burner, heating element, or compressor initiates and/or terminates heating based on sensing flow; has a water temperature sensor located at the inlet of the water heater or in a separate storage tank that is the primary means of initiating and terminating heating; and must be used in combination with a recirculating pump and either a separate storage tank or water circulation loop in order to achieve the water flow and temperature conditions recommended in the manufacturer's installation and operation instructions.'' 87 FR 1554, 1565 (Jan. 11, 2022).

Commenters had varying viewpoints on this topic. AET expressed general agreement with DOE's proposal to add a new definition and product category for circulating water heaters. (AET, No. 29 at p. 1)

[31] Section 5.3.2 of appendix E details the Max GPM rating test for flow-activated water heaters, Table II in section 5.4.1 of appendix E details how to select draw pattern based on Max GPM rating, and sections 5.4.2 and 5.4.3 of appendix E detail the test sequence.

[32] DOE is concurrently evaluating energy conservation standards for commercial water heaters in Docket No. EERE–2021–BT–STD–0027.

[33] An ''aquastat'' is a temperature measuring device typically used to control the water temperature in a separate hot water storage tank.

Rheem supported the addition of a definition for ''circulating water heater'' to 10 CFR 430.2 and accompanying test procedures within appendix E for such products that have residential applications, but the commenter emphasized that the division between consumer and commercial water heaters should be appropriately set. Rheem argued that because a ''circulating water heater'' must use a separate storage tank, circulating water heater product classes should be defined using the storage-type unit input rate criteria (*e.g.,* a gas-fired circulating water heater with an input rate at or below 75,000 Btu/h is a consumer water heater and greater than 75,000 Btu/h is a commercial water heater). Rheem also recommended further investigation as to whether certain capacities of storage-type water heaters could be covered by the ''circulating water heater'' definition. Rheem added that the ''circulating water heater'' definition should be amended to allow a water temperature sensor at the outlet of the water heater. (Rheem, No. 31 at p. 2)

BWC generally disagreed with DOE's proposal that circulating water heaters should be covered as consumer products, arguing that these products are exclusively installed in commercial applications as either part of a recirculation loop or coupled to an unfired hot water storage tank. BWC also noted that circulating water heaters heat water to higher temperatures than consumer instantaneous water heaters do. BWC argued that classifying circulating water heaters as consumer products would provide little to no benefit to consumers, place additional burden on manufacturers, and cause market confusion as to how these products are specified and designed for field applications. (BWC, No. 33 at pp. 1–2)

AHRI expressed concerns about including circulating water heaters in a residential water heaters test procedure because they are mostly used in commercial applications, even with input rates below 200,000 Btu/h. In lieu of a solution in the test procedure, AHRI requested that DOE reinstate the enforcement policy on circulating water heaters.[34] (AHRI, No. 40 at p. 5) A.O. Smith provided similar comments, suggesting that DOE should reissue the September 5, 2019 enforcement policy for gas-fired circulating water heaters, or alternatively identify them in the test procedure as ''historically regulated as commercial water heating equipment'' that ''can be tested via the thermal efficiency energy metrics; and . . . therefore should not be subjected to UEF requirements.'' (A.O. Smith, No. 37 at pp. 2–3) Like AHRI and A.O. Smith, BWC recommended reinstating the September 2019 enforcement policy to allow industry to determine the proper test procedure. (BWC, No. 33 at pp. 1–2)

EEI requested more information on the size of the existing stock and current sales volumes of circulating water heaters. (EEI, Jan. 27, 2022 Public Meeting Transcript, No. 27 at pp. 46–47)

In response, the Department reiterates that EPCA directed DOE to develop a test procedure that applies, to the maximum extent practicable, to all water heating technologies in use and to future water heating technologies. (42 U.S.C. 6295(e)(5)(H)) As a circulating water heater could be designed to operate in a similar manner to other consumer water heaters (*i.e.,* ''heat pump-only'' water heaters) and at conditions appropriate for residential applications, DOE is required to address these products in appendix E with other classes of consumer water heaters. Furthermore, the definition for ''consumer product'' states that it is an article ''of a type'' that is distributed 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))

In response to Rheem's comment, circulating water heaters have high input rate to storage volume ratios, which classify these products as instantaneous-type water heaters (*see* 10 CFR 430.2 and 42 U.S.C. 6291(27)(B)). As such, the statutory definition of a storage-type water heater (found at 42 U.S.C. 6291(27)(A)) does not cover circulating water heaters because circulating water heaters have no more than one gallon of water per 4,000 Btu/h of input. As a result, the 75,000 Btu/h upper limit on the input rate for gas-fired storage-type water heaters would not apply and will not be included in the scope of the definition of ''circulating water heater.''

In response to BWC's comments, DOE notes that hot water delivery temperature is not related to the statutory definition of coverage. Rather, EPCA defines whether a water heater is covered as a consumer product primarily according to its input rating, without regard to its maximum hot water delivery temperature. DOE also concludes that classifying circulating water heaters (that meet the input rating requirements) as consumer products would provide a benefit to consumers by allowing them to compare circulating water heaters alongside other consumer water heaters with a UEF rating. Under 42 U.S.C. 6293(b), EPCA requires that DOE test procedure not place undue burden on manufacturers. In this instance, although test burden would increase for manufacturers of circulating water heaters, it would not be considered an undue burden, because these water heaters are consumer products (by definition) and, therefore, should be subject to consumer water heater test procedures. Contrary to BWC's assertion, DOE concludes that covering circulating water heaters as consumer products would reduce or resolve market confusion surrounding these products; since they can be used in residential applications, they should be rated accordingly.

In response to A.O. Smith's comment requesting DOE to consider circulating gas-fired water heaters as historically regulated as commercial water heaters and sufficiently described by the commercial water heater metrics, DOE is not expanding the scope to products which are ''historically regulated as commercial water heating equipment'' because DOE is only considering circulating gas-fired water heaters with input rates less than or equal to 200,000 Btu/h, which meet the existing statutory definition for consumer water heaters (and, thus, do not meet the definition for gas-fired instantaneous commercial water heaters). Furthermore, DOE clarifies that the Department is not considering these gas-fired circulating water heaters (ones which meet the existing statutory definition for consumer water heaters) to be residential-duty commercial water heaters.

In response to the July 2022 SNOPR, BWC and AHRI once again reiterated their understanding that circulating water waters are used almost exclusively in commercial applications. (BWC, No. 48 at p.4; AHRI, No. 55 at p. 5) BWC requested that DOE exercise authority granted under the American Manufacturing Technical Corrections Act (AEMTCA) (42 U.S.C. 6295(e)(5)(F)) to regulate circulating water heaters as commercial products even though they meet residential definitions, or clearly demonstrate residential use. (BWC, No. 48 at p. 4) AHRI suggested that addressing circulating water heaters in a consumer rulemaking would cause confusion because their efficiency metric is different from conventional consumer water heaters. (AHRI, No. 55 at p. 5)

In response, EPCA allows DOE to provide an exclusion from the uniform

[34] DOE had issued an enforcement policy for circulating water heaters that expired on December 31, 2021.

efficiency descriptor for specific categories of otherwise covered water heaters that do not have residential uses, that can be clearly described, and that are effectively rated using the current thermal efficiency and standby loss descriptors. (42 U.S.C. 6295(e)(5)(F)(i)) [35] However, DOE reads this statutory provision as only permitting exclusion of water heaters that were categories of covered *commercial* water heaters under section 342(a)(5) of EPCA [42 U.S.C. 6313(a)(5)]. It does not grant DOE authority to exclude consumer water heaters from the ambit of the uniform test procedure, nor to somehow convert consumer water heaters to commercial water heaters and to subject them to energy conservation standards applicable to commercial water heaters. In the present case, it is clear that the circulating water heaters in question are consumer water heaters, given that they have input rates below 200,000 Btu/h, and they otherwise meet the definitional criteria of the statute for an instantaneous-type water heater (*see* 42 U.S.C. 6291(27)(B)). Moreover, circulating water heaters have the demonstrated ability to perform tank loading or recirculating loop operation, as would indicate that these products do have clearly described residential uses. Consequently, in response to these comments, DOE notes that because both heat pump-only and gas-fired circulating water heaters meet the requirements to be classified as consumer products under EPCA, the statute requires that such water heaters must be tested according to DOE test procedure at appendix E.

This final rule establishes a test method to determine the UEF of consumer circulating water heaters. Effective and compliance dates are discussed further in section III.I of this document.

In development of this final rule, DOE was not able to discern rates of shipments and amount of stock for consumer circulating water heaters as EEI had requested. However, DOE did identify circulating water heater models currently on the market that are consumer water heaters. DOE has determined that circulating water heaters may have a water temperature sensor at the inlet or at the outlet of the water heater—as suggested by Rheem—and, therefore, the Department agrees with Rheem and is adopting the following definition for ''circulating water heater'' at 10 CFR 430.2:

Circulating water heater means an instantaneous or heat pump-type water heater that does not have an operational scheme in which the burner, heating element, or compressor initiates and/or terminates heating based on sensing flow; has a water temperature sensor located at the inlet or at the outlet of the water heater or in a separate storage tank that is the primary means of initiating and terminating heating; and must be used in combination with a recirculating pump and either a separate storage tank or water circulation loop in order to achieve the water flow and temperature conditions recommended in the manufacturer's installation and operation instructions.

b. Low-Temperature Water Heaters

DOE has identified certain flow-activated water heaters that are designed to deliver water at temperatures below the set point temperature of 125 °F ±5 °F (51.7 °C ±2.8 °C) that is required by section 2.5 of the currently applicable appendix E (hereinafter referred to as ''low-temperature'' water heaters). These low-temperature water heaters (often referred to as ''handwashing'' or ''point-of-use'' water heaters in marketing literature) typically have low heating rates, which requires the testing agency to reduce the flow rate in order to be able to achieve the outlet temperature within the set point temperature range. However, these units also have a minimum activation flow rate below which the unit shuts off. To the extent that a unit would stop heating water when the flow rate is too low, there may be no flow rate at which the unit would operate and deliver water at the outlet temperature required under section 2.5 of appendix E. Further, the definition of water heater or electric instantaneous water heater does not include a minimum water delivery temperature. To the extent that a low-temperature water heater uses electricity as the energy source, has a nameplate input rating of 12 kilowatts or less, and contains no more than one gallon of water per 4,000 Btu per hour of input, it would be an electric instantaneous water heater. 10 CFR 430.2. Therefore, because such products are within the scope of consumer water heater coverage under EPCA, the appendix E test procedure should address them; however, the currently applicable appendix E does not address them.

DOE requested information in the April 2020 RFI on testing these products at a lower set point temperature and other potential changes which may be necessary to accommodate these types of models. 85 FR 21104, 21113 (April 16, 2020). Several commenters on the April 2020 RFI recommended that the test procedure be modified to indicate a lower set point temperature for testing, such as the maximum water temperature delivery that the model is capable of delivering (see NOPR discussion for complete details). 87 FR 1554, 1582 (Jan. 11, 2022).

In the January 2022 NOPR, DOE proposed to define a ''low-temperature water heater'' as an electric instantaneous water heater that is not a circulating water heater and cannot deliver water at a temperature greater than or equal to the set point temperature specified in section 2.5 of appendix E to subpart B of this part when supplied with water at the supply water temperature specified in section 2.3 of appendix E to subpart B of this part. DOE also tentatively determined that lowering the set point temperature for low-temperature water heaters to their maximum possible delivery temperature would allow these water heaters to be tested appropriately and in a representative manner. As such, DOE proposed to require low-temperature water heaters to be tested to their maximum possible delivery temperature. 87 FR 1554, 1583 (Jan. 11, 2022).

AET agreed with DOE's proposal to add a new definition and product category for low-temperature water heaters. (AET, No. 29 at p. 2) EEI requested more information on the size of the existing stock, as well as the current sales volumes of low-temperature water heaters. (EEI, Jan, 27, 2022 Public Meeting Transcript, No. 27 at pp. 46–47) As with circulating water heaters, DOE does not currently have this information available but will continue to gather this data to the extent possible.

Rheem commented that the proposed definition for ''low-temperature water heater'' should include water heaters with less than 10 gallons of storage and clarify how it is different from other electric water heaters. Rheem suggested that the installation and operation (I&O) manual could be referenced to determine delivery temperature limits, but alternatively, manufacturers could certify supplemental testing instructions to DOE (*i.e.,* when testing an electric instantaneous water heater set according to the I&O manual and cannot meet the required delivery temperature, the unit should be tested according to the

[35] DOE acted in accordance with EPCA provisions as specified at 6295(e)(5)(F)(i) when establishing product classes for residential-duty commercial water heaters. In a July 2014 Final Rule establishing the UEF test procedure, DOE determined that covered commercial water heating equipment that did not meet the definition of a ''residential-duty commercial water heater'' met the criteria in EPCA for exclusion from the uniform efficiency descriptor. 79 FR 40542, 40545–40547 (July 11, 2014).

maximum delivery temperature). (Rheem, No. 31 at p. 3)

In response to the comments from Rheem, DOE notes that the inability to deliver water at the specified outlet water temperatures in appendix E is independent of the storage volume of the water heater. Hence, restricting this product type definition to only those water heaters that have less than 10 gallons of storage volume may unintentionally leave larger low-temperature water heaters without adequate test provisions in appendix E. This inability to deliver water at 125 °F ±5 °F—*specifically at the appendix E flow rate*—serves as the key distinguishing factor between low-temperature water heaters and other electric instantaneous water heaters. While the maximum delivery temperatures may be noted in an I&O manual, as Rheem suggested, this must be verified under the test conditions (most notably the supply water temperatures) specified in appendix E. Section 5.2.2 of the amended appendix E includes instructions for setting the outlet discharge temperature. Should the flow rate need to be reduced in order to meet the outlet temperature requirements, then the product would meet the criterion for a low-temperature water heater.

In this final rule, DOE is adopting a slightly modified definition for ''low-temperature water heater,'' taking into account the comments provided by Rheem. Accordingly, DOE is defining ''low-temperature water heater'' as an electric instantaneous water heater that is not a circulating water heater and cannot deliver water at a temperature greater than or equal to the set point temperature specified in section 2.5 of appendix E when supplied with water at the supply water temperature specified in section 2.3 of appendix E at the flow rate specified in section 5.2.2.1 of appendix E. (DOE is including language which specifies that the delivery temperature is that which results from the appendix E flow rate.)

c. Tabletop Water Heaters

As discussed in the January 2022 NOPR, the definition for ''tabletop water heater'' was removed from appendix E as part of the July 2014 Final Rule but was inadvertently not added to 10 CFR 430.2 (79 FR 40542, 40567–40568 (July 14, 2014)). 87 FR 1554, 1566 (Jan. 11, 2022). Up until then, ''tabletop water heater'' was defined as a water heater in a rectangular box enclosure designed to slide into a kitchen countertop space with typical dimensions of 36 inches high, 25 inches deep, and 24 inches wide. 66 FR 4474, 4497 (Jan. 17, 2001). In the January 2022 NOPR, after considering comments on the April 2020 RFI, DOE proposed to add the definition of tabletop water heater 10 CFR 430.2, as it read prior to being removed from appendix E. 87 FR 1554, 1556.

In response to the January 2022 NOPR, AET agreed with re-instating the definition for tabletop water heater at 10 CFR 430.2. (AET, No. 29 at p. 2)

DOE did not receive any other comment relating to this proposal, so the Department is re-instating the definition for ''tabletop water heater'' at 10 CFR 430.2, as proposed.

d. Solar Water Heaters

In response to an RFI published on May 21, 2020 (May 2020 RFI), regarding the energy conservation standards for consumer water heaters (85 FR 30853), the Solar Rating & Certification Corporation (SRCC) recommended that solar water heating technologies be considered for inclusion in the energy conservation standards and test procedures for consumer water heaters. SRCC stated that without the involvement of DOE, the industry metrics struggle to gain acceptance with policymakers and consumers. SRCC also stated that DOE rulemakings to include solar-equipped water heaters in regulations would serve to establish a single performance metric and signal the legitimacy of solar water heating technologies. (Docket: EERE–2017–BT–STD–0019, SRCC, No. 11 at pp. 3–4)

Subsequently, on October 7, 2020, SRCC published a draft test procedure titled, ''Solar Uniform Energy Factor Procedure for Solar Water Heating Systems'' (SUEF test method).[36] The draft SRCC test procedure addresses methods to test different types of solar water heaters.

In the January 2022 NOPR, DOE responded to SRCC's comment on the May 2020 RFI, by noting that on April 8, 2015, DOE published an energy conservation standards NOPR (the April 2015 NOPR) addressing definitions for consumer water heaters (80 FR 18784). 87 FR 1554, 1585 (Jan. 11, 2022). DOE further noted that the April 2015 NOPR proposed definitions for ''solar-assisted fossil fuel storage water heater'' and ''solar-assisted electric storage water heater'' and clarified that water heaters meeting these definitions are not subject to the amended energy conservation standards for consumer water heaters established by the April 2010 final rule. *Id.* DOE stated its intention to address solar water heaters in a separate rulemaking. *Id.* In response to the January 2022 NOPR, SEA commented that DOE should account for solar water heaters in its test procedure and energy conservation standards. (SEA, No. 24 at p. 1)

In response, DOE notes that ''solar water heater,'' as defined in section 5.1 of SRCC's SUEF test method, include a solar collector or module that is directly exposed to solar radiation outdoors and is often separated from a storage tank and/or back-up water heater located indoors. Therefore, appendix E does not currently accommodate these products, and an in-depth evaluation of the modifications to appendix E necessary to accommodate the testing of these products is required. Given the lack of available test data utilizing the SUEF test method, DOE is not amending the scope of the appendix E test procedure in this rulemaking to explicitly include solar water heaters at this time. However, DOE will continue to consider these solar water heater products further, and depending upon the conclusions reached, the Department may address them in a separate future rulemaking, as appropriate.

B. Updates to Industry Standards

Prior to the effective date of this final rule, the applicable DOE test procedure in appendix E referenced the following industry standards:

- ASHRAE 41.1–1986 (Reaffirmed 2006), Standard Method for Temperature Measurement (ASHRAE 41.1–1986 (RA 2006)); and
- ASTM D2156–09, (ASTM D2156–09), Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels.

ASHRAE 41.1–1986 (RA 2006) was superseded by ASHRAE 41.1–2013 on January 30, 2013 (ASHRAE 41.1–2013). ASHRAE 41.1–2013 was superseded by ASHRAE 41.1–2020 on June 30, 2020. Updates to ASHRAE 41.1 are discussed in section III.B.1 of this document.

ASTM D2156–09 was reapproved without modification in 2018 (ASTM D2156–09 (RA 2018)). In the January 2022 NOPR, DOE proposed to update appendix E to reference the most recent version of ASTM D2156 (*i.e.,* ASTM D2156–09 (RA 2018)). 87 FR 1554, 1567 (Jan. 11, 2022). DOE did not receive any comments in response to its proposal. Therefore, DOE is updating the reference of ASTM D2156–09 to the most recent industry standard (*i.e.,* ASTM D2156–09 (RA 2018)). DOE is also incorporating by reference ASTM E97–1987 (W1991) because it is

[36] SRCC's draft Solar Uniform Energy Factor Procedure for Solar Water Heating Systems is available at: *www.iccsafe.org/wp-content/uploads/is_stsc/Solar-UEF-Specification-for-Rating-Solar-Water-Heating-Systems-20201012.pdf* (Last accessed on July 13, 2022).

necessary to perform procedures within ASTM D2156–09 and ASTM D2156–09 (RA 2018).[37]

As discussed previously in this document, ASHRAE maintains a water heater test procedure, ANSI/ASHRAE Standard 118.2, ''Method of Testing for Rating Residential Water Heaters.'' The test procedure specified in ANSI/ASHRAE 118.2–2006 (RA 2015) is similar to the DOE test procedure that was in effect prior to the July 2014 final rule, although neither the previous DOE consumer water heater test procedure nor the version in place prior to this final rule reference ANSI/ASHRAE Standard 118.2–2006 (RA 2015). In March 2019, ASHRAE published the March 2019 ASHRAE Draft 118.2, the second public review draft of Board of Standards Review (BSR) ANSI/ASHRAE Standard 118.2–2006R, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,'' which DOE referenced in the April 2020 RFI. 85 FR 21104, 21109–21111 (April 16, 2020). In April 2021, ASHRAE published substantive changes to a previous public review draft [38] of BSR ANSI/ASHRAE Standard 118.2–2006R, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters'' (April 2021 ASHRAE Draft 118.2). The January 2022 NOPR examined these public review drafts and discussed the differences between them and the DOE test procedure. 87 FR 1554, 1567 (Jan. 11, 2022).

On January 24, 2022, ASHRAE published a revised edition of the 118.2 standard, ''Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,'' ASHRAE 118.2–2022. The published edition finalized revisions shown in the March 2019 and April 2021 public review drafts.

In comments responding to the January 2022 NOPR, Lutz encouraged DOE to incorporate by reference the industry test standard ASHRAE 118.2–2022. Lutz also recommended DOE review the test procedures in use in Europe and Japan. (Lutz, No. 35 at p. 1) BWC supported DOE's proposal to incorporate by reference the latest industry test standards. (BWC, No. 33 at p. 2)

As discussed previously in this document, DOE will adopt industry test standards as DOE test procedures for covered products and equipment, unless such methodology would be unduly burdensome to conduct or would not produce test results that reflect the energy efficiency, energy use, water use (as specified in EPCA) or estimated operating costs of that equipment during a representative average use cycle. (10 CFR part 430, subpart C, appendix A, section 8(c)) In this final rule, DOE is harmonizing provisions in appendix E to align with certain updates in ASHRAE 118.2–2022 rather than incorporate the entire industry test standard. DOE has concluded that certain updates in ASHRAE 118.2–2022 do not meet the EPCA criteria outlined in this paragraph and has, thus, determined that those updates should not be incorporated into the DOE test procedure at appendix E. DOE's assessment of ASHRAE 118.2–2022 is laid out in detail in section III.B.2 of this document.

Finally, as discussed in the July 2022 SNOPR, DOE has reviewed NEEA's Advanced Water Heating Specifications in order to assess optional rating conditions and methods for heat pump water heaters. This test procedure was identified by stakeholders in response to the January 2022 NOPR as becoming a widely used methodology to provide alternate ratings for heat pump water heaters at different climate conditions. 87 FR 42270, 42275–42276 (July 14, 2022). In the January 2022 NOPR, DOE discussed comments previously received on the April 2020 RFI suggesting that DOE explore the usage of NEEA's Advanced Water Heating Specification—which was at version 7.0 at the time—for voluntary climate-specific efficiency representations of heat pump water heaters. 87 FR 1554, 1580 (Jan. 11, 2022). In response to those comments, DOE stated that it did not have data to indicate what conditions would be representative for regional representations, and, thus, DOE tentatively determined not to allow optional representations of additional efficiency ratings at test conditions other than those found in the DOE test procedure (which are representative of the Nation as a whole), such as those made in accordance with NEEA's Advanced Water Heating Specification. *Id.* However, as discussed in the July 2022 SNOPR, DOE has re-evaluated the benefits to consumers provided by optional representations. 87 FR 42270, 42275–42277 (July 14, 2022). In this final rule, DOE is including optional test conditions for heat pump water heaters aligning with version 8.0 (the latest version) of NEEA's Advanced Water Heating Specification. This matter is discussed in further detail in section III.C.7 of this document.

1. ASHRAE 41.1–2020

As stated previously, ASHRAE 41.1–1986 (RA 2006) was superseded by ASHRAE 41.1–2013, and ASHRAE 41.1–2013 was superseded by ASHRAE 41.1–2020. ASHRAE 41.1–2013 removed the aspirated wet-bulb psychrometer descriptions and stated they would be included in the next revision to ASHRAE 41.6, ''Standard Method for Humidity Measurement.'' ASHRAE 41.6 was updated on July 3, 2014, and included the aspirated wet-bulb psychrometer descriptions that were removed in ASHRAE 41.1–2013. ASHRAE 41.1–2013 also added uncertainty analysis for temperature measurements, information for thermistor-type devices, descriptions for thermopiles, and reorganized the standard to be consistent with other ASHRAE standards. ASHRAE 41.1–2020 added conditional steady-state test criteria and further updated the standard to meet ASHRAE's mandatory language requirements.

As discussed in the January 2022 NOPR, section 3.2.1 of appendix E requires that temperature measurements be made in accordance with ASHRAE 41.1–1986 (RA 2006), and section 3.2.2 of appendix E provides accuracy and precision requirements for air dry-bulb, air wet-bulb, inlet and outlet water, and storage tank temperatures. Sections 5.2.2.1 and 5.3.2 of appendix E effectively require steady-state operation in which the flow-activated water heater is operating at the maximum input rate, is supplied with water at a temperature of 58 °F ±2 °F, and delivers water at a temperature of 125 °F ±5 °F. 87 FR 1554, 1567 (Jan. 11, 2022).

In the development of this final rule, DOE reviewed ASHRAE 41.1–1986 (RA 22006), ASHRAE 41.1–2013, and ASHRAE 41.1–2020 and found that the sections most relevant to appendix E are the temperature measurement sections (*i.e.,* sections 5 through 11 of ASHRAE 41.1–1986 (RA 2006), section 7 of ASHRAE 41.1–2013, and section 7 of ASHRAE 41.1–2020) [39] and the steady-state test criteria added in ASHRAE 41.1–2020. The information in the

[37] Certain methods provided as part of ASTM E97–1987 (W1991) are directly referenced by ASTM D2156–09 and ASTM D2156–09 (RA 2018). Copies of ASTM E97–1987 (W1991) are readily available from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 or online at: *www.astm.org.* (Last accessed on Sept. 20, 2022.)

[38] The April 2021 ASHRAE Draft 118.2 shows only the proposed substantive changes to the March 2019 ASHRAE Draft 118.2. All sections not included in the April 2021 ASHRAE Draft 118.2 are as proposed in the March 2019 ASHRAE Draft 118.2 or have not been changed in a way that their content affects the results of the test procedure proposed in the March 2019 ASHRAE Draft 118.2.

[39] Sections 5 through 11 of ASHRAE 41.1–1986 (RA 2006) were combined into section 7 of ASHRAE 41.1–2013.

temperature measurement sections of the examined three versions of ASHRAE 41.1 does not vary significantly. The additional steady-state test criteria of ASHRAE 41.1–2020 varies significantly from and is more stringent than [40] the criteria specified in sections 5.2.2.1 and 5.3.2 of appendix E; however, the appendix E criteria supersede those in ASHRAE 41.1–2020.

In the January 2022 NOPR, DOE tentatively determined that updating the reference of ASHRAE 41.1–1986 (RA 2006) to the most recent version of the industry standard (*i.e.,* ASHRAE 41.1–2020) would not have a significant effect on the test results, as the content of the relevant sections of the ASHRAE 41.1 standards have not changed significantly and the new content published in ASHRAE 41.1–2020 is superseded by appendix E. As such, DOE proposed to update the reference of ASHRAE 41.1–1986 (RA 2006) to ASHRAE 41.1–2020. ASHRAE 41.1–2020 references ASHRAE 41.6–2014 and requires its use when measuring the wet-bulb temperature. The wet-bulb temperature is required when testing heat pump water heaters to appendix E, and, therefore, DOE also proposed to incorporate by reference ASHRAE 41.6–2014. 87 FR 1554, 1567–1568 (Jan. 11, 2022).

DOE did not receive any comments in response to its proposals to incorporate by reference ASHRAE 41.1.–2020 and ASHRAE 41.6–2014; therefore, DOE is incorporating by reference both standards in this final rule for the reasons previously stated.

2. ASHRAE 118.2–2022

ASHRAE 118.2–2022, published on January 24, 2022 and approved by ANSI on March 1, 2022, supersedes ASHRAE 118.2–2006. The foreword to ASHRAE 118.2–2022 states that it was derived from the DOE appendix E test procedure but also has several substantive changes. Specifically, it notes that a major change was to move the conditions of the test (air temperature, humidity, inlet and outlet water temperatures) and draw patterns to an Informative Appendix A, ''U.S. Values for Test Variables,'' indicating that this test standard has been revised such that it can easily be applied with other test conditions and draw patterns. Additionally, the foreword states that other changes include clarifying the timing of the standby period, clarifying the end of the recovery period, specifying that the density of water used in calculations be measured at the outlet, and adjusting the FHR flow rate for smaller tanks and defining a draw time limit if the water heater can keep up with the FHR flow rate. The following subsections of this final rule discuss the substantial differences between the updated ASHRAE 118.2–2022 test standard and DOE's existing appendix E test procedure. Based on a review of its own test data and stakeholder feedback, the Department is not adopting every update in ASHRAE 118.2–2022 into the amended appendix E test procedure promulgated by this final rule. DOE has provided discussion of the amendments being made to harmonize with ASHRAE 118.2–2022 in section III.B.2.b of this document, whereas other updates in ASHRAE 118.2–2022 not being adopted are discussed in section III.B.2.c of this document.

AET generally supported DOE's proposal to adopt most aspects of ASHRAE 118.2 but noted that the definition of ''UEF'' in ASHRAE 118.2 is different from the definition of that term used by DOE. AET noted that a UEF rating per ASHRAE Standard 118.2 would not be comparable to a UEF rating per DOE's test procedure due to differences in test conditions. (AET, No. 29 at pp. 6–7) DOE agrees that there could be differences between the UEF test result from ASHRAE 118.2–2022 and the amended appendix E test procedure from this final rule. Where differences between these test procedures exist, the requirements at 10 CFR 430.23 and appendix E control. As such, manufacturers must ensure that any representations of ''UEF'' are made in accordance with the applicable version of the DOE test procedure.

a. Scope

Section 2 of ASHRAE 118.2–2022 states that the industry test standard applies to water heaters designed to be capable of providing outlet water at a controlled temperature of at least the nominal outlet water temperature under the conditions specified in the standard. As discussed in section III.A.4.b of this final rule, the January 2022 NOPR proposed to expand the scope of the DOE test procedure to include low-temperature water heaters. 87 FR 1554, 1582–1583 (Jan. 11, 2022). As such, the scope of ASHRAE 118.2–2022 is narrower than the test procedure proposed in DOE's January 2022 NOPR and July 2022 SNOPR because it explicitly excludes low-temperature water heaters. In order to include low-temperature water heaters within the scope of the amended appendix E test procedure, DOE is including testing provisions which are not in ASHRAE 118.2–2022 to allow for the testing of low-temperature water heaters. These test methods are discussed in section III.E.3 of this final rule.

Additionally, the scope of ASHRAE 118.2–2022 differs significantly from the scope of products covered under the EPCA definition for consumer ''water heater'' and DOE's definition for ''residential-duty commercial water heater.'' For example, section 2 of ASHRAE 118.2–2022 limits the storage volume for storage-type water heaters to 120 gallons or less and limits the maximum delivery temperature to 180 °F (82 °C), whereas EPCA does not place limits on storage volume or maximum delivery temperature for consumer water heaters. (42 U.S.C. 6291(27); 42 U.S.C. 6311(12)(A)–(B))) The scope of electric instantaneous water heaters covered by ASHRAE 118.2–2022 equates to the limit for residential-duty commercial electric instantaneous water heaters; however, section 2.2 of ASHRAE 118.2–2022 does not specify any limits on storage volume, and as a result, it covers certain commercial electric instantaneous water heaters—whereas the currently applicable appendix E test procedure does not. Section 2.1 of ASHRAE 118.2–2022 has a definition for ''electric heat-pump storage water heater'' which explicitly limits the nameplate input rating to 12 kilowatts or less, which, as discussed in section III.A.2.a of this final rule, does not correspond to the statutory limit for heat pump-type units and would include commercial heat pump water heaters (which are outside of the scope of the appendix E test procedure). Finally, section 2.4 of ASHRAE 118.2–2022 limits gas-fired heat pump storage water heaters to nameplate input ratings no greater than 20,000 Btu/h, which is significantly lower than the statutory limit of 75,000 Btu/h (*see* 42 U.S.C. 6291(27)(A) and the discussion in section III.A.2.b of this document).

In the January 2022 NOPR, DOE evaluated feedback from commenters indicating that most aspects of the test methods in ASHRAE 118.2–2022 [41] were still applicable outside of its formal scope of coverage. 87 FR 1554, 1568 (Jan. 11, 2022). In the January 2022

[40] Section 5.5.3 of ASHRAE 41.1–2020 would be used to determine steady-state operation within sections 5.2.2.1 and 5.3.2 of appendix E. Using this criteria, a flow-activated water heater delivering water between 120 °F and 121 °F, which is within the current delivery temperature range of 125 °F ± 5 °F, would not be considered in steady-state due to the difference in temperature between the average of the sample and the set point temperature.

[41] ASHRAE 118.2–2022 was published on January 24, 2022, which was after the January 2022 NOPR was published in the **Federal Register** on January 11, 2022; thus, the NOPR only discusses public review drafts of ASHRAE 118.2–2022 which were available at the time.

NOPR, DOE stated that it has found through testing that models with rated storage volumes above 120 gallons or that can deliver water above 180 °F can be tested to DOE's appendix E test procedure, and, given the similarities between the currently applicable DOE test procedure and ASHRAE 118.2–2022, DOE tentatively determined that such models could also be tested using the methods in the ASHRAE test standard. *Id.* DOE did not receive any comments in response to this tentative conclusion in the January 2022 NOPR. Therefore, in evaluating the provisions within ASHRAE 118.2–2022, DOE has determined that its test methods remain applicable to all consumer water heaters and residential-duty commercial water heaters within the scope of appendix E (with the exception of low-temperature water heaters). As proposed in the January 2022 NOPR, this final rule makes several amendments to appendix E to harmonize with new provisions in ASHRAE 118.2–2022. Additionally, DOE determined that methods specified in annex B of ASHRAE 118.2 were applicable to the associated test procedures of this rulemaking, and, therefore, the Department has incorporated by reference ASHRAE 118.2–2022 for use in appendix E, with annex B being the directly applicable provision.

b. Provisions in ASHRAE 118.2–2022 Being Addressed by DOE

Thermal Break

ASHRAE 118.2–2022 specifies the use of a ''thermal break'' in the test set-ups shown for free-standing water heaters and water heaters supplied with a countertop enclosure (*see* Figures 1, 2, 3, 6, 7, 8, and 9 of ASHRAE 118.2–2022). A thermal break is optional in the ASHRAE 118.2–2022 test set-ups shown for wall-mounted water heaters (*see* Figures 4 and 5 of ASHRAE 118.2–2022).

ASHRAE 118.2–2022 defines a ''thermal break'' in section 3 as a nipple made of material that has thermal insulation properties (*e.g.* plastics) to insulate the bypass loop from the inlet piping. It should be able to withstand a pressure of 150 psi (1.034 MPa), and a temperature greater than the maximum temperature the water heater is designed to produce. A thermal break is added to the test set-up to prevent heat from traveling up the inlet piping into a bypass line, if one is utilized. (ASHRAE 118.2–2022 requires a bypass line to be installed, whereas the existing appendix E test procedure does not.) When purging the inlet piping before a draw, any heat that is transferred from the water heater through the inlet piping to the bypass line section would be lost, as the bypass line is replenished with cold supply water. The thermal break helps to prevent this heat loss.

In this rulemaking, DOE has sought feedback from stakeholders in the April 2020 RFI as to whether a thermal break should be required in the DOE test procedure regardless of whether a bypass line is used, and additionally, whether DOE should adopt a definition for this set-up component. 85 FR 21104, 21110 (April 16, 2020). The January 2022 NOPR discussed the mixed comments received on this topic. In summary, three commenters stated that a thermal break should be included in the test set-up regardless of whether there is a bypass or purge line; however, three others (including a testing standards organization, CSA Group) stated that a thermal break is not needed if no bypass or purge loop is present. Several commenters indicated that a standardized definition for a ''thermal break'' would be beneficial for repeatability of the test procedure. 87 FR 1554, 1569 (Jan. 11, 2022).

In the January 2022 NOPR, DOE explained that a bypass line is a method that test laboratories use to ensure inlet water temperatures are within the bounds of the test procedure (*i.e.,* within 58 °F ±2 °F by the first measurement of the draw), but its inclusion in the test set-up can create a condition whereby a constant low temperature can remove energy from the water heater at a higher rate than would be removed in the field. Because a bypass line is not the only approach to maintaining inlet conditions, DOE had tentatively determined that requiring a thermal break (and providing a definition for this component) would not be necessary. *Id.*

BWC responded by indicating that it is not aware of any manufacturer or test laboratory omitting the use of a thermal break, and, therefore, DOE should adopt a definition for ''thermal break'' to ensure consistent results from laboratory to laboratory. The commenter recommended that a thermal break should be defined as ''a plastic and thermally non-conductive material that can withstand a minimum temperature of 150 °F.'' BWC also stated that its testing indicated that when a bypass line (also known as a ''purge loop'') is used, all temperatures more consistently met the tolerance criteria in appendix E; furthermore, test results were more often out of tolerance when a bypass line was not used. BWC argued that as a result, use of a bypass line will remain common practice, and as such, thermal breaks will also continue to be used. (BWC, No. 33 at p. 3)

DOE has considered the comments received on this topic throughout this rulemaking, and, although DOE maintains that a thermal break would not be needed in all set-up cases, the Department has concluded that there is overwhelming support for establishing a standardized definition for ''thermal break.'' In order to address concerns regarding the repeatability of the test procedure (*i.e.,* various facilities maintaining a consistent set-up approach), DOE is adopting a definition for this component consistent with that in section 3 of ASHRAE 118.2–2022, but with minor modification. Specifically, DOE is defining ''thermal break'' as ''a thermally non-conductive material that can withstand a pressure of 150 psi (1.034 MPa) at a temperature greater than the maximum temperature the water heater is designed to produce and is utilized to insulate a bypass loop, if one is used in the test set-up, from the inlet piping.'' However, DOE is not requiring the use of a bypass loop or a thermal break in this final rule. DOE reasons that providing a definition for a thermal break will improve consistency in test set-ups when the testing agency opts to use a bypass loop with a thermal break.

FHR Test Flow Rates

Section 7.3.3.1 of ASHRAE 118.2–2022 indicates that the flow rate for non-flow-activated water heaters with rated storage volumes less than 20 gallons would be 1.5 ± 0.25 gallons per minute (gpm) (5.7 ± 0.95 liters (L)/minute (min)) when conducting the FHR test. Section 5.3.3, ''First-Hour Rating Test,'' of appendix E requires that water heaters with a storage volume less than 20 gallons be tested at 1.0 ± 0.25 gpm (3.8 ± 0.95 L/min). These flow rates are lower than the 3.0 ± 0.25 gpm (11.4 ± 0.95 L/min) required for water heaters with rated storage volumes greater than or equal to 20 gallons. Water heaters with low rated storage volumes (less than 20 gallons) and high input rates can potentially operate indefinitely (*i.e.,* instantaneously) at even the 3.0 ± 0.25 gpm (11.4 ± 0.95 L/min) flow rate. Therefore, when such products are tested as currently required by appendix E, the measured FHR is near the maximum possible value of 60 gallons (227 L) [42] and, as a result, these

[42] At 1.0 ±0.25 gallons per minute during the 60-minute first-hour rating test, the maximum possible delivery capacity is 1.0 gallon per minute × 60 minutes = 60 gallons. At 1.5 ± 0.25 gallons per minute during the 60-minute first-hour rating test, the maximum possible delivery capacity is 1.5 gallon per minute × 60 minutes = 90 gallons.

products would be required to use the medium draw pattern according to Table I of appendix E. However, as discussed in the January 2022 NOPR, these models could be used in applications similar to water heaters that are required to test using the high draw pattern, and the existing method of testing these products may not best represent how they are used in the field. Instead, DOE finds that a flow rate of 1.5 ± 0.25 gpm (5.7 ± 0.95 L/min)—as introduced in ASHRAE 118.2–2022—would be sufficient to allow these products to be tested and rated in the high draw pattern. 87 FR 1554, 1569–1570 (Jan. 11, 2022).

In this rulemaking, DOE has sought information from commenters regarding the flow rate for the FHR test of non-flow-activated water heaters with rated storage volumes less than 20 gallons. DOE has also participated in the public review of ASHRAE 118.2 prior to the 2022 edition being released, leading up to the establishment of the 1.5 ± 0.25 gpm (5.7 ± 0.95 L/min) flow rate criteria for these products during the FHR test. DOE also performed testing on three electric storage water heaters less than 20 gallons to both the then currently applicable appendix E and ASHRAE 118.2–2022 flow rates and provided these test data in the January 2022 NOPR. The results indicated that changing the flow rate during the FHR test for water heaters with a rated storage volume less than 20 gallons from 1.0 ± 0.25 gpm (3.8 ± 0.95L/min) to 1.5 ± 0.25 gpm (5.7 ± 0.95 L/min) would have a relatively minimal impact on the FHR for water heaters with low input rates. For models with high input rates, the change in flow rate could significantly increase the FHR and result in some models being tested and rated for UEF using a higher draw pattern, which would provide ratings that are more representative of their actual use. Therefore, DOE proposed to adopt the higher flow rate of 1.5 ± 0.25 gpm (5.7 ± 0.95 L/min) for the FHR test of non-flow-activated water heaters with rated storage volumes less than 20 gallons. 87 FR 1554, 1570 (Jan. 11, 2022).

In response, AHRI indicated that the revised flow rate of 1.5 gpm may not be appropriate for models as small as 2 gallons, for which the proposed change could yield unrepresentative results for FHR. (AHRI, No. 40 at p. 4) AHRI also raised concerns about the accuracy of flow rates for smaller capacity water heaters. (AHRI, Jan. 27, 2022 Public Meeting Transcript, No. 27 at p. 41) Rheem generally supported DOE's proposal to align with ASHRAE 118.2–2022 on this issue. However, Rheem pointed out that the test data provided in the NOPR reflected consumer water heaters in only the very small draw pattern, so Rheem requested DOE to provide further test data and also to conduct testing on products near the division between the very small and low draw patterns. Rheem stated that a change in draw pattern will affect the UEF rating and will need to be taken into account. (Rheem, No. 31 at p. 2)

In response to the concerns raised by AHRI, DOE notes that its test data presented in the January 2022 NOPR were taken from samples in the very small draw pattern (*see* 87 FR 1554, 1570 (Jan. 11, 2022)). DOE has additionally provided the storage volumes of the products which were tested in Table III.1 of this final rule. The samples were all approximately 2 gallons in storage volume, and the 1.5 gpm flow rate was found to be sufficiently representative for these products (the absolute value of the largest percent difference was less than 5 percent). Additionally, as stated in the January 2022 NOPR, the increase in flow rate did not cause any of these products to move from the very small draw pattern to the low draw pattern, which resolves a chief concern regarding the representativeness of the FHR results. *Id.* In response to Rheem's requests for additional data, DOE was not able to identify non-flow-activated water heaters less than 20 gallons closer to 18 gallons of FHR—the division between the very small and low draw patterns—in order to perform testing on such products. However, while the net average change may approximately be a 2-percent increase in FHR rating, DOE has determined that the increased flow rate will allow products to be rated in more representative draw patterns, as discussed earlier in this section.

TABLE III.1—AVERAGE FIRST-HOUR RATING BASED ON A FLOW RATE OF 1.0 GPM AND 1.5 GPM

Unit No.	Measured storage volume, gallons	Average FHR* at 1.0 gpm (3.8 L/min), gallons	Average FHR* at 1.5 gpm (5.7 L/min), gallons	Change %
1	2.4	7.3 (Very Small)	7.5 (Very Small)	+3.4
2	2.4	6.4 (Very Small)	6.2 (Very Small)	-2.2
3	1.8	6.9 (Very Small)	7.2 (Very Small)	+4.7
Net Average			+2.0.	

*FHR results are rounded to the nearest 0.1 gallon and reflect the arithmetic mean of four trials per water heater.

In this final rule, DOE is amending section 5.3.3.1 of the appendix E test procedure to require a flow rate of 1.5 ± 0.25 gpm (5.7 ± 0.95 L/min) when conducting the FHR test on non-flow-activated water heaters with rated storage volumes less than 20 gallons.

24-Hour Simulated-Use Test First Recovery Period

The first recovery period of the 24-hour simulated-use test is used in section 8.3.2 of ASHRAE 118.2–2022 and section 6.3.2 of appendix E to calculate recovery efficiency. Section 8.3.2 of ASHRAE 118.2–2022 specifies that, when the first recovery of the 24-hour simulated-use test ends during a draw, the first recovery period extends until the end of that draw, whereas DOE's test procedure does not explicitly address how to calculate recovery efficiency if the first recovery period ends during a draw.

A ''recovery period'' is defined in section 1 of appendix E as ''the time when the main burner of a storage water heater is raising the temperature of the stored water.'' Each of the parameters in the current recovery efficiency equation in section 6.3.2 of appendix E is recorded from the ''beginning of the test to the end of the first recovery period following the first draw.'' The currently applicable appendix E test procedure does not explicitly state whether values are recorded at the end of the recovery period that ends after the initiation of the first draw, or at the end of a recovery period that occurs after the end of the first draw.

In the January 2022 NOPR, DOE noted that the situation in which a recovery ends during a draw likely occurs during draws with a low enough flow rate that the water heater can heat water more

quickly than the draw is removing. 87 FR 1554, 1574 (Jan. 11, 2022). DOE also explained that the energy used for the recovery efficiency calculation includes energy used to heat water and auxiliary energy; therefore, the energy associated with the first recovery period should represent the entire draw to capture all energy use. *Id.*

On January 31, 2020, DOE published in the **Federal Register** a Notice of Decision and Order [43] (Decision and Order) by which a test procedure waiver for certain basic models was granted to address the issue of a second recovery initiating during the draw during which the first recovery ended. 85 FR 5648. The Decision and Order prescribes an alternate test procedure that extends the first recovery period to include both the first and second recoveries. *Id.* at 85 FR 5652. In the context of the Decision and Order, DOE determined that the consideration of delivered water mass and inlet and outlet temperatures until the end of the draw is appropriately representative, and, therefore, the entire energy used from both recoveries is included. *Id.* at 85 FR 5651–5652.

In the January 2022 NOPR, after considering comments received in response to the April 2020 RFI, DOE proposed to establish a new provision that states that when the first recovery ends during a draw, the first recovery period is extended to the end of the draw and the mean tank temperature measured immediately after cut-out is used as the maximum mean tank temperature value in the recovery efficiency calculation. 87 FR 1554, 1574 (Jan. 11, 2022). In addition, DOE proposed to update the recovery efficiency equation to specify accounting for the mass of water drawn for all draws initiated during the recovery period. DOE noted that such a change would be consistent with the published Notice of Decision and Order and was supported by commenters. *Id.*

In response, BWC stated the proposed updates to the overall test procedure provide a more accurate calculation of recovery efficiency and eliminate situations where products would be disadvantaged for completing their recovery in the middle of a draw, thereby providing a more representative measurement of a product's overall energy efficiency. (BWC, No. 33 at pp. 5–6)

DOE did not receive any other comments in response to these proposals. As such, DOE is amending appendix E to adopt the proposals from the January 2022 NOPR, which are consistent with the alternate test procedure in the Decision and Order and in ASHRAE 118.2–2022.

24-Hour Simulated-Use Test Final Hour

Although not stated explicitly in section 5.4.2 of the currently applicable appendix E, in the case that the standby period is between the first and second draw clusters, power to the main burner, heating element, or compressor is disabled during the last hour of the 24-hour simulated-use test. In the case that the standby period is after the last draw of the 24-hour simulated-use test, power to the main burner, heating element, or compressor is not disabled. Section 5.4.2 of the currently applicable appendix E states that during the last hour of the 24-hour simulated-use test, power to the main burner, heating element, or compressor shall be disabled; at 24 hours, record the reading given by the gas meter, oil meter, and/or the electrical energy meter as appropriate; and determine the fossil fuel and/or electrical energy consumed during the entire 24-hour simulated-use test and designate the quantity as Q. Section 5.4.2 of the currently applicable appendix E also provides that in the case that the standby period is after the last draw of the 24-hour simulated-use test, an 8-hour standby period is required, and this period may extend past hour 24. The procedures for the standby period after the last draw of the 24-hour simulated-use test allow for a recovery to occur at the end of the 8-hour standby period, which indicates that the power to the main burner, heating element, or compressor is not disabled. DOE's procedure, as described, may result in some confusion. Further, the method of determining the total energy use during the 24-hour simulated-use test, Q, and total test time are not explicitly stated for when a standby period occurs after the last draw of the 24-hour simulated-use test. As discussed in the following paragraphs, DOE is amending the procedures for the last hour of the 24-hour simulated-use test, consistent with its proposals in the January 2022 NOPR, to explain how to end the test for both standby period scenarios, and this amendment aligns with the updated approach in ASHRAE 118.2–2022.

In ASHRAE 118.2–2022, power is not disabled when the standby period occurs after the last draw of the test. However, if a recovery occurs between an elapsed time of 23 hours following the start of the test (hour 23) and 24 hours following the start of the test (hour 24), the following alternate approach is applied to determine the energy consumed during the 24-hour simulated-use test: The time, total energy used, and mean tank temperature are recorded at 1 minute prior to the start of the recovery occurring between hour 23 and hour 24, along with the average ambient temperature from 1 minute prior to the start of the recovery occurring between hour 23 and hour 24 to hour 24 of the 24-hour simulated-use test. These values are used to determine the total energy used by the water heater during the 24-hour simulated-use test. This alternate calculation combines the total energy used 1 minute prior to the start of the recovery occurring between hours 23 and 24 and the standby loss experienced by the tank during the time between the minute prior to the recovery start and hour 24. This provision in section 7.4.3.2 of ASHRAE 118.2–2022 does not require the water heater to be de-energized during the standby period. Disabling power to the water heater is typically a manual operation that requires the presence of a technician. In cases where the technician does not disable power at the correct time, a retest of the 24-hour simulated-use test may be necessary. To the extent this provision would eliminate the need to ensure that a unit is switched off for the last hour of the 24-hour simulated-use test, it could reduce test burden.

In the January 2022 NOPR, after considering comments on the April 2020 RFI, DOE tentatively concluded that further evaluation of the alternate procedure presented in the March 2019 ASHRAE Draft 118.2 and April 2021 ASHRAE Draft 118.2 should be conducted before a determination is made on whether DOE should adopt such changes. However, DOE also tentatively determined that the procedure for the last hour of the 24-hour simulated-use test would benefit from further, more explicit instruction, and, thus, DOE proposed to explicitly state how to end the test depending on whether the standby period is between draw clusters 1 and 2 or after the last draw of the test. 87 FR 1554, 1575 (Jan. 11, 2022).

No comments or data were received on this topic in response to the January 2022 NOPR or July 2022 SNOPR.

As such and for the reasons previously stated, DOE is finalizing its proposal from the January 2022 NOPR to clarify how to end the test depending on when the standby period occurs. DOE will continue to evaluate the impacts of fully adopting the ASHRAE 118.2–2022 method and may consider that in a future test procedure rulemaking for the subject water heaters.

[43] Notice of Decision and Order in response to BWC petition for waiver is available at: *www.regulations.gov/document?D=EERE-2019-BT-WAV-0020-0008.*

As discussed in section III.E.4 of this document, DOE is dividing section 5.4.2 of appendix E into two sections: section 5.4.2.1, ''Water Heaters that Can Have Internal Storage Tank Temperature Measured Directly,'' and section 5.4.2.2, ''Water Heaters that Cannot Have Internal Storage Tank Temperature Measured Directly.'' The new section 5.4.2.1 of appendix E provides specific direction on the measurements to be taken if the standby period occurs at the end of the first recovery period after the last draw of the 24-hour simulated-use test. These revised instructions for the final hour of the 24-hour simulated-use test also no longer require disabling the water heater for the standby mode, a change which harmonizes with the procedure in ASHRAE 118.2–2022. DOE has determined that these provisions are appropriate only for water heaters that can have internal storage tank temperatures measured directly, because these steps require recording the mean tank temperature at various points during the final hour. For water heaters that cannot have internal storage tank temperatures measured directly, DOE is adopting an alternative method entirely (discussed in section III.E.7 of this document) which requires a standby period after the final draw and temperature measurements made via estimation.

c. Other Updates

Inlet Water Temperature Measurement Location

In its review of the ASHRAE 118.2–2022 set-up figures, DOE determined that the placement of the inlet water temperature measurement probe differs between ASHRAE 118.2–2022 and the currently applicable appendix E. In ASHRAE 118.2–2022, the inlet water temperature is always measured on the upstream side of the heat trap formed by the U-bend in the required piping, whereas the figures in appendix E vary this location (*i.e.,* either on the upstream side or on the downstream side of the U-bend) depending on the type of water heater being tested.

DOE requested information about the potential impact of this measurement location on energy efficiency results in the January 2022 NOPR. 87 FR 1554, 1569 (Jan. 11, 2022).

On this topic, BWC stated there are inconsistencies in the placement of inlet thermocouples in the set-up figures currently shown in appendix E. BWC suggested adopting the figures in ASHRAE Standard 118.2, as they are representative of most set-ups and illustrate placement of the inlet thermocouples on the upstream side of the U-bend in all instances. BWC also more generally urged DOE to adopt the water heater test set-up figures adopted in ASHRAE 118.2–2022, stating that it is not aware of any testing laboratory that does not utilize the set-ups depicted in these figures. (BWC, No. 33 at pp. 2–3) (DOE understands the ''inconsistencies'' mentioned by BWC as referring to the differences in temperature probe placement for different types of water heaters, as mentioned at the beginning of this subsection.)

AET indicated that there may be problems with the location and orientation of the bypass (purge) line connection in the ASHRAE 118.2–2022 test set-ups when testing small water heaters (*i.e.,* electric instantaneous water heaters). The commenter claimed that without a bypass line installed at the water inlet, it is not possible to meet the test conditions and tolerances for the inlet water temperature during test draws when the measurement location is as specified in the current appendix E test procedure. AET explained that the location of the bypass line combined with the rest of the piping configuration for measuring inlet water temperature can induce a small amount of flow in the piping near the inlet to the water heater, even when a draw is not being conducted and there is no flow through the water heater. According to AET, flow-activated water heaters with especially sensitive flow sensors could initiate heating upon sensing this ''false flow,'' and this would in turn cause the energy consumption under test to increase in an unrepresentative manner. AET provided a detailed description of this phenomenon in its public comment and stated that its claims were substantiated by review of recent test data, though these data were not provided to DOE. AET suggested that one potential solution to the identified problem could be to move the connection point of the purge line and the inlet measurement location further from the water heater. In addition, AET suggested adjusting the various pipe T-junctions and their orientations such that the momentum of a cold-water purge will be directed horizontally away from the pipe direction going to the water heater and not induce a false flow, with the commenter opining that this change could be implemented for all types of water heaters. (AET, No. 29 at pp. 6–9)

As discussed in the January 2022 NOPR, maintaining the same inlet water temperature measurement location for all water heater types ((*i.e.,* harmonizing with ASHRAE 118.2–2022)) would simplify the test set-up as compared to the requirements of the currently applicable appendix E. However, DOE did not have sufficient information at the time to propose such harmonization. 87 FR 1554, 1568–1569 (Jan. 11, 2022).

In the January 2022 NOPR, DOE noted that use of a bypass loop is not the only possible test set-up for meeting the test conditions within appendix E. 87 FR 1554, 1569 (Jan. 11, 2022). However, based on the comment from BWC, DOE understands that many test facilities do use a bypass loop as a solution to having to stabilize the inlet water conditions. After considering the comments from AET and BWC, DOE has determined that laboratories are likely to continue to use bypass lines regardless of the placement of the inlet water temperature measurement, because a bypass line is simple to install and relatively low-cost. If this occurs, then there is a risk that UEF ratings for certain flow-activated water heaters with highly sensitive sensors may be lower due to the additional energy consumption of the water heater when a false flow is sensed. DOE is not incorporating the updates found in the ASHRAE 118.2–2022 figures. Instead, DOE is maintaining the current set-up directions for inlet water temperature measurement in appendix E and, which will allow for the continued use of a bypass line when necessary and appropriate. Regarding AET's concerns about the location of the bypass loop for certain electric instantaneous water heaters, DOE notes that it has not observed the issue in any of its testing. Further, DOE is not adopting the figures in ASHRAE 118.2–2022, so, therefore, the Department is not specifying the location of the bypass loop in its test set-up. Accordingly, during testing, there will be sufficient flexibility to locate the bypass line, when necessary, in a location that results in representative operation and performance of the unit under test.

FHR Test Initiation Criteria

ASHRAE 118.2–2022 includes additional criteria defining the start of the FHR test as compared to DOE's test procedure at appendix E. These differences are briefly explained in the following paragraphs.

Section 5.3.3.3 of the currently applicable appendix E states that prior to the start of the FHR test, if the water heater is not operating (*i.e.,* heating water), initiate a draw until cut-in [44]

[44] ''Cut-in'' is defined in section 1 of appendix E as ''the time when or water temperature at which a water heater control or thermostat acts to increase the energy or fuel input to the heating elements, compressor, or burner.''

(*i.e.,* when the water heater begins heating water). The draw is then terminated any time after cut-in, and the water heater is operated until cut-out.[45] Once the maximum mean tank temperature is observed after cut-out, the initial draw of the FHR test begins.

Section 7.3.3.3 of ASHRAE 118.2–2022 specifies that the draw preceding the initial draw of the FHR test must proceed until the outlet temperature drops 15 °F below the maximum outlet temperature observed, or until a draw time limit [46] is reached. If the draw time limit is reached before the outlet temperature drops 15 °F below the maximum outlet temperature observed, then the main heating source of the water heater is shut off, and the draw is continued until the outlet temperature has dropped 15 °F below the maximum outlet temperature. Requiring the outlet temperature to drop 15 °F below the maximum outlet temperature may provide a more consistent starting condition for the FHR test compared to the pre-conditioning method specified in the currently applicable DOE test procedure because draws of varying lengths can create different internal tank temperature profiles.

Thus, in the January 2022 NOPR, DOE tentatively determined that the additional requirement to tie the length of the initial draw to a specific outlet temperature (which in some cases would extend the draw length as compared to the currently applicable DOE test procedure) could increase the repeatability of the FHR test. 87 FR 1554, 1570–1571 (Jan. 11, 2022). However, DOE also argued that, with both the ASHRAE 118.2–2022 and appendix E initiation criteria, the water heater can be considered ''fully heated'' and to have similar internal energy content before beginning the FHR test, although differences may be present due to the internal water temperature gradient throughout the tank. DOE did not propose an amendment to include pre-FHR test conditioning, because it was unclear how these differences in internal tank temperature would affect the test results. 87 FR 1554, 1571 (Jan. 11, 2022).

In response, A.O. Smith stated that the 15 °F initiation criterion and the additional specificity on draw termination in ASHRAE 118.2 would improve consistency and repeatability and would not conflict with the currently applicable DOE test procedure, and, therefore, those provisions should be adopted. (A.O. Smith, No. 37 at pp. 6–7) BWC also urged DOE to consider adopting the pre-FHR pre-conditioning requirements specified in ASHRAE 118.2. BWC stated that the specifications in ASHRAE 118.2 only add parameters to achieve better testing consistency, and that the currently applicable test procedure may frequently yield inconsistencies from short pre-draws prior to the initiation of the FHR test, thereby causing storage water heaters to be unable to meet the test procedure's 125 °F ± 5 °F requirement. BWC stated that changes to the pre-FHR preconditioning requirements were agreed to by manufacturers during the development of ASHRAE 118.2, and that manufacturers are prepared to undertake the burden of any re-testing in favor of a more robust test method. (BWC, No. 33 at pp. 4–5)

In response, DOE notes that commenters did not indicate the impact of this change on rated values of products nor did they provide any data in that regard. Additionally, DOE is not aware of storage water heaters which are not able to meet the 125 °F ± 5 °F outlet temperature requirement, but if this is demonstrated to be a problem, the Department would address the impacted products in a future rulemaking once more data are collected. Although the Department acknowledges the potential benefits to consistency and repeatability that may accompany a pre-FHR preconditioning requirement, without a clear understanding of the associated impact on ratings, DOE is not adopting this change to the Federal test procedure at this time.

Additionally, DOE notes that the draw time limit in section 7.3.3.3 of ASHRAE 118.2–2022 is a function of the ''nominal'' capacity of the water heater (in gallons or liters). Nominal capacity is typically not equal to the rated storage volume, and there is no standardized methodology in appendix E or in ASHRAE 118.2–2022 to determine nominal capacity; hence, there is a concern that the draw time limits could be different for two identical water heaters labeled at two different nominal capacities. If DOE were to adopt the essence of the initiation criteria in ASHRAE 118.2–2022, DOE would consider substituting ''nominal capacity'' for ''rated storage volume'' (because rated storage volume is a standardized metric with a test method associated with it in section 5.2.1 of appendix E). This deviation could cause additional testing costs for manufacturers.

For these reasons, DOE is maintaining the FHR test initiation criteria currently found in appendix E, which provide that the preconditioning draw can be terminated any time after cut-in, and the water heater is operated until cut-out. Once the maximum mean tank temperature is observed after cut-out, the initial draw of the FHR test begins.

24-Hour Simulated-Use Test Initiation Criteria

Similar to the initiation criteria discussed in the previous section for the FHR test, section 7.4.2 of ASHRAE 118.2–2022 includes criteria for a pre-24-hour simulated-use test draw, which ends after either the outlet temperature drops by 15 °F or the draw time limit is reached. Section 5.4.2 of the currently applicable appendix E requires that the water heater sit idle for 1 hour prior to the start of the 24-hour simulated-use test, during which time no water is drawn from the unit and no energy is input to the main heating elements, heat pump compressor, and/or burners. Appendix E provides no instruction on how to condition the tank prior to this one hour. However, as discussed in the previous section, it remains unclear how the outlet temperature drop criteria and the draw time limit will affect the internal tank temperature at the start of the 24-hour simulated-use test and how this difference in internal tank temperatures will affect the test results.

In the January 2022 NOPR, DOE did not propose to amend appendix E to include the April 2021 ASHRAE Draft 118.2 24-hour simulated-use test initiation criteria (which was substantially the same as the 24-hour simulated-use test initiation criteria included in ASHRAE 118.2–2022) and invited comment and data that provide information on the impact of this update on UEF results. 87 FR 1554, 1573 (Jan. 11, 2022).

On this topic, BWC argued that the initiation criteria in ASHRAE Standard 118.2 should also be adopted for the 24-hour simulated-use test so as to improve the repeatability and reproducibility of the test procedure. (BWC, No. 33 at pp. 4–5) DOE considered this comment, as well as those received regarding the FHR test initiation criteria, and has determined that it still lacks the necessary data that would provide a clear understanding of the impact that this update would have on ratings. Accordingly, for the same reasons stated in the previous section, DOE is not adopting this change in this final rule.

[45] ''Cut-out'' is defined in section 1 of appendix E as ''the time when or water temperature at which a water heater control or thermostat acts to reduce to a minimum the energy or fuel input to the heating elements, compressor, or burner.''

[46] The draw time limit is the rated storage capacity divided by the flow rate times 1.2 (*i.e.,* for a 75-gallon water heater the draw time limit would be 30 minutes, or 75 gallons divided by 3 gpm times 1.2).

FHR Test Termination Temperature

Section 7.3.3.4 of ASHRAE 118.2–2022 includes additional criteria regarding water draws during the FHR test, as compared to the current DOE test procedure. The FHR test required in section 5.3.3 of appendix E specifies a series of water draws over the course of one hour. After each water draw is initiated, the draw is terminated when the outlet water temperature decreases 15 °F from the maximum outlet water temperature measured during the draw. For example, if after initiating a water draw, the outlet water temperature reaches a maximum temperature of 125 °F, the water draw would continue until the outlet water temperature drops to 110 °F, at which time the water draw would be terminated. Similar to the public review drafts of ASHRAE 118.2, section 7.3.3.4 of ASHRAE 118.2–2022 specifies that water draws during the FHR test terminate if either: (1) The outlet water temperature decreases by the quantity of nominal delivery temperature minus 110 °F from the maximum outlet water temperature [47] or (2) the outlet water temperature decreases to 105 °F, regardless of the maximum outlet water temperature measured during the draw. Setting a minimum temperature threshold of 105 °F would reflect that, in practice, consumers would likely stop drawing water when it gets below 105 °F, as the water would no longer be considered ''hot.''

A temperature of 105 °F would be the FHR test termination temperature if the maximum outlet temperature were 120 °F (a 15 °F difference) as per the current DOE test procedure. 120 °F is the lower end of the outlet temperature tolerance band specified in section 5.2.2.2 of appendix E (*i.e.,* 125 °F ± 5 °F). However, as discussed in section III.A.4.b of this document, there exist low-temperature water heaters that are not capable of maintaining these temperatures when tested to the flow rates required in section 5.2.2.2 of appendix E, and this raises the question of whether a criterion for ending a draw when the outlet temperature reaches 105 °F would be representative for all consumer water heaters and residential-duty commercial water heaters.

In this rulemaking, DOE sought information and feedback from stakeholders on the potential impacts and implications of setting an FHR test termination temperature such as 105 °F. In particular, DOE was interested in data which would determine the representativeness of a 105 °F minimum temperature based on consumer use and expectations. 85 FR 21104, 21109 (April 16, 2020). While several stakeholders generally supported the use of a termination temperature, two manufacturers indicated that more testing and investigation are necessary prior to adopting this. 87 FR 1554, 1571, 1572 (Jan. 11, 2022). In commenting on the April 2020 RFI, Rheem suggested 100 °F instead to account for low-temperature water heaters. (Rheem, No. 14 at p. 3) In the January 2022 NOPR, DOE tentatively determined that, based on a review of existing test data, the 105 °F termination temperature criterion would affect only a small number of tests, if any. Additionally, DOE noted that Rheem's suggested 100 °F termination temperature would most likely not be representative for all types of consumer water heaters and residential-duty commercial water heaters. Given the need for further evaluation of the specific termination temperature and its potential impacts, DOE did not propose to adopt a termination temperature for the FHR test in the January 2022 NOPR. 87 FR 1554, 1572 (Jan. 11, 2022).

In response to the January 2022 NOPR, BWC reiterated that DOE should include the 105 °F termination temperature established in ASHRAE Standard 118.2 to provide additional clarity and reflect representative usage. (BWC, No. 33 at p. 4) However, commenters did not provide additional data or consumer usage information to indicate whether 105 °F is representative of the minimum delivery temperature consumers generally expect. DOE was likewise unable to obtain widespread field use data on its own initiative.

As of this final rule, there remains significant uncertainty regarding what the value of the termination temperature should be. As noted previously, Rheem indicated 100 °F should be used to account for low-temperature water heaters. Section 7.3.3.4 of ASHRAE 118.2–2022 uses a 105 °F minimum termination temperature, which was recommended by several stakeholders. DOE did not receive, nor has DOE found, any additional data regarding the minimum delivery temperature consumers would generally expect. However, should the water heater provide a maximum delivery temperature during the test which is lower than 120 °F (which may potentially occur even if the unit's controls are adjusted properly according to section 5.2.2 of appendix E), a 15 °F temperature drop would result in termination below 105 °F. DOE expects this would impact a relatively small number of units, but at this time, there is inadequate test data to indicate how frequently this may occur, which types of products would be affected, and how they would be affected by a specific termination temperature.

Given these considerations, DOE is not adopting a minimum termination temperature for the FHR test in this rulemaking.

FHR Test Final Draw Volume

Section 5.3.3.3 of appendix E includes a provision for the FHR test requiring that if the final draw is not initiated prior to one hour from the start of the test, then a final draw is imposed at the elapsed time of one hour. In this situation, calculations presented in section 6.1 of appendix E are used to determine the volume drawn during the final draw for purposes of calculating FHR. The volume of the final draw is ''scaled'' based on the temperature of the water delivered during the final draw as compared to the temperature of the water delivered during the previous draw to account for the water removed in the final draw being at a lower temperature than previous draws. The scaled final draw volume is added to the total volume drawn during the prior draws to determine the FHR. ASHRAE 118.2–2022 does not include a final draw volume scaling calculation for the case in which a draw is not in progress at one hour from the start of the test and a final draw is imposed at the elapsed time of one hour. Instead, the ASHRAE 118.2–2022 method calculates FHR as the sum of the volume of hot water delivered giving full credit to the final draw.

The methodology for conducting the FHR test, and in particular the issue of whether to scale the final draw, was considered by DOE in a final rule that was published in the **Federal Register** on May 11, 1998 (the May 1998 Final Rule). 63 FR 25996. In the May 1998 Final Rule, DOE determined that scaling the final draw volume based on the outlet water temperature was appropriate and was included to adjust the volume of the last draw to account for the lower heat content of the last draw compared to the earlier draws with fully heated water. *Id.* at 63 FR 25996, 26004–26005.

In the January 2022 NOPR, after considering comments on the April 2020 RFI, DOE proposed not to update the final draw volume provisions in the FHR test because DOE tentatively determined that scaling the final draw

[47] The nominal delivery temperature in section 2.4 of the appendix E test procedure is 125 °F, and 125 °F − 110 °F = 15 °F. Thus, for a nominal delivery temperature of 125 °F, ASHRAE 118.2–2022 and the DOE test procedure both use a 15 °F drop to indicate when the draw must be terminated.

volume based on outlet temperature is more representative of the actual use in the field. 87 FR 1554, 1573 (Jan. 11, 2022). As discussed in the January 2022 NOPR, AHRI and individual manufacturers recommended that DOE remove the scaling calculations to harmonize with ASHRAE 118.2–2022, indicating that this change would have minimal impact on ratings. *Id.* at 87 FR 1572. CSA, however, raised concerns with that approach, because water is usually tempered by the end user, and the commenter argued that a water heater that delivers a volume of water at a higher temperature should not be credited the same as one that delivers roughly the same volume at a lower temperature. CSA also noted that removing the scaling of the final draw volume could possibly move water heaters to a higher draw pattern. *Id.*

After considering these comments, DOE noted in the January 2022 NOPR that the scaling of the final draw accounts for the possible lower heat content of the last draw as compared to earlier draws. DOE further explained that the test procedure specifies a constant flow rate throughout testing, and, as water is drawn from a typical non-flow-activated water heater, the water temperature decreases. As the temperature of the water delivered by the water heater decreases, mixing valves at the point of use will reduce the amount of cold water being mixed with the hot water in order to maintain the same delivery temperature to the consumer. If the water from the water heater is at a lower temperature, more of this hot water will be required to reach the correct temperature at the fixture. Thus, DOE tentatively determined that scaling the final draw volume based on outlet temperature is more representative of the actual use in the field. 87 FR 1554, 1572–1573 (Jan. 11, 2022). Furthermore, DOE also noted that if the scaling calculation were removed, many water heaters would have a different FHR than under the currently applicable appendix E, and some would change draw pattern bins, which would require retesting for UEF and thereby increase manufacturer burden. *Id.*

In response, BWC strongly disagreed with DOE's position that scaling the final draw based on outlet temperature is representative of field use. BWC reiterated its earlier comments that scaling should not be necessary and would potentially lead to unrepeatable test results depending on the timing of the last draw (*e.g.,* creating the possibility of two different FHR ratings for the same product). BWC instead recommended the procedure in ASHRAE Standard 118.2, where the sum of the volume of hot water delivered is used without scaling the final draw. BWC argued that this approach would more fairly account for water heated by the product. (BWC, No. 33 at pp. 4–5)

After considering BWC's comment, DOE maintains that when the final draw is imposed at the end of the FHR test, scaling the volume of water drawn by temperature is representative and appropriate. Scaling the final draw allows FHR to capture the difference in hot water delivery capacity between water heaters that provide roughly the same amount of hot water in the final draw, but where one water heater provides water at a higher temperature than the other. This is appropriate because, as noted, the water temperature is usually tempered at the fixture to provide the end user with water at the target outlet temperature. If the hot water is at a lower temperature, more water is required to provide the user with water at the target temperature, while less water would be needed if the water is at a higher temperature. Therefore, DOE has concluded that it is appropriate for FHR to reflect this difference in capacity, which would not be accounted for if the scaling calculation is removed. DOE also notes that, at this time, there is limited information available to assess the potential impacts of removing the scaling calculation on UEF and FHR ratings, and as a result DOE is not amending the appendix E test procedure to include the full volume of the final draw.

24-Hour Simulated-Use Test Standby Period Duration

Appendix E includes a standby [48] loss measurement period between the first and second draw clusters [49] of the 24-hour simulated use test. During this time, temperature data is recorded and used to calculate the standby heat loss coefficient. *See* section 5.4.2 of appendix E. Sections 7.4.3.1 and 7.4.3.2 of ASHRAE 118.2–2022 add a condition that the standby period data can be recorded between the first and second draw clusters only if the time between the observed maximum mean tank temperatures after cut-out following the first draw cluster to the start of the second draw cluster is greater than or equal to 6 hours. Otherwise, the standby period data would be recorded after the last draw of the test. This condition would provide a sufficiently long standby period to determine standby loss, which might make this calculation more repeatable and the results more representative of standby losses experienced in an average period of use. However, this might also cause the test to extend beyond a 24-hour duration.

The currently applicable DOE test procedure does not have a 6-hour minimum for a standby period between the first and second draw clusters of the 24-hour simulated use test. However, section 5.4.2 of appendix E states, ''In the event that the recovery period continues from the end of the last draw of the first draw cluster until the subsequent draw, the standby period will start after the end of the first recovery period after the last draw of the simulated-use test, when the temperature reaches the maximum average tank temperature, though no sooner than five minutes after the end of this recovery period. The standby period shall last eight hours, so testing will extend beyond the 24-hour duration of the simulated-use test.'' As such, DOE does currently have a minimum standby period duration, but only under the particular case that there is no opportunity to observe standby operation between the first draw cluster and the second draw cluster.

In the April 2020 RFI, the Department requested comments on potentially adding a minimum standby period length of 6 hours and the associated data collection and calculations. 85 FR 21104, 21110 (April 16, 2020). Commenters were split on the appropriateness of this amendment, with some stakeholders noting a key concern would be the extension of the total test period time to over 24 hours in many cases. 87 FR 1554, 1574 (Jan. 11, 2022).

The standby heat loss coefficient (*i.e.,* UA) is the main result calculated from the data recorded during the standby period. DOE reviewed its available test data and found that, generally, the standby period duration has little effect on the UA value, and the UA value in turn has very little effect on UEF. As discussed in the January 2022 NOPR, UA is used only to adjust the daily water heating energy consumption to the nominal ambient temperature of 67.5 °F (19.7 °C); given that the ambient temperature range is relatively narrow (*i.e.,* 65 °F to 70 °F (18.3 °C to 21.1 °C)), the adjustment has only a minimal impact on the daily water heating

[48] ''Standby'' is defined in section 1.12 of appendix E as ''the time, in hours, during which water is not being withdrawn from the water heater.''

[49] A ''draw cluster'' is defined in section 1 of appendix E as ''a collection of water draws initiated during the 24-hour simulated-use test during which no successive draws are separated by more than 2 hours.'' There are two draw clusters in the very small draw pattern and three draw clusters in the low, medium, and high draw patterns.

energy consumption. 87 FR 1554, 1574 (Jan. 11, 2022).

In commenting on the January 2022 NOPR, BWC generally disagreed with DOE's tentative determination that including a 6-hour standby period minimum would not significantly impact UEF ratings. BWC also mentioned that it has experienced difficulty having adequate time to calculate the standby loss coefficient after the first draw cluster. Thus, BWC reiterated its support for the methodology in ASHRAE 118.2–2022 but stated that the company would like time to examine this matter before commenting further. (BWC, No. 33 at p. 6) BWC did not provide further comments or data on this topic in response to the July 2022 SNOPR.

Considering that DOE did not receive further comments demonstrating a quantifiable impact of the standby period length on the UEF, DOE concludes, as initially presented in the January 2022 NOPR, that based on its test data, the duration of the standby period does not significantly impact the UEF result. Therefore, in order to minimize burden (*i.e.,* total test duration) on manufacturers and laboratories while still allowing results to be representative, repeatable, and reproducible, DOE is not amending the appendix E test procedure to require the standby period to be a minimum of 6 hours in duration.

C. Test Conditions and Tolerances

In the January 2022 NOPR, DOE made a number of proposals to the test conditions and tolerances that were intended to improve representativeness, reduce testing burden, and/or harmonize with industry test methods. 87 1554, 1558–1559 (Jan. 11, 2022). These proposals included changes to the electric supply voltage tolerance, ambient condition tolerances, gas supply pressure and manifold pressure tolerances, and flow rate tolerances for certain water heaters. *Id.* In addition, in the July 2022 SNOPR, DOE made supplemental proposals regarding the tolerance on flow rate during the UEF test for models with rated storage volumes less than 2 gallons and max GPM less than 1 gallon, and regarding optional test conditions for heat pump water heaters. 87 FR 42270, 42273 (July 14, 2022). These proposals were intended to improve repeatability and reproducibility and harmonize with industry testing practices, respectively. *Id.*

In response to the January 2022 NOPR proposals, APGA provided general comments stressing the importance of ensuring accuracy, repeatability, and reproducibility in a test procedure that is not unduly burdensome to conduct. (APGA, No. 38 at pp. 1–2) AHRI indicated its support of DOE's proposals to reduce test burden; specifically, AHRI supported increasing test tolerances for ambient temperature and relative humidity, and extending untested provisions to include electric instantaneous water heaters. (AHRI, Jan. 27, 2022 Public Meeting Transcript, No. 27 at p. 40)

As previously discussed in section I.A of this final rule, DOE's efforts are aligned with EPCA requirements to create test procedures that are representative of average use without being unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) Each of the proposed changes to test conditions and tolerances, along with specific stakeholder comments received and DOE's responses, are discussed further in the subsections that immediately follow.

1. Supply Water Temperature Measurements

Section 2.3 of the currently applicable appendix E specifies maintaining the supply water temperature at 58 °F ± 2 °F (14.4 °C ± 1.1 °C). During the 24-hour simulated-use test, maintaining the supply water temperature within this range can be difficult at the immediate start of a draw due to the short time between draw initiation and the first measurement at 5 seconds (with subsequent measurements every 3 seconds thereafter), as required by sections 5.4.2 and 5.4.3 of appendix E. In some test configurations, particularly during the lower flow rate water draws, the inlet water and piping may retain heat from a previous draw, causing the water entering the unit during the initial measurements to be slightly outside of tolerance. Any supply water temperature reading outside of the test tolerances would invalidate a test. However, due to the small percentage of total water use that would be affected, supply water temperatures that are slightly out of tolerance for the first one or two data points would have a negligible effect on the overall test result.[50] This issue is less evident during the FHR test, which specifies an initial temperature measurement 15 seconds after the start of the water draw. This is not an issue during the Max GPM test due to the system being in steady state during the entire test.

In the April 2020 RFI, DOE requested feedback on whether one or two supply water temperature data points outside of the test tolerance at the beginning of a draw would have a measurable effect on the results of the test. 85 FR 21104, 21111 (April 16, 2020). DOE further requested feedback on whether it should consider relaxing the requirement for supply water temperature tolerances at the start of a draw, and if so, which methods are most appropriate for doing so while maintaining accuracy and repeatability. *Id.* at 85 FR 21111–21112. DOE received comments regarding these tolerances from stakeholders including AHRI, A.O. Smith, NEEA, Rheem, BWC, CSA, Rinnai, and SMTI. These comments are summarized and discussed in section III.C.3.a of the January 2022 NOPR. 87 FR 1554, 1576–1577 (Jan. 11, 2022).

In response to comments made on the April 2020 RFI, DOE proposed in the January 2022 NOPR to increase the time between initiating the draw and first measurement of supply water temperature from 5 seconds to 15 seconds in sections 5.4.2 and 5.4.3 of appendix E, as recommended by the commenters. 87 FR 1554, 1577 (Jan. 11, 2022). DOE reasoned that the proposed change may, if adopted, reduce test burden by reducing the occurrence of a test being invalidated (which would require re-testing) due to the first one or two water temperature readings exceeding the defined temperature tolerance. Further, this proposed change would eliminate the need to amend the supply water temperature tolerances which, outside of the time period at the start of a draw, are relatively easy to maintain. *Id.*

In response to the January 2022 NOPR, A.O. Smith reiterated its previous comment that there would be no measurable effect on test results by allowing one or two supply water temperature data points outside of the current test tolerance at the beginning of a draw. The commenter suggested that DOE should adopt the test set-up described in ASHRAE 118.2–2022, which includes a purge line designed by third-party laboratories to help achieve tolerances on supply water temperature. A.O. Smith also commented that widening tolerances in certain cases may ultimately cause variations in test results. (A.O. Smith, No. 37 at p. 5) In contrast, BWC supported DOE's proposal to increase the span between the first draw initiation and the first temperature measurement from 5 seconds to 15 seconds because it would reduce testing burden; the 5-second

[50] For example, the first two temperature readings would reflect 8 seconds of water flow, in comparison to total water draw durations ranging from 1 minute to over 8 minutes, according to the water draw patterns defined in Tables III.1, III.2, III.3, and III.4 of appendix E.

time interval requires significant and frequent purging which, if not conducted, may invalidate tests. (BWC, No. 33 at p. 7) In response to A.O. Smith, DOE reiterates its position, as previously stated in the January 2022 NOPR, that although one or two measurements outside the current tolerance may not have an effect on test results, DOE has chosen to alleviate the issue of potential test invalidation by instead increasing the time between initiating the draw and first measurement of supply water temperature. *Id.*

After considering these comments, DOE has decided to adopt the proposal from the January 2022 NOPR to increase the time between initiating the draw and first measurement from 5 seconds to 15 seconds in sections 5.4.2 and 5.4.3 of appendix E. In response to A.O. Smith's suggestion that DOE adopt the test set-up in ASHRAE 118.2–2022, as discussed in detail in section III.B.2.c of this document, DOE is maintaining the current set-up directions for inlet water temperature measurement in appendix E and not incorporating the updates found in the ASHRAE 118.2–2022 figures because the addition of a bypass line and thermal break was determined to be optional. However, increasing the time of first recordation of the supply water temperature measurement after the start of a draw from being taken at 5 seconds to being taken at 15 seconds will allow units to reach a supply temperature within tolerance without need for modifications to the test set-up.

2. Gas Pressure

For gas-fired water heaters, sections 2.7.2 and 2.7.3 of the currently applicable appendix E require maintaining the gas supply pressure in accordance with the manufacturer's specifications; or if the supply pressure is not specified, maintaining a supply pressure of 7 to 10 inches of water column (1.7 to 2.5 kPa) for natural gas and 11 to 13 inches of water column (2.7 to 3.2 kPa) for propane gas. In addition, for gas-fired water heaters with a pressure regulator, sections 2.7.2 and 2.7.3 of the currently applicable appendix E require the regulator outlet pressure to be within ±10 percent of the manufacturer's specified manifold pressure.

In the January 2022 NOPR, DOE noted that from a review of product literature, DOE found that many gas-fired water heaters with modulating input rate burners have a factory preset manifold pressure that is computer-controlled and cannot be adjusted directly. Further, the manufacturer-specified manifold pressure typically refers to when the water heater is operating at the maximum firing rate. As a result, and after considering comments on the April 2020 RFI, DOE proposed to remove the ±10 percent manifold pressure tolerance for certain gas-fired water heaters, recognizing that some of these products do not provide the capability to adjust the manifold pressure. 87 FR 1554, 1578–1579 (Jan. 11, 2022). DOE also proposed the addition of an absolute manifold pressure tolerance of ±0.2 inches water column, which would be used for gas-fired water heaters with a zero-governor valve for which the ±10 percent tolerance would be overly restrictive. *Id.* For example, applying the ±10 percent to a manufacturer recommended gas pressure of 0.1 inches water column would result in a tolerance of ±0.01 inches of water column, which is less than both the accuracy and precision tolerances required for gas pressure instrumentation within section 3.1 of the currently applicable appendix E. Further, DOE proposed that the required gas pressures within appendix E apply when operating at the manufacturer's specified input rate or, for modulating input rate water heaters, the maximum input rate. *Id.*

DOE did not receive comments in response to the previously discussed amendments to sections 2.7.2 and 2.7.3 of appendix E proposed in the January 2022 NOPR concerning manifold pressure tolerance for gas-fired water heaters. Accordingly, DOE is adopting these amendments in this final rule for the reasons previously stated.

3. Input Rate

In addition to the gas pressure requirements, section 5.2.3 of the currently applicable appendix E test procedure requires maintaining an hourly Btu rating (*i.e.,* input rate) that is within ±2 percent of the value specified by the manufacturer (*i.e.,* the nameplate value). DOE has observed during testing that an input rate cannot be achieved that is within ±2 percent of the nameplate value while maintaining the gas supply pressure and manifold pressure within the required ranges for some gas-fired water heaters. In such instances, it is common practice for the testing laboratory to modify the size of the orifice that is shipped with the water heater; for example, the testing laboratory may enlarge the orifice to allow enough gas flow to achieve the nameplate input rating within the specified tolerance, if the input rate is too low with the orifice as supplied. For commercial water heating equipment, DOE addressed this issue by specifying in the product-specific enforcement provisions that, if the fuel input rate is still not within ±2 percent of the rated input after adjusting the manifold and supply pressures to their specified limits, DOE will attempt to modify the gas inlet orifice. 10 CFR 429.134(n)(ii).

In the April 2020 RFI, DOE requested comment on whether provisions should be added to the test procedure at appendix E to address water heaters that cannot operate within ±2 percent of the nameplate rated input as shipped from the factory and how this issue should be addressed. 85 FR 21104, 21112 (April 16, 2020). On this topic, DOE received comments from manufacturers and their representatives, including AHRI, Rheem, Rinnai, BWC, and CEC, suggesting various methods to achieve the ±2 percent tolerance. These comments are summarized and discussed in the January 2022 NOPR. 87 FR 1554, 1579 (Jan. 11, 2022).

After considering these comments, DOE proposed in the January 2022 NOPR to add provisions to appendix E to provide further direction for achieving an input rate that is ±2 percent of the nameplate value specified by the manufacturer. 87 FR 1554, 1579 (Jan. 11, 2022). Specifically, DOE proposed to modify section 5.2.3 of appendix E to require that the following steps be taken to achieve an input rate that is ±2 percent of the nameplate value specified by the manufacturer:

(1) Attempt to increase or decrease the gas outlet pressure within ±10 percent of the value specified on the nameplate to achieve the nameplate input (within ±2 percent).

(2) If the fuel input rate is still not within ±2 percent of the nameplate input, increase or decrease the gas supply pressure within the range specified on the nameplate.

(3) If the measured fuel input rate is still not within ±2 percent of the certified rated input, modify the gas inlet orifice as required to achieve a fuel input rate that is ±2 percent of the nameplate input rate.

Id.

Regarding commenters' suggestion to check for leaks as an additional step in the process, DOE noted that gas leak detection should be part of a test laboratory's normal operating procedures, and, therefore, detection does not require specification within DOE's test procedures. 87 FR 1554, 1579 (Jan. 11, 2022). DOE also explained that the purpose of adjusting the orifice during testing is to ensure that the performance of the water heater is representative of performance at the Btu rating specified by the manufacturer on the product's nameplate, which informs

the field installation conditions. Allowing for adjustment of the orifice reduces test burden and improves repeatability by providing test laboratories with a last resort to maintain the hourly Btu rating as specified by the manufacturer. Further, DOE noted that the proposal that the orifice be modified would occur only after other options have been exhausted. Lastly, DOE proposed that should a unit fail to achieve an input within the 2 percent tolerance, DOE would continue testing with the measured input value as opposed to the rated value (*i.e.,* the fuel input rate found via testing would be used for the purpose of determining compliance). 87 FR 1554, 1579–1580 (Jan. 11, 2022).

In response to DOE's proposals on this topic in the January 2022 NOPR, AHRI agreed with the Department's proposal to first adjust the manifold pressure and then modify the orifice if an input rate within 2 percent of the nameplate input rating is not achieved. (AHRI, No. 40 at pp. 1–2)

Rheem, AHRI, and BWC commented that if the unit cannot reach input rates within ±2 percent of the nameplate rate, the unit is likely faulty, and the test results should not be accepted. (Rheem, No. 31 at pp. 2–3; AHRI, No. 40 at pp. 1–2; BWC, No. 33 at p. 8) AHRI suggested that if this occurs, the manufacturer should be contacted. AHRI also stated that laboratory testing should only be performed by qualified laboratory personnel, adding that the architecture of oil-fired water heaters also introduces additional complexity for these products. (AHRI, No. 40 at p. 2) BWC also commented that last-resort orifice adjustments should only be performed by qualified laboratory personnel, and indicated that DOE may wish to reference language in Section A1.3.2.1.10 of the AHRI Residential Water Heater Operations Manual.[51] (BWC, No. 33 at p. 7)

In response to these comments, DOE agrees with commenters that testing should generally be performed at accredited laboratory institutions by qualified personnel. In response to BWC's suggestion that DOE reference section A1.3.2.1.10 of the AHRI Residential Water Heater Operations Manual, DOE notes that the amendments to section 5.2.3 of appendix E are consistent with the instructions in the AHRI Residential Water Heater Operations Manual in that they both require a modification to the orifice, with the AHRI Operations Manual requiring the testing laboratory to ''re-orifice'' the unit and the language DOE is adopting requiring the test agency to ''modify'' the orifice. The finalized amendment would provide a more flexible approach than the language of section A1.3.2.1.10 of the AHRI Residential Water Heater Operations Manual by not requiring involvement by the water heater manufacturer in any modifications to the orifice. DOE notes that a unit not achieving the nameplate input rate within ±2 percent could represent a malfunctioning unit or a broader issue in the design of the model. Under the proposed test approach, such models would be tested and evaluated for compliance based on its actual performance.

With regards to oil-fired water heaters, the amended section 5.2.3 provisions to appendix E reference the fuel oil supply requirements in section 2.7.4 of appendix E, which provide adequate direction for the adjustment.

After evaluating these comments, DOE is adopting modifications to appendix E and 10 CFR 429.134 concerning input rate provisions as proposed in the January 2022 NOPR and for the reasons previously stated.

4. Ambient Test Condition Tolerances

Section 2.2 of appendix E specifies maintaining the ambient air temperature between 65.0 °F and 70.0 °F (18.3 °C and 21.1 °C) on a continuous basis for all types of consumer water heaters (and residential-duty commercial water heaters) other than heat pump water heaters. For heat pump water heaters, the dry-bulb (ambient air) temperature must be maintained between 67.5 °F ±1 °F (19.7 °C ±0.6 °C), and the relative humidity must be maintained at 50 percent ±2 percent throughout the test. Appendix E does not specify a relative humidity tolerance for non-heat pump water heaters. Similar to the supply water temperature discussed previously, a brief measurement of air temperature or relative humidity that is only minimally outside of the test tolerance would invalidate a test, but likely would have a negligible effect on the results of the test, as the total time out of tolerance would be insignificant compared to the total time of the test. In the April 2020 RFI, DOE requested feedback on whether the tolerances for ambient air temperature and relative humidity are difficult to maintain at the start of a draw, and if so, whether DOE should consider relaxing these requirements at the start of a draw and to what extent. 85 FR 21104, 21112 (April 16, 2020).

After considering comments received on the April 2020 RFI, DOE proposed in the January 2022 NOPR to change the ambient temperature requirement for non-heat pump water heaters to an average of 67.5 °F ± 2.5 °F, with a maximum deviation of 67.5 °F ± 5 °F, as opposed to only a maximum deviation of 67.5 °F ± 2.5 °F as currently specified in the test procedure. 87 FR 1554, 1578 (Jan. 11, 2022). DOE reasoned that such a change could, if adopted, reduce the need to re-run tests in instances in which the results of the invalid test and the valid test would not differ significantly, and, therefore, reduce test burden. *Id.* DOE also noted that through a review of its available test data, DOE found that short fluctuations in ambient temperature have little to no effect on the test results of non-heat pump water heaters. *Id.*

For heat pump water heaters, DOE proposed in the January 2022 NOPR to change the dry-bulb temperature requirement for heat pump water heaters to an average of 67.5 °F ± 1 °F during recoveries and an average of 67.5 °F ± 2.5 °F when not recovering, with a maximum deviation of 67.5 °F ± 5 °F, as opposed to only a maximum deviation of 67.5 °F ± 1 °F as currently specified in the test procedure. *Id.* DOE reasoned that this proposed change would maintain the stringency of the dry-bulb temperature requirement while allowing for short deviations from the targeted dry-bulb temperature range, which would reduce the need to re-run tests in instances in which the results of the invalid test and the valid test would not differ significantly, and, therefore, reduce test burden. *Id.*

For heat pump water heaters, DOE also proposed in the January 2022 NOPR to increase the absolute relative humidity tolerance from ±2 percent to ±5 percent across the entire test, with the average relative humidity between 50 percent ±2 percent during recoveries. 87 FR 1554, 1578 (Jan. 11, 2022). DOE reasoned that this change, if adopted, would reduce test burden by reducing the need to re-run tests in instances in which the results of the invalid test and the valid test would not differ significantly. *Id.*

As noted, the currently applicable appendix E does not specify a relative

[51] AHRI maintains an Operations Manual for Residential Water Heater Certification Program (AHRI Residential Water Heaters Operations Manual), which addresses how testing will be done in the AHRI certification program. Section A1.3.2.1.10 of the January 2022 edition of the AHRI Operations Manual for its Residential Water Heaters states: ''If adjusting the manifold pressure does not achieve the rated input, the operator shall re-orifice the unit using an alternate orifice supplied by the manufacturer. [Note: Manufacturers are to supply test facility with a selection of orifices for use at the test facility. When a test unit is re-orificed, the test facility will notify the manufacturer of the alternate orifice used, and the manufacturer shall re-supply the test facility with a replacement orifice.'' See: *www.ahrinet.org/Portals/OM/RWH_OM.pdf.* (Last accessed July 21, 2022.)

humidity tolerance for non-heat pump water heaters. In the January 2022 NOPR, DOE explained that (as initially described in the April 2020 RFI), DOE conducted exploratory testing to investigate the effect of relative humidity on the measured UEF values of two consumer gas-fired instantaneous water heaters that are flow-activated and have less than 2 gallons of storage volume, one using non-condensing technology and the other using condensing technology. 87 FR 1554, 1578 (Jan. 11, 2022). For each model, testing was performed at a relative humidity of 50 percent and at a relative humidity of 80 percent, and DOE found that increasing relative humidity from 50 percent to 80 percent resulted in a maximum change in UEF for the non-condensing and condensing models of 0.011 and 0.015, respectively. DOE noted that UEF is reported to the nearest 0.01 (*see* 10 CFR 429.17(b)(2)), and, thus, a change in UEF on the order of 0.01 to 0.02 as suggested by DOE's test results could be considered as substantively impacting the test results. However, DOE did not propose to adopt a tolerance on relative humidity in the January 2022 NOPR, noting that it was still examining this issue. DOE requested further comment and test data on whether a relative humidity requirement should be added to appendix E for non-heat pump water heaters. *Id.*

In response to the proposals made in the January 2022 NOPR concerning ambient air temperature and relative humidity tolerances, AHRI indicated its support of DOE's proposals to reduce test burden; specifically, AHRI supported increasing test tolerances for ambient temperature and relative humidity. (AHRI, Jan. 27, 2022 Public Meeting Transcript, No. 27 at p. 40) NEEA and CA IOUs suggested that DOE should specify a relative humidity level of 50 percent ± 5 percent for all water heater types as was proposed for heat pump water heaters in the January 2022 NOPR, which the commenters argued would reduce test burden and ensure that results are comparable, repeatable, and representative across all products and technologies. (NEEA, No. 30 at pp. 1–2; CA IOUs, No. 36 at pp. 3–4)

BWC, however, anticipated difficulty maintaining even the proposed ±5 percent tolerance during compressor cycling for electric heat pump water heaters. BWC also argued that establishing a relative humidity tolerance when testing water heaters other than heat pump water heaters is unnecessary after observing low impact on UEF rating during its testing of a gas instantaneous water heater at both 20 percent relative humidity and 100 percent relative humidity. (BWC, No. 33 at p. 7) In response to BWC's comments, DOE notes that BWC has not provided, nor is DOE aware of, any data suggesting that a ±5 percent relative humidity tolerance would be difficult to maintain for heat pump water heaters.

After considering comments on the January 2022 NOPR, DOE is adopting the changes to ambient air temperature and relative humidity tolerances as proposed. Regarding the recommendation that DOE specify a relative humidity level of 50 percent ± 5 percent for all water heater types, DOE finds that it does not have adequate test data to make such a change at this time, but DOE will continue to further investigate this issue.

5. Electrical Supply Voltage Tolerances

For all water heaters, section 2.7.1 of the currently applicable appendix E specifies maintaining the electrical supply voltage within ±1 percent of the center of the voltage range specified by the manufacturer. In the April 2020 RFI, DOE requested feedback on whether the tolerances for electrical supply voltage are difficult to maintain at the start of a draw, and if so, whether DOE should consider relaxing these requirements at the start of a draw and to what extent. 85 FR 21104, 21112 (April 16, 2020).

In the January 2022 NOPR, after considering comments received in response to the April 2020 RFI, DOE proposed to increase the electrical supply voltage tolerance from ±1 percent on a continuous basis to ±2 percent on a continuous basis. 87 FR 1554, 1577 (Jan. 11, 2022). DOE also proposed to add clarification that this tolerance is only applicable beginning 5 seconds after the start of a recovery to 5 seconds before the end of a recovery (*i.e.,* only when the water heater is undergoing a recovery). *Id.* DOE reasoned that these proposed changes could reduce test burden by reducing the need to re-run tests while maintaining the representativeness of the test procedure. *Id.*

In response to these proposed changes, DOE received comment from BWC supporting the proposal to increase the tolerance for electric supply voltage. (BWC, No. 33 at p. 7)

DOE has thus determined that the proposed changes to sections 2.7.1 and 3.7 of appendix E concerning electric supply voltage tolerance are appropriate and is adopting them in this final rule for the reasons previously stated.

6. Flow Rate Tolerances

Section 5.4.2 of appendix E, *Test Sequence for Water Heaters with Rated Storage Volumes Greater Than or Equal to 2 Gallons,* provides that all draws during the 24-hour simulated-use test must be made at the flow rates specified in the applicable draw pattern table in section 5.5 of this appendix, within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute). Section 5.4.3 of appendix E, *Test Sequence for Water Heaters with Rated Storage Volume Less Than 2 Gallons,* currently does not provide explicit instruction for the tolerance on the flow rate.

Within the proposed amendments to the regulatory text provided in the January 2022 NOPR, DOE included a proposed amendment to section 5.4.3 of appendix E to specify that flow rates for water heaters with rated storage volume less than 2 gallons must be maintained within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute). 87 FR 1554, 1603 (Jan. 11, 2022). Because this proposed change was not addressed explicitly in the preamble to the January 2022 NOPR, DOE raised this issue again in the July 2022 SNOPR. 87 FR 42270, 42274 (July 14, 2022).

However, as discussed in the July 2022 SNOPR, there are models with Max GPM delivery capacities at or below 1.0 gallon per minute, and for these products, the flow rate used during draws must be the Max GPM flow rate. A flow rate tolerance of ±0.25 gallons per minute would be too wide for products with Max GPM flow rates as low as 0.20 gallons per minute. Because the flow rate tolerance represents 25 percent of the flow rate at 1.0 gallon per minute, DOE proposed another amendment to section 5.4.3 of appendix E in the July 2022 SNOR to specify that for water heaters with a rated Max GPM of less than 1 gallon per minute, the flow rate tolerance shall be ±25 percent of the rated Max GPM. DOE reasoned that for such products, a flow rate tolerance ±25 percent of the rated Max GPM would represent the same level of variation (on a percentage basis) as for products rated at 1.0 gallon per minute and subject to a tolerance of ±0.25 gallon per minute. DOE noted that third-party laboratories are currently technically capable of implementing this methodology based on DOE's own test data. 87 FR 42270, 42274 (July 14, 2022).

In response to the July 2022 SNOPR, ASAP, ACEEE, and NRDC expressed support for DOE's proposal to specify the flow rate tolerance requirements for water heaters with a rated storage volume under 2 gallons. (ASAP, ACEEE, and NRDC, No. 54 at p. 1) BWC expressed they had not had adequate time to conduct testing in order to determine the impact of DOE's proposed

establishment of a ±25 percent of maximum GPM threshold, and as a result, the company had no further comments on that proposal. (BWC, No. 48 at p. 2)

AHRI, A.O. Smith, and Rheem offered a few potential revisions to the proposal. AHRI requested that DOE set a minimum tolerance of ±0.1 gpm for the 24-hour simulated-use test for models with maximum flow rates less than 1 gpm because the proposed ±25 percent tolerance may be difficult to meet for some models. (AHRI, No. 55 at p. 2) A.O. Smith stated that the proposed flow rate tolerances for the 24-hour simulated-use test for water heaters with a rated storage volume less than 2 gallons would require manufacturers to invest in more precise equipment and may also easily invalidate results for units with low Max GPM values. Accordingly, A.O. Smith requested that DOE adopt the proposed flow rate tolerance from the NOPR, rather than the SNOPR. (A.O. Smith, No. 51 at pp. 2–3) Rheem indicated that the proposed flow rate tolerance of 25 percent of Max GPM may be too low for water heaters with very low max GPM and recommended that DOE change the tolerance to the maximum between that value and ±0.1 gpm. Rheem also recommended that all flow rate tolerances be calculated based on the average of the flow rate over the entire draw, so as to help reduce the number of invalid tests. (Rheem, No. 47 at p. 2)

As discussed previously, the lowest Max GPM certified to DOE is currently 0.2 gpm, and DOE's amended test procedure must provide a reproducible and repeatable method for testing products with such low flow rates. DOE has determined that a tolerance of ±0.1 gpm could offer too much variability in test results for products rated with such low flow rates. Specifically, a tolerance this wide would represent ±50 percent of the flow rate of this kind of water heater, and because the temperature rise through the water heater is inversely related to the flow rate when the water heater is constantly firing at its maximum input rate, this variation in flow rate can cause the temperature rise to potentially double. As stated, DOE is aware that third-party laboratories are equipped with instrumentation to measure flow rates within the tolerance level proposed in the July 2022 SNOPR.

DOE did not receive any test data in response to the July 2022 SNOPR indicating that manufacturers or third party test laboratories would not be able to meet the tolerances proposed in the July 2022 SNOPR. Furthermore, DOE has concluded that a 0.1 gpm tolerance is too large for the lowest flow rate models currently on the market (0.2 gpm) and would be even more problematic if models with flow rates below 0.2 gpm are introduced in the future. As such, in this final rule, DOE is adopting the flow rate tolerance amendments to sections 5.4.2 and 5.4.3 of appendix E, as proposed in the July 2022 SNOPR.

7. Optional Test Conditions for Heat Pump Water Heaters

In the course of this rulemaking, DOE has received numerous comments from stakeholders requesting that DOE consider allowing manufacturers to optionally rate heat pump water heaters to test conditions other than those currently specified in appendix E, which are intended to be representative of national average water and air temperatures. Commenters noted that heat pump operation is dependent upon the surrounding ambient air temperatures,[52] and that there would be significant value to providing consumers, installers, and utilities with efficiency representations that are closer to the conditions for particular climates. *See* 87 FR 1554, 1580 (Jan. 11, 2022) and 87 FR 42270, 42275–42276 (July 14, 2022).

For example, Lutz commented that a single inlet water temperature may not be representative for all cases because this may vary by geographical location, and, furthermore, that taking this into account is even more important for split-system heat pump water heaters with an outdoor unit. (Lutz, No. 35 at p. 1) NEEA argued that, because heat pump water heater performance can be affected by variations in ambient conditions, DOE should clarify what manufacturers can report about a unit's performance at conditions other than those required by the test procedure. NEEA added that information regarding delivery capacity and sizing guidance would be important for installers. (NEEA, No. 30 at p. 3)

In the January 2022 NOPR, DOE did not propose to allow for optional (voluntary) representations of heat pump water heater efficiencies at non-standard temperatures because there was not enough information at the time to identify the most representative alternate test conditions (*e.g.,* regional conditions). 87 FR 1554, 1580 (Jan. 11, 2022). However, commenters on the July 2022 SNOPR identified the NEEA Advanced Water Heating Specification (currently at version 8.0, AWHS v8.0) provides multiple conditions which manufacturers are providing ratings at. 87 FR 42270, 42775–42276 (July 14, 2022). Consequentially, DOE revisited the NEEA Advanced Water Heating Specification to determine how the test conditions specified in that document might be applied for optional representations in the DOE test procedure.

Section 2.2 of appendix E currently specifies that the ambient air temperature shall be maintained between 65.0 °F and 70.0 °F (18.3 °C and 21.1 °C) on a continuous basis during the test. Additionally, for heat pump water heaters, that test procedure provision provides that the dry-bulb temperature shall be maintained at 67.5 °F ± 1 °F (19.7 °C ± 0.6 °C) and that the relative humidity shall be maintained at 50 percent ± 2 percent throughout the test. EPCA requires that the DOE test procedure must be reasonably designed to produce test results which measure energy efficiency during a representative average use cycle or period of use. (42 U.S.C. 6293(b)(3)) While the test conditions in the current appendix E test procedure must remain representative for the nation as a whole, in the July 2022 SNOPR, DOE tentatively determined that comments from interested parties have demonstrated that allowing additional representations of efficiency at alternative ambient conditions could provide consumers with additional information about the expected performance of heat pump water heaters at conditions that are representative of their specific installation circumstances. For other types of covered products and equipment, DOE has adopted optional metrics for voluntary representations where it was determined that the primary efficiency metric would not be representative for certain installation conditions common for the product or equipment.[53] As discussed in the July

[52] Because heat pumps ''transfer thermal energy from one temperature level to a higher temperature level'' (*see* 42 U.S.C. 6291(27)(C) and 10 CFR 430.2), the energy efficiency is dependent upon the difference between temperatures that must be overcome by the heat pump cycle. As discussed in section III.A.2 of this document, heat pump water heaters are typically air-source, *i.e.,* these products source heat from surrounding air and transfer it to domestic hot water. Therefore, lower ambient air temperatures, such as those experienced in colder climates or due to seasonal differences, would result in lower efficiencies.

[53] For example, on July 27, 2022, DOE published a final rule in the **Federal Register** pertaining to test procedures for direct-expansion dedicated outdoor air systems, including provisions for optional representations of energy efficiency when the equipment is installed in applications where inlet water conditions are expected to deviate substantially from standard conditions. *See* 10 CFR part 431, subpart F, appendix B, section 2.2.3(d) as established by that final rule. 87 FR 45164, 45201 (July 27, 2022).

2022 SNOPR, depending on the installation location (*e.g.,* whether the water heater is installed in an unconditioned space such as a garage or attic), the ambient conditions may vary significantly from the conditions in the DOE test method, thereby resulting in significantly different performance for heat pump water heater products. Thus, DOE reversed its position and tentatively determined to allow for certain optional representations for additional ambient conditions. 87 FR 42270, 42275–42276 (July 14, 2022).

AWHS v8.0 was published by NEEA on March 1, 2022. Though early editions of the AWHS focused primarily on providing more representative performance metrics for heat pump water heaters in cold climates, the latest editions are now more broadly focused on providing representative performance metrics for heat pump water heaters across all climates. Performance metrics in the AWHS are generally calculated by measuring energy efficiency at multiple (two or more) ambient test conditions, linearly interpolating between the test results, and finally calculating an ambient temperature-weighted efficiency metric using temperature bin data. The metric is a cold climate efficiency (CCE) rating for integrated heat pump water heaters installed in semi-conditioned spaces (*i.e.,* garage, basement) and a seasonal coefficient of performance (SCOP) for split-system heat pump water heaters (where the heat pump is separated from the storage tank and located outdoors). DOE tentatively determined in the July 2022 SNOPR that adopting the test conditions in AWHS v8.0 would not significantly increase test burden for manufacturers who choose to provide these ratings, because manufacturers are already providing representations of CCE and SCOP to NEEA's Qualified Products List.[54] The test conditions in AWHS v8.0 differ from the standard conditions in appendix E in terms of inlet water temperature, ambient dry-bulb temperatures, and ambient relative humidity. A detailed discussion of these conditions was provided in the July 2022 SNOPR. 87 FR 42270, 42276 (July 14, 2022).

In the July 2022 SNOPR, DOE proposed to allow voluntary representations of a new metric, E_X, analogous to UEF, at optional test conditions for heat pump water heaters. The subscript ''X'' would be used to denote the set of conditions being used, and these voluntary representations of E_X would not be integrated together to form a seasonal efficiency metric—in contrast to the methodology in AWHS v8.0. DOE's proposal intended to eliminate any reduction in representativeness caused by assumptions in climate weighting factors. Without substantial additional data, DOE tentatively determined that it would not be able to evaluate whether or not the weighting factors in AWHS v8.0 (used to create a weighted average of the results at various test conditions together into one metric, CCE or SCOP) are representative of climates in the United States, and, thus, DOE proposed to allow for the use of standalone E_X representations only in a way that it is clear to a consumer what test conditions were used in determining the rating. 87 FR 42270, 42276–42277 (July 14, 2022).

In response to the July 2022 SNOPR, ASAP, ACEEE, and NRDC expressed support for DOE's proposal to adopt optional test conditions needed for calculating climate-specific efficiencies. (ASAP, ACEEE, and NRDC, No. 54 at p. 2) A.O. Smith acknowledged that optional efficiency ratings may have consumer utility and stated that additional measures of efficiency may assist with increasing market adoption of heat pump water heaters. (A.O. Smith, No. 51 at pp. 3–4) The CA IOUs supported DOE's tentative determination to allow optional efficiency representations at multiple test conditions for heat pump water heaters, stating that this change will help consumers choose the heat pump water heater that best suits their needs and will aid in the maturation and expansion of the heat pump water heater market. (CA IOUs, No. 52 at pp. 1–2)

NEEA also supported DOE's proposal to allow for optional efficiency representations at alternative ambient conditions for heat pump water heaters but encouraged DOE not to limit condition representations based on the specific type of heat pump. NEEA stated that both split-system water heaters and heat pump-only water heaters can be designed for any combination of indoor, outdoor, and semi-conditioned space operation of the heat pump component. Therefore, NEEA suggested that DOE should not specify which metrics may be reported on the basis of heat pump type, as these additional representations would not add any burden to manufacturers because they are optional. (NEEA, No. 56 at pp. 1–2)

A.O. Smith requested that DOE clarify whether manufacturers may represent optional metrics as consistent with appendix E. (A.O. Smith, No. 51 at pp. 3–4)

In response to NEEA's comment, DOE acknowledges that split-system and heat pump-only water heaters may be installed in a variety of configurations which can vary the location of components. For example, a heat pump module (comprised of the compressor, evaporator, and expansion devices) could be installed either outdoors or in a separate room indoors. Therefore, DOE has updated the table of optional test conditions in section 2.8 of appendix E to reflect this fact by allowing split-system and heat pump-only water heaters to be tested at the conditions specified for any E_X. In response to NEEA and A.O. Smith, DOE notes that manufacturers will be able to represent optional metrics as specified in the amended appendix E.

Rheem stated that the Code of Federal Regulations only allows voluntary ratings for distribution transformers and commercial prerinse spray valves. Rheem also stated that the 24-hour simulated-use test for water heaters is more complex and very different from those specified for these other types of equipment which, according to Rheem, have test procedures that easily handle testing at alternate conditions. (Rheem, No. 47 at pp. 2–3)

In response to Rheem's comment, DOE notes that optional additional test conditions are being adopted in appendix E because industry has already demonstrated its desire for them through testing at specific conditions in compliance with NEEA Advanced Water Heating Specification v8.0. By amending appendix E to include these conditions, DOE is simply standardizing current industry practices. Because ratings at such conditions are voluntary, DOE anticipates that there would be no undue burden associated with adoption of such provisions in this final rule.

DOE also notes that water heaters are used in a variety of conditions and are expected to operate at all times despite them. This sets water heaters apart as compared to what is expected of other products (*e.g.,* air conditioners), which are only active and operate in response to specific conditions. Test procedures for these products already include a range of conditions, and, therefore, they do not require optional representations of performance. For these other types of products, the range of conditions experienced would be narrower and more predictable than the range of conditions experienced by heat pump water heaters,[55] and, therefore, it is not

[54] Available at: *neea.org/img/documents/residential-unitary-HPWH-qualified-products-list.pdf* (Last accessed on May 11, 2022).

[55] For example, Table 11 in section 3.6.1 of appendix M1 to subpart B of 10 CFR part 430 provides the heating mode test conditions for central (space-conditioning) heat pumps having a

unduly burdensome to require testing at multiple conditions for these other types of products. The narrower range of air conditions also ensures that the results of testing are highly representative of the product's average performance. This is not the case for heat pump water heaters because of the many different installation configurations which are applicable to heat pump water heaters—for instance, some are located indoors, and some are located outdoors. Allowing testing at these conditions to be optional avoids burdening manufacturers with test conditions that may not apply to their products. Using a different metric (E_X) for these conditions also ensures that these representations are not read as being valid for all consumer applications; instead, the representation is specific to the condition at which the water heater is being tested.

AHRI, BWC, and Rheem suggested that allowing optional ambient test conditions may increase manufacturer burden, arguing that they may eventually be driven by the market to conduct such testing. (AHRI, No. 55 at p. 3; BWC, No. 48 at p. 2; Rheem, No. 47 at p. 3) BWC also stated that not all manufacturers are currently conducting testing per NEEA Advanced Water Heating Specification v8.0, and that DOE allowing optional testing based on its test conditions would cause significant burden. (BWC, No. 48 at p. 2) Rheem requested that DOE either adopt the position from the last test procedure rulemaking that requiring additional testing at alternate conditions is unduly burdensome or provide justification for why it is not. (Rheem, No. 47 at p. 3) AHRI indicated that third-party laboratories may not be equipped to perform the optional tests at additional ambient conditions because of how the test set-up differs from that used in the standard test and that large capital burdens would need to be incurred in order to comply. AHRI also expressed concern that DOE did not adequately solicit manufacturer and laboratory feedback on increased test burden due to the proposed optional additional ambient test conditions. (AHRI, No. 55 at p. 4) Rheem also stated that optional tests currently performed by manufacturers are not necessarily done to be in accordance with AWHS and that NEEA, an entity which is not a manufacturer, distributor, retailer, or private labeler, was not restricted from making representations of products based on testing which did not use the DOE test procedure. (Rheem, No. 47 at pp. 2–3)

In response to these comments, DOE disagrees that optional testing will increase manufacturer burden for a number of reasons. First, as previously discussed in the July 2022 SNOPR, DOE is currently aware of 17 water heater brands represented in the Qualified Products List for AWHS v8.0. Participation in NEEA's program using Advanced Water Heating Specification v8.0 requires manufacturers to submit their own test results at the prescribed test conditions; NEEA does not appear to perform testing on behalf of manufacturers, per its own documentation.[56] Most importantly, DOE reiterates that this testing is ultimately optional, so a manufacturer may decline to undertake any additional testing. Consequently, DOE has concluded that allowing optional additional testing conditions will not increase burden for manufacturers.

BWC claimed that DOE is not authorized under EPCA to allow manufacturers to have additional optional representations of performance and requested that DOE clarify its statutory authority. (BWC, No. 48 at p. 2) Rheem claimed that justifications for other products allowing optional additional ratings do not apply to consumer water heaters and stated that EPCA [57] can be interpreted as prohibiting optional additional test conditions that are not in the test procedure.

In response to these comments, DOE finds BWC's and Rheem's interpretations of 42 U.S.C. 6293(c) to be misguided. The statute requires appliance efficiency testing and representations to be done in accordance with the DOE test procedure. DOE routinely incorporates by reference private sector testing methods into Federal test procedures, and nothing in the statute would prohibit adoption of optional test conditions as these commenters suggest. DOE notes that the optional conditions at which manufacturers may choose to test their products are specified as part of the AWHS v8.0 test procedure and are not left up to manufacturers to determine individually. Precisely by including these optional conditions and metrics in the appendix E test procedure, DOE is permitting manufacturers and other parties to make such representations to the public in the manner which the statute contemplates. EPCA requires that a uniform efficiency metric (*i.e.,* UEF) be used to rate all water heaters; however, the addition of optional representations does not prevent manufacturers from making its mandatory UEF rating under the required conditions. By virtue of the new heat pump water heater testing and metric being optional, DOE would not enforce the required energy conservation standard based upon results of testing at optional test conditions. Permitting testing under the specified optional conditions may also serve another purpose. In a future rulemaking considering further amendments to the appendix E test procedure, DOE may consider adopting multiple ambient test conditions for certain types of water heaters, if data from testing at these additional conditions proves that this methodology yields results more representative of energy consumption over an average use cycle. Hence, allowing manufacturers to test and rate these optional conditions would allow more data to be collected for potential future amendments.

AHRI requested that DOE provide any data justifying the proposal to include optional ambient test conditions to stakeholders. (AHRI, No. 55 at pp. 2–3) BWC requested that DOE readopt its position that there is insufficient data to support optional additional ambient test conditions and to provide the data that caused DOE to make this proposal in the SNOPR. (BWC, No. 48 at p. 2)

In response, DOE notes that NEEA's Qualified Products List [58] indicates the climate-weighted average performance of heat pump water heaters as tested by manufacturers to the various conditions in AWHS v8.0. (This performance metric, ''cool climate efficiency,'' is a result of testing under the optional conditions which DOE is adopting in this final rule.) From the data points in NEEA's Qualified Products List, manufacturers demonstrate that heat pump water heaters are less energy-efficient at these additional conditions. For example, Tier 4 products, which

single-speed compressor and a fixed-speed indoor blower. The range of temperatures at which the outdoor evaporator coil can be tested is from 5 °F at the lowest to 47 °F at the highest. Because a heat pump water heater would also be active during the summer months, DOE has determined that the representative range of outdoor ambient temperatures for a split-system heat pump water heater's outdoor evaporator coil could be from 5 °F at the lowest to 95 °F at the highest.

[56] Steps in the process flow for NEEA's AWHS Qualified Products List can be found online at: *neea.org/img/documents/qualified-products-process-flow.pdf* (Last accessed on Sept. 10, 2022).

[57] The commenter cited 42 U.S.C. 6293(c), ''Restriction on Certain Representations,'' of which subsection (1) prohibits representations not made in accordance with the currently applicable test procedure and subsection (2) prohibits representations not made in accordance with a new or amended test procedure 180 days after the adoption of that test procedure.

[58] Available at: *www.neea.org/img/documents/residential-unitary-HPWH-qualified-products-list.pdf* (Last accessed on Sept. 18, 2022).

range in UEF from 3.45 to 4.02 at DOE's required test conditions, have cool climate efficiencies ranging from 3.1 to 3.5. These ratings have been provided to NEEA by manufacturers conducting their own testing. While DOE is not adopting the cool climate efficiency metric (because it requires testing at *all* of the additional ambient conditions, and that would significantly increase burden for a manufacturer wanting to provide consumers with additional ratings), these cool climate efficiency ratings are an objective indication of how performance can be impacted by varying climatic conditions. By adopting E_X optional ratings in appendix E, DOE expects to facilitate manufacturer testing and the generation of relevant data related to water heater performance at these additional conditions. Again, the standardized voluntary ratings could be considered in a future rulemaking to determine the representativeness of the current mandatory ambient conditions in appendix E.

AHRI also stated that DOE has not provided evidence that NEEA's AWHS test conditions ensure repeatability and reproducibility and suggested that these requirements still apply even if the procedure is optional. (AHRI, No. 55 at p. 4)

Repeatability refers to the quality of a test method which allows a laboratory to achieve the same results when a product is tested on more than one occasion. Reproducibility refers to the quality of a test method which allows one laboratory to reproduce the results obtained by another laboratory. Test tolerances and set-up requirements are essential to these parameters. As proposed in the July 2022 SNOPR and adopted in this final rule, the optional test conditions would be tested per the same tolerances and set-up requirements as the current UEF test procedure—simply at different temperatures. Utilization of this Federal testing framework makes it possible for DOE to ensure that the voluntary ratings of E_X are repeatable and reproducible.

AHRI stated that DOE has not provided references to other occasions when it has adopted optional metrics for voluntary representations for other products or equipment. (AHRI, No. 55 at p. 4) AHRI requested that DOE remove the proposal concerning optional additional ambient test conditions from this rulemaking and instead address it in a subsequent rulemaking for these products. (AHRI, No. 55 at p. 4)

In response and as discussed earlier in this section, DOE has previously adopted optional metrics for voluntary representations where there was a clear industry precedent for these metrics and a consumer utility for having the additional performance information. Most recently, this was done for dedicated outdoor air systems (DOASes). For heat pump water heaters, there is a clear indication that industry wishes to provide consumers with these additional ratings because numerous product representations have been submitted by several manufacturers to NEEA for its Qualified Products List. DOE's amendment to officially adopt these supplemental test conditions into the appendix E test procedure ensures that when these representations are provided, they are done so based on a consistent test method.

Rheem stated that it has not had enough time to evaluate DOE's proposal to allow optional additional test conditions. (Rheem, No. 47 at p. 2) Rheem requested that DOE clarify the sampling, certification, and enforcement provisions for heat pump water heaters with alternate representations. (Rheem, No. 47 at p. 3)

In response, DOE notes that it provided a three-week comment period on the limited set of issues presented in the July 2022 SNOPR, and other commenters were able to assess DOE's latest proposal and provide substantive comments during the time allotted. By virtue of E_X being an optional metric for voluntary representations, DOE will not require certification of E_X representations. Manufacturers who opt to determine Ex must apply the sampling requirements for determining UEF in order to ensure consistency in values provided to consumers.

Rheem recommended that DOE fully evaluate the alternate conditions specified in AWHS before adopting them. (Rheem, No. 47 at p. 4) Rheem stated that it has not had time to fully evaluate the alternate test conditions and questions whether they adequately represent the entire Nation, or only represent the Northwest, as these test conditions were developed by NEEA. (Rheem, No. 47 at p. 4)

To clarify, by allowing manufacturers to make separate E_X representations for each set of test conditions, the voluntary representations, individually, are not designed to be representative of the entire United States. To do so would require these test conditions to be averaged together based on prevalence of climate conditions at a given location, and this aspect of NEEA's AWHS v8.0 is not being used in the appendix E optional representations. Instead, it is DOE's mandatory testing scenario—the determination of UEF through the standard rating conditions—that is intended to reflect average conditions for the Nation as a whole. DOE has evaluated the full set of test conditions NEEA specifies in AWHS v8.0 and has determined that these conditions are meant to cover the full range of operating conditions (temperature and humidity) possible across the United States. They are not meant to only represent the range of conditions possible in the Northwestern United States. The purpose of E_X representations, as employed by DOE at appendix E, is to indicate performance at individual rating points, which, along with UEF, will provide additional information to consumers. Manufacturers will be permitted to make voluntary representations at any of the optional test conditions specified in appendix E.

BWC stated that DOE's proposal to allow optional additional test conditions would confuse consumers and installers because they may not have the means to sufficiently assess environmental conditions where they live. (BWC, No. 48 at p. 3) In addition, BWC commented that allowing optional additional test conditions may cause scarcity of testing resources, thereby significantly increasing manufacturer burden. (BWC, No. 48 at p. 3)

DOE disagrees with BWC's presumption that consumers and installers cannot assess environmental conditions. These parties may easily access a variety of sources of freely available weather data, such as information generated by the National Oceanic and Atmospheric Administration (NOAA) and the National Weather Service (NWS).[59] [60] In addition, installers of central air conditioning, central heat pump, and cool-climate heat pump units already have sufficient access to local environmental data required to install them. These data are the same data required for the installation of water heaters. Although DOE understands BWC's concern regarding limited testing resources, DOE once again reiterates that this testing is ultimately optional; manufacturers are not obligated to make capital investments or dedicate testing resources if it is not feasible. To the extent that optional testing would

[59] The National Weather Service (NWS) maintains a Climate page on their website which provides past weather records and climate information for regions of the United States and its territories. This page is available at: *www.weather.gov/wrh/climate.* (Last accessed Sept. 28, 2022)

[60] The National Centers for Environmental Information (NCEI) maintains a Past Weather page with past weather data from weather stations around the world. This data is available for download in various file formats. This page is available at: *www.ncei.noaa.gov/access/past-weather/.* (Last accessed Sept. 28, 2022)

utilize resources that would otherwise be used for mandatory testing, DOE notes that manufacturers would have the option of foregoing or delaying optional testing to accommodate mandatory testing since DOE is not requiring use of any of the optional test conditions. Furthermore, as manufacturers have already provided ratings to NEEA at these alternate conditions, DOE does not believe that officially adopting these test conditions would change overall available laboratory capacity, especially as manufacturers may opt to test these optional conditions in-house.

ASAP, ACEEE, and NRDC requested that DOE clarify which optional test conditions would apply to split-system water heaters with an indoor heat pump component. (ASAP, ACEEE, and NRDC, No. 54 at p. 2) In response, DOE notes that the included optional test conditions are intended to be used at the discretion of the manufacturer. Manufacturers are free to use the conditions specified by the test points they believe are most similar to what their product may experience during operation. For example, a manufacturer of a split-system heat pump water heater whose compressor and storage tank are located outdoors and indoors, respectively, may decide it would be beneficial to evaluate the product's performance at an outdoor ambient temperature of 34.0 °F. In this case, the manufacturer would test the product using the conditions specified by the E_{34} metric: outdoor dry-bulb temperature and relative humidity of 34.0 °F and 72 percent, respectively, indoor dry-bulb temperature and relative humidity of 67.5 °F and 50 percent, respectively, and supply water temperature of 47.0 °F.

Rheem requested that DOE evaluate wider tolerance ranges for the alternate test conditions. Rheem also asked that DOE clarify whether relative humidity control is required for storage tanks during split-system water heater tests, in which case, the commenter argued that two psychrometric chambers would be required. (Rheem, No. 47 at pp. 3–4)

In response, DOE notes that the amendments being adopted for ambient condition tolerances during UEF testing would also apply to E_X testing, hence allowing a similarly wider tolerance range to apply at all conditions. When testing a split-system heat pump water heater or heat pump water heater requiring a separate storage tank, the heat pump portion of the system shall be tested at the relative humidity conditions specified, and the storage tank can be tested at either the same conditions or the conditions specified in section 2.2.1 of appendix E. Thus, the relative humidity control is not required for the storage tank during split-system water heater tests. This is discussed further in section III.D.1 of this document.

Rheem requested that DOE remove ''heat pump only'' from the table of alternate test conditions because they are the same as the outdoor portion of a split-system water heater. (Rheem, No. 47 at p. 4)

In response, DOE wishes to make clear that circulating heat pump water heaters (heat pump-only water heaters) and split-system water heaters are not identical. Circulating heat pump water heaters are instantaneous-type units, whereas split-system heat pump water heaters have a storage tank and are, overall, storage-type units. Both types of products may have the heat pump module located remotely from the storage tank, but still indoors. In light of this comment, DOE has modified the table of alternate test conditions to explicitly allow split-system and circulating heat pump water heaters to be tested at any of the conditions specified.

D. Test Set-Up and Installation

1. Split-System Heat Pump Water Heaters

In section III.A.2 of this document, DOE discussed a new definition for this subset of heat pump water heaters. As established by this final rule, a ''split-system heat pump water heater'' means a heat pump-type water heater with an indoor storage tank and outdoor heat pump component. In considering such products, DOE had found that in a split-system heat pump, the heat pump part of the system is typically installed outdoors and, as a result, does not use the indoor ambient air for water heating directly. In the current appendix E test procedure, different ambient conditions are specified in appendix E for heat pump water heaters and non-heat pump water heaters, but there are no specific conditions for split-system heat pump water heaters.

In the January 2022 NOPR, DOE proposed to specify that the heat pump part of the system shall be tested using the heat pump water heater dry-bulb temperature and relative humidity requirements, while the storage tank part of the system shall be tested using the non-heat pump water heater ambient temperature and relative humidity requirements. DOE noted that the required non-heat pump water heater ambient conditions can be met by keeping the entire system within the dry-bulb temperature and relative humidity requirements for heat pump water heaters (*i.e.,* both parts of the system can be tested in the same psychrometric chamber). 87 FR 1554, 1583 (Jan. 11, 2022).

On this topic, AHRI requested that DOE clarify whether the proposed testing requirements for split-system heat pump water heaters would mean testing would have to be carried out with the heat pump and storage tank in separate rooms. (AHRI, Jan, 27, 2022 Public Meeting Transcript, No. 27 at p. 42) NYSERDA indicated that DOE should collaborate with manufacturers to ensure that test conditions and set-up for split-system heat pump water heaters are consistent, repeatable, and not burdensome. (NYSERDA, No. 32 at p. 4) BWC suggested that DOE should permit manufacturers and testing laboratories as much flexibility as possible when determining the testing locations of separate system components and not prevent test set-ups that can meet the specified conditions for both systems in the same room or area, if a manufacturer or test laboratory so chooses. (BWC, No. 33 at p. 9) Rheem requested clarification that the storage tank can be tested at the heat pump test conditions and still meet the requirements of appendix E. (Rheem, No. 31 at p. 3)

To reiterate DOE's explanation in the January 2022 NOPR, if a single room, chamber, or area is capable of meeting the dry-bulb temperature and relative humidity requirements for heat pump water heaters, then, like integrated heat pump water heaters, split-system heat pump water heaters can be tested with both indoor and outdoor components in the same space. In response to NYSERDA, by adopting this approach, DOE is aligning with the methodology used already by industry when testing heat pump water heater products for other representations (such as the Qualified Products List for NEEA's AWHS v8.0), so consequently, DOE expects the results generated to be consistent, repeatable, and not unduly burdensome.

2. Mixing Valves

As discussed in section III.E.1 of this final rule, there are certain water heater designs which raise the temperature of water stored in the tank significantly above the outlet water temperature, and these products are meant to be used with a mixing valve (which may or may not be provided with or built-in to the unit) so that the hot stored water can be tempered down to a more typical delivery temperature. The January 2022 NOPR noted that the installation instructions in section 4 of appendix E do not address cases when a separate

mixing valve should be installed. 87 FR 1554, 1580 (Jan. 11, 2022).

The January 2022 NOPR proposed to incorporate instructions for separate mixing valve installations based on those found in the ENERGY STAR Test Method to Validate Demand Response for Connected Residential Water Heaters (ENERGY STAR Connected Test Method) (published on April 5, 2021). This set-up requires installing the mixing valve in accordance with the water heater and mixing valve manufacturer's instructions. Absent instruction from the water heater or mixing valve manufacturer, the mixing valve is to be installed in the outlet water line, upstream of the outlet water temperature measurement location, with the cold water supplied from a tee installed in the inlet water line, downstream of the inlet water temperature measurement location (*i.e.,* the mixing valve and cold water tee are installed within the inlet and outlet water temperature measurement locations). Section 4.1 of the ENERGY STAR Connected Test Method further clarifies that if the liquid flow rate and/or mass measuring instrumentation is installed on the outlet side of the water heater, that it shall be installed after the mixing valve. 87 FR 1554, 1580 (Jan. 11, 2022).

On July 18, 2022, EPA published the ENERGY STAR Connected Residential Water Heaters Test Method to Validate Demand Response, Version 1.2.[61] The updated test method retains the same instructions for setting up mixing valves in section 4.1.

In response to the January 2022 NOPR, ASAP, ACEEE, and NCLC; AET; A.O. Smith; and the CA IOUs supported DOE's proposal to include instructions for the installation of a mixing valve. (ASAP, ACEEE, and NCLC, No. 34 at pp. 1–2; AET, No. 29 at p. 2; A.O. Smith, No. 37 at p. 4; CA IOUs, No. 36 at p. 4) A.O. Smith also commented that, depending on the design, there may be additional steps that are required (*e.g.,* independently adjusting the tank thermostat and the mixing valve settings to remain in default mode per the manufacturer's instructions), and, therefore, DOE should clarify the details of this procedure. (A.O. Smith, No. 37 at p. 4)

In this final rule, DOE is adopting the proposed installation instructions for mixing valves as discussed in the January 2022 NOPR. To the extent that there may be additional steps required to maintain normal operation with the mixing valve installed per the manufacturer's specifications, these instructions would be heeded in accordance with section 4.3 of the amended appendix E test procedure. As described in section III.E.1 of this document, DOE is also providing an optional test method for high storage tank temperature operation, and this test method involves the installation of mixing valves for products which do not come so equipped.

3. Flow Meter Location

The current test procedure does not specify where in the flow path the flow volume and density of water must be measured, and this allows for laboratory test set-ups to perform these measurements either on the cold/inlet side of the water heater or on the hot/outlet side. As discussed in this rulemaking, water mass calculations can account for the difference in the density of water at the inlet vs. the outlet (colder water at the inlet has a higher density); however, there could be cases when a measurement based on the inlet location could result in inaccurate mass calculations. Specifically, some of the mass of inlet water could, after being heated, expand out of the water heater into the expansion tank and be purged prior to a draw. Any ''expanded'' volume of water that is lost through the bypass (purge) line could be included in a volume measurement taken at the inlet, but not be included in a volume measurement taken at the outlet. 87 FR 1554, 1581 (Jan. 11, 2022). The Department requested information and data regarding the issue of flow meter location (inlet vs. outlet) in the April 2020 RFI and the January 2022 NOPR. 85 FR 21104, 21113 (April 16, 2020); 87 FR 1554, 1581 (Jan. 11, 2022).

In response to the April 2020 RFI, four commenters either disagreed with requiring the flow meter to be located at the outlet or requested that DOE continue to allow facilities to choose the location, whereas two commenters stated that the flow rate should be measured at the outlet of the water heater, expressing concern that measuring at the inlet may be inaccurate. 87 FR 1554, 1581 (Jan. 11, 2022). The January 2022 NOPR presented DOE's exploratory test data evaluating the effect of flow meter location on the water mass measurement (see Table III.2 of the January 2022 NOPR). DOE's testing using Coriolis flow meters on both the inlet and outlet water lines indicated that more accurate measurements of the mass of water delivered are obtained when the flow meter is located in the outlet water line than when located on the inlet line, when both results were compared to a mass scale.[62] In particular, the error in the UEF resulting from a mass measurement from a flow meter at the outlet ranged between 0.002 and 0.016, whereas the error in the UEF resulting from a mass measurement from a flow meter at the inlet ranged between 0.023 and 0.029, depending on the type of water heater (with DOE testing both gas-fired storage and gas-fired instantaneous water heaters). DOE also acknowledged that third party laboratories typically install a flow meter on the inlet side. However, DOE did not propose a change based on this limited set of test results, which only included one gas-fired storage water heater sample and one gas-fired instantaneous water heater sample, and stated that more test data are required. *Id.* at 87 FR1581–1582.

In response to the NOPR's request for information on this issue, AHRI stated that having the flow meter at the inlet of the water heater avoids having debris damage the flow meters (*e.g.,* Teflon tape debris from the test rig can end up in the flow meter and cause damage). In addition, AHRI commented that placing the flow meter at the outlet may cause water mass calculation problems, because the temperature variation is greater at the outlet, and flow meters may not be designed to withstand these higher outlet water temperatures. Therefore, AHRI indicated it would support the option of installing a flow meter at the inlet. (AHRI, No. 40 at p. 2) Rheem once again noted that major third-party testing laboratories have flow meters installed at the inlet of the water heater and that it is likely that all certified models have been tested with such a set-up. (Rheem, No. 31 at pp. 4–5) BWC commented that manufacturers should still have the option to install flow meters at the inlet to ensure accurate results and longevity of testing equipment, as well as to avoid manufacturer burden. Specifically, BWC indicated that manufacturers may have sophisticated set-ups with flow meters installed at the inlet, and there could be substantial burden with overhauling these set-ups. (BWC, No. 33 at p. 8)

Based on these comments, DOE has determined that a requirement for flow meters to be installed at the outlet may not only require re-testing a large number of basic models but also

[61] Available at: *www.energystar.gov/products/spec/residential_water_heaters_specification_version_5_0_pd* (Last accessed on July 25, 2022).

[62] Mass of water drawn from the water heater can either be directly measured using a mass scale, or it can be calculated by using a flow meter to measure the volume of water moved (and converted to mass using the density of the water). The mass scale approach represents the actual value of the mass of water drawn, against which the flow meter results can be compared.

potentially degrade the reliability of the testing rig due to debris flowing downstream. Because there is a generally consensus among stakeholders who commented on this issue that it is necessary to retain the ability to install the flow meter at the inlet side, DOE is not amending appendix E to require measurement at the outlet side. Instead, DOE is maintaining its current provisions in sections 3 and 4 of appendix E, which allow for the flow meter to be installed on either the inlet or outlet side.

4. Separate Storage Tanks

Some water heaters on the market require a volume of water, typically contained in either a storage tank (or tanks) or in a piping distribution system of sufficient volume, to operate. These products operate by circulating water stored either in the piping system or from a separate tank (or multiple separate tanks) to the water heater to be heated then back to the piping system or tank until hot water is needed. As discussed in section III.A.4.a of this document, DOE is adopting a definition for these products, which are termed ''circulating water heaters.'' In the January 2022 NOPR, DOE identified two types of circulating water heater products that require a volume of water to operate—heat pump-only water heaters that require installation with a separate storage tank and circulating gas-fired instantaneous water heaters that require installation with a separate storage tank or a piping system of sufficient volume. 87 FR 1554, 1583–1585 (Jan. 11, 2022). Circulating gas-fired instantaneous water heaters are distinct from other types of gas-fired instantaneous water heaters in that they are not designed to operate independent of a storage tank or hot water system, as other gas-fired instantaneous water heaters are. This applies generally to circulating water heaters; however, DOE has determined that there are no electric resistance or oil-fired circulating water heaters on the market today.

The currently applicable appendix E test procedure does not have procedures in place to appropriately test circulating water heaters. In the January 2022 NOPR, DOE proposed to require that circulating water heaters be tested using an 80 gallon (±1 gallon) unfired hot water storage tank (UFHWST) that meets the energy conservation standards for an unfired hot water storage tank at 10 CFR 431.110(a). 87 FR 1554, 1583–1585 (Jan. 11, 2022).

In response to the January 2022 NOPR, DOE received a number of comments regarding the separate storage tank requirements, primarily related to the ±1 gallon tolerance, the representativeness of an 80-gallon unfired hot water storage tank, and the lack of a specification of an upper bound on thermal insulation for the unfired hot water storage tank. These comments were discussed in detail and addressed in the July 2022 SNOPR. Some commenters specifically recommended that DOE specify electric storage water heaters to be paired with heat pump-only water heaters. Commenters also raised questions as to whether or not the separate tanks to be used during testing may have back-up heating. For gas-fired circulating water heaters, commenters urged DOE to consider allowing multiple tank sizes to be used for testing rather than just the 80-gallon tank proposed in the January 2022 NOPR. 87 FR 42270, 42281–42283 (July 14, 2022).

After considering the issues raised by commenters responding to the January 2022 NOPR, in the July 2022 SNOPR, DOE proposed several updates to its earlier proposals (in section 4.10 of appendix E) for testing circulating water heaters as initially presented in the January 2022 NOPR. 87 FR 42270, 42282–42283 (July 14, 2022). These proposed modifications to DOE's initial proposal are set forth in the paragraphs that follow.

After re-evaluating the market for heat-pump-only water heaters, DOE tentatively determined that testing such products with a conventional electric storage water (*i.e.,* an electric water heater that uses only electric resistance heating elements) would be more representative than testing with an UFHWST. Therefore, DOE proposed that heat-pump-only water heaters be tested in the medium draw pattern using a 40-gallon traditional electric storage tank (*i.e.,* that provides heat only with electric resistance heating elements) that has a UEF rating at the minimum required at 10 CFR 430.32(d). DOE chose a 40-gallon tank in the medium draw pattern because that size and draw pattern combination has the highest number of models currently available on the market.[63] DOE also proposed that, for heat pump-only water heaters, the test be carried out using a tank that does not ''over-heat'' the stored water (*i.e.,* $T_{max,1}$ (maximum measured mean tank temperature after cut-out following the first draw of the 24-hour simulated-use test) must be less than or equal to $T_{del,2}$ (average outlet water temperature during the 2nd draw of the 24-hour simulated-use test); see section III.E.1 of this document for more discussion of water heater ''over-heating''). This would ensure that the electric storage tanks are not overheating during the test, thereby ensuring consistency across tests. 87 FR 42270, 42282 (July 14, 2022).

By contrast, DOE maintained its earlier proposal that a UFHWST be used for testing of circulating gas-fired water heaters, as those products are more likely to be installed with a UFHWST in the field. Therefore, DOE tentatively concluded that testing with an UFHWST would be representative for such units. 87 FR 42270, 42282 (July 14, 2022).

In response to the January 2022 NOPR, some commenters suggested that DOE allow manufacturers to specify the storage tank used for testing. DOE noted that this approach could lead to additional test burden for third-party testing laboratories, which may need to acquire more than one storage tank if they are performing tests for multiple manufacturers, each of whom may specify a different storage tank for testing. In order to avoid creating the potential for additional test burden, DOE tentatively determined not to allow manufacturers to specify the electric storage water heater or unfired hot water storage tank used respectively for testing the heat pump-only or gas-fired instantaneous circulating water heaters. Additionally, DOE stated it would consider relevant amendments to certification and reporting requirements in a separate rulemaking. 87 FR 42270, 42282 (July 14, 2022).

After considering the comments regarding the tolerance on the storage tank initially proposed in the January 2022 NOPR, DOE tentatively determined in the July 2022 SNOPR that a wider tolerance would reduce potential testing burden while still providing representative and reproducible results. Specifically, DOE tentatively concluded that a 10-percent tolerance would increase flexibility for manufacturers by increasing the number of tanks that could be used for testing, while not materially impacting the UEF test results. Therefore, consistent with the recommendations provided by commenters, DOE proposed to adopt a 10 percent tolerance (±10 percent, allowing products with rated storage volumes between 36 gallons and 44 gallons) for the electric storage water heater used for testing heat-pump-only water heaters. 87 FR 42270, 42282 (July 14, 2022).

Additionally, after further review of the market for circulating gas-fired instantaneous water heaters and unfired

[63] *See* Figure 3A.2.8 of the Preliminary Analysis Technical Support Document for consumer water heaters (Docket No. EERE–2017–BT–STD–0019–0018).

hot water storage tanks, DOE proposed in the July 2022 SNOPR to allow testing with a tank at any storage volume between 80- and 120-gallons. Based on further analysis, DOE tentatively determined that variations in the tank size should not significantly impact the result of the test. During a water draw, the internal tank temperature decreases as hot water exits the tank and is replenished by colder water entering the tank. Generally, different tank sizes will result in different rates of internal temperature decrease during a water draw (*e.g.,* during a specified water draw, a smaller tank will generally experience a faster decrease in temperature compared to a larger tank). During a test, any potential differences in the tank water temperature due to the use of different size tanks would be accompanied by a corresponding proportional difference in burner on-time, such that the impact on measured efficiency (*i.e.,* the ratio of energy output to energy input) would be negligible. DOE noted its recognition that a larger tank would likely have more standby losses than a smaller tank; however, DOE tentatively determined that the impact this would have on measure efficiency would also not be significant. 87 FR 42270, 42282–42283 (July 14, 2022).

DOE noted that providing a range of allowable tank volumes would reduce potential burden by providing manufacturers with more tank options, thereby allowing them to pair their circulating gas-fired instantaneous water heaters with an existing UFHWST model. This approach is also likely to be more representative of how the units would be installed in the field as opposed to testing with a custom-made tank for testing or a competitor's tank that meets a specific volume requirement. 87 FR 42270, 42283 (July 14, 2022).

In addition, after considering comments in response to the January 2022 NOPR, DOE tentatively determined in the July 2022 SNOPR that the lack of an upper bound on the thermal insulation value for the UFHWST could lead to differences in measured efficiency that reflect differences in tank performance, rather than reflecting differences in water heater performance. Therefore, DOE tentatively determined that more specific constraints on tank performance are warranted to ensure more comparable test results across the subject water heater models. DOE proposed to require that UFHWSTs used for testing circulating gas-fired instantaneous water heaters exactly meet the baseline energy conservation standard for UFHWSTs.[64] 87 FR 42270, 42283 (July 14, 2022). However, DOE did not include commenters' suggested specifications for other tank characteristics (such as the inlet and outlet connection locations, internal tank baffling, and inlet tube designs) for the UFHWST because, as explained in the July 2022 SNOPR, DOE tentatively determined that over-specifying the design of the UFHWST—given the impacts on the UEF rating are minimal—could result in a very narrow range of UFHWST models which could be used for testing circulating water heaters, thereby potentially introducing significant barriers to testing these products at third-party laboratories. In addition, DOE tentatively concluded that it lacked sufficient information regarding these specifications to do so. 87 FR 42270, 42283 (July 14, 2022).

Similarly, DOE proposed that the electric storage water heater used for testing heat-pump-only water heaters have a rated UEF corresponding to the minimum standard found at 10 CFR 430.32(d), thereby helping to ensure more comparable results.

In summary, in the July 2022 SNOPR, DOE proposed to further amend the separate storage tank requirements proposed in the January 2022 NOPR for heat pump-only and gas-fired circulating water heaters. DOE proposed that heat pump-only water heaters be tested with a 40-gallon (±4 gallons) electric storage water heater that has a UEF value corresponding to the minimum standard for such products and that does not ''over-heat''; and that gas-fired circulating water heaters be tested with an 80-gallon to 120-gallon unfired hot water storage tank that is rated equal to the energy conservation standard for such equipment.

In response to the July 2022 SNOPR, NEEA indicated support for DOE's revisions to the proposed test procedure for circulating water heaters. (NEEA, No. 56 at p. 2) A.O. Smith and the CA IOUs supported DOE's proposal requiring gas-fired circulating water heaters to be tested using a UFHWST with a storage volume between 80 and 120 gallons and an R-value exactly at the minimum R-value required at 10 CFR 431.110(a). (A.O. Smith, No. 51 at p. 8; CA IOUs, No. 52 at p. 6) The CA IOUs also indicated support for the revision to require heat pump circulating water heaters to use a 40-gallon electric resistance water heater meeting the minimum UEF requirements. (CA IOUs, No. 52 at p. 6)

AHRI stated that allowing manufacturers to specify the storage tank used for testing circulating water heaters would not increase test burden for third-party laboratories because manufacturers would provide both the water heater and the storage tank it was designed to be used with to the laboratories. (AHRI, No. 55 at pp. 5–6) BWC suggested that the capacity range of 80 to 120 gallons for UFHWSTs used to test circulating water heaters is too wide to ensure consistent results, so, therefore, the commenter requested that DOE complete further testing to validate it. (BWC, No. 48 at p. 4)

After considering these comments, DOE has concluded that providing a range of allowable tank volumes for use with circulating gas-fired instantaneous water heaters as described in the July 2022 SNOPR would reduce potential burden by providing manufacturers with more tank options, thereby allowing them to pair their circulating gas-fired instantaneous water heaters with an existing UFHWST model. This approach balances manufacturer burden (by allowing flexibility in the tank size) with ensuring reproducibility of test results (by limiting the options to a fixed range of sizes). In response to AHRI's comments, DOE notes that it is not adopting changes to the certification requirements in this final rule, and whether or not manufacturers may specify a specific model of UFHWST is an issue out of the scope of this test procedure rulemaking and will be addressed in a future rulemaking addressing certification requirements for consumer water heaters.

As such, in this final rule, DOE is adopting the separate storage tank requirements for circulating gas-fired instantaneous water heaters as proposed in the July 2022 SNOPR. In response to BWC's comment, DOE understands that the choice of tank size may result in slightly different ratings for these products, and BWC seeks to determine how much variability in results there would be if testing were to be conducted with an 80-gallon UFHWST versus a 120-gallon UFHWST. However, the Department's approach is instead to permit manufacturers some flexibility in testing options so as to be able to tailor the tank pairing to the design or application intent of the circulating water heater, and to then subsequently account for the variation in ratings when setting amended standards for circulating water heaters by having the required UEF be a function of the effective volume. As discussed in section III.I of this document, compliance with the separate storage tank test method will not be required

[64] Currently, baseline energy conservation standards for UFHWSTs require a thermal insulation of R–12.5. 10 CFR 431.110(a).

until compliance with amended energy conservation standards is mandatory, if such standards are adopted. Additionally, section III.F.2.b of this document describes the use of the effective storage volume metric to be able to associate efficiency ratings to the storage tank size for circulating water heaters. This matter is discussed further in this section in response to other comments. In taking these steps, DOE can, in the ongoing standards rulemaking for consumer water heaters, propose and request comment on new energy conservation standards for circulating water heaters that are functions of the effective storage volume.

SMTI requested that DOE widen the accepted volume range for electric storage tanks used to test separate heat pump-only water heaters based on the performance requirements of each product instead of requiring that all products be tested with a 40-gallon tank. (SMTI, No. 49 at p. 1) SMTI suggested that heat pump-only water heaters be tested with manufacturer-specified storage tanks, which the manufacturer would provide to third-party laboratories, and that a 40-gallon tank be used if a specific storage tank is not specified. (SMTI, No. 49 at p. 2) A.O. Smith stated that there is insufficient data to conclude that the 40-gallon electric resistance water heater should be used for testing heat-pump-only or split-system water heaters and that a 50-gallon electric resistance water heater may be more representative based on manufacturer data. (A.O. Smith, No. 51 at p. 9) However, A.O. Smith did not provide any manufacturer data to support its claim that a 50-gallon electric resistance water heater would be more representative.

As described in the July 2022 SNOPR, DOE selected a 40-gallon tank in the medium draw pattern because that size and draw pattern combination has the highest number of models currently available on the market as observed in models currently certified to DOE's Compliance Certification Database (see Figure 3A.2.8 of Preliminary Analysis TSD). 87 FR 42270, 42282 (July 14, 2022). This finding has not changed since the publication of the July 2022 SNOPR, and on this basis (because additional data were not provided by stakeholders), DOE has concluded that this tank size and draw pattern are the most representative choice to be paired with a heat pump-only water heater. In response to SMTI's request to widen the volume range, DOE has determined to adopt a volume tolerance of ±5 gallons, as opposed to ±10% (4 gallons) which was proposed in the July 2022 SNOPR. This change is based on further inspection of the rated storage volumes of electric storage water heaters which have a nominal capacity of ''40 gallons'' as observed in models certified to DOE's Compliance Certification Database. As such, DOE does not expect the difference to be substantial in impacting energy efficiency results for circulating heat pump water heaters because the volume range covers products of the same nominal volume. As previously stated in response to a comment made by AHRI, DOE is allowing manufacturers to specify an effective storage volume for the tank rather than a specific model because any characteristics of the tank that would affect the efficiency rating of the circulating water heater during a test are accounted for in the volume and efficiency rating (in this case, UEF) of the tank.

AHRI and BWC indicated that DOE's primary TSD for energy conservation standards for consumer water heaters suggests that the 40-gallon electric resistance water heaters used to test heat-pump-only water heaters may be phased out by future DOE regulations. (AHRI, No. 55 at p. 5; BWC, No. 48 at pp. 4–5) Rheem supported AHRI's comment on this issue. (Rheem, No. 47 at p. 5)

In response, DOE notes that the current energy conservation standards rulemaking for consumer water heaters is still ongoing, and any preliminary results published as part of that rulemaking are neither final nor binding in any way. Consequently, it is not confirmed that electric resistance storage water heaters will be phased out. Nevertheless, to ensure there will be no confusion in the event such regulatory changes were to occur, DOE is removing the requirement that the storage tank use only electric resistance heating elements. Accordingly, the associated portion of section 4.10 of appendix E has been updated to read as follows:

''When testing a heat pump circulating water heater, the tank to be used for testing shall be an electric storage water heater that has a measured volume of 40 gallons (±5 gallons), has a First-Hour Rating greater than or equal to 51 gallons and less than 75 gallons resulting in classification under the medium draw pattern, and has a rated UEF equal to the minimum UEF standard specified at 10 CFR 430.32(d), rounded to the nearest 0.01. The operational mode of the heat pump circulating water heater and storage water heater paired system shall be set in accordance with section 5.1.1 of this appendix.''

In its comments on the July 2022 SNOPR, A.O. Smith supported ensuring that non-unitary heat pump water heaters [65] intended for use in a single-family home or an individual dwelling unit that need to be paired with a separate storage tank are tested and certified to the Department consistent with appendix E. (A.O. Smith, No. 51 at pp. 8–9) A.O. Smith also requested that DOE clearly define the test apparatus for heat pump circulating water heaters. (A.O. Smith, No. 51 at p. 9)

In response to concern from certain stakeholders, DOE will allow manufacturers of gas-fired circulating water heaters to represent thermal efficiency test results measured according to the commercial water heaters test procedure outlined at 10 CFR part 431, subpart G, in addition to the required UEF test results. DOE also notes that this final rule clearly defines the test apparatus for circulating heat pump water heaters in section 4.10 of the amended appendix E.

Rheem reiterated its request for clarification as to whether a system (*i.e.,* a heat pump and storage tank designed to be used together) can be certified independent of the proposed method to use a specific storage tank or electric resistance water heater. (Rheem, No. 47 at p. 5) Rheem also requested that DOE address whether a split-system water heater, designed to be used with an 80-gallon tank, can have a storage tank with electric resistance elements and whether a replacement tank can be sold. (Rheem, No. 47 at p. 5)

In response to Rheem, DOE would clarify that a product which consists of a heat pump and a storage tank designed to be used together and are sold together would constitute a ''split-system heat pump water heater.'' Such a system would be certified altogether as an electric storage water heater, and there would be no need to use the test procedure provisions for a separate storage tank. If the heat pump module were sold separately and independent of the tank, then it would constitute a ''circulating heat pump water heater,'' and the test procedure provisions for a 40-gallon ±5 gallon separate storage water heater would then apply. In Rheem's example of a product with an 80-gallon storage tank, that configuration would constitute a ''split-

[65] DOE understands ''non-unitary heat pump water heaters'' to refer to products which consist of a heat pump system to heat water but are not packaged with the rest of the components used in domestic hot water production (*i.e.,* a hot water storage tank). These products are considered circulating heat pump water heaters in this rulemaking.

system heat pump water heater''—an electric storage water heater with a storage volume of 80 gallons. The separate storage tank provisions do not apply to such a product. The 80-gallon storage tank component of the split-system heat pump water heater may have electric resistance back-up elements. Replacement storage tanks sold on a separate basis—essentially an electric resistance water heater with a storage volume of 80-gallons—would not be permitted, because electric resistance heating elements would not be able to achieve the UEF energy conservation standard levels mandatory for electric storage water heaters greater than 55 gallons for which compliance is currently required (*see* 10 CFR 430.32(d)).

In response to the January 2022 NOPR, A.O. Smith also commented that the energy from a circulating pump should be used in the UEF calculations and that the flow rates between the circulating heat pump water heater and the storage tank should be specified by the manufacturer. (A.O. Smith, No. 37 at p. 3) DOE agrees that including the energy use of the circulating pump is appropriate and consistent with the currently applicable appendix E test procedure, which requires measurement of power consumption of auxiliary electricity-using components. In this final rule, for water heaters which require separate storage tanks, the power consumption of the circulating pump shall be directly metered if the pump is integrated into the water heater. Section 4.10 of the amended appendix E test procedure will require that if the water heater is supplied with a separate, non-integrated circulating pump, it is to be installed as per the manufacturer's installation instructions, and its power consumption will similarly be accounted for in the energy measurements to determine UEF.

In conclusion, after considering comments received in response to the January 2022 NOPR and the July 2022 SNOPR, DOE is adopting the requirements for separate storage tanks as discussed in this final rule.

DOE's previous proposals involving the use of separate storage tanks did not specify a test procedure by which the storage volume of unfired hot water storage tanks paired with circulating water heaters to determine efficiency is to be measured. It is important to obtain a precise measurement of the storage volume of the UFHWST because its physical size affects the measured efficiency of the water heater due to standby losses of heat from the stored water to the air surrounding the storage tank; these standby losses increase as the size of the tank increases.

To ensure the accuracy and repeatability of test results, DOE is amending sections 4.10 and 5.2.1 of appendix E so that the method for determining storage tank volume specified in section 5.2.1 must also be conducted to verify the volume of unfired hot water storage tanks used to test circulating water heaters. In this method, storage volume is determined in gallons by subtracting the tare weight, measured while the tank is dry and empty, from the weight of the system when filled with water and dividing the resulting net weight of water by the density of water at the measured water temperature. This method is consistent with how the volume of unfired hot water storage tanks is currently rated. It is also the method specified for storage-type and storage-type instantaneous commercial water heaters under subpart G to 10 CFR part 431.

Additionally, as discussed in section III.F.2.b of this document, DOE is establishing that the effective storage volume of a circulating water heater is equivalent to the measured storage volume of the separate storage tank which was used during testing of the circulating water heater. This alleviates the manufacturers' concerns by ensuring that the standby losses reflected in the UEF rating of the circulating water heater can be mapped to the volume of the separate storage tank which was used during testing without having to specify a particular model of tank, for example. DOE would consider this tank volume in the development of energy conservation standards for circulating water heaters.

E. Test Conduct

As discussed throughout this rulemaking, EPCA requires that any test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle (as determined by the Secretary) or period of use and shall not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The proposed changes to test conduct, along with specific stakeholder comments received and DOE's responses, are discussed further in the subsections that immediately follow.

1. High Temperature Testing

Certain electric storage water heaters on the market are capable of raising the temperature of the stored water significantly above the outlet water temperature requirements specified in section 2.4 of appendix E, while still delivering water at a lower temperature that is at or near the temperature specified in appendix E. The storage tank is heated to a temperature which is still within the normal operating range of the water heater, but a mixing valve is typically installed with these products (either integrated into the water heater by the manufacturer at the factory, or added to the water heater in the field by the installer) to temper the outlet water to a more typical delivery temperature. (Set-up requirements for mixing valves that are to be used during testing are discussed in section III.D.2 of this final rule.) When the outlet water is tempered like this, a smaller amount of the hot water from the tank is required to meet demand (because the water in the tank is hotter than desired). Because less water needs to be removed from the tank, the effect of a mixing valve is to increase the amount of hot water that can be delivered overall by the water heater. In addition to determining the set-up considerations to test these products in a representative manner, DOE must consider the impact of raising the storage tank temperature significantly above the setpoint outlet temperature (*i.e.,* ''storage tank overheating'') on the efficiency of a water heater since this represents how the water heater will be used in the field.

As discussed in the July 2022 SNOPR, storage tank overheating increases the amount of hot water that a given size water heater can deliver. 87 FR 42270, 42277–42278 (July 14, 2022).

Historically, it has not been uncommon for water heaters to come with the capability to adjust the settings to increase the temperature of the water being stored in the tank, although, it is DOE's understanding that in the past, consumers rarely modified the preconfigured settings on their storage tanks. However, DOE has recently become aware of products that are being marketed to consumers with ''capacity boosting'' capabilities so as to avoid the need to install a larger storage-type water heater. The products (that DOE addressed in the July 2022 SNOPR) are equipped with user-operable modes which set the water heater to boost the storage tank temperature and use a built-in mixing valve (or one installed at the point of manufacture) to automatically maintain the delivery temperature. For example, one manufacturer produces 30-, 40-, and 50-gallon water heaters with an ''X-High Setting'' claiming to provide the same amount of hot water (''Effective Capacity,'' as the manufacturer refers to

it) as significantly larger water heaters with a more typical storage tank temperature of 125 °F—such as an 80-gallon capacity for the 50-gallon model, 64-gallon capacity for the 40-gallon model, and 48-gallon capacity for the 30-gallon model.[66] DOE notes that the 40-gallon model and the 50-gallon model are capable of providing effective capacities greater than 55 gallons, which, based on effective capacity, would put these models into a different product class. (*see* 10 CFR 430.32(d)). Another manufacturer produces a 55-gallon water heater with a variety of settings allowing the user to get ''performance equivalency'' of a 65-, 80-, or 100-gallon tank, stating that the tank raises the temperature safely up to 170 °F.[67] Again, these increased capacities would put this model into a different product class.

As stated in the July 2022 SNOPR, consumers would be expected to use the over-heated mode as part of the regular operation of their water heater. Accordingly, for such products, DOE expects that a representative average use cycle would include some portion of time in over-heated mode. 87 FR 42270, 42279 (July 14, 2022). For these water heaters, DOE believes that a representative average use cycle in the test procedure must encompass the ''capacity boosting'' capability, as this is the mode that DOE believes the consumer will likely be using once installed in the field, because such purchases are likely predicated on this capacity-boosting capability.

The operational mode selection instructions in section 5.1 of appendix E do not specifically address the situation when a water heater has this type of operational mode that boosts the capacity. In response to the January 2022 NOPR, several commenters requested that DOE consider amendments to the appendix E test procedure to provide more representative efficiency results (including ways to account for the increased effective capacity) for these products that ''overheat'' the stored water beyond the delivery temperature. After considering these comments in the July 2022 SNOPR, DOE proposed to establish additional requirements for the testing of water heaters which have these operational modes. 87 FR 42270, 42278 (July 14, 2022).

In order to further examine the potential impacts of storing water at temperatures higher than the delivery temperature, DOE performed testing on one 50-gallon electric resistance storage water heater that includes a built-in mixing valve and multiple user-selectable modes to boost the delivery capacity through storage tank overheating. As described in the July 2022 SNOPR, DOE collected data at three different storage tank temperatures, each of which provided an outlet water temperature at 125 °F ±5 °F through the use of the built-in mixing valve. DOE compared the maximum measured mean tank temperature after cut-out following the first draw of the 24-hour simulated-use test ($\overline{T}_{max,1}$) to the average outlet water temperature during the second draw ($\overline{T}_{del,2}$) as an indicator of the degree of ''overheating.'' DOE's test data is provided in Table III.3 of the July 2022 SNOPR. 87 FR 42270, 42278–42279 (July 14, 2022).

The test results indicated that storage tank overheating clearly leads to an increase in the measured FHR value. The test configuration corresponding to the current DOE test procedure produced an FHR value of 77 gallons. The overheated configurations with mean tank temperatures of 144.5 and 159.6 produced FHR values of 81 and 95 gallons, respectively. DOE notes that an FHR of 95 gallons is comparable to that of a 100-gallon electric storage water heater.[68] However, increasing the temperature of the stored water can reduce energy efficiency because the hotter tank undergoes substantially higher standby energy losses. As shown in Table III.3 of the July 2022 SNOPR, DOE's test data show that at a tank temperature of 124.3 °F, the measured UEF is 0.94, which is compliant with the current standards. When the temperature is increased to 144.5 °F, the UEF decreases to 0.90. Further increasing the temperature to 159.6 °F decreases the UEF to 0.88. 87 FR 42270, 42279 (July 14, 2022).

All of the tested temperatures correspond to normal operational modes for the water heater, and a review of publicly-available product literature indicates that products that utilize storage tank overheating generally offer user-selectable operational modes that result in stored water temperatures ranging from 100 °F to 170 °F. Consumers who choose to use a high-capacity (*i.e.,* ''overheated'') mode will experience the water heater performing significantly worse in terms of its energy efficiency rating than if the rating were determined based on testing without storage tank overheating. In other words, the rated efficiency at the rated delivery capacity would not be representative of an average use cycle or period of use when operated in a high-capacity mode. 87 FR 42270, 42279 (July 14, 2022).

In the July 2022 SNOPR, DOE surmised that consumers who purchase a water heater that provides overheating capability would do so with the intent to use such capability; as such, these consumers would be expected to use the over-heated mode some portion of the time, ranging from occasional use (*e.g.,* switching between the normal mode and the overheated mode depending on the hot water capacity needed at any particular time) to regular use. Accordingly, for such products, DOE expects that a representative average use cycle would include some portion of time in overheated mode. For this reason, DOE tentatively determined that testing storage-type water heaters that offer user-selectable overheated modes in the overheated mode would provide a more representative result than testing in the default mode. Therefore, DOE proposed to amend section 5.1 of appendix E to require that for water heaters that offer a user-selected operational mode(s) in which the storage tank is maintained at a temperature higher than the delivery temperature, the operational mode shall be that which results in the highest mean tank temperature while maintaining an outlet temperature of 125 °F ±5 °F. Because this amendment would change the measured energy efficiency, DOE proposed that compliance with this requirement would not be necessary until the compliance date for amended energy conservation standards. 87 FR 42270, 42279 (July 14, 2022).

As explained in the July 2022 SNOPR, demand-response water heaters with the capability to undergo utility-initiated overheating would not be expected to increase the capacity of the water heater over a typical average use cycle in the same way that a water heater with user-initiated overheating would, so DOE had tentatively concluded that testing demand-response water heaters in the default/normal would be the most representative method for those products. Therefore, DOE proposed to define ''demand-response water heater'' (see section III.A.1 of this document) and exclude such products from the requirement to test in the operational mode that results in the highest mean tank temperature while maintaining an

[66] See, for example: *www.geappliances.com/appliance/GE-Smart-50-Gallon-Electric-Water-Heater-with-Flexible-Capacity-GE50S10BMM* (Last accessed April 14, 2023).

[67] For example, DOE's Compliance Certification Database includes a 107-gallon electric storage water heater with an FHR of 94 gallons.

[68] For example, DOE's Compliance Certification Database includes a 107-gallon electric storage water heater with an FHR of 94 gallons.

outlet temperature of 125 °F ±5 °F, even if they are capable of overheating the stored water. 87 FR 42270, 42280 (July 14, 2022).

In response to the July 2022 SNOPR, BWC stated that the phrase ''storage tank overheating'' may be confusing to consumers and suggested that DOE find an alternate phrase to describe this concept (*i.e.,* ''water heaters with high heat modes''). (BWC, No. 48 at p. 3) GEA also disagreed with DOE's use of the term ''over-heating'' to refer to water heaters that can deliver water at lower temperature than that at which it is stored, suggesting ''delivery-control'' as an alternative, given that these products heat in the manner intended. (GEA, No. 53 at p. 2) In response to these comments and acknowledging the sensitivity around the potentially negative connotation of the term ''overheating,'' as noted earlier in this document, DOE's use of the term ''overheating'' does not denote performance outside of the normal operating range of the water heater, but rather refers to raising the tank temperature above the outlet water setpoint. To avoid any potential confusion, DOE will hereinafter refer to water heaters with overheating capability as water heaters with ''high heat modes.''

The following subsections summarize the remaining comments received in response to the provisions proposed in the July 2022 SNOPR for water heaters with high heat modes and include DOE's additional assessments of the impact on UEF ratings, representativeness of the test method, and implications for compliance with standards associated with high temperature testing.[69] As discussed in the following subsections, DOE has concluded that including test conduct provisions for determining the ratings of water heaters tested using the high temperature testing method would be justified. Therefore, in this final rule, DOE is establishing the methodology for determining ratings for electric resistance storage water heater using high temperature testing in appendix E, but DOE is allowing voluntary representations at this point. Specifically, manufacturers may opt to use the high temperature test method in addition to the regular temperature setting test method if they desire to make voluntary representations of the efficiency when tested in high temperature mode. DOE will consider establishing requirements for which electric resistance storage water heaters must be tested and represented according to the method for high temperature testing in its ongoing energy conservation standards rulemaking for consumer water heaters. Until such time, the regular test method is mandatory for compliance with the current Federal energy conservation standards.

a. Impact on UEF Ratings

In response to the July 2022 SNOPR, ASAP, ACEEE, and NRDC expressed support for DOE's proposal for addressing storage-type water heaters that heat the stored water beyond the delivery temperature. (ASAP, ACEEE, and NRDC, No. 54 at p. 2)

NEEA supported DOE's proposal to test water heaters in a user-selectable ''overheat'' mode when such a mode is available, as well as DOE's proposed methodology for identifying ''overheat'' modes. NEEA also indicated that it had performed testing on two 120-volt heat pump water heater models which had these modes available, and its test results showed a significant reduction in efficiency when the water heater was set to store water at an elevated temperature of 140 °F.[70] Thus, NEEA stated that requiring testing in the ''overheat'' mode would help realize the energy and cost savings intended with efficiency standards. (NEEA, No. 56 at p. 2)

BWC disagreed that water heaters with high heat modes should have separate testing requirements and expressed concern that tests to examine the potential effects of heating stored water above the delivery temperature setpoint were conducted on a single 50-gallon electric resistance storage water heater. BWC urged DOE to conduct further testing before finalizing this proposal. (BWC, No. 48 at p. 3) In response, DOE notes that the UEF ratings of products which store water at higher temperatures will be lower due to the higher standby losses incurred as a result of this high temperature storage. DOE did, however, conduct additional testing (see section III.F.2 of this document) to determine that the method of determining effective storage volume from the high temperature testing will only affect products which significantly increase capacity by increasing storage temperature.

Additionally, DOE reviewed the heat pump water heater test data referenced in NEEA's comment. NEEA tested two 50-gallon 120-volt heat pump water heaters at two storage setpoint temperatures (*i.e.,* 125 °F and 140 °F), with mixing valves installed to temper the delivery to 120 °F. NEEA's report concludes that the recovery efficiency can decrease by a factor of 3 to 8 percent when the setpoint temperature is increased from 125 °F to 140 °F. The higher setpoint temperature resulted in an increase in FHR of approximately 13 gallons. NEEA's report also states that at 67.5 °F ambient air, an increase in the setpoint temperature could increase standby losses by 25 percent, although NEEA stated that standby losses contribute less to the overall energy consumption of a heat pump water heater compared to recovery periods. DOE notes that NEEA did not conduct standby loss testing or present the UEF results of these water heaters in each mode. DOE expects that the standby loss from having a higher setpoint temperature would have a more significant impact on electric resistance water heaters because the recovery efficiency of electric resistance heating is not affected by the water temperature.[71] However, in conjunction with DOE's own test data (which was obtained through full 24-hour simulated use test measurements of an electric resistance storage water heater), DOE has determined that high temperature testing would result in significantly lower UEF results compared to setting the tank temperature close to the delivery setpoint of 125 °F.

Given the significant difference in UEF performance that have been observed based on the temperature of the water stored in the tank, DOE has concluded it is appropriate to provide a method to conduct high temperature testing. Section III.E.1.d of this document describes how DOE is establishing the requirements for high temperature testing. Due to the expected impacts of high temperature testing on UEF, DOE will not require compliance with this test method until compliance with amended energy conservation standards accounting for such water heaters is also required.

[69] DOE is establishing a method for testing water heaters at an elevated tank temperature, including water heaters without ''high heat modes.'' Therefore, DOE refers to water heaters with a built-in mixing valve and operational mode for overheating the water in the tank as water heaters with ''high heat modes'' but refers to the testing of water heaters at elevated storage water temperatures as ''high temperature testing.''

[70] An August 30, 2022 report by NEEA containing test data for these water heaters can be found online at: *neea.org/resources/plug-in-heat-pump-water-heaters-an-early-look-to-120-volt-products* (Last accessed on Nov. 22, 2022).

[71] Section 6.3.2 of the currently applicable appendix E test procedure (which will be re-located to section 6.3.3 upon the effective date of this final rule) states that the recovery efficiency for electric water heaters with immersed heating elements, not including heat pump water heaters with immersed heating elements, is assumed to be 98 percent.

b. Demand-Response Water Heaters

As discussed previously, in the July 2022 SNOPR, DOE proposed to define ''demand-response water heater'' and exclude such products from the proposed requirement to test in the operational mode that results in the highest mean tank temperature while maintaining an outlet temperature of 125 °F ±5 °F, even if they are capable of heating the stored water above the delivery temperature. 87 FR 42270, 42280 (July 14, 2022).

In response to the July 2022 SNOPR, NYSERDA indicated that water heaters with demand-response functionality should be excluded from testing at the highest tank temperature available. (NYSERDA, No. 50 at p. 3) A.O. Smith agreed with DOE's assessment that demand-response water heaters need the operational capability to ''over-heat'' the stored water in the tank above the intended outlet water temperature in response to a signal or command from a utility or third-party aggregator. The commenter stated that these load-up events are typically short in duration and do not keep the stored water in an over-heated state continuously or permanently. However, A.O. Smith raised concerns about the impact of this proposed amendment on the availability of the high heat mode feature on non-demand-response products. A.O. Smith urged DOE to continue to allow non-demand-response heat pump water heaters with selectable high heat modes to retain this functionality for customer utility. (A.O. Smith, No. 51 at pp. 5–6)

In contrast, the CA IOUs suggested that demand-response capable water heaters should be subject to the same test procedure as other water heaters capable of operating in high heat modes. (CA IOUs, No. 52 at p. 6)

As noted in section III.A.1 of this document, DOE is not establishing a definition for ''demand-response water heater'' in this final rule in order to prevent potential industry confusion from arising due to any differences in the features requirements specified in such definition. However, DOE has found it appropriate to still consider factors which would help to determine whether it is most representative to require demand-response water heaters to test at the highest tank temperature setting.

As described in the July 2022 SNOPR and discussed in section III.A.1 of this document, high-temperature water storage occurring in demand-response water heaters and initiated by the electric utility serves an important purpose for energy storage and grid flexibility. 87 FR 44270, 42279–42280 (July 14, 2022). Additionally, DOE noted that demand-response water heaters do not perform this action to increase the overall daily capacity of the water heater. Instead, the capacity is only temporarily boosted to counteract the deactivation of the heating elements for extended periods of time when demand curtailment is occurring. As such, demand-response water heaters with the capability to undergo only utility-initiated high heat modes would not be expected to increase the capacity of the water heater over a typical average use cycle in the same way that a water heater with the ability to have the user increase the storage tank temperature would. *Id.*

To reiterate, EPCA requires that any test procedures prescribed or amended shall be reasonably designed to product test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product or equipment during a representative average use cycle or period of use and not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3); 42 U.S.C. 6314(a)(2)). Thus, DOE must determine whether testing at the highest tank temperature setting during the delivery capacity test and the 24-hour simulated-use test is representative of an average use cycle for a demand-response water heater. Based on information collected during this rulemaking, including the comment from NYSERDA, demand-response water heaters do not typically remain in a high-temperature storage state for the entirety of a 24-hour average use cycle. The additional energy used and stored when this type of water heater increases the tank temperature is offset by significant periods of low energy usage such that, over a 24-hour average use cycle, the total energy stored and consumed by the water heater is similar to that for a product which maintains a normal storage tank temperature throughout the day.

In response to A.O. Smith's concern about non-demand-response water heaters, as discussed in further detail in sections III.E.1.c and III.E.1.d of this document, DOE notes that the provisions finalized in this rulemaking do not require high temperature testing for any water heaters in particular at this time and, therefore, would not preclude the possibility of non-demand-response heat pump water heaters having user-selectable high heat modes. DOE will consider these concerns further at such time as it proposes to require high temperature testing for certain types of water heaters in a future rulemaking.

c. Representativeness of Field Use

AHRI indicated that additional operational modes to heat water above 125 °F are not meant to be the primary mode of operation and should not be used continuously. AHRI stated that the proposal in the July 2022 SNOPR to test water heaters with these modes at the settings providing the highest internal tank temperature does not reflect the purpose of these modes, and that proposal would require more test data than provided in the NOPR to understand its consequences. For these reasons, AHRI requested that DOE retract this proposal from the current rulemaking and address it at a later time. (AHRI, No. 55 at p. 6) Similarly, Rheem requested that DOE not consider water heaters with a temporary, non-default high heat mode as being water heaters with high heat modes and that DOE not include any changes related to high heat modes in the final rule. (Rheem, No. 47 at p. 6)

GEA argued that the essential function of ''delivery-control'' water heaters is no different than a consumer who sets their standard storage water heater to a higher temperature and regulates water temperature at the tap by mixing in cold water. GEA added that ''delivery-control'' water heaters provide practical energy savings benefits not captured by the consumer water heater test procedure, and that these energy savings benefits mitigate against requiring testing at the maximum tank storage temperature. Specifically, GEA described a use case where a consumer may use a ''delivery-control'' water heater in a high heat mode on occasion when more guests are in the home, which they suggested would, on balance, use less energy as compared to full time use of a water heater with an oversized storage capacity. (GEA, No. 53 at p. 3)

GEA suggested that many consumers already set their storage water heater to temperatures above 140 °F and that ''delivery-control'' water heaters simply allow consumers to do so in a safer way by premixing to a lower temperature, adding that such water heaters should not be penalized through efficiency ratings for providing a safety feature to prevent scalding. (GEA, No. 53 at p. 3)

GEA stated that DOE has provided no evidence that setting ''delivery-control'' water heaters at their maximum storage temperature is a ''representative average use cycle or period of use'' as required by EPCA at 42 U.S.C. 6293(b)(3). GEA also noted that many other products regulated under EPCA have modes that allow for increased or decreased energy consumption relative to their default

setting but that these modes are not included in their respective DOE test procedures because they have not been deemed representative of an average use cycle. (GEA, No. 53 at p. 4)

NYSERDA recommended that all water heaters with the option to elevate the tank temperature, except those with demand-response functionality, should be tested at the highest tank temperature available, as thermostatic mixing valves are regularly installed in the field. (NYSERDA, No. 50 at p. 3) The CA IOUs also commented that external mixing valves are readily available to consumers, and in at least one State (Vermont), they are required for all residential water heater installations. Therefore, the CA IOUs urged DOE to consider changes to its regulations that would further incentivize installers and consumers to minimize installation costs at the expense of energy efficiency. (CA IOUs, No. 52 at p. 5) GEA stated that thermostatic mixing valves can be integrated into a product at the factory or added as an accessory at a consumer's home and suggested that if manufacturers are required to make ''inaccurate'' representations of energy consumption for mixing valves integrated at factories, more mixing valves will be sold as accessories, because consumer demand for flexibility and safety will not change. (GEA, No. 53 at p. 4)

As previously discussed in the July 2022 SNOPR and in response to the comments of AHRI and Rheem, DOE expects that consumers who purchase a water heater with high heat modes intend to use it in order to meet hot water demands; therefore, testing these water heaters using only the default operational mode would not be representative of the product's energy consumption over an average use cycle. 87 FR 42270, 42279 (July 14, 2022). From its review of product literature, DOE has found that manufacturers of water heaters with high heat modes market these products as smaller storage water heaters which provide the delivery capacities of larger storage water heaters, and consumers may opt to install a smaller water heater with high heat mode in lieu of a larger water heater as a result (*e.g.,* if a larger water heater does not fit in the installation space). As such, in order to yield efficiency results that would be most representative of the product's enhanced delivery capabilities, DOE has concluded that it would be necessary to include a high temperature testing method.

In light of these comments, DOE has determined that the ability to operate with an elevated tank temperature is not limited to products with built-in mixing valves and user-selectable capacity boosting settings. DOE agrees with commenters that a product with a field-installed mixing valve and the storage tank manually set to a higher temperature could operate in much the same way, and that this practice may be prevalent given how readily available separate mixing valves are to consumers. As a result of these considerations, DOE concludes that it is possible such testing could be appropriate for models capable of heating and storing water above the delivery temperature specified in the test method while still delivering water at the setpoint temperature of 125 ± 5 °F. Thus, DOE is not limiting the high temperature testing method only to products with a specific capacity boosting mode. In other words, manufacturers may optionally apply the high temperature test method to electric resistance storage water heaters with the capability to heat and store water above the delivery setpoint temperature of 125 ± 5 °F, including products that would require a field-installed mixing valve to do so.

The provisions for high temperature testing adopted by this final rule complement the existing operational mode selection requirements, which, generally, would require water heaters to be set to a ''normal'' storage tank temperature close to the delivery setpoint of 125 °F (see section 5.2.1 of the currently applicable appendix E test procedure). Specifically, the high temperature testing provisions require setting the water heater to the highest storage tank temperature and installing a separate mixing valve to temper the delivery water to the outlet water requirements for products that do not already have a mixing valve installed. If the product is equipped with a built-in mixing valve, then the water heater's storage tank temperature shall be set to the highest temperature which allows the built-in mixing valve to deliver water in accordance with the outlet water requirements.

d. Use of High Temperature Testing

In response to the July 2022 SNOPR, NEEA agreed with DOE's proposal to implement this testing requirement only upon adoption of new standards. (NEEA, No. 56 at p. 2) A.O. Smith supported the Department's position that the effective date of the proposed changes to the test procedure covering user-selectable over-heat modes for non-demand-response water heaters should coincide with the compliance date of any amendments to the energy conservation standards for consumer water heaters. (A.O. Smith, No. 51 at p. 6)

Rheem stated that DOE's proposal to delay testing until amended standards are required may not align with EPCA at 42 U.S.C 6293(c)(2) [72] and requested clarification on DOE's interpretation of this statutory provision. (Rheem, No. 47 at p. 5) Rheem also requested DOE's interpretation of the 42 U.S.C. 6293(e)(2) requirement to ''amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure'' with respect to water heaters with high heat modes because the amended test procedure will alter their measured efficiency. (Rheem, No. 47 at p. 5)

In response to Rheem's questions regarding the relevant statutory provisions at 42 U.S.C. 6293(c)(2) and (e)(2), DOE has concluded that the Department's approach comports with both of these EPCA provisions. To recap, as discussed in section III.I of this document, DOE is not requiring compliance with the high temperature testing provisions until compliance with amended energy conservation standards that address water heaters with such capabilities, if finalized, because DOE has determined that this change to the test procedure will impact the measured efficiency of such water heaters. Under 42 U.S.C. 6293(c)(2), effective 180 days after an amended or new test procedure is prescribed or established for a covered product, no regulated party (*i.e.,* manufacturer, distributor, retailer, or private labeler) may make any representations about the energy use or efficiency of such product unless it has been tested according to the new or amended test procedure and such representations fairly disclose the results of such testing. In the present case, DOE is making clear that its test procedure provisions related to high temperature testing are not required to be used until the compliance date of any amended standards that address such water heaters.

Under 42 U.S.C. 6293(e)(1), DOE must determine whether any test procedure amendments would alter the measured energy efficiency, energy use, or

[72] Under 42 U.S.C. 6293(c)(2), the statute provides that effective 180 days after an amended or new test procedure applicable to a covered product is prescribed or established under paragraph (b) of this section, no manufacturer, distributor, retailer, or private labeler may make any representation—(A) in writing (including a representation on a label); or (B) in any broadcast advertisement, with respect to energy use or efficiency or, in the case of showerheads, faucets, water closets, and urinals, water use of such product or cost of energy consumed by such product, unless such product has been tested in accordance with such amended or new test procedure and such representation fairly discloses the results of such testing.

measured water use of any covered products as determined under the existing test procedure. As explained elsewhere, DOE has determined that the provisions for high temperature testing would alter measured efficiency, so this statutory provision is likewise satisfied.

Finally, under 42 U.S.C. 6293(e)(2), if DOE determines that its amended test procedure will alter the measured energy efficiency or energy use of a covered product, the Department shall amend the applicable energy conservation standard during the rulemaking carried out with respect to such test procedure. This provision applies to the currently applicable energy conservation standard. As noted previously, the high temperature testing provisions that would alter the measured energy efficiency of certain water heaters are not required for determining compliance with the currently applicable standard. These provisions would only be required on the compliance date of any amended standards that address such water heaters. As such, there is no need to amend the current standards under 42 U.S.C. 6293(e)(2).

DOE has determined that the high temperature test method should apply to electric resistance storage water heaters for the reasons discussed in section III.E.1 of this document. Specifically, based on information from stakeholders regarding the operation of demand-response water heaters (see section III.E.1.b of this document) and the Department's own testing and calculations (see section III.F.2.a of this document), DOE has determined that the high temperature test method would apply to electric resistance storage water heaters that are capable of raising their internal tank temperature significantly above their delivery temperature, without utility initiation, to boost hot water delivery capacity in order to meet daily household needs. Products which raise the internal tank temperature only as part of demand-response operation should not use this method.

In this rulemaking, commenters have urged DOE to provide better clarity and specificity regarding which water heaters may be ''exempt'' from high temperature testing (for example, see NYSERDA's comments discussed in section III.A.1 of this document). In the concurrent the energy conservation standards rulemaking, DOE may consider and propose additional criteria to further specify the subset of water heaters which would have to comply with potential amended standards using the high temperature test method. This is because there could be specific cases when a water heater would reach a higher storage tank temperature in a way that does not necessarily increase the delivery capacity over the course of an average use cycle. For example, a user may choose to use an elevated setpoint for storage temperature, but with a delivery temperature equal to this setpoint. In such a case where a higher delivery temperature is actually desired, because no cold water mixing is occurring at the outlet, there is no increase in the volume of hot water that can be provided to the home. Therefore, in its accompanying energy conservation standards rulemaking for consumer water heaters, DOE will consider specifying what user-controllable tank temperature settings might actually constitute ''delivery capacity boosting.'' Additionally, DOE will also consider the length of time these settings may be in use to determine which types of temperature settings would result in capacity boosting over an average daily use cycle.

Once again, because high temperature testing may cause ratings for certain electric resistance storage water heaters to decrease, DOE is not requiring the use of these test provisions until the compliance date of any new energy conservation standards addressing such water heaters (*i.e.,* as part of the separate rulemakings for consumer water heaters). After the effective date of this final rule and before the compliance date of an amended standards final rule, manufacturers of certain electric resistance storage water heaters will be allowed to use the high temperature test method voluntarily to make additional representations of performance in high-temperature mode.

2. Very Small Draw Pattern Flow Rate

Section 5.4.1 of appendix E states that if the Max GPM is less than 1.7 gpm (6.4 L/min), then the very small draw pattern must be used during the 24-hour simulated-use test. Section 5.5 of appendix E states that, for the very small draw pattern, if the water heater has a Max GPM rating less than 1 gpm (3.8 L/min), then all draws shall be implemented at a flow rate equal to the rated Max GPM.

As discussed in the January 2022 NOPR, DOE has identified flow-activated water heaters that are designed to deliver water at the set point temperature of 125 °F ±5 °F (51.7 °C ±2.8 °C) that is required by section 2.5 of appendix E at a flow rate well below 1 gpm (3.8 L/min). For these products, the second draw of the very small draw pattern requires 1 gallon to be removed at the rated Max GPM, and the pattern requires the third draw to start five minutes after the initiation of the second draw. However, any rated Max GPM less than or equal to 0.2 gpm (0.76 L/min) will result in the second draw lasting more than five minutes and past the start time of the third draw. To clarify the appropriate method of testing these products, DOE proposed to amend the very small draw pattern description to state that when a draw extends beyond the start time of a subsequent draw, that the subsequent draw will start after the required volume of the previous draw has been delivered. 87 FR 1554, 1582 (Jan. 11, 2022).

DOE did not receive any comments in response to this proposal, so, therefore, in this final rule, DOE is adopting the amendment to appendix E as proposed in the January 2022 NOPR for the reasons previously stated.

3. Low-Temperature Water Heaters

Low-temperature water heaters (discussed further in section III.A.4.b of this document) are flow-activated products that do not deliver temperatures within the required set point temperature range of 125 °F ±5 °F when tested according to the supply water temperature and flow rate requirements of appendix E. These products are typically suited for point-of-use (POU) applications where the outlet water is minimally tempered prior to delivery through the faucet (typically marketed as ''handwashing'' or ''POU water heaters''). However, because these products cannot meet the outlet temperature requirements in appendix E, DOE is establishing new provisions to address these products.

One primary concern identified in this rulemaking is that these units typically have low heating rates, which currently requires the testing agency to reduce the flow rate in order to be able to achieve the outlet temperature within the set point temperature range. However, these units have a minimum activation flow rate below which the unit shuts off. To the extent that a unit would stop heating water when the flow rate is too low, there may be no flow rate at which the unit would operate and deliver water at the outlet temperature required under section 2.5 of appendix E. In response to the April 2020 RFI, commenters generally indicated that DOE should adopt provisions to use a lower setpoint temperature for low-temperature water heaters. 87 FR 1554, 1582 (Jan. 11, 2022).

For the reasons explained in further detail in the January 2022 NOPR, DOE proposed that low-temperature water heaters be tested at the maximum delivery temperature when using the flow rate requirements already

established in appendix E. Specifically, lowering the flow rate in order to establish a delivery temperature of 125 °F may not be feasible for these products because the flow rate may be so low that the water heater does not activate. DOE tentatively determined that lowering the set point temperature for low-temperature water heaters to their maximum possible delivery temperature would permit these water heaters to be tested appropriately and in a manner that would produce representative test results. 87 FR 1554, 1582–1583 (Jan. 11, 2022).

In commenting on this issue, BWC requested that DOE further assess differences in testing and ratings between electric instantaneous water heaters and low-temperature water heaters. (BWC, No. 33 at p. 8)

In response, DOE will continue to assess the impact of the test procedure provision in section 5.2.2 of appendix E on ratings for low-temperature water heaters as more of these products enter the market and are certified, but at this time, DOE is adopting these provisions in order to set forth a repeatable, representative approach to testing such products. Currently, there is no appendix E test method to test low-temperature water heaters, and, therefore, ratings for low-temperature water heaters are not possible until the effective date of this final rule. DOE is distinguishing low-temperature water heaters from other electric instantaneous water heaters mainly on the inability to reach the standardized outlet water temperatures under the appendix E test procedure. DOE will consider potential impacts on UEF ratings in its concurrent energy conservation standards rulemaking (*see* Docket No. EERE–2017–BT–STD–0019).

4. Delivery Temperature for Flow-Activated Water Heaters

In providing comments in response to the January 2022 NOPR, AET introduced a new topic for DOE to consider when amending the test procedure for consumer water heaters and residential-duty commercial water heaters. AET indicated that the test procedure needs to further clarify the process for setting the delivery temperature for flow-activated water heaters. The commenter argued that such clarification is necessary because the DOE test procedure simply says to initiate normal operation of the water heater at the design power rating. AET stated that, when operating flow-activated water heaters at their maximum heating rate, outlet temperature can be controlled two different ways: (1) adjust some thermostat, and/or (2) adjust flow rate; since the instructions do not specify a flow rate at which to set the thermostat, it is theoretically possible to set the thermostat to a very high temperature, and then adjust the flow rate so that the unit only delivers the desired 125 °F outlet temperature. AET claimed that this would allow the water heater to deliver much hotter temperatures when the flow rate is less than the flow rate needed to deliver 125 °F when operating at maximum heating rate. AET recommended to amend the test procedure so as to provide instructions that the flow rate for draws should be 90 percent of the theoretically calculated maximum flow rate that could be achieved when operating at a full heating rate and delivering the required 125 °F outlet temperature in order to ensure that this temperature is consistent. (AET, No. 29 at p. 11)

On this issue, DOE notes that section 5.2.2.1 of appendix E, ''*Flow-Activated Water Heaters, including certain instantaneous water heaters and certain storage-type water heaters,*'' instructs the test agency to first initiate normal operation of the water heater at the full input rating for electric water heaters and at the maximum firing rate specified by the manufacturer for gas or oil water heaters. Section 5.2.2.1 then states that the test agency must monitor the discharge water temperature and set to a value of 125 °F ±5 °F (51.7 °C ±2.8 °C) in accordance with the manufacturer's instructions. If the water heater is not capable of providing this discharge temperature when the flow rate is 1.7 gallons ±0.25 gallons per minute (6.4 liters ±0.95 liters per minute), then the flow rate is adjusted as necessary to achieve the specified discharge water temperature. Once the proper temperature control setting is achieved, the setting must remain fixed for the duration of the maximum GPM test and the simulated-use test.

In response to AET's comment, DOE notes that the current appendix E test instructions specify that the flow rate for setting the discharge water temperature is 1.7 gallons ±0.25 gallons per minute (6.4 liters ±0.95 liters per minute). If a discharge temperature of 125 °F ±5 °F is not possible at that flow rate, the test method allows for the flow rate to be varied only to the extent necessary to achieve a discharge temperature of 125 °F ±5 °F. Therefore, DOE has determined that the current instruction is explicit enough for the delivery temperature setting to be conducted in a repeatable and reproducible manner.

5. Heat Pump Water Heaters

In this rulemaking, DOE has sought to address multiple test procedure provisions related to heat pump water heaters. In section III.A.2 of this final rule, DOE discusses the scope of applicability of the appendix E test procedure to heat pump water heaters designed for residential applications. Section III.C.7 of this document describes the new optional test conditions being allowed for heat pump water heaters for voluntary representations of E_X based on NEEA's Advanced Water Heating Specification. Additionally, DOE is amending ambient air condition tolerances for heat pump water heater testing because air-source heat pumps exchange latent and sensible heat [73] with the surrounding air, and, thus, the water heater's normal operation will have a tangible impact on air temperature and moisture content (*see* section III.C.4 of this document). Furthermore, there are other requirements being established for the test set-up and installation of split-system heat pump water heaters and circulating heat pump water heaters (*see* sections III.D.1 and III.D.4 of this document).

In addition to these topics, DOE has evaluated the draw patterns for conducting the 24-hour simulated-use test on heat pump water heaters with back-up electric resistance heating elements. In the present market, consumer heat pump water heaters are typically ''integrated,'' with the air-source heat pump and storage tank built together into one assembly. This ''typical'' consumer heat pump water heater uses electricity and has back-up electric resistance elements within the storage tank. Heating water with the heat pump components is more efficient than heating water with the back-up resistance elements. Therefore, water heaters with controls that prioritize heat pump water heating over resistance element water heating will operate more efficiently than water heaters that do not prioritize heat pump water heating or that do not prioritize heat pump water heating to the same extent.

In response to the April 2020 RFI, the Joint Commenters suggested modifying the test procedure to reflect the effectiveness of controls in minimizing use of the resistance element in heat pump water heaters, stating this modification would improve the

[73] ''Sensible heat'' refers to heat that is exchanged with surrounding air that is detectable by measuring the change in temperature of the air, as it does not change the moisture content of the air. ''Latent heat'' refers to heat that is exchanged when moisture in the air is condensed into liquid water (*i.e.,* at the evaporator of a heat pump water heater).

representativeness of the test procedure and create new incentives for manufacturers to develop products that provide increased savings for consumers. As noted in the January 2022 NOPR, no suggestion was provided on how to better reflect the use of controls to minimize element usage. 87 FR 1554, 1583 (Jan. 11, 2022).

In the January 2022 NOPR, DOE noted that its test data indicate that most (or possibly all) heat pump water heater models available on the market currently operate without activating the electric elements during the 24-hour simulated-use test under the current appendix E test procedure. DOE argued that although element usage during the test could be forced through a more aggressive draw pattern (*i.e.,* longer or more frequent draws designed to deplete the water heater and require more hot water than the heat pump alone could keep up with), the draw patterns are required to be representative of actual use. Therefore, designing the draw pattern with the goal of forcing resistance element use would not be representative of typical use. 87 FR 1554, 1583 (Jan. 11, 2022).

In commenting on this issue in response to the January 2022 NOPR, the ASAP, ACEEE and NCLC once again encouraged DOE to evaluate whether current draw patterns are representative of real-world conditions for heat pump water heaters. The ASAP, ACEEE and NCLC noted that investigations conducted by NEEA [74] indicate that electric resistance elements are activated more frequently in heat pump water heaters than DOE observed in its testing. Specifically, ASAP, ACEEE and NCLC pointed to the finding in the NEEA study that the average annual proportion of total input energy that was provided by resistance heat ranged from 4 to 45 percent, depending on the water heater model and location of installation. (ASAP, ACEEE, and NCLC, No. 34 at p. 2) However, DOE did not receive any additional comments in this rulemaking providing any specific approach to testing heat pump water heaters with back-up electric resistance elements in a more representative manner.

In response, DOE notes that the 2015 study by NEEA relies on data collected in a limited geographical area within the U.S.—namely, the Pacific Northwest—and the results may not be representative of installations across the U.S, which is the requisite benchmark for a Federal test procedure. For example, one condition for electric resistance back-up is when the ambient air temperature is below the low-temperature cut-out of the compressor (*e.g.,* 45 °F), and this is more likely to occur in northern climates than it is to occur across the country as a whole. Nevertheless, the study finding demonstrated a substantial range of electric resistance contribution, such that it remains unclear whether an amended draw pattern would be more representative.

The CA IOUs did, however, suggest that DOE should consider any distinguishing characteristics of 120-volt heat pump water heaters that might require changes to the test procedure to represent their real-world performance accurately. (CA IOUs, No. 36 at p. 4) In response to the CA IOUs, within the context of back-up element usage, early indications suggest that not all 120-volt heat pump water heaters will employ back-up electric resistance heating elements due to limitations on a 120-volt circuit, but this market is still evolving. As of this final rule, there are only a limited number of commercially-available 120-volt heat pump water heaters, so DOE has determined that it is premature to establish specific testing requirements for 120-volt heat pump water heaters at this time. Without adequate test data from these products, there is uncertainty as to what, if any, specific requirements for 120-volt heat pump water heaters would be appropriate.

Therefore, after considering these comments and the lack of available data on this topic, DOE has decided to maintain the current language in section 5.1 of appendix E and is not adopting draw patterns specific to any type of heat pump water heater. Accordingly, the draw patterns for electric water heaters generally will continue to apply to these products. DOE will continue to collect information on this topic to inform a future test procedure rulemaking.

6. Draw Pattern for Commercial Applications

In response to the April 2020 RFI and as discussed in the January 2022 NOPR, EEI suggested DOE consider a test procedure for consumer water heaters used in commercial applications that includes a draw pattern more demanding than the ''high'' draw pattern, which is currently the draw pattern with the largest amount of delivered water in the appendix E test procedure. 87 FR 1554, 1575–1576 (Jan. 11, 2022).

In the January 2022 NOPR, DOE stated that 42 U.S.C. 6293(b)(3), in relevant part, requires that any test procedures prescribed or amended shall be reasonably designed to produce test results which measure energy efficiency of a covered product during a representative average use cycle or period of use. Consumer water heaters are designed for use in residential applications, and as such, a draw pattern representative of a commercial installation would not be representative of the product's average use cycle or period of use. For these reasons, DOE declined to propose a draw pattern with a delivered volume greater than the high draw pattern in appendix E. 87 FR 1554, 1576 (Jan. 11, 2022).

BWC agreed that there is no need for a draw pattern above ''high draw,'' since the high draw pattern adequately addresses products that have high hot water deliverability within the scope of the test procedure. (BWC, No. 33 at p. 6)

As such, DOE is not adding another draw pattern to the appendix E test procedure in this final rule for the reasons previously stated.

7. Method for Determining Internal Tank Temperature for Certain Water Heaters

Section 4.5 of appendix E provides the procedure for measuring the internal storage tank temperature for water heaters with a rated storage volume at or above 2 gallons. Section 4.5 of appendix E specifies that the thermocouples be inserted into the storage tank of a water heater through either the anodic device opening, the temperature and pressure relief valve, or the outlet water line. However, DOE has identified consumer water heaters with physical attributes that make measuring internal storage tank temperature difficult, such as water heaters that have a built-in mixing valve and no anodic device, or that have a large heat exchanger that does not accommodate insertion of a thermocouple tree. In this rulemaking, DOE sought suggestions from stakeholders on how the internal storage tank temperature should be measured for these types of designs. After considering the comments received, DOE is amending the appendix E test procedure to specify a method for determining the internal mean tank temperature for such products, as discussed in detail later in this section.

In response to the April 2020 RFI and as discussed in the January 2022 NOPR, BWC recommended a ''drain-down'' approach to address water heaters that cannot have their internal storage tank

[74] ASAP, ACEEE and NCLC cited NEEA's 2015 Heat Pump Water Heater Model Validation Study, (Report #E15–306), found online at: *ecotopewebstorage.s3.amazonaws.com/2015_001_1_HPWHModelVal.pdf* (Last accessed on Sept. 13, 2022).

temperatures measured directly (a position echoed by Rheem). More specifically, BWC's suggested approach consisted of the following: (1) After the FHR test, purging the water heater with inlet water at 58 °F ± 2 °F to establish the mean tank temperature at the beginning of the 24-hour simulated-use test; (2) allowing the water heater to heat up to the original thermostat setting and recording the energy used to do so; (3) running the appropriate draw pattern, then fully draining the water heater by gravity, while measuring the mass and temperature of the water; and (4) calculating the energy change as: energy change = mass × specific heat × the difference between the average end temperature and the beginning temperature just after the 58 °F purge. Rheem also supported a drain-down method, whereby the entire volume would be removed and the temperature measured at the end of the 24-hour test. 87 FR 1554, 1586 (Jan. 11, 2022).

However, DOE's primary concern with the suggested drain-down approach was that it cannot be conducted at every stage during the 24-hour simulated-use test when the mean tank temperature measurement is required. As discussed in the January 2022 NOPR, the procedures recommended by BWC and Rheem could provide an estimate of the mean tank temperature at the start and end of the 24-hour simulated-use test but would not provide an estimate at the end of the first recovery period, the start and end of the standby period, or an average over the standby period, all of which are required for determining UEF. Instead of BWC's drain-down approach, DOE initially proposed a methodology with a modified approach, wherein the mean tank temperature would be estimated as the average of the inlet water temperature and the outlet water temperature each time a mean tank temperature measurement was required. This method assumes that the stored water gradually (*i.e.,* linearly) increases in temperature either from the bottom of the tank to the top, or the further the water is into the heat exchanger from the water inlet, depending on the design of the water heater being tested. As the exact internal dimensions of the storage tank or heat exchanger cannot be known for every water heater, DOE reasoned that the linear assumption is the most representative of the water heater market as a whole. 87 FR 1554, 1586–1587 (Jan. 11, 2022).

In response to DOE's proposal, AHRI, A.O. Smith, and BWC indicated that the linear temperature gradient assumption inherent to the proposed methodology in the January 2022 NOPR is incorrect, based on the companies' own test results. (AHRI, No. 40 at p. 5; A.O. Smith, No. 37 at pp. 5–6; BWC, No. 33 at p. 10) In contrast, Rheem supported DOE's proposed linear temperature gradient assumption. (Rheem, No. 31 at p. 4) None of the comments received in response to the January 2022 NOPR suggested an alternative approach, so in the July 2022 SNOPR, DOE revised its proposal to incorporate aspects of BWC's method but included additional methods to estimate the intermediate temperatures required for efficiency calculations. 87 FR 42270, 42283–42284 (July 14, 2022).

In the July 2022 SNOPR, DOE proposed the following methodology for water heaters with rated storage volumes greater than or equal to 2 gallons that are unable to have their internal tank temperatures measured using thermocouples:

(1) After the FHR test (for non-flow-activated products) or Max GPM test (for flow-activated products), allow the water heater to fully recover.

(2) When cut-out occurs, deactivate the burner, compressor, and/or electrical heating elements.

(3) Remove the hot water from the tank by performing a continuous draw, while measuring the outlet water temperature at 3-second intervals, until the outlet water temperature is within 2 °F of the inlet water temperature for five consecutive readings. Perform the draw at a flow rate of 3.0 gallons per minute (±0.25 gallons per minute). Compute the mean tank temperature, $\overline{T}$st, as follows and assign this value as $\overline{T}$0, $\overline{T}$su,0, and $\overline{T}$max,1:

$$\bar{T}_{st} = T_p - \frac{v_{out,p}}{V_{st}} \times \tau_p(\bar{T}_{in,p} - \bar{T}_{out,p})$$

Where:

$\overline{T}_{st}$ = the estimated average internal storage tank temperature.

T_p = the average of the inlet and the outlet water temperatures at the end of the period defined by τ_p.

$v_{out,p}$ = the average flow rate during the period.

V_{st} = the rated storage volume of the water heater.

τ_p = the duration of the period, determined by the length of time taken for the outlet water temperature to be within 2 °F of the inlet water temperature for 15 consecutive seconds. The duration of the period shall include the 15-second stabilization period.

$\overline{T}_{in,p}$ = the average of the inlet water temperatures during the period.

$\overline{T}_{out,p}$ = the average of the outlet water temperatures during the period.

(4) Re-activate the burner, compressor, and/or electrical elements and perform the 24-hour simulated use test as instructed in section 5.4 of appendix E.

(5) The standby period will start at five minutes after the end of the first recovery period after the last draw of the simulated-use test. The standby period shall last eight hours, so testing will extend beyond the 24-hour duration of the simulated-use test. At the end of the final standby measurement, remove water from the tank once again as in step #3, including computing the value of mean tank temperature. This calculated mean tank temperature is then assigned as $\overline{T}$su,f and $\overline{T}$24.

(6) Determine $\overline{T}$t,stby,1 as the average of $\overline{T}$su,0 and $\overline{T}$su,f.

The revised proposal relied on a different assumption—supported by DOE's test data—that, for typical storage-type water heaters, $\overline{T}_0$, $\overline{T}_{su,0}$, and $\overline{T}_{max,1}$ are similar in that they represent temperatures near the cut-out control temperature. Furthermore, the mean tank temperature at the end of the standby period, $\overline{T}_{su,f}$, can also be measured by removing water and measuring its temperature at the end of a sufficiently long standby period at the end of the test, and this value could also approximate $\overline{T}_{24}$. 87 FR 42270, 42284–42285 (July 14, 2022).

In response to the July 2022 SNOPR, AHRI stated that manufacturers would need additional time to complete testing to verify the proposed equations and requested that DOE provide additional data and evidence that the method is appropriate before adopting it. Further, AHRI asked that DOE specify the correct procedure if the initial recovery period extends beyond the start of the second draw. (AHRI, No. 55 at p. 8) A.O. Smith expressed support for the revised proposal in the SNOPR, but the commenter added that manufacturers will need to work with the Department as additional testing on the identified products ensues, should this proposed change become part of any final rule.

(A.O. Smith, No. 51 at p. 9) BWC stated that the equation presented in the SNOPR is an improvement over the January 2022 NOPR proposal that will more effectively measure internal tank temperatures. However, BWC also commented that it has insufficient data to support or reject some elements of the proposal, and the company provided as an example the DOE's assumption made in the SNOPR proposal that $\overline{T}_{max}$ and $\overline{T}_{su}$ are similar. BWC explained that it would like to conduct additional testing before commenting further. (BWC, No. 48 at p. 5)

Rheem noted that the procedure as proposed in section 5.4.2.2 of the proposed appendix E does not align with steps 1 and 2 of the preamble. Specifically, Rheem argued that the preamble states that after the FHR or Max GPM test, the unit should be allowed to fully recover, and then, one would deactivate the burner, compressor, and/or elements, and remove the hot water from the tank, which would result in a comparatively ''hot'' water temperature that is representative of a $\overline{T}_{max,1}$ or $\overline{T}_{su,0}$ value, both of which are measured after a draw and that is normally followed by a recovery; however, section 5.4.2.2 of the proposed appendix E states that a 1-hour idle period is to be performed prior to draining the tank, which would result in a comparatively ''low'' water temperature that is representative of $\overline{T}_0$, a measurement taken after an idle period where no energy was added to the tank. Rheem requested DOE clarify which method should be used. (Rheem, No. 47 at p. 8) Rheem also requested DOE clarify when a soak-in period is required when testing a water heater that cannot have the internal storage tank temperature directly measured, and specifically, the commenter asked whether a soak-in period is required between draining the tank after FHR testing and starting the 24-hour simulated use portion of the test. (Rheem, No. 47 at p. 8)

Rheem stated that the proposed procedure drains water from the unit at a flow rate of 3 gpm until the inlet and outlet temperatures match, which means all energy in the water and tank/heat exchanger has been removed from the unit under test. Rheem requested that DOE clarify that this is the intent of the procedure and suggested that as an alternative, since the storage volume is known, the test could simply remove the stored water and estimate the internal tank temperature using the proposed equation. (Rheem, No. 47 at p. 8) Rheem also recommended that the flow rate used for draining the tank be the flow rate of draw 1 of the 24-hour simulated-use test and that the temperatures be measured throughout the draw, not just after the first 15 seconds, stating that the flow rate of 3 gpm may be too fast for some water heaters or would not account for the true energy content of the internal water. (Rheem, No. 47 at p. 8) Lastly, Rheem requested that DOE provide the derivation of the $\overline{T}_{st}$ equation, stating that the derivation and assumptions are not immediately apparent. (Rheem, No. 47 at, p. 9)

In response, DOE provides the following clarifications. With respect to AHRI's request for clarification of the test procedure in terms of whether the initial recovery period extends beyond the start of the second draw, DOE notes that the tank would only be drained of hot water twice regardless of when the initial recovery period ends—once after recovery after the FHR or max GPM test, and once at the end of the standby period at the end of the test. The mean tank temperature determined during the first draining would be used to approximate $\overline{T}_{max,1}$ regardless of when that actually occurs during the test, as DOE expects that $\overline{T}_{max,1,}$ which occurs after the first recovery period ends, would not vary significantly depending on whether it occurs after the second draw. Regarding Rheem's request for a clarification of whether a 1-hour idle period is required before the first time drawing off all of the hot water in the tank, DOE clarifies that the 1-hour idle period is required, as was presented in the regulatory text in the SNOPR. As shown in Table III.3 which follows, $\overline{T}_0$ measurements taken after the 1-hour idle period are comparable to $\overline{T}_{max,1}$ and $\overline{T}_{su,f}$ measurements. In addition, for tanks for which the internal tank temperature cannot be directly measured, the same soak-in provisions apply as those that apply generally as described in sections 5.2.4 and 5.4.2 of appendix E.

Regarding Rheem's suggestion to remove volume of stored water in the tank and use the average temperature of that water to represent the measured mean tank temperature, DOE notes that when drawing off hot water through the hot water outlet, cold water is introduced into the tank which could mix with the stored water. Removing only the stored volume in the tank could result in an artificially low mean tank temperature due to the cold inlet water mixing with the stored water, whereas the proposed approach accounts for all of the thermal energy contained in the tank to estimate the temperature of the stored water prior to removing the hot water from the tank. A valid estimate of the tank temperature could be obtained by shutting off the supply (inlet) water line and draining the tank by gravity using the drain at the bottom. However, such an approach would likely require additional equipment for the test set-up, such as an additional temperature sensor, a flowmeter to measure the water leaving through the drain, and a flow control valve to manage the water exiting the drain, equipment not currently included in the typical test set-up. In addition, DOE has found that for some water heaters, even after draining by gravity, a small volume of water remains in the bottom of the tank, which would be difficult to account for under such an approach. After considering these comments, DOE has concluded that the methodology proposed in the SNOPR would not require changes to the test set-up and, therefore, would be less burdensome.

DOE agrees with Rheem that a flow rate of 3.0 gpm may not be appropriate for all water heaters, and in particular it may be too high for temperature sampling rates to accurately estimate the mean tank temperature of smaller water heaters. Thus, DOE is adopting Rheem's suggestion to withdraw water at a flow rate equal to the flow rate of the first draw in the applicable draw pattern. DOE also agrees with Rheem that starting the measurements immediately, rather than after 15 seconds, would provide a more accurate representation of tank temperature, and, therefore, the Department is adopting that recommendation as well.

In response to these comments, DOE re-evaluated its own test data in order to further validate the method for determining internal tank temperature outlined above. Underpinning this method is an assumption that during a simulated use test, the mean tank temperatures that occur after the tank has been in standby for some time, $\overline{T}_{su,f}$ and $\overline{T}_{24}$, are typically very similar to each other, and that the tank temperatures measured soon after a recovery and subsequent ''cut-out'', $\overline{T}_{su,0}$, $\overline{T}_0$, and $\overline{T}_{max,1}$, are also typically very similar to each other. This is because water heaters with thermostats have a control band near the setpoint which directs the cut-in and cut-out to occur once the setpoint is reached. Table III.2 and Table III.3 below show the mean tank temperatures for a sample of 29 consumer water heaters.

TABLE III.2—$\overline{T}_{su,f}$ AND $\overline{T}_{24}$ VALUES FOR WATER HEATERS TESTED BY DOE

Test No.	Product type *	Draw pattern	$\overline{T}_{su,f}$ (°F)	$\overline{T}_{24}$ (°F)	Difference between $\overline{T}_{su,f}$ and $\overline{T}_{24}$ (°F)
1	ES	Low	125.2	127.9	2.72
2	ES	Medium	121.2	116.7	4.50
3	ES	Medium	124.2	123.8	0.40
4	ES	Medium	122.7	122.1	0.56
5	ES	Medium	120.2	121.6	1.44
6	ES	Medium	123.7	120.7	3.04
7	ES	Medium	120.1	119.5	0.60
8	ES	Low	121.7	122.5	0.78
9	ES	Medium	124.2	117.8	6.42
10	ES	Medium	127.1	126.8	0.27
11	ES	High	124.4	122.9	1.54
12	ES	Low	123.4	120.6	2.83
13	ES	Medium	121.1	116.0	5.13
14	ES	Medium	121.5	119.5	1.96
15	ES	Medium	117.4	119.8	2.42
16	ES	Medium	117.5	123.9	6.43
17	ES	Medium	125.1	124.2	0.93
18	ES	Low	121.3	120.4	0.91
19	ES	Medium	119.5	119.4	0.10
20	ES	Medium	122.7	114.5	8.17
21	ES	Medium	116.3	124.5	8.16
22	ES	Medium	112.8	118.2	5.38
23	ES	Medium	126.0	135.8	9.83
24	ES	Medium	124.9	122.7	2.22
25	ES	Low	124.1	122.4	1.72
26	GS	Medium	125.7	126.3	0.60
27	GS	High	125.7	126.3	0.60
28	GS	Medium	125.4	132.8	7.40
29	GS	High	128.9	130.6	1.70
Minimum					0.10
Arithmetic Mean					3.06
Maximum					9.83

* **Note:** "ES" denotes an electric storage water heater, and "GS" denotes a gas-fired storage water heater.

TABLE III.3—$\overline{T}_0$, $\overline{T}_{max,1}$, AND $\overline{T}_{su,0}$ VALUES FOR WATER HEATERS TESTED BY DOE

Test No.	Product type *	Draw pattern	$\overline{T}_0$ (°F)	$\overline{T}_{max,1}$ (°F)	$\overline{T}_{su,0}$ (°F)	Maximum difference between $\overline{T}_0$ $\overline{T}_{max,1}$ and $\overline{T}_{su,0}$ (°F)
1	ES	Low	118.2	116.8	114.0	4.20
2	ES	Medium	117.1	119.8	120.2	3.07
3	ES	Medium	119.0	116.0	119.6	3.60
4	ES	Medium	118.3	119.6	120.2	1.95
5	ES	Medium	124.2	117.8	119.5	6.36
6	ES	Medium	117.7	118.7	119.8	2.13
7	ES	Medium	119.2	116.2	117.5	3.02
8	ES	Low	122.0	117.1	115.6	6.40
9	ES	Medium	124.4	121.3	121.1	3.33
10	ES	Medium	122.4	120.5	122.5	2.00
11	ES	High	120.8	121.1	122.7	1.91
12	ES	Low	123.8	120.7	124.5	3.80
13	ES	Medium	116.8	121.9	119.5	5.13
14	ES	Medium	120.8	126.0	125.2	5.17
15	ES	Medium	121.8	121.2	121.6	0.56
16	ES	Medium	120.6	121.8	122.6	1.98
17	ES	Medium	121.1	118.6	121.4	2.80
18	ES	Low	121.0	121.4	118.6	2.80
19	ES	Medium	122.5	115.3	116.5	7.20
20	ES	Medium	120.1	124.1	125.8	5.75
21	ES	Medium	124.5	116.7	118.8	7.80
22	ES	Medium	122.7	113.6	114.9	9.05
23	ES	Medium	125.6	120.4	122.2	5.23
24	ES	Medium	124.6	124.4	125.4	1.00
25	ES	Low	123.4	118.4	119.1	4.97

TABLE III.3—$\overline{T}_0$, $\overline{T}_{max,1}$, AND $\overline{T}_{su,0}$ VALUES FOR WATER HEATERS TESTED BY DOE—Continued

Test No.	Product type *	Draw pattern	$\overline{T}_0$ (°F)	$\overline{T}_{max,1}$ (°F)	$\overline{T}_{su,0}$ (°F)	Maximum difference between $\overline{T}_0$ $\overline{T}_{max,1}$ and $\overline{T}_{su,0}$ (°F)
26	GS	Medium	125.0	126.0	128.0	3.00
27	GS	High	126.1	125.2	131.8	6.60
28	GS	Medium	124.1	128.7	131.4	7.30
29	GS	High	124.7	123.8	129.8	6.00
Minimum						0.5656
Arithmetic Mean						4.28
Maximum						9.05

* **Note:** "ES" denotes an electric storage water heater, and "GS" denotes a gas-fired storage water heater.

On average, across multiple product classes, the temperatures $\overline{T}_{su,f}$ and $\overline{T}_{24}$ vary about 3 °F from each other. Similarly, the temperatures $\overline{T}_0$, $\overline{T}_{max,1}$, and $\overline{T}_{su,0}$ vary about 4 °F from for each other. In both cases, the range of variability between the mean tank temperatures of the water heaters in the sample was from less than 1 °F up to 9 °F. Based on these data, DOE has concluded that both the temperatures are similar enough among each other that grouping them together for determining internal storage tank temperature, as proposed in the July 2022 SNOPR, is reasonably valid when there is no direct alternative of measuring these temperatures. As such, in this final rule, DOE is adopting the method for determining internal storage tank temperature as proposed in the July 2022 SNOPR with the modifications discussed in the preceding paragraphs.

In response to Rheem's request for a derivation of the $\overline{T}_{st}$ equation, DOE notes that it was derived based on the assumption that the withdrawn water has the same amount of energy as the water stored in the tank, since there would be no energy input (*i.e.,* the burner, compressor, and/or electrical heating elements are deactivated) and assuming minimal losses over the course of the draw. Specifically, DOE sought to determine the initial mean tank temperature of the water, denoted by $\overline{T}_{st}$. The energy in the withdrawn water can be calculated based on its mass, specific heat, and the temperature difference between the water and the ambient air, which are all parameters that can be measured or determined directly as the water is being withdrawn from the tank. As noted previously, this value can then be assumed to be equal to the energy that would have been stored in the tank before withdrawing the water, which can also be determined based on its mass, specific heat, and temperature difference. The mass of water in the tank can be determined based on the stored volume and density; the specific heat can be assumed as 1 Btu/lb°F, and the temperature difference can be calculated as $\overline{T}_{st.}$ minus the ambient temperature. As $\overline{T}_{st}$ is the only unknown, the equation can be rearranged to solve for $\overline{T}_{st}$ to provide an estimate of the mean tank temperature prior to withdrawing water.

In response to requests made by AHRI, A.O. Smith, and BWC for additional time to conduct testing, DOE reiterates that test procedures must be established for all products within the scope of this rulemaking. DOE is finalizing this method for determining internal tank temperature based on an evaluation of its own test data, and the Department does not believe it is necessary to delay publication of this final rule for additional data to be collected on this topic. Water heaters with rated storage volumes greater than or equal to 2 gallons whose internal tank temperatures cannot be measured using thermocouples meet the definition of ''consumer water heater'' as codified at 10 CFR 430.2; therefore, they are covered products and must have applicable test procedures. In this case, based on information from its own testing, DOE is establishing these test procedures in this final rule.

8. Alternate Order 24-Hour Simulated-Use Test

As discussed in the January 2022 NOPR, DOE received comments at the RFI stage from SMTI recommending that DOE move the standby loss period of the test to the beginning of the 24-hour simulated-use test and to start the first draw at the 6-hour mark, based on claims that water heaters with large storage volumes but low input rates (*e.g.,* storage-type heat pump water heaters) may receive artificially low recovery efficiency results from the current test method with the standby loss period occurring in the middle of the test. 87 FR 1554, 1587 (Jan. 11, 2022).

In the January 2022 NOPR, DOE noted that as a general matter, the result of the standby period has a negligible effect on UEF, so moving the standby period to the start of the rest would likewise have a negligible effect on UEF in terms of improving the accuracy of the standby loss calculations for most water heaters. However, DOE agreed that moving the standby period to the start of the test may affect the recovery efficiency of the large-volume/low-input-rate water heaters described by SMTI, and a large change in recovery efficiency can have a significant effect on UEF. DOE tentatively determined that the first recovery is rarely delayed past the first draw (based on DOE's own test data), but if the order of the 24-hour simulated-use test were to be changed (*i.e.,* placing the standby loss period at the beginning), all water heaters on the market would need to be retested. Therefore, DOE declined to propose such a change, as the associated burden on manufacturers to retest would result in a potential increase in accuracy for only a small subset of the consumer water heaters available on the market. 87 FR 1554, 1587 (Jan. 11, 2022).

DOE did not receive further comments on this topic. Therefore, DOE has decided not to move the standby period to the start of the 24-hour simulated-use test because such amendment would be unduly burdensome on all manufacturers, as they would be required to retest all of their products, even though the representativeness of the efficiency results would be improved for only a small subset of water heaters.

F. Computations

1. Mass Calculations

In sections 6.3.5 and 6.4.2 of appendix E, the mass withdrawn during

each draw (M_i) is used to calculate the daily energy consumption of the heated water at the measured average temperature rise across the water heater (Q_{HW}). However, neither section includes a description of how to calculate the mass withdrawn for tests in which the mass is indirectly determined using density and volume measurements. In the April 2020 RFI, DOE requested feedback on whether to update the consumer water heater test procedure to include a description of how to calculate the mass withdrawn from each draw in cases where mass is indirectly determined using density and volume measurements. 85 FR 21104, 21113 (April 16, 2020). Stakeholders generally supported including an equation in the computations of appendix E, with many suggesting that DOE adopt the calculations in the AHRI Operations Manual for Residential Water Heater Certification Program. 87 FR 1554, 1582 (Jan. 11, 2022).

In the January 2022 NOPR, DOE proposed that the volume at the outlet would be multiplied by the density, which would be based on the average outlet temperature measured during the draw. DOE also proposed to add procedures similar to those in the AHRI Operations Manual for Residential Water Heater Certification Program; in particular, DOE proposed to add a method of converting inlet water volume to outlet water volume using the ratio of the water densities at the inlet and outlet.[75] *Id.*

In response to the January 2022 NOPR, BWC supported DOE's proposed clarifications for calculating water mass from indirect measurements. (BWC, No. 33 at p. 8)

After carefully considering the comments, in this final rule, DOE is adopting the computations for determining water mass from indirect measurements that were proposed in the January 2022 NOPR for the reasons previously discussed.

2. Effective Storage Volume

In this final rule, DOE is establishing provisions to calculate the effective storage volume to account for: (1) water heaters which may increase storage tank temperature to increase delivery capacity, and (2) circulating water heaters. As discussed throughout section III.E.1 of this document, raising the temperature of the water stored in the tank can increase the effective storage capacity of the water heater. Additionally, circulating water heaters are instantaneous-type water heaters that operate with a separate stored volume of water such that the actual amount of hot water that can be provided immediately (without additional heat input) is related to the volume of water stored in the circulation pipes or in the separate tank—and not the rated storage volume of the circulating water heater itself. The following subsections describe the approach used for each case.

a. Storage Water Heaters With Elevated Stored Water Temperature

In the July 2022 SNOPR, DOE addressed multiple comments regarding water heaters which boost the tank temperature in order to increase effective storage volume. (Operation in high heat mode and high temperature testing are discussed in detail in section III.E.1 of this final rule.) In particular, DOE noted there are certain consumer activities, such as filling a bathtub, for which the FHR metric and the rated storage volume metric alone do not sufficiently describe the water heater's ability to provide a large amount of hot water immediately. 87 FR 42270, 42280–42281 (July 14, 2022).

For activities such as filling a bathtub, consumers would benefit more from knowing the effective storage volume (*i.e.,* the volume of immediately available hot water) of a water heater, whereas for activities such as taking a shower, consumers could benefit more from knowing the FHR (*i.e.,* ability to deliver hot water for an extended period of time). In particular, FHR represents one full hour of delivery and does not necessarily describe immediate hot water availability, as FHR is also impacted by the rate of recovery. In the past, rated storage volume has served as an indication of the amount of hot water immediately available. However, given the emergence of new water heater designs that allow operation in high heat mode, and the option that has existed to increase the tank temperature and install an external mixing valve, to provide additional capacity, this is no longer the case for all water heaters. Hence, in addition to FHR, DOE tentatively determined in the July 2022 SNOPR that effective storage volume would be a meaningful performance metric for consumers. *Id.*

Therefore, in the July 2022 SNOPR, DOE proposed a method to determine effective storage volume, V_{eff} (expressed in gallons or liters), at section 6.3.1.1 of appendix E. For water heaters capable of operating in high heat mode (which DOE proposed be determined by $\overline{T}_{max,1}$ being greater than $\overline{T}_{del,2}$ during the 24-hour simulated use test), DOE proposed to calculate the effective storage volume based on a volume scaling factor and data already collected during the appendix E test. *Id.* at 87 FR 42281.

DOE proposed that the volume scaling factor would be determined as follows, which is derived by comparing the thermal energy stored by the water heater when the water is heated to 125 °F to the thermal energy stored at its maximum tank temperature, using temperature data collected during the test:

$$k_V = \frac{\rho(\bar{T}_{max,1}) \times C_p(\bar{T}_{max,1}) \times (\bar{T}_{max,1} - 67.5°\text{F})}{\rho(125°\text{F}) \times C_p(125°\text{F}) \times (125°\text{F} - 67.5°\text{F})}$$

Where:

k_V is the dimensionless volume scaling factor;

$\rho(T)$ is the density of water evaluated at temperature T;

$C_P(T)$ is the heat capacity of water evaluated at temperature T;

$\overline{T}_{max,1}$ is the maximum measured mean tank temperature after the first recovery period of the 24-hour simulated-use test, and

67.5 °F is the average ambient temperature.

87 FR 42270, 42281 (July 14, 2022).

DOE proposed to determine the effective storage volume by multiplying the measured storage volume by k_V. *Id.*

In response to DOE's effective storage volume proposal, ASAP, ACEEE, and NRDC expressed support for DOE's proposal to use effective storage volume as a metric for water heaters with high heat modes. (ASAP, ACEEE, and NRDC, No. 54 at pp. 2–3)

AHRI requested that DOE provide additional data and evidence supporting the proposed equations for calculating effective storage volume and stated that manufacturers would also need

[75] The AHRI Operations Manual for Residential Water Heater Certification Program specifies that the outlet water volume is equal to the inlet water volume times the inlet water density divided by the outlet water density.

additional time to complete testing to verify their accuracy, representativeness, and repeatability. AHRI requested that DOE specify the correct procedure to evaluate this metric where the initial recovery period extends beyond the start of the second draw in this test. (AHRI, No. 55 at pp. 7–8)

BWC requested that DOE conduct further testing for the method to determine effective storage volume, stating that manufacturers have not had enough time to conduct their own testing for this proposal. (BWC, No. 48 at pp. 3–4)

Rheem suggested that DOE may not have enough information to incorporate effective storage volume into its energy conservation standards rulemaking without amending certification criteria because DOE is not requiring it to be reported. (Rheem, No. 47 at p. 8) Additionally, Rheem stated that models without ''high heat modes'' may still meet the conditions to be affected by the effective storage volume calculation, and the commenter requested that DOE clarify how to calculate effective storage volume when the first recovery period extends beyond the second draw, raising the concern that the delivery temperature can be too low as a result of this condition. (Rheem, No. 47 at p. 7)

In order to address these comments, DOE has re-evaluated its own test data to further examine the implications of the effective storage volume calculation as proposed in the July 2022 SNOPR. In particular, DOE sought to address Rheem's concern that the criteria which triggers effective storage volume calculation ($T_{max,1} > T_{del,2}$) may lead more models to be impacted than just those operating with an elevated tank temperature and the request for clarification on how to calculate effective storage volume in the instance that the first recovery period extends beyond the second draw. Table III.3 lists the anonymized test data DOE evaluated to address the first of these two concerns. These tests were conducted in accordance with the currently applicable appendix E test procedure, with a nominal setpoint temperature of 125 °F and no mixing valve installed.

TABLE III.3—$T_{max,1}$ AND $T_{del,2}$ VALUES FOR A SAMPLE OF WATER HEATERS

Test No.	Product type *	Draw pattern	$T_{max,1}$ (°F)	$T_{del,2}$ (°F)	$T_{max,1} - T_{del,2}$ (°F) **	$k_v > 1$ †
1	ES	Medium	116.0	124.6	−8.6	NO.
2	ES	Medium	117.8	125.8	−8.0	NO.
3	ES	Medium	121.3	122.8	−1.5	NO.
4	ES	Medium	120.4	122.6	−2.2	NO.
5	GS	Medium	126.0	128.5	−2.5	NO.
6	GS	High	125.2	127.2	−2.0	NO.
7	GS	Medium	128.7	129.5	−0.8	NO.
8	GS	High	123.8	127.0	−3.2	NO.
Minimum			116.0		−8.6	
Mean			122.4		−3.6	
Maximum			128.7		−0.8	
Std. Dev			4.3		3.0	

* **Note:** ''ES'' denotes an electric storage water heater, and ''GS'' denotes a gas-fired storage water heater.
** A value of +5 °F or more in this column would satisfy one of the two criteria for determining k_V to be greater than 1.
† Per the effective storage volume calculation provisions established in this final rule.

Upon further evaluation of the test data presented in Table III.3 and based on comments received, in this final rule, DOE is modifying the approach in its earlier proposal to ensure that k_V values greater than 1 are only calculated for water heaters operating with a significantly elevated tank temperature—as determined by *both* the difference between the storage tank temperature and the delivery temperature, as well as the storage tank temperature itself. Specifically, due to the fact that for some of the water heaters in Table III.3 $T_{max,1}$ is only slightly less than $T_{del,2,}$ DOE has amended the criteria for determining k_V such that a water heater must have both $T_{max,1} > 130$ °F *and* $T_{max,1} > T_{del,2} + 5$ °F in order to have a k_V factor greater than 1. If these two criteria are not met, then the water heater will be assigned a k_V factor of 1 and will have an effective storage volume equal to its rated storage volume. This update to DOE's proposed approach will ensure that effective storage volume is only calculated to be greater than the rated storage volume for water heaters operating with a mean tank temperature that is both significantly above 125 °F and significantly above the delivered water temperature. The data show that for tests conducted at a nominal 125 °F tank temperature setpoint, a k_V greater than 1.0 is not expected. For additional reference, DOE conducted one test on a water heater set to its maximum storage tank temperature, resulting in a $T_{max,1}$ of 159.6 °F and a $T_{del,2}$ of 124.3 °F, which would cause the k_V to be equal to 1.59.

Additionally, in order to address Rheem's concern about models for which the first recovery period extends beyond the start of the second draw, DOE has examined its own test data for water heaters exhibiting this behavior. Table III.4 lists anonymized data from 21 tests for which the first recovery period extended beyond the start of the second draw. Similar to the previous dataset, these tests were conducted at a tank temperature setpoint of 125 °F and no mixing valve installed.

DOE agrees that it would not be appropriate to base the effective storage volume calculation criteria on $T_{del,2}$ if the tank is still recovering during the second draw, because $T_{del,2}$ may be lower than it would be had the tank fully recovered. Therefore, for such cases, DOE has determined that T_0 will take the place of $T_{max,1}$, and $T_{del,1}$ will take the place of $T_{del,2}$ in the criteria specified previously. DOE has specified T_0 and $T_{del,1}$ as substitutes in this instance because they are unaffected by the timing of the first recovery period. $T_{del,1}$ is measured during the first draw of the test, which will begin prior to the start of a recovery. T_0 is measured immediately before the first draw (during which $T_{del,1}$ is measured) and before the first recovery period, and it is, therefore, more representative of internal tank temperature as a point of comparison with $T_{del,1}$ to determine whether the storage tank temperature is elevated relative to the delivery temperature. In reviewing its data for tests whose first recovery period

extended into the second draw, as shown in Table III.4, DOE found that the results using T_0 and $T_{del,1}$ are very comparable to those using $T_{max,1}$ and $T_{del,2}$, as shown in Table III.3. However, DOE is not making T_0 and $T_{del,1}$ the default variables because when T_0 is paired with $T_{del,1}$, the delta between the two is a slightly less reliable indicator of when elevated tank temperatures actually occur, compared to the default pair of $T_{max,1}$ and $T_{del,2}$. This is evidenced by the fact that the standard deviation of the delta, $T_0 - T_{del,1}$, is slightly higher at 3.6, than that of the default variables, $T_{max,1} - T_{del,2}$, which is 3.0. These standard deviations, along with other statistics for the test data are shown in Table III.3 and Table III.4.

TABLE III.4—T_0 AND $T_{del,1}$ VALUES FOR A SAMPLE OF WATER HEATERS WHOSE FIRST RECOVERY PERIOD EXTENDS INTO THE SECOND DRAW

Test No.	Product type	Draw pattern	T_0 (°F)	$T_{del,1}$ (°F)	$T_0 - T_{del,1}$ (°F) **	$k_v > 1$ †
1	ES	Low	118.2	122.8	−4.6	NO.
2	ES	Medium	117.1	128.7	−11.6	NO.
3	ES	Medium	118.3	123.7	−5.5	NO.
4	ES	Medium	117.7	127.7	−10.0	NO.
5	ES	Medium	119.2	125.9	−6.7	NO.
6	ES	Low	122.0	125.2	−3.2	NO.
7	ES	Medium	122.4	128.3	−6.0	NO.
8	ES	High	120.8	126.8	−6.0	NO.
9	ES	Low	123.8	125.6	−1.8	NO.
10	ES	Medium	116.8	129.5	−12.7	NO.
11	ES	Medium	120.8	123.8	−3.0	NO.
12	ES	Medium	121.8	123.9	−2.1	NO.
13	ES	Medium	120.6	123.1	−2.5	NO.
14	ES	Medium	121.1	126.6	−5.5	NO.
15	ES	Low	121.0	125.0	−4.0	NO.
16	ES	Medium	122.5	125.3	−2.8	NO.
17	ES	Medium	120.1	129.0	−9.0	NO.
18	ES	Medium	124.5	125.0	−0.5	NO.
19	ES	Medium	122.7	124.3	−1.6	NO.
20	ES	Medium	124.6	126.3	−1.7	NO.
21	ES	Low	123.4	123.0	0.4	NO.
Minimum			116.8		−12.7	
Mean			120.9		−4.8	
Maximum			124.6		0.4	
Std. Dev			2.4		3.6	

* **Note:** "ES" denotes an electric storage water heater.
** A value of +5 °F or more in this column would satisfy one of the two criteria for initiating calculation of k_V.
† Per the effective storage volume calculation provisions established in this final rule.

AHRI, A.O. Smith, and Rheem expressed concern that because FHR is used as a metric for other activities such as building codes, plumbing codes, and incentive programs, DOE's proposal may cause misalignment with those requirements, as well as increased burden if manufacturers were to be required to comply with metrics for both FHR and effective storage volume. (AHRI, No. 55 at p. 7; A.O. Smith, No. 51 at pp. 7–8; Rheem, No. 47 at pp. 7–8) Rheem suggested that effective storage volume is not more appropriate than FHR as a metric of thermal energy storage. (Rheem, No. 47 at p. 7) A.O. Smith and Rheem also suggested that FHR is a more meaningful metric for consumers and that effective storage volume would be confusing. (A.O. Smith, No. 51 at pp. 7–8; Rheem, No. 47 at p. 7)

In response to these comments, the Department confirms that FHR is not being phased out or fully replaced by effective storage volume in the DOE test procedure, and, therefore, this additional metric will not cause misalignment with other programs and regulations based on FHR. As stated previously, these metrics provide different information: effective storage volume indicates the amount of hot water that can be delivered immediately without need for heat input and is correlated to the standby losses of the tank, whereas the FHR metric is determined by a test which allows the heat input to remain on and for the water heater to initiate a recovery. Additionally, manufacturer burden would be minimal because the effective storage volume can be determined based on measurements already taken during the 24-hour simulated use test.

DOE notes that in contrast to FHR, effective storage volume is capable of accounting for the increase in thermal energy associated with heating water above the intended delivery temperature in comparison with larger units storing water at conventional temperatures. It also allows consumers to compare water heaters with similar delivery capabilities but different sizes, information which DOE considers meaningful, while avoiding the risk of backsliding for units with lower-than-normal FHRs, should FHR be used as the metric. Contrary to what these commenters suggest, DOE finds that providing a measure of effective storage volume is more likely to prevent consumer confusion due to the increased transparency it promotes by reflecting the immediate hot water capacity of the water heater for certain uses such as filling a bathtub. Combined with the high temperature test method, consumers would have a way to directly compare the performance of water heaters of different sizes that can meet the same user needs.

In response to DOE's request for comment regarding its proposed equations and approach to calculate effective storage volume, Rheem agreed that DOE's derivation from an energy balance was appropriate for calculating a scaling factor. (Rheem, No. 47 at p. 7) NEEA commented that that the

proposed method appears to contain an error in the calculation of the dimensionless volume scaling factor (k_v,) by using 67.5 °F, the standard test condition ambient air temperature, instead of 58 °F, the standard test condition water inlet temperature. Otherwise, NEEA indicated support of DOE's proposed method for calculating the effective storage volume metric. (NEEA, No. 56 at p. 3)

DOE's volume scaling factor is derived by comparing the thermal energy stored by the water heater when the water is heated to 125 °F to the thermal energy stored at its maximum tank temperature. In response to NEEA's comment, DOE notes that the method to calculate the dimensionless volume scaling factor k_v uses ambient air temperature because as the water in the storage tank cools, heat is lost to the surrounding air. Thus, the water approaches the temperature of the surrounding air, not the 58 °F inlet water temperature. Therefore, DOE has maintained this calculation method as originally proposed.

Rheem suggested that an effective volume scaled to 125 °F is not useful for customers because a typical bath temperature is around 100 °F. (Rheem, No. 47 at p. 7) In response, DOE notes that the effective storage volume calculation is to show how much additional thermal energy is stored in the tank compared to a water heater which is not raising the internal tank temperature beyond the delivery temperature. Because 125 °F is the delivery setpoint temperature used in the appendix E test procedure as being representative of typical water heater setpoint temperatures, DOE has concluded that it is appropriate for the tank temperature has to be compared to 125 °F.

The CA IOUs supported DOE's proposed effective storage volume metric as being more representative of a storage water heater's hot water delivery capacity than rated storage volume. However, the CA IOUs asserted that effective storage volume does not account for differences in recovery rate between water heaters, a factor which also affects hot water delivery capacity and specifically FHR. The CA IOUs pointed out that large discrepancies in FHR exist within a given rated storage volume for both gas and electric storage water heaters. Therefore, the CA IOUs suggested DOE should revise its proposed algorithm for the effective storage volume to produce a metric incorporating the volume and temperature of the stored water and the water heater recovery rate. (CA IOUs, No. 52 at pp. 2–4)

In response, effective storage volume is intended to measure the maximum thermal energy a water heater can store and to indicate the amount of hot water that is immediately available. Effective storage volume is not intended to measure how fast the unit is able to heat water. This is in contrast with FHR, which accounts for the water heater's recovery rate as previously described. Accounting for water heater recovery rate in the effective storage volume calculation would make the effective storage volume metric duplicative of the existing FHR metric; DOE reiterates that effective storage volume will not replace FHR, which will remain a part of the test procedure. A.O. Smith stated that the effective storage volume metric may become obsolete if DOE's proposed energy conservation standards effectively limit the availability of non-demand response water heaters with user-selectable high heat modes. (A.O. Smith, No. 51 at p. 7) In response to A.O. Smith's comment, DOE notes that the scope of this comment falls within that of the energy conservation standards rulemaking, so it will be properly considered in the concurrent standards rulemaking for consumer water heaters. Additionally, DOE would again mention that certification and representations of effective storage volume will not be required as a result of this final rule, but instead may be required at the time of any energy conservation standards that specifically address which water heaters may be required to carry out high temperature testing.

Finally, when proposing the calculation of estimated mean tank temperature in the July 2022 SNOPR, DOE inadvertently omitted the calculation of annual electrical energy consumption from the test procedure. DOE has once again included this calculation as originally proposed in the January 2022 NOPR at section 6.3.10 of appendix E.

b. Circulating Water Heaters

As discussed in section III.D.4 of this document, DOE is amending the test procedure to require that circulating water heaters must be tested with a separate storage tank. Specifically, gas-fired and oil-fired circulating water heaters and electric resistance circulating water heaters must be tested with an UFHWST, and heat pump-type circulating water heaters must be tested with an electric storage water heater.

For circulating water heaters, effective storage volume calculations will be carried out in a slightly different manner than for storage water heaters. The methodology established in this final rule takes into consideration the concerns raised by stakeholders and discussed in section III.D.4 of this document. In summary, while commenters expressed that it would be beneficial to be able to use a range of UFHWST volumes for testing non-heat-pump-type circulating water heaters, commenters were also concerned that the results of testing may not be reproducible without certifying the specific model of UFHWST to be used. Regarding the volume, DOE understands that circulating water heater designs may be optimized to operate with specific storage volumes; thus, in this final rule, DOE is allowing a range of volumes to be used. However, manufacturers may represent the volume of the UFHWST in terms of the effective storage volume of the circulating water heater as follows.

Because circulating water heaters are to be tested with a separate storage tank, they operate, as a system, in a similar manner to storage-type water heaters. Although the volume stored by the circulating water heater itself may be small, these water heaters require a separate volume of water to operate properly. Therefore, DOE has determined that it is appropriate for the effective storage volume calculation for circulating water heaters to account for the separate storage tank, as the volume of the stored water is representative of the effective volume that would be available for such a water heater in the field, since it is necessary to install a circulating water heater with a storage tank or other stored volume of water. The procedure for calculating effective storage volume of separate storage tanks paired with circulating water heaters is outlined in section 6.3.1.1 of appendix E. This procedure will prescribe the value of the measured storage volume of the separate storage tank to be the effective storage volume of the circulating water heater, and the measured storage volume of the separate storage tank shall be determined in accordance with section 5.2.1 of the amended appendix E (Determination of Storage Tank Volume). This allows the same method of volume measurement to be applied to UFHWSTs and separate electric resistance storage tanks. DOE has determined that this approach allows for manufacturers to have the flexibility to use the appropriate size of UFHWST for the circulating water heater while still ensuring that testing can be done in a reproducible manner.

In a separate rulemaking pertaining to certification requirements for consumer water heaters and residential-duty commercial water heaters, DOE will address any potential amendments

which would need to be made in order to certify the effective storage volume of a product. DOE would consider establishing product-specific enforcement provisions for circulating water heaters at such a time when energy conservation standards for these products are evaluated.

G. Untested Provisions (Alternative Efficiency Determination Methods)

At 10 CFR 429.70, DOE specifies alternative methods for determining energy efficiency and energy use for certain covered products and equipment, including consumer water heaters.[76] In general, these provisions allow a manufacturer to determine the energy efficiency or energy use of a basic model using an alternative efficiency determination method (AEDM) in lieu of actually testing the basic model. Specific to each product or equipment type covered by these AEDM provisions, DOE defines the criteria for using an AEDM and, for some products and equipment, procedures to be used to validate an AEDM and to perform verification testing on units certified using an AEDM.

The provisions at 10 CFR 429.70(g) provide alternative methods for determining ratings for ''untested'' basic models of residential water heaters and residential-duty commercial water heaters. For models of water heaters that differ only in fuel type or power input, these provisions allow manufacturers to establish ratings for untested basic models based on the ratings of tested basic models if certain prescribed requirements are met. (Simulations or other modeling predictions or ratings of UEF, volume, first-hour rating, or maximum gallons per minute are not permitted (10 CFR 429.70(g)).)

Specifically, for gas water heaters, the provisions at 10 CFR 429.70(g)(1) specify that for untested basic models of gas-fired water heaters that differ from tested basic models only in whether the basic models use natural gas or propane gas, the represented value of UEF, FHR, and maximum gallons per minute for an untested basic model can be the same as those for a tested basic model, as long as the input ratings of the tested and untested basic models are within ±10 percent.

For electric storage water heaters, the provisions at 10 CFR 429.70(g)(2) specify rating an untested basic model using the FHR and the UEF obtained from a tested basic model as a basis for ratings of basic models with other input ratings, provided that certain conditions are met: (1) each heating element of the untested basic model is rated at or above the input rating for the corresponding heating element of the tested basic model; and (2) for an untested basic model having any heating element with an input rating that is lower than that of the corresponding heating element in the tested basic model, the FHR for the untested basic model must result in the same draw pattern specified in Table I of appendix E for the simulated-use test as was applied to the tested basic model.[77] 10 CFR 429.70(g)(2)(i)–(ii).

In commenting on this topic in response to the January 2022 NOPR, Rheem suggested expanding the AEDM provisions for consumer water heaters to address circulating water heaters. Specifically, Rheem identified three possible AEDM approaches: (1) test the thermal efficiency or COP using the commercial water heater test procedure and use the result to calculate an estimated UEF for various storage capacities; (2) open the commercial HVAC AEDM provisions at 10 CFR 429.70(c) to circulating consumer water heaters; or (3) add provisions similar to the current electric storage water heater AEDM, where a change in draw pattern would necessitate a new test. (Rheem, No. 31 at pp. 3–4)

Further, DOE notes that although manufacturers of consumer water heaters are not authorized to use an AEDM under 10 CFR 429.70(c) to determine ratings for consumer water heaters, as discussed, manufacturers may determine UEF for certain models using the methods specified under 10 CFR 429.70(g). These models include: (1) gas-fired basic models differing only in whether the basic models use natural gas or propane and with an input rating within 10 percent and (2) electric storage water heater basic models differing only in heating element input rating (in addition, for untested basic models with a heating element with an input rating that is lower than the input rating of the corresponding element in the tested basic model, the FHR for the untested basic model must also result in the same draw pattern as was applied to the tested basic model). These provisions already provide manufacturers with some measure of an alternative method of rating consumer water heaters without testing every model, and this alternative method reduces manufacturer test burden. Further, DOE explained in a 2013 final rule pertaining to AEDMs that the AEDM provisions extend to those products or equipment which have ''expensive or highly-customized basic models.'' 78 FR 79579, 79580 (Dec. 31, 2013). The current AEDM provisions for commercial HVAC equipment (including commercial water heaters, for example) were in part the result of a negotiated rulemaking effort by the Appliance Standards and Rulemaking Federal Advisory Committee (ASRAC) in 2013. *Id.* Consumer water heaters were not considered at the time.[78] *Id* In this rulemaking, DOE did not receive comments indicating that these conditions would apply for consumer water heaters or residential-duty commercial water heaters, and, hence, DOE has determined that modeling-based AEDMs are not required at this time. Additionally, the test method adopted in this final rule has been determined to be representative of energy use over an average use cycle without being unduly burdensome.

Given these factors, DOE is not considering further expansion of the AEDM provisions for water heaters within the scope of this test procedure, aside from applying the untested model provisions to electric instantaneous water heaters, as discussed in section III.G.2 of this document. The following sections discuss representations of the FHR value of certain untested models and the extension of the alternative rating method to electric instantaneous-type water heaters.

1. Representations of First-Hour Ratings for Untested Basic Models

The provisions at 10 CFR 429.70(g) allow for an untested electric storage water heater basic model with element wattages less than a tested basic model to use the FHR of the tested basic model, provided that the untested basic model's FHR is in the same draw pattern as the tested basic model. For an untested basic model with an element wattage that is lower than the tested basic model's, the tested FHR of the untested basic model will generally be less than the FHR of the tested basic model. In such cases, using the tested basic model's FHR to represent the untested model's FHR may not be as

[76] Section 429.71 uses the term ''residential,'', which is synonymous with the use of the term ''consumer'' in this document.

[77] To establish whether this condition is met, the provisions at 10 CFR 429.70(g)(2)(ii) specify determining the FHR for the tested and the untested basic models in accordance with the procedure described in section 5.3.3 of 10 CFR part 430, subpart B, appendix E, and then comparing the appropriate draw pattern specified in Table I of appendix E for the FHR of the tested basic model with that for the untested basic model. If this condition is not met, then the untested basic model must be tested and the appropriate sampling provisions applied to determine its UEF in accordance with appendix E.

[78] Working group meeting transcripts can be found at *www.regulations.gov* under Docket No. EERE–2013–BT–NOC–0023.

representative as using the FHR value directly determined from the untested model (the FHR of the untested basic model is determined pursuant to the procedures in appendix E specifically for the purpose of allowing use of the tested basic model's UEF rating). Instead, using the untested basic model's measured FHR for representation purposes, rather than the tested model's FHR (as currently required), could increase the representativeness of the certified FHR, while potentially not increasing burden on the manufacturer.

The January 2022 NOPR requested comment on the potential to revise the existing provisions at 10 CFR 429.70(g)(2)(ii) for electric storage water heaters with element wattages less than the tested basic model to require that the represented FHR of the untested model be the untested basic model's FHR as determined according to the procedures at appendix E. Specifically, DOE sought information on whether manufacturers collect sufficient data to establish a rated value of FHR based on FHR testing for untested basic models, subject to the sampling plan requirements at 10 CFR 429.17 (*i.e.,* whether manufacturers currently measure the FHR of at least two units of an untested basic model to ensure it is in the same draw pattern bin as the tested model). 87 FR 1554, 1587–1588 (Jan. 11, 2022).

In commenting on this issue, ASAP, ACEEE, and NCLC supported revising the untested provisions for storage water heaters so that the first-hour ratings for untested models are used for ratings. Likewise, ASAP, ACEEE, and NCLC also supported requiring that the represented value of max GPM for untested electric instantaneous water heaters be the actual value determined for the untested model. (ASAP, ACEEE, and NCLC, No. 34 at p. 3)

BWC offered a different view, commenting that the current AEDM provisions yield accurate results for untested electric storage water heaters with element wattages less than the tested basic models. The company stated that changing these provisions would result in significant burden for manufacturers without producing significantly different results. BWC also urged DOE to not apply the more stringent AEDM requirements for electric storage water heaters to electric instantaneous water heaters. (BWC, No. 33 at pp. 10–11)

Similarly, AHRI raised concerns about the increased burden associated with the proposed additional requirements for alternate electric storage water heater input ratings. (AHRI, No. 40 at p. 3) AHRI indicated that, because the sampling plan provisions at 10 CFR 429.17 are not currently required when certifying untested models, manufacturers would have to retest and recertify untested models if DOE were to adopt such requirements. (AHRI, No. 40 at pp. 5–6) A.O. Smith requested additional clarity on exactly which untested models would need to be tested to confirm FHR ratings under the proposed untested provisions. (A.O. Smith, Jan. 27, 2022 Public Meeting Transcript, No. 27 at pp. 48–49) A.O. Smith claimed that the established practice has been to evaluate untested electric storage water heater tank inputs to confirm that these models would perform in the same draw pattern as the tested model. A.O. Smith also stated that certifying data for untested models would be an extra testing burden for manufacturers which have relied on the procedures pursuant to alternative methods for determining energy efficiency and energy use to establish the ratings, and, therefore, the commenter recommended against the Department changing the relevant data collection methodology. (A.O. Smith, No. 37 at pp. 4–5)

After consideration of the comments and the additional burden that an amendment relating to the FHR representations for certain untested water heaters would impose, DOE has decided not to amend these provisions at this time. However, DOE reiterates that, per the current AEDM requirements, manufacturers are required to test the FHR of an untested model prior to making a determination as to whether or not the untested model will fall under the same draw pattern as the tested model. This determination should not be made on the basis of input rates alone. Manufacturers should consult 10 CFR 429.70(g), which states, ''simulations or other modeling predictions for ratings of the uniform energy factor, volume, first-hour rating, or maximum gallons per minute (GPM) are not permitted.'' Furthermore, as a clarification of the existing reporting requirements, manufacturers using the untested provisions to certify certain water heater models to DOE must identify these models as being tested to an AEDM (*see* 10 CFR 429.17(b)(1), which references 10 CFR 429.12).

2. Alternative Rating Method for Electric Instantaneous Water Heaters

In the January 2022 NOPR, in response to earlier stakeholder comments, DOE proposed to expand the untested provisions (described in detail in section III.G.1 of this document) so as to apply similar provisions to electric instantaneous water heaters. The proposed expansion would allow electric instantaneous water heaters and electric storage water heaters to have similar AEDM requirements. 87 FR 1554, 1588 (Jan. 11, 2022).

As discussed in further detail in the January 2022 NOPR, because electric instantaneous water heaters exhibit the same trends in performance that justify the use of an alternative rating determination method for electric storage water heaters, DOE tentatively determined that extending the use of the untested provisions to electric instantaneous water heaters in 10 CFR 429.70(g) would maintain a representative rating of these products' energy efficiency, while reducing manufacturer burden. Therefore, DOE proposed to permit use of the untested provisions for electric instantaneous water heaters through newly proposed provisions at 10 CFR 429.70(g)(3). Specifically, the January 2022 NOPR proposed that the criteria that currently apply to electric storage water heaters at 10 CFR 429.70(g)(2) would apply to electric instantaneous type water heaters at 10 CFR 429.70(g)(3), with the exceptions that: (1) The criteria for electric instantaneous water heaters would reference the maximum GPM rather than the FHR, as FHR applies only to storage water heaters; and (2) the criteria for electric instantaneous water heaters would reference the ''input rate'' rather than the ''heating element'' or ''input rating for the corresponding heating element.''. 87 FR 1554, 1588 (Jan. 11, 2022).

On this topic, AHRI and A.O. Smith expressed support for the inclusion of electric instantaneous water heaters in the untested provisions. (AHRI, No. 40 at pp. 5–6; A.O. Smith, No. 37 at p. 2) Based upon its previous reasoning and after considering the relevant comments, DOE is adopting the untested provisions for electric instantaneous water heaters as proposed in the January 2022 NOPR, with only a minor modification.

Section III.H.1 of this document discusses terminology used with respect to storage vs. instantaneous and flow-activated vs. non-flow-activated water heaters. Specifically, DOE has determined that not all instantaneous water heaters are flow-activated, and also that storage water heaters do not necessarily have to be non-flow-activated, either. As such, in this final rule, DOE is amending the language in all of the untested provisions (those which currently exist and those which are being newly established) such that the delivery capacity metric may be either FHR or Max GPM. This correction

will harmonize the requirements at 10 CFR 429.70(g) with the test procedure, which specifies that the Max GPM metric is for flow-activated water heaters, and the FHR metric is for all others, regardless of the water heater's classification as storage-type or instantaneous-type (see section 5.3 of appendix E).

H. Corrections and Clarifications

DOE is adopting certain corrections and clarifications to the appendix E test procedure that are intended to improve the repeatability and reproducibility of the test procedure. These changes are described in more detail in the subsections that follow.

1. Flow-Activated Terminology

In sections 5.3.3.1 and 5.3.3.2 of appendix E, which describe general requirements and draw initiation criteria, respectively, for the FHR test, the term ''storage-type water heaters'' is used. However, the FHR test applies to all water heaters that are not flow-activated, which includes non-flow-activated instantaneous water heaters. In this rulemaking, DOE sought feedback on updating the phrase ''storage-type water heaters'' in section 5.3.3 to ''non-flow-activated water heaters.'' 85 FR 21104, 21112 (April 16, 2020). Multiple stakeholders provided comments on the use of ''flow-activated'' and ''non-flow-activated'' in response to the April 2020 RFI and the January 2022 NOPR.

Initially, commenters such as AHRI and some manufacturers stated that there is no need to change the phrase ''storage-type water heaters'' in section 5.3.3 of appendix E. However, when DOE submitted a comment to the ASHRAE 118.2 drafting committee suggesting the change from ''storage-type'' to ''non-flow activated'' in the corresponding sections of ASHRAE 118.2, this change was accepted by the committee and used in ASHRAE 118.2–2022. Thus, DOE proposed to update the terminology in the January 2022 NOPR in an effort to align terminology with that recognized by industry. 87 FR 1554, 1576 (Jan. 11, 2022).

Specifically, section 7.3.3.1 of ASHRAE 118.2–2022 uses the term ''non-flow-activated'' water heaters, whereas section 5.3.3.1 of the current appendix E test procedure uses the term ''storage-type'' water heaters. Yet section 7.3.3.2 of ASHRAE 118.2–2022 still uses the ''storage-type'' term that is present in section 5.3.3.2 of appendix E. By contrast, DOE's proposal, as delineated in the January 2022 NOPR, would effectively ensure that language related to the FHR test did not inadvertently narrow the scope of that test to only storage-type water heaters whenever the term ''storage-type'' was used in this context.

On this topic, Rheem supported the proposed amendments to the language throughout appendix E to use ''non-flow activated'' and ''flow-activated,'' and to refer to water heaters with or without storage volumes greater than 2 gallons as such. Rheem stated that these changes eliminate the storage or instantaneous type language except where helpful to navigate the appendix. (Rheem, No. 31 at p. 2)

Many commenters expressed confusion regarding DOE's proposed changes in terminology in appendix E, however. At the public meeting webinar for the January 2022 NOPR, AHRI requested further explanation of the intent behind the proposed terminology update changing ''storage-type'' and ''instantaneous-type'' to ''non-flow-activated'' and ''flow-activated,'' especially since the proposed terms are not used in EPCA. AHRI requested that DOE clarify whether or not the terminology change would have any impact on testing. (AHRI, Jan. 27, 2022 Public Meeting Transcript, No. 27 at pp. 41–42) In its written comments, AHRI stated that replacing the ''instantaneous-type'' and ''storage-type'' terminology with ''flow-activated'' and ''non-flow activated'' may cause confusion for the test methods relevant to water heaters larger than 20 gallons in rated storage volume. AHRI suggested that DOE should consider adding steps to the test procedure to determine: (1) if a unit is ''storage-type'' or ''instantaneous-type'' and (2) if a unit is ''flow-activated'' or ''non-flow activated.'' (AHRI, No. 40 at p. 4) BWC did not support a change from the terms ''storage-type'' and ''instantaneous-type'' to ''non-flow-activated'' and ''flow-activated'' for water heaters above 20 gallons, stating that it would create confusion for manufacturers and testing laboratories. (BWC, No. 33 at p. 6)

AET commented that a flow-activated electric instantaneous water heater will need to be able to heat its stored volume of water to the 67 °F temperature rise in appendix E in no more than about 30 seconds based on a calculation of recovery efficiency and flow rate. (AET, No. 29 at pp. 3–5) However, DOE notes that this calculation is only possible because the recovery efficiency of an electric resistance water heater is defined as 98 percent in the appendix E test procedure; the time criterion would vary for other types of water heaters.

Furthermore, AET commented that DOE should be careful in its use of the term ''instantaneous'' water heater to ensure the test procedure for these products applies to all products which have more than 4,000 Btu/h of input per gallon of storage, adding that there are instantaneous water heaters have several gallons of storage capacity or are thermostatically-activated (which should be tested under a non-flow-activated test method). The commenter stressed that water heaters should be tested per the flow-activated or non-flow-activated test method based on whether or not they are indeed flow-activated, and not whether they are instantaneous-type or storage-type. AET commented that a thermostatically-activated unit does not necessarily mean that stored water is kept fully heated, but rather that the rate of change of temperature of stored water can be used to indicate whether a flow is occurring, and, therefore, the distinction between flow-activation and non-flow-activation (*i.e.,* thermostatic activation) may be difficult to make for water heaters with very small volumes. AET claimed that hybrid instantaneous water heaters activated by both flow and water temperature are under development, and such appliances should be addressed in the test procedure. AET also noted that the largest possible instantaneous-type gas-fired unit may have up to 50 gallons of storage volume per the codified definitions, and the largest possible instantaneous-type oil-fired unit may have up to 52.5 gallons of storage volume. Additionally, AET provided detailed comments indicating that not all instantaneous water heaters are flow-activated within the scope of the standards of consumer water heaters, so DOE should not use the terms interchangeably. (AET, No. 29 at pp. 2–6)

To clarify the intent of the January 2022 NOPR's proposal: DOE agrees with AET that the distinction between storage-type water heaters and instantaneous-type water heaters is different from the distinction between flow-activated water heaters and water heaters with other activation schemes. Comments from manufacturers seem to indicate that there could be a misconception that ''instantaneous-type water heater'' and ''flow-activated water heater'' are interchangeable, because these comments opposed DOE's correction to remove the ''storage-type'' term from the description of the FHR test and replace it with the ''non-flow-activated'' term; however, these terms are *not* interchangeable. When a water heater is referred to as ''storage-type'' or ''instantaneous-type,'' those terms specifically refer to the ratio between

the storage volume and the input rate. These terms are defined in EPCA (*see* 42 U.S.C. 6291(27)(A) and (B)) and at 10 CFR 430.2. For example, DOE's energy conservation standards at 10 CFR 430.32(d) distinguish between storage-type and instantaneous-type water heaters. Section 1.6 of appendix E defines ''flow-activated'' as an operational scheme in which a water heater initiates and terminates heating based on sensing flow in order to determine which method of testing is most appropriate for the water heater's operational scheme. Therefore, whether a water heater is storage-type or instantaneous-type has no bearing on whether it is determined to be ''flow-activated.'' There. can be flow-activated storage water heaters or even non-flow-activated instantaneous water heaters. In fact, circulating water heaters are defined as non-flow-activated instantaneous water heaters (*see* section III.A.4.a of this final rule).

Section 5.3.1 of appendix E states, ''For flow-activated water heaters, conduct the maximum GPM test, as described in section 5.3.2, *Maximum GPM Rating Test for Flow-Activated Water Heaters,* of this appendix. For all other water heaters, conduct the first-hour rating test as described in section 5.3.3 of this appendix.'' In this final rule, the Department is maintaining this requirement in the revised appendix E test procedure.

With respect to comments related to how to determine whether a water heater is flow activated, DOE has concluded that the definition of ''flow-activated'' in proposed section 1.6 of appendix E is sufficient for manufacturers and testing laboratories to determine whether a product meets that definition. Specifically, if a water heater initiates or terminates heating as a result of sensing flow—regardless of what type of sensor is used to determine whether a flow is occurring—then the water heater is flow-activated. If a water heater has two activation schemes, one of which is based on sensing flow (*e.g.,* heating can also be initiated due to the tank temperature crossing below a certain thermostat limit), then it still meets the description of a flow-activated water heater, and, therefore, must be tested as such. This is a clarification of the current test procedure and not an amendment, and, thus, DOE is maintaining the language in the definition of ''flow-activated'' in appendix E (which will now appear at section 1.7).

DOE understands that the term ''non-flow-activated,'' which was used in the January 2022 NOPR's proposal, could be a source of confusion, because, as AET states, there are products which are dually activated. Hence, in this final rule, DOE is not introducing this term into the appendix E test procedure. Instead, DOE is striking out the references to storage-type water heaters in provisions related to water heaters which require the FHR test and striking out the reference to instantaneous-type water heaters in provisions related to water heaters which require the Max GPM test. Because section 5.3.1 already instructs which test is required, these instances of the terms ''storage-type'' and ''instantaneous-type'' are inaccurate and extraneous. DOE has determined that these corrections and clarifications do not change the way in which the appendix E test procedure is conducted.

2. Second Identical 24-Hour Simulated-Use Test

For water heaters that are not flow-activated, the water heaters test procedure in section 5.2.2.2 of the currently applicable appendix E includes directions for setting the temperature controllers such that the test method is repeatable and reproducible.

A.O. Smith requested DOE to clarify that, when testing water heaters larger than or equal to 20 gallons, the second identical simulated-use test is not a requirement of the procedure but only a means by which to validate the stability of the setting, if it is deemed necessary to perform. (A.O. Smith, No. 37 at p. 7)

In response, the Department notes that there is no requirement for a second identical 24-hour simulated-use test in appendix E. Sections 5.2.2.2.1.1 and 5.2.2.2.1.2 of the currently applicable test procedure states that once the proper temperature control setting is achieved, the setting must remain fixed for the duration of the first-hour rating test and the simulated-use test such that a second identical simulated-use test run immediately following the one specified in section 5.4 would result in average delivered water temperatures that are within the bounds specified in section 2.4 of this appendix. This language was included to explain the intent of the temperature control. However, for units which have an integrated mixing valve or that are intended for use with a mixing valve, the language describing the second identical 24-hour simulated-use test may be misleading, as there may be individual draws where the outlet temperature is outside the bounds specified in section 2.4 of appendix E. As a result, the Department is amending the language to remove reference to a second 24-hour simulated-use test. The procedure to ensure the stability of the temperature control as described in sections 5.2.2.2.1.1 and 5.2.2.2.1.2 remains unchanged.

3. Connected Products

Section 5.1 of appendix E currently specifies the operational mode selection for water heaters but does not explicitly address ''smart'' or ''connected'' modes of operation. For water heaters that allow for multiple user-selected operational modes, all procedures specified in appendix E must be carried out with the water heater in the same operational mode (*i.e.,* only one mode). This operational mode must be the default mode (or similarly named, suggested mode for normal operation) as defined by the manufacturer in its product literature for giving selection guidance to the consumer.

On September 17, 2018, DOE published an RFI seeking information on the emerging smart technology appliance and equipment market. 83 FR 46886 (September 2018 RFI). In the September 2018 RFI, DOE sought information to better understand market trends and issues in the emerging market for appliances and commercial equipment that incorporate smart technology. *Id.* at 83 FR 46887. DOE's intent in issuing the September 2018 RFI was to ensure that DOE did not inadvertently impede such innovation when fulfilling its statutory obligations to set efficiency standards for covered products and equipment. *Id.* In the April 2020 RFI, DOE sought comment on the same issues presented in the September 2018 RFI as they may be specifically applicable to consumer water heaters. 85 FR 21104, 21114 (April 16, 2020).

Responding to the April 2020 RFI, commenters urged DOE to update the test procedure to better capture the performance differences between traditional and connected products, provided some recommended definitions delineating the types of connected products, and suggested that DOE adopt additional and/or optional performance metrics related to grid connectivity. These comments are discussed in detail in the January 2022 NOPR. 87 FR 1554, 1585 (Jan. 11, 2022). In the January 2022 NOPR, DOE proposed to explicitly state that any connection to an external network or control would be disconnected during testing. DOE proposed this given that there were insufficient data on consumer usage of connected features for the Department to develop a representative test configuration for assessing the energy consumption of connected functionality for water

heaters. 87 FR 1554, 1585–1586 (Jan. 11, 2022).

On this topic, BWC agreed with DOE's tentative determinations and clarifications regarding the testing of connected water heaters. (BWC, No. 33 at p. 9) NYSERDA recommended that DOE ensure the test procedure supports grid-enabled water heaters specifically, as well as connected water heaters generally. To this point, NYSERDA recommended that DOE should specify how manufacturers can demonstrate their products are ''connected'' and include this as an item for reporting to the agency. NYSERDA encouraged DOE to consider the power usage for connectedness, as this would be informative for utilities planning for decarbonization. Additionally, NYSERDA stated that including the power usage for connected functions would encourage the load to be minimal and better inform consumers regarding anticipated operating costs. (NYSERDA, No. 32 at pp. 2–3)

In response, while DOE acknowledges the potential benefits that could be provided by connected capability, such as providing energy saving benefits to consumers and enabling peak load shifting on the grid, the Department has concluded that requiring measurement and reporting of the energy consumed by connected features at this time may prematurely hinder the development and incorporation of such features in water heaters. As such, DOE is clarifying that connected features on water heaters should remain on but disconnected from any external network or control for the duration of the appendix E test. This approach will allow some baseline energy consumption to be accounted for without imposing any specific network connection test requirements.

4. Heating Value of Gas

In this rulemaking, DOE considered the need for a clarification regarding the correction of the heating value to a standard temperature and pressure. Section 3.7 of appendix E states that the heating values of natural gas and propane must be corrected from those reported at standard temperature and pressure conditions to provide the heating value at the temperature and pressure measured at the fuel meter, but does not specify standard temperature and pressure conditions. Without a specified standard temperature and pressure, the heating values used in calculations may not be consistent from laboratory to laboratory.

As discussed in the January 2022 NOPR, there are several sources which do specify the standard temperature and pressure conditions for natural gas calculations. 87 FR 1554, 1578 (Jan. 11, 2022). For example, AHRI maintains an Operations Manual for Residential Water Heater Certification Program (AHRI Operations Manual), which includes an equation that corrects the measured heating value, when using a dry gas and a wet test meter, to the heating value at the standard temperature and pressure of 60 °F (15.6 °C) and 30 inches of mercury column (101.6 kPa), respectively. Annex B of the March 2019 ASHRAE Draft 118.2 also provides a method for correcting the heating value from measured to standard conditions, which allows for the use of either dry or saturated gas and either a dry or wet test meter—and this calculation was finalized in ASHRAE 118.2–2022 with an example provided for 60 °F (15.6 °C) and 30 inches of mercury column (101.6 kPa). Lastly, sections 2.4.1 and 3.1.1 of appendix O to subpart B of 10 CFR part 430 (Uniform Test Method for Measuring the Energy Consumption of Vented Home Heating Equipment) correct the input rate to the standard conditions of 60 °F (15.6 °C) and 30 inches of mercury column (101.6 kPa). Therefore, to align with the AHRI Operations Manual and the current practice in other appendices within part 430 of the CFR, DOE proposed in the January 2022 NOPR to establish the standard temperature and pressure conditions for gas measurements as 60 °F (15.6 °C) and 30 inches of mercury column (101.6 kPa), respectively. Further, DOE proposed to adopt the method used in Annex B of a finalized ASHRAE 118.2–2022 to correct the heating value of gas to standard conditions. 87 FR 1554, 1578 (Jan. 11, 2022).

DOE did not receive comments from stakeholders regarding this proposal. Accordingly, DOE is adopting these proposals in this final rule for the reasons previously discussed.

I. Effective and Compliance Dates

The effective date for the adopted test procedure amendments will be 30 days after publication of this final rule in the **Federal Register**.

As to the compliance date, EPCA prescribes that all representations of energy efficiency and energy use for consumer products (including consumer water heaters),), including those made on marketing materials and product labels, must be made in accordance with an amended test procedure, beginning 180 days after publication of the final rule in the **Federal Register**. (42 U.S.C. 6293(c)(2)) For residential-duty commercial water heaters, this requirement is beginning 360 days after publication of the final rule in the **Federal Register**. (42 U.S.C. 6314(d)(1)) For consumer products, EPCA provides an allowance for individual manufacturers to petition DOE for an extension of the 180-day period if the manufacturer may experience undue hardship in meeting the deadline. (42 U.S.C. 6293(c)(3)) To receive such an extension, petitions must be filed with DOE no later than 60 days before the end of the 180-day period and must detail how the manufacturer will experience undue hardship. (*Id.*)

With the exception of two test method provisions (*i.e.,* high temperature testing and separate storage tank testing), compliance with the modified test procedure adopted in this final rule is required for consumer water heaters beginning 180 days after the date of publication of this final rule in the **Federal Register**. Similarly, with the exception of the separate storage tank testing requirement, compliance with the modified test procedure is required for residential-duty commercial water heaters beginning 360 days after the date of publication of this final rule in the **Federal Register**.

Beginning on the effective date of this final rule, the use of the high temperature test method (section 5.1.2 of the amended appendix E test procedure) will be allowed for voluntary additional representations until the compliance date of amended energy conservation standards for consumer water heaters that address high temperature operation, should such standards be adopted. Until such a time, the normal temperature test method (section 5.1.1 of the amended appendix E test procedure) is required as the basis for ratings used to determine compliance with energy conservation standards. During this voluntary usage period, manufacturers who choose to publish two sets of ratings must clearly indicate which values correspond to the high temperature test method. In the standards rulemaking, DOE plans to clarify which type(s) of water heaters would be required to utilize the high temperature test method when determining compliance with potential amended standards.

The use of the separate storage tank test method for circulating water heaters (section 4.10 of the amended appendix E test procedure) will be allowed for voluntary representations and compliance with standards beginning on the effective date of this final rule. This test method will become mandatory when compliance with amended energy conservation standards for consumer water heaters and

residential-duty commercial water heaters is required, should such standards addressing circulating water heaters be adopted.

Upon the compliance date of test procedure provisions in this final rule, any waivers that had been previously issued and are in effect that pertain to issues addressed by such provisions are terminated. 10 CFR 430.27(h)(3) and 431.401(h)(3). Recipients of any such waivers are required to test the products subject to the waiver according to the amended test procedure as of the compliance date of the amended test procedure. The amendments adopted in this document pertain to issues addressed by a waiver granted to Bradford White Corporation (Case No. 2019–006). *See* 85 FR 5648 (Jan. 31, 2020). On January 31, 2020, DOE published a Notice of Decision and Order in the **Federal Register** granting Bradford White Corporation a waiver for a specified basic model that experiences the first cut-out of the 24-hour simulated-use test during a draw. 85 FR 5648. The Decision and Order requires Bradford White Corporation to use an alternate test procedure that DOE determined more accurately calculates the recovery efficiency when the first cut-out occurs during a draw. *Id.* at 85 FR 5651. As described in section III.B.2.b of this document, DOE is adopting the alternate test procedure prescribed in the Decision and Order granted to Bradford White Corporation into the test procedure at appendix E.

J. Test Procedure Costs

EPCA requires that test procedures proposed by DOE not be unduly burdensome to conduct. (42 U.S.C. 6293(b)(3)) The following sections discuss DOE's evaluation of estimated costs associated with the proposed amendments for consumer water heaters and residential-duty commercial water heaters.

1. Separate Storage Tanks

In the January 2022 NOPR, DOE tentatively concluded that the cost of running the test procedure using an 80-gallon unfired hot water storage tank should be the same as testing a water heater with an integrated tank with a comparable storage volume. The Department estimated that testing a fossil fuel-fired or electric storage water heater would cost approximately $3,000 and that testing an electric storage water heater which uses heat pump technology would cost approximately $4,500. In addition to the testing cost, the manufacturer or third-party testing facility would incur a one-time cost to purchase an unfired hot water storage tank which are commercially available for approximately $900. 87 FR 1554, 1589 (Jan. 11, 2022).

In the July 2022 SNOPR, DOE revised its proposal. DOE estimated that, for gas-fired circulating water heaters, these proposed changes could require a one-time purchase of an 80- to 120-gallon unfired hot water storage tank, which are readily commercially available for approximately $2,000. For heat pump-only water heaters, the proposed changes could result in a one-time purchase of a 40-gallon (±4 gallons) electric storage water heater readily available for approximately $500. 87 FR 42270, 42283 (July 14, 2022).

DOE evaluated stakeholder feedback regarding this testing requirement and further revised its amended provision. This final rule adopts the following changes concerning the testing of circulating water heaters:

(1) Gas-fired circulating water heaters be tested using an unfired hot water storage tank with a storage volume between 80 and 120 gallons and an R-value exactly at the minimum R-value required at 10 CFR 431.110(a).

(2) Heat pump circulating water heaters be tested using a 40-gallon (±5 gallons) electric storage water heater at the minimum UEF standard required at 10 CFR 430.32(d).

AHRI generally agreed with the estimated costs presented in the January 2022 NOPR, with the exception that $900 may be an underestimate of the cost of purchasing an unfired hot water storage tank. (AHRI, No. 40 at p. 3) No further comments on test costs were received in response to the July 2022 SNOPR. Based upon its subsequent review in light of AHRI's comment, DOE notes that its estimate for the retail price of an unfired hot water storage tank has been raised from $900 to $2,000.

In response, DOE recognizes that these amendments will require manufacturers to make one-time purchases of the necessary storage tanks for each testing facility. DOE's research indicates that the tanks required for testing gas-fired circulating water heaters and heat pump circulating water heaters are commercially available at retail prices of $2,000 and $500, respectively, thereby reflecting third-party laboratory testing costs.

These amendments to appendix E regarding storage tank requirements will allow affected models to be certified for the first time. Manufacturers will not be able to rely on data generated under test procedures in effect prior to this final rule.

2. Method for Determining Internal Tank Temperature for Certain Water Heaters

This final rule amends section 5.4 of appendix E by the addition of section 5.4.2.2, which allows internal tank temperature to be estimated by removing water from the water heater for models with rated storage volumes greater than or equal to 2 gallons whose internal tank temperatures are unable to be measured using thermocouples.

DOE estimates that this testing method may extend test duration by up to 8 hours as part of the final standby period of the 24-hour simulated use test. This additional duration is estimated to increase testing costs by up to $1,000 for affected fossil-fuel-fired and electric water heaters and $1,500 for affected heat pump water heaters.

The addition of section 5.4.2.2 to appendix E will allow affected models to be certified for the first time. Because these water heaters could not previously be accurately tested, manufacturers will not be able to rely on data generated under test procedures in effect prior to this final rule.

3. High Temperature Testing

DOE recognizes that the amendment specifying the high temperature testing method would likely cause UEF ratings for any products that would become subject to this test method (*i.e.,* a subset of electric resistance storage water heaters) to decrease if they are currently certified using a default temperature setting. In order to limit potential retesting and recertification burden for manufacturers, any requirement to test certain products using the high temperature testing method will be established only once DOE completes its ongoing reviews of potential amended energy conservation standards for consumer water heaters, should such standards be adopted. The cost to test per this amended method would not be different from the cost to test per the method in the currently applicable appendix E test procedure (*i.e.,* testing an electric storage water heater would cost approximately $3,000).

4. Additional Amendments

The remainder of the test procedure amendments adopted in this final rule will not impact test costs.

DOE is amending section 2.5 of appendix E, ''Set Point Temperature,'' to allow low-temperature water heaters to deliver water at the maximum outlet temperature that they are capable of producing. This aligns with how these products are tested currently. Manufacturers already should have

requested a waiver for these products, as the current test procedure cannot be used as written to test low-temperature water heaters. As these products are currently tested and rated to the procedures which DOE is adopting, there should be no additional cost associated with this change.

DOE is also amending the existing test procedure for consumer and residential-duty commercial water heaters by modifying the flow rate requirements during the FHR test for water heaters with a rated storage volume less than 20 gallons. This change does not significantly affect the test results of the FHR test, and, thus, DOE expects that manufacturers may rely on existing test data where available. Further, storage-type water heaters (which comprise the majority of water heaters that need to be tested for an FHR rating) with less than 20 gallons of rated storage volume currently do not have energy conservation standards codified at 10 CFR 430.32(d) and are, therefore, not rated and certified to DOE. Instantaneous-type water heaters that will require an FHR rating are expected to be circulating water heaters, and this final rule amends the appendix E test procedure in such a way that allows these products to be tested and rated for the first time (test costs for water heaters requiring separate storage tanks are discussed in section III.J.1 of this document). Therefore, the update to the FHR test method does not change the expected testing costs for products which have been tested per appendix E previously.

DOE is also amending the timing of the first measurement in each draw of the 24-hour simulated-use test and the test condition specifications and tolerances, including electric supply voltage tolerance, ambient temperature, ambient dry-bulb temperature, ambient relative humidity, standard temperature and pressure definition, gas supply pressure, and manifold pressure. These changes are intended to reduce retesting associated with having a single measurement out of tolerance, while maintaining the current representativeness of the test conditions and the stringency of the tolerances for the test conditions. DOE also has determined that the amendment to the flow rate tolerances for water heaters less than 2 gallons in rated storage volume would not alter the measured efficiency of consumer water heaters and residential-duty commercial water heaters, nor require retesting or recertification. In the absence of an explicit instruction for the flow rate tolerance applicable to water heaters with rated storage volume under 2 gallons, DOE expects that general industry best practice is to apply the flow rate tolerances being adopted for section 5.4.3 of appendix E for water heaters with rated storage volume less than 2 gallons (based on DOE's review of third-party laboratory test data), such that this proposal is expected to be consistent with current methodology.

Manufacturers will be able to rely on data generated under the current water heaters test procedure for the remainder of the amendments set forth in this final rule, so accordingly, such changes should result in no associated increase in costs.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Orders 12866, 13563, and 14094

Executive Order (E.O.) 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993), as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), 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 the 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 does not constitute a ''significant regulatory action'' under section 3(f) of E.O. 12866. Accordingly, this action was not submitted to OIRA for review under E.O. 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of a final regulatory flexibility analysis (FRFA) for any final rule where the agency was first required by law to publish a proposed rule 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 DOE 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 reviewed this final rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003.

DOE is amending test procedures for consumer water heaters and residential-duty commercial water heaters. DOE is publishing this final rule in satisfaction of the 7-year-lookback review requirement specified in EPCA. (42 U.S.C. 6293(b)(1)(A); 6314(a)(1)) Further, amending test procedures for consumer and residential-duty commercial water heaters assists DOE in fulfilling its statutory deadline for amending energy conservation standards for products and equipment that achieve the maximum improvement in energy efficiency that is technologically feasible and economically justified. (42 U.S.C. 6295(o)(2)(A); 42 U.S.C. 6313(a)(6)) Additionally, amending test procedures for consumer and residential-duty commercial water heaters allows manufacturers to produce measurements of energy efficiency that

are representative of an average use cycle and uniform for all manufacturers.

On January 11, 2022, DOE published a test procedure NOPR (January 2022 NOPR) in the **Federal Register** proposing to amend the test procedure for consumer water heaters and residential-duty commercial gas water heaters. *See* 87 FR 1554. DOE published a supplemental test procedure NOPR on July 14, 2022 (July 2022 SNOPR) in the **Federal Register**, proposing certain modifications to the January 2022 NOPR. *See* 87 FR 42270.

DOE conducted an initial regulatory flexibility analysis (IRFA) as part of the January 2022 NOPR and July 2022 SNOPR. *See* 87 FR 1554, 1590–1592 (Jan. 11, 2022); 87 FR 42270, 42285–42287 (July 14, 2022). The following sections outline DOE's determination that this final rule does not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of a FRFA is not warranted. DOE did not receive comment specific to the impacts on small business manufacturers as part of the above-referenced IRFAs.

For manufacturers of consumer water heaters and residential-duty commercial water heaters, the Small Business Administration (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 water heaters and residential-duty commercial water heaters is classified under NAICS 335220, ''Major Household Appliance Manufacturing.'' The SBA sets a threshold of 1,500 employees or fewer for an entity to be considered as a small business for this category. DOE used available public information to identify potential small manufacturers. DOE accessed CCMS,[79] the certified product directory of the AHRI,[80] company websites, and manufacturer literature to identify companies that import, private label, or produce the consumer water heaters and residential-duty commercial water heaters covered by this rulemaking. Using these sources, DOE has identified a total of 27 manufacturers of consumer water heaters and residential-duty commercial water heaters.[81] Of these 27 manufacturers, DOE identified one domestic small business that manufactures products covered by the test procedure amendments.

More specifically, in the January 2022 NOPR IRFA, DOE evaluated a range of potential test procedure amendments, with one amendment that could lead to additional testing costs for small business. The existing DOE test procedure does not accommodate testing of circulating water heaters that require a separately sold hot water storage tank to properly operate. In the January 2022 NOPR, DOE proposed to add procedures to test such circulating water heaters to improve the representativeness of the test procedure. The January 2022 NOPR proposed testing be based on a commonly available 80-gallon unfired hot water storage tank which minimally meets the energy conservation standard requirements at 10 CFR 431.110(a). DOE estimated that the cost of running the amended test procedure should be the same as testing a comparable water heater with storage volume (*i.e.,* third-party testing of a fossil fuel-fired or electric storage water heater would cost approximately $3,000; third-party testing of an electric storage water heater which uses heat pump technology would cost approximately $4,500). If a manufacturer chose to perform in-house testing rather than use a third-party, the unfired hot water storage tank was stated to be commercially available for approximately $900. The January 2022 IRFA identified one small manufacturer and estimated compliance costs to be $4,500. 87 FR 1554, 1591 (Jan. 11, 2022).

The July 2022 SNOPR further updated DOE's proposal for testing circulating water heaters that require a separately-sold hot water storage tank to properly operate. Specifically, the July 2022 SNOPR differentiated the test requirements for gas-fired circulating water heaters and heat pump circulating water heaters. The July 2022 SNOPR proposed that heat pump circulating water heaters be tested using an electric storage water heaters that have a rated storage volume of 40 gallons ± 4 gallons, have an FHR that results in classification at the medium draw pattern, and be rated at exactly the minimum required UEF. Compared to the January 2022 NOPR, DOE revised the requirements for circulating heat pump water heaters to better reflect how heat pump water heaters may be installed in the field. To determine cost of testing, DOE utilized a third-party test estimate of $4,500. The July 2022 IRFA identified one small manufacturer and estimated compliance costs to be $4,500. The proposal for heat pump circulating water heaters was the only amendment in the July 2022 SNOPR that could cause the small manufacturer to incur additional costs. 87 FR 42270, 42286–42287 (July 14, 2022).

In this final rule, DOE is establishing testing requirements consistent with the proposal for heat pump circulating water heaters in the July 2022 SNOPR, except that the acceptable volume range for the separate tank has been expanded to 40 gallons ± 5 gallons. For this final rule, DOE is aware of one domestic small manufacturer. The small manufacturers has a single model (a circulating heat pump water heater that requires a separately-sold hot water tank) that would be affected by the amendments being adopted and that would need to be re-tested. DOE estimates that testing would cost $4,500. If the manufacturer conducts two rounds of physical testing, DOE expects the cost impact on the small manufacturer to be $9,000, which is less than 0.01% of company revenue.

DOE has determined the cost impact to small businesses as result of the amendments in this final rule to be minimal. DOE did not receive any comments specifically pertaining to small business impacts. Therefore, on the basis of the *de minimis* compliance burden, DOE certifies that this test procedure final rule does not have a ''significant economic impact on a substantial number of small entities,'' and that the preparation of a FRFA is not warranted. DOE has submitted a certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the Small Business Administration for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

Manufacturers of consumer water heaters and manufacturers of residential-duty commercial water heaters must certify to DOE that their products comply with any applicable energy conservation standards. To certify compliance, manufacturers must first obtain test data for their products according to the DOE test procedures, including any amendments adopted for

[79] U.S. Department of Energy Compliance Certification Management System, available at: *www.regulations.doe.gov/ccms*. (Last accessed July 19, 2022).

[80] AHRI Directory of Certified Product Performance is available at: *www.ahridirectory.org/Search/SearchHome* (Last accessed July 19, 2022).

[81] The January 2022 NOPR identified 31 manufacturers. 87 FR 1554, 1591 (Jan. 11, 2022). The July 2022 SNOPR identified 27 manufacturers. The changes reflect revisions based on manufacturer feedback and additional public information.

those test procedures. DOE has established regulations for the certification and recordkeeping requirements for all covered consumer products and commercial equipment, including consumer water heaters and residential-duty commercial water 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.

DOE is not amending the certification or reporting requirements for consumer water heaters and residential-duty commercial water heaters in this final rule. Instead, DOE may consider proposals to amend the certification requirements and reporting for these products and equipment under a separate rulemaking regarding appliance and equipment certification. DOE will address changes to OMB Control Number 1910–1400 at that time, as necessary.

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

In this final rule, DOE amends the test procedure for consumer water heaters and residential-duty commercial water heaters, amendments which it expects will be used to develop and implement future energy conservation standards for such products and equipment. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, DOE has determined that adopting test procedures for measuring energy efficiency of consumer products and industrial equipment is consistent with activities identified in 10 CFR part 1021, subpart D, appendix A, sections A5 and A6. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 1010, 1999), imposes certain requirements on 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 examined this final rule and determined that it 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. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products and equipment 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(d)) No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), 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. Section 3(b) of Executive Order 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 Executive Order 12988 requires executive agencies to review regulations in light of applicable standards in sections 3(a) and 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 Executive Order 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 resulting 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 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. 62 FR 12820; also available at *www.energy.gov/gc/office-general-counsel*. DOE examined this final rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

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 final rule 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.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation will not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under 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 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 (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

Executive Order 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 OMB, a Statement of Energy Effects for any 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 any significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use if the regulation is implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

This regulatory action is not a significant regulatory action under Executive Order 12866. Moreover, it would not have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Therefore, it is not a significant energy action, and, accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91; 42 U.S.C. 7101), DOE must comply with section 32 of the Federal Energy Administration Act of 1974, as amended by the Federal Energy Administration Authorization Act of 1977. (15 U.S.C. 788; ''FEAA'') Section 32 essentially provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The modifications to the Federal test procedure for consumer water heaters and residential-duty commercial water heaters adopted in this final rule incorporate testing methods contained in certain sections of the following applicable commercial test standards: ASHRAE 41.1–2020, ASTM D2156–09 (RA 2018), and ASHRAE 118.2–2022. DOE has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* whether it was developed in a manner that fully provides for public participation, comment, and review.) DOE has consulted with both the Attorney General and the Chairman of the FTC about the impact on competition of using the methods contained in these standards and has received no comments objecting to their use.

M. Congressional Notification

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

N. Description of Materials Incorporated by Reference

In this final rule, DOE incorporates by reference the following test standards:

ASHRAE 41.1–2020 prescribes methods for measuring temperature under laboratory and field conditions which are required for system performance tests and for testing heating, ventilating, air-conditioning, and refrigerating components.

ASHRAE 41.6–2014 prescribes methods for measuring the humidity of moist air with instruments.

ASHRAE 118.2–2022 provides test procedures for rating the efficiency and hot water delivery capabilities of directly heated residential water heaters and residential-duty commercial water heaters.

ASTM D2156–09 (RA 2018) provides a test method to evaluate the density of smoke in the flue gases from burning distillate fuels, which is intended primarily for use with home heating equipment burning kerosene or heating oils, and can be used in the laboratory or in the field to compare fuels for clean burning or to compare heating equipment.

ASTM E97–1987 (W1991) provides a method to determine the 45-deg, 0-deg directional reflectance factor of nonfluorescent opaque specimens by means of filter photometers.

Copies of ASHRAE 41.1–2020, ASHRAE 41.6–2014, and ASHRAE 118.2–2022 are reasonably available from the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, Inc., 180 Technology Parkway NW, Peachtree Corners, GA 30092, (800) 527–4723 or (404) 636–8400, or online at: *www.ashrae.org.*

Copies of ASTM D2156–09 (RA 2018) are reasonably available from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 or online at: *www.astm.org.*

Copies of ASTM E97–1987 (W1991) are reasonably available from standards resellers including GlobalSpec's Engineering 360 (*https://standards.globalspec.com/std/3801495/astm-e97-82-1987*) and IHS Markit (*https://global.ihs.com/doc_detail.cfm?document_name=ASTM%20E97&item_s_key=00020483*).

V. 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, Imports, Intergovernmental relations, Reporting and recordkeeping requirements, Small businesses.

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.

10 CFR Part 431

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Intergovernmental relations, Laboratories, Reporting and recordkeeping requirements, Small businesses.

Signing Authority

This document of the Department of Energy was signed on May 22, 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 24, 2023.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE amends parts 429, 430, and 431 of Chapter II of Title 10, 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 § 429.70 by revising paragraph (g)(2) and adding paragraph (g)(3) to read as follows:

§ 429.70 Alternative methods for determining energy efficiency and energy use.

* * * * *

(g) * * *

(2) *Electric Storage Water Heaters.* Rate an untested basic model of an electric storage-type water heater using the first-hour rating or maximum GPM (whichever is applicable under section 5.3.1 of appendix E to subpart B of this part) and uniform energy factor obtained from a tested basic model as the basis for ratings of basic models with other input ratings, provided that certain conditions are met:

(i) For an untested basic model, the represented value of the first-hour rating or maximum GPM and the uniform energy factor is the same as that of a tested basic model, provided that each heating element of the untested basic model is rated at or above the input rating for the corresponding heating element of the tested basic model.

(ii) For an untested basic model having any heating element with an input rating that is lower than that of the corresponding heating element in the tested basic model, the represented value of the first-hour rating or maximum GPM and the uniform energy factor is the same as that of a tested basic model, provided that the first-hour rating for the untested basic model results in the same draw pattern specified in Table I of appendix E for the simulated-use test as was applied to the tested basic model. To establish whether this condition is met, determine the first-hour ratings or maximum GPMs for the tested and the untested basic models in accordance with the procedure described in section 5.3 of 10 CFR part 430, subpart B, appendix E, then compare the appropriate draw pattern specified in Table I of appendix E for the first-hour rating of the tested basic model with that for the untested basic model. If this condition is not met, then the untested basic model must be tested, and the appropriate sampling provisions must be applied to determine its uniform energy factor in accordance with appendix E and this part.

(3) *Electric Instantaneous Water Heaters.* Rate an untested basic model of an electric instantaneous-type water heater using the first-hour rating or maximum GPM and the uniform energy factor obtained from a tested basic model as a basis for ratings of basic models with other input ratings, provided that certain conditions are met:

(i) For an untested basic model, the represented value of the first-hour rating or maximum GPM and the uniform energy factor is the same as that of a tested basic model, provided that the untested basic model's input is rated at or above the input rating for the corresponding tested basic model.

(ii) For an untested basic model having an input rating that is lower than that of the corresponding tested basic model, the represented value of the first-hour rating or maximum GPM and the uniform energy factor is the same as that of a tested basic model, provided that the first-hour rating or maximum GPM for the untested basic model results in the same draw pattern specified in Table II of appendix E for the 24-hour simulated-use test as was applied to the tested basic model. To establish whether this condition is met, determine the first-hour rating or maximum GPM for the tested and the untested basic models in accordance with the procedure described in section 5.3 of 10 CFR part 430, subpart B, appendix E, then compare the appropriate draw pattern specified in Table II of appendix E for the first-hour rating or maximum GPM of the tested basic model with that for the untested basic model. If this condition is not met, then the untested basic model must be tested, and the appropriate sampling provisions must be applied to determine its uniform energy factor in accordance with appendix E and this part.

* * * * *

■ 3. Amend § 429.134 by adding paragraph (d)(3) to read as follows:

§ 429.134 Product-specific enforcement provisions.

* * * * *

(d) * * *

(3) *Verification of fuel input rate.* The fuel input rate of each tested unit of the basic model will be measured pursuant to the test requirements of section 5.2.3 of 10 CFR part 430, subpart B, appendix E. The measured fuel input rate (either the measured fuel input rate for a single unit sample or the average of the measured fuel input rates for a multiple unit sample) will be compared to the rated input certified by the

manufacturer. The certified rated input will be considered valid only if the measured fuel input rate is within ±2 percent of the certified rated input.

(i) If the certified rated input is found to be valid, then the certified rated input will be used to determine compliance with the associated energy conservation standard.

(ii) If the measured fuel input rate for gas-fired or oil-fired water heating products is not within ±2 percent of the certified rated input, the measured fuel input rate will be used to determine compliance with the associated energy conservation standard.

* * * * *

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 4. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 5. Amend § 430.2 by adding in alphabetical order definitions for ''Circulating water heater'', ''Low-temperature water heater'', and ''Tabletop water heater'' to read as follows:

§ 430.2 Definitions.

* * * * *

Circulating water heater means an instantaneous or heat pump-type water heater that does not have an operational scheme in which the burner, heating element, or compressor initiates and/or terminates heating based on sensing flow; has a water temperature sensor located at the inlet or the outlet of the water heater or in a separate storage tank that is the primary means of initiating and terminating heating; and must be used in combination with a recirculating pump and either a separate storage tank or water circulation loop in order to achieve the water flow and temperature conditions recommended in the manufacturer's installation and operation instructions.

* * * * *

Low-temperature water heater means an electric instantaneous water heater that is not a circulating water heater and cannot deliver water at a temperature greater than or equal to the set point temperature specified in section 2.5 of appendix E to subpart B of this part when supplied with water at the supply water temperature specified in section 2.3 of appendix E to subpart B of this part and the flow rate specified in section 5.2.2.1 of appendix E to subpart B of this part.

* * * * *

Tabletop water heater means a heater in a rectangular box enclosure designed to slide into a kitchen countertop space with typical dimensions of 36 inches high, 25 inches deep, and 24 inches wide.

* * * * *

■ 6. Section 430.3 is amended by:

■ a. In paragraph (g)(5), removing the text ''appendices E, AA'' and adding, in its place, the text ''appendices AA'';

■ b. Redesignating paragraph (g)(20) as paragraph (g)(22);

■ c. Redesignating paragraph (g)(8) through (19) as paragraphs (g)(9) through (20);

■ d. Adding new paragraph (g)(8);

■ e. In newly redesignated paragraph (g)(13), removing the text ''F and EE'' and adding, in its place, the text ''E, F, and EE'';

■ f. Adding new paragraph (g)(21);

■ g. Revising paragraph (j).

The revisions and additions read as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(g) * * *

(8) ANSI/ASHRAE Standard 41.1–2020 (''ASHRAE 41.1–2020''), *Standard Methods for Temperature Measurement,* ANSI-approved June 30, 2020; IBR approved for appendix E to subpart B.

* * * * *

(21) ANSI/ASHRAE Standard 118.2–2022 (''ASHRAE 118.2–2022''), *Method of Testing for Rating Residential Water Heaters and Residential-Duty Commercial Water Heaters,* ANSI-approved March 1, 2022; IBR approved for appendix E to subpart B.

* * * * *

(j) *ASTM.* ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959; 877–909–2786; *service@astm.org; www.astm.org.*

(1) ASTM D2156–09 (Reapproved 2013) (''ASTM D2156R13''), *Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels,* approved October 1, 2013; IBR approved for appendix N to subpart B.

(2) ASTM D2156–09 (Reapproved 2018) (''ASTM D2156 (R2018)''), *Standard Test Method for Smoke Density in Flue Gases from Burning Distillate Fuels,* approved October 1, 2018; IBR approved for appendices E, O, and EE to subpart B.

(3) ASTM E97–82 (Reapproved 1987) (''ASTM E97–1987''), *Standard Test Method for Directional Reflectance Factor, 45-deg 0-deg, of Opaque Specimens by Broad-Band Filter Reflectometry,* ASTM-approved October 29, 1982; IBR approved for appendix E to subpart B.

Note 2 to paragraph (j)(3): ASTM E97–1987 was withdrawn in 1991. It is reasonably available from standards resellers including GlobalSpec's Engineering 360 (*https://standards.globalspec.com/std/3801495/astm-e97-82-1987*) and IHS Markit (*https://global.ihs.com/doc_detail.cfm?document_name=ASTM%20E97&item_s_key=00020483*).

(4) ASTM E741–11 (Reapproved 2017) (''ASTM E741–11(2017)''), Standard Test Method for Determining Air Change in a Single Zone Means of a Tracer Gas Dilution Approved Sept. 1, 2017; IBR approved for appendix FF to subpart B.

* * * * *

■ 7. Appendix E to subpart B of part 430 is revised to read as follows:

Appendix E to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Water Heaters

Note: Prior to December 18, 2023, representations with respect to the energy use or efficiency of consumer water heaters covered by this test method, including compliance certifications, must be based on testing conducted in accordance with either this appendix as it now appears or appendix E as it appeared at 10 CFR part 430, subpart B revised as of January 1, 2021.

On and after December 18, 2023, representations with respect to energy use or efficiency of consumer water heaters covered by this test method, including compliance certifications, must be based on testing conducted in accordance with this appendix, except as outlined in the following paragraphs.

Prior to June 17, 2024, representations with respect to the energy use or efficiency of residential-duty commercial water heaters covered by this test method, including compliance certifications, must be based on testing conducted in accordance with either this appendix as it now appears or appendix E as it appeared at 10 CFR part 430, subpart B revised as of January 1, 2021.

On and after June 17, 2024, representations with respect to energy use or efficiency of residential-duty commercial water heaters covered by this test method, including compliance certifications, must be based on testing conducted in accordance with this appendix.

Water heaters subject to section 4.10 of this appendix may optionally apply the requirements in section 4.10 of this appendix prior to the compliance date of a final rule reviewing potential amended energy conservation standards for these products and equipment published after June 21, 2023. After the compliance date of such standards final rule, the requirements of section 4.10 are mandatory.

In addition, certain electric resistance storage water heaters may optionally apply the requirements in section 5.1.2 of this appendix in lieu of the requirements in section 5.1.1 of this appendix for additional

voluntary representations only. Water heaters must certify according to the requirements in section 5.1.1 until the publication of a final rule reviewing potential amended energy conservation standards and specifying the required use of section 5.1.2 for these products published after June 21, 2023.

0. Incorporation by Reference.

DOE incorporated by reference in § 430.3 the entire standard for: ASHRAE 41.1–2020; ASHRAE 41.6–2014; ASHRAE 118.2–2022; ASTM D2156–09 (R2018); and ASTM E97–1987. However, only enumerated provisions of ASHRAE 118.2–2022 are applicable to this appendix, as follows:

0.1 ASHRAE 118.2–2022

(a) Annex B—Gas Heating Value Correction Factor;

(b) [Reserved]

0.2 [Reserved]

1. *Definitions.*

1.1. *Cut-in* means the time when or water temperature at which a water heater control or thermostat acts to increase the energy or fuel input to the heating elements, compressor, or burner.

1.2. *Cut-out* means the time when or water temperature at which a water heater control or thermostat acts to reduce to a minimum the energy or fuel input to the heating elements, compressor, or burner.

1.3. *Design Power Rating* means the power rating or input rate that a water heater manufacturer assigns to a particular design of water heater and that is included on the nameplate of the water heater, expressed in kilowatts or Btu (kJ) per hour as appropriate. For modulating water heaters, the design power rating is the maximum power rating or input rate that is specified by the manufacturer on the nameplate of the water heater.

1.4. *Draw Cluster* means a collection of water draws initiated during the 24-hour simulated-use test during which no successive draws are separated by more than 2 hours.

1.5. *First-Hour Rating* means an estimate of the maximum volume of ''hot'' water that a non-flow activated water heater can supply within an hour that begins with the water heater fully heated (*i.e.,* with all thermostats satisfied).

1.6. *Flow-Activated* describes an operational scheme in which a water heater initiates and terminates heating based on sensing flow.

1.7. *Heat Trap* means a device that can be integrally connected or independently attached to the hot and/or cold water pipe connections of a water heater such that the device will develop a thermal or mechanical seal to minimize the recirculation of water due to thermal convection between the water heater tank and its connecting pipes.

1.8. *Maximum GPM (L/min) Rating* means the maximum gallons per minute (liters per minute) of hot water that can be supplied by a flow-activated water heater when tested in accordance with section 5.3.2 of this appendix.

1.9. *Modulating Water Heater* means a water heater that can automatically vary its power or input rate from the minimum to the maximum power or input rate specified on the nameplate of the water heater by the manufacturer.

1.10. *Rated Storage Volume* means the water storage capacity of a water heater, in gallons (liters), as certified by the manufacturer pursuant to 10 CFR part 429.

1.11. *Recovery Efficiency* means the ratio of energy delivered to the water to the energy content of the fuel consumed by the water heater.

1.12. *Recovery Period* means the time when the main burner of a water heater with a rated storage volume greater than or equal to 2 gallons is raising the temperature of the stored water.

1.13. *Split-system heat pump water heater* means a heat pump-type water heater in which at least the compressor, which may be installed outdoors, is separate from the storage tank.

1.14. *Standby* means the time, in hours, during which water is not being withdrawn from the water heater.

1.15. *Symbol Usage.* The following identity relationships are provided to help clarify the symbology used throughout this procedure:

C_p—specific heat of water

E_{annual}—annual energy consumption of a water heater

$E_{annual,e}$—annual electrical energy consumption of a water heater

$E_{annual,f}$—annual fossil-fuel energy consumption of a water heater

E_X—energy efficiency of a heat pump-type water heater when the 24-hour simulated use test is optionally conducted at any of the additional air temperature conditions as specified in section 2.8 of this appendix, where the subscript ''X'' corresponds to the dry-bulb temperature at which the test is conducted.

F_{hr}—first-hour rating of a non-flow activated water heater

F_{max}—maximum GPM (L/min) rating of a flow-activated water heater

i—a subscript to indicate the draw number during a test

k_V—storage tank volume scaling ratio for water heaters with a rated storage volume greater than or equal to 2 gallons

$M_{del,i}$—mass of water removed during the ith draw of the 24-hour simulated-use test

$M_{in,i}$—mass of water entering the water heater during the ith draw of the 24-hour simulated-use test

$M^*_{del,i}$—for non-flow activated water heaters, mass of water removed during the ith draw during the first-hour rating test

$M^*_{in,i}$—for non-flow activated water heaters, mass of water entering the water heater during the ith draw during the first-hour rating test

$M_{del,10m}$—for flow-activated water heaters, mass of water removed continuously during the maximum GPM (L/min) rating test

$M_{in,10m}$—for flow-activated water heaters, mass of water entering the water heater continuously during the maximum GPM (L/min) rating test

n—for non-flow activated water heaters, total number of draws during the first-hour rating test

N—total number of draws during the 24-hour simulated-use test

N_r—number of draws from the start of the 24-hour simulated-use test to the end to the first recovery period as described in section 5.4.2 of this appendix

Q—total fossil fuel and/or electric energy consumed during the entire 24-hour simulated-use test

Q_d—daily water heating energy consumption adjusted for net change in internal energy

Q_{da}—Q_d with adjustment for variation of tank to ambient air temperature difference from nominal value

Q_{dm}—overall adjusted daily water heating energy consumption including Q_{da} and Q_{HWD}

Q_e—total electrical energy used during the 24-hour simulated-use test

Q_f—total fossil fuel energy used by the water heater during the 24-hour simulated-use test

Q_{hr}—hourly standby losses of a water heater with a rated storage volume greater than or equal to 2 gallons

Q_{HW}—daily energy consumption to heat water at the measured average temperature rise across the water heater

$Q_{HW,67\,°F}$—daily energy consumption to heat quantity of water removed during test over a temperature rise of 67 °F (37.3 °C)

Q_{HWD}—adjustment to daily energy consumption, Q_{HW}, due to variation of the temperature rise across the water heater not equal to the nominal value of 67 °F (37.3 °C)

Q_r—energy consumption of water heater from the beginning of the test to the end of the first recovery period

Q_{stby}—total energy consumed during the standby time interval $\tau_{stby,1}$, as determined in section 5.4.2 of this appendix

$Q_{su,0}$—cumulative energy consumption, including all fossil fuel and electrical energy use, of the water heater from the start of the 24-hour simulated-use test to the start of the standby period as determined in section 5.4.2 of this appendix

$Q_{su,f}$—cumulative energy consumption, including all fossil fuel and electrical energy use, of the water heater from the start of the 24-hour simulated-use test to the end of the standby period as determined in section 5.4.2 of this appendix

$\overline{T}_0$—mean tank temperature at the beginning of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix

$\overline{T}_{24}$—mean tank temperature at the end of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix

$\overline{T}_{a,stby}$—average ambient air temperature during all standby periods of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix

$\overline{T}_{a,stby,1}$—overall average ambient temperature between the start and end of the standby period as determined in section 5.4.2 of this appendix

$\overline{T}_{t,stby,1}$— overall average mean tank temperature between the start and end of the standby period as determined in section 5.4.2 of this appendix

$\overline{T}_{del}$—for flow-activated water heaters, average outlet water temperature during the maximum GPM (L/min) rating test

$\overline{T}_{del,i}$—average outlet water temperature during the ith draw of the 24-hour simulated-use test

$\overline{T}_{in}$—for flow-activated water heaters, average inlet water temperature during the maximum GPM (L/min) rating test

$\overline{T}_{st}$—for water heaters which cannot have internal tank temperature directly measured, estimated average internal storage tank temperature

T_p—for water heaters which cannot have internal tank temperature directly measured, average of the inlet and the outlet water temperatures at the end of the period defined by τ_p

$\overline{T}_{in,p}$—for water heaters which cannot have internal tank temperature directly measured, average of the inlet water temperatures

$\overline{T}_{out,p}$—for water heaters which cannot have internal tank temperature directly measured, average of the outlet water temperatures

$\overline{T}_{in,i}$—average inlet water temperature during the *i*th draw of the 24-hour simulated-use test

$\overline{T}_{max,1}$—maximum measured mean tank temperature after the first recovery period of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix

$\overline{T}_{su,0}$—maximum measured mean tank temperature at the beginning of the standby period as determined in section 5.4.2 of this appendix

$\overline{T}_{su,f}$—measured mean tank temperature at the end of the standby period as determined in section 5.4.2 of this appendix

$\overline{T}^*_{del,i}$—for non-flow activated water heaters, average outlet water temperature during the *i*th draw (i = 1 to n) of the first-hour rating test

$\overline{T}^*_{max,i}$—for non-flow activated water heaters, maximum outlet water temperature observed during the *i*th draw (i = 1 to n) of the first-hour rating test

$\overline{T}^*_{min,i}$—for non-flow activated water heaters, minimum outlet water temperature to terminate the *i*th draw (i = 1 to n) of the first-hour rating test

UA—standby loss coefficient of a water heater with a rated storage volume greater than or equal to 2 gallons

UEF—uniform energy factor of a water heater

V—the volume of hot water drawn during the applicable draw pattern

$V_{del,i}$—volume of water removed during the *i*th draw (i = 1 to N) of the 24-hour simulated-use test

$V_{in,i}$—volume of water entering the water heater during the *i*th draw (i = 1 to N) of the 24-hour simulated-use test

$V^*_{del,i}$—for non-flow activated water heaters, volume of water removed during the *i*th draw (i = 1 to n) of the first-hour rating test

$V^*_{in,i}$—for non-flow activated water heaters, volume of water entering the water heater during the *i*th draw (i = 1 to n) of the first-hour rating test

$V_{del,10m}$—for flow-activated water heaters, volume of water removed during the maximum GPM (L/min) rating test

$V_{in,10m}$—for flow-activated water heaters, volume of water entering the water heater during the maximum GPM (L/min) rating test

V_{st}—measured storage volume of the storage tank for water heaters with a rated storage volume greater than or equal to 2 gallons

V_{eff}—effective storage volume

$v_{out,p}$—for water heaters which cannot have internal tank temperature directly measured, average flow rate

W_f—weight of storage tank when completely filled with water for water heaters with a rated storage volume greater than or equal to 2 gallons

W_t—tare weight of storage tank when completely empty of water for water heaters with a rated storage volume greater than or equal to 2 gallons

η_r—recovery efficiency

ρ—density of water

τ_p—for water heaters which cannot have internal tank temperature directly measured, duration of the temperature measurement period, determined by the length of time taken for the outlet water temperature to be within 2 °F of the inlet water temperature for 15 consecutive seconds (including the 15-second stabilization period)

$\tau_{stby,1}$—elapsed time between the start and end of the standby period as determined in section 5.4.2 of this appendix

$\tau_{stby,2}$—overall time of standby periods when no water is withdrawn during the 24-hour simulated-use test as determined in section 5.4.2 of this appendix

1.16. *Temperature Controller* means a device that is available to the user to adjust the temperature of the water inside a water heater that stores heated water or the outlet water temperature.

1.17. *Thermal break* means a thermally non-conductive material that can withstand a pressure of 150 psi (1.034 MPa) at a temperature greater than the maximum temperature the water heater is designed to produce and is utilized to insulate a bypass loop, if one is used in the test set-up, from the inlet piping.

1.18. *Uniform Energy Factor* means the measure of water heater overall efficiency.

1.19. *Water Heater Requiring a Storage Tank* means a water heater without a storage tank specified or supplied by the manufacturer that cannot meet the requirements of sections 2 and 5 of this appendix without the use of a storage water heater or unfired hot water storage tank.

2. *Test Conditions.*

2.1 *Installation Requirements.* Tests shall be performed with the water heater and instrumentation installed in accordance with section 4 of this appendix.

2.2 *Ambient Air Temperature and Relative Humidity.*

2.2.1 *Non-Heat Pump Water Heaters.* The ambient air temperature shall be maintained between 65.0 °F and 70.0 °F (18.3 °C and 21.1 °C) on a continuous basis.

2.2.2 *Heat Pump Water Heaters.* The dry-bulb temperature shall be maintained at an average of 67.5 °F ± 1 °F (19.7 °C ± 0.6 °C) after a cut-in and before the next cut-out, an average of 67.5 °F ± 2.5 °F (19.7 °C ± 1.4 °C) after a cut-out and before the next cut-in, and at 67.5 °F ± 5 °F (19.7 °C ± 2.8 °C) on a continuous basis throughout the test. The relative humidity shall be maintained within a range of 50% ± 5% throughout the test, and at an average of 50% ± 2% after a cut-in and before the next cut-out.

When testing a split-system heat pump water heater or heat pump water heater requiring a separate storage tank, the heat pump portion of the system shall be tested at the conditions within this section and the separate water heater or unfired hot water storage tank shall be tested at either the conditions within this section or the conditions specified in section 2.2.1 of this appendix.

2.3 *Supply Water Temperature.* The temperature of the water being supplied to the water heater shall be maintained at 58 °F ± 2 °F (14.4 °C ± 1.1 °C) throughout the test.

2.4 *Outlet Water Temperature.* The temperature controllers of a non-flow activated water heater shall be set so that water is delivered at a temperature of 125 °F ± 5 °F (51.7 °C ± 2.8 °C).

2.5 *Set Point Temperature.* The temperature controller of a flow-activated water heater shall be set to deliver water at a temperature of 125 °F ± 5 °F (51.7 °C ± 2.8 °C). If the flow-activated water heater is not capable of delivering water at a temperature of 125 °F ± 5 °F (51.7 °C ± 2.8 °C) when supplied with water at the supply water temperature specified in section 2.3 of this appendix, then the flow-activated water heater shall be set to deliver water at its maximum water temperature.

2.6 *Supply Water Pressure.* During the test when water is not being withdrawn, the supply pressure shall be maintained between 40 psig (275 kPa) and the maximum allowable pressure specified by the water heater manufacturer.

2.7 *Electrical and/or Fossil Fuel Supply.*

2.7.1 *Electrical.* Maintain the electrical supply voltage to within ±2% of the center of the voltage range specified on the nameplate of the water heater by the water heater and/or heat pump manufacturer, from 5 seconds after a cut-in to 5 seconds before next cut-out.

2.7.2 *Natural Gas.* Maintain the supply pressure in accordance with the supply pressure specified on the nameplate of the water heater by the manufacturer. If the supply pressure is not specified, maintain a supply pressure of 7–10 inches of water column (1.7–2.5 kPa). If the water heater is equipped with a gas appliance pressure regulator and the gas appliance pressure regulator can be adjusted, the regulator outlet pressure shall be within the greater of ±10% of the manufacturer's specified manifold pressure, found on the nameplate of the water heater, or ±0.2 inches water column (0.05 kPa). Maintain the gas supply pressure and manifold pressure only when operating at the design power rating. For all tests, use natural gas having a heating value of approximately 1,025 Btu per standard cubic foot (38,190 kJ per standard cubic meter).

2.7.3 *Propane Gas.* Maintain the supply pressure in accordance with the supply pressure specified on the nameplate of the water heater by the manufacturer. If the supply pressure is not specified, maintain a supply pressure of 11–13 inches of water column (2.7–3.2 kPa). If the water heater is equipped with a gas appliance pressure regulator and the gas appliance pressure regulator can be adjusted, the regulator outlet pressure shall be within the greater of ±10% of the manufacturer's specified manifold pressure, found on the nameplate of the

water heater, or ±0.2 inches water column (0.05 kPa). Maintain the gas supply pressure and manifold pressure only when operating at the design power rating. For all tests, use propane gas with a heating value of approximately 2,500 Btu per standard cubic foot (93,147 kJ per standard cubic meter).

2.7.4 *Fuel Oil Supply.* Maintain an uninterrupted supply of fuel oil. The fuel pump pressure shall be within ±10% of the pump pressure specified on the nameplate of the water heater or the installation and operations (I&O) manual by the manufacturer. Use fuel oil having a heating value of approximately 138,700 Btu per gallon (38,660 kJ per liter).

2.8 *Optional Test Conditions (Heat Pump-Type Water Heaters).* The following test conditions may be used for optional representations of E_X for heat pump-type water heaters. When conducting a 24-hour simulated use test to determine E_X, the test conditions in section 2.1 and sections 2.4 through 2.7 apply. The ambient air temperature and humidity conditions in section 2.2 and the supply water temperature in section 2.3 are replaced with the air temperature, humidity, and supply water temperature conditions as shown in the following table. Testing may optionally be performed at any or all of the conditions in the table, and the sampling plan found at 10 CFR 429.17(a) may be applied for voluntary representations.

Heat pump type	Metric	Outdoor air conditions		Indoor air conditions		Supply water temperature (°F)
		Dry-bulb temperature (°F)	Relative humidity (%)	Dry-bulb temperature (°F)	Relative humidity (%)	
Split-System or Circulating	E_5	5.0	30	67.5	50	42.0
	E_{34}	34.0	72	.....	.....	47.0
	E_{95}	95.0	25	.....	.....	67.0
Integrated, Split-System, or Circulating	E_{50}	N/A	N/A	50.0	58	50.0
	E_{95}	N/A	N/A	95.0	40	67.0

3. *Instrumentation.*

3.1 *Pressure Measurements.* Pressure-measuring instruments shall have an error no greater than the following values:

Item measured	Instrument accuracy	Instrument precision
Gas pressure	±0.1 inch of water column (±0.025 kPa)	±0.05 inch of water column (±0.012 kPa).
Atmospheric pressure	±0.1 inch of mercury column (±0.34 kPa)	±0.05 inch of mercury column (±0.17 kPa).
Water pressure	±1.0 pounds per square inch (±6.9 kPa)	±0.50 pounds per square inch (±3.45 kPa).

3.2 *Temperature Measurement*

3.2.1 *Measurement.* Temperature measurements shall be made in accordance with the Standard Method for Temperature Measurement, ASHRAE 41.1–2020, including the conditions as specified in ASHRAE 41.6–2014 as referenced in ASHRAE 41.1–2020, and excluding the steady-state temperature criteria in section 5.5 of ASHRAE 41.1–2020.

3.2.2 *Accuracy and Precision.* The accuracy and precision of the instruments, including their associated readout devices, shall be within the following limits:

Item measured	Instrument accuracy	Instrument precision
Air dry-bulb temperature	±0.2 °F (±0.1 °C)	±0.1 °F (±0.06 °C).
Air wet-bulb temperature	±0.2 °F (±0.1 °C)	±0.1 °F (±0.06 °C).
Inlet and outlet water temperatures	±0.2 °F (±0.1 °C)	±0.1 °F (±0.06 °C).
Storage tank temperatures	±0.5 °F (±0.3 °C)	±0.25 °F (±0.14 °C).

3.2.3 *Scale Division.* In no case shall the smallest scale division of the instrument or instrument system exceed 2 times the specified precision.

3.2.4 *Temperature Difference.* Temperature difference between the entering and leaving water may be measured with any of the following:

(a) A thermopile
(b) Calibrated resistance thermometers
(c) Precision thermometers
(d) Calibrated thermistors
(e) Calibrated thermocouples
(f) Quartz thermometers

3.2.5 *Thermopile Construction.* If a thermopile is used, it shall be made from calibrated thermocouple wire taken from a single spool. Extension wires to the recording device shall also be made from that same spool.

3.2.6 *Time Constant.* The time constant of the instruments used to measure the inlet and outlet water temperatures shall be no greater than 2 seconds.

3.3 *Liquid Flow Rate Measurement.* The accuracy of the liquid flow rate measurement, using the calibration if furnished, shall be equal to or less than ±1% of the measured value in mass units per unit time.

3.4 *Electrical Energy.* The electrical energy used shall be measured with an instrument and associated readout device that is accurate within ±0.5% of the reading.

3.5 *Fossil Fuels.* The quantity of fuel used by the water heater shall be measured with an instrument and associated readout device that is accurate within ±1% of the reading.

3.6 *Mass Measurements.* For mass measurements greater than or equal to 10 pounds (4.5 kg), a scale that is accurate within ±0.5% of the reading shall be used to make the measurement. For mass measurements less than 10 pounds (4.5 kg), the scale shall provide a measurement that is accurate within ±0.1 pound (0.045 kg).

3.7 *Heating Value.* The higher heating value of the natural gas, propane, or fuel oil shall be measured with an instrument and associated readout device that is accurate within ±1% of the reading. The heating values of natural gas and propane must be corrected from those measured to the standard temperature of 60.0 °F (15.6 °C) and standard pressure of 30 inches of mercury column (101.6 kPa) using the method described in Annex B of ASHRAE 118.2–2022.

3.8 *Time.* The elapsed time measurements shall be measured with an instrument that is accurate within ±0.5 seconds per hour.

3.9 *Volume.* Volume measurements shall be measured with an accuracy of ±2% of the total volume.

3.10 *Relative Humidity.* If a relative humidity (RH) transducer is used to measure the relative humidity of the surrounding air while testing heat pump water heaters, the

relative humidity shall be measured with an accuracy of ±1.5% RH.

4. *Installation.*

4.1 *Water Heater Mounting.* A water heater designed to be freestanding shall be placed on a ¾ inch (2 cm) thick plywood platform supported by three 2x4 inch (5 cm x 10 cm) runners. If the water heater is not approved for installation on combustible flooring, suitable non-combustible material shall be placed between the water heater and the platform. Water heaters designed to be installed into a kitchen countertop space shall be placed against a simulated wall section. Wall-mounted water heaters shall be supported on a simulated wall in accordance with the manufacturer-published installation instructions. When a simulated wall is used, the construction shall be 2x4 inch (5 cm x 10 cm) studs, faced with ¾ inch (2 cm) plywood. For heat pump water heaters not delivered as a single package, the units shall be connected in accordance with the manufacturer-published installation instructions, and the overall system shall be placed on the above-described plywood platform. If installation instructions are not provided by the heat pump manufacturer, uninsulated 8 foot (2.4 m) long connecting hoses having an inside diameter of ⅝ inch (1.6 cm) shall be used to connect the storage tank and the heat pump water heater. With the exception of using the storage tank described in section 4.10 of this appendix, the same requirements shall apply for water heaters requiring a storage tank. The testing of the water heater shall occur in an area that is protected from drafts of more than 50 ft/min (0.25 m/s) from room ventilation registers, windows, or other external sources of air movement.

4.2 *Water Supply.* Connect the water heater to a water supply capable of delivering water at conditions as specified in sections 2.3 and 2.6 of this appendix.

4.3 *Water Inlet and Outlet Configuration.* For freestanding water heaters that are taller than 36 inches (91.4 cm), inlet and outlet piping connections shall be configured in a manner consistent with Figures 1 and 2 of section 7 of this appendix. Inlet and outlet piping connections for wall-mounted water heaters shall be consistent with Figure 3 of section 7 of this appendix. For freestanding water heaters that are 36 inches or less in height and not supplied as part of a counter-top enclosure (commonly referred to as an under-the-counter model), inlet and outlet piping shall be installed in a manner consistent with Figures 4, 5, or 6 of section 7 of this appendix. For water heaters that are supplied with a counter-top enclosure, inlet and outlet piping shall be made in a manner consistent with Figures 7a and 7b of section 7 of this appendix, respectively. The vertical piping noted in Figures 7a and 7b shall be located (whether inside the enclosure or along the outside in a recessed channel) in accordance with the manufacturer-published installation instructions.

All dimensions noted in Figures 1 through 7 of section 7 of this appendix must be achieved. All piping between the water heater and inlet and outlet temperature sensors, noted as T_{IN} and T_{OUT} in the figures, shall be Type ''L'' hard copper having the same diameter as the connections on the water heater. Unions may be used to facilitate installation and removal of the piping arrangements. Install a pressure gauge and diaphragm expansion tank in the supply water piping at a location upstream of the inlet temperature sensor. Install an appropriately rated pressure and temperature relief valve on all water heaters at the port specified by the manufacturer. Discharge piping for the relief valve must be non-metallic. If heat traps, piping insulation, or pressure relief valve insulation are supplied with the water heater, they must be installed for testing. Except when using a simulated wall, provide sufficient clearance such that none of the piping contacts other surfaces in the test room.

At the discretion of the test laboratory, the mass or water delivered may be measured on either the inlet or outlet of the water heater.

For water heaters designed to be used with a mixing valve and that do not have a self-contained mixing valve, a mixing valve shall be installed according to the water heater and/or mixing valve manufacturer's installation instructions. If permitted by the water heater and mixing valve manufacturer's instructions, the mixing valve and cold water junction may be installed where the elbows are located in the outlet and inlet line, respectively. If there are no installation instructions for the mixing valve in the water heater or mixing valve manufacturer's instructions, then the mixing valve shall be installed on the outlet line and the cold water shall be supplied from the inlet line from a junction installed downstream from the location where the inlet water temperature is measured. The outlet water temperature, water flow rate, and/or mass measuring instrumentation, if installed on the outlet side of the water heater, shall be installed downstream from the mixing valve.

4.4 *Fuel and/or Electrical Power and Energy Consumption.* Install one or more instruments that measure, as appropriate, the quantity and rate of electrical energy and/or fossil fuel consumption in accordance with section 3 of this appendix.

4.5 *Internal Storage Tank Temperature Measurements.* For water heaters with rated storage volumes greater than or equal to 20 gallons, install six temperature measurement sensors inside the water heater tank with a vertical distance of at least 4 inches (100 mm) between successive sensors. For water heaters with rated storage volumes between 2 and 20 gallons, install three temperature measurement sensors inside the water heater tank. Position a temperature sensor at the vertical midpoint of each of the six equal volume nodes within a tank larger than 20 gallons or the three equal volume nodes within a tank between 2 and 20 gallons. Nodes designate the equal volumes used to evenly partition the total volume of the tank. As much as is possible, the temperature sensor should be positioned away from any heating elements, anodic protective devices, tank walls, and flue pipe walls. If the tank cannot accommodate six temperature sensors and meet the installation requirements specified in this section, install the maximum number of sensors that comply with the installation requirements. Install the temperature sensors through:

(a) The anodic device opening;

(b) The relief valve opening; or

(c) The hot water outlet.

If installed through the relief valve opening or the hot water outlet, a tee fitting or outlet piping, as applicable, must be installed as close as possible to its original location. If the relief valve temperature sensor is relocated, and it no longer extends into the top of the tank, install a substitute relief valve that has a sensing element that can reach into the tank. If the hot water outlet includes a heat trap, install the heat trap on top of the tee fitting. Cover any added fittings with thermal insulation having an R value between 4 and 8 $h \cdot ft^2 \cdot °F/Btu$ (0.7 and 1.4 $m^2 \cdot °C/W$). If temperature measurement sensors cannot be installed within the water heater, follow the alternate procedures in section 5.4.2.2 of this appendix.

4.6 *Ambient Air Temperature Measurement.* Install an ambient air temperature sensor at the vertical midpoint of the water heater and approximately 2 feet (610 mm) from the surface of the water heater. Shield the sensor against radiation.

4.7 *Inlet and Outlet Water Temperature Measurements.* Install temperature sensors in the cold-water inlet pipe and hot-water outlet pipe as shown in Figures 1, 2, 3, 4, 5, 6, 7a, and 7b of section 7 of this appendix, as applicable.

4.8 *Flow Control.* Install a valve or valves to provide flow as specified in sections 5.3 and 5.4 of this appendix.

4.9 *Flue Requirements.*

4.9.1 *Gas-Fired Water Heaters.* Establish a natural draft in the following manner. For gas-fired water heaters with a vertically discharging draft hood outlet, connect to the draft hood outlet a 5-foot (1.5-meter) vertical vent pipe extension with a diameter equal to the largest flue collar size of the draft hood. For gas-fired water heaters with a horizontally discharging draft hood outlet, connect to the draft hood outlet a 90-degree elbow with a diameter equal to the largest flue collar size of the draft hood, connect a 5-foot (1.5-meter) length of vent pipe to that elbow, and orient the vent pipe to discharge vertically upward. Install direct-vent gas-fired water heaters with venting equipment specified by the manufacturer in the I&O manual using the minimum vertical and horizontal lengths of vent pipe recommended by the manufacturer.

4.9.2 *Oil-Fired Water Heaters.* Establish a draft at the flue collar at the value specified by the manufacturer in the I&O manual. Establish the draft by using a sufficient length of vent pipe connected to the water heater flue outlet, and directed vertically upward. For an oil-fired water heater with a horizontally discharging draft hood outlet, connect to the draft hood outlet a 90-degree elbow with a diameter equal to the largest flue collar size of the draft hood, connect to the elbow fitting a length of vent pipe sufficient to establish the draft, and orient the vent pipe to discharge vertically upward. Direct-vent oil-fired water heaters should be installed with venting equipment as specified by the manufacturer in the I&O manual, using the minimum vertical and horizontal

lengths of vent pipe recommended by the manufacturer.

4.10 *Storage Tank Requirement for Circulating Water Heaters.* On or after the compliance date of a final rule reviewing potential amended energy conservation standards for these products published after June 21, 2023,when testing a gas-fired, oil-fired, or electric resistance circulating water heater (*i.e.,* any circulating water heater that does not use a heat pump), the tank to be used for testing shall be an unfired hot water storage tank having volume between 80 and 120 gallons (364–546 liters) determined using the method specified in section 5.2.1 that meets but does not exceed the minimum energy conservation standards required according to 10 CFR 431.110. When testing a heat pump circulating water heater, the tank to be used for testing shall be an electric storage water heater that has a measured volume of 40 gallons (±5 gallons), has a First-Hour Rating greater than or equal to 51 gallons and less than 75 gallons resulting in classification under the medium draw pattern, and has a rated UEF equal to the minimum UEF standard specified at § 430.32(d), rounded to the nearest 0.01. The operational mode of the heat pump circulating water heater and storage water heater paired system shall be set in accordance with section 5.1.1 of this appendix. If the circulating water heater is supplied with a separate non-integrated circulating pump, install this pump as per the manufacturer's installation instructions and include its power consumption in energy use measurements.

4.11 *External Communication.* If the water heater can connect to an external network or controller, any external communication or connection shall be disabled for the duration of testing; however, the communication module shall remain in an ''on'' state.

5. *Test Procedures.*

5.1 *Operational Mode Selection.* For water heaters that allow for multiple user-selected operational modes, all procedures specified in this appendix shall be carried out with the water heater in the same operational mode (*i.e.,* only one mode).

5.1.1 *Testing at Normal Setpoint.* The operational mode shall be the default mode (or similarly named, suggested mode for normal operation) as defined by the manufacturer in the I&O manual for giving selection guidance to the consumer. For heat pump water heaters, if a default mode is not defined in the product literature, each test shall be conducted under an operational mode in which both the heat pump and any electric resistance back-up heating element(s) are activated by the unit's control scheme, and which can achieve the internal storage tank temperature specified in this test procedure; if multiple operational modes meet these criteria, the water heater shall be tested under the most energy-intensive mode. If no default mode is specified and the unit does not offer an operational mode that utilizes both the heat pump and the electric resistance back-up heating element(s), the first-hour rating test and the 24-hour simulated-use test shall be tested in heat-pump-only mode. For other types of water heaters where a default mode is not specified, test the unit in all modes and rate the unit using the results of the most energy-intensive mode.

5.1.2 *High Temperature Testing.* This paragraph applies to electric storage water heaters that are capable of heating their stored water above the target delivery temperature without initiation from a utility or third-party demand-response program, except for those that meet the definition of ''heat pump-type'' water heater at 10 CFR 430.2.

For those equipped with factory-installed or built-in mixing valves, set the unit to maintain the highest mean tank temperature possible while delivering water at 125 °F ± 5 °F. For those not so equipped, install an ASSE 1017-certified mixing valve in accordance with the provisions in section 4.3 and adjust the valve to deliver water at 125 °F ± 5 °F when the water heater is operating at its highest storage tank temperature setpoint. Maintain this setting throughout the entirety of the test.

5.2 *Water Heater Preparation.*

5.2.1 *Determination of Storage Tank Volume.* For water heaters with a rated storage volume greater than or equal to 2 gallons and for separate storage tanks used for testing circulating water heaters, determine the storage capacity, $V_{st,}$ of the water heater or separate storage tank under test, in gallons (liters), by subtracting the tare weight, W_t, (measured while the tank is empty) from the gross weight of the storage tank when completely filled with water at the supply water temperature specified in section 2.3 of this appendix, W_f, (with all air eliminated and line pressure applied as described in section 2.6 of this appendix) and dividing the resulting net weight by the density of water at the measured temperature.

5.2.2 *Setting the Outlet Discharge Temperature.*

5.2.2.1 *Flow-Activated Water Heaters, including certain instantaneous water heaters and certain storage-type water heaters.* Initiate normal operation of the water heater at the design power rating. Monitor the discharge water temperature and set to the value specified in section 2.5 of this appendix in accordance with the manufacturer's I&O manual. If the water heater is not capable of providing this discharge temperature when the flow rate is 1.7 gallons ± 0.25 gallons per minute (6.4 liters ± 0.95 liters per minute), then adjust the flow rate as necessary to achieve the specified discharge water temperature. Once the proper temperature control setting is achieved, the setting must remain fixed for the duration of the maximum GPM test and the 24-hour simulated-use test.

5.2.2.2 *All Other Water Heaters.*

5.2.2.2.1 *Water Heaters with a Single Temperature Controller.*

5.2.2.2.1.1 *Water Heaters with Rated Volumes Less than 20 Gallons.* Starting with a tank at the supply water temperature as specified in section 2.3 of this appendix, initiate normal operation of the water heater. After cut-out, initiate a draw from the water heater at a flow rate of 1.0 gallon ± 0.25 gallons per minute (3.8 liters ± 0.95 liters per minute) for 2 minutes. Starting 15 seconds after commencement of the draw, record the outlet temperature at 15-second intervals until the end of the 2-minute period. Determine whether the maximum outlet temperature is within the range specified in section 2.4 of this appendix. If not, turn off the water heater, adjust the temperature controller, and then drain and refill the tank with supply water at the temperature specified in section 2.3 of this appendix. Then, once again, initiate normal operation of the water heater, and repeat the 2-minute outlet temperature test following cut-out. Repeat this sequence until the maximum outlet temperature during the 2-minute test is within the range specified in section 2.4 of this appendix. Once the proper temperature control setting is achieved, the setting must remain fixed for the duration of the first-hour rating test and the 24-hour simulated-use test.

5.2.2.2.1.2 *Water Heaters with Rated Volumes Greater than or Equal to 20 Gallons.* Starting with a tank at the supply water temperature specified in section 2.3 of this appendix, initiate normal operation of the water heater. After cut-out, initiate a draw from the water heater at a flow rate of 1.7 gallons ± 0.25 gallons per minute (6.4 liters ± 0.95 liters per minute) for 5 minutes. Starting 15 seconds after commencement of the draw, record the outlet temperature at 15-second intervals until the end of the 5-minute period. Determine whether the maximum outlet temperature is within the range specified in section 2.4 of this appendix. If not, turn off the water heater, adjust the temperature controller, and then drain and refill the tank with supply water at the temperature specified in section 2.3 of this appendix. Then, once again, initiate normal operation of the water heater, and repeat the 5-minute outlet temperature test following cut-out. Repeat this sequence until the maximum outlet temperature during the 5-minute test is within the range specified in section 2.4 of this appendix. Once the proper temperature control setting is achieved, the setting must remain fixed for the duration of the first-hour rating test and the 24-hour simulated-use test.

5.2.2.2.2 *Water Heaters with Two or More Temperature Controllers.* Verify the temperature controller set-point while removing water in accordance with the procedure set forth for the first-hour rating test in section 5.3.3 of this appendix. The following criteria must be met to ensure that all temperature controllers are set to deliver water in the range specified in section 2.4 of this appendix:

(a) At least 50 percent of the water drawn during the first draw of the first-hour rating test procedure shall be delivered at a temperature within the range specified in section 2.4 of this appendix.

(b) No water is delivered above the range specified in section 2.4 of this appendix during first-hour rating test.

(c) The delivery temperature measured 15 seconds after commencement of each draw begun prior to an elapsed time of 60 minutes from the start of the test shall be within the range specified in section 2.4 of this appendix.

If these conditions are not met, turn off the water heater, adjust the temperature controllers, and then drain and refill the tank with supply water at the temperature specified in section 2.3 of this appendix. Repeat the procedure described at the start of section 5.2.2.2.2 of this appendix until the criteria for setting the temperature controllers is met.

If the conditions stated above are met, the data obtained during the process of verifying the temperature control set-points may be used in determining the first-hour rating provided that all other conditions and methods required in sections 2 and 5.2.4 of this appendix in preparing the water heater were followed.

5.2.3 *Power Input Determination.* For all water heaters except electric types, initiate normal operation (as described in section 5.1 of this appendix) and determine the power input, P, to the main burners (including pilot light power, if any) after 15 minutes of operation. Adjust all burners to achieve an hourly Btu (kJ) rating that is within ±2% of the maximum input rate value specified by the manufacturer. For an oil-fired water heater, adjust the burner to give a CO_2 reading recommended by the manufacturer and an hourly Btu (kJ) rating that is within ±2% of the maximum input rate specified by the manufacturer. Smoke in the flue may not exceed No. 1 smoke as measured by the procedure in ASTM D2156 (R2018), including the conditions as specified in ASTM E97–1987 as referenced in ASTM D2156 (R2018). If the input rating is not within ±2%, first increase or decrease the fuel pressure within the tolerances specified in section 2.7.2, 2.7.3 or 2.7.4 (as applicable) of this appendix until it is ±2% of the maximum input rate value specified by the manufacturer. If, after adjusting the fuel pressure, the fuel input rate cannot be achieved within ±2 percent of the maximum input rate value specified by the manufacturer, for gas-fired models increase or decrease the gas supply pressure within the range specified by the manufacturer. Finally, if the measured fuel input rate is still not within ±2 percent of the maximum input rate value specified by the manufacturer, modify the gas inlet orifice, if so equipped, as necessary to achieve a fuel input rate that is within ±2 percent of the maximum input rate value specified by the manufacturer.

5.2.4 *Soak-In Period for Water Heaters with Rated Storage Volumes Greater than or Equal to 2 Gallons.* For water heaters with a rated storage volume greater than or equal to 2 gallons (7.6 liters), the water heater must sit filled with water, connected to a power source, and without any draws taking place for at least 12 hours after initially being energized so as to achieve the nominal temperature set-point within the tank and with the unit connected to a power source.

5.3 *Delivery Capacity Tests.*

5.3.1 *General.* For flow-activated water heaters, conduct the maximum GPM test, as described in section 5.3.2, Maximum GPM Rating Test for Flow-Activated Water Heaters, of this appendix. For all other water heaters, conduct the first-hour rating test as described in section 5.3.3 of this appendix.

5.3.2 *Maximum GPM Rating Test for Flow-Activated Water Heaters.* Establish normal water heater operation at the design power rating with the discharge water temperature set in accordance with section 5.2.2.1 of this appendix.

For this 10-minute test, either collect the withdrawn water for later measurement of the total mass removed or use a water meter to directly measure the water mass of volume removed. Initiate water flow through the water heater and record the inlet and outlet water temperatures beginning 15 seconds after the start of the test and at subsequent 5-second intervals throughout the duration of the test. At the end of 10 minutes, turn off the water. Determine and record the mass of water collected, M_{10m}, in pounds (kilograms), or the volume of water, V_{10m}, in gallons (liters).

5.3.3 *First-Hour Rating Test.*

5.3.3.1 *General.* During hot water draws for water heaters with rated storage volumes greater than or equal to 20 gallons, remove water at a rate of 3.0 ± 0.25 gallons per minute (11.4 ± 0.95 liters per minute). During hot water draws for water heaters with rated storage volumes below 20 gallons, remove water at a rate of 1.5 ± 0.25 gallon per minute (5.7 ± 0.95 liters per minute). Collect the water in a container that is large enough to hold the volume removed during an individual draw and is suitable for weighing at the termination of each draw to determine the total volume of water withdrawn. As an alternative to collecting the water, a water meter may be used to directly measure the water mass or volume withdrawn during each draw.

5.3.3.2 *Draw Initiation Criteria.* Begin the first-hour rating test by starting a draw on the water heater. After completion of this first draw, initiate successive draws based on the following criteria. For gas-fired and oil-fired water heaters, initiate successive draws when the temperature controller acts to reduce the supply of fuel to the main burner. For electric water heaters having a single element or multiple elements that all operate simultaneously, initiate successive draws when the temperature controller acts to reduce the electrical input supplied to the element(s). For electric water heaters having two or more elements that do not operate simultaneously, initiate successive draws when the applicable temperature controller acts to reduce the electrical input to the energized element located vertically highest in the storage tank. For heat pump water heaters that do not use supplemental, resistive heating, initiate successive draws immediately after the electrical input to the compressor is reduced by the action of the water heater's temperature controller. For heat pump water heaters that use supplemental resistive heating, initiate successive draws immediately after the electrical input to the first of either the compressor or the vertically highest resistive element is reduced by the action of the applicable water heater temperature controller. This draw initiation criterion for heat pump water heaters that use supplemental resistive heating, however, shall only apply when the water located above the thermostat at cut-out is heated to within the range specified in section 2.4 of this appendix. If this criterion is not met, then the next draw should be initiated once the heat pump compressor cuts out.

5.3.3.3 *Test Sequence.* Establish normal water heater operation. If the water heater is not presently operating, initiate a draw. The draw may be terminated any time after cut-in occurs. After cut-out occurs (*i.e.,* all temperature controllers are satisfied), if the water heater can have its internal tank temperatures measured, record the internal storage tank temperature at each sensor described in section 4.5 of this appendix every one minute, and determine the mean tank temperature by averaging the values from these sensors.

Initiate a draw after a maximum mean tank temperature (the maximum of the mean temperatures of the individual sensors) has been observed following a cut-out. If the water heater cannot have its internal tank temperatures measured, wait 5 minutes after cut-out. Record the time when the draw is initiated and designate it as an elapsed time of zero ($\tau^* = 0$). (The superscript * is used to denote variables pertaining to the first-hour rating test). Record the outlet water temperature beginning 15 seconds after the draw is initiated and at 5-second intervals thereafter until the draw is terminated. Determine the maximum outlet temperature that occurs during this first draw and record it as $T^*_{max,1}$. For the duration of this first draw and all successive draws, in addition, monitor the inlet temperature to the water heater to ensure that the required supply water temperature test condition specified in section 2.3 of this appendix is met. Terminate the hot water draw when the outlet temperature decreases to $T^*_{max,1} - 15$ °F ($T^*_{max,1} - 8.3$ °C). (Note, if the outlet temperature does not decrease to $T^*_{max,1} - 15$ °F ($T^*_{max,1} - 8.3$ °C) during the draw, then hot water would be drawn continuously for the duration of the test. In this instance, the test would end when the temperature decreases to $T^*_{max,1} - 15$ °F ($T^*_{max,1} - 8.3$ °C) after the electrical power and/or fuel supplied to the water heater is shut off, as described in the following paragraphs.) Record this temperature as $T^*_{min,1}$. Following draw termination, determine the average outlet water temperature and the mass or volume removed during this first draw and record them as $\overline{T}^*_{del,i}$ and M^*_1 or V^*_1, respectively.

Initiate a second and, if applicable, successive draw(s) each time the applicable draw initiation criteria described in section 5.3.3.2 of this appendix are satisfied. As required for the first draw, record the outlet water temperature 15 seconds after initiating each draw and at 5-second intervals thereafter until the draw is terminated. Determine the maximum outlet temperature that occurs during each draw and record it as $T^*_{max,i}$, where the subscript i refers to the draw number. Terminate each hot water draw when the outlet temperature decreases to $T^*_{max,i} - 15$ °F ($T^*_{max,i} - 8.3$ °C). Record this temperature as $T^*_{min,i}$. Calculate and record the average outlet temperature and the mass or volume removed during each draw ($\overline{T}^*_{del,i}$ and M^*_i or V^*_i, respectively). Continue this sequence of draw and recovery until one hour after the start of the test, then shut off the electrical power and/or fuel supplied to the water heater.

If a draw is occurring at one hour from the start of the test, continue this draw until the outlet temperature decreases to $T^*_{max,n} - 15$ °F ($T^*_{max,n} - 8.3$ °C), at which time the draw shall be immediately terminated. (The subscript n shall be used to denote measurements associated with the final draw.) If a draw is not occurring one hour after the start of the test, initiate a final draw at one hour, regardless of whether the criteria described in section 5.3.3.2 of this appendix are satisfied. This draw shall proceed for a minimum of 30 seconds and shall terminate when the outlet temperature first indicates a value less than or equal to the cut-off temperature used for the previous draw ($T^*_{min,n-1}$). If an outlet temperature greater than $T^*_{min,n-1}$ is not measured within 30 seconds of initiation of the draw, zero additional credit shall be given towards first-hour rating (*i.e.,* $M^*_n = 0$ or $V^*_n = 0$) based on the final draw. After the final draw is terminated, calculate and record the average outlet temperature and the mass or volume removed during the final draw ($\overline{T}^*_{del,n}$ and M^*_n or V^*_n, respectively).

5.4 *24-Hour Simulated-Use Test.*

5.4.1 *Selection of Draw Pattern.* The water heater will be tested under a draw profile that depends upon the first-hour rating obtained following the test prescribed in section 5.3.3 of this appendix, or the maximum GPM rating obtained following the test prescribed in section 5.3.2 of this appendix, whichever is applicable. For water heaters that have been tested according to the first-hour rating procedure, one of four different patterns shall be applied based on the measured first-hour rating, as shown in Table I of this section. For water heater that have been tested according to the maximum GPM rating procedure, one of four different patterns shall be applied based on the maximum GPM, as shown in Table II of this section.

TABLE I—DRAW PATTERN TO BE USED BASED ON FIRST-HOUR RATING

First-hour rating greater than or equal to:	. . . and first-hour rating less than:	Draw pattern to be used in the 24-hour simulated-use test
0 gallons	18 gallons	Very-Small-Usage (Table III.1).
18 gallons	51 gallons	Low-Usage (Table III.2).
51 gallons	75 gallons	Medium-Usage (Table III.3).
75 gallons	No upper limit	High-Usage (Table III.4).

TABLE II—DRAW PATTERN TO BE USED BASED ON MAXIMUM GPM RATING

Maximum GPM rating greater than or equal to:	and maximum GPM rating less than:	Draw pattern to be used in the 24-hour simulated-use test
0 gallons/minute	1.7 gallons/minute	Very-Small-Usage (Table III.1).
1.7 gallons/minute	2.8 gallons/minute	Low-Usage (Table III.2).
2.8 gallons/minute	4 gallons/minute	Medium-Usage (Table III.3).
4 gallons/minute	No upper limit	High-Usage (Table III.4).

The draw patterns are provided in Tables III.1 through III.4 in section 5.5 of this appendix. Use the appropriate draw pattern when conducting the test sequence provided in section 5.4.2 of this appendix for water heaters with rated storage volumes greater than or equal to 2 gallons or section 5.4.3 of this appendix for water heaters with rated storage volumes less than 2 gallons.

5.4.2 *Test Sequence for Water Heater With Rated Storage Volume Greater Than or Equal to 2 Gallons.*

If the water heater is turned off, fill the water heater with supply water at the temperature specified in section 2.3 of this appendix and maintain supply water pressure as described in section 2.6 of this appendix. Turn on the water heater and associated heat pump unit, if present. If turned on in this fashion, the soak-in period described in section 5.2.4 of this appendix shall be implemented. If the water heater has undergone a first-hour rating test prior to conduct of the 24-hour simulated-use test, allow the water heater to fully recover after completion of that test such that the main burner, heating elements, or heat pump compressor of the water heater are no longer raising the temperature of the stored water. In all cases, the water heater shall sit idle for 1 hour prior to the start of the 24-hour test; during which time no water is drawn from the unit, and there is no energy input to the main heating elements, heat pump compressor, and/or burners.

For water heaters that can have their internal storage tank temperature measured directly, perform testing in accordance with the instructions in section 5.4.2.1 of this appendix. For water heaters that cannot have their internal tank temperatures measured, perform testing in accordance with the instructions in section 5.4.2.2. of this appendix.

5.4.2.1 *Water Heaters Which Can Have Internal Storage Tank Temperature Measured Directly.*

After the 1-hour period specified in section 5.4.2 of this appendix, the 24-hour simulated-use test will begin. One minute prior to the start of the 24-hour simulated-use test, record the mean tank temperature (T_0).

At the start of the 24-hour simulated-use test, record the electrical and/or fuel measurement readings, as appropriate. Begin the 24-hour simulated-use test by withdrawing the volume specified in the appropriate table in section 5.5 of this appendix (*i.e.,* Table III.1, Table III.2, Table III.3, or Table III.4, depending on the first-hour rating or maximum GPM rating) for the first draw at the flow rate specified in the applicable table. Record the time when this first draw is initiated and assign it as the test elapsed time (τ) of zero (0). Record the average storage tank and ambient temperature every minute throughout the 24-hour simulated-use test. At the elapsed times specified in the applicable draw pattern table in section 5.5 of this appendix for a particular draw pattern, initiate additional draws pursuant to the draw pattern, removing the volume of hot water at the prescribed flow rate specified by the table. The maximum allowable deviation from the specified volume of water removed for any single draw taken at a nominal flow rate of 1.0 GPM or 1.7 GPM is ±0.1 gallons (±0.4 liters). The maximum allowable deviation from the specified volume of water removed for any single draw taken at a nominal flow rate of 3.0 GPM is ±0.25 gallons (0.9 liters). The quantity of water withdrawn during the last draw shall be increased or decreased as necessary such that the total volume of water withdrawn equals the prescribed daily amount for that draw pattern ±1.0 gallon (±3.8 liters). If this adjustment to the volume drawn during the last draw results in no draw taking place, the test is considered invalid.

All draws during the 24-hour simulated-use test shall be made at the flow rates specified in the applicable draw pattern table in section 5.5 of this appendix, within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute). Measurements of the inlet and outlet temperatures shall be made 15 seconds after the draw is initiated and at every subsequent 3-second interval throughout the duration of each draw. Calculate and record the mean of the hot water discharge temperature and the cold water inlet temperature for each draw $T_{del,i}$ and $T_{in,i}$). Determine and record the net mass or volume removed (M_i or V_i), as appropriate, after each draw.

The first recovery period is the time from the start of the 24-hour simulated-use test and continues during the temperature rise of the stored water until the first cut-out; if the cut-out occurs during a subsequent draw, the first recovery period includes the time until the draw of water from the tank stops. If, after the first cut-out occurs but during a subsequent draw, a subsequent cut-in occurs prior to the draw completion, the first

recovery period includes the time until the subsequent cut-out occurs, prior to another draw. The first recovery period may continue until a cut-out occurs when water is not being removed from the water heater or a cut-out occurs during a draw and the water heater does not cut-in prior to the end of the draw.

At the end of the first recovery period, record the maximum mean tank temperature observed after cut-out ($T_{max,1}$). At the end of the first recovery period, record the total energy consumed by the water heater from the beginning of the test (Q_r), including all fossil fuel and/or electrical energy use, from the main heat source and auxiliary equipment including, but not limited to, burner(s), resistive elements(s), compressor, fan, controls, pump, *etc.,* as applicable.

The start of the portion of the test during which the standby loss coefficient is determined depends upon whether the unit has fully recovered from the first draw cluster. If a recovery is occurring at or within five minutes after the end of the final draw in the first draw cluster, as identified in the applicable draw pattern table in section 5.5 of this appendix, then the standby period starts when a maximum mean tank temperature is observed starting five minutes after the end of the recovery period that follows that draw. If a recovery does not occur at or within five minutes after the end of the final draw in the first draw cluster, as identified in the applicable draw pattern table in section 5.5 of this appendix, then the standby period starts five minutes after the end of that draw. Determine and record the total electrical energy and/or fossil fuel consumed from the beginning of the test to the start of the standby period ($Q_{su,0}$).

In preparation for determining the energy consumed during standby, record the reading given on the electrical energy (watt-hour) meter, the gas meter, and/or the scale used to determine oil consumption, as appropriate. Record the mean tank temperature at the start of the standby period ($T_{su,0}$). At 1-minute intervals, record ambient temperature, the electric and/or fuel instrument readings, and the mean tank temperature until the next draw is initiated. The end of the standby period is when the final mean tank temperature is recorded, as described. Just prior to initiation of the next draw, record the mean tank temperature ($T_{su,f}$). If the water heater is undergoing recovery when the next draw is initiated, record the mean tank temperature ($T_{su,f}$) at the minute prior to the start of the recovery. Determine the total electrical energy and/or fossil fuel energy consumption from the beginning of the test to the end of the standby period ($Q_{su,f}$). Record the time interval between the start of the standby period and the end of the standby period ($\tau_{stby,1}$).

Following the final draw of the prescribed draw pattern and subsequent recovery, allow the water heater to remain in the standby mode until exactly 24 hours have elapsed since the start of the 24-hour simulated-use test (*i.e.,* since $\tau = 0$). During the last hour of the 24-hour simulated-use test (*i.e.,* hour 23 of the 24-hour simulated-use test), power to the main burner, heating element, or compressor shall be disabled. At 24 hours, record the reading given by the gas meter, oil meter, and/or the electrical energy meter as appropriate. Determine the fossil fuel and/or electrical energy consumed during the entire 24-hour simulated-use test and designate the quantity as Q.

In the event that the recovery period continues from the end of the last draw of the first draw cluster until the subsequent draw, the standby period will start after the end of the first recovery period after the last draw of the 24-hour simulated-use test, when the temperature reaches the maximum mean tank temperature, though no sooner than five minutes after the end of this recovery period. The standby period shall last eight hours, so testing may extend beyond the 24-hour duration of the 24-hour simulated-use test. Determine and record the total electrical energy and/or fossil fuel consumed from the beginning of the 24-hour simulated-use test to the start of the 8-hour standby period ($Q_{su,0}$). In preparation for determining the energy consumed during standby, record the reading(s) given on the electrical energy (watt-hour) meter, the gas meter, and/or the scale used to determine oil consumption, as appropriate. Record the mean tank temperature at the start of the standby period ($T_{su,0}$). Record the mean tank temperature, the ambient temperature, and the electric and/or fuel instrument readings at 1-minute intervals until the end of the 8-hour period. Record the mean tank temperature at the end of the 8-hour standby period ($T_{su,f}$). If the water heater is undergoing recovery at the end of the standby period, record the mean tank temperature ($T_{su,f}$) at the minute prior to the start of the recovery, which will mark the end of the standby period. Determine the total electrical energy and/or fossil fuel energy consumption from the beginning of the test to the end of the standby period ($Q_{su,f}$). Record the time interval between the start of the standby period and the end of the standby period as $\tau_{stby,1}$. Record the average ambient temperature from the start of the standby period to the end of the standby period ($T_{a,stby,1}$). Record the average mean tank temperature from the start of the standby period to the end of the standby period ($T_{t,stby,1}$).

If the standby period occurred at the end of the first recovery period after the last draw of the 24-hour simulated-use test, allow the water heater to remain in the standby mode until exactly 24 hours have elapsed since the start of the 24-hour simulated-use test (*i.e.,* since $\tau = 0$) or the end of the standby period, whichever is longer. At 24 hours, record the mean tank temperature (T_{24}) and the reading given by the gas meter, oil meter, and/or the electrical energy meter as appropriate. If the water heater is undergoing a recovery at 24 hours, record the reading given by the gas meter, oil meter, and/or electrical energy meter, as appropriate, and the mean tank temperature (T_{24}) at the minute prior to the start of the recovery. Determine the fossil fuel and/or electrical energy consumed during the 24 hours and designate the quantity as Q.

Record the time during which water is not being withdrawn from the water heater during the entire 24-hour period ($\tau_{stby,2}$). When the standby period occurs after the last draw of the 24-hour simulated-use test, the test may extend past hour 24. When this occurs, the measurements taken after hour 24 apply only to the calculations of the standby loss coefficient. All other measurements during the time between hour 23 and hour 24 remain the same.

5.4.2.2 *Water Heaters Which Cannot Have Internal Storage Tank Temperature Measured Directly.*

After the water heater has undergone a 1-hour idle period (as described in section 5.4.2 of this appendix), deactivate the burner, compressor, or heating element(s).

Remove water from the storage tank by performing a continuous draw at the flow rate specified for the first draw of applicable draw pattern for the 24-hour simulated use test in section 5.5 of this appendix within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute). While removing the hot water, measure the inlet and outlet temperature after initiating the draw at 3-second intervals. Remove water until the outlet water temperature is within ±2 °F (±1.1 °C) of the inlet water temperature for 15 consecutive seconds. Determine the mean tank temperature using section 6.3.77 of this appendix and assign this value of $\overline{T}_{st}$ for $\overline{T}_0$, $\overline{T}_{max,1}$, and $\overline{T}_{su,0}$.

After completing the draw, reactivate the burner, compressor, or heating elements(s) and allow the unit to fully recover such that the main burner, heating elements, or heat pump compressor is no longer raising the temperature of the stored water. Let the water heater sit idle again for 1 hour prior to beginning the 24-hour test, during which time no water shall be drawn from the unit, and there shall be no energy input to the main heating elements. After the 1-hour period, the 24-hour simulated-use test will begin.

At the start of the 24-hour simulated-use test, record the electrical and/or fuel measurement readings, as appropriate. Begin the 24-hour simulated-use test by withdrawing the volume specified in the appropriate table in section 5.5 of this appendix (*i.e.,* Table III.1, Table III.2, Table III.3, or Table III.4, depending on the first-hour rating or maximum GPM rating) for the first draw at the flow rate specified in the applicable table. Record the time when this first draw is initiated and assign it as the test elapsed time (τ) of zero (0). Record the average ambient temperature every minute throughout the 24-hour simulated-use test. At the elapsed times specified in the applicable draw pattern table in section 5.5 of this appendix for a particular draw pattern, initiate additional draws pursuant to the draw pattern, removing the volume of hot water at the prescribed flow rate specified by the table. The maximum allowable deviation from the specified volume of water removed for any single draw taken at a nominal flow rate of 1.0 GPM or 1.7 GPM is ± 0.1 gallons (± 0.4 liters). The maximum allowable deviation from the specified volume of water removed for any single draw taken at a nominal flow rate of 3.0 GPM is ± 0.25 gallons (0.9 liters). The quantity of water withdrawn during the last draw shall be increased or decreased as necessary such that the total volume of water withdrawn equals the prescribed daily amount for that draw

pattern ± 1.0 gallon (± 3.8 liters). If this adjustment to the volume drawn during the last draw results in no draw taking place, the test is considered invalid.

All draws during the 24-hour simulated-use test shall be made at the flow rates specified in the applicable draw pattern table in section 5.5 of this appendix, within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute). Measurements of the inlet and outlet temperatures shall be made 15 seconds after the draw is initiated and at every subsequent 3-second interval throughout the duration of each draw. Calculate and record the mean of the hot water discharge temperature and the cold water inlet temperature for each draw $T_{del,i}$ and $T_{in,i}$). Determine and record the net mass or volume removed (M_i or V_i), as appropriate, after each draw.

The first recovery period is the time from the start of the 24-hour simulated-use test and continues until the first cut-out; if the cut-out occurs during a subsequent draw, the first recovery period includes the time until the draw of water from the tank stops. If, after the first cut-out occurs but during a subsequent draw, a subsequent cut-in occurs prior to the draw completion, the first recovery period includes the time until the subsequent cut-out occurs, prior to another draw. The first recovery period may continue until a cut-out occurs when water is not being removed from the water heater or a cut-out occurs during a draw and the water heater does not cut-in prior to the end of the draw.

At the end of the first recovery period, record the total energy consumed by the water heater from the beginning of the test (Q_r), including all fossil fuel and/or electrical energy use, from the main heat source and auxiliary equipment including, but not limited to, burner(s), resistive elements(s), compressor, fan, controls, pump, etc., as applicable.

The standby period begins at five minutes after the first time a recovery ends following last draw of the simulated-use test and shall continue for 8 hours. At the end of the 8-hour standby period, record the total amount of time elapsed since the start of the 24-hour simulated-use test (*i.e.,* since $\tau = 0$).

Determine and record the total electrical energy and/or fossil fuel consumed from the beginning of the 24-hour simulated-use test to the start of the 8-hour standby period ($Q_{su,0}$). In preparation for determining the energy consumed during standby, record the reading(s) given on the electrical energy (watt-hour) meter, the gas meter, and/or the scale used to determine oil consumption, as appropriate. Record the ambient temperature and the electric and/or fuel instrument readings at 1-minute intervals until the end of the 8-hour period. At the 8-hour mark, deactivate the water heater before drawing water from the tank. Remove water from the storage tank by performing a continuous draw atthe flow rate specified for the first draw of applicable draw pattern for the 24-hour simulated use test in section 5.5 of this appendix within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute). While removing the hot water, measure the inlet and outlet temperature after initiating the draw at 3-second intervals. Remove water until the outlet water temperature is within ±2 °F (±1.1 °C) of the inlet water temperature for 15 consecutive seconds. Determine the mean tank temperature using section 6.3.77 of this appendix and assign this value of $\overline{T}_{st}$ for $\overline{T}_{su,f}$ and $\overline{T}_{24}$.

Determine the total electrical energy and/or fossil fuel energy consumption from the beginning of the test to the end of the standby period ($Q_{su,f}$). Record the time interval between the start of the standby period and the end of the standby period as $\tau_{stby,1}$. Record the average ambient temperature from the start of the standby period to the end of the standby period ($T_{a,stby,1}$). The average mean tank temperature from the start of the standby period to the end of the standby period ($T_{t,stby,1}$) shall be the average of $T_{su,0}$ and $T_{su,f.}$

5.4.3 *Test Sequence for Water Heaters With Rated Storage Volume Less Than 2 Gallons.*

Establish normal operation with the discharge water temperature at 125 °F ± 5 °F (51.7 °C ± 2.8 °C) and set the flow rate as determined in section 5.2 of this appendix. Prior to commencement of the 24-hour simulated-use test, the unit shall remain in an idle state in which controls are active but no water is drawn through the unit for a period of one hour. With no draw occurring, record the reading given by the gas meter and/or the electrical energy meter as appropriate. Begin the 24-hour simulated-use test by withdrawing the volume specified in Tables III.1 through III.4 of section 5.5 of this appendix for the first draw at the flow rate specified. Record the time when this first draw is initiated and designate it as an elapsed time, τ, of 0. At the elapsed times specified in Tables III.1 through III.4 for a particular draw pattern, initiate additional draws, removing the volume of hot water at the prescribed flow rate specified in Tables III.1 through III.4. The maximum allowable deviation from the specified volume of water removed for any single draw taken at a nominal flow rate less than or equal to 1.7 GPM (6.4 L/min) is ±0.1 gallons (±0.4 liters). The maximum allowable deviation from the specified volume of water removed for any single draw taken at a nominal flow rate of 3.0 GPM (11.4 L/min) is ±0.25 gallons (0.9 liters). The quantity of water drawn during the final draw shall be increased or decreased as necessary such that the total volume of water withdrawn equals the prescribed daily amount for that draw pattern ±1.0 gallon (±3.8 liters). If this adjustment to the volume drawn in the last draw results in no draw taking place, the test is considered invalid.

All draws during the 24-hour simulated-use test shall be made at the flow rates specified in the applicable draw pattern table in section 5.5 of this appendix within a tolerance of ±0.25 gallons per minute (±0.9 liters per minute) unless the unit being tested is flow-activated and has a rated Max GPM of less than 1 gallon per minute, in which case the tolerance shall be ±25% of the rated Max GPM. Measurements of the inlet and outlet water temperatures shall be made 15 seconds after the draw is initiated and at every 3-second interval thereafter throughout the duration of the draw. Calculate the mean of the hot water discharge temperature and the cold-water inlet temperature for each draw. Record the mass of the withdrawn water or the water meter reading, as appropriate, after each draw. At the end of the first recovery period following the first draw, determine and record the fossil fuel and/or electrical energy consumed, Q_r. Following the final draw and subsequent recovery, allow the water heater to remain in the standby mode until exactly 24 hours have elapsed since the start of the test (*i.e.,* since $\tau = 0$). At 24 hours, record the reading given by the gas meter, oil meter, and/or the electrical energy meter, as appropriate. Determine the fossil fuel and/or electrical energy consumed during the entire 24-hour simulated-use test and designate the quantity as Q.

5.5 *Draw Patterns.*

The draw patterns to be imposed during 24-hour simulated-use tests are provided in Tables III.1 through III.4. Subject each water heater under test to one of these draw patterns based on its first-hour rating or maximum GPM rating, as discussed in section 5.4.1 of this appendix. Each draw pattern specifies the elapsed time in hours and minutes during the 24-hour test when a draw is to commence, the total volume of water in gallons (liters) that is to be removed during each draw, and the flow rate at which each draw is to be taken, in gallons (liters) per minute.

TABLE III.1—VERY-SMALL-USAGE DRAW PATTERN

Draw No.	Time during test ** [hh:mm]	Volume [gallons (L)]	Flow rate *** [GPM (L/min)]
1 *	0:00	2.0 (7.6)	1 (3.8)
2 *	1:00	1.0 (3.8)	1 (3.8)
3 *	1:05	0.5 (1.9)	1 (3.8)
4 *	1:10	0.5 (1.9)	1 (3.8)
5 *	1:15	0.5 (1.9)	1 (3.8)
6	8:00	1.0 (3.8)	1 (3.8)
7	8:15	2.0 (7.6)	1 (3.8)

TABLE III.1—VERY-SMALL-USAGE DRAW PATTERN—Continued

Draw No.	Time during test ** [hh:mm]	Volume [gallons (L)]	Flow rate *** [GPM (L/min)]
8	9:00	1.5 (5.7)	1 (3.8)
9	9:15	1.0 (3.8)	1 (3.8)
Total Volume Drawn Per Day: 10 gallons (38 L)			

* Denotes draws in first draw cluster.
** If a draw extends to the start of the subsequent draw, then the subsequent draw shall start when the required volume of the previous draw has been delivered.
*** Should the water heater have a maximum GPM rating less than 1 GPM (3.8 L/min), then all draws shall be implemented at a flow rate equal to the rated maximum GPM.

TABLE III.2—LOW-USAGE DRAW PATTERN

Draw No.	Time during test [hh:mm]	Volume [gallons (L)]	Flow rate [GPM (L/min)]
1 *	0:00	15.0 (56.8)	1.7 (6.4)
2 *	0:30	2.0 (7.6)	1 (3.8)
3 *	1:00	1.0 (3.8)	1 (3.8)
4	10:30	6.0 (22.7)	1.7 (6.4)
5	11:30	4.0 (15.1)	1.7 (6.4)
6	12:00	1.0 (3.8)	1 (3.8)
7	12:45	1.0 (3.8)	1 (3.8)
8	12:50	1.0 (3.8)	1 (3.8)
9	16:15	2.0 (7.6)	1 (3.8)
10	16:45	2.0 (7.6)	1.7 (6.4)
11	17:00	3.0 (11.4)	1.7 (6.4)
Total Volume Drawn Per Day: 38 gallons (144 L)			

*Denotes draws in first draw cluster.

TABLE III.3—MEDIUM-USAGE DRAW PATTERN

Draw No.	Time during test [hh:mm]	Volume [gallons (L)]	Flow Rate [GPM (L/min)]
1 *	0:00	15.0 (56.8)	1.7 (6.4)
2 *	0:30	2.0 (7.6)	1 (3.8)
3 *	1:40	9.0 (34.1)	1.7 (6.4)
4	10:30	9.0 (34.1)	1.7 (6.4)
5	11:30	5.0 (18.9)	1.7 (6.4)
6	12:00	1.0 (3.8)	1 (3.8)
7	12:45	1.0 (3.8)	1 (3.8)
8	12:50	1.0 (3.8)	1 (3.8)
9	16:00	1.0 (3.8)	1 (3.8)
10	16:15	2.0 (7.6)	1 (3.8)
11	16:45	2.0 (7.6)	1.7 (6.4)
12	17:00	7.0 (26.5)	1.7 (6.4)
Total Volume Drawn Per Day: 55 gallons (208 L)			

* Denotes draws in first draw cluster.

TABLE III.4—HIGH-USAGE DRAW PATTERN

Draw No.	Time during test [hh:mm]	Volume [gallons (L)]	Flow rate [GPM (L/min)]
1 *	0:00	27.0 (102)	3 (11.4)
2 *	0:30	2.0 (7.6)	1 (3.8)
3 *	0:40	1.0 (3.8)	1 (3.8)
4 *	1:40	9.0 (34.1)	1.7 (6.4)
5	10:30	15.0 (56.8)	3 (11.4)
6	11:30	5.0 (18.9)	1.7 (6.4)
7	12:00	1.0 (3.8)	1 (3.8)
8	12:45	1.0 (3.8)	1 (3.8)
9	12:50	1.0 (3.8)	1 (3.8)
10	16:00	2.0 (7.6)	1 (3.8)

TABLE III.4—HIGH-USAGE DRAW PATTERN—Continued

Draw No.	Time during test [hh:mm]	Volume [gallons (L)]	Flow rate [GPM (L/min)]
11	16:15	2.0 (7.6)	1 (3.8)
12	16:30	2.0 (7.6)	1.7 (6.4)
13	16:45	2.0 (7.6)	1.7 (6.4)
14	17:00	14.0 (53.0)	3 (11.4)
Total Volume Drawn Per Day: 84 gallons (318 L)			

* Denotes draws in first draw cluster.

5.6 *Optional Tests (Heat Pump-Type Water Heaters).* Optional testing may be conducted on heat pump-type water heaters to determine E_X. If optional testing is performed, conduct the additional 24-hour simulated use test(s) at one or multiple of the test conditions specified in section 2.8 of this appendix. Prior to conducting a 24-hour simulated use test at an optional condition, confirm the air and water conditions specified in section 2.8 are met and re-set the outlet discharge temperature in accordance with section 5.2.2 of this appendix. Perform the optional 24-hour simulated use test(s) in accordance with section 5.4 of this appendix using the same draw pattern used for the determination of UEF.

6. *Computations.*

6.1 *First-Hour Rating Computation.* For the case in which the final draw is initiated at or prior to one hour from the start of the test, the first-hour rating, F_{hr}, shall be computed using,

$$F_{hr} = \sum_{i=1}^{n} V^*_{del,i}$$

Where:

n = the number of draws that are completed during the first-hour rating test.

$V^*_{del,i}$ = the volume of water removed during the *i*th draw of the first-hour rating test, gal (L) or, if the mass of water removed is being measured,

$$V^*_{del,i} = \frac{M^*_{del,i}}{\rho_{del,i}}$$

Where:

$M^*_{del,i}$ = the mass of water removed during the *i*th draw of the first-hour rating test, lb (kg).

$\rho_{del,i}$ = the density of water removed, evaluated at the average outlet water temperature measured during the *i*th draw of the first-hour rating test, ($\overline{T}^*_{del,i}$), lb/gal (kg/L).

or, if the volume of the water entering the water heater is being measured,

$$V^*_{del,i} = V^*_{in,i}\frac{\rho_{in,i}}{\rho_{del,i}}$$

Where:

$V^*_{in,i}$ = the volume of water entering the water heater during the *i*th draw of the first-hour rating test, gal (L).

$\rho_{in,i}$ = the density of water entering the water heater, evaluated at the average inlet water temperature measured during the *i*th draw of the first-hour rating test, ($\overline{T}^*_{in,i}$), lb/gal (kg/L).

or, if the mass of water entering the water heater is being measured,

$$V^*_{del,i} = \frac{M^*_{in,i}}{\rho_{del,i}}$$

Where:

$M^*_{in,i}$ = the mass of water entering the water heater during the *i*th draw of the first-hour rating test, lb (kg).

For the case in which a draw is not in progress at one hour from the start of the test and a final draw is imposed at the elapsed time of one hour, the first-hour rating shall be calculated using,

$$F_{hr} = V^*_{del,n}\left(\frac{\overline{T}^*_{del,n} - \overline{T}^*_{min,n-1}}{\overline{T}^*_{del,n-1} - \overline{T}^*_{min,n-1}}\right) + \sum_{i=1}^{n-1} V^*_{del,i}$$

where n and $V^*_{del,i}$ are the same quantities as defined above, and

$V^*_{del,n}$ = the volume of water removed during the *n*th (final) draw of the first-hour rating test, gal (L).

$\overline{T}^*_{del,n-1}$ = the average water outlet temperature measured during the *(n − 1)*th draw of the first-hour rating test, °F (°C).

$\overline{T}^*_{del,n}$ = the average water outlet temperature measured during the *n*th (final) draw of the first-hour rating test, °F (°C).

$T^*_{min,n-1}$ = the minimum water outlet temperature measured during the *(n − 1)*th draw of the first-hour rating test, °F (°C).

6.2 *Maximum GPM (L/min) Rating Computation.* Compute the maximum GPM (L/min) rating, F_{max}, as:

$$F_{max} = \frac{V_{del,10m}(\overline{T}_{del} - \overline{T}_{in})}{10(125°F - 58°F)}$$

or,

$$F_{max} = \frac{V_{del,10m}(\overline{T}_{del} - \overline{T}_{in})}{10(51.7°C - 14.4°C)}$$

Where:

$V_{del,10m}$ = the volume of water removed during the maximum GPM (L/min) rating test, gal (L).

$\overline{T}_{del}$ = the average delivery temperature, °F (°C).

$\overline{T}_{in}$ = the average inlet temperature, °F (°C).

10 = the number of minutes in the maximum GPM (L/min) rating test, min.

or, if the mass of water removed is measured,

$$V_{del,10m} = \frac{M_{del,10m}}{\rho_{del}}$$

Where:

$M_{del,10m}$ = the mass of water removed during the maximum GPM (L/min) rating test, lb (kg).

ρ_{del} = the density of water removed, evaluated at the average delivery water temperature of the maximum GPM (L/min) rating test ($\overline{T}_{del}$), lb/gal (kg/L).

or, if the volume of water entering the water heater is measured,

$$V_{del,10m} = V_{in,10m}\frac{\rho_{in}}{\rho_{del}}$$

Where:

$V_{in,10m}$ = the volume of water entering the water heater during the maximum GPM (L/min) rating test, gal (L).

ρ_{in} = the density of water entering the water heater, evaluated at the average inlet

water temperature of the maximum GPM (L/min) rating test ($\overline{T}_{del}$), lb/gal (kg/L).

or, if the mass of water entering the water heater is measured,

$$V_{del,10m} = \frac{M_{in,10m}}{\rho_{del}}$$

Where:

$M_{in,10m}$ = the mass of water entering the water heater during the maximum GPM (L/min) rating test, lb (kg).

6.3 *Computations for Water Heaters with a Rated Storage Volume Greater Than or Equal to 2 Gallons and Circulating Water Heaters.*

6.3.1 *Storage Tank Capacity.* The storage tank capacity, V_{st}, is computed as follows:

$$V_{st} = \frac{(W_f - W_t)}{\rho}$$

Where:

V_{st} = the storage capacity of the water heater, or, for circulating water heaters, the storage capacity of the separate storage tank used in accordance with section 4.10, gal (L).

W_f = the weight of the storage tank when completely filled with water, lb (kg).

W_t = the (tare) weight of the storage tank when completely empty, lb (kg).

ρ = the density of water used to fill the tank measured at the temperature of the water, lb/gal (kg/L).

6.3.1.1 *Effective Storage Volume.* The effective storage tank capacity, V_{eff}, is computed as follows:

For water heaters requiring a separate storage tank, V_{eff} is the storage tank capacity of the separate storage tank as determined per section 6.3.1.

For all other water heaters:

$V_{eff} = k_V V_{st}$

Where:

V_{st} = as defined in section 6.3.1 and

k_V = a dimensionless volume scaling factor determined as follows:

If the first recovery period extends into the second draw of the 24-hour simulated use test, and

If $\overline{T}_0 > (\overline{T}_{del,1} + 5\ °F)$ and $\overline{T}_0 \geq 130\ °F$,

(if $\overline{T}_0 > (\overline{T}_{del,1} + 2.8\ °C)$ and $\overline{T}_0 \geq 54.4\ °C$),

$$k_V = \frac{\rho(\overline{T}_0) \times C_p(\overline{T}_0) \times (\overline{T}_0 - 67.5°F)}{\rho(125°F) \times C_p(125°F) \times (125°F - 67.5°F)}$$

$$\left(k_V = \frac{\rho(\overline{T}_0) \times C_p(\overline{T}_0) \times (\overline{T}_0 - 19.7℃)}{\rho(51.7℃) \times C_p(51.7℃) \times (51.7℃ - 19.7℃)}\right);$$

If the first recovery period does not extend into the second draw of the 24-hour simulated use test, and

If $\overline{T}_{max,1} > (\overline{T}_{del,2} + 5\ °F)$ and $\overline{T}_{max,1} \geq 130\ °F$,

(if $\overline{T}_{max,1} > (\overline{T}_{del,2} + 2.8\ °C)$ and $\overline{T}_{max,1} \geq 54.4\ °C$),

$$k_V = \frac{\rho(\overline{T}_{max,1}) \times C_p(\overline{T}_{max,1}) \times (\overline{T}_{max,1} - 67.5°F)}{\rho(125°F) \times C_p(125°F) \times (125°F - 67.5°F)}$$

$$\left(k_V = \frac{\rho(\overline{T}_{max,1}) \times C_p(\overline{T}_{max,1}) \times (\overline{T}_{max,1} - 19.7℃)}{\rho(51.7℃) \times C_p(51.7℃) \times (51.7℃ - 19.7℃)}\right);$$

Otherwise, $k_V = 1$.

Where:

$\overline{T}_0$= the mean tank temperature at the beginning of the 24-hour simulated-use test, °F(°C).

$\overline{T}_{del,1}$= the average outlet water temperature during the first draw of the 24-hour simulated-use test, °F(°C).

$\rho(\overline{T}_0)$ = the density of the stored hot water evaluated at the mean tank temperature at the beginning of the 24-hour simulated-use test ($\overline{T}_0$), lb/gal (kg/L).

$C_p(\overline{T}_0)$ = the specific heat of the stored hot water, evaluated at $\overline{T}_0$, Btu/(lb·°F) (kJ/(kg·°C)).

$\overline{T}_{max,1}$ = the maximum measured mean tank temperature after cut-out following the first draw of the 24-hour simulated-use test, °F(°C).

$\overline{T}_{del,2}$= the average outlet water temperature during the second draw of the 24-hour simulated-use test, °F(°C).

$\rho(\overline{T}_{max,1})$ = the density of the stored hot water evaluated at the maximum measured mean tank temperature after cut-out following the first draw of the 24-hour simulated-use test ($\overline{T}_{max,1}$), lb/gal (kg/L).

$C_p(\overline{T}_{max,1})$ = the specific heat of the stored hot water, evaluated at $\overline{T}_{max,1}$, Btu/(lb·°F) (kJ/(kg·°C)).

ρ(125 °F) = the density of the stored hot water at 125 °F, lb/gal (kg/L).

C_p(125 °F) = the specific heat of the stored hot water at 125 °F, Btu/(lb·°F) (kJ/(kg·°C)).

125 °F (51.7 °C) = the nominal maximum mean tank temperature for a storage tank that does not utilize a mixing valve to achieve a 125 °F delivery temperature.

67.5 °F (19.7 °C) = the nominal average ambient air temperature.

6.3.2 *Mass of Water Removed.* Determine the mass of water removed during each draw of the 24-hour simulated-use test ($M_{del,i}$) as:

If the mass of water removed is measured, use the measured value, or, if the volume of water removed is being measured,

$M_{del,i} = V_{del,i} * P_{del,i}$

Where:

$V_{del,i}$ = volume of water removed during the *i*th draw of the 24-hour simulated-use test, gal (L).

$\rho_{del,i}$ = density of the water removed, evaluated at the average outlet water temperature measured during the *i*th draw of the 24-hour simulated-use test, ($\overline{T}_{del,i}$), lb/gal (kg/L).

or, if the volume of water entering the water heater is measured,

$M_{del,i} = V_{in,i} * \rho_{in,i}$

Where:

$V_{in,i}$ = volume of water entering the water heater during draw *i*th draw of the 24-hour simulated-use test, gal (L).

$\rho_{in,i}$ = density of the water entering the water heater, evaluated at the average inlet water temperature measured during the *i*th draw of the 24-hour simulated-use test, ($\overline{T}_{in,i}$), lb/gal (kg/L).

or, if the mass of water entering the water heater is measured,

$M_{del,i} = M_{in,i}$

Where:

$M_{in,i}$ = mass of water entering the water heater during draw *i*th draw of the 24-hour simulated-use test, lb (kg).

6.3.3 *Recovery Efficiency.* The recovery efficiency for gas, oil, and heat pump water heaters with a rated storage volume greater than or equal to 2 gallons, η_r, is computed as:

$$\eta_r = \frac{V_{st}\,\rho_1\,C_{p1}\left(\overline{T}_{max,1} - \overline{T}_0\right)}{Q_r} + \sum_{i=1}^{N_r} \frac{M_{del,i}\,C_{pi}\left(\overline{T}_{del,i} - \overline{T}_{in,i}\right)}{Q_r}$$

Where:

V_{st} = as defined in section 6.3.1 of this appendix.

ρ_1 = density of stored hot water evaluated at $(\overline{T}_{max,1} + \overline{T}_0)/2$, lb/gal (kg/L).

C_{p1} = specific heat of the stored hot water, evaluated at $(\overline{T}_{max,1} + \overline{T}_0)/2$, Btu/(lb·°F) (kJ/(kg·°C).

$\overline{T}_{max,1}$ = maximum mean tank temperature recorded after the first recovery period as defined in section 5.4.2 of this appendix, °F (°C).

$\overline{T}_0$ = mean tank temperature recorded at the beginning of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix, °F (°C).

Q_r = the total energy used by the water heater during the first recovery period as defined in section 5.4.2 of this appendix, including auxiliary energy such as pilot lights, pumps, fans, *etc.,* Btu (kJ). (Electrical auxiliary energy shall be converted to thermal energy using the following conversion: 1 kWh = 3412 Btu).

N_r = number of draws from the start of the 24-hour simulated-use test to the end to the first recovery period as described in section 5.4.2.

$M_{del,i}$ = mass of water removed as calculated in section 6.3.2 of this appendix during the *i*th draw of the first recovery period as described in section 5.4.2, lb (kg).

C_{pi} = specific heat of the withdrawn water during the *i*th draw of the first recovery period as described in section 5.4.2, evaluated at $(\overline{T}_{del,i} + \overline{T}_{in,i})/2$, Btu/(lb· °F) (kJ/(kg· °C)).

$\overline{T}_{del,i}$ = average water outlet temperature measured during the *i*th draw of the first recovery period as described in section 5.4.2, °F (°C).

$\overline{T}_{in,i}$ = average water inlet temperature measured during the *i*th draw of the first recovery period as described in section 5.4.2, °F (°C).

The recovery efficiency for electric water heaters with immersed heating elements, not including heat pump water heaters with immersed heating elements, is assumed to be 98 percent.

6.3.4 *Hourly Standby Losses.* The energy consumed as part of the standby loss test of the 24-hour simulated-use test, $Q_{stby,}$ is computed as:

$Q_{stby} = Q_{su,f} - Q_{su,o}$

Where:

$Q_{su,0}$ = cumulative energy consumption, including all fossil fuel and electrical energy use, of the water heater from the start of the 24-hour simulated-use test to the start of the standby period as determined in section 5.4.2 of this appendix, Btu (kJ).

$Q_{su,f}$ = cumulative energy consumption, including all fossil fuel and electrical energy use, of the water heater from the start of the 24-hour simulated-use test to the end of the standby period as determined in section 5.4.2 of this appendix, Btu (kJ).

The hourly standby energy losses are computed as:

$$Q_{hr} = \frac{Q_{stby} - \dfrac{V_{st}\,\rho\,C_p\left(\overline{T}_{su,f} - \overline{T}_{su.0}\right)}{\eta_r}}{\tau_{stby,1}}$$

Where:

Q_{hr} = the hourly standby energy losses of the water heater, Btu/h (kJ/h).

V_{st} = as defined in section 6.3.1 of this appendix.

ρ = density of the stored hot water, evaluated at $(\overline{T}_{su,f} + \overline{T}_{su,0})/2$, lb/gal (kg/L).

C_p = specific heat of the stored water, evaluated at $(\overline{T}_{su,f} + \overline{T}_{su,0})/2$, Btu/(lb·°F), (kJ/(kg·K)).

$\overline{T}_{su,f}$ = the mean tank temperature measured at the end of the standby period as determined in section 5.4.2 of this appendix, °F (°C).

$\overline{T}_{su,0}$ = the maximum mean tank temperature measured at the beginning of the standby period as determined in section 5.4.2 of this appendix, °F (°C).

η_r = as defined in section 6.3.3 of this appendix.

$\tau_{stby,1}$ = elapsed time between the start and end of the standby period as determined in section 5.4.2 of this appendix, h.

The standby heat loss coefficient for the tank is computed as:

$$UA = \frac{Q_{hr}}{\overline{T}_{t,stby,1} - \overline{T}_{a,stby,1}}$$

Where:

UA = standby heat loss coefficient of the storage tank, Btu/(h· °F), (kJ/(h· °C).

$\overline{T}_{t,stby,1}$ = overall average mean tank temperature between the start and end of the standby period as determined in section 5.4.2 of this appendix, °F (°C).

$\overline{T}_{a,stby,1}$ = overall average ambient temperature between the start and end of the standby period as determined in section 5.4.2 of this appendix, °F (°C).

6.3.5 *Daily Water Heating Energy Consumption.* The total energy used by the water heater during the 24-hour simulated-use test (Q) is as measured in section 5.4.2 of this appendix, or,

$Q = Q_f + Q_e$ = total energy used by the water heater during the 24-hour simulated-use test, including auxiliary energy such as pilot lights, pumps, fans, etc., Btu (kJ).

Q_f = total fossil fuel energy used by the water heater during the 24-hour simulated-use test, Btu (kJ).

Q_e = total electrical energy used during the 24-hour simulated-use test, Btu (kJ). (Electrical energy shall be converted to thermal energy using the following conversion: 1kWh = 3412 Btu.)

The daily water heating energy consumption, Q_d, is computed as:

$$Q_d = Q - \frac{V_{st}\,\rho\,C_p\,(\overline{T}_{24} - \overline{T}_0)}{\eta_r}$$

Where:

V_{st} = as defined in section 6.3.1 of this appendix.

ρ = density of the stored hot water, evaluated at $(\overline{T}_{24} + \overline{T}_0)/2$, lb/gal (kg/L).

C_p = specific heat of the stored water, evaluated at $(\overline{T}_{24} + \overline{T}_0)/2$, Btu/(lb·°F), (kJ/(kg·K)).

$\overline{T}_{24}$ = mean tank temperature at the end of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix, °F (°C).

$\overline{T}_0$ = mean tank temperature recorded at the beginning of the 24-hour simulated-use test as determined in section 5.4.2 of this appendix, °F (°C).

η_r = as defined in section 6.3.3 of this appendix.

6.3.6 *Adjusted Daily Water Heating Energy Consumption.* The adjusted daily water

heating energy consumption, $Q_{da,}$ takes into account that the ambient temperature may differ from the nominal value of 67.5 °F (19.7 °C) due to the allowable variation in surrounding ambient temperature of 65 °F (18.3 °C) to 70 °C (21.1 °C). The adjusted daily water heating energy consumption is computed as:

$Q_{da} = Q_d - (67.5°C - \overline{T}_{a,stby,2})\ UA\ \tau_{stby,2}$

or,

$Q_{da} = Q_d - (19.7°C - \overline{T}_{a,stby,2})\ UA\ \tau_{stby,2}$

Where:

Q_{da} = the adjusted daily water heating energy consumption, Btu (kJ).

Q_d = as defined in section 6.3.4 of this appendix.

$\overline{T}_{a,stby,2}$ = the average ambient temperature during the total standby portion, $\tau_{stby,2}$, of the 24-hour simulated-use test, °F (°C).

UA = as defined in section 6.3.4 of this appendix.

$\tau_{stby,2}$ = the number of hours during the 24-hour simulated-use test when water is not being withdrawn from the water heater.

A modification is also needed to take into account that the temperature difference between the outlet water temperature and supply water temperature may not be equivalent to the nominal value of 67 °F (125 °F–58 °F) or 37.3 °C (51.7 °C–14.4 °C). The following equations adjust the experimental data to a nominal 67 °F (37.3 °C) temperature rise.

The energy used to heat water, Btu/day (kJ/day), may be computed as:

$$Q_{HW} = \sum_{i=1}^{N} \frac{M_{del,i}\ C_{pi}\left(\overline{T}_{del,i} - \overline{T}_{in,i}\right)}{\eta_r}$$

Where:

N = total number of draws in the 24-hour simulated-use test.

$M_{del,i}$ = the mass of water removed during the *i*th draw (i = 1 to N) as calculated in section 6.3.2 of this appendix, lb (kg).

C_{pi} = the specific heat of the water withdrawn during the *i*th draw of the 24-hour simulated-use test, evaluated at ($\overline{T}_{del,i}$ + $\overline{T}_{in,i}$)/2, Btu/(lb· °F) (kJ/(kg·°C)).

$\overline{T}_{del,i}$ = the average water outlet temperature measured during the *i*th draw (i = 1 to N), °F (°C).

$\overline{T}_{in,i}$ = the average water inlet temperature measured during the *i*th draw (i = 1 to N), °F (°C).

η_r = as defined in section 6.3.3 of this appendix.

The energy required to heat the same quantity of water over a 67 °F (37.3 °C) temperature rise, Btu/day (kJ/day), is:

$$Q_{HW,67°F} = \sum_{i=1}^{N} \frac{M_{del,i}\ C_{pi}(125°F - 58°F)}{\eta_r}$$

or,

$$Q_{HW,37.3°C} = \sum_{i=1}^{N} \frac{M_{del,i}\ C_{pi}(51.7°C - 14.4°C)}{\eta_r}$$

The difference between these two values is:

$Q_{HWD} = Q_{HW,67.°F} - Q_{HW}$

or,

$Q_{HWD} = Q_{HW,37.3°C} - Q_{HW}$

This difference (Q_{HWD}) must be added to the adjusted daily water heating energy consumption value. Thus, the daily energy consumption value, which takes into account that the ambient temperature may not be 67.5 °F (19.7 °C) and that the temperature rise across the storage tank may not be 67 °F (37.3 °C) is:

$Q_{dm} = Q_{da} - Q_{HWD}$

6.3.7 *Estimated Mean Tank Temperature for Water Heaters with Rated Storage Volumes Greater Than or Equal to 2 Gallons.* If testing is conducted in accordance with section 5.4.2.2 of this appendix, calculate the mean tank temperature immediately prior to the internal tank temperature determination draw using the following equation:

$$\overline{T}_{st} = T_p - \frac{v_{out,p}}{V_{st}} \times \tau_p(\overline{T}_{in,p} - \overline{T}_{out,p})$$

Where:

$\overline{T}_{st}$ = the estimated average internal storage tank temperature, °F (°C).

T_p = the average of the inlet and the outlet water temperatures at the end of the period defined by τ_p, °F (°C).

$v_{out,p}$ = the average flow rate during the period, gal/min (L/min).

V_{st} = the rated storage volume of the water heater, gal (L).

τ_p = the number of minutes in the duration of the period, determined by the length of time taken for the outlet water temperature to be within 2 °F of the inlet water temperature for 15 consecutive seconds and including the 15-second stabilization period.

$\overline{T}_{in,p}$ = the average of the inlet water temperatures during the period, °F (°C).

$\overline{T}_{out,p}$ = the average of the outlet water temperatures during the period, °F (°C).

6.3.8 *Uniform Energy Factor.* The uniform energy factor, UEF, is computed as:

$$UEF = \sum_{i=1}^{N} \frac{M_{del,i}\ C_{pi}\ (125°F - 58°F)}{Q_{dm}}$$

or,

$$UEF = \sum_{i=1}^{N} \frac{M_{del,i}\ C_{pi}\ (51.7°C - 14.4°C)}{Q_{dm}}$$

Where:

N = total number of draws in the 24-hour simulated-use test.

Q_{dm} = the modified daily water heating energy consumption as computed in accordance with section 6.3.6 of this appendix, Btu (kJ).

$M_{del,i}$ = the mass of water removed during the *i*th draw (i = 1 to N) as calculated in section 6.3.2 of this appendix, lb (kg).

C_{pi} = the specific heat of the water withdrawn during the *i*th draw of the 24-hour simulated-use test, evaluated at (125 °F + 58 °F)/2 = 91.5 °F ((51.7 °C + 14.4 °C)/2 = 33 °C), Btu/(lb·°F) (kJ/(kg·°C)).

6.3.9 *Annual Energy Consumption.* The annual energy consumption for water heaters with rated storage volumes greater than or equal to 2 gallons is computed as:

$$E_{annual} = 365 * \frac{(V)(\rho)(C_p)(67)}{UEF}$$

Where:

UEF = the uniform energy factor as computed in accordance with section 6.3.88 of this appendix.

365 = the number of days in a year.

V = the volume of hot water drawn during the applicable draw pattern, gallons.

= 10 for the very-small-usage draw pattern.

= 38 for the low-usage draw pattern.

= 55 for the medium-usage draw pattern.

= 84 for high-usage draw pattern.

ρ = 8.24 lb/gallon, the density of water at 125 °F.

C_p = 1.00 Btu/(lb °F), the specific heat of water at 91.5 °F.

67 = the nominal temperature difference between inlet and outlet water

6.3.10 *Annual Electrical Energy Consumption.* The annual electrical energy consumption in kilowatt-hours for water heaters with rated storage volumes greater than or equal to 2 gallons, $E_{annual,e,}$ is computed as:

$$E_{annual,e} = \frac{E_{annual}}{3412} * \left(\frac{Q_e}{Q}\right)$$

Where:

E_{annual} = the annual energy consumption as determined in accordance with section 6.3.99 of this appendix, Btu (kJ).

Q_e = the daily electrical energy consumption as defined in section 6.3.5 of this appendix, Btu (kJ).

Q = total energy used by the water heater during the 24-hour simulated-use test in accordance with section 6.3.5 of this appendix, Btu (kJ).

3412 = conversion factor from Btu to kWh.

6.3.11 *Annual Fossil Fuel Energy Consumption.* The annual fossil fuel energy consumption for water heaters with rated storage volumes greater than or equal to 2 gallons, $E_{annual,f,}$ is computed as:

$E_{annual,f} = E_{annual} - (E_{annual,e} * 3412)$

Where:

E_{annual} = the annual energy consumption as determined in accordance with section 6.3.9 of this appendix, Btu (kJ).

$E_{annual,e}$ = the annual electrical energy consumption as determined in accordance with section 6.3.10 of this appendix, kWh.

3412 = conversion factor from kWh to Btu.

6.4 *Computations for Water Heaters with a Rated Storage Volume Less Than 2 Gallons.*

6.4.1 *Mass of Water Removed*

Calculate the mass of water removed using the calculations in section 6.3.2 of this appendix.

6.4.2 *Recovery Efficiency.* The recovery efficiency, $\eta_{r,}$ is computed as:

$$\eta_r = \frac{M_1\ C_{p1}\ \left(\overline{T}_{del,1} - \overline{T}_{in,1}\right)}{Q_r}$$

Where:

M_1 = mass of water removed during the first draw of the 24-hour simulated-use test, lb (kg).

C_{p1} = specific heat of the withdrawn water during the first draw of the 24-hour simulated-use test, evaluated at $(\overline{T}_{del,1} + \overline{T}_{in,1})/2$, Btu/(lb·°F) (kJ/(kg·°C)).

$\overline{T}_{del,1}$ = average water outlet temperature measured during the first draw of the 24-hour simulated-use test, °F (°C).

$\overline{T}_{in,1}$ = average water inlet temperature measured during the first draw of the 24-hour simulated-use test, °F (°C).

Q_r = the total energy used by the water heater during the first recovery period as defined in section 5.4.3 of this appendix, including auxiliary energy such as pilot lights, pumps, fans, etc., Btu (kJ). (Electrical auxiliary energy shall be converted to thermal energy using the following conversion: 1 kWh = 3412 Btu.)

6.4.3 *Daily Water Heating Energy Consumption.* The daily water heating energy consumption, $Q_{d,}$ is computed as:

$Q_d = Q$

Where:

$Q = Q_f + Q_e$ = the energy used by the water heater during the 24-hour simulated-use test.

Q_f = total fossil fuel energy used by the water heater during the 24-hour simulated-use test, Btu (kJ).

Q_e = total electrical energy used during the 24-hour simulated-use test, Btu (kJ).

(Electrical auxiliary energy shall be converted to thermal energy using the following conversion: 1 kWh = 3412 Btu.)

A modification is needed to take into account that the temperature difference between the outlet water temperature and supply water temperature may not be equivalent to the nominal value of 67 °F (125 °F − 58 °F) or 37.3 °C (51.7 °C − 14.4 °C). The following equations adjust the experimental data to a nominal 67 °F (37.3 °C) temperature rise.

The energy used to heat water may be computed as:

$$Q_{HW} = \sum_{i=1}^{N} \frac{M_{del,i}\, C_{pi}\left(\bar{T}_{del,i} - \bar{T}_{in,i}\right)}{\eta_r}$$

Where:

N = total number of draws in the 24-hour simulated-use test.

$M_{del,i}$ = the mass of water removed during the *i*th draw (i = 1 to N) as calculated in section 6.4.1 of this appendix, lb (kg).

C_{pi} = the specific heat of the water withdrawn during the *i*th draw of the 24-hour simulated-use test, evaluated at ($\bar{T}_{del,i}$ + $\bar{T}_{in,i}$)/2, Btu/(lb·°F) (kJ/(kg·°C)).

$\bar{T}_{del,i}$ = the average water outlet temperature measured during the *i*th draw (i = 1 to N), °F (°C).

$\bar{T}_{in,i}$ = the average water inlet temperature measured during the *i*th draw (i = 1 to N), °F (°C).

η_r = as defined in section 6.4.2 of this appendix.

The energy required to heat the same quantity of water over a 67 °F (37.3 °C) temperature rise is:

$$Q_{HW,67°F} = \sum_{i=1}^{N} \frac{M_{del,i}\, C_{pi}(125°F - 58°F)}{\eta_r}$$

or,

$$Q_{HW,37.3°C} = \sum_{i=1}^{N} \frac{M_{del,i}\, C_{pi}(51.7°C - 14.4°C)}{\eta_r}$$

Where:

N = total number of draws in the 24-hour simulated-use test.

$M_{del,i}$ = the mass of water removed during the *i*th draw (i = 1 to N) as calculated in section 6.4.1 of this appendix, lb (kg).

C_{pi} = the specific heat of the water withdrawn during the *i*th draw of the 24-hour simulated-use test, evaluated at ($\bar{T}_{del,i}$ + $\bar{T}_{in,i}$)/2, Btu/(lb·°F) (kJ/(kg·°C)).

η_r = as defined in section 6.4.2 of this appendix.

The difference between these two values is:

$Q_{HWD} = Q_{HW,67°F} - Q_{HW}$

or,

$Q_{HWD} = Q_{HW,37.3°C} - Q_{HW}$

This difference (Q_{HWD}) must be added to the daily water heating energy consumption value. Thus, the daily energy consumption value, which takes into account that the temperature rise across the water heater may not be 67 °F (37.3 °C), is:

$Q_{dm} = Q_{da} + Q_{HWD}$

6.4.4 *Uniform Energy Factor.* The uniform energy factor, UEF, is computed as:

$$UEF = \sum_{i=1}^{N} \frac{M_{del,i}\, C_{pi}\, (125°F - 58°F)}{Q_{dm}}$$

or,

$$UEF = \sum_{i=1}^{N} \frac{M_{del,i}\, C_{pi}\, (51.7°C - 14.4°C)}{Q_{dm}}$$

Where:

N = total number of draws in the 24-hour simulated-use test.

Q_{dm} = the modified daily water heating energy consumption as computed in accordance with section 6.4.3 of this appendix, Btu (kJ).

$M_{del,i}$ = the mass of water removed during the *i*th draw (i = 1 to N) as calculated in section 6.4.1 of this appendix, lb (kg).

C_{pi} = the specific heat of the water withdrawn during the *i*th draw of the 24-hour simulated-use test, evaluated at (125 °F + 58 °F)/2 = 91.5 °F ((51.7 °C + 14.4 °C)/2 = 33.1 °C), Btu/(lb·°F) (kJ/(kg·°C)).

6.4.5 *Annual Energy Consumption.* The annual energy consumption for water heaters with rated storage volumes less than 2 gallons, $E_{annual,}$ is computed as:

$$E_{annual} = 365 * \frac{(V)(\rho)(C_p)(67)}{UEF}$$

Where:

UEF = the uniform energy factor as computed in accordance with section 6.4.4 of this appendix.

365 = the number of days in a year.

V = the volume of hot water drawn during the applicable draw pattern, gallons.

= 10 for the very-small-usage draw pattern.

= 38 for the low-usage draw pattern.

= 55 for the medium-usage draw pattern.

= 84 for high-usage draw pattern.

ρ = 8.24 lb/gallon, the density of water at 125 °F.

C_p = 1.00 Btu/(lb °F), the specific heat of water at 91.5 °F.

67 = the nominal temperature difference between inlet and outlet water.

6.4.6 *Annual Electrical Energy Consumption.* The annual electrical energy consumption in kilowatt-hours for water heaters with rated storage volumes less than 2 gallons, $E_{annual,e,}$ is computed as:

$$E_{annual,e} = \frac{E_{annual}}{3412} * \left(\frac{Q_e}{Q}\right)$$

Where:

Q_e = the daily electrical energy consumption as defined in section 6.4.3 of this appendix, Btu (kJ).

E_{annual} = the annual energy consumption as determined in accordance with section 6.4.5 of this appendix, Btu (kJ).

Q = total energy used by the water heater during the 24-hour simulated-use test in accordance with section 6.4.3 of this appendix, Btu (kJ).

Q_{dm} = the modified daily water heating energy consumption as computed in accordance with section 6.4.3 of this appendix, Btu (kJ).

3412 = conversion factor from Btu to kWh.

6.4.7 *Annual Fossil Fuel Energy Consumption.* The annual fossil fuel energy consumption for water heaters with rated storage volumes less than 2 gallons, $E_{annual,f,}$ is computed as:

Where:

E_{annual} = the annual energy consumption as defined in section 6.4.5 of this appendix, Btu (kJ).

$E_{annual,e}$ = the annual electrical energy consumption as defined in section 6.4.6 of this appendix, kWh.

3412 = conversion factor from kWh to Btu.

6.5 *Energy Efficiency at Optional Test Conditions.* If testing is conducted at optional test conditions in accordance with section 5.6 of this appendix, calculate the energy efficiency at the test condition, $E_{X,}$ using the formulas in sections 6.3 or 6.4 of this appendix (as applicable), except substituting the applicable ambient temperature and supply water temperature used for testing (as specified in section 2.8 of this appendix) for the nominal ambient temperature and supply water temperature conditions used in the equations for determining UEF (*i.e.,* 67.5 °F and 58 °F).

7. Test Set-Up Diagrams

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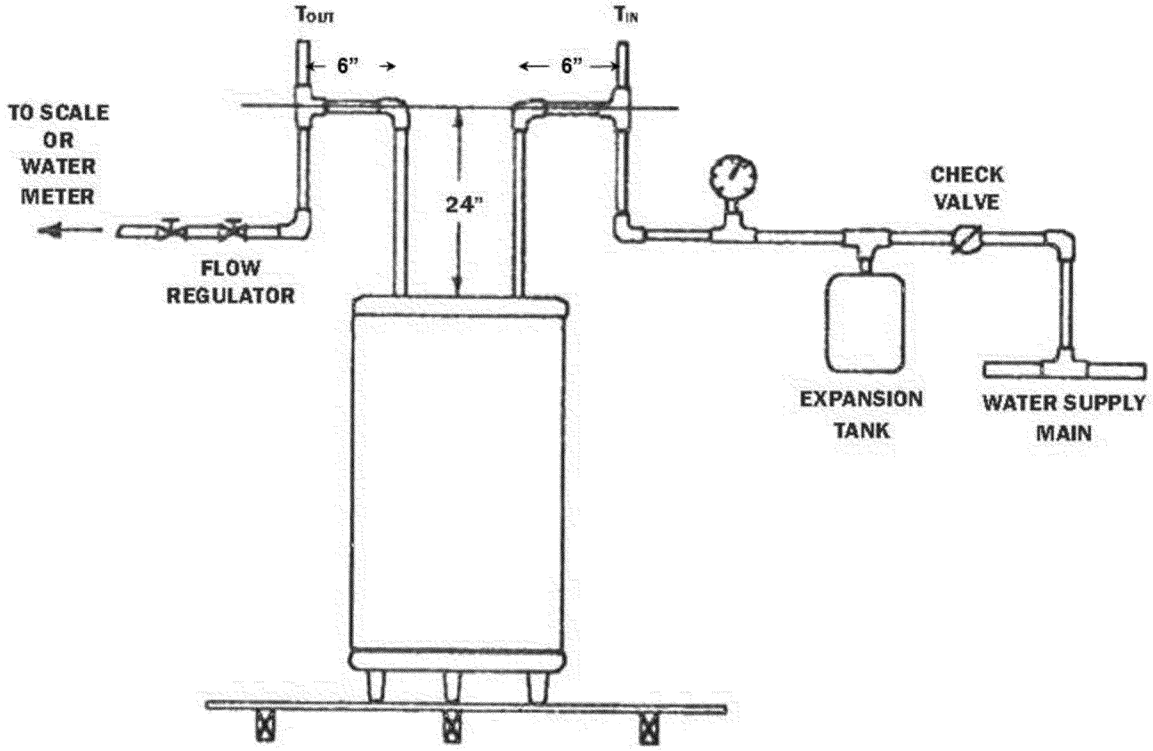

Figure 1.

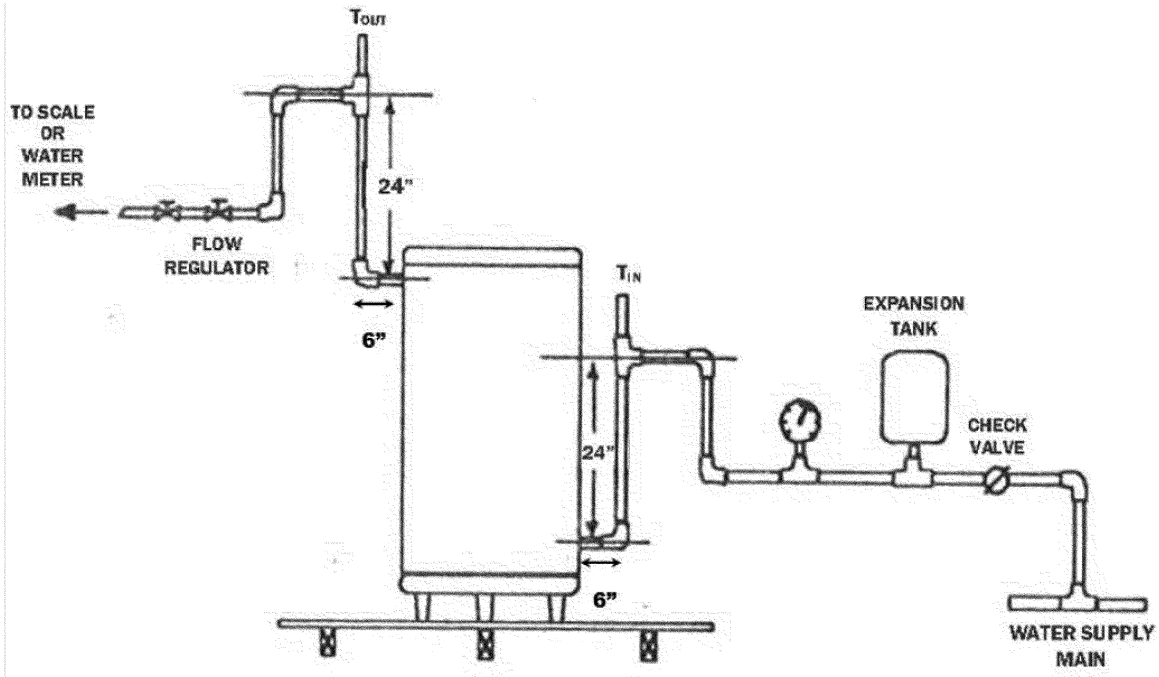

Figure 2.

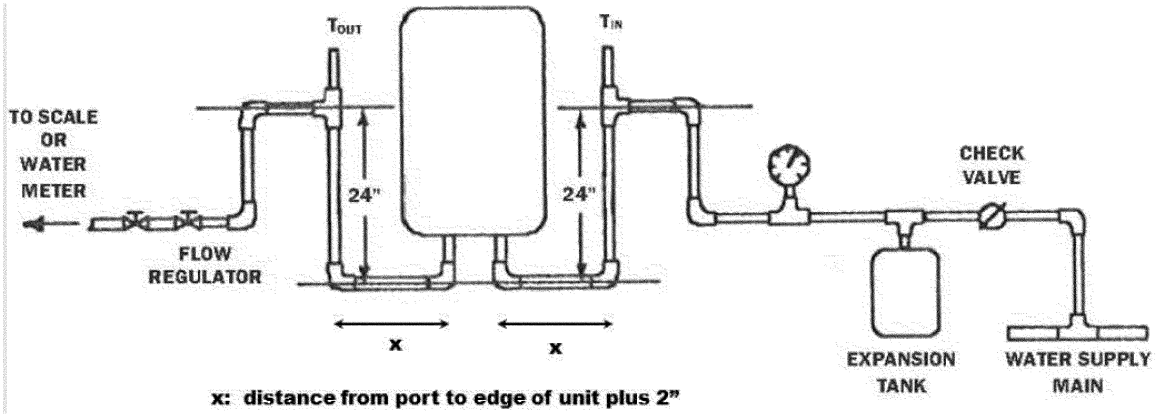

Figure 3.

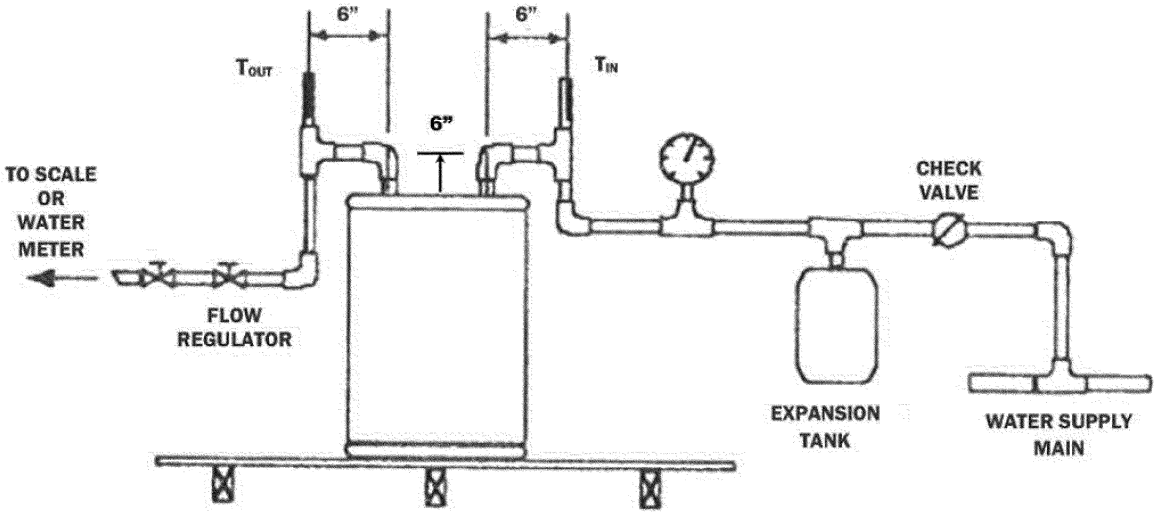

Figure 4.

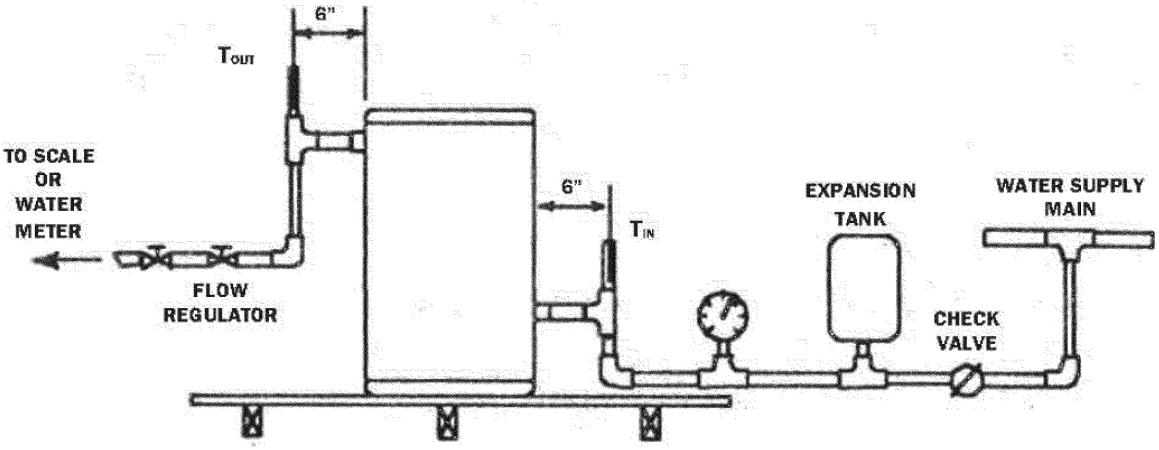

Figure 5.

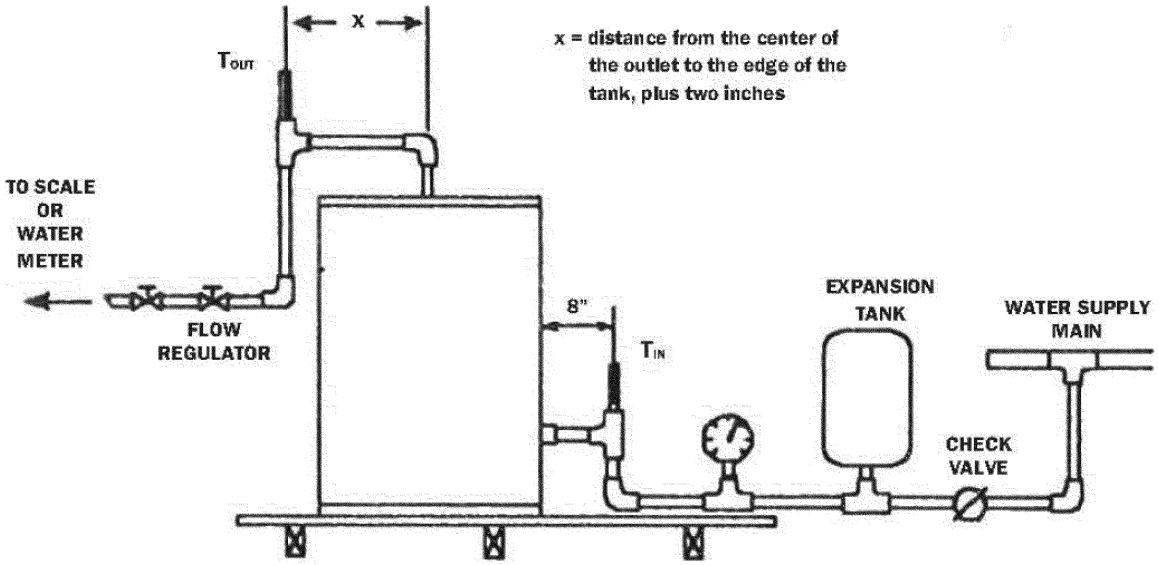

Figure 6.

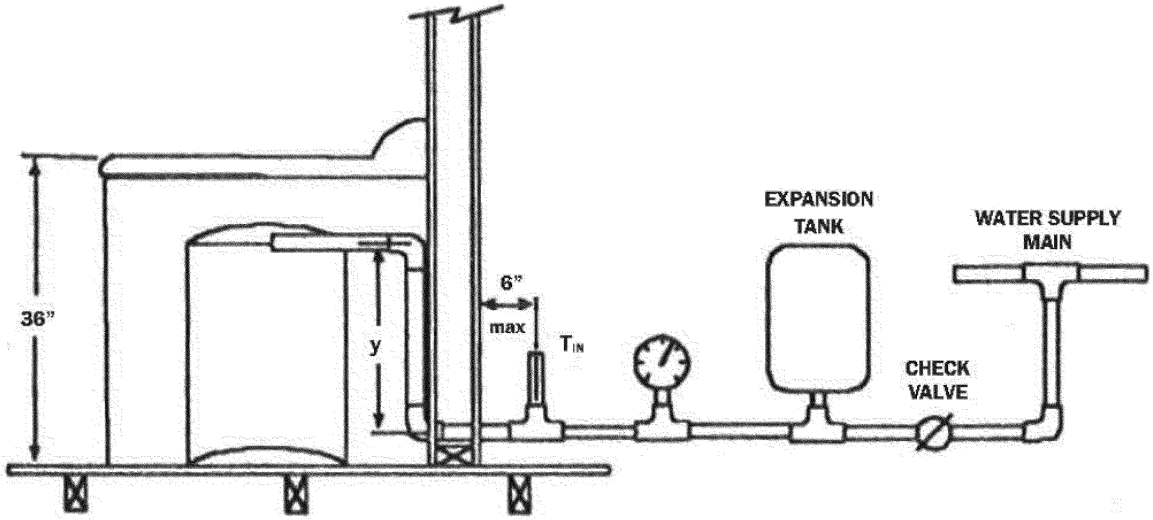

Figure 7a.

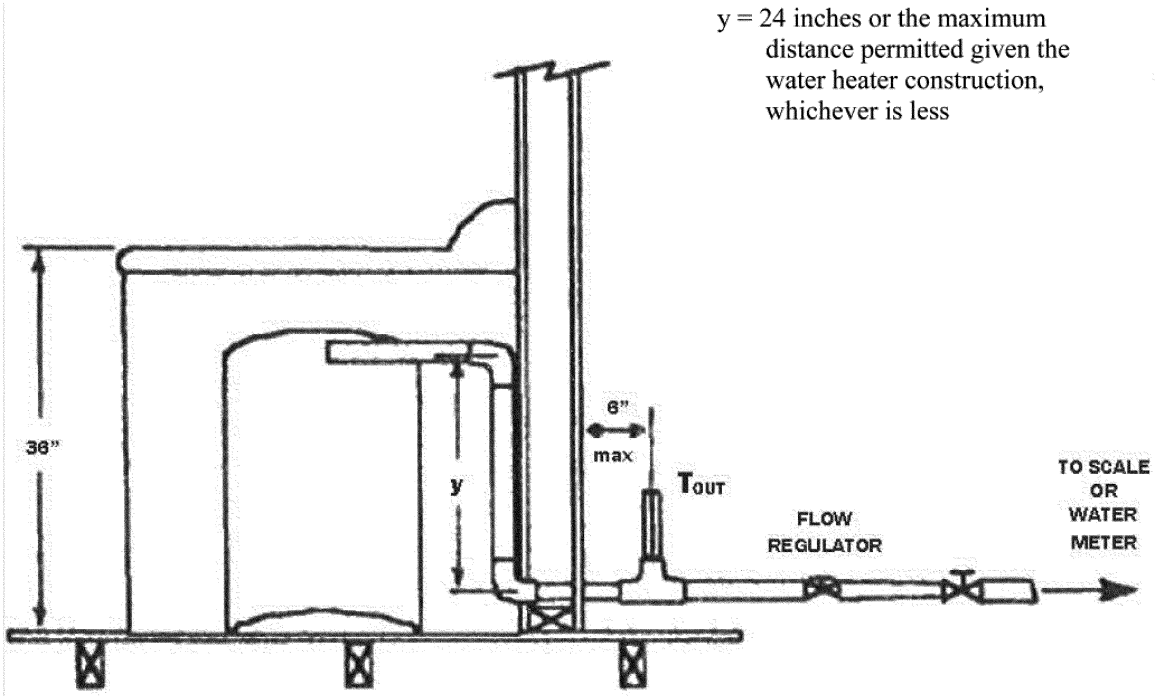

Figure 7b.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 8. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317; 28 U.S.C. 2461 note.

■ 9. Amend § 431.102 by revising the definition for ''Commercial heat pump water heater (CHPWH)'' to read as follows:

§ 431.102 Definitions concerning commercial water heaters, hot water supply boilers, unfired hot water storage tanks, and commercial heat pump water heaters.

* * * * *

Commercial heat pump water heater (CHPWH) means a water heater (including all ancillary equipment such as fans, blowers, pumps, storage tanks, piping, and controls, as applicable) that uses a refrigeration cycle, such as vapor compression, to transfer heat from a low-temperature source to a higher-temperature sink for the purpose of heating potable water, and operates with a current rating greater than 24 amperes or a voltage greater than 250 volts. Such equipment includes, but is not limited to, air-source heat pump water heaters, water-source heat pump water heaters, and direct geo-exchange heat pump water heaters.

* * * * *

[FR Doc. 2023–11429 Filed 6–20–23; 8:45 am]

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FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Part III

Department of the Treasury

Internal Revenue Service
26 CFR Part 1

Section 6418 Transfer of Certain Credits; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–101610–23]

RIN 1545–BQ64

Section 6418 Transfer of Certain Credits

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the election under the Inflation Reduction Act of 2022 to transfer certain Federal income tax credits. The proposed regulations describe the proposed rules for the election to transfer eligible credits in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding excessive credit transfer or recapture events. In addition, the proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed regulations affect eligible taxpayers that elect to transfer eligible credits in a taxable year and the transferee taxpayers to which eligible credits are transferred.

DATES: Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 23, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on August 21, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 18, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–101610–23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's public docket. Send paper submissions to: CC:PA:LPD:PR (REG–101610–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, Jeremy Milton at (202) 317–5665 and James Holmes at (202) 317–5114 (not a toll-free number); concerning submissions of comments and requests for a public hearing, Vivian Hayes at (202) 317–6901 (not a toll-free number) or by email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

Section 6418 was added to the Internal Revenue Code (Code) on August 16, 2022, by section 13801(b) of Public Law 117–169, 136 Stat. 1818, 2009, commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 6418 allows ''eligible taxpayers'' to elect to transfer certain credits to unrelated taxpayers rather than using the credits against their Federal income tax liabilities. Section 6418 also provides special rules relating to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 6418 and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418. Section 13801(g) of the IRA provides that section 6418 applies to taxable years beginning after December 31, 2022. This document contains proposed regulations that would amend the Income Tax Regulations (26 CFR part 1) to implement the statutory provisions of section 6418.

In the Rules and Regulations section of this issue of the **Federal Register**, the Treasury Department and the IRS are issuing temporary regulations under § 1.6418–4T that implement the pre-filing registration process described in § 1.6418–4 of the proposed regulations. The temporary regulations require eligible taxpayers that want to elect to transfer eligible credits under section 6418 to register with the IRS through an IRS electronic portal in advance of the eligible taxpayer filing the return on which the election under section 6418 is made.

I. Overview of Section 6418

Section 6418(a) provides that, in the case of an eligible taxpayer that elects to transfer to an unrelated transferee taxpayer all (or any portion specified in the election) of an eligible credit determined with respect to the eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to such credit (or such portion thereof). Under section 6418(b), any amount of consideration paid by the transferee taxpayer to the eligible taxpayer for the transfer of such credit (or such portion thereof) is (1) required to be paid in cash, (2) not included in the eligible taxpayer's gross income, and (3) not allowed as a deduction to the transferee taxpayer under any provision of the Code.

Section 6418(f)(2) defines the term ''eligible taxpayer'' to mean any taxpayer that is not described in section 6417(d)(1)(A).

Section 6418(f)(1)(A) defines the term ''eligible credit'' to mean each of the following 11 credits:

(1) So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) The renewable electricity production credit determined under section 45(a) of the Code (section 45 credit);

(3) The credit for carbon oxide sequestration determined under section 45Q(a) of the Code (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit);

(5) The clean hydrogen production credit determined under section 45V(a) of the Code (section 45V credit);

(6) The advanced manufacturing production credit determined under section 45X(a) of the Code (section 45X credit);

(7) The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);

(8) The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);

(9) The energy credit determined under section 48 of the Code (section 48 credit);

(10) The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and

(11) The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

Under section 6418(f)(1)(B), an election to transfer a section 45 credit, section 45Q credit, section 45V credit,

or section 45Y credit is made separately with respect to each facility and for each taxable year during the credit period of the respective credit. Pursuant to section 6418(f)(1)(C) an eligible credit does not include any business credit carryforward or business credit carryback. Section 6418(g)(4) provides that an eligible taxpayer may not make an election to transfer credits for progress expenditures.

Pursuant to section 6418(e)(1), an eligible taxpayer must make an election to transfer any portion of an eligible credit on its original tax return for the taxable year for which the credit is determined by the due date of such return (including extensions of time) but such an election cannot be made earlier than 180 days after the date of the enactment of section 6418 by section 13801(b) of the IRA (that is, in no event earlier than 180 days after August 16, 2022, which is February 13, 2023). An eligible taxpayer may not revoke an election to transfer any portion of a credit. Pursuant to section 6418(d), a transferee taxpayer takes the transferred eligible credit into account in its first tax year ending with, or after, the eligible taxpayer's tax year with respect to which the transferred eligible credit was determined. Section 6418(e)(2) provides that a transferee taxpayer may not make any additional transfers of a transferred eligible credit under section 6418.

II. Section 6418 Rules for Partnerships and S Corporations

Pursuant to section 6418(c), in the case of a partnership or an S corporation that directly holds a facility or property for which an eligible credit is determined: the election to transfer an eligible credit is made at the entity level and no election by any partner or shareholder is allowed with respect to such facility or property; any amount received as consideration for a transferred eligible credit is treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and a partner's distributive share of the tax exempt income is based on the partner's distributive share of the transferred eligible credit.

III. Special Rules

Section 6418(g) provides special rules regarding the elective transfer of certain credits. Section 6418(g)(1) provides that, as a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to section 6418(a), the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418.

Pursuant to section 6418(g)(2), if the Secretary determines that there is an excessive credit transfer to a transferee taxpayer, then the tax imposed on the transferee taxpayer by chapter 1 of the Code (chapter 1) (regardless of whether such entity would otherwise be subject to tax under chapter 1) is increased in the year of such determination by the amount of the excessive credit transfer plus 20 percent of such excessive credit transfer. The additional amount of 20 percent of the excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the Secretary that the excessive credit transfer resulted from reasonable cause. An excessive credit transfer is defined in section 6418(g)(2)(C) as, with respect to a facility or property for which an election is made under section 6418(a) for any taxable year, an amount equal to the excess of (i) the amount of the eligible credit claimed by the transferee taxpayer with respect to such facility or property for such taxable year; over (ii) the amount of the eligible credit that, without application of section 6418, would be otherwise allowable under the Code with respect to such facility or property for such taxable year.

Pursuant to section 6418(g)(3), if a section 48 credit, section 48C credit, or section 48E credit is transferred, the basis reduction rules of section 50(c) apply to the applicable investment credit property as if the transferred eligible credit was allowed to the eligible taxpayer. Further, if applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period as described in section 50(a)(1), then certain notification requirements apply. The eligible taxpayer must notify the transferee taxpayer of a recapture event in such form and manner as the Secretary may provide. In addition, the transferee taxpayer must notify the eligible taxpayer of the recapture amount, if any, in such form and manner as the Secretary may provide.

Section 6418(h) directs the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6418, including guidance providing rules for determining a partner's distributive share of the tax exempt income described in section 6418(c)(1).

IV. Notice 2022–50

On October 24, 2022, the Treasury Department and the IRS published Notice 2022–50, 2022–43 I.R.B. 325, to, among other things, request feedback from the public at large on potential issues with respect to the transfer election provisions under section 6418 that may require guidance. Over 200 comment letters were received in response to Notice 2022–50. Based in part on the feedback received, the Treasury Department and the IRS are issuing these proposed regulations regarding the transfer election provisions under section 6418. The major areas with respect to which public stakeholders provided letters are discussed in the following Explanation of Provisions.

Explanation of Provisions

I. Transfers of Eligible Credits

Proposed § 1.6418–1(a) would provide generally that an eligible taxpayer may make a transfer election under proposed § 1.6418–2 to transfer any specified portion of an eligible credit determined with respect to any eligible credit property of such eligible taxpayer for any taxable year to a transferee taxpayer in accordance with section 6418 of the Code and §§ 1.6418–1 through 1.6418–5 (''the section 6418 regulations''). The remainder of proposed § 1.6418–1 would then provide definitions for terms used throughout the section 6418 regulations, including definitions of eligible taxpayer, eligible credit, eligible credit property, paid in cash, specified credit portion, transferred specified credit portion, transfer election, transferee taxpayer, transferee partnership, transferee S corporation, transferor partnership, and transferor S corporation.

Proposed § 1.6418–1(b) would define the term ''eligible taxpayer'' to mean any taxpayer (as defined in section 7701(a)(14) of the Code), other than one described in section 6417(d)(1)(A) and proposed § 1.6417–1(b). The term ''taxpayer'' in section 7701(a)(14) means ''any person subject to any internal revenue tax'' and generally, includes entities that have a United States employment tax or excise tax obligation even if they do not have a United States income tax obligation.

Proposed § 1.6418–1(c) would define the term ''eligible credit'' consistent with section 6418(f)(1)(A), and include all 11 of the credits listed in such section. Further, the definition would include a rule that an eligible credit does not include any business credit carryforward or business credit carryback determined under section 39

of the Code, which is consistent with section 6418(f)(1)(C). The regulations also would clarify that the entire amount of any eligible credit is separately determined with respect to each single eligible credit property of the eligible taxpayer and includes any bonus credit amounts (described in proposed § 1.6418–2(c)(3)) determined with respect to that single eligible credit property.

Consistent with the proposed rules described later in this Explanation of Provisions related to the manner of making the transfer election, proposed § 1.6418–1(d) would generally define the term ''eligible credit property'' as the unit of property of an eligible taxpayer with respect to which the amount of an eligible credit is determined. While the proposed regulations reference the statutory rules for each eligible credit to determine the appropriate unit of measurement for section 6418 registrations and election, the following additional information is relevant for each of the 11 eligible credits:

(1) For the section 30C credit, a taxpayer would be required to register and make an election on a property-by-property basis. For this purpose, a property means a ''qualified alternative fuel vehicle refueling property'' as defined in section 30C(c).[1]

(2) For the section 45 credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a ''qualified facility'' as defined in section 45(d).

(3) For the section 45Q credit, a taxpayer would be required to register and make an election on the basis of a unit of carbon capture equipment. The regulations under § 1.45Q–2(c)(3) state that all components that make up an independently functioning process train capable of capturing, processing, and preparing carbon oxide for transport (single process train) will be treated as a single ''unit of carbon capture equipment.''

(4) For the section 45U credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a ''qualified nuclear power facility'' as defined in section 45U(b)(1).

(5) For the section 45V credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a ''qualified clean hydrogen production facility'' as defined in section 45V(c)(3).

(6) For the section 45X credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means one that produces eligible components, as described in guidance under sections 48C and 45X.

(7) For the section 45Y credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a ''qualified facility'' as defined in section 45Y(b)(1).

(8) For the section 45Z credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a ''qualified facility'' as defined in section 45Z(d)(4).

(9) For the section 48 credit, a taxpayer would be required to register and make an election on a property-by-property basis. For this purpose, a property means an energy property, which generally includes all components of property that are functionally interdependent (unless such equipment is an addition or modification to an energy property). See Notice 2018–59, 2018–28 I.R.B. 196. Components of property are functionally interdependent if the placing in service of each component is dependent upon the placing in service of each of the other components in order to generate electricity. Functionally-interdependent components of property that can be operated and metered together and can begin producing electricity separately from other components of property within a larger energy project will be considered an energy property. See *Id.* (Section 7.01 of Notice 2018–59 describes energy property generally and also cites Rev. Rul. 94–31, 1994–1 C.B. 16.) Energy property is comprised of all components of property necessary to generate electricity up to the point of transmission or distribution. However, an eligible taxpayer would have the option, to the extent consistently applied for purposes of the pre-filing registration requirements of proposed § 1.6418–4 and the election requirements of proposed §§ 1.6418–2 through 1.6418–3, to make the section 6418 registrations and election for an energy project, as defined in forthcoming guidance. See section 48(a)(9)(A)(ii).

(10) For the section 48C credit, a taxpayer would be required to register and make an election on a property-by-property basis. For this purpose, a property means an ''eligible property'' as defined in section 48C(c)(2).

(11) For the section 48E credit, a taxpayer would be required to register and make an election on a facility-by-facility basis if the credit relates to a qualified investment with respect to a qualified facility. For this purpose, a facility means a ''qualified facility'' as defined in section 48E(b)(3). However, a taxpayer would be required to register and make an election with respect to the section 48E credit on a property-by-property basis if the credit relates to a qualified investment with respect to energy storage technology. For this purpose, a property means a unit of ''energy storage technology'' as defined in section 48E(c)(2).

Proposed § 1.6418–1(j) would define the term ''transfer election'' as an election under section 6418(a) of the Code to transfer to a transferee taxpayer a specified portion of an eligible credit determined with respect to an eligible credit property in accordance with the section 6418 regulations. This term would be consistent with the references in section 6418(a) to a taxpayer ''elect[ing] to transfer'' and transferring ''all (or any specified portion in the election)'' of an eligible credit.

Also consistent with the language in section 6418(a) requiring the portion of the credit transferred to be specified, proposed § 1.6418–1(h) would define a ''specified credit portion'' to mean a proportionate share (including all) of an entire eligible credit determined with respect to an eligible credit property of the eligible taxpayer that is specified in a transfer election. A specified credit portion of an eligible credit would be required to reflect a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of the eligible credit determined with respect to a single eligible credit property. In defining this term, the Treasury Department and the IRS considered questions from stakeholders asking whether it is possible to transfer bonus credit amounts related to an eligible credit separately from the ''base'' eligible credit determined with respect to the relevant eligible credit property. As section 6418 does not contemplate such a transfer, the proposed regulations would not permit this type of transfer. Thus, an eligible taxpayer would not be permitted to divide an eligible credit from a single eligible credit property into the portion from the qualified activity or investment credit property and one or more bonus amounts of the eligible credit. Instead, an eligible taxpayer would be permitted to transfer the entire eligible credit (or portion of the entire eligible credit, which would include a proportionate amount of any

[1] These proposed regulations under section 6418 do not impact the ability of tax-exempt entities to transfer a section 30C credit to the seller of the qualified alternative fuel vehicle refueling property under section 30C(e)(2).

component part of the entire eligible credit) determined with respect to a single eligible credit property.

Proposed § 1.6418–1(p) would define the term ''transferred specified credit portion'' to mean the specified credit portion that is transferred from an eligible taxpayer to a transferee taxpayer pursuant to a transfer election.

Section 6418(b)(1) and proposed § 1.6418–2(a)(4)(ii) (disallowing transfer elections for non-cash consideration) and proposed § 1.6418–2(e)(1) (treatment of payments made in connection with a transfer election) would require that any amounts paid by a transferee taxpayer in connection with the transfer of a specified credit portion be paid in cash. Proposed § 1.6418–1(f) would define ''paid in cash'' as a payment made in United States dollars. The definition of ''paid in cash'' contemplates limiting the manner in which United States dollars may be transferred in connection with a transfer election to payments by cash, check, cashier's check, money order, wire transfer, ACH transfer, or other bank transfer of immediately available funds. The proposed regulations also would provide a safe harbor timing rule to allow for certainty as to the treatment of such payments of United States dollars made during a prescribed time period. The proposed regulations would provide that a payment does not violate the paid in cash requirement if the cash payment is made within the period beginning on the first day of the eligible taxpayer's taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement (as provided in proposed § 1.6418–2(b)(5)(iii)). The proposed regulations also address an issue raised by stakeholders regarding advanced commitments and would provide that a contractual commitment to purchase eligible credits in advance of the date a specified credit portion is transferred satisfies the paid in cash requirement, so long as all cash payments are made during the time period described in proposed § 1.6418–1(f)(1)(ii).

Proposed § 1.6418–1(m) would define the term ''transferee taxpayer'' by incorporating the requirement in section 6418(a) that an eligible taxpayer only transfer eligible credits to a taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1)) to the eligible taxpayer. Thus, the proposed regulations would define a transferee taxpayer as any taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer making the transfer election to which the eligible taxpayer transfers a specified credit portion of an eligible credit. Further, consistent with the proposed definitions of transferee taxpayer and eligible taxpayer, proposed § 1.6418–1(k), (l), (n), and (o) would define the terms ''transferee partnership,'' ''transferee S corporation,'' ''transferor partnership,'' and ''transferor S corporation,'' respectively.

II. Rules for Making Transfer Elections

The rules in proposed § 1.6418–2 would describe the general requirements for making a transfer election, including clarifying when a transfer election can be made in certain ownership situations, situations where no transfer election may be made, the manner and due date for the election, limitations related to a transfer election, the determination of an eligible credit, the treatment of payments related to a transfer of eligible credits, and the treatment of a transferred specified credit portion by a transferee taxpayer.

A. Transfer Elections in General

Proposed § 1.6418–2(a) would provide rules generally applicable to a transfer election. Consistent with the language in section 6418(a), the proposed rules would provide that if a valid transfer election is made by an eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the specified credit portion.

Proposed § 1.6418–2(a)(2) would clarify the rule related to multiple transfer elections. Stakeholders requested clarification on whether an eligible taxpayer can make multiple elections to transfer an eligible credit to multiple transferees. Proposed § 1.6418–2(a)(2) would provide that an eligible taxpayer may make multiple transfer elections to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of specified credit portions transferred with respect to a single eligible credit property does not exceed the amount of the eligible credit determined with respect to the eligible credit property. In other words, section 6418 does not, and therefore these proposed regulations would not, limit the number of transfer elections or number of transferee taxpayers for which an eligible taxpayer can make a transfer election, unless the transfer of a specified credit portion would exceed the available eligible credit to be transferred.

Proposed § 1.6418–2(a)(3) would address when eligible taxpayers are permitted to make a transfer election in certain ownership situations. The situations addressed are based on requests from stakeholders for clarification. Rules are proposed for disregarded entities, undivided ownership interests, members of a consolidated group, and partnerships and S corporations. For a disregarded entity wholly owned (directly or indirectly) by an eligible taxpayer, the eligible taxpayer makes a transfer election. For undivided ownership interests, if eligible credit property is directly owned through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code, each co-owner's or member's undivided ownership share of the eligible credit property will be treated for purposes of section 6418 as a separate eligible credit property owned by such co-owner or member, and each makes a separate transfer election. For members of a consolidated group, a member is required to make a transfer election. Finally, for a partnership or S corporation, with respect to any eligible credit property held directly by such partnership or S corporation, the partnership or S corporation makes a transfer election, not the partners or shareholders.

Proposed § 1.6418–2(a)(4) would describe three circumstances where no transfer election can be made.

First, consistent with section 6418(g)(4), the proposed regulations preclude any election with respect to any amount of an eligible credit determined based on progress expenditures that is allowed pursuant to rules similar to the rules of section 46(c)(4) and (d) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

Second, the proposed rules would preclude a transfer election when an eligible taxpayer receives any amount not paid in cash (as defined in § 1.6418–1(f)) as consideration in connection with the transfer of a specified credit portion. Section 6418(b)(1) requires that ''any'' consideration paid in connection with a transfer be paid in cash. Thus, if any consideration is other than cash, the transfer election is disallowed.

Third, no election is allowed when eligible credits are not determined with respect to an eligible taxpayer. As further explained later in this preamble, an eligible credit is determined with respect to an eligible taxpayer in cases where the eligible taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise

conducts the activities giving rise to the underlying eligible credit. As examples, the proposed regulations describe two situations where a credit is allowable to an eligible taxpayer, but the eligible taxpayer is not permitted to transfer the credit under section 6418. First, the proposed regulations provide that a section 45Q credit allowable to a person that disposes of qualified carbon oxide, utilizes qualified carbon oxide, or uses qualified carbon oxide as a tertiary injectant due to an election made under section 45Q(f)(3)(B) is not transferable under section 6418. Second, the proposed regulations provide that a section 48 credit allowable to a lessee of property under section 50(d)(5) and an election under § 1.48–4 is not transferable under section 6418. In both cases, the taxpayer is only allowed to claim the credit as a result of an election by another taxpayer, and does not own the eligible credit property to which the credit was determined. These situations can be contrasted with a sale-leaseback transaction under section 50(d)(4) where a purchaser/lessor of investment credit property owns the underlying property to which an eligible credit is determined. In that case, provided all of the rules are met, because the eligible credit is determined with respect to eligible credit property owned and treated as originally placed in service by the purchaser/lessor, the purchaser/lessor can elect to transfer eligible credits determined with respect to the property under section 6418.

B. Manner and Due Date of Making a Transfer Election

Section 6418(a) allows an eligible taxpayer to transfer an eligible credit (or portion thereof) determined with respect to such taxpayer to a transferee taxpayer. Generally, section 6418 does not expressly provide for the relevant unit of measurement for an election to transfer eligible credits. Proposed § 1.6418–2(b) would provide generally that an eligible taxpayer is required to make a transfer election to transfer a specified credit portion on the basis of a single eligible credit property. For example, an eligible taxpayer that determines eligible credits with respect to two eligible credit properties would need to make a separate transfer election with respect to any specified credit portion determined with respect to each eligible credit property. This approach would provide eligible taxpayers with flexibility in determining the credit to transfer and aligns with how an excessive credit transfer is defined in section 6418(g)(2)(C).

In requiring the election to be made on the basis of a single eligible credit property, the Treasury Department and the IRS request comments on two issues. First, whether more specific guidance with respect to any eligible credit property is needed to allow eligible taxpayers to make the election as required. If such guidance is needed, suggestions for further defining the relevant eligible credit property are requested. Second, whether to adopt a grouping rule that allows taxpayers to make an election with respect to certain groups of eligible credit properties. If such a rule is recommended, discussion of the eligible credits that a rule should apply to, the appropriate circumstances for grouping, as well as specific rules for determining a group with respect to an eligible credit is requested.

Consistent with section 6418(f)(1)(B)(i), proposed § 1.6418–2(b)(2) would provide specific rules in the case of any section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit that is an eligible credit. The proposed rules would provide that a transfer election is made with respect to each eligible credit property for which an eligible credit is determined. Consistent with section 6418(f)(1)(B)(ii), the proposed rules also would provide that a transfer election would be required to be made for each taxable year an eligible taxpayer elects to transfer a specified credit portion with respect to such eligible credit property during the 10-year period beginning on the date such eligible credit property was originally placed in service (or, in the case of a section 45Q credit, for each taxable year during the 12-year period beginning on the date the eligible credit property was originally placed in service).

Proposed § 1.6418–2(b)(3) would provide the manner of making a valid transfer election. Stakeholders asked for clarity regarding the manner of making a valid election and provided suggestions for how an election should be effectuated and potential information to be included. Proposed § 1.6418–2(b)(3) outlines the requirements for making a transfer election for eligible taxpayers other than partnerships or S corporations (those rules are in proposed § 1.6418–3(d)). While described in more detail in the proposed regulations, to make a valid transfer election, an eligible taxpayer as part of filing a return (or a return for a short year within the meaning of section 443 of the Code (short year return)), generally would be required to include the following—(A) a properly completed relevant source credit form for the eligible credit; (B) a properly completed Form 3800, *General Business Credit* (or its successor), including reporting the registration number received during the required pre-filing registration (as described in proposed § 1.6418–4); (C) a schedule attached to the Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property; (D) a transfer election statement as described later in this preamble; and (E) any other information related to the election specified in guidance (as defined in proposed § 1.6418–1(e)).

A transfer election statement is described in proposed § 1.6418–2(b)(5) and would be generally defined as a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. Election statements are used in similar situations to a transfer election under section 6418 (for example, an election under section 50(d)(5) and § 1.48–4, section 45G, or section 45J all require a written document between the parties). A transfer election statement that is completed by both the eligible taxpayer and the transferee taxpayer would be necessary to allow the transferee taxpayer the opportunity to file a return without needing to wait for the eligible taxpayer to file. A transfer election statement, which is described in more detail in the proposed regulations, would be required to generally include (1) information related to the transferee taxpayer and the eligible taxpayer; (2) a statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property; (3) a statement that the parties are not related (within the meaning of section 267(b) or 707(b)(1)); (4) a representation from the eligible taxpayer that it has complied with all relevant requirements to make a transfer election; (5) a statement from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements under section 6418(g)(3) and the section 6418 regulations (if applicable); and (6) a statement or representation from the eligible taxpayer that the eligible taxpayer has provided the required minimum documentation to the transferee taxpayer. Required minimum documentation is specified in proposed § 1.6418–2(b)(3)(iv). Required minimum documentation would be the minimum documentation that the eligible taxpayer is required to provide to a transferee taxpayer, and is more fully described in the proposed regulations, but is generally documentation to validate the existence of the eligible credit property, any bonus credits amounts, and the

evidence of credit qualification. This requirement is consistent with a stakeholder suggestion that such information should be required to be provided by the eligible taxpayer. Proposed § 1.6418–2(b)(5)(v) would specify that a transferee taxpayer, consistent with § 1.6001–1(e), would be required to retain the requirement minimum documentation provided by the eligible taxpayer so long as the contents thereof may become material in the administration of any internal revenue law.

Proposed § 1.6418–2(b)(5)(iii) would provide a rule on the timing of the transfer election statement. The proposed rule generally allows a transfer election statement to be completed any time after the eligible taxpayer and transferee taxpayer have sufficient information to prepare a transfer election statement. However, a transfer election statement cannot be completed for any taxable year after the earlier of (A) the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer, or (B) the filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account. This proposed rule is intended to provide flexibility but places an outer limit on the timing of the transfer election statement because both the eligible taxpayer and the transferee taxpayer would be required to include a transfer election statement as part of filing a return, and therefore, the transfer election statement would need to be completed before a return is filed by either party.

Consistent with section 6418(e)(1), proposed § 1.6418–2(b)(4) would provide that an election to transfer any specified credit portion would need to be made not later than the due date (including extensions) for the tax return for the taxable year for which the eligible credit is determined. The proposed regulations would also clarify that an election would need to be filed on an original return and may not be made or revised on an amended return or by filing a request for an administrative adjustment under section 6227 of the Code. An original return includes a superseding return filed on or before the due date (including extensions). The proposed regulations would also provide that there is no relief available under §§ 301.9100–1 through 301.9100–3 for a late transfer election.

C. Limitations on the Election

Proposed § 1.6418–2(c) would include rules that describe certain limitations with respect to making an election under section 6418. First, consistent with section 6418(e)(1), the proposed regulations would provide that once made, an election to transfer an eligible credit is irrevocable. Second, consistent with section 6418(e)(2), the proposed regulations would prohibit a transferee taxpayer of any specified credit portion from making a second transfer under section 6418 with respect to any amount of such transferred credit.

Stakeholders asked whether a passthrough transferee taxpayer that allocates purchased eligible credits to its direct or indirect owners violates the no second transfer rule in section 6418(e)(2). An allocation of a transferred specified credit portion to a direct or indirect owner of a passthrough entity would not be considered a transfer under section 6418. As a result, an allocation of a transferred specified credit portion to a direct or indirect owner of a passthrough transferee taxpayer does not violate the no second transfer rule in section 6418(e)(2). However, certain rules would apply to allocations of a transferred specified credit portion from passthrough entities as further described in proposed § 1.6418–3.

Stakeholders also inquired whether eligible credits can be transferred through dealer arrangements. Any arrangement where the Federal income tax ownership of a specified credit portion transfers first, from an eligible taxpayer to a dealer or intermediary and then, ultimately, to a transferee taxpayer is in violation of the no second transfer rule in section 6418(e)(2). In contrast, an arrangement using a broker to match eligible taxpayers and transferee taxpayers should not violate the no second transfer rule, assuming the arrangement at no point transfers the Federal income tax ownership of a specified credit portion to the broker or any taxpayer other than the transferee taxpayer.

D. Determining the Eligible Credit

Proposed § 1.6418–2(d) would provide rules to clarify how to determine the amount of an eligible credit that is transferable. Any rules that relate to the determination of an eligible credit, such as rules in sections 49 and 50(b), would apply to the eligible taxpayer and therefore can limit the amount of transferable eligible credits determined with respect to a single eligible credit property owned by the eligible taxpayer. Section 6418(a) states that an eligible taxpayer can elect to transfer all (or any portion specified in the election) of an eligible credit determined with respect to such eligible taxpayer. The inclusion of the word ''determined'' is instructive, and the proposed regulations would draw a distinction between rules that impact the amount of credit determined or the credit base (and thus, the amount of eligible credit that can be transferred) versus rules that impact a taxpayer's ability to claim a particular eligible credit against its tax liability. Rules that impact the ability of a taxpayer to claim a particular eligible credit against its tax liability do not limit the amount of an eligible credit that an eligible taxpayer can transfer. Providing a limitation based on an eligible taxpayer's ability to claim an eligible credit would undercut one of the purposes of section 6418, which is to provide an alternative monetization mechanism to eligible taxpayers that would be unable to utilize credits in the current taxable year.

As previously stated, section 49 generally impacts the amount of a credit determined with respect to an investment credit property that an eligible taxpayer can transfer. The proposed regulations would provide rules for the application of section 49 to a partnership or S corporation that is an eligible taxpayer and elects under section 6418 to transfer an eligible credit (a transferor partnership or transferor S corporation). The proposed regulations would provide that any amount of eligible credit determined with respect to investment credit property held directly by a transferor partnership or transferor S corporation (or held directly by an entity disregarded as separate from such transferor partnership or transferor S corporation) is determined by the transferor partnership or transferor S corporation by taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the investment credit property is placed in service. Thus, if the credit base of the investment credit property is limited to a partner or shareholder by section 49, then the amount of the eligible credit determined by the transferor partnership or transferor S corporation is also limited. The proposed regulations would provide that a transferor partnership or transferor S corporation that transfers any specified credit portion with respect to an investment credit property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the investment credit

property as of the close of the taxable year in which the property is placed in service. Additionally, the transferor partnership or transferor S corporation would attach to its tax return for the taxable year in which the property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to any specified credit portion transferred with respect to the investment credit property. The Treasury Department and the IRS request comments as to whether (1) any information or reporting requirements are needed for transferor partnerships or transferor S corporations to apply these rules when determining the amount of an eligible credit that can be transferred or (2) any additional clarifications are needed regarding how the at-risk rules apply to the determination of an eligible credit by an eligible taxpayer.

E. Treatment of Payments Made in Connection With Transfer

Proposed § 1.6418–2(e) would include rules to clarify the treatment of payments made by a transferee taxpayer to an eligible taxpayer in connection with the transfer of an eligible credit. The proposed regulations relate to the rules provided in section 6418(b)(1) through (3) and include a rule clarifying when a payment is considered to be made in connection with a transfer election.

Proposed § 1.6418–2(e)(1) would provide that an amount paid by a transferee taxpayer to an eligible taxpayer is consideration for a transfer of a specified credit portion only if it is paid in cash (as defined in § 1.6418–1(f)), directly relates to the specified credit portion, and is not described in § 1.6418–5(a)(3) (describing payments related to an excessive credit transfer). These proposed rules would provide objective criteria for eligible taxpayers and transferee taxpayers that seek certainty as to the timing of payments and acceptable forms of payment. General tax rules apply to any payments made or received outside of the requirements described in proposed § 1.6418–2(e)(1). Additionally, the requirements of proposed § 1.6418–2(e)(1) would not be satisfied where a specified credit portion is not ultimately transferred to a transferee taxpayer.

Pursuant to section 6418(b), the proposed regulations also include rules that would clarify that amounts paid in connection with a transfer election by a transferee taxpayer are not includible in the gross income of an eligible taxpayer and are not deductible by the transferee taxpayer.

In addition to these rules, the proposed regulations would include an anti-abuse provision. The intent of the anti-abuse provision is to disallow the election and transfer of an eligible credit under section 6418, or otherwise recharacterize a transaction's income tax consequences, in circumstances where the parties to the transaction have engaged in the transaction or a series of transactions with the principal purpose of avoiding tax liability beyond the intent of section 6418. This could include transactions that are intended to decrease the eligible taxpayer's gross income or increase a transferee taxpayer's deductions. For example, a transaction where an eligible taxpayer undercharges or overcharges for services to a customer who is also purchasing credits from the eligible taxpayer as a transferee taxpayer may violate the anti-abuse rule. The proposed regulations include two examples to illustrate application of the anti-abuse rule.

The proposed regulations do not address (1) the Federal income tax treatment of transaction costs, either for the eligible taxpayer or the transferee taxpayer, and (2) whether a transferee taxpayer is permitted to deduct a loss if the amount paid to an eligible taxpayer exceeds the amount of the eligible credit that the transferee taxpayer can ultimately claim. The Treasury Department and the IRS are currently developing rules on these general issues and seek comments as part of that process. Any comments should also consider the specific matters described in the following paragraphs.

Generally, gain or loss is recognized on the sale or other disposition of property. See section 1001 of the Code. If a seller incurs costs to facilitate the sale of property, such costs are generally required to be capitalized and reduce the amount realized from the sale. See § 1.263(a)–1(e). If a buyer incurs costs to facilitate the acquisition of property (for example, legal fees to draft the purchase agreement), such costs are generally required to be capitalized and included in the basis of property acquired. See, for example, §§ 1.263(a)–2(f)(1) and 1.263(a)–4(b)(1)(v).

It is a longstanding principle that courts should construe Federal tax laws in harmony with the legislative intent and seek to carry out the legislative purpose. *Foster* v. *U.S.*, 303 U.S. 118 (1938). Furthermore, it is a well-established principle of statutory interpretation that a tax law should not be interpreted to allow the practical equivalent of a double benefit absent a clear declaration of intent by Congress (no double benefit principle). *See generally U.S.* v. *Skelly Oil Co.* 394 U.S. 678, 684 (1969); *cf. Hillsboro Nat. Bank* v. *Commissioner,* 460 U.S. 370 (1983). A double tax benefit could arise in situations of a double deduction, a deduction and a credit, a credit or a deduction from amounts that are excluded from gross income, or credits from expenditures made to generate other credits. *Cf. Hintz* v. *Commissioner,* 712 F2d 281 (7th Cir. 1983); section 265, Expenses and Interest Relating to Tax-Exempt Income; *S/V Drilling Partners* v. *Commissioner,* 114 T.C. 83 (2000).

Section 6418 provides specific rules that explicitly or implicitly supersede certain general Federal income tax rules in whole or in part. Accordingly, the Treasury Department and the IRS must consider not only the application of specific provisions of section 6418 but also other applicable provisions of the Code when developing rules on the general issues described previously.

With respect to an eligible taxpayer, section 6418(b)(2) provides that any consideration received from a transferee taxpayer for the transfer of an eligible credit (or portion thereof) is not includible in gross income of the eligible taxpayer. Section 6418(c)(1)(A) provides that in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, any amount received as consideration for the transfer of such credit is treated as tax exempt income for purposes of sections 705 and 1366. In developing the rules applicable to transaction costs of an eligible taxpayer, it will be necessary to determine, among other things, whether (1) the no double benefit principle applies and, if so, how it should apply, and (2) the capitalization rules of section 263 and the regulations thereunder apply and, if so, how they interact with the rules under section 6418(b)(2) and (c)(1)(A).

With respect to a transferee taxpayer, as described herein, the proposed regulations would provide that there is no gross income to a transferee taxpayer when claiming an eligible credit if the amount paid for the eligible credit is less than the amount of the eligible credit transferred and claimed (transferee gross income exclusion rule). Similar to the development of rules for transaction costs of an eligible taxpayer, in developing the rules applicable to transaction costs of a transferee taxpayer, it will be necessary to determine, among other things, whether (1) the no double benefit principle applies and, if so, how it should apply, and (2) the capitalization rules of section 263 and the regulations thereunder apply and, if so, how they interact with the transferee gross income exclusion rule in the proposed regulations.

Also, with respect to a transferee taxpayer, section 6418(b)(3) provides that any consideration paid to the eligible taxpayer for an eligible credit is not deductible under any provision of the Code. However, it is not clear whether the ''not deductible'' language in section 6418(b)(3) should be read to preclude capitalization of the consideration paid to the eligible taxpayer (for example, under section 263). Therefore, it will be necessary for the Treasury Department and the IRS to determine whether the capitalization rules of section 263 and the regulations thereunder apply to a transferee taxpayer and, if so, how they should apply. It will also be necessary to interpret the scope of section 6418(b)(3) and resolve whether it precludes a deduction for any amount of consideration paid that is otherwise deductible as a loss under section 165 (for example, where the amount of consideration paid exceeds the amount of the credit the transferee taxpayer can ultimately claim).

F. Transferee Taxpayer's Treatment of an Eligible Credit

Proposed § 1.6418–2(f) would provide rules describing the transferee taxpayer's treatment of a transferred specified credit portion. Stakeholders sought clarification of whether a transferee taxpayer has a choice of which year to take an eligible credit into account. Section 6418(d) provides that in the case of any eligible credit transferred to a transferee taxpayer pursuant to a transfer election, the eligible credit is taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined. This language prescribes the specific year the transferee taxpayer takes the transferred eligible credit into account. Therefore, no clarification is needed. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the transferee taxpayer will take the specified credit portion into account in that taxable year. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on different dates, the transferee taxpayer will take the specified credit portion into account in the transferee taxpayer's first taxable year that ends after the taxable year of the eligible taxpayer. Consistent with this rule, the transferee taxpayer may claim a specified credit portion on an amended return or, if applicable, a request for administrative adjustment. A transferee taxpayer may also take into account a specified credit portion that it has purchased, or intends to purchase, when calculating its estimated tax payments, though the transferee taxpayer remains liable for any additions to tax in accordance with sections 6654 and 6655 to the extent the transferee taxpayer has an underpayment of estimated tax.

Stakeholders also asked whether there are any income tax consequences to a transferee taxpayer if the amount paid for an eligible credit is less than the amount of the eligible credit transferred and claimed. As described earlier, the proposed regulations would clarify this issue by providing that there is no gross income to a transferee taxpayer when claiming an eligible credit if the amount paid for the eligible credit is less than the amount of the eligible credit transferred and claimed. Under section 6418(a), a transferee taxpayer is treated as the eligible taxpayer for other purposes of the Code with respect to a transferred eligible credit. An eligible taxpayer would not have gross income as a result of claiming an eligible credit. As such, a transferee taxpayer also should not have gross income as a result of claiming a transferred eligible credit.

The proposed regulations would also describe the effect of the language in section 6418(a), which provides that the transferee taxpayer specified in an election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to such credit (or such portion thereof). Consistent with an eligible credit being determined based on ownership of the underlying eligible credit property by an eligible taxpayer, or, if ownership is not required, based on conducting the activities giving rise to the eligible credit, the proposed regulations would provide that a transferee taxpayer does not also apply rules that relate to the determination of an eligible credit, such as rules in section 49 or 50(b) as described in proposed § 1.6418–2(d)(1). However, a transferee taxpayer would apply rules that relate to the amount of a transferred eligible credit that is allowed to be claimed in the taxable year based on a transferee's particular circumstances, such as the rules in section 38 or 469.

Consistent with applying credit utilization rules to transferee taxpayers, the proposed regulations would provide a rule that a transferred specified credit portion is treated as earned in connection with the conduct of a trade or business, and, if applicable, such transferred specified credit portion is subject to the passive activity limitation rules in section 469. However, a transferee taxpayer (or a direct or indirect owner of a transferee taxpayer that claims a transferred specified credit portion) that is subject to section 469 is not, as a result of a transfer election, considered to have owned an interest in the eligible taxpayer's business at the time the work was done (as required for material participation in § 1.469–5(f)(1)) and cannot change the characterization of the transferee taxpayer's participation with respect to generation of the transferred specified credit portion by using any of the grouping rules in § 1.469–4(c). This proposed rule would be consistent with the result that the transferee taxpayer does not apply rules that relate to the determination of an eligible credit because the transferee does not own the underlying eligible credit property to which the credit is determined or conduct the activity directly. Further, allowing a transferee taxpayer to try to change the characterization of an eligible credit based on grouping with its own activities under § 1.469–4(c) would conflict with the conclusion that the eligible credit has already been determined. In contrast, an eligible credit generated through the conduct of a trade or business does not lose such attribute through a transfer under section 6418 for purposes of determining whether a transferee taxpayer is allowed the credit. Likewise, a section 38 business credit does not become an individual (non-business) credit if transferred to an individual. If such attributes did not transfer under section 6418, eligible credits earned and used by eligible taxpayers would be subject to different limitations than transferred eligible credits used by transferee taxpayers. The impact of this rule for a transferee taxpayer that is subject to section 469 is that such transferee taxpayer will be considered to earn eligible credits through the conduct of a trade or business related to the eligible credit but will not materially participate in such business for purposes of section 469. Thus, a transferee taxpayer subject to section 469 would be required to treat the credits making up the specified credit portion as passive activity credits (as defined in section 469(d)(2)) to the extent the specified credit portion exceeds passive tax liability. The Treasury Department and the IRS request comments on whether there are circumstances in which it would be appropriate to not apply the passive activity rules under section 469 to a transferee taxpayer or to attribute the participation of an eligible taxpayer to a transferee taxpayer.

Lastly, proposed § 1.6418–2(f)(4) would provide rules for how a

transferee taxpayer can take into account a transferred specified credit portion. Section 6418(d) provides the taxable year that a transferee taxpayer takes a transferred eligible credit into account but does not provide further procedures applicable to a transferee taxpayer. In determining the proposed procedures, consideration was given to the requirements for any taxpayer when taking into account a general business credit, with additional information required that is necessary for tracking the transfer of specified credit portions. The proposed rules would provide that in order for a transferee taxpayer to take into account a specified credit portion, the transferee taxpayer would be required to include certain information as part of filing a return (or short year return). The proposed regulations would require (A) a properly completed Form 3800, *General Business Credit* (or its successor), taking into account a transferred eligible credit as a current general business credit, including all registration number(s) related to the transferred eligible credit; (B) the transfer election statement described earlier in this preamble attached to the return; and (C) any other information related to the transfer election specified in guidance.

III. Partnerships and S Corporations

A. Overview

The proposed regulations would provide general rules related to transfers of eligible credits by transferor partnerships and transferor S corporations and purchases of eligible credits by transferee partnerships and transferee S corporations. As a preliminary matter, the proposed regulations would clarify that a partnership or an S corporation may qualify as an eligible taxpayer or a transferee taxpayer, assuming all other relevant requirements in section 6418 are met. The proposed regulations would also clarify that the language in section 6418(c) requiring an eligible credit property to be ''held directly'' by a transferor partnership or transferor S corporation allows for such eligible credit property to be owned by an entity disregarded as separate from the transferor partnership or transferor S corporation for Federal income tax purposes.

In addition, the proposed regulations would clarify that any tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership or transferor S corporation is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As a result, such tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B). Because a transfer of a specified credit portion does not involve the transfer of any assets used in a trade or business, it is more appropriate to treat any tax exempt income resulting from the transfer as arising from an investment activity.

B. Special Recapture Rules for Transferor Partnerships and S Corporations

Stakeholders requested clarification on whether indirect disposition events result in recapture of transferred investment tax credits to a transferee taxpayer under section 6418(g)(3)(B). Section 1.47–4(a)(2) provides that if an S corporation shareholder's interest in an S corporation is reduced as a result of certain events during the recapture period by a certain percentage of the shareholder's interest for the taxable year of the S corporation in which the investment credit property is placed in service, recapture can occur to such S corporation shareholder. Likewise, § 1.47–6(a)(2) provides that if a partner's interest in the general profits of a partnership is reduced as a result of certain events during the recapture period by a certain percentage of the partner's interest in general profits for the taxable year of the partnership in which the investment credit property is placed in service, recapture can occur to such partner. As explained later in part V of this Explanation of Provisions, the proposed regulations would provide generally that if an applicable investment credit property is disposed of, or otherwise ceases to be investment credit property *with respect to the eligible taxpayer,* a transferee taxpayer bears the recapture tax associated with any transferred eligible investment tax credit transferred to such transferee taxpayer.

The recapture events described in §§ 1.47–4(a)(2) and 1.47–6(a)(2) are applicable with respect to the specific shareholder or partner to which the recapture event occurs and not with respect to the transferor S corporation or transferor partnership. As a result, such recapture events should not result in recapture of a transferred eligible investment tax credit to a transferee taxpayer under section 6418(g)(3)(B). Instead, the recapture tax liability resulting from the reduction of an S corporation shareholder's interest or a partner's interest in general profits should continue to result in recapture to the applicable disposing shareholder or partner. The proposed regulations would clarify that ''indirect'' dispositions under §§ 1.47–4(a)(2) and 1.47–6(a)(2) do not result in recapture tax liability to a transferee taxpayer under section 6418. Instead, these rules continue to apply to a disposing partner or shareholder in a transferor partnership or transferor S corporation, respectively. Any recapture to a disposing partner is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with § 1.46–3(f). Any recapture to a disposing shareholder is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with § 1.48–5.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to how the indirect disposition recapture rules under §§ 1.47–6(a)(2) and 1.47–4(a)(2) apply to partners or shareholders in transferor partnerships or transferor S corporations, respectively.

As previously stated, the proposed regulations would provide that any amount of eligible credit determined with respect to investment credit property held directly by a partnership or S corporation would be required to be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the investment credit property is placed in service. The proposed regulations also would provide that any net increase in the amount of nonqualified nonrecourse financing during the recapture period for a partner or shareholder in a transferor partnership or transferor S corporation with respect to such partner's or shareholder's credit base for a transferred eligible investment tax credit does not result in recapture to a transferee taxpayer under section 6418(g)(3). Similar to the indirect disposition recapture rules described above, the recapture rules under section 49(b) for partners or shareholders in a transferor partnership or transferor S corporation apply with respect to a disposition or change in financing at the partner or shareholder level and not at the eligible taxpayer (*i.e.,* the partnership or S corporation) level. As such, these rules would continue to apply to partners or shareholders in transferor partnerships or transferor S corporations that increase their nonqualified nonrecourse financing

amount during the recapture period. Any recapture to a disposing partner is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with § 1.46–3(f). Any recapture to a disposing shareholder is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with § 1.48–5.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to how the recapture rules under section 49(b) apply to partners or shareholders in transferor partnerships or transferor S corporations. As a clarification, recapture under section 49(b) applicable directly to an eligible taxpayer (for example, to an eligible taxpayer that is an individual) results in recapture to a transferee taxpayer under section 6418(g)(3).

The proposed regulations would also provide that any net decrease in the amount of nonqualified nonrecourse financing during the recapture period with respect to a partner's or shareholder's credit base for a transferred specified credit portion determined with respect to investment credit property does not result in additional eligible credit that can be transferred by the applicable partner, shareholder or transferor partnership or transferor S corporation. Instead, any net decrease in the amount of nonqualified nonrecourse financing and resulting increase in the credit base to a partner or shareholder results in additional investment tax credit that can be used by the applicable partner or shareholder. The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to how decreases in nonqualified nonrecourse amounts under section 49(a)(2) that increase the credit base for which eligible credits have previously been transferred apply to partners or shareholders in a transferor partnership or transferor S corporation, respectively.

C. Rules Solely Applicable to Transferor and Transferee Partnerships

The proposed regulations include special rules applicable to transferor and transferee partnerships and their direct and indirect partners. Section 6418(c)(1)(A) provides that any amount received as consideration for a transfer of eligible credits by a transferor partnership is treated as tax exempt income for purposes of section 705. Section 6418(c)(1)(B) provides that a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise eligible credit for each taxable year. Stakeholders asked for clarity as to how this determination should be made.

The proposed regulations would provide generally that a partner's distributive share of tax exempt income resulting from the receipt of cash by a transferor partnership for a transferred specified credit portion is based on the partner's proportionate distributive share of the otherwise eligible credit as determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii). The proposed regulations further clarify that any tax exempt income resulting from the receipt of cash by a transferor partnership for a transferred specified credit portion is treated as received or accrued, including for purposes of section 705, as of the date the specified credit portion is determined with respect to the transferor partnership. In effect, this means that tax exempt income resulting from the receipt of cash by a transferor partnership in exchange for a transferred specified credit portion should be allocated to the same partners and in the same proportionate amount, as the specified credit portion would have been allocated if not transferred.

The proposed regulations would provide a special rule for allocations of tax exempt income resulting from a transfer of a specified credit portion of less than all eligible credit(s) determined with respect to an eligible credit property held by a transferor partnership. This special rule permits tax exempt income resulting from the receipt of cash for a transfer of one or more specified credit portion(s) of less than all eligible credits from an eligible credit property to, generally, be allocated to those partners that desired to transfer their distributive share of the underlying credits. To take advantage of this special rule, a transferor partnership would first determine each partner's distributive share of the otherwise eligible credits determined with respect to such eligible credit property in accordance with §§ 1.46–3(f) and 1.704–1(b)(4)(ii). This amount is referred to as a ''partner's eligible credit amount.'' Thereafter, the transferor partnership may determine, either in a manner described in the partnership agreement or as the partners may agree, the portion of each partner's eligible credit amount to be transferred and the portion of each partner's eligible credit amount to be retained and allocated to such partner. Following the transfer of the specified credit portion(s), the transferor partnership may allocate to each partner its agreed upon share of eligible credits, tax exempt income resulting from the receipt of consideration for the transferred specified credit portion(s), or both, as the case may be; provided that, the amount of eligible credits allocated to each partner may not exceed such partner's eligible credit amount and the amount of tax exempt income allocated to each partner would equal such partner's proportionate share of tax exempt income resulting from the transfer(s). Each partner's proportionate share of tax exempt income resulting from the transfer(s) is equal to the total tax exempt income resulting from the transfer(s) of the specified credit portion(s) multiplied by a fraction, (i) the numerator of which is a partner's total eligible credit amount minus the amount of eligible credits actually allocated to the partner with respect to the eligible credit property for the taxable year, and (ii) the denominator of which is the total amount of the specified credit portion(s) transferred by the partnership with respect to the eligible credit property for the taxable year. The proposed regulations provide examples of this rule.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to when allocations of tax exempt income and eligible credits under section 6418 will be respected under section 704(b).

The proposed regulations would clarify that a partnership that is an indirect or direct partner of a transferor partnership (an upper-tier partnership) is not an eligible taxpayer with respect to an eligible credit allocated by a transferor partnership. The proposed regulations also would clarify that for any tax exempt income allocated to an upper-tier partnership as a result of the receipt of consideration for a transfer of a specified credit portion by a transferor partnership, the upper-tier partnership would determine its partners' distributive shares of the tax exempt income in proportion to the partners' distributive shares of the otherwise eligible credit. In effect, this means that the upper-tier partnership would allocate any tax exempt income resulting from a transfer of a specified credit portion by a lower-tier partnership among its partners as of the same time, and in the same proportionate amount, as the eligible credit would have been allocated if not transferred by the transferor partnership.

Stakeholders asked for confirmation that cash payments received by a

transferor partnership as consideration for a transfer of eligible credits can be distributed in a manner different from the partners' distributive shares of the tax exempt income resulting from the receipt of the cash payment. A transferor partnership that receives a cash payment from a transfer of a specified credit portion is under no restriction on how it can use such cash payment (including on how it makes distributions to its partners). Such cash payment is treated in the same manner as the transferor partnership's other cash flows.

The proposed regulations would provide rules for transferee partnerships and clarify that allocations of a transferred specified credit portion by a transferee partnership are not a violation of the no additional transfer rule in § 1.6418–2(c)(2). The proposed regulations also would provide that cash payments by a transferee partnership for a transferred specified credit portion are treated as a section 705(a)(2)(B) expenditure. Each partner's distributive share of any transferred specified credit portion is based on such partner's distributive share of the section 705(a)(2)(B) expenditures used to fund the purchase of such transferred specified credit portion. Each partner's distributive share of the section 705(a)(2)(B) expenditures used to fund the purchase of any transferred specified credit portion is determined by the partnership agreement. Or, if the partnership agreement does not provide for the allocation of such nondeductible expenditures, then each partner's distributive share is based on the transferee partnership's general allocation of nondeductible expenditures.

To prevent avoidance of the no additional transfer rule in proposed § 1.6418–2(c)(2) through transfers of interests in transferee partnerships, the proposed regulations in proposed § 1.6418–3(b)(4)(iv) would provide that a transferred specified credit portion purchased by a transferee partnership is treated as an extraordinary item under § 1.706–4(e) (including also a proposed addition to § 1.706–4(e) confirming a transferred specified portion is an extraordinary item). The proposed regulations further provide that if the transferee partnership and eligible taxpayer have the same taxable years, such extraordinary item is deemed to occur on the date the transferee partnership first makes a cash payment to an eligible taxpayer for any transferred specified credit portion. If the transferee partnership and eligible taxpayer have different taxable years, the extraordinary item is deemed to occur on the later of the first date the transferee partnership takes the transferred specified credit portion into account under section 6418(d), or the first date that the transferee partnership made a cash payment to the eligible taxpayer for the transferred specified credit portion. For example, if an eligible taxpayer is a calendar year taxpayer and a transferee partnership is a fiscal year taxpayer with its tax year beginning on June 1st, and the transferee partnership makes its first cash payment before June 1st for a transferred specified credit portion determined with respect to the eligible taxpayer during year 1, then the transferred specified credit portion is deemed to occur to the transferee partnership on June 1st. However, if the transferee partnership makes its first cash payment at any point from June 1st to December 31st, the transferred specified credit portion is deemed to occur on the cash payment date. The Treasury Department and the IRS continue to study whether additional rules are required under section 6418 to prevent avoidance of the no additional transfer rule through transfers of interests in transferee partnerships.

Finally, for transferee partnerships, the proposed regulations would clarify that an upper-tier partnership that is a direct or indirect partner in a transferee partnership and that is allocated a transferred specified credit portion is not an eligible taxpayer with respect to such transferred specified credit portion. The upper-tier partnership would determine each partner's distributive share of the transferred specified credit portion in accordance with the same rules the transferee partnership determines its partners' distributive shares of the transferred specified credit portion.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to when allocations of a transferred specified credit portion will be respected under section 704(b). The Treasury Department and the IRS also request comments on whether additional rules or clarifications are needed with respect to transfers of partnership interests that are made after the transferring partner has contributed capital to a transferee partnership for the purpose of purchasing eligible credits, but before the transferee partnership has made any cash payments to an eligible taxpayer.

D. Rules Solely Applicable to Transferor and Transferee S Corporations

The proposed regulations would include special rules applicable to transferor and transferee S corporations and their shareholders. Section 6418(c)(1)(A) provides that any amount received as consideration for a transfer of eligible credits by a transferor S corporation is treated as tax exempt income for purposes of section 1366. The proposed regulations would provide that each shareholder would take into account such shareholder's pro rata share (as determined under section 1377(a) of the Code) of any tax exempt income resulting from the receipt of cash for the transfer of a specified credit portion by a transferor S corporation. The proposed regulations would further clarify that any tax exempt income resulting from the receipt of cash for the transfer of a specified credit portion by a transferor S corporation is treated as received or accrued, including for purposes of section 1366, as of the date the transferred specified credit portion is determined with respect to the transferor S corporation. In effect, this means that any tax exempt income resulting from the receipt of cash by a transferor S corporation for a transferred specified credit portion should be allocated to the same shareholders and in the same proportionate amount as the specified credit portion would have been allocated if not transferred.

The proposed regulations would also provide rules for transferee S corporations and indicate that allocations of a transferred specified credit portion by a transferee S corporation are not a violation of the no additional transfer rule in § 1.6418–2(d)(2).

The proposed regulations would clarify that cash payments by a transferee S corporation for a transferred specified credit portion are treated as an expenditure under section 1367(a)(2)(D) of the Code since such payments are nondeductible. The proposed regulations would also provide rules for how shareholders of a transferee S corporation account for a transferred specified credit portion. Each shareholder of a transferee S corporation would take into account its pro rata share (as determined under section 1377(a)) of any transferred specified credit portion. If the transferee S corporation and eligible taxpayer have the same taxable years, the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's permitted year (as defined under sections 444 and 1378(b)) that the transferee S corporation first makes a cash payment as consideration to an eligible taxpayer for the transferred specified credit portion. If the transferee S corporation and eligible taxpayer have

different taxable years, then the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's first permitted year (as defined under sections 444 and 1378(b)) ending with, or after, the taxable year of the eligible taxpayer to which the transferred specified credit portion was determined.

E. Elections for Transferor Partnerships and Transferor S Corporations

Finally, the proposed regulations would provide specific rules relating to elections for transferor partnerships or transferor S corporations. Consistent with the rules for other eligible taxpayers, partnerships and S corporations would generally make a transfer election for a specified credit portion in the manner provided in proposed § 1.6418–2(b)(1) through (3) described earlier in this preamble. The proposed regulations would also clarify that all documents required in § 1.6418–2(b)(1) through (3) would need to be attached to the partnership or S corporation return for the taxable year during which the transferred specific credit portion was determined. For the transfer election to be valid, the return would need to be filed not later than the time prescribed by §§ 1.6031(a)–1(e) and 1.6037–1(b) (including extensions of time) for filing the return for such taxable year.

IV. Registration Under Section 6418(g)(1)

Section 6418(g)(1) provides that as a condition of, and prior to, any transfer of any portion of an eligible credit under section 6418, the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

In general, consistent with section 6417, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended a registration system that assigns a transfer number to an eligible taxpayer that can be used by transferee taxpayers to claim transferred credits and allows the IRS to track transfers of eligible credits. Stakeholders also recommended that information or registration requirements should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1). In order to meet the purpose of section 6418(g)(1), the Treasury Department and the IRS believe that it is necessary to establish a mandatory registration process that is in place before the end of the 2023 calendar year, which is the first full taxable year during which a transfer election under section 6418 is available.

Proposed § 1.6418–4 generally provides rules requiring that eligible taxpayers register before filing the return on which a transfer election is made and provide information related to each eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. Proposed § 1.6418–4(a), consistent with section 6418(g)(1), requires that, as a condition of, and prior to, making an election to transfer a specified credit portion, an eligible taxpayer satisfy the pre-filing registration requirements in proposed § 1.6418–4(b). After the required pre-filing registration process is successfully completed, an eligible taxpayer will receive a unique registration number from the IRS for each registered eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. The Treasury Department and the IRS intend for this pre-filling registration process to occur through an IRS electronic portal (unless otherwise allowed in guidance). An eligible taxpayer that does not obtain a registration number and report the registration number on its return with respect to an eligible credit property is ineligible to make a transfer election. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property. The registration number also must be reported on the eligible taxpayer's return.

Proposed § 1.6418–4(b) provides the following pre-filing registration requirements.

First, an eligible taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

Second, an eligible taxpayer must satisfy the registration requirements and receive a registration number prior to making a transfer election for a specified credit portion on the eligible taxpayer's return for the taxable year at issue.

Third, an eligible taxpayer is required to obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

Finally, an eligible taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the eligible credits, and about the eligible credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive transfers under section 6418. For example, verifying information about the taxpayer will allow the IRS to mitigate the risk of fraud or improper transfers. Information about eligible credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date will allow the IRS to mitigate the risk of duplication, fraud, and improper transfers for properties that are not eligible credit properties.

Proposed § 1.6418–4(c) provides rules related to the registration number that is obtained after the IRS has reviewed and approved the taxpayer's submitted information. First, these rules provide that a registration number is valid for an eligible taxpayer only for the taxable year for which it is obtained, and for a transferee taxpayer's taxable year in which the specified credit portion is taken into account. Second, proposed § 1.6418–4(c) provides rules for the renewal of a registration number that has been previously obtained. The eligible taxpayer is required to renew the registration with respect to an eligible credit property each year in accordance with guidance, including attesting that all the facts are still correct or updating any facts. Third, the proposed regulations provide that, if facts change with respect to an eligible credit property for which a registration number has been previously obtained, an eligible taxpayer is required to amend the registration to reflect these new facts. Lastly, the proposed regulations provide that an eligible taxpayer is required to include the registration number of the eligible credit property on the eligible taxpayer's return for the taxable year, as provided in proposed § 1.6418–2(b), for an election to be effective with respect to any eligible credit determined with respect to any eligible credit property. The IRS will treat a transfer election as ineffective with respect to an eligible credit determined with respect to an

eligible credit property for which the eligible taxpayer does not include a valid registration number on its return.

A transferee taxpayer is also required to report the registration number received from an eligible taxpayer on its return for the taxable year that the transferee taxpayer takes the transferred eligible credit into account.

V. Special Rules

The proposed regulations would provide special rules relating to the determination of an excessive credit transfer, reasonable cause for a transferee taxpayer, the difference between an excessive credit transfer and recapture under section 50(a) or 45Q(f)(4), the mechanics for basis reduction and recapture notification, and rules for ineffective elections. The proposed regulations also would provide special rules relating to the carryback and carryforward of transferred eligible credits.

The proposed regulations describe the rules related to an excessive credit transfer consistent with section 6418(g)(2)(A). Section 6418(g)(2)(A) provides in the case of any specified credit portion that is transferred to a transferee taxpayer pursuant to section 6418(a) that the Secretary determines constitutes an excessive credit transfer, the tax imposed on the transferee taxpayer by chapter 1, regardless of whether such entity would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made will be increased by an amount equal to the sum of (i) the amount of such excessive credit transfer, plus (ii) an amount equal to 20 percent of such excessive credit transfer.

Consistent with section 6418(g)(2)(B), the proposed regulations would provide that the 20 percent penalty related to an excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause. Under the proposed regulations, reasonable cause would be generally determined based on the relevant facts and circumstances of a transaction. The proposed regulations would further provide that the determination of reasonable cause includes an evaluation of a transferee taxpayer's efforts to determine that the amount of eligible credit transferred by the eligible taxpayer to the transferee taxpayer is not more than the eligible credit that was determined with respect to the eligible credit property for the taxable year in which the eligible credit was determined and has not been transferred to any other taxpayer. Further, based on a review of suggestions by stakeholders, the proposed regulations would provide a list of factors that a transferee taxpayer could show to demonstrate reasonable cause. The list of factors is not exhaustive and is also not intended as a list of required actions in all transfers. Instead, the list of factors, which includes a review of the eligible taxpayer's records with respect to the determination of the eligible credit (including documentation evidencing eligibility for bonus credit amounts), would be intended to provide more clarity with respect to reasonable cause in these circumstances for eligible taxpayers, transferee taxpayers and the IRS in administration of the provision.

The proposed regulations also would define the term ''excessive credit transfer'' consistent with section 6418(g)(2)(C) to mean, with respect to an eligible credit property for which an election is made under proposed § 1.6418–2 or § 1.6418–3 for any taxable year, an amount equal to the excess of—(i) the amount of the specified credit portion claimed by the transferee taxpayer with respect to such eligible credit property for such taxable year; over (ii) the amount of the eligible credit that, without the application of section 6418, would be otherwise allowable under the Code with respect to such eligible credit property for such taxable year. In the second part of the definition of the term, the Treasury Department and the IRS are interpreting the phrase ''amount of such credit . . . which would be otherwise allowable'' with respect to such eligible credit property for the taxable year to have the same meaning as the amount of the eligible credit properly determined with respect to such eligible credit property for such taxable year in the hands of the eligible taxpayer. See Joint Committee on Taxation, *Description Of Energy Tax Changes Made By Public Law 117–169,* JCX–5–23, 98 (April 17, 2023).

The proposed regulations would also provide a rule for determining an excessive credit transfer when there are multiple transferees. The proposed regulations would provide that all transferee taxpayers are considered one transferee for calculating whether there was an excessive credit transfer and the amount of the excessive credit transfer. If there was an excessive credit transfer, then the amount of excessive credit transferred to a specific transferee taxpayer is equal to the total excessive credit transferred multiplied by the transferee's portion of the total credit transferred to all transferees. This rule is applied on an eligible credit property basis.

Finally, with respect to excessive credit transfers, the proposed regulations provide three examples to illustrate when there is no excessive credit transfer, when there is an excessive credit transfer, and when there is an excessive credit transfer as to multiple transferees.

Stakeholders asked whether a recapture event under section 50(a) would be treated as an excessive credit transfer under section 6418(g)(2). The excessive credit transfer rules operate separately from the recapture rules. The excessive credit transfer rules apply where the credit amount reported on the original credit source form by the eligible taxpayer and transferred to a transferee taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. The proposed regulations therefore would provide a rule that recapture events under section 45Q(f)(4) or 50(a) do not result in an excessive credit transfer.

Stakeholders asked for clarification whether the recapture tax under section 50(a) is imposed on the eligible taxpayer or the transferee taxpayer. Section 6418(g)(3)(B) provides that if, during any taxable year, the applicable investment credit property (as defined in section 50(a)(5)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period (as described in section 50(a)(1))—(i) such eligible taxpayer must provide notice of such occurrence to the transferee taxpayer (in such form and manner as the Secretary prescribes), and (ii) the transferee taxpayer must provide notice of the recapture amount (as defined in section 50(c)(2)), if any, to the eligible taxpayer (in such form and manner as the Secretary prescribes). The proposed regulations include a rule that the recapture amount is calculated and taken into account by the transferee taxpayer. This interpretation is consistent with the statutory framework for recapture tax under section 50, which generally imposes recapture tax on the taxpayer who claimed the credit, regardless of whether such taxpayer owns the underlying property to which the credit is determined. This interpretation is also consistent with section 6418(a), which treats the transferee taxpayer (and not the eligible taxpayer) as the taxpayer for purposes of the Code with respect to a specified credit portion, and with section 6418(g)(3)(B)(ii), which requires the transferee taxpayer to provide notice of

the recapture amount, if any, to the eligible taxpayer.

Consistent with recapture tax liability being imposed on the transferee taxpayer, as a requested clarification, there is no prohibition under section 6418 for an eligible taxpayer and a transferee taxpayer to contract between themselves for indemnification of the transferee taxpayer in the event of a recapture event.

The proposed regulations would also provide guidance on the notifications that are required by the eligible taxpayer and the transferee taxpayer after a recapture event, as described in section 6418(g)(3)(B)(i) and (ii). The proposed regulations would provide that an eligible taxpayer would be required to provide notification of a recapture event to a transferee taxpayer, with such notification including all of the information necessary for the transferee taxpayer to calculate the recapture amount (as defined under section 50(c)(2)). This notification would need to be provided in a timely manner so that a transferee taxpayer can calculate the recapture amount by the due date of the transferee taxpayer's return (without extensions). Beyond these requirements, the parties can contract as to the form the notice must take and to any additional time periods for providing the notice, provided the terms of the contract do not otherwise conflict with the terms of the proposed regulations. The IRS would also be permitted to provide further information requirements or more specific time periods if required through instructions to forms or further guidance. The proposed regulations contain similar requirements as to the notification required by the transferee taxpayer of the recapture amount, with the difference being the type of information that is provided. Together, these notification rules seek to inform parties of the minimum information required in a notice and the outer limits on time periods, but still allow for parties to agree to other terms as needed.

Section 6418(g)(3) does not specifically address recapture under section 45Q(f)(4). Instead, section 6418(g)(3) only addresses recapture under section 50(a), which occurs when an investment credit property for which an eligible credit was determined is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer before the end of the recapture period. However, applying rules consistent with section 6418(g)(3) to eligible section 45Q credits is appropriate. Section 45Q has similar requirements in that carbon oxide that has been sequestered, utilized, or used and to which a section 45Q credit has been determined is generally intended to remain sequestered, utilized or used for the entire recapture period. Addressing this issue is also consistent with the authority granted in section 6418(h) to issue regulations necessary to carry out the purposes of section 6418. As such, the proposed regulations would clarify that the rules under proposed §§ 1.6418–5(d) and 1.45Q–5 apply to a transferee taxpayer to the extent any eligible section 45Q is transferred under section 6418. The proposed regulations would also clarify that an eligible taxpayer would be required to provide notice to a transferee taxpayer of a recapture event, the amount of leaked qualified carbon oxide, the amount of qualified carbon oxide subject to recapture and the recapture amount in accordance with § 1.45Q–5(c) through (e). Such notice would be required to be provided in a timely manner so that a transferee taxpayer can calculate the recapture amount by the due date of the transferee taxpayer's tax return (without extensions).

The proposed regulations would also provide a clarification that an ineffective election is not considered an excessive credit transfer to the transferee taxpayer. An ineffective election to transfer an eligible credit means that no transfer has occurred for purposes of section 6418. This means that section 6418 would not apply to the transaction, and the tax consequences are determined under any other relevant provisions of the Code. For example, an ineffective election results if an eligible taxpayer tries to elect to transfer an eligible credit, but the eligible taxpayer did not complete or receive a registration number with respect to the eligible credit property to which the credit is determined or if an eligible taxpayer attempts to transfer an eligible credit to a related party.

Stakeholders asked whether eligible credits are subject to new section 39(a)(4), regarding additional carryback and carryforward years. The proposed regulations would provide that a transferee taxpayer can use section 39(a)(4) to the extent an eligible credit is also listed in section 6417(b). Section 39(a)(4) generally allows a 3-year carryback period (as opposed to a 1-year) in the case of any applicable credit (as defined in section 6417(b)). This issue has two parts, the first of which is broader than these proposed regulations. The first issue is whether the reference in section 39(a)(4) to applicable credit is only referring to an applicable credit determined by an applicable entity under section 6417(a), or, if the reference is only referring to the list of credits in section 6417(b). The proposed regulations would provide that the language in section 39(a)(4) is referring to the list of credits in section 6417(b). Regardless of the taxpayer determining the credit, if the credit is listed in section 6417(b), then the credit is an applicable credit. The second issue is whether there is any prohibition against a transferee taxpayer using section 39(a)(4). No statutory language prohibits a transferee taxpayer from using the rule in section 39(a)(4) with respect to an eligible credit. All of the eligible credits would meet the definition in section 6417(b), although there are placed in service dates under section 6417(b)(2), (3), and (5) that may impact application of section 39(a)(4), which must be taken into consideration.

With respect to real estate investment trusts (REITs), stakeholders requested that the proposed regulations clarify that eligible credits that have not yet been transferred are treated as a real estate asset, cash, or cash item and thus, will not potentially cause a REIT to fail the asset test for REITs under section 856(c)(4). The proposed regulations do not directly adopt this comment; however, the Treasury Department and the IRS believe that the proposed regulations, particularly with respect to the paid in cash and timing of sale requirements, will assist REITs in managing issues with the REIT asset test. Further comments are requested with respect to whether the proposed regulations provide sufficient guidance to enable REITs to manage the potential REIT asset test issues.

Stakeholders also requested that the proposed regulations clarify that the transfer of an eligible credit pursuant to section 6418 is not considered a dealer sale under the REIT prohibited transactions rules of section 857(b)(6). The proposed regulations do not include a rule addressing this question. The Treasury Department and the IRS do not believe that a prohibited transaction tax issue arises from the transfer of eligible tax credits. Section 6418 provides that the cash amount received as consideration for the transfer of an eligible credit from an eligible taxpayer to a transferee taxpayer is not includible in the eligible taxpayer's gross income. Section 857(b)(6) imposes a tax equal to 100% of the net income derived from a REIT's prohibited transactions. Since cash received by an eligible REIT as consideration for the transfer of an eligible tax credit would not be includible in any calculation of the eligible taxpayer's gross income, the transaction cannot result in any net

income and, consequently, there is no prohibited transaction tax issue regarding the transfer of an eligible credit.

Stakeholders also requested confirmation that receipt of (or the right to receive) an eligible credit does not result in income to an eligible taxpayer that is also a REIT. Generally, Federal income tax rules do not treat as gross income a person's becoming entitled under the Code to a credit against Federal income tax. This general principle equally applies to an eligible taxpayer—including a REIT—becoming entitled to an eligible credit that it may transfer under section 6418. Accordingly, the proposed regulations do not include the requested rule specifically addressing REITs.

Lastly, stakeholders sought confirmation that the sale of energy under sections 45 and 45Y is not a dealer sale under the REIT prohibited transactions rules of section 857(b)(6). The proposed regulations do not address this issue. However, in the preamble to TD 9784 (81 FR 59849, 59856 (August 31, 2016)), the Treasury Department and the IRS noted that until additional guidance is published in the Internal Revenue Bulletin, in any taxable year in which (1) the quantity of excess electricity transferred to the utility company during the taxable year from energy producing distinct assets that serve an inherently permanent structure does not exceed (2) the quantity of electricity purchased from the utility company during the taxable year to serve the inherently permanent structure, the IRS will not treat any net income resulting from the transfer of such excess electricity as constituting net income derived from a prohibited transaction under section 857(b)(6). The Treasury Department and the IRS believe that any sale of electricity that is not within the scope of the statement in the 2016 preamble should be analyzed on a facts and circumstances basis to determine whether the sale is subject to the prohibited transaction rules of section 857(d)(6).

Proposed Applicability Dates

These regulations are proposed to apply to taxable years ending on or after the date the final regulations are published in the **Federal Register** Taxpayers may rely on these proposed regulations for taxable years beginning after December 31, 2022, and before the date the final regulations are published in the **Federal Register**, provided the taxpayers follow the proposed regulations in their entirety and in a consistent manner.

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (''PRA'') generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. 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 control number.

The collections of information in these proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed regulations are considered general tax records under § 1.6001–1(e). These records are required for the IRS to validate that transferee taxpayers have met the regulatory requirements and are entitled to the transferred specified credit portions. For PRA purposes, general tax records are already approved by OMB under 1545–0074 for individuals and under 1545–0123 for business entities.

These proposed regulations also mention reporting requirements related to making transfer elections as detailed in proposed §§ 1.6418–2 and 1.6418–3. These transfer elections will be made by eligible taxpayers as part of filing a return (such as the appropriate Form 1040, Form 1120, Form 1120–S, or Form 1065), including filling out the relevant source credit form and completing the Form 3800. The proposed regulation in proposed § 1.6418–2(b)(5) describes third-party disclosures, which require eligible taxpayers and transferee taxpayers to complete transfer election statements and also require eligible taxpayers to provide required minimum documentation to transferee taxpayers as part of making a transfer election. These forms and third-party disclosures are approved under 1545–0074 for individuals and 1545–0123 for business entities.

These proposed regulations also describe recapture procedures as detailed in proposed § 1.6418–5 that are required by section 6418(g)(3). The reporting of a recapture event will still be required to be reported using Form 4255, Recapture of Investment Credit. This form is approved under 1545–0074 for individuals and 1545–0123 for business entities. The proposed regulation is not changing or creating new collection requirements not already approved by OMB.

These proposed regulations mention the reporting requirement to complete pre-filing registration with IRS to be able to transfer eligible credits to a transferee taxpayer as detailed in proposed § 1.6418–4. For further information concerning the registration and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations (T.D. 9975) published in the Rules and Regulations section of this issue of the **Federal Register**. For burden estimates associated with the pre-filing registration requirement as detailed in proposed § 1.6418–4, see the preamble to the corresponding temporary regulations. This proposed regulation is not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities. Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

1. Need for and Objectives of the Rule

The proposed regulations would provide guidance to taxpayers that

intend to make an election under section 6418 to transfer eligible credits. The proposed regulations would also provide guidance to transferee taxpayers as to the treatment of transferred eligible credits under section 6418. The proposed rules would include needed definitions, the time and manner to make a transfer election, and information about the pre-filing registration process, among other items. The Treasury Department and the IRS intend and expect that providing taxpayers guidance that allows them to effectively use section 6418 to transfer eligible credits will beneficially impact various industries, deliver benefits across the economy, and reduce economy wide greenhouse gas emissions.

In particular, section 6418 allows eligible taxpayers to transfer an eligible credit (or portion thereof) to a transferee taxpayer. Allowing eligible taxpayers without sufficient Federal income tax liability to use a business tax credit to instead transfer the tax credit to a taxpayer that has sufficient tax liability to use the credit will increase the incentive for taxpayers to invest in clean energy projects that generate eligible credits. It will also increase the amount of cash available to such taxpayers, thereby reducing the amount of financing needed for clean energy projects.

2. Affected Small Entities

The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this proposed regulation and in this IRFA, section 6418 and these proposed regulations may affect a variety of different entities across several different industries as there are 11 different eligible credits that may be transferred pursuant to a transfer election. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is 50,000 taxpayers as described in the Paperwork Reduction Act section of the preamble. The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule and again when taxpayers start to make the transfer election using the guidance and procedures provided in these proposed regulations.

3. Impact of the Rules

The proposed regulations provide rules for how taxpayers can take advantage of the section 6418 credit monetization regime. Taxpayers that elect to take advantage of transferability will have administrative costs related to reading and understanding the rules in addition to recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. The costs will vary across different-sized taxpayers and across the type of project(s) in which such taxpayers are engaged.

The pre-filing registration process requires a taxpayer to register itself as intending to make a transfer election, to list all eligible credits it intends to transfer, and to list each eligible credit property that contributed to the determination of such credits. This process must be completed to receive a registration number for each eligible credit property with respect to which the eligible taxpayer intends to transfer an eligible credit. On filing the return, to make a valid transfer election, the eligible taxpayer and transferee taxpayer would be required to complete and attach a transfer election statement. The transfer election statement is generally a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. Further, the eligible taxpayer is required to provide certain required minimum documentation to the transferee taxpayer, and the transferee taxpayer is required to retain the documentation for as long as it may be relevant. Many of the other requirements, such as completing the relevant source credit form and completing the Form 3800 would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was transferring the credit under section 6418. Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

4. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed regulations. The proposed regulations requirements of pre-filing registration and the additional requirements to make a valid transfer election were designed to minimize burden while also minimizing the opportunity for duplication, fraud, improper payments, or excessive payments under section 6418. For example, in adopting these requirements, the Treasury Department and the IRS considered whether such information could be obtained strictly at filing of the relevant return. However, the Treasury Department and IRS decided that such an option would increase the opportunity for duplication, fraud, improper payments or excessive payments under section 6418. Section 6418(g)(1) specifically authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418 as a condition of, and prior to, any transfer of any portion of an eligible credit. As described in the preamble to these proposed regulations, these proposed rules carry out that Congressional intent as pre-filing registration allows for the IRS to verify certain information in a timely manner and then process the annual tax return of the eligible taxpayer and the transferee taxpayer with minimal delays. Having a distinction between eligible taxpayers that are small businesses versus others making a transfer election would create a scenario where a subset of taxpayers seeking to transfer eligible credits would not have been verified or received registration numbers, potentially delaying return processing for both eligible taxpayers and transferee taxpayers.

Another example is the proposed requirement that eligible taxpayers and transferee taxpayers complete a transfer election statement. In determining to adopt this proposal, the Treasury Department and the IRS considered that such a statement would again minimize opportunity for fraud and decrease the chance of duplication but would also benefit a transferee taxpayer by allowing the filing of its return without having to wait for an eligible taxpayer to file in all cases. Further, the contents of the transfer election statement were intended to be available to eligible taxpayers, such that the size of the business should not impact greatly the time needed to prepare such statements. The Treasury Department and the IRS also considered whether any required documentation was needed to be provided by eligible taxpayers to transferee taxpayers, which the transferee taxpayers are then required to

keep for so long as the contents thereof may become material in the administration of any internal revenue law. Again, this requirement was considered consistent with the goal of minimizing fraud, as the information is generally documentation to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification. Any size business generating an eligible credit should have access to such information. Further the recordkeeping duration is consistent with general recordkeeping rules under § 1.6001–1(e). This proposed requirement also will benefit small businesses that are transferee taxpayers as it provides a mechanism to receive such information from the eligible taxpayer. Comments are requested on the requirements in the proposed regulations, including specifically, whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, improper payments, or excessive payments under section 6418.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the proposed rule would merely provide procedures and definitions to allow taxpayers to take advantage of the ability to transfer eligible credits. The Treasury Department and the IRS invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. Unfunded Mandates Reform Act

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

V. Executive Order 13132: Federalism

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

VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. This proposed rule does not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive order.

VII. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and any paper comments submitted, will be made available at *https://www.regulations.gov* or upon request.

Announcement 2023–16, 2023–20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone. Any telephonic hearing will be made accessible to people with disabilities.

A public hearing has been scheduled for August 23, 2023, beginning at 10:00 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue NW, Washington, DC, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the **ADDRESSES** section.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at *https://www.regulations.gov,* search IRS and REG–101610–23. Copies of the agenda will also be available by emailing a request to *publichearings@irs.gov.* Please put ''REG–101610–23 Agenda Request'' in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–101610–23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG–101610–23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–101610–23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG–101610–23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–101610–23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG–101610–23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 21,

2023. Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–101610–23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG–101610–23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 21, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317–6901 (not a toll-free number) at least August 18, 2023.

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal authors of these proposed regulations are James Holmes and Jeremy Milton, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order for §§ 1.6418–0 through 1.6418–5 to read in part as follows:

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

Sections 1.6418–0 through 1.6418–5 also issued under 26 U.S.C. 6418(g)(1) and (h).

* * * * *

■ **Par. 2.** Section 1.706–4 is amended as follows:

■ 1. Redesignate paragraphs (e)(2)(ix) through (xi) as paragraphs (e)(2)(x) through (xii).

■ 2. Add new paragraph (e)(2)(ix).

■ 3. Revise the heading of paragraph (g).

■ 4. Redesignate the text of paragraph (g) as paragraph (g)(1).

■ 5. Add paragraph (g)(2).

The addition and revisions read as follows:

§ 1.706–4 Determination of distributive share when a partner's interest varies.

* * * * *

(e) * * *

(2) * * *

(ix) Any specified credit portion transferred pursuant to section 6418 and §§ 1.6418–1 through 1.6418–5;

* * * * *

(g) *Applicability date.* * * *

(2) Paragraph (e)(2)(ix) of this section applies to taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE].

■ **Par. 3.** Sections 1.6418–0 through 1.6418–5 are added to read as follows:

Sec.

* * * * *

* * * * *

§ 1.6418–0 Table of contents.

This section lists the captions contained in §§ 1.6418–1 through 1.6418–5.

§ 1.6418–1 Transfer of eligible credits.

(a) *Transfer of eligible credits.* An eligible taxpayer may make a transfer election under § 1.6418–2(a) to transfer any specified portion of an eligible credit determined with respect to any eligible credit property of such eligible taxpayer for any taxable year to a transferee taxpayer in accordance with section 6418 of the Code and the section 6418 regulations (defined in paragraph (g) of this section). Paragraphs (b) through (q) of this section provide definitions. See § 1.6418–2 for rules and procedures under which all transfer elections must be made, limitations to making transfer elections, the treatment of payments made in connection with transfer elections, and the treatment of eligible credits transferred to transferee taxpayers. See § 1.6418–3 for special rules pertaining to transfer elections made by partnerships or S corporations. See § 1.6418–4 for pre-filing registration requirements and other information required to make any transfer election effective. See § 1.6418–5 for special rules related to the imposition of tax on excessive credit transfers, basis reductions, required notifications and impacts of the recapture of transferred credits, and rules regarding carrybacks and carryforwards.

(b) *Eligible taxpayer.* The term *eligible taxpayer* means any taxpayer (as defined in section 7701(a)(14) of the

Code), other than one described in section 6417(d)(1)(A) and § 1.6417–1(b).

(c) *Eligible credit*—(1) *In general.* The term *eligible credit* is a credit described in paragraph (c)(2) of this section determined for a taxable year with respect to a single eligible credit property of an eligible taxpayer but does not include any business credit carryforward or business credit carryback determined under section 39 of the Code.

(2) *Separately determined credit amounts.* The amount of any credit described in this paragraph (c)(2) is the entire amount of the credit separately determined with respect to each single eligible credit property of the eligible taxpayer and includes any bonus credit amounts described in paragraph (c)(3) of this section determined with respect to that single eligible credit property. The eligible credits described in this paragraph (c)(2) are:

(i) *Alternative fuel vehicle refueling property.* So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit).

(ii) *Renewable electricity production.* The renewable electricity production credit determined under section 45(a) of the Code (section 45 credit).

(iii) *Carbon oxide sequestration.* The credit for carbon oxide sequestration determined under section 45Q(a) of the Code (section 45Q credit).

(iv) *Zero-emission nuclear power production.* The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit).

(v) *Clean hydrogen production.* The clean hydrogen production credit determined under section 45V(a) of the Code (section 45V credit).

(vi) *Advanced manufacturing production.* The advanced manufacturing production credit determined under section 45X(a) of the Code (section 45X credit).

(vii) *Clean electricity production.* The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit).

(viii) *Clean fuel production.* The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit).

(ix) *Energy.* The energy credit determined under section 48 of the Code (section 48 credit).

(x) *Qualifying advance energy project.* The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit).

(xi) *Clean electricity.* The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

(3) *Bonus credit amounts.* The bonus credit amounts described in this paragraph (c)(3) are:

(i) In the case of a section 30C credit, the increased credit amounts for which the requirements under section 30C(g)(2)(A) and (3) are satisfied.

(ii) In the case of a section 45 credit, the increased credit amounts for which the requirements under section 45(b)(7)(A)(8), (9), and (11) are satisfied.

(iii) In the case of a section 45Q credit, the increased credit amounts for which the requirements under section 45Q(h)(3) and (4) are satisfied.

(iv) In the case of a section 45U credit, the increased credit amount for which the requirements under section 45U(d)(2) are satisfied.

(v) In the case of a section 45V credit, the increased credit amounts for which the requirements under section 45V(e)(3) and (4) are satisfied.

(vi) In the case of a section 45Y credit, the increased credit amounts for which the requirements under section 45Y(g)(7), (9), (10), and (11) are satisfied.

(vii) In the case of a section 45Z credit, the increased credit amounts for which the requirements under section 45Z(f)(6) and (7) are satisfied.

(viii) In the case of a section 48 credit, the increased credit amounts for which the requirements under section 48(a)(10), (11), (12), (14), and (e) are satisfied.

(ix) In the case of a section 48C credit, the increased credit amounts for which the requirements under section 48C(e)(5) and (6) are satisfied.

(x) In the case of a section 48E credit, the increased credit amounts for which the requirements under section 48E(a)(3)(A), (B), (d)(3), (d)(4), and (h) are satisfied.

(d) *Eligible credit property.* The term *eligible credit property* means each of the units of property of an eligible taxpayer described in paragraphs (d)(1) through (11) of this section with respect to which the amount of an eligible credit is determined:

(1) In the case of a section 30C credit, a *qualified alternative fuel vehicle refueling property* described in section 30C(c).

(2) In the case of a section 45 credit, a *qualified facility* described in section 45(d).

(3) In the case of a section 45Q credit, a *single process train of carbon capture equipment* described in § 1.45Q–2(c)(3).

(4) In the case of a section 45U credit, a *qualified nuclear power facility* described in section 45U(b)(1).

(5) In the case of a section 45V credit, a *qualified clean hydrogen production facility* described in section 45V(c)(3).

(6) In the case of a section 45X credit, a *facility* that produces eligible components, as described in guidance under sections 48C and 45X.

(7) In the case of a section 45Y credit, a *qualified facility* described in section 45Y(b)(1).

(8) In the case of a section 45Z credit, a *qualified facility* described in section 45Z(d)(4).

(9)(i) *In general.* In the case of a section 48 credit and except as provided in paragraph (d)(9)(ii) of this section, an *energy property* described in section 48.

(ii) *Pre-filing registration and elections.* At the option of an eligible taxpayer, and to the extent consistently applied for purposes of the pre-filing registration requirements of § 1.6418–4 and the election requirements of §§ 1.6418–2 through 1.6418–3, an *energy project* as described in section 48(a)(9)(A)(ii) and defined in guidance.

(10) In the case of a section 48C credit, an *eligible property* described in section 48C(c)(2).

(11) In the case of a section 48E credit, a *qualified facility* as defined in section 48E(b)(3) or, in the case of a section 48E credit relating to a qualified investment with respect to energy storage technology, an *energy storage technology* described in section 48E(c)(2).

(e) *Guidance.* The term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. See §§ 601.601 and 601.602 of this chapter.

(f) *Paid in cash.* The term *paid in cash* means a payment in United States dollars that—

(1) Is made by cash, check, cashier's check, money order, wire transfer, automated clearing house (ACH) transfer, or other bank transfer of immediately available funds;

(2) Is made within the period beginning on the first day of the eligible taxpayer's taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement (as provided in § 1.6418–2(b)(5)(iii)); and

(3) May include a transferee taxpayer's contractual commitment to purchase eligible credits with United States dollars in advance of the date a specified credit portion is transferred to such transferee taxpayer if all payments of United States dollars are made in a manner described in paragraph (f)(1) of

this section during the time period described in paragraph (f)(2) of this section.

(g) *Section 6418 regulations.* The term *section 6418 regulations* means this section and §§ 1.6418–2 through 1.6418–5.

(h) *Specified credit portion.* The term *specified credit portion* means a proportionate share (including all) of an eligible credit determined with respect to a single eligible credit property of the eligible taxpayer that is specified in a transfer election. A specified credit portion of an eligible credit must reflect a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of eligible credit determined with respect to a single eligible credit property.

(i) *Statutory references*—(1) *Chapter 1.* The term *chapter 1* means chapter 1 of the Code.

(2) *Code.* The term *Code* means the Internal Revenue Code.

(3) *Subchapter K.* The term *subchapter K* means subchapter K of chapter 1.

(4) *Subtitle A.* The term *subtitle A* means subtitle A of the Code.

(j) *Transfer election.* The term *transfer election* means an election under section 6418(a) of the Code to transfer to a transferee taxpayer a specified portion of an eligible credit determined with respect to an eligible credit property in accordance with the section 6418 regulations.

(k) *Transferee partnership.* The term *transferee partnership* means a partnership for Federal income tax purposes that is a transferee taxpayer.

(l) *Transferee S corporation.* The term *transferee S corporation* means an S corporation within the meaning of section 1361(a) that is a transferee taxpayer.

(m) *Transferee taxpayer.* The term *transferee taxpayer* means any taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer making the transfer election to which an eligible taxpayer transfers a specified credit portion of an eligible credit.

(n) *Transferor partnership.* The term *transferor partnership* means a partnership for Federal income tax purposes that is an eligible taxpayer that makes a transfer election.

(o) *Transferor S corporation.* The term *transferor S corporation* means an S corporation within the meaning of section 1361(a) that is an eligible taxpayer that makes a transfer election.

(p) *Transferred specified credit portion.* The term *transferred specified credit portion* means the specified credit portion that is transferred from an eligible taxpayer to a transferee taxpayer pursuant to a transfer election.

(q) *U.S. territory.* The term *U.S. territory* means the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(r) *Applicability date.* This section applies to taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE].

§ 1.6418–2 Rules for making transfer elections.

(a) *Transfer election*—(1) *In general.* An eligible taxpayer can make a transfer election as provided in this section. If a valid transfer election is made by an eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the specified credit portion. This paragraph (a) provides rules on the number of transfers permitted, rules for determining the eligible taxpayer in certain ownership situations, and rules describing circumstances where no transfer election is allowed. Paragraph (b) of this section provides specific rules regarding the scope, manner, and timing of a transfer election. Paragraph (c) of this section provides rules regarding limitations applicable to transfer elections. Paragraph (d) of this section provides rules regarding an eligible taxpayer's determination of an eligible credit. Paragraph (e) of this section provides the treatment of payments in connection with a transfer election. Paragraph (f) of this section provides rules regarding a transferee taxpayer's treatment of an eligible credit following a transfer.

(2) *Multiple transfer elections permitted.* An eligible taxpayer may make multiple transfer elections to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of specified credit portions transferred with respect to any single eligible credit property does not exceed the amount of the eligible credit determined with respect to the eligible credit property.

(3) *Transfer election in certain ownership situations*—(i) *Disregarded entities.* If an eligible taxpayer is the sole owner (directly or indirectly) of an entity that is disregarded as separate from such eligible taxpayer for Federal income tax purposes and such entity directly holds an eligible credit property, the eligible taxpayer may make a transfer election in the manner provided in this section with respect to any eligible credit determined with respect to such eligible credit property.

(ii) *Undivided ownership interests.* If an eligible taxpayer is a co-owner of an eligible credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code, then the eligible taxpayer's undivided ownership share of the eligible credit property will be treated for purposes of section 6418 as a separate eligible credit property owned by such eligible taxpayer, and the eligible taxpayer may make a transfer election in the manner provided in this section for any eligible credit(s) determined with respect to such eligible credit property.

(iii) *Members of a consolidated group.* A member of a consolidated group is required to make a transfer election in the manner provided in this section to transfer any eligible credit determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(iv) *Partnerships and S corporations.* A partnership or S corporation that determines an eligible credit with respect to any eligible credit property held directly by such partnership or S corporation may make a transfer election in the manner provided in § 1.6418–3(d) with respect to eligible credits determined with respect to such eligible credit property.

(4) *Circumstances where no transfer election can be made*—(i) *Prohibition on election or transfer with respect to progress expenditures.* No transfer election can be made with respect to any amount of an eligible credit that is allowed for progress expenditures pursuant to rules similar to the rules of section 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990).

(ii) *No election allowed when non-cash consideration.* No transfer election is allowed when an eligible taxpayer receives any consideration other than cash (as defined in § 1.6418–1(f)) in connection with the transfer of a specified credit portion.

(iii) *No election allowed when eligible credits not determined with respect to taxpayer.* No transfer election is allowed for eligible credits that are not determined with respect to an eligible taxpayer as described in paragraph (d) of this section. For example, a section 45Q credit allowable to an eligible taxpayer because of an election made under section 45Q(f)(3)(B), or a section 48 credit allowable to an eligible taxpayer because of an election made

under section 50(d)(5) and § 1.48–4, although described in § 1.6418–1(c)(2), is not an eligible credit that can be transferred by the taxpayer because such credit is not determined with respect to the eligible taxpayer.

(b) *Manner and due date of making a transfer election*—(1) *In general.* An eligible taxpayer must make a transfer election to transfer a specified credit portion of an eligible credit on the basis of a single eligible credit property. For example, an eligible taxpayer that determines eligible credits with respect to two eligible credit properties would need to make a separate transfer election with respect to any specified credit portion of the eligible credit determined with respect to each eligible credit property. Any transfer election must be consistent with the eligible taxpayer's pre-filing registration under § 1.6418–4.

(2) *Specific rules for certain eligible credits.* In the case of any section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit that is an eligible credit, the rules in paragraphs (b)(2)(i) and (ii) of this section apply.

(i) *Separate eligible credit property.* A transfer election must be made separately with respect to each eligible credit property described in § 1.6418–1(d)(2), (3), (5), and (7), as applicable, for which an eligible credit is determined.

(ii) *Time period.* A transfer election must be made for each taxable year an eligible taxpayer elects to transfer specified credit portions with respect to such an eligible credit property during the 10-year period beginning on the date such eligible credit property was originally placed in service (or, in the case of a section 45Q credit, for each taxable year during the 12-year period beginning on the date the single process train of carbon capture equipment was originally placed in service).

(3) *Manner of making a valid transfer election.* A transfer election is made by an eligible taxpayer on the basis of each specified credit portion with respect to a single eligible credit property that is transferred to a transferee taxpayer. To make a valid transfer election, an eligible taxpayer as part of filing a return (or a return for a short year within the meaning of section 443 of the Code (short year return)), must include the following—

(i) A properly completed relevant source credit form for the eligible credit (such as Form 7207, *Advanced Manufacturing Production Credit,* if making a transfer election for a section 45X credit) for the taxable year that the eligible credit was determined;

(ii) A properly completed Form 3800, *General Business Credit* (or its successor), including reductions necessary because of the transferred eligible credit as required by the form and instructions and the registration number received during the required pre-filing registration (as described in § 1.6418–4) related to the eligible credit property with respect to which a transferred eligible credit was determined;

(iii) A schedule attached to the Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property (such as for a section 45X election, the relevant lines that include the eligible credit property reported on Form 7207), except as otherwise provided in guidance;

(iv) A transfer election statement as described in paragraph (b)(5) of this section; and

(v) Any other information related to the election specified in guidance.

(4) *Due date and original return requirement of a transfer election.* A transfer election by an eligible taxpayer with respect to a specified portion of an eligible credit must be made on an original return not later than the due date (including extensions of time) for the original return of the eligible taxpayer for the taxable year for which the eligible credit is determined. No transfer election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no late-election relief available under §§ 301.9100–1 through 301.9100–3 of this chapter for a transfer election that is not timely filed.

(5) *Transfer election statement*—(i) *In general.* A transfer election statement is a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. An eligible taxpayer and transferee taxpayer must each attach a transfer election statement to their respective return as required under paragraphs (b)(3)(iv) and (f)(4)(ii) of this section, unless otherwise provided in guidance. An eligible taxpayer and transferee taxpayer can use any document (such as a purchase and sale agreement) that meets the conditions in paragraph (b)(5)(ii) of this section but must label the document a ''Transfer Election Statement'' when attaching to a return. The information required in paragraph (b)(5)(ii) of this section does not otherwise limit any other information that the eligible taxpayer and transferee taxpayer may agree to provide in connection with the transfer of any specified credit portion. The statement must be signed under penalties of perjury by an individual with authority to legally bind the eligible taxpayer. The statement must also include the written consent of an individual with authority to legally bind the transferee taxpayer.

(ii) *Information required in transfer election statement.* A transfer election statement must, at a minimum, include each of the following:

(A) Name, address, and taxpayer identification number of the transferee taxpayer and the eligible taxpayer. If the transferee taxpayer or eligible taxpayer is a member of a consolidated group (as defined in § 1.1502–1), then only include information for the group member that is the transferee taxpayer or eligible taxpayer (if different from the return filer).

(B) A statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property, including—

(*1*) A description of the eligible credit (for example, advanced manufacturing production credit for a section 45X transfer election), the total amount of the credit determined with respect to the eligible credit property, and the amount of the specified credit portion;

(*2*) The taxable year of the eligible taxpayer and the first taxable year in which the specified credit portion will be taken into account by the transferee taxpayer;

(*3*) The amount(s) of the cash consideration and date(s) on which paid by the transferee taxpayer; and

(*4*) The registration number related to the eligible credit property.

(C) Attestation that the eligible taxpayer (or any member of its consolidated group) is not related to the transferee taxpayer (or any member of its consolidated group) within the meaning of section 267(b) or 707(b)(1)).

(D) A statement or representation from the eligible taxpayer that it has or will comply with all requirements of section 6418, the section 6418 regulations, and the provisions of the Code applicable to the eligible credit, including, for example, any requirements for bonus credit amounts described in § 1.6418–1(c)(3) (if applicable).

(E) A statement or representation from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements under section 6418(g)(3) and the section 6418 regulations (if applicable).

(F) A statement or representation from the eligible taxpayer that the eligible taxpayer has provided the required minimum documentation (as described in paragraph (b)(5)(iv) of this section) to the transferee taxpayer.

(iii) *Timing of transfer election statement.* A transfer election statement can be completed at any time after the eligible taxpayer and transferee taxpayer have sufficient information to meet the requirements of paragraph (b)(5)(ii) of this section, but the transfer election statement cannot be completed for any year after the earlier of:

(A) The filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer; or

(B) The filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account.

(iv) *Required minimum documentation.* Required minimum documentation is the minimum documentation that the eligible taxpayer is required to provide to a transferee taxpayer. This documentation consists of—

(A) Information that validates the existence of the eligible credit property, which could include evidence prepared by a third party (such as a county board or other governmental entity, a utility, or an insurance provider);

(B) If applicable, documentation substantiating that the eligible taxpayer has satisfied the requirements to include any bonus credit amounts (as defined in § 1.6418–1(c)(3)) in the eligible credit that was part of the transferred specified credit portion; and

(C) Evidence of the eligible taxpayer's qualifying costs in the case of a transfer of an eligible credit that is part of the investment credit or the amount of qualifying production activities and sales amounts, as relevant, in the case of a transfer of an eligible credit that is a production credit.

(v) *Transferee recordkeeping requirement.* Consistent with § 1.6001–1(e), the transferee taxpayer must retain the required minimum documentation provided by the eligible taxpayer as long as the contents thereof may become material in the administration of any internal revenue law.

(c) *Limitations after a transfer election is made*—(1) *Irrevocable.* A transfer election with respect to a specified credit portion is irrevocable.

(2) *No additional transfers.* A specified credit portion may only be transferred pursuant to a transfer election once. A transferee taxpayer may not make a transfer election of any specified credit portion transferred to the transferee taxpayer.

(d) *Determining the eligible credit*—(1) *In general.* An eligible taxpayer may only transfer eligible credits determined with respect to the eligible taxpayer (paragraph (a)(4) of this section disallows transfer elections in other situations). For an eligible credit to be determined with respect to an eligible taxpayer, the eligible taxpayer must own the underlying eligible credit property or, if ownership is not required, otherwise conduct the activities giving rise to the underlying eligible credit. All rules that relate to the determination of the eligible credit, such as the rules in sections 49 and 50(b) of the Code, apply to the eligible taxpayer and therefore can limit the amount of eligible credit determined with respect to an eligible credit property that can be transferred. Rules relating to the amount of an eligible credit that is allowed to be claimed by an eligible taxpayer, such as the rules in section 38(c) or 469 of the Code, do not limit the eligible credit determined, but do apply to a transferee taxpayer as described in paragraph (f)(3) of this section.

(2) *Application of section 49 at-risk rules to determination of eligible credits for partnerships and S corporations.* Any amount of eligible credit determined with respect to investment credit property held directly by a transferor partnership or transferor S corporation that is eligible credit property (eligible investment credit property) must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the eligible investment credit property is placed in service. Thus, if the credit base of an eligible investment credit property is limited to a partner or S corporation shareholder by section 49, then the amount of the eligible credit determined by the transferor partnership or transferor S corporation is also limited. A transferor partnership or transferor S corporation that transfers any specified credit portion with respect to an eligible investment credit property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the eligible investment credit property as of the close of the taxable year in which the property is placed in service. Additionally, the transferor partnership or transferor S corporation must attach to its tax return for the taxable year in which the eligible investment credit property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to any specified credit portion transferred with respect to the eligible investment credit property. Changes to at-risk amounts under section 49 for partners or S corporation shareholders after the close of the taxable year in which the eligible investment credit property is placed in service do not impact the eligible credit determined by the transferor partnership or transferor S corporation, but do impact the partner(s) or S corporation shareholder(s) as described in § 1.6418–3(a)(6)(ii).

(e) *Treatment of payments made in connection with a transfer election*—(1) *In general.* An amount paid by a transferee taxpayer to an eligible taxpayer is in connection with a transfer election with respect to a specified credit portion only if it is paid in cash (as defined in § 1.6418–1(f)), directly relates to the specified credit portion, and is not described in § 1.6418–5(a)(3) (describing payments related to an excessive credit transfer).

(2) *Not includible in gross income.* Any amount paid to an eligible taxpayer that is described in paragraph (e)(1) of this section is not includible in the gross income of the eligible taxpayer.

(3) *Not deductible.* No deduction is allowed under any provision of the Code with respect to any amount paid by a transferee taxpayer that is described in paragraph (e)(1) of this section.

(4) *Anti-abuse rule*—(i) *In general.* A transfer election of any specified credit portion, and therefore the transfer of that specified credit portion to a transferee taxpayer, may be disallowed, or the Federal income tax consequences of any transaction(s) effecting such a transfer may be recharacterized, in circumstances where the parties to the transaction have engaged in the transaction or a series of transactions with the principal purpose of avoiding any Federal tax liability beyond the intent of section 6418. An amount of cash paid by a transferee taxpayer will not be considered as paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to allow an eligible taxpayer to avoid gross income. Conversely, an amount of cash paid by a transferee taxpayer will be considered paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to increase a Federal income tax deduction of a transferee taxpayer.

(ii) *Example 1.* Taxpayer A, an eligible taxpayer, generates $100 of an eligible credit with respect to an eligible credit property in the course of its trade or business. Taxpayer A also provides

services to customers. Taxpayer A offers Customer B, a transferee taxpayer that cannot deduct the cost of the services, the opportunity to be transferred $100 of eligible credit for $100 while receiving Taxpayer A's services for free. Taxpayer A normally charges $20 for the same services without the purchase of the eligible credit, and the average transfer price of the eligible credit between unrelated parties is $80 paid in cash for $100 of the eligible credit. Taxpayer A is engaged in a transaction where it is undercharging for services to Customer B to avoid recognizing $20 of gross income. This transaction is subject to recharacterization under the anti-abuse rule in paragraph (e)(4) of this section, and Taxpayer A will be treated as transferring $100 of the eligible credit for $80, and have $20 of gross income from the services provided to Customer B.

(iii) *Example 2.* Taxpayer C, an eligible taxpayer, generates $100 of an eligible credit with respect to an eligible credit property in the course of its trade or business. Taxpayer C also sells property to customers. Taxpayer C offers Customer D, a transferee taxpayer that can deduct the purchase of property, the opportunity to receive the $100 of eligible credit for $20 while purchasing Taxpayer C's property for $80. Taxpayer C normally charges $20 for the same property without the transfer of the eligible credit, and the average transfer price of the eligible credit between unrelated parties is $80 paid in cash for $100 of the eligible credit. Taxpayer C is willing to accept the higher price for the property because Taxpayer C has a net operating loss carryover to offset any taxable income from the transaction. This transaction is subject to recharacterization under the anti-abuse rule under paragraph (e)(4) of this section, and Taxpayer C will be treated as selling the property for $20 and transferring $100 of the eligible credit for $80, and Customer D will have a $20 deduction related to the purchase of the property instead of $80.

(f) *Transferee taxpayer's treatment of eligible credit*—(1) *Taxable year in which credit taken into account.* In the case of any specified credit portion transferred to a transferee taxpayer pursuant to a transfer election under this section, the transferee taxpayer takes the specified credit portion into account in the transferee taxpayer's first taxable year ending with or ending after the taxable year of the eligible taxpayer with respect to which the eligible credit was determined. Thus, to the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the transferee taxpayer will take the specified credit portion into account in that taxable year. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on different dates, the transferee taxpayer will take the specified credit portion into account in the transferee taxpayer's first taxable year that ends after the taxable year of the eligible taxpayer.

(2) *No gross income for a transferee taxpayer when claiming a transferred specified credit portion.* A transferee taxpayer does not have gross income when claiming a transferred specified credit portion even if the amount of cash paid to the eligible taxpayer was less than the amount of the transferred specified credit portion, assuming all other requirements of section 6418 are met. For example, a transferee taxpayer who paid $9X for $10X of a specified credit portion that the transferee taxpayer then claims on its return does not result in the $1X difference being included in the gross income of the transferee taxpayer.

(3) *Transferee treated as the eligible taxpayer*—(i) *In general.* A transferee taxpayer (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the transferred specified credit portion. An eligible taxpayer must apply the rules necessary to determine the amount of an eligible credit prior to making the transfer election for a specified credit portion, and therefore a transferee taxpayer does not re-apply rules that relate to a determination of an eligible credit, such as the rules in section 49 or 50(b). However, a transferee taxpayer must apply rules that relate to computing the amount of the specified credit portion that is allowed to be claimed in the taxable year by the transferee taxpayer, such as the rules in section 38 or 469, as applicable.

(ii) *Application of section 469.* A specified credit portion transferred to a transferee taxpayer is treated as determined in connection with the conduct of a trade or business and, if applicable, such transferred specified credit portion is subject to the rules in section 469. In applying section 469, a transferee taxpayer is not considered to own an interest in the eligible taxpayer's trade or business at the time the work was done (as required for material participation under § 1.469–5(f)(1)) and cannot change the characterization of the transferee taxpayer's participation (or lack thereof) in the eligible taxpayer's trade or business by using any of the grouping rules under § 1.469–4(c).

(4) *Transferee taxpayer requirements to take into account a transferred specified credit portion.* In order for a transferee taxpayer to take into account in a taxable year (as described in paragraph (f)(1) of this section) a specified credit portion that was transferred by an eligible taxpayer, as part of filing a return (or short year return), an amended return, or a request for an administrative adjustment under section 6227 of the Code, the transferee taxpayer must include the following—

(i) A properly completed Form 3800, *General Business Credit* (or its successor), to take into account the transferred specified credit portion as a current general business credit, and including all registration number(s) related to the transferred specified credit portion;

(ii) The transfer election statement described in paragraph (b)(5) of this section attached to the return; and

(iii) Any other information related to the transfer election specified in guidance.

(g) *Applicability date.* This section applies to taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE].

§ 1.6418–3 Additional rules for partnerships and S corporations.

(a) *Rules applicable to both partnerships and S corporations*—(1) *Partnerships and S corporations as eligible taxpayers and transferee taxpayers.* Under section 6418, a partnership or an S corporation may qualify as a transferor partnership or a transferor S corporation and may elect to make a transfer election to transfer a specified credit portion to a transferee taxpayer. A partnership or S corporation may also qualify as a transferee partnership or a transferee S corporation. This section provides rules applicable to transferor partnerships and transferor S corporations and transferee partnerships and transferee S corporations. Paragraph (b) of this section provides rules applicable solely to partnerships. Paragraph (c) of this section provides rules applicable solely to S corporations. Paragraph (d) of this section provides guidelines for the manner and due date for which a partnership or S corporation makes an election under section 6418(a). Paragraph (e) of this section contains examples illustrating the operation of the provisions of this section. Except as provided in this section, the general rules under section 6418 and the section 6418 regulations apply to partnerships and S corporations.

(2) *Treatment of cash received for a specified credit portion.* In the case of any specified credit portion determined with respect to any eligible credit property held directly by a partnership

or S corporation, if such partnership or S corporation makes a transfer election with respect to such specified credit portion—

(i) Any amount of cash payment received as consideration for the transferred specified credit portion will be treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and

(ii) A partner's distributive share of such tax exempt income will be as described in paragraphs (b)(1) and (2) of this section.

(3) *No partner or shareholder level transfers.* In the case of an eligible credit property held directly by a partnership or S corporation, no transfer election by any partner or S corporation shareholder is allowed under § 1.6418–2 or this section with respect to any specified credit portion determined with respect to such eligible credit property.

(4) *Disregarded entity ownership.* In the case of an eligible credit property held directly by an entity disregarded as separate from a partnership or S corporation for Federal income tax purposes, such eligible credit property will be treated as held directly by the partnership or S corporation for purposes of making a transfer election.

(5) *Treatment of tax exempt income.* Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership or transferor S corporation is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, any tax exempt income is not treated as passive income to any direct or indirect partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(6) *Certain recapture events not requiring notice*—(i) *Indirect dispositions under section 50*—(A) *Treatment of transferor partnership or transferor S corporation and transferee taxpayer.* For purposes of section 6418(g)(3)(B) only, the disposition of a partner's interest under § 1.47–6(a)(2) or an S corporation shareholder's interest under § 1.47–4(a)(2) in an eligible taxpayer that is treated as a transferor partnership or transferor S corporation is disregarded. As such, provided the investment credit property that is eligible credit property owned by the transferor partnership or transferor S corporation is not disposed of, and continues to be investment credit property with respect to such transferor partnership or transferor S corporation, a transferor partnership or transferor S corporation should not provide notice to a transferee taxpayer of an interest disposition by the partner or shareholder because the disposition does not result in recapture under section 6418(g)(3)(B) to which the transferee taxpayer is liable, and thus, the transferee taxpayer does not have to calculate a recapture amount.

(B) *Treatment of partner or shareholder.* A partner or S corporation shareholder that has disposed of an interest in a transferor partnership or transferor S corporation is subject to the rules relating to such disposition under § 1.47–6(a)(2) or § 1.47–4(a)(2), respectively. Any recapture to a disposing partner is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.46–3(f). Any recapture to a disposing shareholder is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.48–5.

(ii) *Changes in at-risk amounts under section 49*—(A) *Treatment of transferor partnership or transferor S corporation and transferee taxpayer.* For purposes of section 6418 only, a change in the nonqualified nonrecourse financing (as defined in section 49(a)(1)(D)) amount of any partner or shareholder of a transferor partnership or transferor S corporation, respectively, after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined, is disregarded. A transferor partnership or transferor S corporation should not provide notice to a transferee taxpayer of the change because the change does not cause recapture under section 6418(g)(3)(B) to which the transferee taxpayer is liable, and thus, the transferee taxpayer does not have to calculate a recapture amount.

(B) *Treatment of partner or shareholder.* A partner or shareholder in a transferor partnership or transferor S corporation, respectively, must apply the rules under section 49 at the partner or shareholder level if there is a change in nonqualified nonrecourse financing with respect to the partner or shareholder after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined. If there is an increase in nonqualified nonrecourse financing to a partner, any adjustment under the rules of section 49(b) is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.46–3(f). If there is an increase in nonqualified nonrecourse financing to a shareholder, any adjustment under the rules of section 49(b) is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.48–5. If there is a decrease in nonqualified nonrecourse financing, any increase in the credit base is taken into account by the partner or shareholder as provided under section 49, and any resulting credit is not eligible for transfer under section 6418.

(b) *Rules applicable to partnerships*—(1) *Allocations of tax exempt income amounts generally.* A transferor partnership must generally determine a partner's distributive share of any tax exempt income resulting from the receipt of consideration for the transfer based on such partner's proportionate distributive share of the eligible credit that would otherwise have been allocated to such partner absent the transfer of the specified credit portion (otherwise eligible credit). A partner's distributive share of an otherwise eligible credit is determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii). Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership is treated as received or accrued, including for purposes of section 705 of the Code, as of the date the specified credit portion is determined with respect to the transferor partnership (such as, for investment credit property, the date the property is placed in service).

(2) *Special rule for allocations of tax exempt income amounts and eligible credits for an election to transfer less than all eligible credits determined with respect to an eligible credit property.* In the event a transferor partnership elects to transfer one or more specified credit portions of less than all eligible credits determined with respect to an eligible credit property held directly by the partnership, the partnership may allocate any tax exempt income resulting from the receipt of consideration for the specified credit portion(s) in accordance with the rules in this paragraph (b)(2).

(i) First, the partnership must determine each partner's distributive share of the otherwise eligible credits with respect to such eligible credit property in accordance with paragraph (b)(1) of this section (partner's eligible credit amount).

(ii) Thereafter, the transferor partnership may determine, in any manner described in the partnership

agreement, or as the partners may agree, the portion of each partner's eligible credit amount to be transferred, and the portion of each partner's eligible credit amount to be retained and allocated to such partner. The partnership may allocate to each partner its agreed upon share of eligible credits, tax exempt income resulting from the receipt of consideration for the specified credit portion(s), or both, as the case may be, provided that—

(A) The amount of eligible credits allocated to each partner may not exceed such partner's eligible credit amount; and

(B) Each partner is allocated its proportionate share of tax exempt income resulting from the transfer(s).

(iii) Each partner's proportionate share of tax exempt income resulting from the transfer(s) is equal to the total amount of tax exempt income resulting from the transfer(s) of the specified credit portion(s) by the partnership multiplied by a fraction—

(A) The numerator of which is such partner's eligible credit amount minus the amount of eligible credits actually allocated to such partner with respect to the eligible credit property for the taxable year; and

(B) The denominator of which is the specified credit portion(s) transferred by the partnership with respect to the eligible credit property for the taxable year.

(3) *Transferor partnerships in tiered structures.* If a partnership (upper-tier partnership) is a direct or indirect partner of a transferor partnership and directly or indirectly receives—

(i) An allocation of an eligible credit, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to any eligible credit allocated by a transferor partnership; or

(ii) An allocation of tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners' distributive shares of the otherwise eligible credit as provided in paragraph (b)(1) of this section.

(4) *Partnership as a transferee taxpayer*—(i) *Eligibility under section 6418.* A partnership may qualify as a transferee partnership to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer. A transferee partnership is subject to the no additional transfer rule in § 1.6418–2(c)(2), however, an allocation of a transferred specified credit portion to a direct or indirect partner of a transferee partnership under section 704(b) is not a transfer for purposes of section 6418.

(ii) *Treatment of a cash payment for a transferred specified credit portion.* A cash payment by a transferee partnership as consideration for a transferred specified credit portion is treated as an expenditure described in section 705(a)(2)(B).

(iii) *Allocations of transferred specified credit portions.* A transferee partnership must determine each partner's distributive share of any transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. Each partner's distributive share of the nondeductible expenses used to fund the purchase of any transferred specified credit portion is determined by the partnership agreement, or, if the partnership agreement does not provide for the allocation of nondeductible expenses paid pursuant to section 6418, then the allocation of the specified credit portion is based on the transferee partnership's general allocation of nondeductible expenses.

(iv) *Transferred specified credit portion treated as an extraordinary item.* A transferred specified credit portion is treated as an extraordinary item and must be allocated among the partners of a transferee partnership as of the time the transfer of the specified credit portion to the transferee partnership is treated as occurring in accordance with this paragraph (b)(4)(iv) and § 1.706–4(e)(1) and (e)(2)(ix). If the transferee partnership and eligible taxpayer have the same taxable years, the transfer of a specified credit portion to a transferee partnership is treated as occurring on the first date that the transferee partnership makes a cash payment to the eligible taxpayer as consideration for the specified credit portion. If the transferee partnership and eligible taxpayer have different taxable years, the transfer of a specified credit portion to a transferee partnership is treated as occurring on the later of—

(A) The first date of the taxable year that the transferee partnership takes the specified credit portion into account under section 6418(d); or

(B) The first date that the transferee partnership makes a cash payment to the eligible taxpayer for the specified credit portion.

(v) *Transferee partnerships in tiered structures.* If an upper-tier partnership is a direct or indirect partner of a transferee partnership and directly or indirectly receives an allocation of a transferred specified credit portion, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to the transferred specified credit portion. The upper-tier partnership must determine each partner's distributive share of the transferred specified credit portion in accordance with paragraphs (b)(4)(iii) and (iv) of this section and must report the credits to its partners in accordance with guidance.

(c) *Rules applicable to S corporations*—(1) *Pro rata shares of tax exempt income amounts.* Each shareholder of a transferor S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a) of the Code) of any tax exempt income resulting from the receipt of consideration for the transfer. Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor S corporation is treated as received or accrued, including for purposes of section 1366, as of the date the specified credit portion is determined with respect to the transferor S corporation (such as, for investment credit property, the date the property is placed in service).

(2) *S corporation as a transferee taxpayer*—(i) *Eligibility under section 6418.* An S corporation may qualify as a transferee taxpayer to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer (transferee S corporation). A transferee S corporation is subject to the no additional transfer rule in § 1.6418–2(c)(2), however, an allocation of a transferred specified credit portion to a direct or indirect shareholder of a transferee S corporation is not a transfer for purposes of section 6418.

(ii) *Treatment of a cash payment for a transferred specified credit portion.* A cash payment by a transferee S corporation as consideration for a transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D) of the Code.

(iii) *Pro rata shares of transferred specified credit portions.* Each shareholder of a transferee S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a)) of any transferred specified credit portion. If the transferee S corporation and eligible taxpayer have the same taxable years, the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's permitted year (as defined under sections 444 and 1378(b)) that the transferee S

corporation first makes a cash payment as consideration to the eligible taxpayer for the specified credit portion. If the transferee S corporation and eligible taxpayer have different taxable years, then the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's first permitted year (as defined under sections 444 and 1378(b)) ending with or after, the taxable year of the eligible taxpayer to which the transferred specified credit portion was determined.

(d) *Transfer election by a partnership or S corporation*—(1) *In general.* A partnership or S corporation may make a transfer election to transfer a specified credit portion under section 6418 if it files an election in accordance with the rules set forth in this paragraph (d). A transfer election is made on the basis of an eligible credit property and only applies to the specified credit portion identified in the transfer election by such partnership or S corporation in the taxable year for which the election is made.

(2) *Manner and due date of making a transfer election.* A transfer election for a specified credit portion must be made in the manner provided in § 1.6418–2(b)(1) through (3). All documents required in § 1.6418–2(b)(1) through (3) must be attached to the partnership or S corporation return for the taxable year during which the transferred specific credit portion was determined. For the transfer election to be valid, the return must be filed not later than the time prescribed by §§ 1.6031(a)–1(e) and 1.6037–1(b) (including extensions of time) for filing the return for such taxable year. No transfer election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no late-election relief available under §§ 301.9100–1 through 301.9100–3 of this chapter for a transfer election that is not timely filed.

(3) *Irrevocable election.* A transfer election by a partnership or S corporation is irrevocable.

(e) *Examples.* The examples in this paragraph (e) illustrate the application of paragraphs (a)(6), (b), and (c) of this section.

(1) *Example 1. Transfer of all eligible credits by a transferor partnership*—(i) *Facts.* A and B each contributed $150X of cash to AB partnership for the purpose of investing in energy property. The partnership agreement provides that A and B share equally in all items of income, gain, loss, deduction, and credit of AB partnership. AB partnership invests $300X in an energy property in accordance with section 48 and places the energy property in service on date X in year 1. As of the end of year 1, AB partnership has $90X of eligible credits under section 48 with respect to the energy property. Before AB partnership files its tax return for year 1, AB partnership transfers the $90X of eligible credits to an unrelated transferee taxpayer, Transferee Taxpayer X for $80X and executes a transfer election statement with Transferee Taxpayer X.

(ii) *Analysis.* Under § 1.6418–3(b)(1), AB partnership allocates the tax exempt income resulting from the transfer of the specified credit portion proportionately among the partners based on each partner's distributive share of the otherwise eligible section 48 credit as determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii). Under § 1.46–3(f)(2), each partner's share of the basis of the energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. Under the AB partnership agreement, A and B share partnership profits equally. Thus, each partner's share of the basis of the energy property under § 1.46–3(f) and distributive share of the otherwise eligible credits under § 1.704–1(b)(4)(ii) is 50 percent. The transfer made pursuant to section 6418(a) causes AB partnership's eligible credits under section 48 with respect to the energy property to be reduced to zero, and the consideration of $80X received by AB partnership for the transferred specified credit portion is treated as tax exempt income. Because the tax exempt income is allocated in the same proportion as the otherwise eligible credit would have been allocated, A and B will each be allocated $40X of tax exempt income. Each of partner A's and partner B's basis in its partnership interest and capital account will be increased by $40X. Also in year 1, the basis in the energy property held by AB partnership and with respect to which the credit is calculated is reduced under section 50(c)(3) by 50 percent of the amount of the credit so determined, or $45. A's and B's basis in their partnership interests and capital accounts will be appropriately adjusted to take into account adjustments made to the energy property under section 50(c)(5) and § 1.704–1(b)(2)(iv)(*j*). The tax exempt income received or accrued by AB partnership as a result of the transferred specified credit portion is treated as received or accrued, including for purposes of section 705, as of date X in year 1, which is the date the transferred specified credit portion was determined with respect to AB partnership.

(2) *Example 2. Recapture to a transferor partnership*—(i) *Facts.* Assume the same facts as in paragraph (e)(1)(i) of this section (*Example 1*), except in year 3, within the recapture period related to the energy property, A reduces its proportionate interest in the general profits of the partnership by 50 percent causing a recapture event to A under § 1.47–6(a)(2). The energy property is not disposed of by AB partnership and continues to be energy property with respect to AB partnership.

(ii) *Analysis.* AB partnership should not provide notice of recapture to Transferee Taxpayer X as a result of the recapture event under § 1.47–6(a)(2) with respect to A. Transferee Taxpayer X is not liable for any recapture amount. A, however, is subject to recapture as provided in § 1.47–6(a)(2) and based on its share of the basis (or cost) of the energy property to which the eligible credits were determined under § 1.46–3(f)(2).

(3) *Example 3. Transfer of a portion of eligible credits by a transferor partnership*—(i) *Facts.* C and D each contributed cash to CD partnership for the purpose of investing in a qualified wind facility. The partnership agreement provides that until a flip point, C is allocated 99 percent of all items of income, gain, loss, deduction and credit of CD partnership and D is allocated the remaining 1 percent of such items. After the flip point, C is allocated 5 percent of all items of income, gain, loss, deduction and credit of CD Partnership and D is allocated 95 percent of such items. CD partnership invests in a qualified wind facility and places the facility in service in year 1. CD partnership generates $100X of credit under section 45(a) for year 1. Before the due date for CD partnership's year 1 tax return (with extension), C and D agree that D's share of the eligible credit will be transferred, and C will be allocated its share of eligible credit. CD partnership transfers $1X of the eligible credit to an unrelated transferee taxpayer for $1X. The flip point has not been reached by the end of year 1.

(ii) *Analysis.* Under paragraph (b)(2) of this section, CD partnership must first determine each partner's eligible credit amount, which is equal to such partner's distributive share of the otherwise eligible section 45(a) credit as determined under § 1.704–1(b)(4)(ii). Under § 1.704–1(b)(4)(ii), for an eligible credit that is not an investment tax credit, allocations of credit are deemed to be in accordance with the partner's interest in the partnership if the credit is allocated in the same proportion as

the partners' distributive share of the receipts that give rise to the credit. The CD partnership agreement provides that until the flip point, C is allocated 99 percent of all items of income, gain, loss, deduction and credit of CD partnership and D is allocated the remaining 1 percent of such items. Assuming all requirements of the safe harbor provided for in Revenue Procedure 2007–65, 2007–2 CB 967 are met, CD partnership's allocations of the otherwise eligible credits would be respected as in accordance with section 704(b). Thus, partner C's and partner D's distributive share of the otherwise eligible credit is 99 percent and 1 percent, respectively. C and D have agreed to sell D's eligible credit amount of $1X for full value and to allocate to C its eligible credit amount of $99X. The transfer made pursuant to section 6418(a) causes CD partnership's eligible credits under section 45(a) with respect to the wind facility to be reduced to $99X, and the consideration of $1X received by CD partnership is treated as tax exempt income. D is allocated $1X of tax exempt income from the transfer of the eligible credits, and C is allocated $99X of eligible credits under section 45(a) with respect to the wind facility. Neither C nor D is allocated more eligible credits than its eligible credit amount. Additionally, D is allocated an amount of tax exempt income equal to $\$1X \times (1-0)/1$ and C is allocated none of the tax exempt income. The allocations of eligible credits and tax exempt income are permissible allocations under paragraph (b)(2) of this section.

(4) *Example 4. Upper-tier partnership of a transferor partnership*—(i) *Facts.* E, F, and G each contributed $100X of cash to EFG partnership for the purpose of investing in an energy property. E, F, and G are partnerships for Federal income tax purposes. The partnership agreement provides that E, F and G share equally in all items of income, gain, loss, and deduction of EFG partnership. EFG partnership invests $300X in an energy property in accordance with section 48 and places the energy property in service in year 1. As of the end of year 1, EFG partnership has $90X of eligible credits under section 48 with respect to the energy property. Before the due date for EFG partnership's year 1 tax return (with extension), E, F and G agree that E's share of the eligible credits will be transferred, and F and G will each be allocated their shares of eligible credits (or basis). EFG partnership transfers $30X of the eligible credits to an unrelated transferee taxpayer for $25X. Assuming the allocations to E, F and G of the eligible credits and tax exempt income resulting from the receipt of cash for the transferred specified credit portion are permissible allocations under paragraph (b)(2) of this section, E is allocated $25X of tax exempt income from the transfer of the eligible credits and F and G are each allocated $30X of basis with respect to the energy property.

(ii) *Analysis.* E must allocate the $25X of tax exempt income to its partners as if it had retained its share of the eligible credits. Under § 1.46–3(f)(2), each partner's share of the basis of the section 48 energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. The E partnership agreement provides for equal allocations of income, gain, deduction, and loss to its partners, and thus, E partnership must allocate the otherwise eligible credits in the same manner. Therefore, E partnership must allocate the $25X of tax exempt income equally among its partners. In accordance with paragraph (b)(3)(i) of this section, F and G do not qualify as an eligible taxpayer for purposes of section 6418 and thus, are not permitted to make a transfer election for any portion of the $30X of eligible credit allocated to them by EFG partnership. Under § 1.46–3(f)(2), each partner's share of the basis of the section 48 energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. The F and G partnership agreements provide for equal allocations of income, gain, deduction, and loss to its partners, and F and G must allocate the basis from the energy property to their partners in the same manner.

(5) *Example 5. Transferee partnership*—(i) *Facts.* Y and Z each contributed $50X of cash to YZ partnership for the purpose of purchasing eligible section 45 credits under section 6418. The partnership agreement provides that all items of income, gain, loss, deduction, and credit are shared equally among Y and Z. The partnership agreement also provides that any nondeductible expenses used to fund the purchase of any transferred specified credit portion will be shared equally among Y and Z. On date X in year 1, YZ partnership qualifies as a transferee taxpayer and makes a cash payment of $80X to an eligible taxpayer for $100X of a transferred specified credit portion. The eligible credits will be determined with respect to the eligible taxpayer as of the end of year 1. Both YZ partnership and the eligible taxpayer are calendar year taxpayers.

(ii) *Analysis.* The cash payment of $80X made by YZ partnership for the transferred specified credit portion is treated as a nondeductible expenditure under section 705(a)(2)(B). Under paragraph (b)(4)(iii) of this section, YZ partnership must determine each partner's distributive share of the transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. The YZ partnership agreement provides that nondeductible expenses used to fund the purchase of any transferred specified credit portion will be shared equally among Y and Z and thus, the transferred specified credit portion is also shared equally among Y and Z. The transferred specified credit portion is treated as an extraordinary item under § 1.706–4(e)(2)(ix) that is deemed to occur on date X in year 1. As of date X in year 1, each of Y and Z are allocated $40X of a section 705(a)(2)(B) expenditure with respect to the cash payment for the transferred specified credit portion and $50X of transferred section 45 credits.

(6) *Example 6. Upper-tier partnership of a transferee partnership*—(i) *Facts.* Assume the same facts as in paragraph (e)(5)(i) of this section (*Example 5*), except Y is a partnership for Federal tax purposes, and Z is a corporation for Federal tax purposes.

(ii) *Analysis.* In accordance with paragraph (b)(4)(v) of this section, Y does not qualify as an eligible taxpayer for purposes of section 6418 for that portion of the transferred specified credit portion allocated to it by YZ partnership. Under paragraph (b)(4)(iii) of this section, Y must determine each partner's distributive share of the transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. The Y partnership agreement provides that all items of income, gain, loss, deduction, and credit are shared equally. The partnership agreement also provides that any nondeductible expenses used to fund the purchase of any specified credit portion are shared equally. Thus, the transferred specified credit portion must be shared equally among the partners of Y.

(7) *Example 7. Transferor S corporation*—(i) *Facts.* V and W each contributed $150X of cash to an S corporation for the purpose of investing in energy property. The S corporation

invests $300X in an energy property in accordance with section 48 and places the energy property in service on date X in year 1. As of the end of year 1, the S corporation has $90X of eligible credits under section 48 with respect to the energy property. Before the due date for S corporation's year 1 tax return (with extension), S corporation transfers the $90X of eligible credits to an unrelated transferee taxpayer for $80X.

(ii) *Analysis.* The transfer made pursuant to section 6418(a) causes the S corporation's eligible credits under section 48 with respect to the energy property to be reduced to zero, and the consideration of $80X received by the S corporation for the transferred specified credit portion is treated as tax exempt income. Under paragraph (c)(1) of this section, each of V and W must take into account its pro rata share (as determined under section 1377(a)) of any tax exempt income resulting from the receipt of consideration for the transfer of the eligible credit, or $40X. Under section 1367(a)(1)(A), each of the shareholder's basis in its stock will be increased by $40X. Also in year 1, the basis in the energy property with respect to which the credit is calculated is reduced under section 50(c)(3) by 50 percent of the amount of the credit so determined, or $45. The tax exempt income received or accrued by S corporation as a result of the transfer of the specified credit portion is treated as received or accrued, including for purposes of section 1366, as of date X in year 1, which is the date the transferred specified credit portion was determined with respect to the transferor S corporation.

(8) *Example 8. Transferee S corporation*—(i) *Facts.* J and K each contributed $50X of cash to S corporation for the purpose of purchasing eligible section 48 credits under section 6418. At the beginning of year 2, S corporation qualifies as a transferee taxpayer and makes a cash payment of $80X to an eligible taxpayer for $100X of a transferred specified credit portion. The transferred specified credit portion was determined with respect to the eligible taxpayer for energy property placed in service in year 1. Both S corporation and the eligible taxpayer are calendar year taxpayers.

(ii) *Analysis.* The cash payment of $80X made by the S corporation for the transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D). Each of J and K must take into account its pro rata share (as determined under section 1377(a)) of the transferred specified credit portion. The transferred specified credit portion is deemed to arise for purposes of sections 1366 and 1377 during year 2 of the S corporation. For year 2, each of J and K take into account $40X of a section 1367(a)(2)(D) expenditure with respect to the cash payment for the transferred specified credit portion and $50X of transferred section 48 credits.

(f) *Applicability date.* This section applies to taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE].

§ 1.6418–4 Additional information and registration.

(a) *Pre-filing registration and election.* As a condition of, and prior to, any specified credit portion being transferred by an eligible taxpayer to a transferee taxpayer pursuant to an election under § 1.6418–2, or a specified credit portion being transferred by a partnership or S corporation pursuant to § 1.6418–3, the eligible taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section. An eligible taxpayer that does not obtain a registration number under paragraph (c)(1) of this section, and report the registration number on its return pursuant to paragraph (c)(5) of this section, is ineligible to make a transfer election for a specified credit portion under § 1.6418–2 or § 1.6418–3, with respect to the eligible credit determined with respect to the specific eligible credit property for which the eligible taxpayer has failed to obtain and report a registration number. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property.

(b) *Pre-filing registration requirements*—(1) *Manner of pre-filing registration.* Unless otherwise provided in guidance, eligible taxpayers must complete the pre-filing registration process electronically through an IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration to transfer any eligible credit determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration.* An eligible taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making a transfer election under § 1.6418–2 or § 1.6418–3 for a specified credit portion on the taxpayer's return for the taxable year at issue.

(4) *Each eligible credit property must have its own registration number.* An eligible taxpayer must obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an eligible taxpayer is required to provide the following information to the IRS to complete the pre-filing registration process:

(i) The eligible taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal, such as information establishing that the entity is an eligible taxpayer;

(iii) The taxpayer's taxable year, as determined under section 441;

(iv) The type of annual tax return(s) normally filed by the eligible taxpayer, or that the eligible taxpayer does not normally file an annual tax return with the IRS;

(v) The type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;

(vi) Each eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election;

(vii) For each eligible credit property listed in paragraph (b)(5)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of eligible credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the eligible credit property);

(C) Any supporting documentation relating to the construction or acquisition of the eligible credit property (such as State, Indian Tribal, or local government permits to operate the eligible credit property, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the eligible credit property is constructed or housed, and U.S. Coast Guard registration numbers for offshore wind vessels);

(D) The beginning of construction date, and the placed in service date of the eligible credit property; and

(E) Any other information that the eligible taxpayer believes will help the IRS evaluate the registration request;

(viii) The name of a contact person for the eligible taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either:

(A) Possess legal authority to bind the eligible taxpayer; or

(B) Must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative;*

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the registration information provided and will issue a separate registration number for each eligible credit property for which the eligible taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid to an eligible taxpayer only for the taxable year in which the credit is determined for the eligible credit property for which the registration is completed, and for a transferee taxpayer's taxable year in which the eligible credit is taken into account under § 1.6418–2(f).

(3) *Renewing registration numbers.* If an election to transfer an eligible credit will be made with respect to an eligible credit property for a taxable year after a registration number under this section has been obtained, the eligible taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained, but not yet used, an eligible taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for a transfer election under § 1.6418–2 or § 1.6418–3 for eligible credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the eligible credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered eligible credit property.

(5) *Reporting of registration number by an eligible taxpayer and a transferee taxpayer*—(i) *Eligible taxpayer reporting.* As part of making a valid transfer election under § 1.6418–2 or § 1.6418–3, an eligible taxpayer must include the registration number of the eligible credit property on the eligible taxpayer's return (as provided in § 1.6418–2(b) or § 1.6418–3(d)) for the taxable year the specified credit portion was determined. The IRS will treat an election as ineffective if the eligible taxpayer does not include a valid registration number on the return.

(ii) *Transferee taxpayer reporting.* A transferee taxpayer must report the registration number received (as part of the transfer election statement as described in § 1.6418–2(b) or otherwise) from a transferor taxpayer on the Form 3800, *General Business Credit,* as part of the return for the taxable year that the transferee taxpayer takes the transferred specified credit portion into account. The specified credit portion will be disallowed to the transferee taxpayer if the transferee taxpayer does not include the registration number on the return.

(d) *Applicability date.* This section applies to taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE].

§ 1.6418–5 Special rules.

(a) *Excessive credit transfer tax imposed*—(1) *In general.* If any specified credit portion that is transferred to a transferee taxpayer pursuant to an election in § 1.6418–2(a) or § 1.6418–3 is determined to be an excessive credit transfer (as defined in paragraph (b) of this section), the tax imposed on the transferee taxpayer by chapter 1 (regardless of whether such entity would otherwise be subject to chapter 1 tax) for the taxable year in which such determination is made will be increased by an amount equal to the sum of—

(i) The amount of such excessive credit transfer; and

(ii) An amount equal to 20 percent of such excessive credit transfer.

(2) *Taxable year of the determination.* The taxable year of the determination for purposes of paragraph (a)(1) of this section is the taxable year that includes the determination and not the taxable year when the eligible credit was originally determined by the eligible taxpayer, unless those are the same taxable years.

(3) *Payments related to excessive credit transfer.* Any payments made by a transferee taxpayer to an eligible taxpayer that directly relate to the excessive credit transfer (as defined in paragraph (b) of this section) are not subject to section 6418(b)(2) or § 1.6418–2(e).

(4) *Reasonable cause.* Paragraph (a)(1)(ii) of this section does not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause. Determination of reasonable cause will be made based on the relevant facts and circumstances. Generally, the most important factor is the extent of the transferee taxpayer's efforts to determine that the amount of specified credit portion transferred by the eligible taxpayer to the transferee taxpayer is not more than the amount of the eligible credit determined with respect to the eligible credit property for the taxable year in which the eligible credit was determined and has not been transferred to any other taxpayer. Circumstances that may indicate reasonable cause can include, but are not limited to, review of the eligible taxpayer's records with respect to the determination of the eligible credit (including documentation evidencing eligibility for bonus credit amounts), reasonable reliance on third party expert reports, reasonable reliance on representations from the eligible taxpayer that the total specified credit portion transferred (including portions transferred to other transferee taxpayers when an eligible taxpayer makes multiple transfer elections with respect to a single credit property) does not exceed the total eligible credit determined with respect to the eligible credit property for the taxable year, and review of audited financial statements provided to the Securities and Exchange Commission (and underlying information), if applicable.

(5) *Recapture events.* A recapture event under section 45Q(f)(4) or 50(a) is not an excessive credit transfer.

(b) *Excessive credit transfer defined*—(1) *In general.* The term *excessive credit transfer* means, with respect to an eligible credit property for which a transfer election is made under § 1.6418–2 or § 1.6418–3 for any taxable year, an amount equal to the excess of—

(i) The amount of the transferred specified credit portion claimed by the transferee taxpayer with respect to such eligible credit property for such taxable year; over

(ii) The amount of the eligible credit that, without the application of section 6418, would be otherwise allowable under the Code with respect to such eligible credit property for such taxable year.

(2) *Multiple transferees treated as one.* All transferee taxpayers are considered as one transferee for calculating whether there was an excessive credit transfer and the amount of the excess credit transfer. If there was an excessive credit transfer, then the amount of excessive credit transferred to a specific transferee taxpayer is equal to the total excessive credit transferred multiplied by the transferee taxpayer's portion of the total specified credit portions transferred to all transferees. The rule in this paragraph (b)(2) is applied on an eligible credit property basis, as applicable.

(3) *Examples.* The following examples illustrate the rules of this paragraph (b):

(i) *Example I—No excessive credit transfer.* Taxpayer A claims $50 of an eligible credit and transfers $50 of an eligible credit to Transferee Taxpayer B related to a single facility that was expected to generate $100 of such eligible credit. In a later year it is determined that the facility only generated $50 of such eligible credit. There is no excessive credit transfer in this case because the amount of the eligible credit claimed by Transferee Taxpayer B of $50 is equal to the amount of the credit that would be otherwise allowable with respect to such facility for the taxable year the transfer occurred. Taxpayer A is disallowed the $50 of the eligible credit claimed.

(ii) *Example II—Excessive credit transfer.* Same facts as in paragraph (b)(3)(i) of this section (*Example I*) except that Taxpayer A transfers $80 of the $100 of eligible credit to Transferee Taxpayer B. Taxpayer A claims $20 of the eligible credit and Transferee Taxpayer B claims $80 of the eligible credit. In this situation, there is a $30 excessive credit transfer because the amount of the credit claimed by Transferee Taxpayer B ($80) exceeds the amount of credit otherwise allowable with respect to the facility ($50) by $30. Therefore, Transferee Taxpayer B's tax is increased in the later year by $36, which is equal to the amount of the excessive credit transfer plus 20 percent of the excessive credit transfer as provided in paragraph (a) of this section and section 6418(g)(2)(A). If Transferee Taxpayer B can show reasonable cause as provided in paragraph (a)(4) of this section and section 6418(g)(2)(B), then Transferee Taxpayer B will only have a tax increase of $30. Taxpayer A is disallowed the $20 of the eligible credit claimed, and pursuant to paragraph (a)(3) of this section the payments made to Taxpayer A from Transferee Taxpayer B that directly relate to the excessive credit transfer are not subject to section 6418(b)(2) or § 1.6418–2(e).

(iii) *Example III—Excessive credit with multiple transferees.* Same facts as in paragraph (b)(3)(i) of this section (*Example I*) except that Taxpayer A transfers $45 of the eligible credit to Transferee Taxpayer B and $35 of the eligible credit to Transferee Taxpayer C. Taxpayer A claims $20 of the eligible credit, Transferee Taxpayer B claims $45 of the eligible credit, and Transferee Taxpayer C claims $35 of the eligible credit. In this situation, because there are multiple transferees, all transferees are treated as one transferee for determining the excessive credit transfer amount under paragraph (b)(2) of this section. There is a total excessive credit transfer of $30 because the amount of the credit claimed by the transferees in total ($80) exceeds the amount of credit otherwise allowable with respect to the facility ($50) by $30. The excessive credit transfer to Taxpayer B is equal to ($45/$80 * $30) = $16.88, and the excessive credit transfer to Taxpayer C is equal to ($35/$80 * $30) = $13.12. Therefore, Transferee Taxpayer B and Transferee Taxpayer C are subject to the provisions in paragraph (a) of this section. Transferee Taxpayer B's and Transferee Taxpayer C's tax is increased in the later year by the respective excessive credit transfer amount and 20 percent of the excessive credit transfer amount ($20.26 for Transferee Taxpayer B and $15.74 for Transferee Taxpayer C) as provided in paragraph (a) of this section and section 6418(g)(2)(A). If Transferee Taxpayer B or Transferee Taxpayer C can show reasonable cause as provided in paragraph (a)(4) of this section and section 6418(g)(2)(B), then the tax increase will only be $16.88 or $13.12, respectively. Taxpayer A is disallowed the $20 of eligible credit claimed and pursuant to paragraph (a)(3) of this section the payments made to Taxpayer A that directly relate to the excessive credit transfer are not subject to section 6418(b)(2) or § 1.6418–2(e).

(c) *Basis reduction under section 50(c).* In the case of any transfer election under § 1.6418–2 or § 1.6418–3 with respect to any specified credit portion described in § 1.6418–1(c)(2)(ix) through (xi), section 50(c) will apply to the applicable investment credit property (as defined in section 50(a)(6)(A)) as if such credit was allowed to the eligible taxpayer.

(d) *Notification and impact of recapture under section 50(a) or 49(b)*—(1) *In general.* In the case of any election under § 1.6418–2 or § 1.6418–3 with respect to any specified credit portion described in § 1.6418–1(c)(2)(ix) through (xi), if, during any taxable year, the applicable investment credit property (as defined in section 50(a)(6)(A)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period (as described in section 50(a)(1)(A)), other than as described in § 1.6418–3(a)(6), or has a reduction in credit base causing recapture under section 49, other than as described in § 1.6418–3(a)(6), such eligible taxpayer and the transferee taxpayer must follow the notification process in paragraph (d)(2) of this section, with recapture impacting the transferee taxpayer and eligible taxpayer as described in paragraph (d)(3) of this section.

(2) *Notification requirements*—(i) *Eligible taxpayer.* The eligible taxpayer must provide notice of the occurrence of recapture to the transferee taxpayer. This notice must provide all information necessary for a transferee taxpayer to correctly compute the recapture amount (as defined under section 50(c)(2)), and the notification must occur in sufficient time to allow the transferee taxpayer to compute the recapture amount by the due date of the transferee taxpayer's return (without extensions) for the taxable year in which the recapture event occurs. The eligible taxpayer and transferee taxpayer can contract with respect to the form of the notice and any specific time periods that must be met, so long as the terms of the contractual arrangement do not conflict with the requirements of this paragraph (d)(2)(i). Any additional information that is required or other specific time periods that must be met may be prescribed by the IRS in guidance issued with respect to this notification requirement.

(ii) *Transferee taxpayer.* The transferee taxpayer must provide notice of the recapture amount (as defined in section 50(c)(2)), if any, to the eligible taxpayer. This must occur in sufficient time to allow the eligible taxpayer to calculate any basis adjustment with

respect to the investment credit property by the due date of the eligible taxpayer's return (without extensions) for the taxable year in which the recapture event occurs. The eligible taxpayer and transferee taxpayer can contract with respect to the form of the notice and any specific time periods that must be met, so long as the terms of the contractual arrangement do not conflict with the requirements of this paragraph (d)(2)(ii). Any additional information that is required or other specific time periods that must be met may be provided in guidance prescribed by the IRS issued with respect to this notification requirement.

(3) *Impact of recapture*—(i) *Impact of recapture on transferee.* The transferee taxpayer is responsible for any amount of tax increase under section 50(a) upon the occurrence of a recapture event.

(ii) *Impact on eligible taxpayer.* The eligible taxpayer must increase the basis of the investment credit property (immediately before the event resulting in such recapture) by an amount equal to the recapture amount provided to the eligible taxpayer by the transferee taxpayer under paragraph (d)(2)(ii) of this section and in accordance with section 50.

(e) *Notification and impact of recapture under section 45Q(f)(4)*—(1) *In general.* In the case of any election under § 1.6418–2 or § 1.6418–3 with respect to any specified credit portion described in § 1.6418–1(c)(2)(iii), if, during any taxable year, there is recapture of any section 45Q credit allowable with respect to any qualified carbon oxide that ceases to be captured, disposed of, or used as a tertiary injectant in a manner consistent with section 45Q, before the close of the recapture period (as described in § 1.45Q–5(f)), such eligible taxpayer and the transferee taxpayer must follow the notification process in paragraph (e)(2) of this section with recapture impacting the transferee taxpayer as described in paragraph (e)(3) of this section.

(2) *Notification requirements.* The notification requirements for the eligible taxpayer are the same as for an eligible taxpayer that must report a recapture event as described in paragraph (d)(2)(i) of this section, except that the recapture amount that must be computed is defined in § 1.45Q–5(e).

(3) *Impact of recapture.* The transferee taxpayer is responsible for any amount of tax increase under section 45Q(f)(4) and § 1.45Q–5 upon the occurrence of a recapture event.

(f) *Impact of an ineffective transfer election by an eligible taxpayer.* An ineffective transfer election means that no transfer of an eligible credit has occurred for purposes of section 6418, including section 6418(b). Section 6418 does not apply to the transaction and the tax consequences are determined under any other relevant provisions of the Code. For example, an ineffective election results if an eligible taxpayer tries to elect to transfer a specified credit portion, but the eligible taxpayer did not register and receive a registration number with respect to the eligible credit property (or otherwise satisfy the requirements for making a transfer election under the section 6418 regulations) with respect to which the specified credit portion was determined.

(g) *Carryback and carryforward.* A transferee taxpayer can apply the rules in section 39(a)(4) (regarding a 3-year carryback period for unused current year business credits) to a specified credit portion to the extent the specified credit portion is described in section 6417(b) (list of applicable credits, taking into account any placed in service requirements in section 6417(b)(2), (3), and (5)).

(h) *Applicability date.* This section applies to taxable years ending on or after [DATE OF PUBLICATION OF FINAL RULE].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–12799 Filed 6–14–23; 11:15 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Part IV

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 301
Section 6417 Elective Payment of Applicable Credits; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–101607–23]

RIN 1545–BQ63

Section 6417 Elective Payment of Applicable Credits

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the election under the Inflation Reduction Act of 2022 to treat the amount of certain tax credits as a payment of Federal income tax. The proposed regulations describe rules for the elective payment of these credit amounts in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding repayment of excessive payments. In addition, the proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed regulations affect tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three of these credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 21, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on August 17, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 16, 2023.

ADDRESSES: Stakeholders are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *https://www.regulations.gov* (indicate IRS and REG–101607–23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's public docket. Send paper submissions to: CC:PA:LPD:PR (REG–101607–23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Jeremy Milton at (202) 317–5665 and James Holmes at (202) 317–5114 (not toll-free numbers); concerning submissions of comments or the public hearing, Vivian Hayes at (202) 317–6901 (not a toll-free number) or by email to *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

Section 6417 was added to the Internal Revenue Code (Code) on August 16, 2022, by section 13801(a) of Public Law 117–169, 136 Stat. 1818, 2003, commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 6417 allows ''applicable entities'' (including tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, and rural electric cooperatives) to make an election to treat an applicable credit determined with respect to such entity as making a payment against the tax imposed by subtitle A of the Code (subtitle A), for the taxable year with respect to which such credit was determined, equal to the amount of such credit. Section 6417 also allows certain taxpayers to elect to be treated as applicable entities for limited purposes, as described in part III of this background section. Section 6417 also provides special rules relating to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 6417 and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417. Section 13801(g) of the IRA provides that section 6417 applies to taxable years beginning after December 31, 2022. This document contains proposed regulations that would amend the Income Tax Regulations (26 CFR part 1) and the Procedure and Administration Regulations (part 301) to implement the statutory provisions of section 6417.

In the Rules and Regulations section of this issue of the **Federal Register**, the Treasury Department and the IRS are issuing temporary regulations under § 1.6417–5T that implement the pre-filing registration process described in proposed § 1.6417–5 of the proposed regulations. The temporary regulations require applicable entities that want to elect the elective payment of applicable credit amounts to register with the IRS through an IRS electronic portal in advance of the applicable entity filing the return on which the election under section 6417 is made.

I. Overview of Section 6417

Section 6417(a) provides that, in the case of an applicable entity that makes an elective payment election under section 6417 with respect to any applicable credit determined with respect to the applicable entity for the taxable year, the applicable entity is treated as making a payment against the tax imposed by subtitle A, that is, Federal income taxes, for the taxable year with respect to which such credit was determined that is equal to the amount of such credit (elective payment amount). An election under section 6417 must be made at such time and in such manner as provided by the Secretary.

Section 6417(b) defines the term ''applicable credit'' to mean each of the following 12 credits:

(1) So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) So much of the renewable electricity production credit determined under section 45(a) of the Code as is attributable to qualified facilities that are originally placed in service after December 31, 2022 (section 45 credit);

(3) So much of the credit for carbon oxide sequestration determined under section 45Q(a) of the Code as is attributable to carbon capture equipment that is originally placed in service after December 31, 2022 (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit);

(5) So much of the credit for production of clean hydrogen determined under section 45V(a) of the Code as is attributable to qualified clean hydrogen production facilities that are

originally placed in service after December 31, 2012 (section 45V credit);

(6) In the case of a ''tax-exempt entity'' described in section 168(h)(2)(A)(i), (ii), or (iv) of the Code, the credit for qualified commercial vehicles determined under section 45W of the Code by reason of section 45W(d)(3) [1] (section 45W credit);

(7) The credit for advanced manufacturing production under section 45X(a) of the Code (section 45X credit);

(8) The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);

(9) The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);

(10) The energy credit determined under section 48 of the Code (section 48 credit);

(11) The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and

(12) The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

As described in part II of this Background section, section 6417(d) defines an ''applicable entity'' and provides generally applicable rules for making elective payment elections. Sections 6417(e) through (h) provide special rules applicable under section 6417 that are described in part II of this Background section. As described in parts III and IV of this Background section, section 6417(c), (d)(1)(B), (C), and (D), and (d)(3) also contain special rules allowing a taxpayer, including for this purpose a partnership or S corporation, that is not an applicable entity (electing taxpayer) to elect to be treated as an applicable entity for the limited purpose of making an elective payment election under section 6417, but only with respect to section 45Q credits, section 45V credits, and section 45X credits. Part V of this Background section describes Notice 2022–50, 2022–43 I.R.B. 325, which, in part, requested feedback from the public on potential issues with respect to the elective payment election provisions under section 6417.

II. Applicable Entities and General Elective Payment Election Rules

Section 6417(d)(1)(A) defines the term ''applicable entity'' to mean:

(1) Any organization exempt from tax imposed by subtitle A;

(2) Any State or political subdivision thereof;

(3) The Tennessee Valley Authority;

(4) An Indian tribal government (as defined in section 30D(g)(9) of the Code);

(5) Any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)); or

(6) Any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.

Section 6417(d)(2) provides that, in the case of any applicable entity that makes the election described in section 6417(a), any applicable credit amount is determined (1) without regard to section 50(b)(3) and (4)(A)(i) of the Code (that is, restrictions on property used by tax-exempt organizations and governmental units), and (2) by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

Section 6417(d)(3)(A)(i) provides rules regarding the due date for making any elective payment election. In the case of any government (such as a State, the District of Columbia, an Indian Tribal government, any U.S. territory, or any agency or instrumentality of the foregoing), or political subdivision, described in section 6417(d)(1) and for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code, any election under section 6417(a) cannot be made later than the date as is determined appropriate by the Secretary. In any other case, any election under section 6417(a) cannot be made later than the due date (including extensions of time) for the tax return for the taxable year for which the election is made, but in no event earlier than 180 days after the date of the enactment of section 6417 (that is, in no event earlier than 180 days after August 16, 2022, which is February 13, 2023).

Section 6417(d)(3)(A)(ii) provides that any election under section 6417(a), once made, is irrevocable, and applies (except as otherwise provided in section 6417(d)(3)) with respect to any credit for the taxable year for which the election is made.

Section 6417(d)(3)(B) provides that, in the case of section 45 credits, any election under section 6417(a): (1) applies separately with respect to each qualified facility; (2) must be made for the taxable year in which such qualified facility is originally placed in service; and (3) applies to such taxable year and to any subsequent taxable year that is within the 10-year credit period described in section 45(a)(2)(A)(ii) with respect to such qualified facility.

Section 6417(d)(3)(C) provides that, in the case of section 45Q credits, any election under section 6417(a): (1) applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year; and (2) applies to such taxable year and to any subsequent taxable year that is within the 12-year credit period described in section 45Q(a)(3)(A) or (4)(A) with respect to such equipment. Section 6417(d)(3)(C)(i)(II)(aa), (d)(3)(C)(ii), and (d)(3)(C)(iii) provides special rules for a taxpayer making the election to be treated as an applicable entity for purposes of section 6417 with respect to the 45Q credit (see part III of this Background section).

Section 6417(d)(3)(D) provides that, in the case of section 45V credits, any election under section 6417(a): (1) applies separately with respect to each qualified clean hydrogen production facility; (2) must be made for the taxable year in which such facility is placed in service (or within the 1-year period subsequent to the date of enactment of section 6417 in the case of facilities placed in service before December 31, 2022); and (3) applies to the taxable year and all subsequent taxable years with respect to such facility. Section 6417(d)(3)(D)(i)(III)(aa), (d)(3)(D)(ii), and (d)(3)(D)(iii) provide special rules for a taxpayer making the election to be treated as an applicable entity for purposes of section 6417 with respect to the 45V credit (see part III of this Background section).

Section 6417(d)(3)(E) provides that, in the case of section 45Y credits, any election under section 6417(a): (1) applies separately with respect to each qualified facility; (2) must be made for the taxable year in which such facility is placed in service; and (3) applies to such taxable year and to any subsequent taxable year that is within the 10-year credit period described in section 45Y(b)(1)(B) with respect to such facility.

Section 6417(d)(4) provides rules regarding when the elective payment is treated as made. Section 6417(d)(4)(A) provides that in the case of any government or political subdivision described in section 6417(d)(1), and for which no return is required under section 6011 or section 6033(a), the payment described in section 6417(a) is treated as made on the later of the date that a return would be due under section 6033(a) if such government or subdivision were described in section 6033 or the date on which such government or subdivision submits a claim for credit or refund (at such time and in such manner as the Secretary provides). Section 6417(d)(4)(B) provides that, in any other case, the payment described in section 6417(a) is

[1] The reference should be to 45W(d)(2). This has been corrected in the proposed regulations.

treated as made on the later of the due date (determined without regard to extensions) of the return of tax for the taxable year or the date on which such return is filed with the IRS.

Section 6417(d)(5) provides that, as a condition of, and prior to, any amount being treated as a payment that is made by an applicable entity under section 6417(a), the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417.

Section 6417(d)(6) provides rules relating to excessive payments. In the case of any amount treated as a payment that is made by the applicable entity under section 6417(a), or the amount of the payment made pursuant to section 6417(c), that is determined to constitute an excessive payment, the tax imposed on such entity by chapter 1 of the Code (chapter 1), regardless of whether such entity would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made is increased by an amount equal to the sum of (1) the amount of such excessive payment, plus (2) an amount equal to 20 percent of such excessive payment. The increase equal to 20 percent of the excessive payment does not apply if the applicable entity can demonstrate that the excessive payment resulted from reasonable cause.

An excessive payment is defined as, with respect to a facility or property for which an election is made under section 6417 for any taxable year, an amount equal to the excess of (1) the amount treated as a payment that is made by the applicable entity under section 6417(a), or the amount of the payment made pursuant to section 6417(c), with respect to such facility or property for such taxable year, over (2) the amount of the credit that, without application of section 6417, would be otherwise allowable (as determined pursuant to section 6417(d)(2) and without regard to section 38(c)) with respect to such facility or property for such taxable year.

Section 6417(e) provides a denial of double benefit rule providing that, in the case of an applicable entity making an election under section 6417 with respect to an applicable credit, such credit is reduced to zero and, for any other purpose under the Code, is deemed to have been allowed to such entity for such taxable year.

Section 6417(f) provides a special rule relating to any territory [2] of the United States with a mirror code tax system (as defined in section 24(k) of the Code). Under this rule, section 6417 will not be treated as part of the income tax laws of the United States for purposes of determining the income tax law of any such U.S. territory unless such U.S. territory elects to have section 6417 be so treated. Currently, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands have mirror code tax systems.

Section 6417(g) provides basis reduction and recapture rules. It states that, except as otherwise provided in section 6417(d)(2)(A),[3] rules similar to the rules of section 50 apply for purposes of section 6417.

Section 6417(h) authorizes the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment or deemed payment made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).

III. Special Rules Relating to Certain Taxpayers Making an Election Under Section 6417(d)(1)(B), (C), or (D) (Electing Taxpayers)

A taxpayer other than an applicable entity under section 6417(d)(1)(A) may make an election under section 6417(d)(1)(B), (C), or (D) at such time and in such manner as the Secretary provides (but no election may be made with respect to any taxable year beginning after December 31, 2032). The election allows the electing taxpayer to be treated as an applicable entity for the limited purpose of making an elective payment election under section 6417 with respect to a section 45V credit, a section 45Q credit, or a section 45X credit, respectively. The special rules for such an election are described in paragraphs III.A, III.B, and III.C of this background section.

A. Electing Taxpayers Making an Election With Respect to Section 45V Credits

Section 6417(d)(1)(B) allows an electing taxpayer to make an elective payment election for any taxable year in which such taxpayer has placed in service a qualified clean hydrogen production facility (as defined in section 45V(c)(3)), but only with respect to a section 45V credit determined in such year with respect to the electing taxpayer. Pursuant to section 6417(d)(3)(D)(i)(III), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(3)(D)(iii), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year within the 5-year period and cannot be revoked.

Section 6417(d)(3)(D)(ii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45V credit for any year for which the electing taxpayer's election under section 6417(d)(1)(B) is in effect.

B. Electing Taxpayers Making an Election With Respect to Section 45Q Credits

Section 6417(d)(1)(C) allows an electing taxpayer to make an elective payment election for any taxable year in which the electing taxpayer has, after December 31, 2022, placed in service carbon capture equipment at a qualified facility (as defined in section 45Q(d)), but only with respect to a section 45Q credit determined in such year with respect to such taxpayer. Pursuant to section 6417(d)(3)(C)(i)(II)(aa), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(3)(C)(iii), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year within the 5-year period and cannot be revoked.

Section 6417(d)(3)(C)(ii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45Q credit for any year for which the electing taxpayer's election under section 6417(d)(1)(C) is in effect.

[2] Section 6417(f) uses the term ''possession,'' but this proposed regulation uses the alternative term ''territory.''

[3] Section 6417(g) actually states ''subsection (c)(2)(A),'' but there is no section 6417(c)(2)(A); thus, the proposed regulations correct the reference to state''(d)(2)(A).''

C. Electing Taxpayers Making an Election With Respect to Section 45X Credits

Section 6417(d)(1)(D) allows an electing taxpayer to make an elective payment election for any taxable year in which the electing taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), but only with respect to a section 45X credit determined in such year with respect to such taxpayer. Pursuant to section 6417(d)(1)(D)(ii)(I), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(1)(D)(ii)(II), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year remaining within the 5-year period and cannot be revoked.

Section 6417(d)(1)(D)(iii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45X credit for any year for which the electing taxpayer's election under section 6417(d)(1)(D) is in effect.

IV. Section 6417 Rules for Partnerships and S Corporations

Section 6417(c) provides special rules for partnerships and S corporations that hold directly (as determined for Federal income tax purposes) a facility or property for which an applicable credit is determined. Section 6417(c)(1) provides that, in the case of any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation, any elective payment election must be made by such partnership or S corporation in the manner provided by the Secretary. If such a partnership or S corporation makes an elective payment election with respect to any applicable credit, (1) a payment is made to such partnership or S corporation equal to the applicable credit amount, (2) section 6417(e) is applied with respect to the applicable credit before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such applicable credit, (3) any applicable credit amount with respect to which the election in section 6417(a) is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code, and (4) a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise applicable credit for each taxable year (an S corporation shareholder's share of tax exempt income is based on the shareholder's pro rata share).

Section 6417(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under section 6417(a) with respect to any applicable credit determined with respect to such facility or property.

V. Notice 2022–50

On October 24, 2022, the Treasury Department and the IRS published Notice 2022–50, 2022–43 I.R.B. 325, to, among other things, request feedback from the public on potential issues with respect to the elective payment election provisions under section 6417 that may require guidance. Over 200 comment letters were received in response to Notice 2022–50. Based in part on the feedback received, the Treasury Department and the IRS are issuing these proposed regulations regarding the elective payment election provisions under section 6417. The major areas with respect to which public stakeholders provided letters are discussed in the following Explanation of Provisions.

Explanation of Provisions

I. General Rules and Definitions

A. Applicable Entity

Section 6417(d)(1) defines ''applicable entity'' as (1) any organization exempt from the tax imposed by subtitle A, (2) any State or political subdivision thereof, (3) the Tennessee Valley Authority, (4) an Indian tribal government (as defined in section 30D(g)(9)), (5) any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)), or (6) any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas. Proposed § 1.6417–1(c) would clarify these statutory definitions pursuant to the Secretary's authority under section 6417(h) to issue regulations necessary to carry out the purposes of section 6417, as discussed below.

1. Any Organization Exempt From the Tax Imposed by Subtitle A

Stakeholders asked for clarification on the scope of the phrase ''any organization exempt from the tax imposed by subtitle A'' for purposes of determining whether a taxpayer is an applicable entity. Entities may be exempt from tax or have their income exempt from tax under various authorities. For example, an organization could be exempt from taxation by section 501(a) of the Code or by other provisions of the Code. An organization could also have its income excluded from taxation by section 115.

The Treasury Department and the IRS propose to define the term ''any organization exempt from the tax imposed by subtitle A'' to include all organizations exempt from the tax imposed by subtitle A by section 501(a) of the Code, commonly referred to as ''tax-exempt organizations.''

Several stakeholders requested clarification that tax-exempt entities in the U.S. territories are eligible to make an election under section 6417. Under these proposed regulations, such entities would be considered organizations exempt from the tax imposed by subtitle A as long as they are exempt from taxation by section 501(a) and as long as they meet the requirements to claim an applicable credit (such as being an appropriate owner of an investment credit property under sections 50(b)(1)(B) and 168(g)(4)(G)).[4]

Stakeholders also asked whether an entity classified as a nonprofit under State law but that does not have Federal tax-exempt status would be described in section 6417(d)(1)(A). Such an entity would not be described in section 6417(d)(1)(A) because it is not exempt from the tax imposed by subtitle A (unless it met the requirements of another type of applicable entity discussed below, such as a state instrumentality).

Stakeholders also specifically sought clarification as to whether governments of U.S. territories would be treated as applicable entities, based on their unique status and the importance of their energy security. These stakeholders noted that the renewable energy credits generally may be claimed for activities in the U.S. territories provided the underlying requirements are met, including the specific ownership requirements for investment tax credits.[5] In response, the proposed regulations would interpret the term ''organization exempt from the tax

[4] Section 50(b)(1) provides that no investment tax credit can be determined with respect to property used predominantly outside of the United States, but section 50(b)(1)(B) provides an exception for property described in section 168(g)(4). In the case of entities, section 168(g)(4)(G) describes property which is owned by a domestic corporation and which is used predominantly in a U.S. territory by such a corporation, or by a corporation created or organized in, or under the law of, a U.S. territory.

[5] See footnote 2.

imposed by subtitle A'' as used in section 6417(d)(1)(A) to include the governments of the U.S. territories. Since section 115(2) excludes the income accruing to the government of any territory of the United States, or any political subdivision thereof, from gross income, it effectively exempts these governments from the tax imposed by subtitle A. In addition, these governments may properly be viewed as organizations.[6] Accordingly, proposed § 1.6417–1(c)(1)(ii) would provide that the government of any U.S. territory, or a political subdivision thereof, is an applicable entity for purposes of section 6417 or provisions of law referencing section 6417(d)(1)(A).

The Treasury Department and the IRS request comments on this definition of any organization exempt from the tax imposed by subtitle A, including as to whether the term should encompass the United States, federal agencies, or other organizations beyond those listed in these proposed rules.

2. Any State or Political Subdivision Thereof

Section 6417(d)(1)(A)(ii) states that ''any State or political subdivision thereof'' is an applicable entity for purposes of section 6417.

The Treasury Department and the IRS note that section 7701(a)(10) provides that the term ''State'' must be construed to include the District of Columbia where such construction is necessary to carry out provisions of Title 26, and thus propose that the definition of State would include the District of Columbia. The Treasury Department and the IRS request comments on whether additional clarification is needed.

3. Indian Tribal Governments

Section 6417(d)(1)(A)(iv) states that an applicable entity includes an Indian tribal government (as defined in section 30D(g)(9)). To provide Indian tribal governments parity with state governments, proposed § 1.6417–1(c)(3) would include subdivisions of Indian tribal governments in this definition.

Section 30D(g)(9) provides that ''the term ''Indian tribal government'' means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of this subsection pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). Thus, proposed § 1.6417–1(k) would incorporate this definition into the 6417 regulations. See Rev. Proc. 2008–55, 2008–39 I.R.B. 768 (generally providing that an Indian tribal entity that appears on the most recent list published by the Department of the Interior in the **Federal Register** pursuant to the requirements of the List Act is designated an Indian tribal government for purposes of section 7701(a)(40)).

The Treasury Department and the IRS request comments regarding the definitions in proposed § 1.6417–1(c)(3) and (k), including as to whether any further clarification would be warranted. The Treasury Department and the IRS further request comments on whether the proposed definitions encompass the entity structures that Indian tribal governments employ in activities that would give rise to elective payments, including entities with partial Indian tribal government ownership.

4. Alaska Native Corporations

Section 6417(d)(1)(A)(v) provides that an applicable entity for purposes of section 6417(a) includes ''any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)).'' A ''Native Corporation'' is defined in 43 U.S.C. 1602(m) to mean ''any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation,'' which are organized under the laws of the State of Alaska. Although 43 U.S.C. 1606(d) provides that a Regional Corporation is incorporated to conduct business for profit, each of a Village Corporation, Urban Corporation, and Group Corporation may be organized as a business for profit or nonprofit corporation to hold rights and assets for Native villages, urban communities of Natives, or members of a Native group.

A few stakeholders requested that a Settlement Trust (within the meaning of 43 U.S.C. 1602(t)) that is established by an Alaska Native Corporation (ANC) for the benefit of its shareholders also be treated as an applicable entity. The stakeholders stated that an ANC is a separate legal entity that is required to be a C corporation for Federal income tax purposes, and as such, it is an entity different from the Settlement Trust established by the ANC. However, the beneficiaries of the ANC Settlement Trust are typically the same Native individuals as the shareholders of the ANC. the stakeholders thus asked that an ANC Settlement Trust be added as an applicable entity in cases in which the Settlement Trust is directly affiliated with an applicable ANC.

Unlike the case of the statutory definitions of ''Indian Tribal government,'' the statutory definition of ANC is not ambiguous. Accordingly, the proposed regulations would not treat Settlement Trusts as ANCs. However, Settlement Trusts could themselves be applicable entities not based on their relationship with an ANC if they qualified for exempt status under section 501(a) and applied for and received a determination letter from the IRS recognizing any such tax-exempt status.

Separately, an ANC may be the common parent of a consolidated group of corporations (ANC-parented group) that, in many ways, is treated similarly to a single taxpayer for Federal income tax purposes by the consolidated return regulations (§§ 1.1502–1, *et seq.*). For example, the members of a consolidated group report their consolidated taxable income on a single Federal income tax return that the common parent files with the IRS as the agent for the group under § 1.1502–77. In this regard, some stakeholders have inquired whether non-ANC members of an ANC-parented group may separately make an elective payment election with respect to a section 45V credit, a section 45Q credit, or section 45X credit determined with respect to such member. The concern appears to be that, by reason of their affiliation with an ANC common parent, the non-ANC members might be prevented from making an election under section 6417(d)(1)(B), (C), or (D).

The proposed regulations would clarify that a non-ANC member of an ANC-parented group may qualify as an electing taxpayer eligible to make elections under section 6417(d)(1)(B), (C), or (D), based on its own corporate status. See § 1.1502–80(a). As with any other electing taxpayer, a non-ANC member of an ANC-parented group would be required to complete pre-filing registration (as would be required under proposed § 1.6417–5) and must make its elective payment election under section 6417(d)(1)(B), (C), or (D) with respect to an applicable section 45V credit, section 45Q credit, or section 45X credit determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

The Treasury Department and the IRS request comments regarding the definition in proposed § 1.6417–1(c)(4) and whether additional guidance is

[6] The Code and the regulations under 26 CFR part 1 occasionally refer to governmental entities as organizations. For example, section 509(a)(1) refers to ''an organization described in section 170(b)(1)(A),'' which includes a governmental unit described in sections 170(b)(1)(A)(v) and 170(c)(1). See corresponding rules in § 1.170A–9(a) and (e).

necessary regarding consolidated groups with ANC common parents.

5. Tennessee Valley Authority

As per section 6417(d)(1)(A)(iii), the Tennessee Valley Authority would be an applicable entity under proposed § 1.6417–1(c)(5).

6. Rural Electrical Co-Ops

Section 6417(d)(1)(A)(vi) provides that ''any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas'' is an applicable entity. These proposed regulations do not elaborate on this definition, but request comments on whether further clarification of the definition in proposed § 1.6417–1(c)(6) is necessary.

Stakeholders asked that any payment under section 6417(a) not be considered income for purposes of the 85-percent income test under section 501(c)(12) for electric cooperatives. Because the section 6417(a) election results in a credit being treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit was determined, any such payment that results in a refund being issued by the IRS to an electric cooperative under section 6417(a) will not affect the application of the 85-percent income test determined with respect to the electric cooperative.

The Treasury Department and the IRS request comments on whether additional guidance is necessary to address any uncertainty that may exist regarding the application of section 6417 in the context of a consolidated group with members that are cooperatives subject to the rules of subchapter T of chapter 1.

7. Agencies and Instrumentalities

Based on feedback from stakeholders, the Treasury Department and the IRS believe that, in many instances, States, Indian tribal governments, U.S. territories, or political subdivisions thereof are likely to make investments or engage in activities that qualify for applicable credits through their agencies and instrumentalities. Multiple stakeholders requested that State and local government agencies and instrumentalities be included as applicable entities under a variety of theories, including cross-references to sections 50(b)(4)(A)(i) and 168(h)(2)(A)(i) in section 6417, the fact that the income of an instrumentality is generally excluded from tax by section 115 of the Code, and the authority provided by section 6417(h) to issue regulations necessary to carry out the purposes of section 6417. In particular, stakeholders stated that the term ''Indian tribal government'' should be defined to include, in part, economic subdivisions of a tribe (such as a utility, housing authority, energy division or authority, or other enterprise) regardless of how the entity is formed (whether by Federal, Tribal or State law).

It would be administratively burdensome, both for stakeholders and for the IRS, to determine what is part of a State, Indian tribal government, U.S. territory, or political subdivision, on the one hand, and what is an agency or instrumentality thereof on the other hand.[7] For example, stakeholders expressed uncertainty about whether certain entities, such as school districts, public utility districts, and special purpose entities established by governments (such as joint action agencies, economic development corporations, and joint powers authorities) would qualify as political subdivisions or would be viewed as agencies or instrumentalities. Stakeholders also noted that the status of such entities as political subdivisions may turn on differences in state law, such as whether a school district has taxing authority.

In addition, different States may structure ownership of relevant property differently (for example, a school district or the county of the school district may own the electric school buses), and it would be inequitable for entities to be eligible or ineligible for elective payment on the basis of such differences in ownership structures. Furthermore, if agencies and instrumentalities were not specifically listed as applicable entities, States and political subdivisions may decide to create new entities or reorganize the administration of their activities to perform applicable credit eligible activities directly, which would be administratively burdensome without a commensurate public benefit. For these reasons, and to promote uniform treatment throughout the United Sates, proposed § 1.6417–1(c)(7) would provide that applicable entities include any agency or instrumentality of any State, the District of Columbia, Indian tribal government, U.S. territory, or political subdivision thereof.

The Treasury Department and the IRS request comments on this approach to defining applicable entities and on whether further guidance is necessary.

[7] The definitions of political subdivision under § 1.103–1(b) and of instrumentality under Rev. Rul. 57–128, 1957–1 C.B. 311, are frequently cited for Federal tax purposes.

8. Electing Taxpayers

Certain taxpayers may make an election to be treated as an applicable entity with respect to applicable credit property giving rise to the section 45Q credit, section 45V credit, or section 45X credit, as described in part III of this Explanation of Provisions. Proposed § 1.6417–1(g) defines an ''electing taxpayer'' as any taxpayer that is not an applicable entity, but makes an election in accordance with proposed §§ 1.6417–2(b), 1.6417–3, and, if applicable, 1.6417–4, to be treated as an applicable entity for a taxable year with respect to applicable credits determined with respect to an applicable credit property described in proposed § 1.6417–1(e)(3), (5), or (7). Section 7701(a)(14) defines a ''taxpayer'' as any person subject to any internal revenue tax, including income taxes, employment taxes, and excise taxes.

Members of a consolidated group that is not an ANC-parented group also may make an election to be treated as an applicable entity with respect to the section 45Q credit, section 45V credit, or section 45X credit. A member of the consolidated group would be required to complete pre-filing registration (as would be required under proposed § 1.6417–5) and must make its elective payment election with respect to an applicable section 45V credit, section 45Q credit, or section 45X credit determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members). The Treasury Department and the IRS request comments regarding the application of section 6417 to consolidated groups with electing taxpayers (for example, whether special rules are necessary for consolidated groups under proposed § 1.6417–2(e)(2) (the *denial of double benefit* rule).

B. Entities Formed by an Applicable Entity or by an Electing Taxpayer

1. Disregarded Entities

Several stakeholders asked whether an entity disregarded as separate from its owner (disregarded entity) is described in section 6417(d)(1)(A) if its owner is described in section 6417(d)(1)(A). Since a disregarded entity is disregarded for Federal income tax purposes and its attributes are attributed to the owner regarded for Federal income tax purposes, the disregarded entity's activities would be attributed to the owner and the owner could claim the credit as long as the owner is described in section 6417(d)(1)(A). This would also include property that an electing taxpayer that is a partnership or

S corporation holds through a disregarded entity or multiple disregarded entities, including tiers of multiple disregarded entities owned though chains of ownership. Thus, proposed §§ 1.6417–2(a)(1)(ii) and –2(a)(2)(iv) would provide that, if an applicable entity or electing taxpayer is the owner (directly or indirectly) of a disregarded entity that directly holds an applicable credit property, the applicable entity may make an elective payment election for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

2. Taxable C Corporations

Stakeholders also asked whether an entity described in section 6417(d)(1)(A) could create an entity that is a taxable C corporation to perform the applicable credit activity and still qualify for the section 6417 election. Because a taxable C corporation is an entity separate from its owner, proposed § 1.6417–1(c)(1) would not include a C corporation that is not itself an applicable entity described in proposed § 1.6417–1(c)(1), even if its owner is an applicable entity described in proposed § 1.6417–1(c)(1). However, an electing taxpayer may include a taxable C corporation (including a member of a consolidated group).

3. Undivided Ownership Interests

Stakeholders also asked whether entities such as unincorporated joint ventures could provide applicable entities access to earning applicable credits available for an elective payment election, including by partnering with other applicable entities or with for-profit entities. Proposed § 1.6417–2(a)(1)(iii) would provide that, if an applicable entity is a co-owner of an applicable credit property through an ownership arrangement treated as a tenancy-in-common or pursuant to a joint operating arrangement that has properly elected out of subchapter K of chapter 1 of the Code (subchapter K) under section 761, then each owner is considered to own an undivided interest in or share of the underlying applicable credit property and thus, any applicable credits are determined separately with respect to each owner. As a result, an applicable entity may make an elective payment election under section 6417(a) in the manner provided in paragraph (b) with respect to its share of the applicable credits determined with respect to its undivided ownership interest in or share of the underlying applicable credit property.

4. Partnerships

Many stakeholders questioned whether a partnership that contains partners described in section 6417(d)(1)(A) could make an elective payment election under section 6417 with respect to those partners, pointing to the ''determined with respect to such entity'' language in section 6417(a). Stakeholders stated that clarity around the treatment of these partnerships is of particular importance as many applicable entities choose to partner with non-applicable entities in investment and development of credit generating projects, that applicable entities may not have the expertise or resources to own such projects outright, and that the ability to partner is key to their meaningful participation in the energy transition.

The Treasury Department and the IRS believe that the better interpretation of the ''determined with respect to such entity'' language in section 6417(a), as well as the rules in sections 6417(c), is to apply entity-specific rules under section 6417. Section 6417(c) refers to a credit determined with respect to any facility or property ''held directly by a partnership or S corporation,'' meaning that the partnership or S corporation, not its owners, is the relevant entity for these purposes. Additionally, section 6417(c) provides that the partnership or S corporation, not the partners or shareholders, makes the section 6417 election. Furthermore, because section 6417 elections are made for a particular applicable credit property, allowing a section 6417 election for a portion of an applicable credit property would be contrary to section 6417(a) and, if permitted, would be difficult to administer, particularly in tiered partnership structures.

Thus, proposed § 1.6417–2(a)(1)(iv) would provide that partnerships and S corporations are not applicable entities described in section 6417(d)(1)(A) and proposed § 1.6417–1(c). This proposed rule would apply no matter how many of the partners or shareholders are described in section 6417(d)(1)(A) and proposed § 1.6417–1(c), including if all partners or shareholders are described in section 6417(d)(1)(A) and proposed § 1.6417–1(c). However, because section 6418(f)(2) defines ''eligible taxpayer'' as any taxpayer that is not described in section 6417(d)(1)(A) (and thus not in proposed § 1.6417–1(c)), such a partnership would be an eligible taxpayer described in section 6418(f)(2).

In addition, as described in part I.B.3. of this Explanation of Provision, an applicable entity may engage with other entities, including with for-profit partners, in an ownership arrangement that has properly elected out of subchapter K and make an elective payment election under section 6417(a) with respect to its share of the applicable credits determined with respect to its share of the underlying applicable credit property. This type of arrangement provides some flexibility for tax-exempt and government entities to participate in section 6417 with other entities. The Treasury Department and the IRS request comments on whether any additional rules are needed. Comments are also requested regarding whether any entity described in section 6417(d)(1)(A)(i)–(vi) or proposed § 1.6417–1(c) could include an entity organized as a partnership for Federal tax purposes.

As described in part IV of this Explanation of Provisions, an electing taxpayer may include a partnership or S corporation.

C. Applicable Credit

Section 6417(b) lists the applicable credits for which a section 6417(a) election is available. Proposed § 1.6417–1(d) lists those credits, with minor changes to account for erroneous cross-references in the statute.

Stakeholders asked for clarification on the scope of the credit for qualified commercial vehicles. Section 6417(b)(6) states that the term ''applicable credit'' includes the credit for qualified commercial vehicles determined under section 45W by reason of subsection (d)(2)[8] thereof, ''in the case of a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A).'' In order to qualify for elective pay for the section 45W credit, an entity would need to be both be an applicable entity, as defined in proposed § 1.6417–1(c), and a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A) (in other words, an organization exempt from the tax imposed by subtitle A by reason of section 501(a) of the Code; a State, the District of Columbia, a political subdivision thereof, or any agency or instrumentality of any of the foregoing; a U.S. territory, a political subdivision thereof, or any agency or instrumentality of any of the foregoing; or an Indian tribal government, a subdivision thereof, or any agency or instrumentality of any of the foregoing), and would also need to otherwise qualify for the section 45W credit.

One stakeholder asked whether the elective payment election applies to

[8] While section 6417(b)(6) refers to section 45W(d)(3), the reference should be to section 45W(d)(2). This has been corrected in the proposed regulations.

both the applicable credit and any eligible bonus credit amounts. The amount of applicable credit is determined, in part, under the Code by including any eligible bonus credit amounts. The entire amount of any applicable credit is eligible under the Code for the elective payment election, assuming all the relevant requirements are met.

Several stakeholders asked whether the applicable entity could treat the applicable credits arising during a quarter as a payment against quarterly estimated tax (assuming such an amount was due). These proposed regulations do not contain a special rule because taxpayers can determine, based on their projected tax liability, the correct amount of estimated tax to pay in order to avoid a section 6654 or section 6655 estimated tax penalty at the end of the year.

Because registration must be made with respect to each facility or property giving rise to an applicable credit, proposed § 1.6417–1(e) defines ''applicable credit property'' for purposes of each of the applicable credits, and the section 6417 regulations use the term ''applicable credit property'' throughout for clarity.

D. Definitions Pertaining to the Election

Proposed § 1.6417–1(i) would provide that the ''elective payment election'' is the election provided in proposed § 1.6417–2(b). Proposed § 1.6417–1(h) would provide that the ''elective payment amount'' means, with respect to an applicable entity or an electing taxpayer that is not a partnership or an S corporation, the applicable credit(s) for which an applicable entity or electing taxpayer makes an elective payment election to be treated as making a payment against the tax imposed by subtitle A for the taxable year, which would be equal to the sum of (1) the amount (if any) of the current year applicable credit(s) allowed as a general business credit (GBC) under section 38 for the taxable year, and (2) the amount (if any) of unused current year applicable credits which would otherwise be carried back or carried forward from the unused credit year under section 39 and that are treated as a payment against tax. With respect to an electing taxpayer that is a partnership or an S corporation, the term ''elective payment amount'' would mean the sum of the applicable credit(s) for which the partnership or S corporation makes an elective payment election and results in a payment to such partnership or S corporation equal to the amount of such credit(s) (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability).

E. Guidance

Interpretations and procedures pertaining to section 6417 and the section 6417 regulations may be issued through guidance, as appropriate. Proposed § 1.6417–1(j) would define ''guidance'' for purposes of these regulations as guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the *IRS.gov* website.

F. Annual Tax Return

To avoid any confusion about where the elective payment election should be made, proposed § 1.6417–1(b) would define ''annual tax return,'' for purposes of the section 6417 regulations, as follows: (1) for any taxpayer normally required to file an annual tax return with the IRS, such annual return (including the Form 1065, ''U.S. Return of Partnership Income,'' for partnerships and the Form 990–T for organizations with unrelated business income tax or a proxy tax under section 6033(e)); (2) for any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the return they would be required to file if they were located in the United States, or, if no such return is required (such as for State, District of Columbia, local, or Indian tribal governmental entities), the Form 990–T; and (3) for short tax year filers, the short year tax return. For example, an individual in a U.S. territory would file a Form 1040, ''U.S. Individual Income Tax Return,'' a corporation in a U.S. territory would file a Form 1120, ''U.S. Corporation Income Tax Return,'' and the U.S. territory itself would file Form 990–T, ''Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e).'' Similarly, a tax-exempt entity would file the Form 990–T even if not otherwise required to file the Form 990–T.

II. Rules for Making Elective Payment Elections

A. In General

Proposed § 1.6417–2 would provide general rules for an applicable entity or electing taxpayer to make an elective payment election under section 6417 in accordance with the rules of proposed § 1.6417–2(b) with respect to any applicable credit determined with respect to such entity.

Proposed § 1.6417–2(a)(1) would provide the rules for applicable entities making elective payment elections. An applicable entity that makes an elective payment election in the manner described in Part II.B. of this Explanation of Provisions would be treated as making a payment against the Federal income taxes imposed by subtitle A, for the taxable year with respect to which an applicable credit was determined, in the amount of such credit as determined under the rules discussed in Part II.C. of this Explanation of Provisions. Proposed § 1.6417–2(d)(1) would provide that the payment described in proposed § 1.6417–2(a)(1) is treated as made (1) in the case of an entity for which no return is required under sections 6011 or 6033(a), on the later of the date that a return would be due under section 6033(a) (determined without regard to extensions) if such entity were described in that section, or the date on which such entity submits a claim for credit or refund, and (2) in any other case, on the later of the due date (determined without regard to extensions) of the return of tax for the taxable year, or the date on which such return is filed.

Special rules are provided in proposed § 1.6417–2(a)(1)(ii) through (v) that would apply for applicable entities if the election is made for applicable credit property held by a disregarded entity; if the applicable entity is a co-owner in an applicable credit property through an ownership arrangement properly treated as a tenancy-in-common, or pursuant to a joint operating arrangement that has properly elected out of subchapter K under section 761; and for members of a consolidated group of which an Alaska Native Corporation is the common parent.

As discussed in Part I.B.4 of this Explanation of Provisions, partnerships and S corporations would not be applicable entities described in proposed § 1.6417–1(c)(1), and thus would not be eligible to make an elective payment election unless the partnership or S corporation is an electing taxpayer.

Proposed § 1.6417–2(a)(2) would provide the rules for electing taxpayers making an elective payment election. An electing taxpayer other than a partnership or an S corporation that has made an elective payment election in accordance with proposed §§ 1.6417–3 and § 1.6417–2(b) would be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which the applicable credit is determined in

the amount determined under proposed § 1.6417–2(c). Proposed § 1.6417–2(d)(1) would provide that the payment described in proposed § 1.6417–2(a)(2) is treated as made at the same time as made by an applicable entity. However, in the case of an electing taxpayer that is a partnership or S corporation that has made an elective payment election in accordance with proposed §§ 1.6417–3, 1.6417–4, and 1.6417–2(b), the IRS will make a payment to such partnership or S corporation equal to the amount of such credit determined under proposed §§ 1.6417–2(b) and 1.6417–4(d)(3) (unless the partnership or S corporation owes any Federal income tax liability, in which case the payment may be reduced by such tax liability).

Proposed § 1.6417–2(a)(2) also provides special rules for electing taxpayers that would apply if the election is made for applicable credit property held by a disregarded entity; if the applicable entity is a co-owner in an applicable credit property through an ownership arrangement properly treated as a tenancy-in-common, or pursuant to a joint operating arrangement that has properly elected out of subchapter K under section 761; and for members of a consolidated group.

Proposed § 1.6417–2(a)(3)(i)–(iv) would address the special rules with regard to the election for credits under section 45, 45V, 45Q, or 45Y, as provided in section 6417(d)(3). However, the special rules in section 6417(d)(3) that relate to electing taxpayers are set forth in proposed § 1.6417–3, for clarity.

Consistent with the special rule for electing taxpayers that may elect to be treated as an applicable entity for purposes of section 6417 for up to five years with respect to a facility placed in service that produces eligible components (as defined in section 45X(c)(1)), proposed § 1.6417–2(a)(3)(v) would clarify that a section 45X election is made, for purposes of section 6417, with respect to a facility (whether the facility existed on or before, or after, December 31, 2022) at which a taxpayer produces, after December 31, 2022, eligible components as defined in section 45X(c)(1) during the taxable year.

B. Manner of Making the Election

Section 6417(a) provides that the elective payment election is made ''at such time and in such manner as the Secretary may provide,'' and proposed § 1.6417–2(b) would provide those rules. First, proposed § 1.6417–2(b)(1) provides that an applicable entity or electing taxpayer would make an elective payment election on the applicable entity's or electing taxpayer's annual tax return, as defined in § 1.6417–1(b), in the manner prescribed by the IRS in guidance, along with any required completed source credit form(s) with respect to the applicable credit property, a completed Form 3800, *General Business Credit,* (or its successor), and any additional information, including supporting calculations, required in instructions to the relevant forms.

Proposed § 1.6417–2(b)(1)(iv) would provide that an elective payment election may only be made on an original return (including any revisions on a superseding return) filed not later than the due date (including extensions of time) for the original return for the taxable year for which the applicable credit is determined. No elective payment election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There also would be no relief available under §§ 301.9100–1 through 301.9100–3 of the Procedure and Administration Regulations (26 CFR part 301) for an elective payment election that is not timely filed.

Second, proposed § 1.6417–2(b)(2) would specify that pre-filing registration (as would be required under proposed § 1.6417–5) is a condition of any amount being treated as a payment that is made by an applicable entity under section 6417(a). An elective payment election will not be effective with respect to applicable credits determined with respect to an applicable credit property unless the applicable entity or electing taxpayer received a valid registration number for the applicable credit property and provided the registration number for each applicable credit property on its Form 3800 (or its successor) attached to the tax return in accordance with guidance.

Third, proposed § 1.6417–2(b)(3) would provide the due date for the election under section 6417(a). In the case of any entity for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code (such as a governmental entity), the elective payment election must be made no later than the due date (including an extension of time) for the original return that would be due under section 6033(a) if such applicable entity were described in that section. Under section 6072(e), that date is the 15th day of the fifth month after the taxable year determined by section 441 of the Code. Subject to issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code could request an extension of time to file, an automatic paperless six-month extension from the original due date is deemed to be allowed.

In the case of any taxpayer that is not normally required to file an annual tax return with the IRS (such as those located in the U.S. territories), the elective payment election must be made no later than the due date (including extensions of time) that would apply if the taxpayer was located in the United States (such as the 15th day of the fourth month after the end of the year for individuals filling Form 1040 or for corporations filling Form 1120). For example, an individual in a U.S. territory would be required to make the elective payment election on or before the 15th day of April following the close of the calendar year, or, if they filed an extension, on or before the 15th day of October following the close of the calendar year.

In any other case, the elective payment election must be made no later than the due date (including extensions of time) for the original return for the taxable year for which the election is made, but in no event earlier than February 13, 2023.

Fourth, proposed § 1.6417–2(b)(4) would provide that any election under section 6417(a), once made, is irrevocable and applies with respect to any applicable credit for the taxable year for which the election is made.

Under section 6417, the election period applies for a period of years with respect to certain applicable credits. Specifically, for the section 45 credit or section 45Y credit, the election applies to the 10-year period beginning on the date the facility was originally placed in service. For the section 45Q credit, the election applies to the 12-year period beginning on the date the equipment was originally placed in service. For the section 45V credit, the election applies to all subsequent taxable years with respect to the facility.

Electing taxpayers make the election for one five-year period per applicable credit property, but are allowed one revocation per applicable credit property, as provided in section 6417(d)(1)(D) and (d)(3)(C) and (D), and would be provided in proposed § 1.6417–3 (as described in part III of this Explanation of Provisions).

Fifth, proposed § 1.6417–2(b)(5) would provide that an elective payment election applies to the entire amount of applicable credit(s) determined with respect to each applicable credit property that was properly registered for the taxable year, resulting in an elective payment amount that is the entire

amount of applicable credit(s) determined with respect to the applicable entity or electing taxpayer for a taxable year.

C. Determination of Applicable Credit

Proposed § 1.6417–2(c) would provide three rules relating to the determination of any applicable credit.

1. Special Rules for Tax-Exempt Organizations and Government Entities

In accordance with section 6417(d)(2), proposed § 1.6417–2(c)(1) would provide that, in the case of any applicable entity that makes the election described in section 6417(a), any applicable credit is determined (1) without regard to the restrictions regarding use of property by tax-exempt organizations and government entities found in sections 50(b)(3) and (4)(A)(i), and (2) by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

Proposed § 1.6417–2(c)(2) elaborates on the effect of the ''trade or business'' rule in section 6417(d)(2) and proposed § 1.6417–2(c)(1)(ii). First, the rule would allow tax-exempt and government entities to take advantage of applicable credits even outside of the unrelated business taxable income context (provided other requirements are met) by allowing the entity to treat an item of property as if it is of a character subject to an allowance of depreciation (such as under sections 30C and 45W); to produce items ''in the ordinary course of a trade or business of the taxpayer'' (such as in sections 45V and 45X); and to state that an item of property is one for which depreciation (or amortization in lieu of depreciation) is allowable (such as in sections 48, 48C, and 48E).

Second, the rule allows the entity to apply the capitalization and accelerated depreciation rules (such as sections 167, 168, 263 and 263A) that apply to determining the basis and the depreciation allowance for property used in a trade or business.

Third, the rule makes applicable general limitations on the use of credits by those persons engaged in the conduct of a trade or business, such as section 49 in the context of investment tax credits, and section 469 for all applicable credits. For section 49 to apply for purposes of section 6417, the property must be placed in service by an applicable entity or electing taxpayer described in section 465(a)(1) (that is, an individual or a C corporation with respect to which the stock ownership requirements of section 542(a)(2) are met). For section 469 to apply for purposes of section 6417, the applicable entity or electing taxpayer would need to be described in section 469(a)(2) (that is, an individual, estate or trust, a closely held C corporation, or a personal service corporation). Thus, for any applicable entity or electing taxpayer for which section 49 or 469 generally applies, those sections apply with respect to the determination of applicable credits under section 6417. The Treasury Department and the IRS request comments on whether any additional clarification is needed regarding the application of sections 49 and 469 to applicable entities or electing taxpayers determining the amount of an applicable credit.

Lastly, the rule does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity's exempt purpose.

2. Special Rule for Investment-Related Credit Property Acquired With Income, Including Income From Certain Grants and Forgivable Loans, That Is Exempt From Taxation Under Subtitle A

Multiple stakeholders asked that regulations clarify whether an applicable entity that funded the purchase of an investment credit property with income, including income from certain grants and forgivable loans, that is exempt from taxation under subtitle A (Tax-Exempt Amounts [9]) can include those amounts in the basis of the property for purposes of calculating the amount of the investment tax credit. Stakeholders also noted that in some cases the full cost of the investment credit property can be paid through Tax-Exempt Amounts.

Generally, the basis of property is the cost of such property. See section 1012 of the Code. However, for a taxable entity, cost basis in property may need to be reduced if Tax-Exempt Amounts are used for the purpose of purchasing, constructing, or otherwise acquiring such property. See for example, sections 118(a) and 362(c)(2) of the Code. However, grants and forgivable loans received by taxable entities are generally taxable, and thus generally do not result in a reduction in basis. See generally section 61 of the Code.

For tax-exempt and government entities, for which grants, forgivable loans, and other amounts are generally exempt from taxation under subtitle A, the treatment of such Tax-Exempt Amounts with respect to basis in property is less clear. Because these entities may acquire investment credit properties eligible for the section 6417(a) election, in whole or in part, with Tax-Exempt Amounts, if such amounts were not included in the basis of the investment credit property (that is, they resulted in a reduction in the basis of the investment credit property), the applicable entity may have little or no basis with respect to which to calculate the credit, which would frustrate Congressional intent to provide the section 6417(a) election for investment credit properties owned by such entities. However, as stakeholders noted, allowing an elective payment for an applicable tax credit when the investment credit property was fully purchased with Tax-Exempt Amounts subject to donor restrictions for that purpose would result in an aggregate benefit to the applicable entity in excess of the cost of the property. As a result, a few stakeholders suggested that local, State, and Federal government grants received as Tax-Exempt Amounts by applicable entities specifically for acquisition of investment credit property should not be included in the basis of such property for purposes of calculating the applicable credit for the elective payment under section 6417.

Proposed § 1.6417–2(c)(3) would provide a special rule for investment credit property acquired with Tax-Exempt Amounts and would expand the rule to other credits that are determined on the basis of property. The rule states that, for purposes of 6417, any Tax-Exempt Amounts used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in sections 30C, 45W, 48, 48C, or 48E (investment-related credit property) are included in basis for purposes of computing the applicable credit amount determined with respect to the investment-related credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under other provisions of the Code.

However, to prevent an excessive benefit, proposed § 1.6417–2(c)(3) would provide that, if an applicable entity receives Tax Exempt Amounts for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment credit property (Restricted Tax Exempt Amount), and the Restricted Tax-Exempt Amount plus the applicable credit otherwise determined with respect to that investment-related credit property exceeds the cost of the investment-related credit property, then the amount of the applicable credit is reduced so that the total amount of applicable credit plus the amount of any

[9] For this purpose, ''Tax-Exempt Amounts'' do not include the proceeds of loans, which are not included in income as long as they need to be repaid.

Restricted Tax Exempt Amount equals the cost of investment credit property.

Proposed § 1.6417–2(c)(5) contains three examples illustrating these rules.

3. Credits Must Be Determined With Respect to the Applicable Entity or Electing Taxpayer

Multiple stakeholders asked that regulations clarify whether applicable entities may ''chain'' an election under section 6417(a) for credits obtained from other sources. For example, stakeholders questioned whether an applicable entity may make an elective payment election under section 6417(a) with respect to purchased credits under section 6418(a) or credits allowable to the applicable entity because of an election under section 45Q(f)(3)(B) or former section 48(d) (pursuant to section 50(d)(5)). Stakeholders also asked whether an applicable entity may make an elective payment election in the case of a third-party ownership arrangement, such as an energy project owned by a for-profit developer but developed by a government entity.

The Treasury Department and the IRS propose that such chaining will not be permissible and seek further comment on the issue. Proposed § 1.6417–2(c)(4) would state that any credits for which an election is made under section 6417(a) must have been determined with respect to the applicable entity or electing taxpayer, meaning that the applicable entity or electing taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit.[10] This proposed rule, which is consistent with the proposed regulations under section 6418, would mean that no election may be made under section 6417(a) for credits purchased pursuant to section 6418, transferred pursuant to section 45Q(f)(3), acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)), owned by a third party, or otherwise not determined directly with respect to the applicable entity or electing taxpayer.

Stakeholders noted several administrative and practical reasons why making an elective payment election with respect to credits transferred under section 6418 would present challenges. For example, stakeholders noted that businesses electing to be treated as applicable entities with respect to applicable credit property giving rise to section 45V, 45Q, or 45X credits must do so in the taxable year in which such taxpayer has placed in service such property, and the election generally lasts through the following four taxable years, whereas the duration of the section 6418 transfer election is limited to the tax year. In addition, any credit determined with respect to an electing taxpayer that is a partnership or S corporation must be determined with respect to only applicable credit property held directly by the partnership or S corporation. Allowing a partnership or S corporation to make an elective payment election with respect to transferred credits would conflict with this rule. Furthermore, the elective payment election under section 6417 with respect to a section 45 credit or section 45Q credit only applies to applicable credit property that is originally placed in service after December 31, 2022, and the elective payment election under section 6417 with respect to a section 45V credit only applies to clean hydrogen attributable to applicable credit property that is originally placed in service after December 31, 2012, whereas there are no such restrictions under section 6418. In addition, stakeholders contended that section 6417(d)(3)(ii)'s requirement that a section 6417(a) election be ''irrevocable'' would seem to prohibit an applicable entity from making a section 6417(a) election with respect to any transferred credit for which the 6417(a) election spans more than one year (such as credits determined under sections 45, 45Q, 45V, 45Y, and, for electing taxpayers only, under section 45X), because elections to transfer all or a portion of eligible credits under section 6418(a) are annual and the transferee does not own the property or engage in the activities that originally gave rise to the eligible credits. Finally, stakeholders noted that a transferee may purchase only a portion of a credit determined with respect to an eligible credit property pursuant to section 6418(a), which they argued is inconsistent with the requirement under section 6417(a) that the elective payment election be with respect to the entire applicable credit determined with respect to applicable credit property for a taxable year.

These administrative and practical reasons have informed the proposed conclusion of the Treasury Department and the IRS that sections 6417 and 6418 are best interpreted to not allow an applicable entity under section 6417 to make an elective payment election for a transferred credit under section 6418. Furthermore, the pre-filing registration process contemplated by section 6417(d)(5) and by section 6418(g)(1) is not currently designed to allow an applicable entity purchasing eligible credits under section 6418 to make an elective payment election under section 6417.

Other stakeholders have suggested that the Code may allow a transferee taxpayer under section 6418 to make an elective payment election under section 6417 for a transferred credit because section 6418(a) provides that ''the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit.'' These stakeholders argue the transferee taxpayer steps into the shoes of the eligible taxpayer transferring the credit, such that a transferee taxpayer may be viewed as the taxpayer earning the credit for purposes of section 6417 and therefore is able to make an elective payment election with respect to such credit. They further noted that section 6417 does not expressly prohibit an applicable entity from making an elective payment election with respect to a transferred credit and that allowing applicable entities to make an elective payment election with respect to a transferred credit may further the policy goals of the IRA by expanding the financing methods available to renewable energy projects.

The Treasury Department and the IRS agree with stakeholders who noted that there is no restriction on who can be a transferee under section 6418, other than that the transferee cannot be related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer transferring the credit. Thus, an applicable entity could be transferred credits under 6418, at least to offset any Federal income tax liability. However, the statute does not address whether an applicable entity can make an elective payment election under section 6417 with respect to transferred credits. Based on the reasons previously discussed in this part II.C.3. of this Explanation of Provisions, the Treasury Department and the IRS believe that a transferred credit is not properly interpreted as an applicable credit that is ''determined with respect to'' an applicable entity or electing taxpayer under section 6417(a) because the credit is not determined with respect to underlying applicable credit property owned by the applicable entity or electing taxpayer, or, if ownership is not required, activities otherwise conducted by the applicable entity or

[10] The section 45X credit requires that the taxpayer produce eligible components. Thus, an applicable entity or electing taxpayer must produce eligible components to claim the credit.

electing taxpayer. Section 6418(a) and the proposed regulations under section 6418 provide that a transferred credit is determined with respect to the eligible taxpayer transferring the credit. Although the transferee taxpayer uses the credit, the proposed regulations under section 6418 provide that the transferee taxpayer is not considered to have owned an interest in the underlying eligible credit property or have otherwise conducted any of the activities that give rise to the credit.

The Treasury Department and the IRS seek comments on limited situations where exceptions to this proposed rule may be appropriate because it is consistent with the text, design, and intent of the IRA, while also ensuring that such exceptions are not subject to fraud or abuse. Stakeholders could consider appropriate limitations such as (1) the type of applicable entity that may be allowed to make an elective payment election with respect to credits transferred under section 6418, such as a government entity; (2) the involvement of the transferee taxpayer in the project's development; (3) the level of due diligence conducted by the transferee taxpayer regarding whether the project qualifies for the applicable credit and any bonus credits and whether the amount of transferred credits was properly determined with respect to the eligible taxpayer transferring the credit; (4) the fact that the transferee taxpayer is paying close to the face value of the credit (and what minimum percentage of face value should be required); and (5) there are no other special financial arrangements between the parties. Stakeholders should address legal considerations, as well as practical and administrative challenges, to any such exception to the proposed rule.

D. Denial of Double Benefit

Section 6417(a) allows an applicable entity or electing taxpayer other than a partnership or S corporation to be treated as making a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit was determined equal to the amount of such credit. Section 6417(c)(1)(A) provides that, for an electing taxpayer that is a partnership or S corporation, the Secretary will make a payment to such partnership or S corporation with respect to a credit determined with respect to applicable credit property held directly by the partnership or S corporation equal to the amount of such credit. Sections 6417(e) and 6417(c)(1)(B) each provide that such credit is reduced to zero and, for any other purposes of the Code, is deemed to have been allowed to such entity for such taxable year. Section 6417(h) provides that the Secretary must issue guidance necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment (in the case of an electing taxpayer that is a partnership or S corporation) or deemed payment (in the case of all other electing taxpayers and applicable entities) made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).

Proposed § 1.6417–2(e)(2) and (3) would address the methodology for determining the amount of the elective payment election, reducing the elective payment election amount to zero, and treating the applicable credit as a credit allowed for the taxable year for all other purposes of the Code with respect to applicable entities and electing taxpayers other than partnerships or S corporations. The methodology with respect to a payment made to a partnership or S corporation is provided in proposed § 1.6417–4(c), as described in part IV of this Explanation of Provisions.

An applicable entity or electing taxpayer (other than an electing taxpayer that is a partnership or S corporation) making an elective payment election applies section 6417(e) by taking the following steps. First, the taxpayer would compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the GBC, that is payable on the due date of the return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on amount of tax under section 38. Second, the taxpayer would compute the allowed amount of GBC carryforwards carried to the taxable year plus the amount of current year GBCs (including current applicable credits) allowed for the taxable year under section 38 (that is, in accordance with all the rules in section 38, including the ordering rules provided in section 38(d)). Since the election would be required to be made on an original return, any business credit carrybacks would not be considered when determining the elective payment amount for the taxable year. Third, the taxpayer would apply the GBCs allowed for the taxable year as computed in step 2, including those attributable to applicable credits as GBCs, against the tax liability computed in step 1. Fourth, the taxpayer would identify the amount of any excess or unused current year business credit, as defined under section 39, attributable to current year applicable credit(s) for which the applicable entity is making an elective payment election. The amount of such unused applicable credits would be treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount). Fifth, the taxpayer would reduce the applicable credits for which an elective payment election is made by the amount (if any) allowed as a GBC under section 38 for the taxable year, as provided in step 3, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in step 4, which results in the applicable credits being reduced to zero.

The proposed regulations would provide, consistent with section 6417(e), that the full amount of the applicable credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and calculation of any underpayment of estimated tax under sections 6654 and 6655 of the Code. The proposed regulations would give several examples illustrating these rules.

The Treasury Department and the IRS request comments on whether future guidance should expand or clarify the methodology that an applicable entity follows to compute the amount of its elective payment. Comments are also requested on additional Code sections under which it may be necessary to consider the applicable credit to have been deemed to have been allowed for the taxable year in which an elective payment election is made.

III. Elective Payment Election by Electing Taxpayers

Section 6417(d)(1)(B), (C), and (D) provides that a taxpayer that is not an applicable entity described in section 6417(d)(1)(A) and that, with respect to any taxable year, places in service applicable credit property that qualifies for the section 45V credit or the section 45Q credit, or, with respect to any taxable year in which such taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), respectively, may elect to be treated as an applicable entity for purposes of section 6417 for such taxable year, but only with respect to the applicable credit property and only with respect to the credit under section 45V(a), 45Q(a), or 45X(a), respectively. Proposed § 1.6417–1(g)

would define such a taxpayer as an ''electing taxpayer.''

The special rules for electing taxpayers are found in section 6417(d)(1) and (d)(3). Proposed § 1.6417–3 would combine these rules for clarity.

Proposed § 1.6417–3(b), (c), and (d) would provide the specific rules regarding the election under section 6417(d)(1)(B), (C), or (D). Proposed § 1.6417–3(e) would provide the rules relating to the election for electing taxpayers. Proposed § 1.6417–4 would provide additional rules for electing taxpayers that are partnerships or S corporations.

Proposed § 1.6417–3(b) would provide that an electing taxpayer that has placed in service a qualified clean hydrogen production facility as defined in section 45V(c)(3) during the taxable year may make an elective payment election for such taxable year (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022), but only with respect to the qualified clean hydrogen production facility, only with respect to the section 45V credit, and only if the pre-filing registration process that would be required by proposed § 1.6417–5 was properly completed. An electing taxpayer that elects to treat qualified property that is part of a specified clean hydrogen production facility as energy property under section 48(a)(15) would not be able to make an elective payment election with respect to such facility.

Proposed § 1.6417–3(c) would provide that an electing taxpayer that has, after December 31, 2022, placed in service a single process train described in § 1.45Q–2(c)(3) at a qualified facility (as defined in section 45Q(d)) during the taxable year may make an elective payment election for such taxable year, but only with respect to the single process train, only with respect to the section 45Q credit, and only if the pre-filing registration process that would be required by proposed § 1.6417–5 was properly completed.

Proposed § 1.6417–2(a)(3)(v) and –3(d) would provide that an electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility during the taxable year may make an elective payment election for such taxable year, but only with respect to the facility at which the eligible components are produced by the electing taxpayer in that year, only with respect to the section 45X credit, and only if the pre-filing registration process that would be required by proposed § 1.6417–5 was properly completed.

Proposed § 1.6417–3(e) would provide rules on how the electing taxpayer makes the elective payment election. First, if an electing taxpayer makes an elective payment election under proposed § 1.6417–2(b) with respect to any taxable year in which the electing taxpayer places in service a qualified clean hydrogen production facility for which a section 45V credit is determined, places in service a single process train at a qualified facility for which a section 45Q credit is determined, or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility, respectively, the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in proposed § 1.6417–3(e)(3), but only with respect to the applicable credit property described in proposed § 1.6417–1(e)(3), (5), or (7), respectively, that is the subject of the election. The taxpayer would be required to otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in proposed § 1.6417–3(e)(3).

Second, the election would be made separately for each applicable credit property, which is, respectively, a qualified clean hydrogen production facility placed in service for which a section 45V credit is determined, a single process train placed in service at a qualified facility for which a section 45Q credit is determined, or a facility in which eligible components are produced for which a section 45X credit is determined. Only one election may be made with respect to any specific applicable credit property.

Third, the elective payment election generally would apply for an election period consisting of the taxable year in which the election is made and each of the four subsequent taxable years that end before January 1, 2033. The election period would not be able to be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code.

However, an electing taxpayer may, during a subsequent year of the election period, revoke the elective payment election with respect to an applicable credit property described in proposed § 1.6417–1(e)(3), (5), or (7) in accordance with forms and instructions. Any such revocation, if made, applies to the taxable year in which the revocation is made (which cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code) and each subsequent taxable year within the election period. Any such revocation may not be subsequently revoked.

An electing taxpayer would not be able to make a transfer election under section 6418(a) with respect to any applicable credit under proposed § 1.6417–1(d)(3), (5), or (7) determined with respect to applicable credit property described in proposed § 1.6417–1(e)(3), (5), or (7) during the election period for that applicable credit property. However, if the election period is no longer in effect with respect to an applicable credit property, any credit determined with respect to such applicable credit property would be able to be transferred pursuant to a transfer election under section 6418(a), as long as the taxpayer meets the requirements of section 6418 and the 6418 regulations.

IV. Elective Payment Election for Partnerships and S Corporations

A. Overview

Section 6417(c)(1) provides that, in the case of any applicable credit determined with respect to any applicable credit property held directly by a partnership or S corporation, any election under section 6417(a) is made by such partnership or S corporation. These proposed regulations would clarify that partnerships or S corporations are not applicable entities described in section 6417(d)(1)(A); thus, any partnership or S corporation making an elective payment election must be an electing taxpayer, and as such, the only applicable credits with respect to which the partnership or S corporation can make an elective payment election are a section 45V credit, a section 45Q credit, and a section 45X credit.

If a partnership or S corporation makes an election under section 6417(a) and proposed § 1.6417–2(b), the special rules of section 6417(c)(1)(A) through (D) apply. In that regard, proposed § 1.6417–4(c) would provide that (1) the IRS will make a payment to such partnership or S corporation equal to the amount of such credit; (2) before determining any partner's distributive share, or shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under this title, deemed to have been allowed solely to such entity (and not allocated by such entity, or otherwise allowed, to any partner or shareholder) for such taxable year (for example, if a partnership pays a Federal tax liability to the IRS in a year for which an elective payment election is made and cash is

received, it treats the payment to the IRS as if it paid the liability with the same amount of underlying credit for which the elective payment election is made); (3) any amount with respect to which the election under section 6417(a) is made is treated as tax exempt income for purposes of sections 705 and 1366; and (4) a partner's distributive share of such tax exempt income is equal to such partner's distributive share of the otherwise applicable credit for each taxable year as determined under § 1.704–1(b)(4)(ii). The tax exempt income would be taken into account by the partnership or S corporation at the same time as the underlying credit would have been taken into account by the partnership or S corporation absent an elective payment election. The proposed regulations provide an example illustrating this rule. Because it is the applicable credits, and not the tax exempt income, that arise from the conduct of the trade or business, the proposed regulations would treat the tax exempt income resulting from an elective payment election by a partnership or an S corporation as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income would not be treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

As requested by stakeholders, the Treasury Department and the IRS clarify here that there are no restrictions imposed under section 6417 or the section 6417 regulations on how a partnership or S corporation that receives a payment from the IRS pursuant to an elective payment election may use the cash payments in its operations (including on when it makes distributions to its partners or shareholders).

Section 6417(h) requires that the Secretary issue regulations or other guidance to ensure that the amount of the payment to a partnership or S corporation is commensurate with the amount of the credit that would otherwise be allowable (without regard to section 38(c)). Therefore, proposed § 1.6417–4(d)(1) would provide that, in determining the applicable credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation must compute the amount of the applicable credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of an applicable credit determined with respect to an applicable credit property held directly by a partnership or S corporation is not subject to limitation by section 469. In addition, because the credits to which a partnership or S corporation may make the elective payment election (that is, section 45V, 45Q, and 45X) are not investment tax credits under section 46, sections 49 and 50 do not apply to limit the amount of the credits.

B. BBA Partnerships

Many partnerships are subject to the centralized partnership audit regime found in subchapter C of chapter 63 of the Code as amended by the Bipartisan Budget Act of 2015 (BBA).[11] In connection with the implementation of section 6417, the Treasury Department and the IRS identified several areas of the BBA regulations that require updates to administer section 6417 in the case of a partnership subject to the BBA (BBA Partnership). Section 6221 of the Code provides that any adjustment to a partnership-related item with respect to a BBA Partnership, and any tax attributable thereto, is assessed and collected at the partnership-level except to the extent provided under the BBA. The BBA outlines centralized audit procedures which generally must be followed before the IRS can adjust a partnership-related item (as defined in § 301.6241–1). In order to implement section 6417, the Treasury Department and the IRS propose updates to the regulations under §§ 301.6241–1 and 301.6241–7.

1. Partnership-Related Items

Under § 301.6241–1(a)(6)(ii), a partnership-related item is any item or amount that is, with respect to the BBA Partnership, relevant in determining the tax liability of any person under chapter 1. Because the partnership-related item definition is based on relevance to the chapter 1 liability of any person, the liability could belong to the BBA Partnership or its partners. While partnerships do not typically pay chapter 1 tax pursuant to section 701 of the Code, a BBA Partnership is eligible to be an electing taxpayer under section 6417 and is thus subject to the excessive payment rule under section 6417(d)(6), which could result in a chapter 1 tax liability to the BBA Partnership. In addition, if a partnership makes an election under section 6417, the partnership must reduce its applicable credit under section 6417(e), which would impact the amount of credit and tax exempt income that the partners would be allocated, thereby affecting the partners' chapter 1 liability. Because the application of section 6417 may be relevant in determining the chapter 1 liabilities of a BBA Partnership and its partners, any item or amount relevant to section 6417 that is ''with respect to the partnership'' would be a partnership-related item as defined under § 301.6241–1(a)(6)(ii).

Section 301.6241–1(a)(6)(iii) provides than an item or amount is ''with respect to the partnership'' if the item or amount is shown or reflected, or required to be shown or reflected, on a return of the partnership under section 6031 of the Code or is required to be maintained in the partnership's books and records. Because the definition of a partnership-related item is based on the item's relevance to the chapter 1 tax liability of any person, this definition ensures that the definition of a partnership-related item is not so broad as to include items that are wholly unrelated to a BBA Partnership, such as a partner's unrelated income. While the limitation in this definition works well to ensure partner-level items are not inadvertently swept into the definition of a partnership related item, this definition may inadvertently exclude a chapter 1 liability of a BBA Partnership if, for instance, the liability is not required to be shown or reflected on the BBA Partnership's return. The BBA Partnership's own chapter 1 tax liability, in contrast with a partner's liability, is undoubtedly ''with respect to the partnership'' and a partnership-related item.

Accordingly, these proposed regulations propose to add a sentence to § 301.6241–1(a)(6)(iii) (regarding items or amounts with respect to a BBA Partnership) to provide that any chapter 1 tax that is the liability of the BBA Partnership is an item with respect to the BBA Partnership regardless of whether that chapter 1 tax is required to be reflected or shown on the partnership return or required to be maintained in the BBA Partnership's books and records.

2. Special Enforcement Rule for the Elective Payment Election

As noted in part IV.B.1. of this Explanation of Provisions, the BBA's centralized partnership audit regime requires the IRS to follow certain procedures before adjusting partnership-related items of a BBA Partnership.

[11] See section 1101 of the BBA, Public Law 114–74, 129 Stat. 584, 625–638 (2015), as amended by section 411 of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114–113, 129 Stat. 2242, 3121 (2015), and sections 201 through 207 of the Tax Technical Corrections Act of 2018, Public Law 115–141, 132 Stat. 348, 1171–1183 (2018).

Under section 6241(11), in the case of partnership-related items that the Secretary determines involve a special enforcement matter, the Secretary is authorized to prescribe regulations pursuant to which the BBA audit procedures do not apply, and such partnership-related items are subject to special rules (including rules related to assessment and collection) as the Secretary determines necessary for the effective and efficient enforcement of the Code. Section 6241(11)(A). Section 6241(11)(B) provides a list of certain ''special enforcement matters,'' including the failure to comply with information reporting obligations of tiered partnerships, jeopardy assessments of tax in exigent circumstances, and matters involving foreign partners and partnerships. Sections 6241(11)(B)(i), (ii), and (v). Section 6241(11)(B)(vi) also provides a grant of authority to the Secretary for ''other matters that the Secretary determines by regulation present special enforcement considerations.''

Proposed § 1.6417–2(b) would provide that the elective payment election must be made on an original return and that the election may not be made on an amended return or administrative adjustment request. Under the existing BBA regulations, a BBA Partnership's elective payment election under section 6417 is a partnership-related item because the existence of the election is relevant in determining chapter 1 tax and because the election is required to be made on the BBA Partnership's return. Because the elective payment election is a partnership-related item, the only way for the IRS to make an adjustment upon the determination of an ineffective election would be to follow the audit procedures of the centralized partnership audit regime. To prevent duplication, fraud, improper payments, or excessive payments in an effective manner, the IRS must be able to determine whether a BBA Partnership's elective payment election is ineffective in an expeditious manner. The procedural requirements of the BBA would require the IRS to treat BBA Partnerships that have made an ineffective election payment election differently from other electing taxpayers that are not subject to the centralized partnership audit regime but that are otherwise similarly situated. The Treasury Department and the IRS are proposing that, due to the unique nature of the section 6417 election, which, pursuant to proposed § 1.6417–2(d), would result in a payment treated as having been made on the later of the due date of the return or the date the return was filed, the special enforcement matters described in section 6241(11) would apply, and the BBA centralized partnership audit regime should not apply to adjustments with respect to partnership-related items that affect the amount or existence of a payment to the BBA Partnership, or credit or refund of a payment to the BBA Partnership under section 6417. Accordingly, these proposed regulations would add new paragraph (j) to § 301.6241–7 to provide that an election by a BBA Partnership under section 6417 can be adjusted outside of the BBA audit rules. These proposed regulations also would redesignate existing paragraph (j) (regarding applicability dates) to a new paragraph (k) and update that paragraph (k) to reflect an applicability date for these proposed regulations.

V. Pre-Filing Registration Requirements and Additional Information

Section 6417(d)(5) provides that as a condition of, and prior to, any amount being treated as a payment that is made by the taxpayer under section 6417(a) or any payment being made pursuant to section 6417(c), the Secretary may require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments.

In general, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended that the information required to be provided to the IRS should be provided in a manner that facilitates automated procedures to help catch potential fraud, discourages abusive or otherwise illegitimate claims, and allows efficient and prompt review (both before payment and through audits). Stakeholders recommended that all required documents and information should be able to be submitted easily via an online portal. Stakeholders recommended that information or registration should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1).

Proposed § 1.6417–5 would provide the mandatory pre-filing registration process that, except as provided in guidance, an applicable entity or electing taxpayer would be required to complete as a condition of, and prior to (1) any amount being treated as a payment against the tax imposed by subtitle A that is made by an applicable entity or electing taxpayer (other than a partnership of S corporation) under proposed §§ 1.6417–2(a)(1)(i) or –2(a)(2)(i), or (2) any amount being paid to a partnership or S corporation pursuant to proposed § 1.6417–2(a)(2)(ii).

Proposed § 1.6417–5(a) provides an overview of this process and would require an applicable entity or electing taxpayer to satisfy the pre-filing registration requirements as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer would be required to use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number and report the registration number on its annual tax return with respect to an applicable credit property would be ineligible to make an elective payment election to treat any credit determined with respect to that applicable credit property as a payment of tax. However, completion of the pre-filing registration requirements and receipt of a registration number would not, by itself, mean that the applicable entity or electing taxpayer would receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

Proposed § 1.6417–5(b) would provide the following pre-filing registration requirements.

First, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

Second, an applicable entity or electing taxpayer must satisfy the registration requirements and receive a registration number prior to making an elective payment election on the applicable entity's tax return for the taxable year at issue.

Third, an applicable entity or electing taxpayer is required to obtain a registration number for each applicable credit property with respect to which an applicable credit will be determined

and for which the applicable entity or electing taxpayer intends to make an elective payment election.

Finally, an applicable entity or electing taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the applicable credits, and about the applicable credit property, would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 6417. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not applicable entities or electing taxpayers. Information about the taxpayer's taxable year would allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about applicable credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not applicable credit properties. Information about whether an investment tax credit property was acquired using any Restricted Tax Exempt Amounts would allow the IRS to prevent improper payments.

Proposed § 1.6417–5(c) would provide information about the required registration number. Proposed § 1.6417–5(c)(1) would provide that, after an applicable entity or electing taxpayer completes the pre-filing registration process as provided in proposed § 1.6417–5(b) for the applicable credit properties with respect to which the entity intends to make an elective payment election in the taxable year, the IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information, as provided in guidance.

Proposed § 1.6417–5(c)(2) would provide that a registration number is valid only for the taxable year for which it is obtained. Proposed § 1.6417–5(c)(3) would provide that, if an elective payment election will be made with respect to an applicable credit property for which a registration number under proposed § 1.6417–5 has been previously obtained, the applicable entity or electing taxpayer would be required to renew the registration each year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. Proposed § 1.6417–5(c)(4) would provide that, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer would be required to amend the registration (or may need to submit a new registration) to reflect these new facts. For example, one stakeholder asked that, if a taxpayer becomes a party to an internal reorganization under section 368(a) (such as a merger or distribution in a nonrecognition transaction) during the election period, the elective payment election should carry over to the successor entity. The proposed regulations would provide that if a facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the credit property and the new owner must submit an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered credit property.

Lastly, proposed § 1.6417–5(c)(5) would provide that the applicable entity or electing taxpayer would be required to include the registration number of the applicable credit property on their annual tax return for the taxable year. The IRS will treat an elective payment election as ineffective with respect to the portion of a credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

The corresponding temporary regulations under § 1.6417–5T published in the Rules and Regulations section of this edition of the **Federal Register** apply rules to taxable years ending on or after June 21, 2023, that are identical to those that would apply under proposed § 1.6417–5. The temporary regulations under § 1.6417–5T expire on June 12, 2026.

VI. Special Rules

Proposed § 1.6417–6 would provide special rules relating to excessive payment as well as basis reduction and recapture.

A. Excessive Payment

Pursuant to 6417(d)(6), proposed § 1.6417–6 would provide that the IRS may determine that an amount treated as a payment made by an applicable entity under proposed § 1.6417–2(a)(1)(i) or an electing taxpayer under proposed § 1.6417–2(a)(2)(i), or the amount of the payment made pursuant to proposed § 1.6417–2(a)(2)(ii), constitutes an excessive payment. Proposed § 1.6417–6(a) would provide that in the case of an excessive payment determined by the IRS, the amount of chapter 1 tax imposed on the applicable entity or electing taxpayer for the taxable year in which the excessive payment determination is made will be increased by an amount equal to the sum of (1) the amount of such excessive payment, plus (2) an amount equal to 20 percent of such excessive payment (additional 20-percent chapter 1 tax). This would be the case even if the applicable entity or electing taxpayer is otherwise not subject to chapter 1 tax. The additional 20-percent chapter 1 tax amount would not apply if the applicable entity or electing taxpayer demonstrates to the satisfaction of the IRS that the excessive payment resulted from reasonable cause. If the additional 20-percent chapter 1 tax is applicable, it would apply in addition to any penalties, additions to tax, or other amounts applicable under the Code. The Treasury Department and the IRS anticipate that existing standards of reasonable cause will inform the determination by the IRS of whether reasonable cause has been demonstrated for this purpose.

The term ''excessive payment'' is proposed to be defined as an amount equal to the excess of (1) the amount treated as a payment under proposed § 1.6417–2(a)(1)(i) or –2(a)(2)(i), or the amount of the payment made pursuant to proposed § 1.6417–2(a)(2)(ii), with respect to such facility or property for such taxable year, over (2) the amount of the credit that, without application of section 6417, would be otherwise allowable (as described in part II.C and II.D. or IV. of this Explanation of Provisions and without regard to section 38(c)) under the Code with respect to such facility or property for such taxable year.

Several stakeholders asked that the term ''excessive payment'' be determined without any tax credit utilization rules, such as those found in sections 38, 49, and 469. Because the statute provides that the amount of the credit should not exceed the amount ''otherwise allowable'' (without application of sections 38(c), without

regard to sections 50(b)(3) and (4)(A)(i), and by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity), the Treasury Department and the IRS are proposing that all other relevant code sections, including sections 38 (but not 38(c)), 49, and 469, would apply to the amount treated as a payment that is made by the applicable entity or electing taxpayer as described in part II of this Explanation of Provisions. Thus, if an applicable entity or electing taxpayer is an individual, trust, closely held corporation, or other taxpayer subject to the rules of section 469, or if an applicable credit is an investment tax credit that is determined including the rules of section 49, then those rules would apply. However, proposed § 1.6417–2(c) would provide additional rules relating to the determination of applicable credits, such as the special rule for investment credit property acquired by a tax-exempt or government entity using nontaxable grants or other nontaxable proceeds, as described in part II.C. of this Explanation of Provisions.

In contrast, the amount of the payment to partnerships and S corporations described in part IV of this Explanation of Provisions has different proposed rules. As discussed in part IV of this Explanation of Provisions, in determining the applicable credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation would be required to compute the amount of the applicable credit allowable (without regard to section 38(c)) as if an elective payment election were not made. However, because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of the credit determined by a partnership or S corporation would not be subject to limitation by section 469. In addition, because the only applicable credits for which a partnership or S corporation may make the elective payment election are the section 45V credit, section 45Q credit, and section 45X credit, which are production tax credits, sections 49 and 50 (applicable to investment tax credits) would not apply to limit these applicable credit amounts.

Stakeholders asked for clarification on how the excessive payment would be determined and in which year the adjustment applies. The Treasury Department and the IRS anticipate that excessive payments may arise in a variety of situations, such as an improperly claimed bonus credit amount, an error in calculating a credit, inflated basis, failure to apply the section 38(d) ordering rules, or a misapplication of the credit utilization rules, among other things. The statute provides that the tax is imposed on the applicable entity in the year the determination of the excessive payment is made, despite the fact that this is a later year than the year in which the credit was allowable. The Treasury Department and the IRS request comments on whether additional guidance on excessive payments is needed.

B. Basis Reduction and Recapture

Proposed § 1.6417–6(b) would provide rules similar to the rules of section 50 (without regard to section 50(b)(3) and (4)(A)(i)) apply for purposes of section 6417. (Section 6417(g) erroneously refers to section 6417(c)(2)(A), a provision that does not exist, and it is evident that such reference was intended to be to section 6417(d)(2)(A). That error is accounted for in these proposed regulations.)

One stakeholder asked how entities that don't normally file tax returns should report recapture events. The stakeholder asked that the reporting and payment of the recapture amount should be consistent with the rules applicable to taxable entities (that is, no reporting or payment due until a tax return would be due for the related calendar year). Proposed § 1.6417–6(b)(2) would clarify that any reporting of recapture is made on the taxpayer's annual tax return in the manner prescribed by the IRS in future guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*.

Stakeholders asked whether recapture is considered an excessive payment event. The excessive payment rules operate separately from the recapture rules. The excessive payment rules apply where the credit amount reported on the original credit source form by the applicable entity or electing taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. Thus, recapture events, including recapture events under sections 45Q(f)(4) or 50(a), do not result in an excessive payment.

Stakeholders asked that the proposed regulations clarify that basis reduction and recapture applies only to the investment tax credits. The section 50 rules, including basis reduction and recapture, only apply to investment tax credits so no clarification on this point is required.

Stakeholders also asked that guidance be provided in the form of examples that illustrate the manner in which section 50 will be applied for purposes of basis reduction and recapture. Proposed § 1.6417–6(b)(3) would provide an example.

Proposed Applicability Dates

Each of proposed §§ 1.6417–1 through 1.6417–6 is proposed to apply to taxable years ending on or after the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**. Entities may rely on these proposed regulations for elective payments of applicable credit amounts after December 31, 2022, in taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, provided the entities follow the proposed regulations in their entirety and in a consistent manner with respect to all elections made under section 6417. Sections 301.6241–1 and 301.6241–7 are proposed to apply to taxable years ending on or after the date these proposed regulations are published in the **Federal Register**.

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (''PRA'') generally requires that a federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. 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 control number.

The collections of information in these proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed regulations are considered general tax records under Section 1.6001–1(e). These records are required for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election. For PRA purposes, general tax records are already approved by OMB under 1545–0047 for tax-exempt organizations and government entities; 1545–0074 for individuals; and under 1545–0123 for business entities.

These proposed regulations also mention reporting requirements related to making elections as detailed in

§§ 1.6417–2 and 1.6417–3 and calculating the claim amounts as detailed in §§ 1.6417–2 and 1.6417–4. These elections will be made by taxpayers on Forms 990–T, 1040, 1120–S, 1065, and 1120; and credit calculations will be made on Form 3800 and supporting forms. These forms are approved under 1545–0047 for tax-exempt organizations and governmental entities; 1545–0074 for individuals; and 1545–0123 for business entities.

These proposed regulations also mention recapture procedures as detailed in § 1.6417–6. These recaptures are performed using Form 4255. This form is approved under 1545–0047 for tax-exempt organizations and governmental entities; 1545–0074 for individuals; and 1545–0123 for business entities. These proposed regulations are not changing or creating new collection requirements not already approved by OMB.

These proposed regulations mention a requirement to register with the IRS to be able to elect payments as detailed in § 1.6417–5. For further information concerning the registration, where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations (T.D. 9975) published in the Rules and Regulations section of this issue of the **Federal Register**. These proposed regulations are not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

1. Need for and Objectives of the Rule

The proposed regulations would provide greater clarity to taxpayers that intend to take advantage of section 6417's credit monetization mechanism. It provides needed definitions, the time and manner to make the election, and information about the pre-filing registration process, among other items. The Treasury Department and the IRS intend and expect that giving taxpayers guidance that allows them to use section 6417 will beneficially impact various industries, delivering benefits across the economy, and reduce economy-wide greenhouse gas emissions.

In particular, section 6417 allows applicable entities to treat an applicable credit as a payment against Federal income taxes and defines applicable entities to include many entities that may not have any tax liability. Allowing entities without sufficient federal income tax liability to use a business tax credit to instead make an election to receive a refund of any overpayment of taxes created by the elective payment election will increase the incentive for taxpayers to invest in clean energy projects that generate eligible credits because it will increase the amount of cash available to those entities, thereby reducing the amount of financing needed for clean energy projects.

2. Affected Small Entities

The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this proposed regulation and in this IRFA, section 6417 and these proposed regulations may affect a variety of different entities across several different industries as there are 12 different applicable credits for which an elective payment election may be made. Further, the elective payment election for 3 of the applicable credits may be made both by applicable entities and by taxpayers other than applicable entities. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is 20,000 taxpayers, as described in the Paperwork Reduction Act section of the preamble.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule and again when taxpayers start to make the elective payment election using the guidance and procedures provided in these proposed regulations.

3. Impact of the Rules

The proposed regulations provide rules for how taxpayers can take advantage of the section 6417 credit monetization regime. Taxpayers that elect to take advantage of section 6417 will have administrative costs related to reading and understanding the rules as well as recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. The costs will vary across different-sized entities and across the type of project(s) in which such entities are engaged.

The pre-filing registration process requires a taxpayer to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits. This process must be completed to receive a registration number for each applicable credit property with respect to which the applicable taxpayer intends to make an elective payment election. To make the elective payment election and claim the credit, the taxpayer must file an annual tax return. The reporting and recordkeeping requirements for that return would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was making an elective payment election under section 6417.

Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

4. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed regulations. For example, in adopting the pre-filing registration requirements, the Treasury Department and the IRS considered whether such information could be obtained at the filing of the relevant annual tax return. However, the Treasury Department and the IRS decided that such an option would increase the opportunity for duplication fraud, improper payments, or excessive payments under section 6417 as well as potentially delaying payments to qualifying taxpayers. Section 6417(d)(5) specifically authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417 as a condition of, and prior to, any amount being treated as a payment which is made by an applicable entity under section 6417. As described in the preamble to these proposed regulations, these proposed rules carry out that Congressional intent as pre-filing registration allows for the IRS to verify certain information in a timely manner and then process the annual tax return with minimal delays. Having a distinction between applicable entities or electing entities that are small businesses versus others making an elective payment election would create a scenario where a subset of taxpayers seeking to make an elective payment election would not have been verified or received registration numbers, potentially delaying payment not only to them but to other taxpayers seeking to use section 6417.

Additionally, when considering how taxpayers should claim the credits and make the elective payment election, the Treasury Department and the IRS considered creating an election system outside of the tax return filing system. However, it was determined that such a process would not be an efficient use of resources, especially given the statutory due date to make an election, which is the return filing date for the taxpayers with a filing obligation (which would include small business taxpayers). The Treasury Department and the IRS decided that the most efficient and reliable method is to use the existing method for claiming business tax credits; that is, the filing of the annual tax return. To create a different method for small businesses making an elective payment election than for a small business claiming the credit (or a larger business making an elective payment election or claiming the credit) would create an additional burden for both small businesses and the IRS, without any commensurate benefit.

Comments are requested on the requirements in the proposed regulations, including specifically whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, improper payments, or excessive payments under section 6417.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the proposed rule would merely provide procedures and definitions to allow taxpayers to take advantage of the ability to make an elective payment election. The Treasury Department and the IRS invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. Unfunded Mandates Reform Act

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

V. Executive Order 13132: Federalism

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

VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive Order. This proposed rule does not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive Order.

Nevertheless, on November 28, 2022, and November 29, 2022, the Treasury Department and the IRS held consultations with Tribal leaders requesting assistance in addressing questions related to the elective payment election under section 6417. Consultation was also held with Alaska Native Corporations on December 2, 2022. These consultations informed the development of these proposed regulations.

The Treasury Department and the IRS will hold additional consultations with Tribal leaders and Alaska Native Corporations after providing an opportunity for review of the proposed regulations and early in the process of publishing final regulations under section 6417.

VII. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and any paper comments submitted, will be made available at *https://www.regulations.gov* or upon request.

Announcement 2023–16, 2023–20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone. Any

telephonic hearing will be made accessible to people with disabilities.

A public hearing is scheduled to be held in person on August 21, 2023, beginning at 10:00 a.m. ET, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the **ADDRESSES** section.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at *https://www.regulations.gov,* search IRS and REG–101607–23. Copies of the agenda will also be available by emailing a request to *publichearings@irs.gov.* Please put ''REG–101607–23 Agenda Request'' in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–101607–23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG–101607–23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–101607–23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG–101607–23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG–101607–23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG–101607–23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 17, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG–101607–23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG–101607–23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 17, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317–6901 (not a toll-free number) at least August 16, 2023.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal authors of theses proposed regulations are Jeremy Milton and James Holmes, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR parts 1 and 301 as follows:

PART 1—INCOME TAXES

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

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

* * * * *

■ **Par. 2.** Sections 1.6417–0 through 1.6417–6 are added under the undesignated heading ''Abatements, Credits, and Refunds'' to read as follows:

§ 1.6417–0 Table of contents

This section lists the table of contents for §§ 1.6417–1 through 1.6417–6.

(a) Excessive payment.
(b) Basis reduction and recapture.
(c) Mirror code territories.
(d) Partnerships subject to subchapter C of chapter 63 of the Code.
(e) Applicability date.

§ 1.6417–1 Elective payment election of applicable credits.

(a) *In general.* An applicable entity may make an elective payment election with respect to any applicable credit determined with respect to such applicable entity in accordance with section 6417 of the Code and the section 6417 regulations. Paragraphs (b) through (p) of this section provide definitions. See § 1.6417–2 for rules and procedures under which all elective payment elections must be made, rules for determining the amount and the timing of payments, and statutory rules denying double benefits. See § 1.6417–3 for special rules pertaining to electing taxpayers. See § 1.6417–4 for special rules pertaining to electing taxpayers that are partnerships or S corporations. See § 1.6417–5 for pre-filing registration requirements and other information required to make any elective payment election effective. See § 1.6417–6 for special rules related to excessive payments, basis reduction and recapture, any U.S. territory with a mirror code tax system, and payments made to partnerships subject to subchapter C of chapter 63 of the Code.

(b) *Annual Tax Return.* The term *annual tax return* means, for purposes of section 6417 and the section 6417 regulations, the following returns (and for each, any successor return)—

(1) For any taxpayer normally required to file an annual tax return with the IRS, such annual return (including the Form 1065 for partnerships and the Form 990–T for organizations with unrelated business income tax or a proxy tax under section 6033(e));

(2) For any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the return they would be required to file if they were located in the United States, or, if no such return is required (such as for governmental entities), the Form 990–T; and

(3) For short tax year filers, the short year tax return.

(c) *Applicable entity.* The term *applicable entity* means—

(1) Any organization exempt from the tax imposed by subtitle A—

(i) By reason of section 501(a) of the Code; or

(ii) Because it is the government of any U.S. territory or a political subdivision thereof;

(2) Any State, the District of Columbia, or political subdivision thereof;

(3) An Indian tribal government or a subdivision thereof;

(4) Any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m));

(5) The Tennessee Valley Authority;

(6) Any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas; and

(7) An agency or instrumentality of any applicable entity described in paragraphs (1)(ii), (2), or (3).

(d) *Applicable credit.* The term *applicable credit* means each of the following:

(1) So much of the credit for alternative fuel vehicle refueling property determined under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) So much of the renewable electricity production credit determined under section 45(a) as is attributable to qualified facilities that are originally placed in service after December 31, 2022 (section 45 credit);

(3) So much of the credit for carbon oxide sequestration determined under section 45Q(a) as is attributable to carbon capture equipment that is originally placed in service after December 31, 2022 (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) (section 45U credit);

(5) So much of the credit for production of clean hydrogen determined under section 45V(a) as is attributable to qualified clean hydrogen production facilities that are originally placed in service after December 31, 2012 (section 45V credit);

(6) In the case of a tax-exempt entity described in section 168(h)(2)(A)(i), (ii), or (iv) of the Code, the credit for qualified commercial vehicles determined under section 45W by reason of section 45W(d)(2) (section 45W credit);

(7) The credit for advanced manufacturing production determined under section 45X(a) (section 45X credit);

(8) The clean electricity production credit determined under section 45Y(a) (section 45Y credit);

(9) The clean fuel production credit determined under section 45Z(a) (section 45Z credit);

(10) The energy credit determined under section 48 (section 48 credit);

(11) The qualifying advanced energy project credit determined under section 48C (section 48C credit); and

(12) The clean electricity investment credit determined under section 48E (section 48E credit).

(e) *Applicable credit property.* The term *applicable credit property* means each of the following units of property with respect to which the amount of an applicable credit is determined:

(1) In the case of a section 30C credit, a *qualified alternative fuel vehicle refueling property* described in section 30C(c).

(2) In the case of a section 45 credit, a *qualified facility* described in section 45(d).

(3) In the case of a section 45Q credit, a *single process train* described in § 1.45Q–2(c)(3).

(4) In the case of a section 45U credit, a *qualified nuclear power facility* described in section 45U(b)(1).

(5) In the case of a section 45V credit, a *qualified clean hydrogen production facility* described in section 45V(c)(3).

(6) In the case of a section 45W credit, a *qualified commercial clean vehicle* described in section 45W(c).

(7) In the case of a section 45X credit, a facility that produces eligible components, as described in guidance under sections 48C and 45X.

(8) In the case of a section 45Y credit, a *qualified facility* described in section 45Y(b)(1).

(9) In the case of a section 45Z credit, a *qualified facility* described in section 45Z(d)(4).

(10) *Section 48 credit property*—(i) *In general.* In the case of a section 48 credit and except as provided in paragraph (d)(10)(ii) of this section, an *energy property* described in section 48.

(ii) *Pre-filing registration and elections.* At the option of an applicable entity or electing taxpayer, and to the extent consistently applied for purposes of the pre-filing registration requirements of § 1.6417–5 and the elective payment election requirements of §§ 1.6417–2 through 1.6417–4, an *energy project* as described in section 48(a)(9)(A)(ii) and defined in guidance.

(11) In the case of a section 48C credit, an *eligible property* described in section 48C(c)(2).

(12) In the case of a section 48E credit, a *qualified facility* described in section 48E(b)(3) or, in the case of a section 48E credit relating to a qualified investment with respect to energy storage technology, an *energy storage technology* described in section 48E(c)(2).

(f) *Disregarded entity.* The term *disregarded entity* means an entity that is disregarded as an entity separate from

its owner for Federal income tax purposes.

(g) *Electing taxpayer.* The term e*lecting taxpayer* means any taxpayer that is not an applicable entity described in paragraph (b) of this section but makes an election in accordance with §§ 1.6417–2(b), 1.6417–3, and, if applicable, 1.6417–4, to be treated as an applicable entity for a taxable year with respect to applicable credits determined with respect to an applicable credit property described in § 1.6417–1(e)(3), (5), or (7).

(h) *Elective payment amount*—(1) *In general.* The term *elective payment amount* means, with respect to an applicable entity or an electing taxpayer that is not a partnership or an S corporation, the applicable credit(s) for which an applicable entity or electing taxpayer makes an elective payment election to be treated as making a payment against the tax imposed by subtitle A for the taxable year, which is equal to the sum of—

(i) The amount (if any) of the current year applicable credit(s) allowed as a general business credit under section 38 for the taxable year, as provided in § 1.6417–2(e)(2)(iii), and

(ii) The amount (if any) of unused current year applicable credits which would otherwise be carried back or carried forward from the unused credit year under section 39 and that are treated as a payment against tax, as provided in § 1.6417–2(e)(2)(iv).

(2) *Elective payment amount with respect to partnerships and S corporations.* With respect to an electing taxpayer that is a partnership or an S corporation, the term *elective payment amount* means the sum of the applicable credit(s) for which the partnership or S corporation makes an elective payment election and that results in a payment to such partnership or S corporation equal to the amount of such credit(s) (unless the partnership owes a Federal tax liability, in which case the payment may be reduced by such tax liability).

(i) *Elective payment election.* The term *elective payment election* means an election made in accordance with § 1.6417–2(b) for applicable credit(s) determined with respect to an applicable entity or electing taxpayer.

(j) *Guidance.* The term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the *IRS.gov* website. See §§ 601.601 and 601.602 of this chapter.

(k) *Indian tribal government.* The term *Indian tribal government* means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the most recent list published by the Department of the Interior in the **Federal Register** pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).

(l) *Partnership.* The term *partnership* has the meaning provided in section 761 of the Code.

(m) *S corporation.* The term *S corporation* has the meaning provided in section 1361(a)(1) of the Code.

(n) *Section 6417 regulations.* The term *section 6417 regulations* means §§ 1.6417–1 through 1.6417–6.

(o) *Statutory references*—(1) *Chapter 1.* The term *chapter 1* means chapter 1 of the Code.

(2) *Code.* The term *Code* means the Internal Revenue Code.

(3) *Subchapter K.* The term *subchapter K* means subchapter K of chapter 1.

(4) *Subtitle A.* The term *subtitle A* means subtitle A of the Code.

(p) *U.S. territory.* The term *U.S. territory* means the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(q) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§ 1.6417–2 Rules for making elective payment elections.

(a) *Elective payment elections*—(1) *Elections by applicable entities*—(i) *In general.* An applicable entity that makes an elective payment election in the manner provided in paragraph (b) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which an applicable credit is determined in the amount determined under paragraph (c) of this section.

(ii) *Disregarded entities.* If an applicable entity is the owner (directly or indirectly) of a disregarded entity that directly holds an applicable credit property, the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

(iii) *Undivided ownership interests.* If an applicable entity is a co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K, then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect such applicable credit property.

(iv) *Partnerships and S corporations not applicable entities.* Partnerships and S corporations are not applicable entities described in § 1.6417–1(c), and thus are not eligible to make any election under paragraph (b) of this section, unless the partnership or S corporation is an electing taxpayer. This is the case no matter how many of the partners of a partnership are described in § 1.6417–1(c)(1), including if all of a partnership's partners are so described.

(v) *Members of a consolidated group of which an Alaska Native Corporation is the common parent.* In the case of a consolidated group (as defined in § 1.1502–1) the common parent of which is an Alaska Native Corporation, any member that is an electing taxpayer may make an elective payment election with respect to applicable credits determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(2) *Electing taxpayers*—(i) *Electing taxpayers that are not partnerships or S corporations.* An electing taxpayer other than a partnership or an S corporation that has made an elective payment election in accordance with § 1.6417–3 and paragraph (b) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which the applicable credit is determined in the amount determined under paragraph (c) of this section.

(ii) *Electing taxpayers that are partnerships or S corporations.* In the case of an electing taxpayer that is a partnership or S corporation that has made an elective payment election in accordance with §§ 1.6417–3 and 1.6417–4 and paragraph (b) of this section, the Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit determined under paragraph (c) of this section and § 1.6417–4(d) (unless the partnership owes any Federal income tax liability, in which case the payment may be reduced by such tax liability).

(iii) *Partners and S corporation shareholders prohibited from making any elective payment election.* Under section 6417(c)(1) of the Code, any elective payment election with respect to applicable credit property held directly by a partnership or S corporation must be made by the partnership or S corporation. As provided under section 6417(c)(2) of the Code, no partner in a partnership, or shareholder of an S corporation, may make an elective payment election with respect to any applicable credit determined with respect to such applicable credit property.

(iv) *Disregarded entities.* If an electing taxpayer is the owner (directly or indirectly) of a disregarded entity that directly holds any applicable credit property, the electing taxpayer may make an elective payment election in the manner provided in paragraph (b) of this section for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

(v) *Undivided ownership interests.* If an electing taxpayer is a co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K, then the electing taxpayer's undivided ownership interest in or share of the applicable credit property will be treated as a separate applicable credit property owned by such electing taxpayer, and the electing taxpayer may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect to such applicable credit property.

(vi) *Members of a consolidated group.* A member of a consolidated group may make an elective payment election with respect to applicable credits determined with respect to the member. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Special rules for certain credits*—(i) *Renewable electricity production credit.* Any election under this paragraph (a) with respect to a section 45 credit—

(A) Applies separately with respect to each qualified facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such qualified facility is originally placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45(a)(2)(A)(ii) with respect to such qualified facility.

(ii) *Credit for carbon oxide sequestration.* Except as provided in § 1.6417–3(c), which provides a special rule for electing taxpayers, any election under this paragraph (a) with respect to a section 45Q credit—

(A) Applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such qualified facility is originally placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45Q(3)(A) or (4)(A) with respect to such equipment.

(iii) *Credit for production of clean hydrogen.* Except as provided in § 1.6417–3(b), which provides a special rule for electing taxpayers, any election under this paragraph (a) with respect to a section 45V credit—

(A) Applies separately with respect to each qualified clean hydrogen production facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such facility is placed in service (or within the 1-year period after August 16, 2022, for facilities placed in service before December 31, 2022); and

(C) Applies to such taxable year and all subsequent taxable years with respect to such facility.

(iv) *Clean electricity production credit.* Any elective payment election with respect to a section 45Y credit—

(A) Applies separately with respect to each qualified facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such facility is placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year which is within the period described in section 45Y(b)(1)(B) with respect to such facility.

(v) A*dvanced manufacturing production credit.* Any elective payment election with respect to a section 45X credit applies separately with respect to each facility (whether the facility existed on or before, or after, December 31, 2022) at which a taxpayer produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) during the taxable year.

(b) *Manner of making election*—(1) *In general*—(i) *Election is made on the annual tax return.* An elective payment election is made on the annual tax return, as defined in § 1.6417–1(b), in the manner prescribed by the IRS in guidance, along with any required completed source credit form(s) with respect to the applicable credit property, a completed Form 3800, *General Business Credit,* (or its successor), and any additional information, including supporting calculations, required in instructions.

(ii) *Election must be made on original return.* An election must be made on an original return (including any revisions on a superseding return) filed not later than the due date (including extensions of time) for the original return for the taxable year for which the applicable credit is determined. No elective payment election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no relief available under §§ 301.9100–1 through 301.9100–3 of this chapter for an elective payment election that is not timely filed.

(2) *Pre-filing registration required.* Pre-filing registration in accordance with § 1.6417–5 is a condition for making an elective payment election. An elective payment election will not be effective with respect to credits determined with respect to an applicable credit property unless the applicable entity or electing taxpayer received a valid registration number for the applicable credit property in accordance with § 1.6417–5(c) and provided the registration number for each applicable credit property on its Form 3800 (or its successor) attached to the tax return, in accordance with guidance.

(3) *Due date for making the election.* To be effective, an elective payment election must be made no later than:

(i) In the case of any taxpayer for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code, the due date (including an extension of time) for the original return that would be due under section 6033(a) if such applicable entity were described in that section. Under section 6072(e), that date is the 15th day of the fifth month after the taxable year determined by section 441 of the Code. Subject to issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code could request an extension of time to file, an automatic paperless six-month extension from the original due date is deemed to be allowed.

(ii) In the case of any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the due date (including extensions of time) that would apply if the taxpayer was located in the United States.

(iii) In any other case, the due date (including extensions of time) for the original return for the taxable year for which the election is made, but in no event earlier than February 13, 2023.

(4) *Election is not revocable*—(i) *In general.* Except as provided in subparagraphs (ii) and (iii) of this paragraph, any elective payment election, once made, is irrevocable and applies with respect to any applicable credit for the taxable year for which the election is made.

(ii) *Election lasts for a period of years for certain credits.* For elective payment elections with respect to section 45 credits described in § 1.6417–1(d)(2) or section 45Y credits described in § 1.6417–1(d)(8), the election applies to each taxable year in the 10-year period provided in section 45(a)(2)(A)(ii) or 45Y(b)(1)(B), respectively, beginning on the date the facility was originally placed in service. For elective payment elections with respect to section 45Q credits described in § 1.6417–1(d)(3), the election applies to each taxable year in the 12-year period provided in section 45Q(a)(3)(A) or (4)(A) beginning on the date the carbon capture equipment was originally placed in service. For elective payment elections with respect to section 45V credits described in § 1.6417–1(d)(5), the election applies to the taxable year in which the qualified clean hydrogen production facility was originally placed in service and all subsequent taxable years.

(iii) *Electing taxpayers.* For electing taxpayers who make an elective payment election, the election applies for one five-year period per applicable credit property, but such election may be revoked once per applicable credit property, as provided in § 1.6417–3.

(5) *Scope of election.* An elective payment election applies to the entire amount of applicable credit(s) determined with respect to each applicable credit property that was properly registered for the taxable year, resulting in an elective payment amount that is the entire amount of applicable credit(s) determined with respect to the applicable entity or electing taxpayer for a taxable year.

(c) *Determination of applicable credit*—(1) *In general.* In the case of any applicable entity making an elective payment election, any applicable credit is determined—

(i) Without regard to section 50(b)(3) and (4)(A)(i) of the Code, and

(ii) By treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

(2) *Effect of trade or business rule.* The trade or business rule in paragraph (c)(1)(ii) of this section—

(i) Allows the applicable entity to treat an item of property as if it is of a character subject to an allowance of depreciation (such as under sections 30C and 45W); to produce items in the ordinary course of a trade or business of the taxpayer (such as in sections 45V and 45X); and to state that an item of property is one for which depreciation (or amortization in lieu of depreciation) is allowable (such as in sections 48, 48C, and 48E);

(ii) Allows the applicable entity to apply the capitalization and accelerated depreciation rules (such as sections 167, 168, 263, and 263A of the Code) that apply to determining the basis and the depreciation allowance for property used in a trade or business;

(iii) Makes applicable general credit limitations by those persons engaged in the conduct of a trade or business and to which such limitations apply, such as section 49 in the context of investment tax credits and section 469 for all applicable credits; and

(iv) Does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity's exempt purpose.

(3) *Special rule for investment-related credit property acquired with income, including income from certain grants and forgivable loans, that is exempt from taxation.* For purposes of section 6417, income, including income from certain grants and forgivable loans, that is exempt from taxation under subtitle A and used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in sections 30C, 45W, 48, 48C, or 48E (investment-related credit property) are included in basis for purposes of computing the applicable credit amount determined with respect to the applicable credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under general tax principles. However, if an applicable entity receives a grant, forgivable loan, or other income exempt from taxation under subtitle A for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property (Restricted Tax Exempt Amount), and the Restricted Tax Exempt Amount plus the applicable credit otherwise determined with respect to that investment-related credit property exceeds the cost of the investment-related credit property, then the amount of the applicable credit is reduced so that the total amount of applicable credit plus the amount of any Restricted Tax Exempt Amount equals the cost of investment-related credit property.

(4) *Credits must be determined with respect to the applicable entity or electing taxpayer.* Any credits for which an elective payment election is made must have been determined with respect to the applicable entity or electing taxpayer. An applicable credit is determined with respect to an applicable entity or electing taxpayer in cases where the applicable entity or electing taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit. Thus, no election may be made under this section for any credits purchased pursuant to section 6418, transferred pursuant to section 45Q(f)(3), acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)), owned by a third party, or otherwise not determined with respect to the applicable entity or electing taxpayer.

(5) *Examples.* The following examples illustrate the rules of this paragraph (c).

(i) *Example 1.* School district A receives a tax exempt grant in the amount of $400,000 from the Environmental Protection Agency to purchase electric school bus B. A purchases B for $400,000. A's basis in B is $400,000. B qualifies for the maximum section 45W credit, $40,000. However, because the amount of the restricted tax exempt grant plus the amount of the section 45W credit exceeds the cost of B, A's section 45W credit is reduced by the amount necessary so that the total amount of the section 45W credit plus the restricted tax exempt amount equals the cost of B. A's section 45W credit is therefore reduced by $40,000 to zero.

(ii) *Example 2.* Assume the same facts as in paragraph (c)(5)(i) of this section (Example 1), except that the grant is in the amount of $300,000. A purchases B using the grant and $100,000 of A's unrestricted funds. A's basis in B is $400,000 and A's section 45W credit is $40,000. Since the amount of the restricted tax exempt grant plus the amount of the section 45W credit ($340,000) is less than the cost of B, A's 45W credit under section 6417(b)(6) is not reduced.

(iii) *Example 3.* Public charity B receives a $60,000 grant from a private foundation to build energy property, P, a qualified investment credit property that costs $80,000. B uses $20,000 of its own funds plus the $60,000 grant to build P. B's basis in P is $80,000. Based upon acquisition cost, B can earn a section 48 investment credit (with bonus credit amounts) of $40,000 (50% of basis). However, because the amount of the restricted tax exempt grant ($60,000) plus the section 48 credit ($40,000) exceeds P's cost by $20,000, B's section 48 applicable credit is reduced by $20,000 so that the total amount of the section 48 investment credit plus the restricted tax exempt grant equals the cost of P.

(iv) *Example 4.* Taxpayer Q is engaged in the business of capturing carbon oxide. Q properly elects to be treated as an applicable entity with respect to the section 45Q credit determined with respect to single process trains A, B, and C for 2024. In the same year, Q also purchases section 45Q credits under section 6418 from an unrelated taxpayer and has section 45Q credits transferred to itself pursuant to section 45Q(f)(3). Q can make an elective payment election only with respect to section 45Q applicable credits determined with respect to A, B, and C. Q cannot make an elective payment election with respect to any credits transferred to Q pursuant to sections 6418 and 45Q(f)(3).

(d) *Timing of payment.* Except as provided in § 1.6417–4(d) (relating to payments to partnerships and S corporations), the elective payment amount will be treated as made—

(1) In the case of any taxpayer for which no return is required under sections 6011 or 6033(a), on the later of—

(i) The date that a return would be due under section 6033(a) (determined without regard to extensions) if the taxpayer were described in that section, or

(ii) The date on which such taxpayer submits a claim for credit or refund in accordance with paragraph (b) of this section.

(2) In any other case, on the later of—

(i) The due date (determined without regard to extensions) of the return for the taxable year, or

(ii) The date on which such return is filed.

(e) *Denial of double benefit*—(1) *In general.* Under section 6417(e), in the case of an applicable entity or electing taxpayer making an elective payment election with respect to an applicable credit, such credit is reduced to zero and is, for any other purposes of the Code, deemed to have been allowed as a credit to such entity or taxpayer for such taxable year. Paragraphs (e)(2) and (e)(3) of this section explain the application of the section 6417(e) denial of double benefit rule to an applicable entity or electing taxpayer (other than a partnership or S corporation). The application of section 6417(e) for an electing taxpayer that is a partnership or S corporation is provided in § 1.6417–4(c)(1)(ii).

(2) *Application of the Denial of Double Benefit Rule.* An applicable entity or electing taxpayer (other than an electing taxpayer that is a partnership or S corporation) making an elective payment election applies section 6417(e) by taking the following steps:

(i) Compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the GBC, that is payable on the due date of the return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on amount of tax under section 38.

(ii) Compute the allowed amount of GBC carryforwards carried to the taxable year plus the amount of current year GBCs (including current applicable credits) allowed for the taxable year under section 38 (including, for clarity purposes, the ordering rules in section 38(d)). Because the election is made on an original return for the taxable year for which the applicable credit is determined, any business credit carrybacks are not considered when determining the elective payment amount for the taxable year.

(iii) Apply the GBCs allowed for the taxable year as computed under paragraph (e)(2)(ii) of this section, including those attributable to applicable credits as GBCs, against the tax liability computed in paragraph (e)(2)(i) of this section.

(iv) Identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year applicable credit(s) for which the applicable entity is making an elective payment election. Treat the amount of such unused applicable credits as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount).

(v) Reduce the applicable credits for which an elective payment election is made by the amount (if any) allowed as a GBC under section 38 for the taxable year, as provided in paragraph (e)(2)(iii) of this section, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in paragraph (e)(2)(iv) of this section, which results in the applicable credits being reduced to zero.

(3) *Use of applicable credit for other purposes.* The full amount of the applicable credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and calculation of any underpayment of estimated tax under sections 6654 and 6655 of the Code.

(4) *Examples.* The following examples illustrate the rules of this paragraph (e).

(i) *Example 1.* U is a tax-exempt university described in section 501(c)(3) whose fiscal year runs from July 1 to June 30. U places in service P, energy property eligible for a section 48 credit, in June 2024. P is an asset used in connection with its unrelated business. U completes the pre-filing registration in accordance with § 1.6417–5 as an applicable entity that has placed P into service and intends to make an elective payment election with respect to section 48 credits determined with respect to P. U timely files its 2024 Form 990–T on November 15, 2024. On its return, U properly determines that it has $500,000 of Unrelated Business Income Tax (UBIT) under section 512. On its Form 3800 attached to its return, U calculates its limitation of GBC under section 38(c) (simplified) is $375,000 (paragraph (e)(2)(i) of this section). U attaches Form 3468 to claim a section 48 credit of $100,000 with respect to P (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Under paragraph (e)(2)(iii) of this section, the section 48 credit reduces U's UBIT liability to $400,000. U pays its $400,000 tax liability on November 15, 2024. Because there is no unused current year applicable credit, paragraph (e)(2)(iv) of this section does not apply. Under paragraph (e)(2)(v) of this section, the $100,000 of section 48 credit is reduced by the $100,000 of applicable credits claimed as GBCs for the taxable year, which results in the applicable credits being reduced to zero. However, the $100,000 of current year section 48 credit is deemed to have been allowed to U for 2024 for all other purposes of the Code (paragraph (e)(3) of this section).

(ii) *Example 2.* Assume the same facts as in paragraph (e)(4)(i) of this section (*Example 1),* except that U has $80,000 of Unrelated Business Income Tax (UBIT) under section 512, and calculates its limitation of GBC under section 38(c) (simplified) is $60,000 (paragraph (e)(2)(i) of this section). U uses $60,000 of its $100,000 of section

48 credit against its tax liability (paragraph (e)(2)(iii) of this section). U's net elective payment amount is $40,000 (paragraph (e)(2)(iv) of this section). U reduces its applicable credit by the $60,000 claimed against tax in paragraph (e)(2)(iii) of this section and by the $40,000 net elective payment amount determined in paragraph (e)(2)(iv) of this section, resulting in the applicable credit being reduced to zero (paragraph (e)(2)(v) of this section). When the IRS processes U's 2024 Form 990–T, the net elective payment amount results in a $40,000 refund to U. However, for other purposes of the Code, the $100,000 section 48 credit is deemed to have been allowed to U for 2024 (paragraph (e)(3) of this section).

(iii) *Example 3.* V is a city located in the United States that never has Federal income tax liability, so paragraph (e)(2)(i) of this section does not apply. V timely completes pre-filing registration in accordance with § 1.6417–5 as an applicable entity that will be eligible to make an elective payment election, with regard to its annual accounting period ending in 2024, for the credit determined under section 30C(a) from properties A, B, and C; the credit determined under section 45(a) for facility D; the credit determined under section 45U(a) for facility E; the credit determined under section 45W(a) with respect to vehicles F, G, and H; and the credit determined under section 48(a) with respect to property I and J. V timely files its 2024 Form 990–T. V properly completes and attaches the relevant source credit forms and Form 3800 with registration numbers and all required information in the instructions, properly making the elective payment election for all of the credits, and properly determining that the amount of applicable credits determined with respect to A, B, C, D, E, F, G, H, I, and J is $500,000 (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Paragraph (e)(2)(iii) of this section does not apply. Under paragraph (e)(2)(iv) of this section, the entire $500,000 is a net elective payment amount. When the IRS processes V's 2024 Form 990–T, the net elective payment amount results in a $500,000 refund to V. V's elective payment amount is reduced by the net elective payment amount, so all applicable credits for 2024 are reduced to zero. However, for other purposes of the Code, the $500,000 of applicable credits are deemed to have been allowed to V for its annual accounting period ending in 2024 (paragraph (e)(3) of this section).

(iv) *Example 4.* W is a business taxpayer engaged in the manufacturing of components, including eligible components as defined in section 45X(c)(1) at facility F. W completes pre-filing registration in accordance with § 1.6417–5 stating that it intends to elect to be treated as an applicable entity with respect to eligible components produced at F in 2024. In 2024, W timely files its 2024 return electing to be treated as an applicable entity, calculating its federal income tax before GBCs of $125,000 and that its limitation of GBC under section 38(c) (simplified) is $100,000 (paragraph (e)(2)(i) of this section). W attaches Form 7207 to claim a current section 45X credit of $50,000 with respect to eligible components produced at F (its applicable credits). W also attaches Form 5884 to claim a current work opportunity tax credit (WOTC) of $50,000 (WOTC is not an applicable credit). W also completes and attaches Form 3800 which shows the amount of each current credit, including current section 45X credit with registration number, and business credit carryforwards of $25,000 (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Using the ordering rules in sections 38(d), W is allowed $25,000 of the carryforwards, $50,000 of WOTC plus only $25,000 of section 45X credit against net income tax, as defined under section 38(c)(1)(B), leaving $25,000 of tax liability (paragraph (e)(2)(iii) of this section). The $25,000 of unused section 45X credit is the net elective payment amount that results in a $25,000 payment against tax by W (paragraph (e)(2)(iv) of this section). On its return, W shows net tax liability of $25,000 ($125,000 − $100,000 allowed GBC) and the net elective payment of $25,000 which W applied to net tax liability, resulting in zero tax owed on the return. Under paragraph (e)(2)(v) of this section, W's applicable credit is reduced by the $25,000 of section 45X credit claimed as a GBC for the taxable year, as provided in paragraph (e)(2)(iii) of this section, as well as by the $25,000 net elective payment amount determined in paragraph (e)(2)(iv) of this section, resulting in the $50,000 of applicable credit being reduced to zero. However, for all other purposes of the Code, the $50,000 of 45X applicable credits are deemed to have been allowed to W for 2024 (paragraph (e)(3) of this section).

(v) *Example 5.* Assume the same facts as in paragraph (e)(4)(iv) of this section (*Example 4),* except W filed the return on a timely filed extension after the due date of the return (without extensions). Even though W did not owe tax after applying the net elective payment amount against its net tax liability, W may be subject to the section 6655 penalty for failure to pay estimated income tax. The net elective payment is not an estimated tax installment, rather, it is treated as a payment made at the filing of the return.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§ 1.6417–3 Special rules for electing taxpayers.

(a) *In general.* This section relates to the election available to electing taxpayers. An electing taxpayer that makes an elective payment election in accordance with this section is treated as an applicable entity for the duration of the election period, but only with respect to the applicable credit property described in proposed § 1.6417–1(e)(3), (5), or (7), respectively, that is the subject of the election. See paragraphs (b), (c), and (d) of this section for the specific rules regarding taxpayers making an election under section 6417(d)(1)(B), (C), or (D), respectively. See paragraph (e) for rules relating to the making the election. See § 1.6417–4 for special rules related to electing taxpayers that are partnerships or S corporations.

(b) *Elections with respect to the credit for production of clean hydrogen.* An electing taxpayer that has placed in service applicable credit property described in § 1.6417–1(e)(5) (in other words, a qualified clean hydrogen production facility as defined in section 45V(c)(3)) during the taxable year may make an elective payment election for such taxable year (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022), but only with respect to the qualified clean hydrogen production facility, only with respect to the applicable credit described in § 1.6417–1(d)(5) (in other words, the section 45V credit), and only if the pre-filing registration required by § 1.6417–5 was properly completed. An electing taxpayer that elects to treat qualified property that is part of a specified clean hydrogen production facility as energy property under section 48(a)(15) may not make an elective payment election with respect to such facility.

(c) *Election with respect to the credit for carbon oxide sequestration.* An electing taxpayer that has, after December 31, 2022, placed in service applicable credit property described in § 1.6417–1(e)(3) (in other words, a single process train described in § 1.45Q–2(c)(3) at a qualified facility (as defined in section 45Q(d)) during the taxable year may make an elective payment election for such taxable year, but only with respect to the single process train,

only with respect to the applicable credit described in § 1.6417–1(d)(3) (in other words, the section 45Q credit), and only if the pre-filing registration required by § 1.6417–5 was properly completed.

(d) *Election with respect to the advanced manufacturing production credit.* An electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in § 1.6417–1(e)(7) during the taxable year (whether the facility existed on or before, or after, December 31, 2022) may make an elective payment election for such taxable year, but only with respect to the facility at which the eligible components are produced by the electing taxpayer in that year, only with respect to the applicable credit described in § 1.6417–1(d)(7) (in other words, the section 45X credit), and only if the pre-filing registration required by § 1.6417–5 was properly completed.

(e) *Election for electing taxpayers*—(1) *In general.* If an electing taxpayer makes an elective payment election under 1.6417–2(b) with respect to any taxable year in which the electing taxpayer places in service a qualified clean hydrogen production facility for which a section 45V credit is determined, places in service a single process train at a qualified facility for which a section 45Q credit is determined, or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility, respectively, the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in paragraph (e)(3) of this section, but only with respect to the applicable credit property described in § 1.6417–1(e)(3), (5), or (7), as applicable, that is the subject of the election. The taxpayer must otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in paragraph (e)(3) of this section.

(2) *Election is per applicable credit property.* An elective payment election under § 1.6417–2(b) is made separately for each applicable credit property, which is, respectively, a qualified clean hydrogen production facility placed in service for which a section 45V credit is determined, a single process train placed in service at a qualified facility for which a section 45Q credit is determined, or a facility at which eligible components are produced for which a section 45X credit is determined. Only one election may be made with respect to any specific applicable credit property.

(3) *Election period*—(i) *In general.* Except as provided in paragraph (e)(3)(ii) of this section, if an electing taxpayer makes an elective payment election under § 1.6417–2(b) with respect to applicable credit property described in § 1.6417–1(e)(3), (5), or (7) for which an applicable credit is determined under § 1.6417–1(d)(3), (5), or (7), the election period during which such election applies includes the taxable year in which the election is made and each of the four subsequent taxable years that end before January 1, 2033. The election period cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code.

(ii) *Revocation of election.* An electing taxpayer may, during a subsequent year of the election period described in paragraph (e)(3)(i) of this section, revoke the elective payment election with respect to an applicable credit property described in § 1.6417–1(e)(3), (5), or (7), in accordance with forms and instructions. See § 601.602 of this chapter. Any such revocation, if made, applies to the taxable year in which the revocation is made (which cannot be less than a taxable year but may be made for a taxable period of less than 12 months as described in section 443 of the Code) and each subsequent taxable year within the election period. Any such revocation may not be subsequently revoked.

(4) *No transfer election under section 6418(a) permitted while an elective payment election is in effect.* No transfer election under section 6418(a) may be made by an electing taxpayer with respect to any applicable credit under § 1.6417–1(d)(3), (5), or (7) determined with respect to applicable credit property described in § 1.6417–1(e)(3), (5), or (7) during the election period for that applicable credit property. However, if the election period is no longer in effect with respect to an applicable credit property, any credit determined with respect to such applicable credit property can be transferred pursuant to a transfer election under section 6418(a), as long as the taxpayer meets the requirements of section 6418 and the 6418 regulations.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§ 1.6417–4 Elective payment election for electing taxpayers that are partnerships or S corporations.

(a) *In general.* In the case of any applicable credit determined with respect to any applicable credit property described in § 1.6417–1(e)(3), (5), or (7) that is held directly (or treated as held directly because it is held by a disregarded entity) by an electing taxpayer that is a partnership or S corporation, any elective payment election under § 1.6417–2(b) must be made by the partnership or S corporation.

(b) *Elections.* If an electing taxpayer that is a partnership or S corporation makes an elective payment election under § 1.6417–2(b) with respect to any taxable year in which the electing taxpayer places in service applicable credit property described in § 1.6417–1(e)(3) or (5), or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in § 1.6417–1(e)(7), the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in § 1.6417–3(e)(3), but only with respect to the applicable credit property described in § 1.6417–1(e)(3), (5), or (7), respectively, that is the subject of the election. In addition, the taxpayer must otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in § 1.6417–3(e)(3).

(c) *Effect of election*—(1) *In general.* If a partnership or S corporation electing taxpayer makes an elective payment election, with respect to the section 45V, 45Q, or 45X credit—

(i) The Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit, determined in accordance with paragraph (d) of this section (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability);

(ii) Before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated or otherwise allowed to its partners or shareholders) for such taxable year;

(iii) Any amount with respect to which such election is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code;

(iv) A partner's distributive share of such tax exempt income is equal to such partner's distributive share of the otherwise applicable credit for each taxable year, as determined under § 1.704–1(b)(4)(ii);

(v) An S corporation shareholder's pro rata share (as determined under section 1377(a) of the Code) of such tax exempt income for each taxable year (as determined under sections 444 and 1378(b) of the Code) is equal to the S corporation shareholder's pro rata share (as determined under section 1377(a)) of the otherwise applicable credit for each taxable year; and

(vi) Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366 of the Code, as of the date the applicable credit is determined with respect to the partnership or S corporation. (such as, for investment credit property, the date the property is placed in service).

(2) *Electing partnerships in tiered structures.* If a partnership (upper-tier partnership) is a direct or indirect partner of a partnership that makes an elective payment election (electing partnership) and directly or indirectly receives an allocation of tax exempt income resulting from the elective payment election made by the electing partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners' distributive shares of the otherwise applicable credit as provided in paragraph (c)(1)(iv) of this section.

(3) *Character of tax exempt income.* Tax exempt income resulting from an elective payment election by an S corporation or a partnership is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(d) *Determination of amount of the credit*—(1) *In general.* In determining the amount of an applicable credit that will result in a payment under paragraph (c)(1)(i) of this section, the partnership or S corporation must compute the amount of the applicable credit allowable as if an elective payment election were not made. Because a partnership or S corporation is not subject to sections 38(b) and (c) and 469 (that is, those sections apply at the partner or S corporation shareholder level), the amount of applicable credit determined by a partnership or S corporation is not subject to limitation by those sections. In addition, because the only applicable credits with respect to which a partnership or S corporation may make an elective payment election are not investment credits under section 46, sections 49 and 50 do not apply to limit the amount of the applicable credits.

(2) *Example.* The rules of this paragraph (d) are illustrated in the following example. A and B each contributed cash to P, a calendar-year partnership, for the purpose of manufacturing clean hydrogen at V, a qualified clean hydrogen facility that meets the definition of section 45V(c)(3). The partnership agreement provides that A and B share equally in all items of income, gain, loss, deduction and credit of P. P completes the pre-filing registration process with respect to the section 45V credit at V for 2023 in accordance § 1.6417–5. P places V in service in 2023. P timely files its 2023 Form 1065 and properly makes the elective payment election in accordance with §§ 1.6417–2(b),1.6417–3, and 1.6417–4. On its Form 1065, P properly determined that the amount of the section 45V credit with respect to the clean hydrogen produced at V for 2023 is $100,000. The IRS processes P's return and makes a $100,000 payment to P. Before determining A's and B's distributive shares, P reduces the credit to zero. While the $100,000 section 45V credit is deemed to have been allowed to P for 2023 for any other purpose under this title, the credit is not allocated or otherwise allowed to its partners. The $100,000 is treated as tax exempt income for purposes of section 705, and is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). P allocates the tax exempt income from the elective payment election proportionately among the partners based on each partner's distributive share of the otherwise eligible section 45V credit as determined under § 1.704–1(b)(4)(ii). Under that section, if partnership receipts or expenditures give rise to a credit, the partner's interest in the partnership with respect to such credit is in the same proportion as such partners' distributive shares of such receipt, loss, or deduction. Section 45V credits arise based on the amount of clean hydrogen produced at a facility. Under the partnership agreement, A and B share all items equally. Thus, A and B will each be allocated $50,000 of tax exempt income for 2023. P will continue to be treated as an applicable entity with respect to V for taxable years 2024–2027 unless P revokes its election in accordance with § 1.6417–3(e)(3)(ii). At the end of 2023, A and B increase their respective tax bases in their partnership interest and capital accounts by $50,000 each (that is, their share of the $100,000 of tax exempt income).

(e) *Partnerships subject to subchapter C of chapter 63.* For the application of subchapter C of chapter 63 of the Code to section 6417, see § 301.6241–7 of this chapter.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§ 1.6417–5 Additional information and registration.

(a) *Pre-filing registration and election.* An applicable entity or electing taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer must use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number under paragraph (c)(1) of this section or report the registration number on its annual tax return, as defined in § 1.6417–1(b), pursuant to paragraph (c)(5) of this section with respect to an otherwise applicable credit property, is ineligible to receive any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the applicable entity or electing taxpayer is eligible to receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

(b) *Pre-filing registration requirements*—(1) *Manner of pre-filing registration.* Unless otherwise provided in guidance, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior

to, making an elective payment election. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration.* An applicable entity or electing taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making an elective payment election under § 1.6417–2(b) on the applicable entity's or electing taxpayer's annual tax return for the taxable year at issue.

(4) *Each applicable credit property must have its own registration number.* An applicable entity or electing taxpayer must obtain a registration number for each applicable credit property with respect to which it intends to make an elective payment election.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an applicable entity or electing taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The applicable entity's or electing taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity.

(ii) Any additional information required by the IRS electronic portal, such as information regarding the taxpayer's exempt status under section 501(a) of the Code; that the applicable entity is a political subdivision of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory; or that the applicable entity is an agency or instrumentality of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory.

(iii) The taxpayer's taxable year, as determined under section 441 of the Code.

(iv) The type of annual tax return(s) normally filed by the applicable entity or electing taxpayer, or that the applicable entity or electing taxpayer does not normally file an annual tax return with the IRS.

(v) The type of applicable credit(s) for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vi) For each applicable credit, each applicable credit property that the applicable entity or electing taxpayer intends to use to determine the credit for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vii) For each applicable credit property listed in paragraph (b)(4)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of applicable credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the applicable credit property);

(C) Any supporting documentation relating to the construction or acquisition of the applicable credit property (such as State, District of Columbia, Indian Tribal, U.S. territorial, or local government permits to operate the applicable credit property; certifications; evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the applicable credit property is constructed or housed; U.S. Coast Guard registration numbers for offshore wind vessels; and the vehicle identification number of an eligible clean vehicle with respect to which a section 45W credit is determined);

(D) The beginning of construction date and the placed in service date of the applicable credit property.

(E) If an investment-related credit property (as defined § 1.6417–2(c)(3)), the source of funds the taxpayer used to acquire the property; and

(F) Any other information that the applicable entity or electing taxpayer believes will help the IRS evaluate the registration request.

(viii) The name of a contact person for the applicable entity or electing taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either (1) possess legal authority to bind the applicable entity or electing taxpayer or (2) must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative.*

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant.

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid only with respect to the applicable entity or electing taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(3) *Renewing registration numbers.* If an elective payment election will be made with respect to an applicable credit property for a taxable year after a registration number under this section has been obtained, the applicable entity or electing taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for an elective payment election for applicable credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the applicable credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered applicable credit property.

(5) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The applicable entity or electing taxpayer must include the registration number of the applicable credit property on its annual tax return as provided in § 1.6417–2(b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to an applicable credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a

valid registration number on the annual tax return.

(d) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§ 1.6417–6 Special rules.

(a) *Excessive payment*—(1) *In general.* In the case of any elective payment amount which the IRS determines constitutes an excessive payment, the tax imposed on such entity by chapter 1, regardless of whether such entity or taxpayer would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made will be increased by an amount equal to the sum of—

(i) The amount of such excessive payment, plus

(ii) An amount equal to 20 percent of such excessive payment.

(2) *Reasonable cause.* The amount described in paragraph (a)(1)(ii) of this section will not apply to an applicable entity or electing taxpayer if the applicable entity or electing taxpayer demonstrates to the satisfaction of the IRS that the excessive payment resulted from reasonable cause.

(3) *Excessive payment defined.* For purposes of this section, the term *excessive payment* means, with respect to an applicable credit property for which an elective payment election is made under § 1.6417–2(b) for any taxable year, an amount equal to the excess of—

(i) The amount treated as a payment under § 1.6417–2(a)(1)(i) or (a)(2)(i), or the amount of the payment made pursuant to § 1.6417–2(a)(2)(ii), with respect to such applicable credit property for such taxable year, over

(ii) The amount of the credit which, without application of this section, would be otherwise allowable under the Code (as determined pursuant to § 1.6417–2(c) and (e) or § 1.6417–4(d)(1) and (3), and without regard to the limitation based on tax in section 38(c)) with respect to such applicable credit property for such taxable year.

(4) *Example.* This example illustrates the principles of this paragraph (a). B, an instrumentality of state M, places in service in 2023 facility F, which is eligible for the energy credit determined under section 48. B properly completes the pre-filing registration as an applicable entity that will earn the energy credit from F in accordance with § 1.6417–5, and receives a registration number for F. B timely files its 2023 Form 990–T, properly providing the registration number for F and otherwise complying with § 1.6417–2(b). On its Form 990–T, B calculates that the amount of energy credit determined with respect to F is $100,000 and that the net elective payment amount is $100,000. B receives a refund in the amount of $100,000. In 2025, the IRS determines that the amount of energy credit properly allowable to B in 2023 with respect to F (as determined pursuant to § 1.6417–2(c) and (e) and without regard to the limitation based on tax in section 38(c)) was $60,000. B is unable to show reasonable cause for the difference. The excessive payment amount is $40,000 ($100,000 treated as a payment—$60,000 allowable amount). In 2025, the tax imposed under chapter 1 on B is increased in the amount of $48,000 ($40,000 + (20% * $40,000).)

(b) *Basis reduction and recapture*—(1) *In general.* Rules similar to the rules of section 50 (without regard to section 50(b)(3) and (4)(A)(i)) apply for purposes of this section.

(2) *Reporting recapture.* Any reporting of recapture is made on the annual tax return of the applicable entity or electing taxpayer in the manner prescribed by the IRS in any guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit.*

(3) *Example.* This example illustrates the principles of this paragraph (b). In December 2023, G, a government entity, places in service P, which is energy property eligible for the energy credit determined under section 48 (section 48 credit). G properly completes the pre-filing registration in accordance with § 1.6417–5 as an applicable entity to make an election under section 6417 for 2023. G timely files its 2023 Form 990–T in 2024, properly making the elective payment election in accordance with § 1.6417–2 for a section 48 energy credit determined with respect to P. On its Form 990–T, G properly determines that the amount of section 48 credit determined with respect P is $100,000 and that its net elective payment amount is $100,000. The IRS sends G a $100,000 refund. Pursuant to section 50(c), G reduces its basis in P by $50,000. In July 2025, P ceases to be investment credit property with respect to G. Because this occurs before the close of the recapture period set forth in section 50, section 50(a)(1)(A) provides that the tax under chapter 1 for 2025 is increased by the recapture percentage of the aggregate decrease in the credits allowed under section 38 for all prior taxable years which would have resulted solely from reducing to zero any credit determined under subpart E of part IV of subchapter A of chapter 1 with respect to such property. Because P ceased to be investment credit property within 2 full years after P was placed in service, section 50(a)(1)(B) provides that the recapture percentage is 80%. G must properly report the recapture event in 2025, paying an $80,000 tax. Because G is a government entity, G reports the recapture event on a Form 990–T or any Form provided in further guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit.* G's basis in P is increased by $40,000.

(c) *Mirror code territories.* Pursuant to section 6417(f) of the Code, section 6417 and the section 6417 regulations are not treated as part of the income tax laws of the United States for purposes of determining the income tax law of any U.S. territory with a mirror code tax system (as defined in section 24(k) of the Code), unless such U.S. territory elects to have section 6417 and the section 6417 regulations be so treated. The applicable territory tax authority for a U.S. territory determines whether such an election has been made.

(d) *Partnerships subject to subchapter C of chapter 63 of the Code.* See § 301.6241–7(j) of this chapter for rules applicable to payments made to partnerships subject to subchapter C of chapter 63 of the Code for a partnership taxable year.

(e) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 3.** The authority citation for part 301 is amended by adding entries in numerical order for §§ 301.6241–1 and 301.6241–7 to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6241–1 also issued under sections 48D(d), 6241, and 6417.

* * * * *

Section 301.6241–7 also issued under sections 48D(d), 6241, and 6417.

* * * * *

■ **Par. 4.** Section 301.6241–1 is amended by:

■ 1. Adding a sentence after the second sentence of paragraph (a)(6)(iii); and

■ 2. Adding a sentence to the end to the end of paragraph (b)(1).

The additions and revisions read as follows:

§ 301.6241–1 Definitions

(a) * * *

(6) * * *

(iii) * * * Notwithstanding the previous two sentences, any tax, penalty, addition to tax, or additional amount imposed on the partnership under chapter 1 is an item or amount with respect to the partnership. * * *

(b) * * *

(1) * * * The third sentence of paragraph (a)(6)(iii) applies to partnership taxable years ending on or after June 21, 2023. * * *

* * * * *

■ **Par. 5.** Section 6241–7 is amended by:
■ 1. Redesignating paragraph (j) as paragraph (k);
■ 2. Adding new paragraph (j);
■ 3. Revising the first sentence of newly redesignated paragraph (k)(1); and
■ 4. Adding paragraph (k)(3).

The additions and revisions read as follows:

§ 301.6241–7 Treatment of special enforcement matters

* * * * *

(j) *Elections resulting in payments to a partnership.* The IRS may adjust any election that results or could result in a payment to the partnership in lieu of a Federal tax credit or deduction without regard to subchapter C of chapter 63. The IRS may also make determinations, without regard to subchapter C of chapter 63, about the payment itself as well as any partnership-related item relevant to adjusting the election or the payment.

* * * * *

(k) *Applicability date*—(1) *In general.* Except as provided in paragraph (k)(2) (relating to paragraph (b) of this section) and paragraph (k)(3) of this section (relating to paragraph (j) of this section), this section applies to partnership taxable years ending on or after November 20, 2020. * * *

* * * * *

(3) *Elections resulting in payments to a partnership.* Paragraph (j) of this section applies to taxable years ending on or after June 21, 2023.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–12798 Filed 6–14–23; 11:15 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Part V

Department of Homeland Security

48 CFR Parts 3001, 3002, 3004, et al.
Homeland Security Acquisition Regulation; Safeguarding of Controlled Unclassified Information; Final Rule

DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3001, 3002, 3004 and 3052

[HSAR Case 2015–001; DHS Docket No. DHS–2017–0006]

RIN 1601–AA76

Homeland Security Acquisition Regulation; Safeguarding of Controlled Unclassified Information

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Final rule.

SUMMARY: DHS is issuing a final rule to amend the Homeland Security Acquisition Regulation (HSAR) to modify a subpart, remove an existing clause and reserve the clause number, update an existing clause, and add two new contract clauses to address requirements for the safeguarding of Controlled Unclassified Information (CUI). This final rule implements security and privacy measures to safeguard CUI and facilitate improved incident reporting to DHS. These measures are necessary because of the urgent need to protect CUI and respond appropriately when DHS contractors experience incidents with DHS information.

DATES: This final rule is effective July 21, 2023.

FOR FURTHER INFORMATION CONTACT: Shaundra Ford, Procurement Analyst, DHS, Office of the Chief Procurement Officer, Acquisition Policy and Legislation, (202) 447–0056, or email *HSAR@hq.dhs.gov.* When using email, include HSAR Case 2015–001 in the subject line.

SUPPLEMENTARY INFORMATION:

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Table of Abbreviations

ATO Authority to Operate
BAA Buy American Act
CAGE Commercial and Government Entity
CIO Chief Information Officer
COR Contracting Officer's Representative
CSO Chief Security Officer
CUI Controlled Unclassified Information
CVI chemical-terrorism vulnerability information
DHS Department of Homeland Security
DoD Department of Defense
EA Executive Agent
E.O. Executive Order
FAR Federal Acquisition Regulation
FedRAMP Federal Risk and Authorization Management Program
FIPS Federal Information Processing Standards
FISMA Federal Information Security Modernization Act of 2014
FPDS Federal Procurement Data System
FR Federal Register
FRFA final regulatory flexibility analysis
FTE full-time equivalent
FY Fiscal Year
GFE government-furnished equipment
GSA General Services Administration
HIPAA Health Insurance Portability and Accountability Act
HSAR Homeland Security Acquisition Regulation
IRFA initial regulatory flexibility analysis
ISAC Information Sharing and Analysis Center
ISAO Information Sharing and Analysis Organization
IT information technology
NAICS North American Industry Classification System
NARA National Archives and Records Administration
NIST National Institute of Standards and Technology
NPRM notice of proposed rulemaking
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
PCII protected critical infrastructure information
PII Personally Identifiable Information
POA&M Plans of Action and Milestones
POC Point of Contact
PSC Product and Service Code
RFA Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996
SA Security Authorization
SBA Small Business Administration
SME subject-matter expert
SOC Security Operations Center
SP Special Publication
SPII Sensitive Personally Identifiable Information
SRTM Security Requirements Traceability Matrix
SSI Sensitive Security Information
TAA Trade Agreements Act
TSA Transportation Security Administration
UEI Unique Entity Identifier
US–CERT United States Computer Emergency Readiness Team

I. Executive Summary

A. Purpose of the Regulatory Action

The purpose of this final rule is to implement security and privacy measures to safeguard CUI and facilitate improved incident reporting to DHS. This final rule does not apply to classified information. These measures are necessary because of the urgent need to protect CUI and respond appropriately when DHS contractors experience incidents with DHS information. Persistent and pervasive high-profile breaches of Federal information continue to demonstrate the need to ensure that information security protections are clearly, effectively, and

consistently addressed in contracts. This final rule strengthens and expands existing HSAR language to ensure adequate security when: (1) contractor and/or subcontractor employees will have access to CUI; (2) CUI will be collected or maintained on behalf of the agency; or (3) Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. Specifically, the final rule:

- Identifies CUI handling requirements and security processes and procedures applicable to Federal information systems, which include contractor information systems operated on behalf of the agency;
- Identifies incident reporting requirements, including timelines and required data elements, inspection provisions, and post-incident activities;
- Requires certification of sanitization of government and government-activity-related files and information; and
- Requires contractors to have in place procedures and the capability to notify and provide credit monitoring services to any individual whose Personally Identifiable Information (PII) or Sensitive PII (SPII) was under the control of the contractor or resided in the information system at the time of the incident.

B. Legal Authority

This rule addresses the safeguarding requirements specified in the Federal Information Security Modernization Act of 2014 (FISMA) (44 U.S.C. 3551, *et seq.*); Office of Management and Budget (OMB) Circular A–130, *Managing Information as a Strategic Resource;* relevant National Institute of Standards and Technology (NIST) guidance; Executive Order (E.O.) 13556, *Controlled Unclassified Information* (75 FR 68675, Nov. 9, 2010), and its implementing regulation at 32 CFR part 2002; and the following OMB memoranda: M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information;* M–14–03, *Enhancing the Security of Federal Information and Information Systems;* and Reporting Instructions for FISMA and Agency Privacy Management as identified in various OMB memoranda.

C. Costs and Benefits

The final rule will apply to DHS contractors that require access to CUI, collect or maintain CUI on behalf of the Government, or operate Federal information systems, which include contractor information systems operating on behalf of the agency, that collect, process, store, or transmit CUI. DHS estimates the final rule will have an annualized cost that ranges from $15.32 million to $17.28 million at a discount rate of 7 percent and a total 10-year cost that ranges from $107.62 million to $121.37 million at a discount rate of 7 percent. The primary contributors to these costs are the independent assessment requirement and reporting and recordkeeping requirements. There are additional small, quantified costs from rule familiarization and security review processes. DHS was unable to quantify costs associated with incident reporting requirements, PII and SPII notification requirements, credit monitoring requirements and they are therefore discussed qualitatively. DHS was unable to quantify the cost savings or benefits associated with the rule. However, the final rule is expected to produce cost savings by reducing the time required to grant an ATO, reducing DHS time reviewing and reissuing proposals because contractors are better qualified, and reducing the time to identify a data breach. The final rule also produces benefits by better notifying the public when their data are compromised, requiring the provision of credit monitoring services so that the public can better monitor and avoid costly consequences of data breaches, and reducing the severity of incidents through timely incident reporting.

II. Background

DHS published a notice of proposed rulemaking (NPRM) in the **Federal Register** at 82 FR 6429 on January 19, 2017, to implement adequate security and privacy measures to safeguard CUI from unauthorized access and disclosure and facilitate improved incident reporting to DHS. Fourteen respondents submitted public comments in response to the proposed rule. This final rule incorporates the reasoning of the proposed rule except as reflected elsewhere in this preamble.

III. Discussion and Analysis

DHS reviewed the public comments in the development of the final rule. A certain number of the comments received were outside the scope of the rule. A discussion of the comments within the scope of the rule and the changes made to the rule as a result of those comments is provided, as follows:

A. Significant Changes From Proposed Rule

1. HSAR 3052.204–71, *Contractor Employee Access,* is revised as follows:

- Revised paragraph (a) to remove the definition of ''sensitive information'' and replace it with the definition of ''CUI'';
- Revised paragraph (b) to remove the definition of ''information technology resources'' and replace it with the definition of ''information resources'';
- Replaced all references to ''sensitive information'' with ''CUI'' and all references to ''information technology resources'' with ''information resources'';
- Revised paragraph (e) to clarify that both initial and refresher training concerning the protection and disclosure of CUI is required;
- Revised paragraph (g) of Alternate I to make clear that additional training on certain CUI categories may be required if identified in the contract; and
- Replaced the reference to ''statement of work'' in paragraph (h) of Alternate I with ''contract.''

2. Restructured clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* as follows:

- Made the requirements of paragraph (c), *Authority to Operate,* into Alternate I to the basic clause; and
- Made the requirements of paragraphs (f), *PII and SPII Notification Requirements,* and (g), *Credit Monitoring Requirements,* into a separate clause at 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.* This includes clarifying updates to the *PII and SPII Notification Requirements* section.

3. Revised requirements of restructured clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* as follows:

- Made clear that both contractors and subcontractors are responsible for reporting known or suspected incidents to the Department;
- Made clear that subcontractors are required to notify the prime contractor that they have reported a known or suspected incident to the Department;
- Increased the amount of time a vendor must retain monitoring/packet capture data from 90 days to 180 days; and
- Revised the requirements for when prime contractors must include clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* in subcontracts.

4. Made clarifying edits to the definitions of the following terms: *Controlled Unclassified Information, Sensitive Security Information, Homeland Security Agreement Information, Information Systems Vulnerability Information, Personnel Security Information, Privacy Information,* and *Sensitive Personally Identifiable Information.*

5. Made additional amendments to paragraph (b) of clause 3052.212–70 to add clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.*

B. Discussion of Public Comments and Responses

1. General

Comment: Two comments requested that the Department withdraw the proposed rule. One of the comments requested that DHS grant an extension of the comment period if the rule was not going to be withdrawn. The other comment stated that the rule was ill-considered and was not properly coordinated with other agencies that follow and support the principles in 32 CFR part 2002. The comment also stated the rulemaking adds burdens to DHS and its contractors that differ from what is required or expected by others and requested that DHS delay implementation of the entire rule or suspend the rulemaking process altogether pending further progress with the expected general Federal Acquisition Regulation (FAR) CUI rule.[1]

Response: Given the nature of this rule, and the prevalent and persistent nature of cyber-attacks impacting both public and private networks, DHS declines the respondents' request to withdraw this rule. Failure to proceed with this rule places at risk both the Department's CUI and the information systems where CUI resides, which would be in contravention to the Department's mission and to the public interest. In addition, DHS will neither delay nor suspend this rulemaking pending progress on the FAR CUI rule. A 30-day extension of the comment period from March 20, 2017, to April 19, 2017, was granted. Additionally, DHS conducted extensive interagency coordination while developing this rule, including coordination with NARA. Also, the FAR CUI rule does not eliminate the need for DHS to proceed with this rulemaking. DHS is a participant on the FAR team responsible for drafting the FAR language that will implement the CUI Program and has determined that the issuance of a FAR CUI rule does not eliminate the need for DHS to identify its agency-specific requirements for CUI and the methodology it uses to ensure that Federal information systems, which includes contractor information systems operated on behalf of the agency, that collect, process, store, or transmit CUI are adequately protected. Also, DHS does not agree that this rulemaking adds burdens to DHS and its contractors that differ substantively from what is required or expected by other agencies as the requirements for Federal information systems are largely based in statute, *i.e.,* FISMA (44 U.S.C. 3551, *et seq.*), and implementing policies promulgated by OMB and NIST. Agency specific requirements such as an independent assessment and security review are not in conflict with these requirements. They are at the discretion of the agency, considered industry best practices, and are actually becoming more pervasive Governmentwide. Notwithstanding this, DHS has determined that information security is of paramount importance and is prepared to accept the cost impacts stemming from vendor compliance with these requirements.

Comment: One respondent stated that the rule does not clearly articulate how requirements would be applied to professional service providers, what safeguards they would be obligated to provide, or how they would be assessed by DHS.

Response: Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* clearly identifies the requirements applicable to contractors that access or develop CUI under DHS contracts, as well as the information security requirements applicable to Federal information systems, which include contractor information systems operated on behalf of the agency. The applicability of these requirements does not change depending on the type of contractor. As such, there is no need to identify requirements applicable to the subset of contractors that fall within the professional services community.

Comment: One respondent proposed that DHS use a server that requires verification from a higher ranking official so that the information does not enter the wrong hands, such as an extremist group. The respondent also recommended that there should be logins for each official that could be listed on public servers, as long as the server was American, and that citizens trying to access the information should pass a background check to make sure they are not a threat.

Response: The commenter has oversimplified the process by which DHS should ensure CUI is adequately protected, and DHS has made no corresponding changes to the rule. While DHS and its contractors routinely use servers, logins, and passwords to control access on networks and information systems, this is only a subset of the actions required to ensure CUI and the information systems where CUI resides are adequately protected. Making login information publicly available is a violation of information security policy. Also, limiting servers used by the Department and its contractors to those manufactured only in the United States does not ensure the security of the server and violates statutory requirements that govern Federal procurements. DHS, like other Departments and agencies, adheres to FAR part 25, *Foreign Acquisition,* when purchasing supplies. FAR part 25 details the application of the Buy American Act (BAA) and the Trade Agreements Act (TAA), including the dollar thresholds at which the TAA supersedes the BAA and nondomestic trading partners receive equal treatment with domestic sources. Additionally, the Department already has in place background investigation requirements for Federal employees and contractors that have access to CUI. Where the Department has determined access to CUI must be limited to U.S. citizens and lawful permanent residents, DHS policies and regulations already reflect those requirements.

Comment: One respondent stated that the proposed rule is very important considering how open information is in this day and age, adding that this rule will help secure important information about the U.S. Government.

Response: DHS agrees that this rule is important and that its requirements will help ensure the security of important government information.

Comment: One respondent stated that small businesses should be concerned by this rule, citing that DHS acknowledged that the rule is a ''significant'' regulatory action that will impact small business. The respondent stated that there is nothing specific in the rule to assure the small business community that it will be able to comply.

Response: This rule is a ''significant'' regulatory action that will have an impact on small business; however, this comment implies that all small businesses will be impacted equally, which is not the case. Small businesses that routinely provide services to the Government that rely on Federal information systems, which include contractor information systems operated on behalf of an agency, already are positioned to implement these requirements and always have been required to do so under DHS contracts. Information security and information security requirements applicable to Federal information systems are not based on the size of a particular business but rather on the sensitivity of

[1] Rulemaking to implement the National Archives and Records Administration (NARA) CUI program (*see* E.O. 13556 and 32 CFR part 2002).

the information and the impact(s) of unauthorized access to such information. Applying a lesser standard because a business voluntarily operating in this space is considered small would be untenable and in contravention to the mission of the Department. Additionally, it is important to note that DHS's commitment to small business participation is unparalleled, as evidenced by the Department's 12 consecutive ratings of ''A'' or higher on the Small Business Administration's (SBA) Small Business Procurement Scorecard (*see https://www.sba.gov/document/support-department-homeland-security-contracting-scorecard*). The Department expressed in the proposed rule its interest in receiving comments from small business concerns related to this rule and has thoroughly considered and adjudicated all comments received.

Comment: One respondent stated that guidance on DHS CUI requirements for cleared facilities should be consistent with Department of Defense (DoD) cleared facility requirements.

Response: The protection of classified information at contractor locations, whether cleared by DoD or another government agency, is outside the scope of this regulation. CUI is protected according to the underlying law, regulation, or Governmentwide policy. DHS does not have the broad authority to waive CUI safeguarding or dissemination requirements that differ from those of classified information.

Comment: One respondent questioned if the proposed rule covers sharing of information on software vulnerabilities with Information Sharing and Analysis Organizations (ISAOs) or Information Sharing and Analysis Centers (ISACs). The respondent also questioned if the ISAOs or ISACs require flow-down of the clauses to ensure that their members provide adequate protection in accordance with the DHS proposed rule. The respondent stated such a requirement would impose a significant barrier for private sector entities to participate in information sharing.

Response: DHS shares information with ISAOs and ISACs through information sharing agreements between the Government and the ISAO/ISAC, not through contracts. Generally, information sharing agreements do not include the clauses.

2. Alignment With FISMA, E.O. 13556 (Controlled Unclassified Information), and Its Implementing Regulation at 32 CFR Part 2002 (Controlled Unclassified Information)

Comment: Several respondents stated that the proposed rule is not consistent with FISMA, E.O. 13356, and 32 CFR part 2002.

Response: (a) Alignment with FISMA: The rule is fully consistent with FISMA. FISMA and its predecessor, the Federal Information Security Management Act of 2002, require that agency heads provide ''information security protections commensurate with the risk and magnitude of the harm resulting from unauthorized access, use, disclosure, disruption, modification, or destruction of—(i) information collected or maintained by or on behalf of the agency; and (ii) information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of an agency . . . .'' *See, e.g.,* 44 U.S.C. 3554(a)(1)(A). The rule is consistent with these requirements by requiring that information collected or maintained on behalf of the Department and information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of an agency are adequately protected. The rule does this in two ways by identifying: (1) requirements and DHS policies and procedures for handling and protecting CUI collected and maintained on behalf of the Department; and (2) security requirements and procedures for information systems used or operated by a contractor on behalf of an agency.

(b) Alignment with E.O. 13556 and 32 CFR part 2002: The rule is fully consistent with E.O. 13556 and 32 CFR part 2002 (81 FR 63324, Sept. 14, 2016). The NARA CUI rule requires Departments and agencies to develop internal policies and procedures to implement the requirements of the CUI Program.[2] These policies and procedures are subject to review and approval by the CUI Executive Agent (EA) before they are finalized. In addition, the NARA CUI rule establishes baseline information security requirements necessary to protect CUI Basic[3] on nonfederal information systems by mandating the use of NIST Special Publication (SP) 800–171, *Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations,* when establishing security requirements to protect CUI's confidentiality on nonfederal information systems. However, consistent with 32 CFR 2002.14(a)(3) and (g), ''[a]gencies may increase CUI Basic's confidentiality impact level above moderate only internally, or by means of agreements with agencies or non-executive branch entities (including agreements for the operation of an information system on behalf of the agencies).'' Relatedly, 32 CFR 2002.4(c) states that agreements ''include, but are not limited to, contracts, grants, licenses, certificates, memoranda of agreement/arrangement or understanding, and information-sharing agreements or arrangements.'' Therefore, DHS can require a confidentiality impact level above moderate through agreements with non-executive branch entities. Nonetheless, the information system security requirements of this rule are focused on those applicable to Federal information systems.

Comment: One respondent stated that the revisions to the HSAR must be coordinated as part of the DHS implementation of the CUI Program, per the milestones established by CUI Notice 2016–01, *Implementation Guidance for the Controlled Unclassified Information Program.*

Response: CUI Notice 2016–01, *Implementation Guidance for the Controlled Unclassified Information Program,* was superseded by CUI Notice 2020–01, *CUI Program Implementation Guidelines,* issued May 14, 2020. Neither of the CUI Notices provide guidance on coordination of rulemakings. Nonetheless, DHS conducted extensive interagency coordination while developing this rule, including coordination with NARA.

Comment: One respondent stated that the proposed rule federalizes contractor systems that are not used in an

[2] The NARA CUI rule is implemented at 32 CFR part 2002 (81 FR 63324). That regulation describes the executive branch's CUI Program and establishes policy for designating, handling, and decontrolling information that qualifies as CUI. The CUI Program standardizes the way the executive branch handles information that requires protection under laws, regulations, or Governmentwide policies but that does not qualify as classified under E.O. 13526, *Classified National Security Information* (Dec. 29, 2009), or any predecessor or successor order, or the Atomic Energy Act of 1954 (42 U.S.C. 2011, *et seq.*), as amended.

[3] *CUI Basic* is the subset of CUI for which the authorizing law, regulation, or Governmentwide policy does not set out specific handling or dissemination controls. Agencies handle CUI Basic according to the uniform set of controls set forth in 32 CFR part 2002 and the CUI Registry. CUI Basic controls apply whenever CUI Specified ones do not cover the involved CUI. *CUI Specified* is the subset of CUI in which the authorizing law, regulation, or Governmentwide policy contains specific handling controls that it requires or permits agencies to use that differ from those for CUI Basic. The CUI Registry indicates which laws, regulations, and Governmentwide policies include such specific requirements. CUI Specified controls may be more stringent than, or may simply differ from, those required by CUI Basic; the distinction is that the underlying authority spells out specific controls for CUI Specified information and does not for CUI Basic information. CUI Basic controls apply to those aspects of CUI Specified where the authorizing laws, regulations, and Governmentwide policies do not provide specific guidance.

operational capacity on behalf of the Government.

Response: The rule does not federalize contractor systems that are not used in an operational capacity on behalf of the Government. Conversely, it recognizes that there are circumstances when contractor information systems are operated on behalf of an agency. When this is the case, the contractor information system is considered a Federal information system and is subject to the same information system security requirements required for Federal information systems. The rule identifies the security requirements and processes such systems must meet before they are able to operate on behalf of the agency. These requirements are now provided as Alternate I to the basic clause. The rulemaking does not identify any information system security requirements or processes for information systems that are not categorized as Federal information systems. The applicability of the basic clause is not predicated on the type of information system, *i.e.,* Federal or nonfederal. The basic clause is limited to definitions, DHS CUI handling requirements, incident reporting and response requirements, and sanitization requirements. These requirements exist whenever CUI will be accessed or developed under a contract regardless of the type of information system involved in contract performance. This is the reason why the basic clause is more broadly applicable. DHS was intentionally silent in this rule on the requirements applicable to nonfederal information systems as that was never the purpose of this rulemaking, and the FAR CUI rule is intended to address the requirements for these information systems.

Comment: One respondent requested that DHS revise the scope of its rule to clarify or remove the language related to accessing CUI.

Response: Contractors and subcontractors that have access to CUI are responsible for ensuring the information is handled and safeguarded appropriately and reporting any known or suspected incidents regarding the information for which they have access. As such, DHS declines to revise the scope of the rule to clarify or remove language related to accessing CUI.

Comment: One respondent expressed concern that clause 3004.470–3 requires that ''CUI be safeguarded wherever such information resides,'' including on both ''contractor-owned and/or operated information systems operating on behalf of the agency'' as well as ''any situation where contractor and/or subcontractor employees may have access to CUI.'' The respondent also expressed concern that contracting officers are required to insert clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* in all solicitations and contracts where contractor and/or subcontractor employees will have access to CUI and that the clause requires contractors provide ''adequate security to protect CUI,'' which ''includes compliance with DHS policies and procedures in effect at the time of contract award. These policies and procedures are accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors.*'' Another respondent similarly stated that inclusion of these statements improperly subjects all contractors and all contractor information systems to DHS agency-specific standards.

Response: Some of the policies and procedures currently posted to the DHS publicly facing website predate the CUI E.O. and the NARA CUI rule. DHS, like many other Departments and agencies, is still in the process of implementing the CUI Program. This process includes an update to internal policies and procedures related to CUI. Once these policies and procedures have been drafted and finalized, they will replace the policies and procedures currently listed on the publicly facing website. These policies and procedures are required to address all elements of the CUI Program and extend beyond the protection of CUI in information systems. For example, the new policies and procedures also will address training, handling, transmission, marking requirements, incident reporting, etc. The current DHS-specific policies and procedures on the publicly facing website address these requirements and the new policies and procedures will as well. As such, compliance with these policies and procedures is mandatory.

It appears that the respondents have focused on the information system security policies that are incorporated into the rule without also considering the other policies and procedures identified, all of which have varying applicability depending on the specifics of the contract. For example, one of the policies referenced governs the Department's background investigation process and security requirements applicable to individuals who have access to the Department's sensitive but unclassified information, now known as CUI. It is both necessary and appropriate that DHS mandate that its contractors comply with these requirements. Anything less is inconsistent with the mission of the Department, has the potential to place important government information at risk, and is contrary to the public interest. Like many of the other DHS policies referenced, the need to comply with this requirement is based on access to the information, not whether a Federal information system or nonfederal information system will process, store, or transmit the data. Also, the applicability of the information system security policies is specifically defined in the text of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* Specifically, Alternate I, *Authority to Operate,* documents the applicability of *DHS Sensitive Systems Policy Directive 4300A* and *DHS 4300A Sensitive Systems Handbook.* The prescription for Alternate I is clear that these requirements are applicable when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. In addition, the first sentence of proposed paragraph (c), *Authority to Operate,* of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* specifically stated that its requirements are ''applicable only to Federal information systems, which include[ ] contractor information systems operating on behalf of the agency.'' As such, it is clear that it is not the intent of the Department to levy the requirements in these policies and procedures on contractor information systems that are not operated on its behalf. Lastly, the basic clause is limited to definitions, DHS CUI handling requirements, incident reporting and response requirements, and sanitization requirements. These requirements exist whenever CUI will be accessed or developed under a contract regardless of the type of information system involved in contract performance. This is the reason why the basic clause is more broadly applicable.

Also, the statements in paragraph (a) of clause 3004.470–3, *Policy,* are levied on DHS contractors through the inclusion of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* in the solicitation and resultant contract. Absent inclusion of the clause in the contract, the requirements are not applicable.

Comment: One respondent stated that the proposed rule fails to reflect the information systems safeguarding requirements of the CUI Federal regulation (32 CFR part 2002) and allows DHS full discretion on what electronic safeguarding controls to apply to contractors for any category of CUI. The respondent asserted that the

rule makes no distinction operationally in the way nonfederal contractor information systems and DHS agency information systems are treated, a distinction made in the CUI regulation (32 CFR part 2002) and in FISMA.

Response: The respondent is incorrect that the rule: (1) allows DHS full discretion on what electronic safeguarding controls to apply to contractors for any category of CUI; and (2) makes no distinction between nonfederal contractor information systems and the Federal information systems. DHS understands that the information security requirements applicable to Federal information systems differ from the requirements applicable to nonfederal information systems, as referenced in footnote 5 of the proposed rule, which advised that DHS is aware NIST Special Publication 800–171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations, was released in June 2015 to provide federal agencies with recommended requirements for protecting the confidentiality of Controlled Unclassified Information on non-Federal information systems. However, the information system security requirements in this proposed rulemaking are focused on Federal information systems, which include contractor information systems operating on behalf of an agency, and consistent with 32 CFR part 2002, these information systems are not subject to the requirements of NIST Special Publication 800–171.

DHS also makes this distinction in the prescription for Alternate I, *Authority to Operate,* to clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* It specifies that these requirements are applicable when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. Additionally, the first sentence of paragraph (c), *Authority to Operate,* of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* in the proposed rule stated ''[t]his subsection is applicable only to Federal information systems, which include[ ] contractor information systems operating on behalf of the agency.'' As such, the Department has made clear it understands there are differing requirements for nonfederal information systems and has not, through the rule, retained full discretion on what electronic safeguarding controls to apply to contractors for any category of CUI.

Comment: One respondent expressed concerns regarding clause 3004.470–4(a), which states ''subcontractor employee access to CUI or government facilities must be limited to U.S. citizens and lawful permanent residents.'' The respondent stated that this limitation is not a legal requirement and recommended that access to government facilities be treated as a separate and distinct issue from the issue of access to CUI and that access limitations for CUI be based on the associated legal requirement as outlined in the NARA CUI rule.

Response: This recommendation is outside the scope of this regulation. DHS notes that although CUI Basic does not inherently convey citizenship or residency requirements, some of the limited dissemination caveats that can be appended to CUI Basic do. While 32 CFR part 2002 does standardize the safeguarding and dissemination requirements that can be imposed on those with whom CUI is shared, the determination and decision to share CUI information remains subject to agency policy and discretion.

3. Applicability of NIST SP 800–171

Comment: Several respondents raised concerns regarding the applicability of NIST SP 800–171. Some of the respondents correctly recognized that the information system security requirements in the proposed rule are specific to Federal information systems, which include contractor information systems operated on behalf of the Government. These respondents expressed concern that the rule did not address the information system security requirements applicable to nonfederal information systems and requested that DHS identify the information system security requirements applicable to nonfederal information systems either through this rulemaking or another one.

Response: DHS does not accept the suggestion to identify the information system security requirements applicable to nonfederal information systems. The rule is intentionally silent on the security requirements applicable to nonfederal information systems because NARA is working with the FAR Councils, in which DHS is a participant, to develop a FAR CUI rule that addresses the requirements nonfederal information systems must meet before processing, storing, or transmitting CUI. As such, there is no need for the Department to identify requirements applicable to nonfederal information systems in this rulemaking, as inclusion would be duplicative and redundant to the work of the FAR Councils.

Comment: Several respondents did not recognize that the scope of the information system security requirements in the proposed rule were specific to Federal information systems and believed that the Department either conflated the two different categories of information systems (*i.e.,* Federal and nonfederal) or was incorrectly applying requirements for Federal information systems to nonfederal information systems (*i.e.,* contractor information systems that are not operated on behalf of the Department). These respondents either requested that DHS refine the scope of the rule to exclude contractor information systems or explicitly identify NIST SP 800–171 as the applicable security standard for contractor information systems. One respondent stated that the proposed rule requires contracting officers to insert proposed clause 305.204–7X, *Safeguarding of Controlled Unclassified Information,* too often (*i.e.,* any time the contractor or subcontractor will have access to CUI regardless of the type of information system being used).

Response: DHS does not accept the recommendation to modify the scope of the rule to exclude contractor information systems or explicitly identify NIST SP 800–171 as the applicable security standard for such systems. There is a misconception among industry actors that NIST SP 800–171 is the only policy that must be followed when CUI is provided or accessed under a contract. This is not correct. As discussed in the preamble of the proposed rule, OMB Circular A–130, *Managing Information as a Strategic Resource,* makes clear that a contractor information system can be considered a Federal information system if it operates on behalf of an agency. Specifically, Circular A–130 defines a Federal information system as an information system used or operated by an agency or by a contractor of an agency or by another organization on behalf of an agency. In accordance with FISMA, Departments and agencies are responsible for determining when a contractor information system is operated on its behalf. As such, a blanket exclusion of contractor information systems absent a determination of the type of system (*i.e.,* Federal or nonfederal) is not appropriate.

When the Government determines that a contractor information system is being operated on its behalf, that information system is considered a Federal information system and subject to the requirements of NIST SP 800–53, *Security and Privacy Controls for Information Systems and Organizations.*

Alternatively, NIST SP 800–171 is applicable ''(1) when the CUI is resident in a nonfederal system and organization; (2) when the nonfederal organization is *not* collecting or maintaining information on behalf of a federal agency or using or operating a system on behalf of an agency; and (3) where there are no specific safeguarding requirements for protecting the confidentiality of CUI prescribed by the authorizing law, regulation, or governmentwide policy for the CUI category listed in the CUI Registry'' (emphasis original; footnote omitted).

Generally speaking, should the Government determine that a contractor information system is not operated on its behalf, NIST SP 800–171 is applicable. However, consistent with 32 CFR 2002.14(a)(3) and (g), ''[a]gencies may increase CUI Basic's confidentiality impact level above moderate only internally, or by means of agreements with agencies or non-executive branch entities (including agreements for the operation of an information system on behalf of the agencies).'' Relatedly, 32 CFR 2002.4(c) states that agreements ''include, but are not limited to, contracts, grants, licenses, certificates, memoranda of agreement/arrangement or understanding, and information-sharing agreements or arrangements.'' Therefore, Departments and agencies can require a confidentiality impact level above moderate for nonfederal information systems through agreements with non-executive branch entities. Nonetheless, the information system security requirements of this rule, including those in *DHS Sensitive Systems Policy Directive 4300A* and *DHS 4300A Sensitive Systems Handbook,* are specific to Federal information systems.

As stated in the preamble of the proposed rule, the Government believed that requirements of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* were written in such a way that they would be self-deleting when they are not applicable to a solicitation or contract. For example, the first sentence of paragraph (c), *Authority to Operate,* of the proposed clause stated ''[t]his subsection is applicable only to Federal information systems, which include[ ] contractor information systems operating on behalf of the agency.'' This section of the clause also defined the applicability of *DHS Sensitive Systems Policy Directive 4300A* and *DHS 4300A Sensitive Systems Handbook,* making clear these policies are applicable only to Federal information systems. Additional examples include language for the notification and credit monitoring requirements stating that the applicability is limited to incidents involving PII or SPII. The remaining requirements of the proposed clause did not include any caveats on their applicability because compliance with them is mandatory regardless of the type of information system (*i.e.,* Federal information system or nonfederal information system).

However, DHS believes the concerns raised regarding proper understanding of the applicability of the requirements of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* are legitimate. In response, DHS has: (1) made the requirements of paragraph (c), *Authority to Operate,* Alternate I to the basic clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information;* and (2) made the requirements of paragraphs (f), *PII and SPII Notification Requirements,* and (g), *Credit Monitoring Requirements,* a separate clause at 3052.204–7Y titled *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.* As a result of these changes, basic clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* is limited to the following provisions: paragraphs (a), *Definitions;* (b), *Handling of Controlled Unclassified Information;* (c), *Incident Reporting Requirements;* (d), *Incident Response Requirements;* (e), *Certification of Sanitization of Government and Government-Activity-Related Files and Information;* (f), *Other Reporting Requirements;* and (g), *Subcontracts.* Compliance with these requirements is mandatory regardless of the information system type (*i.e.,* Federal information system or nonfederal information system). Alternate I to the basic clause is applicable when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. New clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* is applicable to solicitations and contracts where a contractor will have access to PII. These changes were made to: (1) ensure that DHS contractors clearly understand the scope and applicability of the various requirements contained in proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information;* (2) make clear that the Authority to Operate (ATO) requirements of the clause are only applicable to Federal information systems, which include contractor information systems operated on behalf of the agency; and (3) ensure that DHS contractors understand credit monitoring and notification requirements are only applicable when the solicitation and contract require contractor access to PII.

Comment: Several respondents raised concerns about footnote 5 in the proposed rule. The footnote advised that DHS is aware NIST Special Publication 800–171, Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations, was released in June 2015 to provide federal agencies with recommended requirements for protecting the confidentiality of Controlled Unclassified Information on non-Federal information systems. However, the information system security requirements in this proposed rulemaking are focused on Federal information systems, which include contractor information systems operating on behalf of an agency, and consistent with 32 CFR part 2002, these information systems are not subject to the requirements of NIST Special Publication 800–171.

One respondent interpreted the footnote to mean that DHS believes NIST SP 800–171 is applicable to nonfederal entities that handle, process, use, share, or receive CUI. One respondent raised concerns that the proposed rule was not consistent with the footnote because the rule requires in clause 3004.470–3(a) that CUI be safeguarded in ''any situation where contractor and/or subcontractor employees may have access to CUI.'' Another respondent stated that the footnote downplays the applicability of NIST SP 800–171 and implies that the guidance is for the more limited set of systems covered by NIST SP 800–53. The same respondent advised that in other parts of the rule, contractors' internal business systems that do fall under the provisions of NIST SP 800–171 are specifically called out. Specific actions requested include:

- Moving the content of footnote 5 to the *Background* section to improve the clarity of the scope of the rule and avoid unnecessary misinterpretations and misunderstandings;
- Making clear that the proposed rule does not apply to contractor information systems;
- Clarifying that the ''adequate security'' requirements of the rule do not apply to internal contractor information systems that are not operated on behalf of an agency, and stressing that the use of sanitization procedures for CUI spills onto internal contractor information systems, instead of requiring ''adequate security''

implementation on systems ''regardless of where'' the CUI may reside; and

• Clarifying that contractors are not responsible for implementing the ''adequate security'' requirements on government-furnished equipment (GFE) that contractors operate in their own internal contractor environment, unless specifically agreed between the DHS procuring activity (*i.e.,* contracting office) and the contractor.

Response: There appears to be a misunderstanding within industry regarding the applicability of NIST SP 800–171. Categorization as a nonfederal entity does not mean the security requirements for information systems used by a nonfederal entity default to those provided for in NIST SP 800–171. The Government must first determine if the contactor information system is operated on its behalf, thus making the information a Federal information system. If the Government determines the contractor information system is operated on its behalf, then the system is required to comply with NIST SP 800–53. Generally speaking, if the Government determines that the contractor information system is not operated on its behalf, NIST SP 800–171 is applicable. The Government's determination of the type of system, Federal versus nonfederal, must be made before any decision can be made on the security requirements applicable to the information system.

Commenters are incorrect in stating that the proposed rule is not consistent with the footnote by requiring that CUI be safeguarded in ''any situation where contractor and/or subcontractor employees may have access to CUI.'' CUI is required to be handled properly and adequately safeguarded at all times. As previously stated, it appears that the respondents have focused on the information system security policies that are incorporated into the rule with no regard for the other policies and procedures identified, all of which have varying applicability depending on the specifics of the contract. The only requirement in proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* applicable to information systems was paragraph (c), *Authority to Operate.* The remaining requirements of the proposed clause, namely paragraphs (b), *Handling of Controlled Unclassified Information,* (d), *Incident Reporting Requirements,* (e), *Incident Response Requirements,* (f), *PII and SPII Notification Requirements,* (g), *Credit Monitoring Requirements,* (h), *Certificate of Sanitization of Government and Government-Activity-Related Files and Information,* (i), *Other Reporting Requirements,* and (j), *Subcontracts,* are applicable regardless of the type of information system (*i.e.,* Federal or nonfederal), as well as when information systems are not used and only paper documents are available under the contract. *DHS Sensitive Systems Policy Directive 4300A* and *DHS 4300A Sensitive Systems Handbook* are only applicable to Federal information systems. The prescription for Alternate I is clear that the ATO requirements are applicable only when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. Additionally, the proposed rule made clear this point by specifically stating in the first sentence of paragraph (c), *Authority to Operate,* of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* that the ''subsection is applicable only to Federal information systems, which include[ ] contractor information systems operating on behalf of the agency.''

The footnote is no longer included in the rule and DHS has provided significant information regarding the applicability of NIST SP 800–171 throughout the *Discussion and Analysis* section of the rule. These statements not only address the applicability of the publication to nonfederal information systems, but they also address the ability of Departments and agencies to increase CUI Basic's confidentiality impact level above moderate on nonfederal systems (*i.e.,* beyond the requirements of NIST SP 800–171), pursuant to the terms of an agreement as provided for in 32 CFR part 2002.

DHS declines the recommendation to clarify that the rule is not applicable to contractor information systems. As previously stated, the only requirement in the proposed rule specific to information systems was paragraph (c), *Authority to Operate,* in clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information;* in this final rule, the requirements of that paragraph have been made into Alternate I to the basic clause. All the other requirements are applicable regardless of the type of information system (*i.e.,* Federal or nonfederal), as well as when information systems are not used, making the requirements applicable to contractors that access or develop CUI under DHS contracts. Also, absent a determination of the status of the contractor information system as Federal or nonfederal, it would be inappropriate for DHS to state that the rule is not applicable to contractor information systems.

DHS declines the recommendation to clarify that the ''adequate security'' requirements of the rule do not apply to internal contractor information systems that are not operated on behalf of an agency, and stress that the use of sanitization procedures for CUI spills onto internal contractor information systems, instead of requiring ''adequate security'' implementation on systems ''regardless of where'' the CUI may reside. The requirement for adequate security is not solely specific to information systems. Adequate security includes ensuring security protections are applied commensurate with the risk resulting from unauthorized access, use, disclosure, disruption, modification or destruction of the information. It also includes ensuring information contractors and subcontractors host on information systems on behalf of the agency, as well as information systems and applications used by the agency, operate effectively and provide appropriate protections related to confidentiality, integrity, and availability.

Additionally, paragraph (b)(1) of clause 305.204–7X, *Safeguarding of Controlled Unclassified Information,* requires contractors and subcontractors to provide adequate security to protect CUI from unauthorized access and disclosure. This includes complying with DHS policies and procedures, accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors,* in effect when the contract is awarded.

A review of the policies and procedures on the referenced website would demonstrate that the applicability of the various policies and procedures depends on the requirements of each contract, including the type(s) of CUI accessed or developed under the contract. In addition, the clause makes clear that the information system security policies and procedures on the website are only applicable to Federal information systems. Also, the respondent is incorrect that internal contractor information systems that are not operated on behalf of the agency should not be required to have adequate security. If such a system includes the Department's CUI, it is imperative that adequate security of the system be maintained. Nonetheless, the information system security requirements of this rule are limited to Federal information systems. The purpose of this rule is the safeguarding of CUI, so it would be inappropriate to assert that DHS was attempting to apply security standards to contractor information systems that do not contain CUI. Also, ''CUI spills onto internal

contractor information systems'' are considered incidents and are subject to the incident reporting and response requirements of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.*

DHS declines the recommendation to clarify that contractors are not responsible for implementing the ''adequate security'' requirements on GFE that contractors operate in their own internal contractor environment, unless specifically agreed between the DHS procuring activity and the contractor. Clause 3052.204–7X *Safeguarding of Controlled Unclassified Information,* is clear on the applicability of the information system security requirements and, as such, there is no need to state within the text of the clause that the requirements are not applicable to GFE.

4. ATO Requirements

Comment: One respondent stated that it appears as if the requirements of paragraph (c)(1)(i) of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* would apply only to an information system that is in development and the security authorization (SA) package must be submitted before the system goes operational.

Response: The respondent is partially correct. The SA package must be submitted and ATO granted before a Federal information system, which includes a contractor information system operated on behalf of the agency, can be used to collect, process, store, or transmit CUI. However, the requirement for submission of a SA package is not limited to information systems that are under development. Whether the Federal information system is under development or already in existence, before it can be used to collect, process, store, or transmit CUI it must receive an ATO from DHS and the requirements for submission of the SA package must be met.

Comment: The same respondent questioned if the ATO requirements are applicable to nonfederal information systems. If so, the respondent stated that the clause should state when the SA package for these systems must be submitted as well as clarify the applicability of the independent assessment and which standard (*i.e.,* NIST SP 800–53 or NIST SP 800–171) will be used to determine compliance.

Response: The prescription for Alternate I identifies that these requirements are applicable when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. Additionally, the first sentence of paragraph (c), *Authority to Operate,* in proposed clause 3052.204–7X, *Safeguarding Controlled Unclassified Information,* stated ''[t]his subsection is applicable only to Federal information systems, which include[ ] contractor information systems operating on behalf of the agency.'' As such, the information system security requirements of the clause are applicable only to Federal information systems. As previously stated, DHS is intentionally silent on the requirements applicable to nonfederal information systems as the FAR CUI rule is intended to address the requirements for these information systems. Inclusion of such requirements in this rule would be duplicative and redundant to the work of the FAR Councils.

Comment: One respondent stated that the proposed clause could be interpreted to require that contractors meet the security requirements of NIST SP 800–53 when safeguarding CUI at DHS prior to collecting, processing, storing, or transmitting CUI. The respondent also stated that a contractor will need to have gone through the DHS ATO process and demonstrated its capabilities to meet the requirements of the proposed clause. The respondent raised concerns that such a process thwarts the ''do once, use many'' efficiencies established under the Federal Risk and Authorization Management Program (FedRAMP). Additionally, the respondent stated that absent definitive guidance on the timing of the ATO, unnecessary expenses may be incurred by potential offerors, or competition may be needlessly stifled, precluding access to best commercial solutions and innovative new technology.

Response: Consistent with FISMA and its implementing Governmentwide policies, Federal information systems, which include contractor information systems operated on behalf of the Government, are required to receive an ATO before they can collect, process, store, or transmit Federal information. This requirement does not mean that a contractor's information system must have received an ATO from the Department before a contractor responds to a DHS solicitation. To require a contractor to obtain an ATO before contract award is costly and unnecessarily burdensome, and it could potentially place contractors in the position to incur costs that they would have no possibility to recoup. Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* documents the timeline and process contractors must comply with to receive an ATO from the Department and it is clear that this process takes place after a contract award is made.

Comment: One respondent asserted that DHS should tie new regulatory requirements on cybersecurity controls to FedRAMP. Another respondent stated that the rule does not recognize or accommodate the use of cloud services.

Response: FedRAMP addresses requirements for cloud computing. To the extent a contractor is proposing a cloud solution to the Department, DHS would comply with FedRAMP policies and procedures. This includes the expectation that contractors would rely on the documents the cloud service provider used to obtain its provisional ATO under FedRAMP and modify them to reflect any additional requirements necessary to provide the specific services required by the Department.

Comment: One respondent stated that the proposed process will impose significant responsibilities on DHS, will require a great expense to the contractor, and will end up limiting competition.

Response: DHS recognizes there are significant costs associated with these requirements; however, the persistent and prevalent nature of cyber-attacks on both government and private sector networks has shown that this is a necessary expense. DHS fully expects its contractors to reflect these costs in the price and cost proposals they submit to the Department.

Comment: Two respondents raised concerns regarding the applicability of the rule to contracts awarded using the procedures of FAR part 12, *Acquisition of Commercial Items.* The respondents stated that applying the requirements of the rule to contracts awarded under the procedures of this FAR part impact the Department's access to innovative technology and increase the number of obstacles to market entry to the DHS supply chain for these companies as well as new start-ups with innovative technical ideas. The respondents recommended that DHS exclude commercial items from the requirements of the rule.

Response: DHS relies extensively on commercial contractors to provide services that include access to and the processing, storing, and transmitting of CUI. Eliminating this large pool of contractors from compliance with these requirements is untenable. It is not only inconsistent with the mission of the Department, but it is also contrary to the public interest. DHS has determined that the costs associated with compliance with the security requirements of this rule are a necessary

expense to ensure DHS CUI is adequately protected.

Comment: One respondent recommended that DHS specify if the Department will be the arbiter of compliance or if contractor self-assessments will suffice, the latter of which is the preference of the respondent.

Response: Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* is clear that a contractor operating a Federal information system, which includes a contractor information system operated on behalf of the agency, must receive an independent assessment. Specifically, the clause requires contractors have an independent third party validate the security and privacy controls in place for the information system(s). Validation includes reviewing and analyzing the SA package and reporting on technical, operational and other deficiencies as outlined in NIST Special Publication 800–53, Security and Privacy Controls for Information Systems and Organizations. Deficiencies must be addressed before the SA package is submitted to the COR for review. DHS will review the independent assessment and, in conjunction with its own analysis, determine if an ATO should be granted.

Comment: One respondent recommended if DHS will be responsible for determining if a contractor has implemented adequate security that the rule clarify how any determination of adequacy will be made. The respondent requested that the authority be placed at a level higher than the contracting officer, such as the Chief Information Officer (CIO), to ensure a more uniform application across DHS. The respondent also recommended that DHS include further guidance on this subject on the cited website to explain to contractors how this standard will be applied.

Response: Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* consistently has identified that the Component or Headquarters CIO, or designee, is responsible. Alternate I, which incorporates paragraph (c) of the proposed clause, states that ''[t]he Contractor shall not collect, process, store, or transmit CUI within a Federal information system until an ATO has been granted by the Component or Headquarters CIO, or designee.'' Alternate I makes clear that these requirements are only applicable to Federal information systems and the Component or Headquarters CIO, or designee, is responsible for determining if a contractor has implemented adequate security.

DHS declines the recommendation to add further guidance on this topic on the publicly facing website. Adequate security means ensuring security protections are applied commensurate with the risk resulting from unauthorized access, use, disclosure, disruption, modification or destruction of the information. It also includes ensuring information contractors and subcontractors host on information systems on behalf of the agency, as well as information systems and applications used by the agency, operate effectively and provide appropriate protections related to confidentiality, integrity, and availability.

Additionally, paragraph (b)(1) of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* requires contractors and subcontractors to provide adequate security to protect CUI from unauthorized access and disclosure. This includes complying with DHS policies and procedures, accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors,* in effect when the contract is awarded.

As it relates to the information system security portion of the adequate security requirements, the process to obtain an ATO is clearly described in the text of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* The remaining adequate security requirements are documented in the policies and procedures on the publicly facing website. As such, no additional guidance on adequate security is required.

Comment: One respondent recommended that DHS establish mechanisms through which contractors can obtain sufficient clarity during the proposal stage both to determine whether CUI will be processed under the contract and, if yes, to assess whether they can comply with such safeguarding obligations.

Response: DHS shared this concern when developing the proposed rule and indicated as such in the preamble of the proposed rule by stating that feedback from industry consistently has indicated the need for transparency and clear and concise requirements as it relates to information security. This concern led DHS to establish in the proposed rule a process by which DHS contractors will be aware of the security requirements they must meet when responding to DHS solicitations that require a contractor to collect, process, store, or transmit CUI. Previously, information security requirements were either embedded in a requirements document (*i.e.,* Statement of Work, Statement of Objectives, or Performance Work Statement) or identified through existing clause 3052.204–70, *Security Requirements for Unclassified Information Technology Requirements.* This approach: (1) created inconsistencies in the identification of information security requirements for applicable contracts; (2) required the identification and communication of security controls for which compliance was necessary after contract award had been made; and (3) resulted in delays in contract performance. Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* substantially mitigates the concerns with DHS's previous approach. Through the government-provided Security Requirements Traceability Matrix (SRTM), contractors will know at the solicitation level the security requirements with which they must comply. The SRTM identifies the security controls that must be implemented on an information system that collects, processes, stores, or transmits CUI and that are necessary for the contractor to prepare its SA package. Clear identification of these requirements at the solicitation level affords contractors the ability to: (1) assess their qualifications and ability to fully meet the Government's requirements; (2) make informed business decisions when deciding to compete on the Government's requirements; and (3) engage subcontractors, if needed, early in the process to enable them to be fully responsive to the Government's requirements. The rule states that ''[t]he SA package shall be developed using the government-provided Security Requirements Traceability Matrix and SA templates.'' Any concerns regarding the SRTM can be raised and resolved using traditional solicitation processes.

Comment: One respondent recommended that DHS consider implementing a review process for ensuring that contractors can propose alternative, but equally effective, controls, an approach used by DoD in its information safeguarding rulemaking. The respondent recommended that the process also include a procedure through which contractors can obtain confirmation that a particular control is unnecessary. The respondent also recommended that DHS clarify the process for making such determinations and that contractors be permitted to make such determinations on an individual basis.

Response: DHS declines these recommendations given that the ability for a contractor to engage on security measures included in the SRTM, which includes the applicability of the control

and implementation method, is inherent in the Department's SA process. In addition, because the SRTM will be included in all applicable solicitations, any concerns regarding the SRTM can be raised and resolved using traditional solicitation processes. As such, there is no need to add language to the clause to identify this capability.

Comment: One respondent stated that the government-supplied SRTM has the potential to be a useful tool to help ensure its members' ability to be responsive to the Government's security requirements. The respondent was unclear whether an SRTM will be provided with each solicitation or only in cases where a contractor will be operating an information technology (IT) system on behalf of the Government. The respondent requested that all DHS solicitations include: (1) a description of whether CUI Basic and/or CUI Specified information will be collected, processed, stored, or transmitted by the contractor on behalf of DHS during the course of the project; and (2) a list of applicable security requirements, including any requirements for CUI Specified information that must be protected on nonfederal information systems at higher than the CUI Basic ''moderate'' confidentiality level of the NIST SP 800–171 standards.

Response: The information system security requirements in this rule are focused on those applicable to Federal information systems, which include contractor information systems operated on behalf of the agency. As previously stated, the requirements applicable to nonfederal information systems will be addressed in the FAR CUI rule, and as such, they are not addressed in this rulemaking. For the purposes of the information systems subject to this rulemaking, an SRTM will be included in all applicable solicitations using the controls from NIST SP 800–53. The type(s) of CUI provided and/or developed under the contract also will be identified in the solicitation. Apart from using NIST SP 800–171 as a baseline for the security controls, DHS does not anticipate a change to the process of providing an SRTM and identifying the type(s) of CUI provided or developed under a contract where nonfederal information systems are used. However, this process cannot be fully defined until the FAR CUI rule is finalized.

Comment: One respondent raised concerns regarding the security review requirements of paragraph (c)(3) of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* The respondent stated that proper control of information is already outlined in the applicable law, regulation, and Governmentwide policy that applies to that information and that compliance with contract terms is already included in agreement terms. The commenter requested that DHS take an approach similar to DoD and either use existing FAR processes and procedures to facilitate these requirements or identify them at the contract level in lieu of specifying the requirements in the clause.

Response: The ability to perform periodic security reviews is an important mechanism for the Department to consistently ensure contractors are and remain compliant with the security requirements contained in their contracts. This is borne out by the prevalent and persistent nature of cyber-attacks against both public and private networks and information systems. Although the Department is reserving the right to perform random security reviews, the Department will be judicious in its use and will coordinate appropriately with contractors to ensure operations are not unduly impacted. It is also important to note that reciprocity among agency regulations is outside the scope of this rule.

5. CUI Registry

Comment: Several respondents raised concerns that the rule proposed included categories of CUI that are not included in the CUI Registry maintained by NARA. In support of these concerns, respondents cited various sections of 32 CFR part 2002, such as ''[a]gencies may use only those categories or subcategories approved by the CUI EA [established by E.O. 13556 as NARA] and published in the CUI Registry to designate information as CUI.'' 32 CFR 2002.12(b).

Response: Based on the number of comments related to DHS's inclusion of new categories and subcategories of CUI in the proposed rule, it appears there is: (1) a misperception among our industry partners that the CUI Registry cannot change; and (2) a misunderstanding of the process by which agencies can add new categories to the CUI Registry. The categories and subcategories of information in the CUI Registry are not static. E.O. 13556, *Controlled Unclassified Information,* establishes a process to add new categories and subcategories of CUI. DHS's addition of new CUI categories and subcategories is in line with the procedures established by E.O. that require that the category or subcategory of information be in a law, regulation, or Governmentwide policy. DHS proposed the new categories and subcategories of CUI through the regulatory process (*i.e.,* its NPRM) and received provisional approval from NARA for the proposed categories. As a result of this approval, these categories now appear in the CUI registry.

Comment: One respondent advised that restating CUI categories increases administrative burdens. The same respondent also raised concerns that paragraph (b), *Handling of Controlled Unclassified Information,* of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* refers contractors back to DHS policies and procedures and advised that DHS should instead refer contractors to the CUI Registry and avoid duplicative descriptions of CUI. The respondent also stated that DHS defined Operations Security Information too broadly and that it could be interpreted to include almost any information. Multiple respondents raised the same concern about the Department's definition of Homeland Security Agreement Information. One respondent stated that the definition is vague and overly broad and does not comport with either the definition of CUI set forth in 32 CFR part 2002 or the categories or subcategories of CUI included in the CUI Registry, while other respondents stated that the definition allows DHS to determine what Homeland Security Agreement Information is on a case-by-case basis in individual contracts. Another stated that the parameters for Homeland Security Agreement Information are very uncertain and seemingly could apply to any information included in such agreements.

Response: The CUI Registry does not describe safeguarding and dissemination requirements in sufficient detail to allow for general users to properly protect information without supplemental guidance. In most instances, it is only a citation of a law, regulation, or Governmentwide policy. With regard to Operations Security Information, the definition used in this regulation has been updated and is derived from the definition ''Operations Security (OPSEC)'' from National Security Presidential Memorandum 28, which was issued in January 2021. While agreeing that the category is broad, DHS also believes it necessary, much like other similarly broad categories, such as privacy and law enforcement information. DHS is unable to address it solely in specific contracts or project guidance as such a practice would by definition be an ad-hoc agency practice existing outside of a law, regulation, or Governmentwide policy and, thus, contrary to E.O. 13556.

Instead, DHS opted to define this protection within the scope of this regulation.

With regard to Homeland Security Agreement Information, in furtherance of the Department's core missions of (1) preventing terrorism and enhancing security, (2) securing and managing the borders, (3) ~~Homeland Security Agreement Information~~ enforcing and administering immigration laws, (4) safeguarding and securing cyberspace, and (5) ensuring resilience to disasters, DHS enters into thousands of information sharing agreements with State, local, and private sector entities. The information being shared is often sensitive, thus requiring protections from public disclosure, but does not easily fall into one of the other CUI categories. DHS has historically protected this information as For Official Use Only, the DHS precursor to the CUI regime. While the definition of Homeland Security Agreement Information is admittedly broad, fulfilling core DHS missions while protecting sensitive information shared with DHS by our nonfederal partners requires such flexibility. DHS finalizes the CUI categories as proposed and declines to make changes in response to public comments.

Comment: One respondent stated the rule does not discuss who has the responsibility to identify or designate DHS CUI; whether any safeguarding obligations also apply to other categories or subcategories of CUI as listed in the CUI Registry; what relationship must exist between the presence of information that could be CUI and a contractual obligation to DHS; or how the agency will respond, advise, or adjudicate any questions as to application, administration, implementation, or enforcement of the safeguarding obligation.

Response: The purpose of this rulemaking is to clearly identify contractor responsibilities with respect to safeguarding CUI and identify security requirements and processes applicable to Federal information systems, which include contractor information systems operated on behalf of the Government. Identification of individuals/organizations within the Department responsible for designating CUI and safeguards applicable to CUI does not achieve this end. Also, a specific process on how the agency will respond, advise, or adjudicate any questions as to application, administration, implementation, or enforcement of the safeguarding obligation is also unnecessary. Should an issue or concern arise, it can be handled through traditional contract administration practices.

6. DHS Internal Policies and Procedures

Comment: One respondent expressed concern that the ''adequate security'' requirements in paragraph (b), *Handling of Controlled Unclassified Information,* in clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* refer to security standards in DHS-specific documents (as opposed to security standards designed for use across the executive branch) that are hosted on a DHS website. The respondent expressed concern that DHS may unilaterally change these security standards from time to time, causing significant adverse effects to contractors without giving them a meaningful opportunity to comment on these changes. Based on this concern, the respondent proposed the following revision (revision in bold type):

> Adequate security includes compliance with DHS policies and procedures in effect at the time of contract award. These policies and procedures are accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors.* **Changes to policies and procedures will be identified by version controls and implementations of these new versions will only occur after the contractors affected by the change are allowed time to comment on changes that will affect a contract's cost and/or schedule.**

Response: DHS does not accept the recommendation to add language to clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* documenting how and when updates to the Department's policies and procedures will be handled after a contract has been awarded. DHS employs version control on all internal policies and procedures. Contractors are not afforded the opportunity to comment on internal policies and procedures of Federal agencies when they are developed or when they are updated. Any impacts to DHS contractors as a result of updates to policies and procedures will be handled through the normal contract administration process, which already allows a contractor to assess the impact of the change and request consideration from the Government prior to implementation of the change. As such, there is no need to add specific language in the clause allowing a contractor to review and assess impacts to contract schedules and costs.

7. Definitions

Comment: Multiple respondents requested that DHS include the definition of ''on behalf of an agency'' consistent with 32 CFR part 2002. Another respondent stated that the rule does not clearly define the term ''nonfederal information system'' as storing or handling CUI only incidental to providing a service or product to the Government, nor does it apply ''on behalf of an agency'' in a manner consistent with 32 CFR part 2002.

Response: DHS intentionally excluded the ''on behalf of an agency'' definition provided in the NARA CUI rule from this rulemaking. The phrase ''on behalf of an agency'' is already rooted in statute and is used extensively in FISMA. FISMA designates the Director of the OMB as being responsible for ''developing and overseeing the implementation of policies, principles, standards, and guidelines on information security. . . .'' 44 U.S.C. 3553(a)(1). As such, any definition of the phrase ''on behalf of an agency'' must be provided in FISMA policy and guidance issued by OMB after going through the appropriate interagency coordination process to assess the wide-ranging implications of defining this term. In the case of the NARA CUI rule, that has not happened. In addition, the NARA CUI rule addresses a small subset of the issues covered by FISMA. For example, FISMA applies to all information, not just CUI. In addition, FISMA requires agencies to provide information security protections related to the integrity, confidentiality, and availability of all information (including CUI). The NARA CUI rule relates only to a subset of these concerns, specifically confidentiality of CUI.

The rule defines a Federal information system as ''an information system used or operated by an agency or by a Contractor of an agency or by another organization on behalf of an agency.'' This definition was taken directly from OMB Circular A–130. Defining a Federal information system is sufficient for the purposes of this rulemaking as an information system, in the context of this rule, is either Federal or nonfederal. Including a definition of a nonfederal information system is not necessary as it logically follows that a nonfederal information system is the opposite of a Federal information system. Also, ''nonfederal information system'' is not defined in Governmentwide policy. Lastly, the information system security requirements of this rule are limited to Federal information systems.

8. Reciprocity in Interagency Regulations and Information Security Requirements

Comment: Multiple respondents raised concerns that the requirements of the rule are not the same as other rules related to CUI issued by other Departments and agencies, such as DoD,

and requested that DHS revise this rule to be consistent with those rules. Respondents also stated that there is a lack of consistency between DHS and DoD incident reporting requirements on what constitutes timely reporting of breaches. Because companies often do work for multiple Federal agencies, the respondent stated that it is important to have a consistent approach Governmentwide so that companies can set up a single compliant system and process.

Response: Reciprocity in information security policies and regulations and incident reporting requirements among Departments and agencies is outside the scope of this regulation. The purpose of this rulemaking is to ensure that DHS contractors adequately protect CUI received under DHS contracts. As such, the focus of this rule is properly limited to the interests and mission needs of the Department. Additionally, this rule is fully consistent with all applicable statutes, regulations, and Governmentwide policies applicable to CUI and information systems. With regard to reciprocity in information security policies, DHS finalizes the rule as proposed and declines to make changes in response to public comments.

Comment: One respondent expressed concern that the rule fails to emphasize the need for reciprocity across Federal agencies and the requirement to rely upon provisional authorizations and ATOs already obtained through other Federal agencies.

Response: The focus of this rule is properly limited to the interests and requirements of DHS. As such, reciprocity across the Federal government and the requirement to rely upon provisional authorizations and ATOs obtained from other Departments and agencies is beyond the scope of this rule. However, nothing in the rule prevents a contractor from submitting a SA package that was previously approved by another Department, agency, or DHS Component. DHS will consider existing SA packages and test results, as appropriate. It is quite possible that such a submission would expedite the approval process to obtain an ATO from DHS.

9. Incident Reporting and Response

Comment: Several respondents stated that the DHS requirement to report incidents involving PII or SPII within 1 hour of discovery, and all other incidents within 8 hours of discovery, is unreasonably short and inconsistent with other government requirements. One respondent stated that it is important to have a consistent approach Governmentwide so that companies can set up a single compliant system and process. One respondent recommended DHS extend the reporting timeframes to 8 hours for known incidents and 72 hours for suspected incidents involving contractors' internal information systems. One respondent suggested DHS extend the timeframe for reporting known or suspected incidents on contractor information systems not operated on behalf of the Department to 72 hours. Another respondent requested that DHS revise its incident reporting requirement to exclude reporting when the contractor information system is not operated on behalf of the Department.

Response: The requirement to report incidents impacting PII within 1 hour of discovery is documented in OMB memorandum M–18–02, *Fiscal Year 2017–2018 Guidance on Federal Information Security and Privacy Management Requirements,* and in United States Computer Emergency Readiness Team (US–CERT) Federal Incident Notification Guidelines. The 8-hour reporting timeline for incidents impacting all other categories of CUI came from the Department's review of its internal policies and procedures for other categories of CUI. Specifically, the Department reviewed its policies for chemical-terrorism vulnerability information (CVI), protected critical infrastructure information (PCII), and sensitive security information (SSI) (categories of information for which the Department is statutorily responsible) and determined that the existing reporting timeline for incidents impacting these information categories is 8 hours. The Department considered creating a separate reporting timeline for PII, CVI, PCII, and SSI and establishing a different reporting timeline for the remaining categories of CUI and determined that having multiple reporting timelines would create confusion and could potentially result in incidents not being timely reported to the Department. It is also important to note that Departments and agencies must report information security incidents where the confidentiality, integrity, or availability of a Federal information system is potentially compromised to US–CERT within 1 hour of being identified by the agency's top-level Computer Security Incident Response Team, Security Operations Center (SOC), or IT department. As it relates to the incident reporting timelines required by DoD, reciprocity among agency regulations is outside the scope of this rule.

DHS does not accept the recommendation to extend the reporting requirement for known or suspected incidents on contractor information systems that are not operated on behalf of the Department (*i.e.,* a nonfederal information system). The importance of CUI is not changed by being on a nonfederal information system. As such, DHS will not hold nonfederal information systems that contain the Department's CUI to a lower standard than Federal information systems that contain the same information.

DHS also does not accept the recommendation that incidents impacting CUI on a contractor's internal information systems should not be reported to the Department. A suspected or known incident impacting the Department's CUI should always be reported. To require anything less would be contrary to the public interest and the mission of the Department.

Comment: One respondent asked DHS to clarify that if a subcontractor experiences an incident, the subcontractor is required to submit the incident report to DHS, but the subcontractor also must notify the prime contractor (or next higher tier contractor) that it submitted the report.

Response: DHS accepts this recommendation. DHS included paragraph (j), *Subcontracts,* in proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* to make clear that the requirements of the clause must be included in the terms and conditions of subcontract agreements, making subcontractors responsible for complying with the requirements of the clause. However, to make clear the Department's intent to require that subcontractors report incidents that occur in their facilities and information systems, DHS has revised proposed paragraph (d) (now paragraph (c)), *Incident Reporting Requirements,* to add subcontractor reporting responsibilities.

Comment: One respondent raised concerns that the incident response requirements in paragraphs (e)(3) and (5) of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* state the following: ''(3) Incident response activities determined to be required by the Government may include, but are not limited to, the following: (i) Inspections, (ii) Investigations . . .'' and ''(5) The Government, at its sole discretion, may obtain assistance from other Federal agencies and/or third-party firms to aid in incident response activities.'' The respondent recommended that the clause clarify how a contractor's confidential and privileged information will be protected in a case where the Government elects to conduct such inspections and investigations,

particularly with the assistance of third-party firms.

Response: DHS does not accept the recommendation to identify in the text of the clause how a contractor's confidential and privileged information will be protected when third-party firms assist with the Department's incident response activities. However, DHS's current processes account for the protection of this information when third-party firms are used. DHS will continue to protect against the unauthorized use or disclosure of information received or obtained from contractors under clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* Contractors from third-party firms that assist in the Government's incident response activities are required to sign nondisclosure agreements. Additionally, both DHS and its contractors that report suspected or known incidents are required to complete a formal Rules of Engagement before incident response activities begin. The Rules of Engagement documents the security mechanisms that will be used to ensure the protection of information received during the Department's incident response activities.

Comment: One respondent stated that the incident reporting obligation does not limit the scope of reportable incidents to Federal information systems or even contractor information systems that contain Federal information. Because this distinction is not made, the respondent asserted that the rule could be read to require a contractor to report to DHS any incident impacting its own internal information systems, regardless of whether the incident has any likelihood of impacting the DHS CUI resident on that information system. The respondent recommended that DHS harmonize its reporting obligations with any reporting obligations currently under consideration by the FAR Councils in conjunction with its work on the FAR CUI rule.

Response: DHS disagrees that incidents should be reported to the Department only after the contractor determines it is likely the incident will impact/has impacted the DHS CUI resident on the information system. If DHS CUI is resident on an information system where a suspected or known incident occurs, contractors are required to report that incident to the Department. Additionally, it is clear from the title and substance of this rule that the focus is ensuring the adequate security of CUI, in general and when resident on an information system. To imply that this rule is requiring that suspected or known incidents must be reported on any and all information systems, including those that do not include the Department's CUI, is unreasonable and false. DHS is a participant on the FAR team responsible for drafting the FAR CUI rule and has not identified any conflicts between this rule and the work taking place with the FAR team.

Comment: One respondent stated that the requirement to report all known and suspected incidents may result in a substantial number of false positives that would be unduly burdensome for both DHS and its contractors.

Response: The respondent is correct that the incident reporting requirements of the clause may result in a number of ''false positives'' being reported to the Department. DHS expects that this may be the case and is structured to receive and resolve the anticipated number of incidents to be reported under this clause. Given the persistent and prevalent nature of cyber-attacks against both public and private networks and information systems, it is increasingly imperative that the Department is timely notified of any suspected or known incidents impacting information systems where the Department's CUI resides.

Comment: One respondent stated that paragraphs (e), *Incident Response Requirements,* and (f), *PII and SPII Notification Requirements,* of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* should be revised to be consistent with the current OMB directive. The *Discussion and Analysis* section of the proposed rule stated that ''[t]he timing for reporting incidents involving PII or SPII is consistent with OMB Memorandum M–07–16, Safeguarding Against and Responding to the Breach of Personally Identifiable Information.'' The respondent advised that the OMB memorandum cited was superseded on January 3, 2017, by OMB Memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information.* The respondent recommended that DHS update the rule and proposed clause to reflect the current OMB memorandum.

Response: DHS accepts the recommendation and has updated the relevant portions of the rule to ensure consistency with OMB M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information.*

10. Privacy Requirements

Comment: One respondent raised a concern regarding paragraph (b)(3) of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* which prohibits a contractor from maintaining SPII in its invoicing, billing, and other recordkeeping systems. The respondent stated that some recordkeeping systems may have appropriate protections in place for safeguarding SPII while other systems may not. Because of this gap, the respondent recommended that contractors be required to protect SPII as required by law and be permitted to choose how best to meet that obligation given the nature of their information systems. The contractor also stated that the requirement would be prohibitive for an institution of higher education accepting a contract.

Response: DHS does not accept the respondent's recommendation. DHS has made a business decision based on previous incident response activities that DHS contractors are not authorized to maintain the Department's SPII in their invoicing, billing, and other recordkeeping systems.

Comment: One respondent raised concerns with paragraph (f)(1) of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* which states that ''[t]he Contractor shall not proceed with notification unless directed in writing by the Contracting Officer.'' The respondent expressed concern that the SPII or PII also might fall under the Health Insurance Portability and Accountability Act (HIPAA) or other Federal breach reporting requirements. If so, the respondent said, the language may present a conflict as to when and how to notify someone of the breach of their personal information. The respondent also stated that while it is unlikely that an institution would be notifying individuals of breaches within 5 days of the incident, an institution may choose to notify another government official, such as the Secretary of Health and Human Services, if the incident also constitutes a breach under HIPAA. Because there is no other section of the clause clearly delineating the process to notify other governmental bodies, as may be required by State or Federal law, the respondent recommends revising the language as follows (revision in bold type):

The Contractor may notify other state or federal government agencies as required by law, but must copy the Contracting Officer on any reports made to other federal or state agencies. The Contractor shall not proceed with notification to **individuals or entities outside of the government** unless directed in writing by the Contracting Officer.

Response: DHS partially accepts the recommendation. Proposed clause

3052.204–7X, *Safeguarding of Controlled Unclassified Information,* identifies requirements for reporting suspected or confirmed PII incidents as required by internal DHS policy and OMB memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information.* Such requirements are identified in the DHS Incident Handling Guidance and are implemented in proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* Nonetheless, this clause was not intended to preempt contractors from reporting PII incidents under any applicable law. To ensure this point is clear, the statement was amended to add language allowing for compliance with applicable laws. Also, it is important to note the Department's timeline for notifying individuals pertains to when a contractor receives a notification request from the contracting officer; it is not related to the date the incident is reported.

Comment: One respondent recommended DHS consider extending the 5-day notification requirement to affected individuals to enable contractors to dedicate resources to remediation and investigation activities in the initial days after a breach. The respondent stated that the 5-day notification period is substantially shorter than most State reporting obligations (30–45 days in many States). The respondent asserted that many companies reflect these State time periods for providing notifications to affected individuals and raised concerns that the notification timeline will detract from a contractor's ability to meaningfully respond to the incident.

Response: DHS does not accept the recommendation. The Department is requiring that contractors *notify the individual* whose PII and/or SPII was under the control of the contractor or resided in its systems at the time of the incident *not later than 5 business days after being directed to notify individuals, unless otherwise approved by the Contracting Officer* (emphasis added). The 5-business day notification period is only to address the time period in which the contractor must prepare and mail the notification to the individual, after being directed to do so by the Contracting Officer. It is completely unrelated to the timing of incident notification.

Comment: One respondent raised concerns with paragraph (g), *Credit Monitoring Requirements,* of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* The section requires the contractor to provide credit monitoring services, including call center services, if directed by the Contracting Officer, to any individual whose PII or SPII was under the control of the contractor, or resided in the information system, at the time of the incident for a period beginning the date of the incident and extending not less than 18 months from the date the individual is notified. The respondent recommends that contractor's internal information systems be excepted from this requirement.

Response: DHS does not accept the recommendation to exclude contractor information systems from the credit monitoring requirements in clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* The respondent is attempting to draw a distinction where there is none. Unauthorized access to or disclosure of the Department's PII on a contractor's internal information system has the same level of importance and potential impact as it would on a Federal information system. To the extent a contractor's internal information system contains PII provided by the Government or generates PII on behalf of the Government and is subject to a known or suspected incident that impacts the PII, the contractor is responsible for providing notification and credit monitoring if the Government determines it is appropriate to do so. Any stance to the contrary is inconsistent with the public interest and the mission of the Department.

Comment: One respondent stated that the HSAR should include a requirement that the DHS procuring activity and the contractor explicitly agree on whether and to what extent the contractor has credit monitoring and call center obligations as part of a specific contract. The respondent stated that the agreement should specifically clarify whether these obligations extend to the contractor in relation to GFE that the contractor operates in its own internal contractor environment.

Response: Paragraphs (f), *PII and SPII Notification Requirements,* and (g), *Credit Monitoring Requirements,* of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* state that those requirements are only applicable when an incident involves PII or SPII. To ensure that contractors understand when these requirements are applicable, DHS is making these requirements a separate clause at 3052.204–7Y titled *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.* The applicability of new clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* is limited to solicitations and contracts where a contractor will have access to PII. This change ensures DHS contractors understand credit monitoring and notification requirements are only applicable when the solicitation and contract require contractor access to PII.

The decision to provide notification and credit monitoring services is specific to each incident. As such, a blanket determination cannot be made that these services will be required each time a known or suspected incident is reported that impacts PII. The intent of the clause is to ensure that the Government can timely notify individuals impacted by an incident and provide them with credit monitoring services if and when the Government determines it is appropriate to do so. Paragraph (b)(2) of clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* states that ''[a]ll determinations by the Department related to notifications to affected individuals and/or Federal agencies and related services (*e.g.,* credit monitoring) will be made in writing by the Contracting Officer.'' Therefore, the Contracting Officer will advise contractors of their requirements depending on the incident on a case-by-case basis. Depending on the severity of the incident, credit monitoring may not be necessary in one instance, but may be in another.

11. Sanitization of Government and Government-Activity-Related Files and Information

Comment: One respondent questioned the implementation of paragraph (h), *Certificate of Sanitization of Government and Government-Activity-Related Files and Information,* of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* The clause states ''the Contractor shall return all CUI to DHS and/or destroy it physically and/or logically as identified in the contract.'' The respondent asked where such information would be identified in the contract, specifically whether the information would be identified in the clause, the Statement of Work, or some other attachment. The respondent also stated that it would be helpful to see the DHS language that identifies how a contractor is to destroy CUI physically and/or logically.

Response: DHS will identify in the Statement of Work, Statement of Objectives, Performance Work Statement, or specification if and when CUI is required to be returned,

physically and/or logically destroyed, or both. Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* states that destruction of the CUI ''shall conform to the guidelines for media sanitization contained in NIST SP 800–88, *Guidelines for Media Sanitization*.'' As such, no additional instruction on how to physically or logically destroy CUI is necessary.

Comment: One respondent noted that the sanitization requirement is contrary to data use rights typical for an institution of higher education environment. The respondent stated that it is very common for higher education institutions to maintain files and data associated with research under U.S. Government contracts and grants that will be used for follow-on research and that CUI may be resident on contractor information systems. The respondent recommended that the language be revised to indicate that the contractor must return or destroy the CUI when it is specified by the individual contract. The respondent also recommended DHS use the requirements under NIST SP 800–171, which includes a media sanitization protocol.

Response: Proposed paragraph (h), *Certificate of Sanitization of Government and Government-Activity-Related Files and Information,* requires contractors to return all CUI to DHS and/or destroy it physically and/or logically using the guidelines in NIST SP 800–88, Guidelines for Media Sanitization. Contractors must also certify and confirm sanitization and submit the certification to the COR and contracting officer.

However, to ensure that media is returned and destroyed only when the Government has determined it to be appropriate to do so, the language is revised to state that CUI must be returned and/or destroyed *unless* the contract states that return or destruction of CUI is not required. Also, the media sanitization requirements in the clause do not conflict with the media sanitization protocols in NIST SP 800–171 as the sanitization requirements in this publication are taken from NIST SP 800–88.

12. Subcontractor Flow-Down Requirements

Comment: Multiple respondents expressed concern that paragraph (j), *Subcontracts,* of proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* requires contractors to ''insert this clause in all subcontracts and require subcontractors to include this clause in all lower-tier subcontracts.'' The respondent stated that this language appears to require contractors to flow down the clause to subcontractors that have no role in receiving or creating CUI in performance of the contract. The respondent stated that this is inconsistent with the applicability described in the preamble to the proposed rule and recommended that the language be updated accordingly.

Response: DHS agrees with the recommendation. Proposed paragraph (j) (now paragraph (g)), *Subcontracts,* has been revised to require contractors flow down the clause only to subcontracts involving CUI.

13. Requirements Applicable to Educational Institutions

Comment: One respondent noted that paragraph (a) of proposed clause 3004.470–4 states that ''[n]either the basic clause nor its alternates should ordinarily be used in contracts with educational institutions.'' The respondent stated that it would be helpful for DHS to indicate what specific contract clauses they expect to use with educational institutions, and what controls (such as, for example, those described in NIST SP 800–171) would be required to be in place to protect CUI information received pursuant to those clauses. The respondent recommended that, in the case of contracts requiring an institution of higher education to have access to CUI, or to collect or maintain CUI on behalf of the agency, DHS use the baseline requirement of ''moderate'' security controls for CUI Basic information, as described in NIST SP 800–171. The respondent stated that protections required in addition to those present under CUI Basic should be implemented through the CUI Registry's CUI Specified mechanisms to reflect the requirements of applicable law, regulations, or Governmentwide policy requiring supplemental controls, and should be specifically identified in the governing contract. The respondent also requested that information that does not meet the definition of CUI, such as vendor proprietary information, be specifically identified in the contract, along with the level of protection that must be afforded to such information. The respondent stated that this approach would reduce the substantial administrative and financial burdens to the institutions, funding agencies, and their external partners and will allow institutions of higher education to adopt the compliance solutions that work best with their existing information systems and practices.

Response: The statement that ''[n]either the basic clause nor its alternates should ordinarily be used in contracts with educational institutions'' is only applicable to clause 3052.204–71, *Contractor Employee Access.* It is also important to note that this statement does not prohibit the Department from including the clause or its alternates in contracts with educational institutions when it is determined to be necessary. The recommendation that DHS should indicate what specific contract clauses it expects to use and security controls required to be in place to protect CUI when contracting with educational institutions implies the Department should use a lesser information security standard when contracting with these organizations. This is not the case. The security requirements required are those discussed in this rule. Additionally, information that is neither CUI nor classified is not required to be protected.

As previously stated, Federal information systems, which include contractor information systems operated on behalf of the agency, are subject to the requirements of NIST SP 800–53. Generally speaking, should the Government determine that a contractor information system is not operated on its behalf, NIST SP 800–171 is applicable instead of NIST SP 800–53. However, consistent with 32 CFR 2002.14(a)(3) and (g), ''[a]gencies may increase CUI Basic's confidentiality impact level above moderate only internally, or by means of agreements with agencies or non-executive branch entities (including agreements for the operation of an information system on behalf of the agencies).'' Relatedly, 32 CFR 2002.4(c) states that agreements ''include, but are not limited to, contracts, grants, licenses, certificates, memoranda of agreement/arrangement or understanding, and information-sharing agreements or arrangements.'' Therefore, DHS can require a confidentiality impact level above moderate through agreements with non-executive branch entities and does not need an update to the CUI Registry to do so. DHS will determine if an information system is Federal or nonfederal, perform the necessary risk assessment consistent with Departmental policy, and identify the security controls contractors must meet through an SRTM. The SRTM will be included in the solicitation to ensure contractors clearly understand the security requirements they must meet before responding to the solicitation. Apart from using NIST SP 800–171 as a baseline for the security controls, DHS does not anticipate a change to the

process of providing an SRTM and identifying the type(s) of CUI provided or developed under a contract where nonfederal information systems are used. However, this process cannot be fully defined until the FAR CUI rule is finalized.

14. Self-Deleting Requirements

Comment: DHS invited comments on the self-deleting requirements in proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* One respondent raised concerns with the use of self-deleting requirements and requested that DHS consider the use of alternates to help parties achieve certainty about their responsibilities to implement the requirements of the clause.

Response: DHS agrees with the commenter that the use of alternates will increase certainty among DHS contractors on their responsibilities to comply with the requirements of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.* As such, DHS has: (1) made the requirements of paragraph (c), *Authority to Operate,* Alternate I to the basic clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information;* and (2) made the requirements of paragraphs (f), *PII and SPII Notification Requirements,* and (g), *Credit Monitoring Requirements,* a separate clause at 3052.204–7Y titled *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.*

As a result of these changes, basic clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* is limited to the following provisions: paragraphs (a), *Definitions;* (b), *Handling of Controlled Unclassified Information;* (c), *Incident Reporting Requirements;* (d), *Incident Response Requirements;* (e), *Certification of Sanitization of Government and Government-Activity-Related Files and Information;* (f), *Other Reporting Requirements;* and (g), *Subcontracts.* Compliance with these requirements is mandatory regardless of the information system type (*i.e.,* Federal information system or nonfederal information system). Alternate I to the basic clause is applicable when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI. New clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* is applicable to solicitations and contracts where a contractor will have access to PII. These changes were made to: (1) ensure DHS contractors clearly understand the scope and applicability of the various requirements contained in clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information;* (2) make clear that the ATO requirements of the clause are only applicable to Federal information systems, which include contractor information systems operated on behalf of the agency; and (3) ensure DHS contractors understand credit monitoring and notification requirements are only applicable when the solicitation and contract require contractor access to PII.

15. Applicability to Service Contracts

Comment: The proposed rule requested comments on making proposed clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* applicable to all service contracts with the understanding that the clause would be self-deleting if it does not apply. One respondent stated that it would be preferable for DHS to include the clause only in those contracts where the clause is required, saying there is no realistic self-deleting function.

Response: DHS agrees with the commenter and will not make the requirements of the proposed rule applicable to all service contracts. Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* will be included only in contracts where its requirements are applicable.

16. Costs

Comment: One respondent noted that the cost data provided in the proposed rule are based on the assumption of a contractor having a centralized system base (for example, one information system, one accounting system, a limited number of individuals with access, a controlled physical environment). The respondent stated that institutions of higher education are highly decentralized entities and that costs increase significantly when implementing these requirements over multiple systems, on a case-by-case basis, as would generally be required in the decentralized higher education environment. The respondent said the problem only is magnified when each agency adopts separate and distinct requirements for the safeguarding of CUI, making it imperative to have one standard to operate by, such as that proposed under the NARA CUI rule.

Response: The information system security requirements of this rule are focused on the requirements applicable to Federal information systems. Requirements for Federal information systems are governed by Federal Information Processing Standards (FIPS) Publication 199, *Standards for Security Categorization of Federal Information and Information Systems;* FIPS Publication 200, *Minimum Security Requirements for Federal Information and Information Systems;* and NIST SP 800–53, *Security and Privacy Controls for Information Systems and Organizations.* These publications define the process by which the Government categorizes a Federal information system as requiring low, moderate, or high security controls to protect the confidentiality, integrity, and availability of information that is processed, stored, and transmitted by those systems/organizations and to satisfy a set of defined security requirements. The commenter's approach displaces compliance with these publications and requests that the Government identify a single security standard for Federal information systems without the benefit of the methodical and deliberate processes required by each of these publications. This approach is unacceptable because it is inconsistent with FISMA and NIST policy for Federal information systems. Alternatively, the NARA CUI rule establishes baseline information security requirements necessary to protect CUI Basic on nonfederal information systems by mandating the use of NIST SP 800–171, *Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations,* when establishing security requirements to protect CUI's confidentiality on nonfederal information systems. However, consistent with 32 CFR 2002.14(a)(3) and (g), ''[a]gencies may increase CUI Basic's confidentiality impact level above moderate only internally, or by means of agreements with agencies or non-executive branch entities (including agreements for the operation of an information system on behalf of the agencies).''

The Department has not updated cost estimates to account for institutions with multiple systems because, based on Federal Procurement Data System (FPDS) data on unique vendors awarded contracts under the most likely applicable Product and Service Codes (PSCs) in Fiscal Year (FY) 2019 and FY

2020, fewer than 1 percent of affected entities are educational institutions that could have multiple systems. Based on the estimated population of affected entities (171), only one entity would be an educational institution that might have multiple systems on average.[4] In addition, DHS has no data on how many systems these entities use. Other types of entities could have multiple systems. However, multiple variables dictate the cost of an independent assessment (*e.g.,* governance, decentralization of information systems, number of information systems (*i.e.,* size), complexity, categorization, and documentation). As such, the number of information systems impacted by the ATO is not the sole factor to consider when determining if there will be increases to the cost of an independent assessment. While there may be increases to the cost of an independent assessment when multiple information systems are involved, such increases are largely dependent upon the level of decentralization of the systems and variances in the governance structure of each system. If the information systems have the same or similar governance structures, the cost of the independent assessment may not see significant cost impacts. Conversely, if there is significant decentralization and variances in governance structures, the cost of an independent assessment could increase. Such determinations must be made on a case-by-case basis and take into consideration all relevant factors that dictate the cost of an independent assessment.

Therefore, DHS maintains the cost estimates from the proposed rule but recognizes that these costs may be underestimates because FPDS data do not indicate subcontractors that may have multiple systems, and there is uncertainty on the prevalence of multiple systems for affected entities beyond educational institutions and uncertainty related to the cost implications to independent assessment of multiple systems.

IV. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

E.O. 12866 (Regulatory Planning and Review) and E.O. 13563 (Improving Regulation and Regulatory Review) 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 (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action,'' although not economically significant, under section 3(f) of E.O. 12866. Accordingly, the rule has been reviewed by OMB.

1. Outline of the Analysis

Section IV.A.2.a describes the need for the final rule, and section IV.A.2.b describes the process used to estimate the costs of the rule and the general inputs used, such as the number of affected entities. Section IV.A.3 explains how the provisions of the final rule will result in quantifiable costs and presents the calculations DHS used to estimate them. In addition, section IV.A.3 describes the qualitative costs, cost savings, and benefits of the final rule. Section IV.A.4 summarizes the estimated first year and 10-year total and annualized costs of the final rule. Finally, section IV.A.5 presents the regulatory alternatives considered.

2. Summary of the Analysis

DHS expects that the final rule will result in costs, cost savings, and benefits. As shown in Exhibit 1, DHS estimates a range of costs to capture uncertainty in cost data and, therefore, presents the estimated impacts using a lower bound, upper bound, and primary estimate. The primary estimate is calculated by taking the average of the upper bound and lower bound estimates. DHS estimates the final rule will have an annualized cost ranging from $15.32 million to $17.28 million at a discount rate of 7 percent and a total 10-year cost that ranges from $107.62 million to $121.37 million at a discount rate of 7 percent. DHS was unable to quantify the cost savings or benefits associated with the rule. However, the final rule is expected to produce cost savings by reducing the time required to grant an ATO, reducing DHS time reviewing and reissuing proposals because contractors are better qualified, and reducing the time to identify a data breach. The final rule also produces benefits by better notifying the public when their data are compromised, requiring the provision of credit monitoring services so that the public can better monitor and avoid costly consequences of data breaches, and reducing the severity of incidents through timely incident reporting.

EXHIBIT 1—ESTIMATED MONETIZED COSTS OF THE FINAL RULE

[$2020 millions]

	Costs		
	Low	Primary	High
Undiscounted 10-Year Total	$152.60	$162.32	$172.04
10-Year Total with Discount Rate of 3%	130.28	138.58	146.889
10-Year Total with Discount Rate of 7%	107.62	114.49	121.37
Annualized with Discount Rate of 3%	15.27	16.25	17.22
Annualized with Discount Rate of 7%	15.32	16.30	17.28

Exhibit 2 below provides a detailed summary of the final rule provisions and their impacts. *See* the costs and cost savings subsections of section IV.A.3 (Subject-by-Subject Analysis) below for more detailed explanations.

[4] Calculation: 171 ATO vendors * 0.72 percent of educational institutions in the population = 1.2 ATO vendors with multiple systems.

EXHIBIT 2—SUMMARY OF PROVISIONS AND ECONOMIC IMPACTS OF THE FINAL RULE

3052.204–7X, Safeguarding of controlled unclassified information	Requirement(s)	Expressly required by statute, regulation, or governmentwide policy?	Statute, regulation, or governmentwide policy	Costs	Benefits
(a) Definitions	Defines terms applicable to the clause.	N/A	Definitions for adequate security, Homeland Security Agreement Information, Homeland Security Enforcement Information, Operations Security Information, Personnel Security Information, and Sensitive Personally Identifiable Information are the only terms that are not defined in a statute, regulation, or Governmentwide policy.	No costs associated with definitions.	
(b) Handling of Controlled Unclassified Information.	(a) Requires contractors to comply with DHS policies and procedures for the handling of CUI. (b) Limits contractors' use or redistribution of CUI to only those activities specified in the contract.	(a) Yes ..... (b) No	(a) 32 CFR part 2002, *Controlled Unclassified Information (CUI)*. (b) N/A—Internal DHS requirement.	(a) No new costs, is currently a regulatory requirement. (b) Imposes no new cost	Unquantified cost savings to DHS from clarified system requirements, which reduce time to grant ATOs, identify better qualified bidders for DHS contracts, and prevent DHS from putting contracts on hold to reissue requests for proposals and alternate contractors.
	(c) Ensures CUI transmitted via email is protected by encryption or transmitted within secure communications systems.	(c) No	(c) N/A—Internal DHS requirement.	(c) Imposes no new cost.	
(c) Incident Reporting Requirements.	Contractors and subcontractors must: (a) Report all known or suspected incidents involving PII or SPII within 1 hour of discovery.	(a) Yes	(a) OMB Memorandum M–17–12 PRIV, *Preparing for and Responding to a Breach of Personally Identifiable Information,* requires each agency to have a breach response plan that includes timely reporting. The DHS Senior Agency Official for Privacy determined that to meet the timeliness requirements of M–17–12, the initial report must occur within 1 hour of discovery.	(a, b) The primary estimate of reporting an incident to DHS is $1,075 per incident. DHS cannot quantify the aggregate total of these costs because DHS does not track the origin of security event notices and is therefore unable to determine how many security event notices external contractors reported to their respective Component SOC or the DHS Network Operations Security Center.	(a, b, c) Timely reporting of incidents is critical to prevent the impact of an incident from expanding, ensure incident response and mitigation activities are undertaken quickly, and ensure individuals are timely notified of the possible or actual compromise of their PII. Reducing the time to identify a breach improves the effectiveness of incident management, reduces false positives, improves triage by lowering the cost of trivial true positives, minimizes mission disruption and the resulting impact on revenue and performance, and reduces the cost of investigation.
	(b) Report all other incidents within 8 hours of discovery.	(b) No, internal policy requirement.	(b) N/A.		
	(c) Ensure CUI transmitted via email is protected by encryption or transmitted within secure communications systems.	(c) No	(c) 32 CFR 2002.14, *Safeguarding,* paragraphs (c), *Protecting CUI under the control of an authorized holder,* and (g), *Information systems that process, store, or transmit CUI*.	(c) No new costs, is currently a regulatory requirement.	
(d) Incident Response Requirements.	(a) Requires contractors and subcontractors to provide full access and cooperation for all activities determined by the Government to be required to ensure an effective incident response.	(a) Yes	(a) Federal Information Security Modernization Act of 2014 (44 U.S.C. 3551), OMB A–130, *Managing Information as a Strategic Resource*.	(a) DHS components have included differing language in contracts for incident response, while this provision creates consistency across DHS components in language without change to requirements. Since DHS already conducts this practice, these costs are part of the existing baseline costs of business.	Standardizing incident reporting leads to more proactive incident response, potentially faster incident resolution, and potential reduction in the scope and impact of the incident depending on the nature of the attack (*i.e.,* fewer records breached).

EXHIBIT 2—SUMMARY OF PROVISIONS AND ECONOMIC IMPACTS OF THE FINAL RULE—Continued

3052.204–7X, Safeguarding of controlled unclassified information	Requirement(s)	Expressly required by statute, regulation, or governmentwide policy?	Statute, regulation, or governmentwide policy	Costs	Benefits
	(b) Allows the Government to obtain outside assistance to assist in incident response activities.	(b) No	(b) N/A—Internal DHS requirement.	(b) N/A—The Government bears the costs related to obtaining assistance from external parties for incident response activities (*e.g.,* existing DHS contracts, interagency agreements). This cost is not new because incident response is a longstanding practice and DHS has existing pre-position contracts that allow it to tap services for incident response.	
(e) Certificate of Sanitization of Government and Government-Activity-Related Files and Information.	Requires the contractor to return all CUI to DHS and/or destroy it physically and/or logically. Destruction must conform to the guidelines for media sanitization contained in NIST SP 800–88, *Guidelines for Media Sanitization*.	Yes	Paragraph (d) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources*.	No new costs are anticipated as this requirement simply replaces the pre-existing requirement in paragraph (d) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.* Additionally, any costs associated with this requirement are covered under the initial regulation for HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources*.	
(f) Other Reporting Requirements.	Informs contractors that the incident reporting required by this clause does not rescind the contractor's responsibility for other incident reporting pertaining to its unclassified information systems under other clauses that may apply to its contract(s), or as a result of other applicable statutory or regulatory requirements, or other U.S. Government requirements.	No	N/A	No costs related to DHS are anticipated with this requirement as those costs would be covered under the ''other applicable statutory or regulatory requirements, or other U.S. Government requirements''.	
(g) Subcontracts	Requires the contractor to insert this clause in all subcontracts and require subcontractors to include this clause in all lower tier subcontracts when subcontractor employees will have access to CUI; CUI will be collected or maintained on behalf of the agency by a subcontractor; or a subcontractor information system(s) will be used to process, store, or transmit CUI.	In part. Prime contractors are required to flow down the text of this clause to applicable subcontracts. Many of the clause requirements stem from a statute, regulation, or Governmentwide policy as indicated above and below.	See above and below.		

EXHIBIT 2—SUMMARY OF PROVISIONS AND ECONOMIC IMPACTS OF THE FINAL RULE—Continued

3052.204–7X, Safeguarding of controlled unclassified information	Requirement(s)	Expressly required by statute, regulation, or governmentwide policy?	Statute, regulation, or governmentwide policy	Costs	Benefits
(h) Authority to Operate.	(a) Security Authorization	(a) Yes	(a) Federal Information Security Modernization Act of 2014 (44 U.S.C. 3551), OMB A–130, *Managing Information as a Strategic Resource,* OMB Memorandum M–22–01, *Improving Detection of Cybersecurity Vulnerabilities and Incidents on Federal Government Systems through Endpoint Detection and Response,* NIST SP 800–53, Revisions 4 and 5, *Security and Privacy Controls for Information Systems and Organizations,* and paragraphs (a) and (e) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.*	(a) No new costs are anticipated as this requirement simply replaces the pre-existing requirement in paragraphs (a), (b), and (e) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.* As part of the existing paragraphs (a) and (e) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources,* vendors are required to maintain full-time equivalent (FTE) oversight that is estimated to cost $209,008 per vendor.	
	(b) Independent Assessment	(b) No	(b) N/A	(b) $71.28 million at a 7% discount rate associated with the cost of an independent third party validating the security and privacy controls in place for the information system(s); reviewing and analyzing the SA package; and reporting on technical, operational, and management level deficiencies.	Independent assessment provides an objective measure of compliance with security and privacy controls. Benefits of using a third party to perform an independent assessment extend to contractor because they can use results to demonstrate cybersecurity excellence for customers.
	(c) ATO Renewal	(c) Yes	(c) See response at paragraph (a).	(c) No new costs are anticipated as this requirement simply replaces the pre-existing requirement in paragraphs (a), (b), and (e) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.* Additionally, any costs associated with this requirement are covered under the initial regulation for HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.*	
	(d) Security Review	(d) No	(d) N/A	(d) $159,924 at a 7% discount rate from a new cost to the government to conduct the security reviews and to the contractor for any interruptions to normal operations caused by the security review.	(d) Security review is an important mechanism for the Department to consistently ensure contractors are and remain compliant with the security requirements contained in their contracts.
	(e) Federal Reporting and Continuous Monitoring Requirements.	(e) Yes	(e) Federal Information Security Modernization Act of 2014 (44 U.S.C. 3551), OMB A–130, *Managing Information as a Strategic Resource,* OMB Memorandum M–14–03, *Enhancing the Security of Federal Information and Information Systems,* and NIST SP 800–53, Revisions 4 and 5, *Security and Privacy Controls for Information Systems and Organizations.*	(e) No new costs are anticipated as this requirement simply replaces the pre-existing requirement in paragraphs (a) and (e) of HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.* Additionally, any costs associated with this requirement are covered under the initial regulation for HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Resources.*	

3052.204–7Y, Safeguarding of controlled unclassified information	Requirement(s)	Expressly required by statute, regulation, or governmentwide policy?	Statute, regulation, or governmentwide policy	Costs	Benefits
(a) Definitions	Defines terms applicable to the clause.	No	Definition for Sensitive Personally Identifiable Information is not defined in a statute, regulation, or Governmentwide policy.	No costs associated with definition.	
(b) PII and SPII Notification Requirements.	Requires the contractor, when directed, to notify any individual whose PII or SPII was either under the control of the contractor or resided in an information system under control of the contractor at the time the incident occurred.	Yes	OMB Memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information*.	Estimated costs of notification are $2.72 per year per individual. DHS cannot quantify an aggregate total of this cost due to the rule because DHS does not track at the Department level the number of notifications required on either an annual or per-incident basis. *Note:* These costs are discretionary as the Government may or may not choose to have the contractor perform these services.	Benefit of improved notification to the public regarding breaches of their data, allowing better self-monitoring for identity theft. Such notification affords individuals the opportunity to take steps to minimize any harm associated with unauthorized or fraudulent activity.
(c) Credit Monitoring Requirements.	Requires the contractor, when directed, to provide credit monitoring services to individuals whose PII or SPII was under the control of the contractor, or resided in the information system at the time of the incident, for a period beginning the date of the incident and extending not less than 18 months from the date the individual is notified.	Yes	OMB Memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information*.	Credit monitoring is estimated to cost $6.53 per year per individual. DHS cannot quantify these costs because it does not have estimates for the population of individuals affected. *Note:* These costs are discretionary as the Government may or may not choose to have the contractor perform these services.	Credit monitoring services can be particularly beneficial to the affected public as they can assist individuals in the early detection of identity theft as well as notify individuals of changes that appear in their credit report, such as creation of new accounts, changes to their existing accounts or personal information, or new inquiries for credit. Such notification affords individuals the opportunity to take steps to minimize any harm associated with unauthorized or fraudulent activity.

3052.204–71, Contractor employee access	Requirement(s)	Expressly required by statute, regulation, or governmentwide policy?	Statute, regulation, or governmentwide policy	Costs	Benefits
(a) Controlled Unclassified Information.	Provides definition of CUI	N/A	Definitions for Homeland Security Agreement Information, Homeland Security Enforcement Information, Operations Security Information, Personnel Security Information, and Sensitive Personally Identifiable Information are the only terms that are not defined in a statute, regulation, or Governmentwide policy.	N/A—No new costs are anticipated with the changes to this clause as the changes are merely updates to terminology and clarifying edits to ensure complete understanding of pre-existing requirements. Additionally, the costs associated with this clause are covered under the initial regulation for HSAR 3052.204–71, *Contractor Employee Access*.	
(b) Information Resources.	Provides definition of information resources.	N/A	Definition is taken from statute.	No costs associated with definitions.	
(c) Background Investigation Requirements.	Identifies background investigation requirements.	Yes	Paragraph (c) of HSAR 3052.204–71, *Contractor Employee Access. Note:* Paragraph was updated in final rule to replace the term ''IT resources'' with ''information resources''.	No new costs, is currently a regulatory requirement.	
(d) Prohibition	Identifies circumstances where the contracting officer can prohibit individuals from working under a contract.	Yes	Paragraph (d) of HSAR 3052.204–71, *Contractor Employee Access. Note:* No change from original text.	No new costs, is currently a regulatory requirement.	

3052.204–71, Contractor employee access	Requirement(s)	Expressly required by statute, regulation, or governmentwide policy?	Statute, regulation, or governmentwide policy	Costs	Benefits
(e) CUI Disclosure and Training Requirements.	Identifies limitation on disclosure of CUI and training requirements.	Yes	Paragraph (e) of HSAR 3052.204–71, *Contractor Employee Access. Note:* Replaced references to ''sensitive information'' with ''CUI'' and clarified the timing for completion of training discussed in the original clause.	No new costs, is currently a regulatory requirement.	
(f) Subcontract Requirements.	Identifies when clause must be included in subcontracts.	Yes	Paragraph (f) of HSAR 3052.204–71, *Contractor Employee Access. Note:* Replaced reference to ''sensitive information'' with ''CUI'' and ''resources'' with ''information resources''.	No new costs, is currently a regulatory requirement. *Note:* The change in terminology from ''sensitive information'' to ''CUI'' does not change the requirement for safeguarding. This change was made solely to comply with E.O. 13556, *Controlled Unclassified Information,* and its implementing regulation at 32 CFR part 2002. The type(s) of information DHS protected under ''sensitive information'' and now under ''CUI'' is not changed. Additionally, cost impacts associated with Governmentwide implementation of the CUI Program will be captured under the Federal Acquisition Regulation rulemaking that is currently in progress.	
(g) Training and Non-Disclosure Agreement Requirements.	Identifies that contractors must complete a security briefing, additional training for specific categories of CUI (if identified in the contract), and sign a non-disclosure agreement before receiving access to information resources under the contract.	Yes	Paragraph (g) of HSAR 3052.204–71, *Contractor Employee Access. Note:* Added language to clarify that additional training for specific categories of CUI from paragraph (e) will be identified in the contract.	No new costs, is currently a regulatory requirement.	
(h) Contractor Access to Information Resources.	Identifies restrictions on access to DHS information resources and consequences for attempting to access information resources that are not authorized under the contract.	Yes	Paragraph (h) of HSAR 3052.204–71, *Contractor Employee Access. Note:* Replaced reference to ''information technology resources'' with ''information resources''.	No new costs, already a regulatory requirement.	
(i), (j), (k), and (l)	No change from original clause text.	Yes	Paragraphs (i), (j), (k), and (l) of HSAR 3052.204–71, *Contractor Employee Access. Note:* No change from original clause text.	No new costs, is currently a regulatory requirement.	

a. Need for Regulation

DHS has determined that rulemaking is needed to implement security and privacy measures to safeguard CUI and facilitate improved incident reporting to DHS. The final rule enables DHS to identify, remediate, mitigate, and resolve incidents when they occur, not necessarily completely prevent them. DHS understands that there is no ''true'' way to completely prevent an incident from occurring. However, these measures are intended to decrease the likelihood of occurrence with full knowledge that there is no such thing as an ''unhackable'' system.

The final rule adds a new clause at 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* that ensures adequate protection of CUI. That new clause (1) identifies CUI handling requirements and security processes and procedures applicable to Federal information systems, which include contractor information systems operated on behalf of the agency; (2) identifies incident reporting requirements, including timelines and required data elements, inspection provisions, and post-incident activities; and (3) requires certification of sanitization of government and government-activity-related files and information. Additionally, new clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* requires contractors to have in place procedures and the capability to notify and provide credit monitoring services to any individual whose PII or SPII was under the control of the contractor or resided in the information system at the time of the incident.

These measures are necessary because of the urgent need to protect CUI and

respond appropriately when DHS contractors experience incidents with DHS information. Persistent and pervasive high-profile breaches of Federal information continue to demonstrate the need to ensure that information security protections are clearly, effectively, and consistently addressed in contracts. This final rule strengthens and expands existing HSAR language to ensure adequate security when contractor and/or subcontractor employees will have access to CUI; CUI will be collected or maintained on behalf of the agency; or Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI.

b. Analysis Considerations

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with DHS's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of the final rule (*i.e.,* costs and cost savings that accrue to entities affected) relative to the baseline (existing regulations, statutes, and guidance).

This analysis covers 10 years (2023 through 2032) to ensure it captures major costs and cost savings that accrue over time. DHS expresses all quantifiable impacts in 2020 dollars and uses discount rates of 3 and 7 percent, pursuant to Circular A–4.[5] The impacts of this final rule are estimated relative to the existing baseline (*i.e.,* current requirements for security and training for contractors). DHS estimates impacts using a range of potential costs and cost savings to account for uncertainty and, therefore, presents the estimated impacts using a lower bound, upper bound, and primary estimate. The primary estimate is calculated by taking the average of the upper bound and lower bound estimates. DHS was unable to quantify some costs, cost savings, and benefits of the final rule. DHS describes them qualitatively in section IV.A.3 (Subject-by-Subject Analysis).

(1) Analysis Baseline

The final rule primarily codifies and updates the HSAR regulation to clarify, streamline, and include requirements from existing regulations, including those required by:

- Existing HSAR 3052.204–70, *Security Requirements for Unclassified Information Technology Requirements*
- 32 CFR part 2002, *Controlled Unclassified Information (CUI)*
- Federal Information Security Modernization Act of 2014 (44 U.S.C. 3551)
- NIST SP 800–53, *Recommended Security and Privacy Controls for Federal Information Systems and Organizations,* and NIST SP 800–88, *Guidelines for Media Sanitization* (Appendix G)

A more comprehensive discussion of existing requirements is in section IV.A.3 (Subject-by-Subject Analysis). In addition, the prior Exhibit 2 maps provisions of the final rule to relevant existing requirements.

The analysis of this final rule estimates impacts relative to a baseline assuming no regulatory action. The baseline represents the agency's best assessment of what the world would be like absent this action. A key difference in the impacts estimated in this final rule compared to the proposed rule is that the proposed rule did not perform an analysis incremental to a baseline of existing regulations. Instead, the proposed rule presented estimates of the costs of activities covered by provisions, regardless of whether those activities were new requirements from the rulemaking. In particular, two of the larger cost estimates (FTE oversight and continuous monitoring) presented in the proposed rule were for activities already required by existing regulations and are discussed below.

(a) Baseline Cost of Continuous Monitoring

Alternate I to clause 3052.204–7X, *Authority to Operate,* mandates that contractors operating Federal information systems comply with information system continuous monitoring requirements. FISMA regulations (44 U.S.C. 3551, *et seq.*) already require continuous monitoring and vendors therefore historically have incurred costs associated with continuous monitoring equipment and labor costs for setup, maintenance, and operation of continuous monitoring.[6] Consistent with the proposed rule analysis, internal DHS data and cost information from vendors indicate the cost for vendors complying with continuous monitoring requirements to acquire continuous monitoring equipment ranges from a lower bound of $82,034 to an upper bound of $376,107, with a primary estimate of $229,071.[7] ATO vendors already are required by FISMA to incur this one-time cost.

ATO vendors that are complying with continuous monitoring requirements also have labor in place to operate information systems and perform continuous monitoring. Internal DHS historical data and cost information from vendors indicate that labor costs for initial setup and operation of information systems to perform continuous monitoring range from a lower bound of $50,506 to an upper bound of $69,848 per year, with a primary estimate of $59,827.[8] This labor cost occurs every 3 years when there is ATO renewal and systems need to be initialized. ATO vendors complying with existing continuous monitoring requirements also have an annual cost to maintain systems that assist with continuous monitoring. DHS estimates this cost ranges from a lower bound of $6,448 to an upper bound of $19,343, with a primary estimate of $12,895.[9]

(b) Baseline Cost of FTE Oversight

Meeting the requirements of the final rule requires overseeing compliance of individuals who have received security authorization, as already required by FISMA. The final rule maintains this requirement in Alternate I to clause 3052.204–7X, *Authority to Operate.* The costs associated with this FTE oversight stem directly from a vendor's pre-existing information security posture. Vendors, particularly those operating in the IT space, have been complying with these requirements for years. In these instances, the vendors have the existing infrastructure (*i.e.,* hardware, software, and personnel) to implement these requirements and implementation costs are lower. The same is also true for many vendors that provide professional services to the Government and use IT to provide those services. Alternatively, vendors with less experience and capability in this area procure the hardware and software necessary to implement these requirements, as well as the labor costs associated with

[5] All present value calculations assume a base year of 2022.

[6] *See* 44 U.S.C. 3551.

[7] The final rule estimates of obtaining continuous monitoring equipment are consistent with the proposed rule (Safeguarding of Controlled Unclassified Information (HSAR Case 2015–001) [Docket No. DHS–2017–0006]) estimates and adjusted to 2020 dollars from 2016 dollars using the GDP deflator (Bureau of Economic Analysis (BEA) NAIPA Table 1.1.9 Implicit Price Deflators for Gross Domestic Product: *https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey*).

[8] Estimates were developed using cost information from multiple vendors whose contracts with DHS include similar continuous monitoring requirements. The final rule estimates of labor cost to perform continuous monitoring are consistent with the proposed rule estimates and adjusted to 2020 dollars using the GDP deflator.

[9] The final rule estimates of labor cost to maintain systems that assist with continuous monitoring are consistent with the proposed rule estimates and adjusted to 2020 dollars using the GDP deflator.

personnel needed to implement and oversee these requirements. Costs vary depending on the hardware and software selected and the skill set each contractor requires in its employee(s) responsible for ensuring compliance with these requirements.

DHS determined the costs associated with FTE oversight of the final rule requirements by requesting cost information from multiple vendors. These data indicated that the cost of FTE oversight ranges from a lower bound of $69,848 to an upper bound of $348,168, with a primary estimate of $209,008.[10] These costs decline as vendors become more sophisticated and efficient.

(2) Estimated Number of Vendors Impacted by the Final Rule

The final rule will apply to DHS contractors that require access to CUI, collect or maintain CUI on behalf of the Government, or operate Federal information systems, which include contractor information systems operated on behalf of the agency that collect, process, store, or transmit CUI. DHS estimated the number of vendors subject to the final rule using FY 2019 and FY 2020 Federal Procurement Data System (FPDS) data on unique vendors awarded contracts under the most likely applicable Product and Service Codes (PSCs) in FY 2019 and FY 2020. FPDS data indicated that 3,030 unique vendors were awarded contracts under the most likely applicable PSCs in FY 2019 and 3,203 in FY 2020, including small business. However, not all contractors will be subject to clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.*

(a) Population of Alternate I to Clause 3052.204–7X, Safeguarding of Controlled Unclassified Information

DHS estimated that approximately 5.5 percent of the unique vendors identified as being awarded contracts under the most likely applicable PSCs in FY 2019 and FY 2020 would be subject to the requirements of Alternate I to clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* and will be required to respond to ATO requirements and submit SA documentation.[11] DHS calculated the number of vendors subject to Alternate I to clause 3052.204–7X, *Authority to Operate,* by multiplying the number of unique vendors awarded contracts under the most likely applicable PSCs in FY 2019 (3,030 unique vendors) and FY 2020 (3,203 unique vendors) by 5.5 percent. DHS estimated that in FY 2019, 167 vendors would be subject to Alternate I to clause 3052.204–7X,[12] and in FY 2020, 176 vendors would be subject to Alternate I to clause 3052.204–7X.[13] DHS then took a 2-year average of the 167 and 176 figures to estimate that approximately 171 vendors will be subject to Alternate I to clause 3052.204–7X.[14] DHS presents the ATO population estimate in Exhibit 3 along with the population estimate used in the NPRM.

EXHIBIT 3—CHANGE TO ATO POPULATION COMPARED TO NPRM

Component	NPRM	Final rule
ATO vendors subject to the rule	137	171

(b) Population of Paragraphs (b), (c), (d), (e), and (f) of Clause 3052.204–7X, Safeguarding of Controlled Unclassified Information

Based on FY 2019 and FY 2020 data, DHS estimated that approximately 11 percent of the unique vendors identified as being awarded contracts under the most likely applicable PSCs in FY 2019 and FY 2020 would be subject to the requirements of paragraphs (b), (c), (d), (e), and (f) of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information.*[15] DHS calculated the number of vendors subject to paragraphs (b), (c), (d), (e), and (f) by multiplying the number of unique vendors awarded contracts under the most likely applicable PSCs in FY 2019 (3,030 unique vendors) and FY 2020 (3,203 unique vendors) by 11 percent. DHS estimated that in FY 2019, 333 vendors would be subject to paragraphs (b), (c), (d), (e), and (f),[16] and in FY 2020, 352 vendors would be subject to paragraphs (b), (c), (d), (e), and (f).[17] DHS then took a 2-year average of the 333 and 352 figures to estimate that approximately 343 vendors will be subject to paragraphs (b), (c), (d), (e), and (f).[18] DHS presents the non-ATO population estimates in Exhibit 4 along with the non-ATO population estimates used in the NPRM.

[10] The final rule estimates of FTE oversight are consistent with the proposed rule estimates and adjusted to 2020 dollars using the GDP deflator.

[11] The estimate of the number of entities to which the rule will apply was established by reviewing FPDS data for FY 2019 and FY 2020, internal DHS contract data, experience with similar safeguarding requirements used in certain DHS contracts, and the most likely applicable PSCs. Additionally, the estimate was reviewed and validated by the cognizant departmental subject-matter experts (SMEs) for information security, information system security, and privacy. These SMEs have extensive experience in the requirements of these clauses and their applicability and current implementation in DHS contracts. The data review identified 3,030 unique contractors that were awarded contracts under the most likely applicable PSCs in FY 2019 and 3,203 in FY 2020, including small and large businesses. However, not all contractors awarded contracts under the most likely applicable PSCs are subject to clauses 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* and 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.* A number of factors determine the applicability of the clauses, and a case-by-case analysis of each action is required to determine the applicability of the clauses. Further, the clauses are delineated by those entities that are granted access to CUI but information systems will not be used to process, store, or transmit CUI, and those that are required to meet the ATO requirements because Federal information systems will be used to process, store, or transmit CUI.

[12] Calculation: 3,030 unique vendors subject to Alternate I to clause 3052.204–7X in FY 2019 * 5.5 percent of PSCs affected by the rule = 166.65 vendors.

[13] Calculation: 3,203 unique vendors subject to Alternate I to clause 3052.204–7X in FY 2020 * 5.5 percent of PSCs affected by the rule = 176.16 vendors.

[14] Calculation: (166.65 vendors subject to Alternate I to clause 3052.204–7X in FY 2019 + 176.16 vendors subject to Alternate I to clause 3052.204–7X in FY 2020)/2 = 171.4 vendors (the 2-year average number of vendors subject to Alternate I to clause 3052.204–7X).

[15] The estimate of the number of entities to which the rule will apply was established by reviewing FPDS data for FY 2019 and FY 2020, internal DHS contract data, experience with similar safeguarding requirements used in certain DHS contracts, and the most likely applicable PSCs. Additionally, the estimate was reviewed and validated by the cognizant departmental SMEs for information security, information system security, and privacy. See footnote 11 for more detail.

[16] Calculation: 3,030 unique vendors subject to paragraphs (b), (c), (d), (e), and (f) in FY 2019 * 11 percent of PSCs affected by the rule = 333.3 vendors.

[17] Calculation: 3,203 unique vendors subject to paragraphs (b), (c), (d), (e), and (f) in FY 2019 * 11 percent of PSCs affected by the rule = 352.33 vendors.

[18] Calculation: (333.30 vendors subject to paragraphs (b), (c), (d), (e), and (f) in FY 2019 + 352.33 vendors subject to paragraphs (b), (c), (d), (e), and (f) in FY 2020)/2 = 342.82 vendors (the 2-year average number of vendors subject to paragraphs (b), (c), (d), (e), and (f)).

EXHIBIT 4—CHANGES TO NON-ATO POPULATION COMPARED TO NPRM

Component	NPRM	Final rule
Non-ATO prime contractors subject to the rule	274	343
Non-ATO subcontractors subject to the rule	411	514

(3) Changes to Component Costs Relative to NPRM

Under the proposed rule, DHS requested cost information from vendors whose contracts with DHS include requirements similar to this final rule; obtained cost input from FedRAMP, for which DHS is a participant; reviewed the Congressional Budget Office Cost Estimate for the Personal Data Protection and Breach Accountability Act of 2011; reviewed pricing from the Identity Protection Services (IPS) blanket purchase agreements recently awarded by the General Services Administration (GSA); and reviewed internal price data from DHS's Managed Compliance Services and notification and credit monitoring services contracts. DHS determined that the majority of these costs are unchanged from the proposed rule and, therefore, adjusts them to 2020 dollars.[19] For two costs, DHS obtained updated estimates: the cost of notification of incidents to individuals whose PII was compromised and the cost of credit monitoring services. These costs are discussed in more detail in the subject-by-subject analysis. For this final rule analysis, DHS presents a low, high, and primary estimate to capture uncertainty in the costs to affected entities. Exhibit 5 summarizes the costs in the NPRM and this final rule.

EXHIBIT 5—SUMMARY OF CHANGES TO COMPONENT COSTS [T]

Component cost	NPRM **		Final rule		
	Low	High	Low	Primary	High
Independent assessment ($ per entity)	$123,615	$150,000	*$132,836	*$147,012	*$161,189
Equipment to set up continuous monitoring system ($ per entity)	76,340	350,000	*82,034	*229,071	*376,107
Labor to perform continuous monitoring ($ per entity)	47,000	65,000	*50,506	*59,827	*69,848
Maintain continuous monitoring equipment ($ per entity)	6,000	18,000	*6,448	*12,895	*19,343
FTE oversight ($ per entity)	65,000	324,000	*69,848	*209,008	*348,168
Reporting an incident to DHS ($ per incident)	500	1,500	*537	*1,075	*1,612
Notification of incident to individuals ($ per impacted individual)	1.03	4.60	0.84	2.72	4.60
Credit monitoring services ($ per impacted individual)	60	260	4.16	6.53	8.90

[t] The table includes costs that were presented in the proposed rule that are considered baseline costs in the final rule, including continuous monitoring and FTE oversight.
* Value is unchanged but is inflated to 2020 dollars.
** The proposed rule did not use a primary estimate.

3. Subject-by-Subject Analysis

DHS's analysis below covers the estimated costs and cost savings of the final rule relative to the existing baseline. DHS emphasizes that many of the provisions in the final rule are existing requirements in the statute, regulations, or regulatory guidance and presents existing requirements related to each provision in the previous Exhibit 2. The final rule codifies these practices under one set of rules; therefore, they are not considered ''new'' burdens resulting from the final rule. This rule addresses the safeguarding requirements specified in:

• FISMA, which (1) provides a comprehensive framework for ensuring the effectiveness of information security controls over information resources that support Federal operations and assets; (2) recognizes the highly networked nature of the current Federal computing environment and provides effective governmentwide management and oversight of the related information security risks, including coordination of information security efforts throughout the civilian, national security, and law enforcement communities; (3) provides for development and maintenance of minimum controls required to protect Federal information and information systems; and (4) provides a mechanism for improved oversight of Federal agency information security programs, including through automated security tools to continuously diagnose and improve security.

• NIST SP 800–53, *Recommended Security and Privacy Controls for Federal Information Systems and Organizations,* and NIST SP 800–88, *Guidelines for Media Sanitization* (Appendix G). Pursuant to FISMA, NIST is responsible for developing information security standards and guidelines, including minimum requirements for Federal information systems (Note: Such standards and guidelines do not apply to national security systems without the express approval of appropriate Federal officials exercising policy authority over such systems.). NIST SP 800–53 sets forth information security requirements contractors operating a Federal information system must meet prior to collecting, processing, storing, or transmitting CUI in that information system. NIST SP 800–88 assists organizations and system owners in making practical sanitization decisions based on the categorization of confidentiality of their information.

• OMB Circular A–130, *Managing Information as a Strategic Resource,* which establishes general policy for the planning, budgeting, governance, acquisition, and management of Federal information, personnel, equipment, funds, IT resources, and supporting infrastructure and services. The Circular's appendices include responsibilities for protecting Federal information resources and managing PII.

[19] The values used in the NPRM adjusted to 2020 dollars using a GDP deflator of 105.736 for 2016 and a GDP deflator of 113.623 for 2020. Bureau of Economic Analysis: Table 1.1.4. Price Indexes for GDP. *https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey.*

• OMB Memorandum M–17–12, *Preparing for and Responding to a Breach of Personally Identifiable Information,* which sets forth the policy for Federal agencies to prepare for and respond to a breach of PII, including a framework for assessing and mitigating the risk of harm to individuals potentially affected by a breach, as well as guidance on whether and how to provide notification and services to those individuals.

• OMB Memorandum M–20–04, *Fiscal Year 2019–2020 Guidance on Federal Information Security and Privacy Management Requirements,* which in accordance with FISMA provides agencies with FY 2020 reporting guidance and deadlines.

• E.O. 13556, *Controlled Unclassified Information,* and its implementing regulation at 32 CFR part 2002, which defines the executive branch's CUI Program and establishes policy for designating, handling, and decontrolling information that qualifies as CUI and standardizes the way the executive branch handles information that requires protection under laws, regulations, or Governmentwide policies but that does not qualify as classified information.

DHS considered both the costs and benefits associated with the requirements of clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* and clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* specifically those requirements believed to be of most import to industry, such as the requirements to: obtain an independent assessment, perform continuous monitoring, report all known and suspected incidents, provide notification and credit monitoring services in the event an incident impacts PII, document sanitization of Government and Government-activity-related files and information, as well as ensure overall compliance with the requirements of the clauses. Accordingly, the regulatory analysis focuses on the costs and cost savings that can be attributed exclusively to the new requirements in the final rule.

The analysis assumes that not all efforts (*e.g.,* retrieving and retaining records) are attributed solely to this new rule; only those actions resulting from this rule that are not customary to normal business practices are attributed to this estimate. There are several instances of requirements of the final rule that are not new requirements; for example, the analysis does not include revisions to clause 3052.204–71, *Contractor Employee Access,* as the revisions to this clause are primarily clarifying in nature (*i.e.,* updates to terminology). Regarding the training requirements discussed in the revisions to this clause, specifically additional training that may be required due to the CUI Specified status of the information, this requirement is not new for DHS contractors. CUI Basic and CUI Specified categories of information previously were considered sensitive but unclassified information under prior Departmental policy. When additional training is required for CUI Specified information, it is because the statute or regulation for that specific category requires certain training. DHS and its contractors always complied with the additional training requirements when they were applicable under its sensitive but unclassified information policy. As such, these requirements are covered by the existing information collection that covers this clause (*i.e.,* OMB Control Number 1600–0003). Another example is clause 3052.204–7X(c)(3), specifying contractors and subcontractors should not include CUI in the body of any email but instead include such information in encrypted attachments, with passwords to these files sent via separate emails. The cost of this requirement (*i.e.,* the time to compose two emails, rather than one email) is not quantified because it is an existing requirement. Other requirements are required by existing regulations. For example, FISMA requires continuous monitoring and vendors therefore historically have incurred costs associated with continuous monitoring equipment and labor costs for setup, maintenance, and operation of continuous monitoring. The previous Exhibit 2 lays out which provisions have requirements that already exist under FISMA, existing HSAR, and other regulations.

a. Costs

This section quantifies the costs associated with the final rule changes, including costs associated with rule familiarization, reporting and recordkeeping requirements, conducting an independent assessment, and security review. DHS presents each cost with an associated lower bound estimate, upper bound estimate, and primary estimate.

(1) Quantitative Costs

(a) Rule Familiarization

When the final rule takes effect, ATO vendors will need to familiarize themselves with the new regulations. Consequently, this imposes a one-time cost on ATO vendors in the first year of the rule. DHS estimates the time to review the rule is 1 hour. Therefore, DHS estimated the one-time cost of rule familiarization to be $12,590.[20] DHS estimated the total cost of rule familiarization over the 10-year period is $12,223 and $11,766 at discount rates of 3 percent and 7 percent, respectively. The annualized cost over the 10-year period is $1,433 and $1,675 at discount rates of 3 percent and 7 percent, respectively.

(b) Reporting and Recordkeeping

DHS has determined that 343 non-ATO vendors and 514 non-ATO subcontractors, for a total of 857 entities (Exhibit 4), are subject to reporting requirements associated with notification and credit monitoring. DHS estimates that each non-ATO vendor will require 36 hours to meet the reporting requirements. Therefore, DHS estimated the cost of reporting for non-ATO vendors to be $2.27 million annually.[21] DHS has determined that 171 ATO vendors are subject to reporting requirements associated with notification and credit monitoring. DHS estimated that each ATO vendor will require 120 hours to meet the reporting requirements. Therefore, DHS estimated that the cost of reporting for ATO vendors is $1.51 million annually.[22]

It is estimated that the number of recordkeepers associated with these clauses (ATO and non-ATO vendors) is 1,028. Both ATO and non-ATO vendors will require the same preparation time and maintenance per response, which is estimated to average 16 hours per year, meaning that the total annual recordkeeping burden is 16,455.20 hours.[23] DHS estimates the cost of recordkeeping requirements to be $1.21 million annually.[24]

[20] Calculation: 171.41 ATO vendors * $73.45 loaded hourly wage rate of Information Security Analysts = $12,589.95 one-time, undiscounted cost of rule familiarization to ATO vendors.

[21] Calculation: 857.04 total annual responses * 36 estimated hours per response = 30,852.44 total estimated burden hours. Calculation: 30,852.44 total estimated hours * ($51.72/hour * 1.42 loaded wage rate factor) = $2,266,191. The average hourly salary is based on the hourly wage of private sector information security analysts (*https://www.bls.gov/oes/current/oes151212.htm*). The loaded wage rate factor is based on BLS' estimates for private industry workers by occupational and industry group (*https://www.bls.gov/news.release/ecec.t04.htm*).

[22] Calculation: 171.41 total annual responses * 120 estimated hours per response = 20,569.20 total estimated burden hours. Calculation: 20,569.20 total estimated hours * ($51.72/hour * 1.42 loaded wage rate factor) = $1,510,794.

[23] Calculation: 1,028.45 recordkeepers * 16 hours per recordkeeper per year = 16,455.20 hours.

[24] Calculation: 16,455.20 annual reporting hours * ($51.72/hour * 1.42 loaded wage rate factor) hourly wage plus overhead = $1,208,635.

Finally, the Government will face costs to receive, review, and take action on reporting and recordkeeping submissions. To estimate the cost of receiving, reviewing, and taking action on reporting and recordkeeping submissions, the Department assumed an Information Security Analyst reviews submissions.[25] [26] DHS estimated that the Government's cost of receiving, reviewing, and taking action from incident reporting, incident response activities, PII and SPII notification requirements, credit monitoring, and receipt of certification of sanitization of government and government-activity-related files and information from non-ATO vendors is $452,516 annually.[27] The Government's cost of these activities from ATO vendors is $678,774 annually.[28]

Reporting and recordkeeping requirements impose costs on ATO vendors, non-ATO vendors, and the Government. The total cost of reporting and recordkeeping associated with the final rule is $6.12 million.[29] DHS estimates the total cost of reporting and recordkeeping over the 10-year period is $52.18 million and $42.96 million at discount rates of 3 percent and 7 percent, respectively. The annualized cost estimate over the 10-year period is $6.30 million and $6.55 million at discount rates of 3 percent and 7 percent, respectively.

(c) Independent Assessment

According to the changes in Alternate I to clause 3052.204–7X, *Authority to Operate,* contractors must have an independent third party validate the security and privacy controls in place for the information system(s); review and analyze the SA package; and report on technical, operational, and management level deficiencies.[30] The contractor must address all deficiencies before submitting the SA package to the COR for review.

Alternate I to clause 3052.204–7X, *Authority to Operate,* requires ATO vendors to acquire an independent assessment. The independent assessment is used to validate the security and privacy controls in place for the information system prior to submission of the SA package to the Government for review and acceptance. DHS estimated the cost of an independent assessment to ATO vendors by first determining the price of an independent assessment. DHS estimated that the cost of an independent assessment ranges from a lower bound of $132,836 to an upper bound of $161,189, with a primary estimate of $147,012.[31] Once an ATO is accepted and signed by the Government, it is valid for 3 years and must be renewed at that time unless otherwise specified in the ATO letter. As a result, ATO vendors will incur the cost of obtaining an independent assessment in the first year of the study period and in 3-year increments following the initial independent assessment. DHS then determined that 171 ATO vendors are subject to the provision. DHS estimates the total cost of independent assessments over the 10-year period, using the primary estimate, is $71.28 million and $86.09 million at discount rates of 3 percent and 7 percent, respectively. The primary annualized cost estimate over the 10-year period is $10.09 million and $10.15 million at discount rates of 3 percent and 7 percent, respectively. Exhibit 6 summarizes the range of cost estimates of independent assessments.

EXHIBIT 6—ESTIMATED MONETIZED COSTS OF INDEPENDENT ASSESSMENTS

[$2020 Millions]

	Cost (low estimate)	Cost (primary estimate)	Cost (high estimate)
10-Year Total (Undiscounted)	$91.08	$100.80	$110.52
10-Year Total (3% Discounted)	77.79	86.09	94.40
10-Year Total (7% Discounted)	64.40	71.28	78.15
Annualized (3% Discounted)	9.12	10.09	11.07
Annualized (7% Discounted)	9.17	10.15	11.13

(d) Security Review

The Government may elect to conduct periodic reviews to ensure that the security requirements contained in contracts are being implemented and enforced. The Government, at its sole discretion, may obtain assistance from other Federal agencies and/or third-party firms to aid in security review activities. Under this requirement, the contractor must afford DHS, the Office of the Inspector General, other government organizations, and contractors working in support of the Government access to the contractor's facilities, installations, operations, documentation, databases, networks, systems, and personnel used in the performance of the contract. The contractor must, through the Contracting Officer and COR, contact the Component or Headquarters CIO, or designee, to coordinate and participate in review and inspection activity by government organizations external to DHS. Access must be provided, to the extent necessary as determined by the Government (including providing all requested images), for the Government to carry out a program of inspection,

[25] Calculation: $36.64 Private Industry Workers' Total Compensation/$25.80 Private Industry Workers' Wages and Salaries = 1.42 Loaded Wage Factor. Employer Costs for Employee Compensation for private industry workers by occupational and industry group. *https://www.bls.gov/news.release/ecec.t04.htm.*

[26] Loaded hourly wage is $73.45. Calculation: $51.72 * Loaded Wage Factor (1.42). Occupational Employment and Wages, May 2020, Information Security Analyst, *https://www.bls.gov/oes/2020/may/oes151212.htm.*

[27] Calculation: 857.04 non-ATO vendors * 8 hours of review time * $66 hourly wage plus overhead = $452,516. The average hourly salary is based on the OPM GS–13/Step 4 salary ($48.09 an hour) plus a 36.25 percent fringe and overhead burden rate, the one mandated by OMB Memorandum M–08–13 for use in public-private competition, rounded to the nearest dollar, or $66 an hour. Reference Salary Table 2020–RUS, Effective January 2020, found at *https://www.opm.gov.*

[28] Calculation: 171.41 ATO vendors * 60 hours of review time * $66 hourly wage plus overhead = $678,774.

[29] Calculation: $3,776,986 total reporting cost + $1,208,635 recordkeeping cost + $1,131,290 cost to the Government = $6,116,911.

[30] These standards are outlined in NIST SP 800–53, *Security and Privacy Controls for Information Systems and Organizations,* or successor publication, accessible at *https://csrc.nist.gov/publications/sp.*

[31] The $132,836 estimate of an independent assessment is consistent with the proposed rule estimate of $123,615 and adjusted to 2020 dollars using the GDP deflator. The $123,615 estimate of an independent assessment was sourced from cost information requested from multiple vendors whose contracts with DHS require an independent assessment as part of the SA process. The $161,189 estimate of an independent assessment is consistent with the proposed rule estimate of $150,000, which was sourced from FedRAMP data and adjusted to 2020 dollars.

investigation, and audit to safeguard against threats and hazards to the integrity, availability, and confidentiality of government data or the function of computer systems used in performance of the contract and to preserve evidence of computer crime.

These requirements impose a cost to the contractor to perform the security review and to DHS to review and assist the security review. DHS has determined that it will conduct 50 self-assessment surveys and 4 full assessments annually, which take 3 and 40 hours, respectively. To estimate the cost of receiving, reviewing, and taking action on reporting and recordkeeping submissions, the Department assumed an Information Security Analyst reviews submissions.[32] [33] After completing security reviews, DHS has a GS–13 level analyst review 20 self-assessments and 2 full assessments annually. The total cost to contractors over 10 years to conduct self-assessments and full assessments is $227,696.[34] The total cost to DHS to review self-assessments and full assessments over 10 years is $118,800.[35] The total cost of security review associated with the final rule is $346,496.[36] DHS estimates the total cost of security reviews over the 10-year period—both the self-assessments and full assessments as well as their review—using the primary estimate, is $295,568 and $243,365 at discount rates of 3 percent and 7 percent, respectively. The primary annualized cost estimate over the 10-year period is $34,650 at discount rates of both 3 percent and 7 percent.

(2) Qualitative Costs

DHS is unable to quantify some costs related to clause 3052.204–7X paragraph (c), *Incident Reporting Requirements,* and clause 3052.204–7Y paragraphs (b), *PII and SPII Notification Requirements,* and (c), *Credit Monitoring Requirements.* Monetization is not possible for clause 3052.204–7Y paragraphs (b) and (c) because DHS does not track data on the number of individuals whose data are compromised under a data breach. Without this estimate, DHS is unable to determine the average number of individuals whom vendors would have to notify and who will require credit monitoring services. DHS anticipates a cost to vendors that are subject to the requirements of clause 3052.204–7Y paragraphs (b) and (c) and experience a data breach.

(a) Costs Related to Clause 3052.204–7X, Safeguarding of Controlled Unclassified Information, Paragraph (c), Incident Reporting Requirements

Clause 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* paragraph (c), *Incident Reporting Requirements,* requires contractors to report known or suspected incidents that involve PII or SPII within 1 hour of discovery as well as all other incidents (such as those impacting any other category of CUI) within 8 hours of discovery. Contractors must also provide as many of the following data elements that are available at the time the incident is reported, with any remaining data elements provided within 24 hours of submission of the initial incident report:

(i) Unique Entity Identifier (UEI);

(ii) Contract numbers affected unless all contracts by the company are affected;

(iii) Facility CAGE code if the location of the event is different than the prime contractor location;

(iv) Point of contact (POC) if different than the POC recorded in the System for Award Management (address, position, telephone, and email);

(v) Contracting Officer POC (address, telephone, and email);

(vi) Contract clearance level;

(vii) Name of subcontractor and CAGE code if this was an incident on a subcontractor network;

(viii) Government programs, platforms, or systems involved;

(ix) Location(s) of incident;

(x) Date and time the incident was discovered;

(xi) Server names where CUI resided at the time of the incident, both at the contractor and subcontractor level;

(xii) Description of the Government PII or SPII contained within the system; and

(xiii) Any additional information relevant to the incident.

DHS determined the cost of reporting an incident by requesting cost information from multiple vendors whose contracts with DHS include similar incident reporting requirements and reviewing internal historical data. These data indicated that the cost of reporting an incident to DHS ranges from a lower bound of $537 per incident to an upper bound of $1,612 per incident, with a primary estimate of $1,075 per incident.[37] DHS cannot quantify the aggregate total of these costs because DHS does not track the origin of security event notices and is therefore unable to determine how many security event notices external contractors reported to their respective Component SOC or the DHS Network Operations Security Center.

(b) Costs Related to Clause 3052.204–7Y, Safeguarding of Controlled Unclassified Information, Paragraph (b), PII and SPII Notification Requirements

Clause 3052.204–7Y, *Safeguarding of Controlled Unclassified Information,* paragraph (b), *PII and SPII Notification Requirements,* sets forth the notification procedures and capability requirements for contractors when notifying any individual whose PII and/or SPII was under the control of the contractor or resided in the information system at the time of the incident. The provision requires that, when appropriate, vendors must provide notification to individuals affected by the incident.

In response to compromised PII/SPII, the Government determines whether notification is appropriate, thereby adding another cost to both non-ATO and ATO vendors. DHS obtained values for the cost of providing notification to individuals via the GSA Data Breach Response and Identity Protection Services web page.[38] The Department assumed that vendors will purchase the ''Per Impacted Individual'' package (as opposed to the ''Per Enrollee'' package) when obtaining notification services.[39] The Department collected per impacted individual data from Experian, Identity Theft Guards, and Sontiq and then determined the lowest value and highest value for each service to create the following estimates. DHS estimated that the cost of notifying each individual ranges from $0.84 ($0.29 plus $0.55 for a standard-sized letter stamp) to $4.60

[32] Calculation: $36.64 Private Industry Workers' Total Compensation/$25.80 Private Industry Workers' Wages and Salaries = 1.42 Loaded Wage Factor. Employer Costs for Employee Compensation for private industry workers by occupational and industry group. *https://www.bls.gov/news.release/ecec.t04.htm.*

[33] Loaded hourly wage is $73.45. Calculation: $51.72 * Loaded Wage Factor (1.42). Occupational Employment and Wages, May 2020, Information Security Analyst, *https://www.bls.gov/oes/2020/may/oes151212.htm.*

[34] Calculation: ($73.45 loaded hourly wage * 50 self-assessments * 3 hours per self-assessment) + ($73.45 loaded hourly wage * 4 full assessments * 40 hours per full assessment) = $227,696.

[35] Calculation: ($66 loaded hourly wage * 50 self-assessments * 2 hours review per self-assessment) + ($66 loaded hourly wage * 4 full assessments * 20 hours review per full assessment) = $118,800.

[36] Calculation: $227,696 cost of self-assessments and full assessments + $118,800 cost of reviewing self-assessments and full assessments = $346,496.

[37] The final rule estimates of incident reporting are consistent with the proposed rule and adjusted to 2020 dollars using the GDP deflator.

[38] GSA eLibrary Data Breach and Identity Protection: *https://www.gsaelibrary.gsa.gov/ElibMain/sinDetails.do?scheduleNumber=MAS&specialItemNumber=541990IPS&executeQuery=YES.*

[39] Per Impacted Individual pricing is used when the enrollment rate of a breach is unknown and services are therefore provided to the entire impacted population regardless of enrollment status.

per year per individual, or $2.72 on average, depending on the level of security, features, and data included in each plan by the companies providing these services.

DHS cannot quantify an aggregate total of this cost due to the rule because DHS does not track at the Department level the number of notifications required on either an annual or per-incident basis. Additionally, the number of individuals requiring notification varies from incident to incident. Because DHS cannot estimate the number of individuals who require notification on an annual or per-incident basis, the Department cannot quantify an aggregate total of this cost due to the rule. Finally, there are existing State or local laws requiring notification and DHS does not collect data on where breaches are occurring. Therefore, DHS does not collect data on the baseline notification costs that already exist. The bearer of the notification cost—the government or the contractor—is determined on a case-by-case basis based on DHS's discretion.

(c) Costs Related to Clause 3052.204–7Y, Safeguarding of Controlled Unclassified Information, Paragraph (c), Credit Monitoring Requirements

Clause 3052.204–7Y, *Safeguarding of Controlled Unclassified Information,* paragraph (c), *Credit Monitoring Requirements,* requires that contractors, in the event of an incident, provide credit monitoring services, including call center services, if directed by the Contracting Officer, to any individual whose PII or SPII was under the control of the contractor, or resided in the information system, at the time of the incident for a period beginning the date of the incident and extending not less than 18 months from the date the individual is notified.

This rule requires contractors to provide credit monitoring services (including call center services) to any individual whose PII or SPII resided in a compromised information system. DHS updated costs estimated in the proposed rule by obtaining values for the cost of providing credit monitoring services to individuals from data on the GSA Data Breach Response and Identity Protection Services web page.[40] The Department assumed that vendors will purchase the ''Per Impacted Individual'' package (as opposed to the ''Per Enrollee'' packages) when obtaining credit monitoring services. The Department collected per impacted individual data from Experian, Identity Theft Guards, and Sontiq and then determined the lowest value and highest value for each service to create the following estimates. The Department estimates that the cost of private credit monitoring services ranges from $4.16 to $8.90 per year per individual, or $6.53 on average, depending on the level of security, features, and data included in each plan by the companies providing these services. The Department assumes that vendors will have the capabilities to obtain favorable credit monitoring prices. DHS cannot quantify these costs because it does not have estimates for the population of individuals affected.

(3) Summary of Costs

The changes in the final rule are expected to incur a cost to vendors that are subject to the final rule requirements. DHS estimates the 10-year costs to range from an undiscounted lower bound of $152.60 million to an undiscounted upper bound of $172.04 million. Over the 10-year analysis period, DHS estimates that the final rule will incur a total lower bound cost to vendors of $130.28 million at a 3-percent discount rate and $107.62 million at a 7-percent discount rate. DHS estimates that over the 10-year analysis period, the final rule will incur a total upper bound cost to vendors of $146.88 million at a 3-percent discount rate and $121.376 million at a 7-percent discount rate. Exhibit 7 provides a summary of the total estimated costs due to the final rule by provision.

EXHIBIT 7—ESTIMATED 10-YEAR MONETIZED COSTS THE FINAL RULE BY PROVISION

[$2020 Millions]

Provision	Cost (low estimate)	Cost (primary estimate)	Cost (high estimate)
Independent assessment	$91.08	$100.80	$110.52
Rule familiarization	0.01	0.01	0.01
Reporting and Recordkeeping	61.17	61.17	61.17
Security Review	0.35	0.35	0.35
10-Year Undiscounted Total	152.60	162.32	172.04
10-Year Total with a Discount Rate of 3%	130.28	138.58	146.889
10-Year Total with a Discount Rate of 7%	107.62	114.49	121.37

b. Qualitative Cost Savings

This section describes the cost savings associated with the final rule changes, including cost savings associated with clause 3052.204–7X paragraph (b), *Handling of Controlled Unclassified Information,* and Alternate I to clause 3052.204–7X, *Authority to Operate.*

The final rule will result in multiple cost savings associated with the transparency and consistency provided to contractors considering doing business with DHS. One cost saving is associated with the reduced time for DHS to grant an ATO. If a system is presented to DHS without the correct SRTM and/or with a poorly developed SA package, it can take up to 6 months to correct the issues and rewrite the SA package. In addition, post-assessment activities can be greatly reduced, as the number and severity of those corrections through POA&Ms required would be significantly reduced. DHS is unable to quantify reductions in time required for the ATO process, but lowering the risk of delays has the potential to produce significant time savings to DHS and impacted contractors.

Another cost savings to DHS results from time saved reviewing and reissuing requests for proposals and finding new contractors when they are unable to implement the SRTM. Under the final rule, contractors are more clearly notified of the system requirements of the contract up front, resulting in more bids from contractors capable of meeting DHS standards. Previously, embedding requirements in separate documents (*i.e.,* Statement of Work, Statement of Objectives, or Performance Work Statement) or through existing clause 3052.204–70, *Security Requirements for*

[40] GSA eLibrary Data Breach and Identity Protection: *https://www.gsaelibrary.gsa.gov/ElibMain/sinDetails.do?scheduleNumber=MAS&specialItemNumber=541990IPS&executeQuery=YES.*

Unclassified Information Technology Requirements, had the following impacts: (1) created inconsistencies in the identification of information security requirements for applicable contracts; (2) required the identification and communication of security controls for which compliance was necessary after contract award had been made; and (3) resulted in delays in contract performance. Under this final rule, DHS is less likely to have to put the project on hold to reissue a request for proposal or look for an alternate contractor, which reduces the reissuance of solicitations in situations where contractors are unable to implement the SRTM. Avoiding the reissuance of proposals also results in cost savings associated with avoiding background investigations for IT contractors, which can range in cost from approximately $425 to $1,000 per investigation. DHS is unable to quantify the cost savings associated with more bids from contractors capable of meeting DHS standards because we are unable to estimate the number of avoided reissuances that will occur.

The final rule will reduce the response time when incidents do occur, resulting in quicker identification of breaches and reducing the severity of incidents, thereby producing significant cost savings. The timely reporting of incidents is critical to prevent the impact of the incident from expanding, ensure incident response and mitigation activities are undertaken quickly, and ensure individuals are timely notified of the possible or actual compromise of their PII and offered credit monitoring services when applicable. Contractors were previously not consistently provided with specific incident reporting timelines, leaving the timeliness of incident reporting to the contractor. Standardizing incident reporting leads to more proactive incident response, potentially faster incident resolution, and potential reduction in the scope and impact of the incident depending on the nature of the attack (*i.e.,* fewer records breached). According to Cyentia Institute's 2020 Information Risk Insights Study report, the median cost of a data breach in the public sector was approximately $132,000, with higher cost cases (95th percentile) reaching approximately $13 million per incident.[41] An alternative source, the most recent (2021) Verizon Data Breach Investigations Report (DBIR), indicates that while 76 percent of the reported data breaches did not result in a loss, the losses for the remaining 24 percent ranged between $148 and $1.6 million, with a median breach cost of $30,000 for 95 percent of the cases with losses.[42] Based on an analysis of 79,000 breaches, the 2021 Verizon DBIR shows that approximately 60 percent of the incidents are discovered in days, while 20 percent could take months or longer to discover.[43] Early detection of the incidents is critical in preventing data loss, data encryption, and other damage.[44] Reducing the time to identify the breach results in immediate short-term benefits, such as improving the effectiveness of incident management, reducing false positives, improving triage by lowering the cost of trivial true positives,[45] minimizing mission disruption and the resulting impact on revenue and performance, and reducing the cost of investigation.[46] There are also significant long-term benefits of early discovery. Specifically, decreasing time to detection enables streamlined incident data collection and reporting, which allows for the generation of actionable insights and advice to the broader Federal Civilian Executive Branch, State-Local-Tribal-Territorial Government, and Critical Infrastructure communities on the proactive measures that reduce the potential for large-scale service disruptions. Cumulatively, short- and long-term benefits increase costs to the adversary, thus reducing the effectiveness of adversary campaigns. However, lacking an authoritative source that establishes a defensible estimate of the difference in a breach cost in the public sector based on the mean time to detection, DHS is unable to estimate the reduction in time to identify a breach under the final rule and, therefore, does not quantify these cost savings and other benefits.

c. Qualitative Benefits

This section describes the benefits associated with the final rule changes, including cost savings associated with clause 3052.204–7X paragraph (d), *Incident Response Requirements,* and clause 3052.204–7Y paragraphs (b), *PII and SPII Notification Requirements,* and (c), *Credit Monitoring Requirements.*

There are several nonquantifiable benefits of the final rule in addition to the cost savings discussed above. One of the main benefits is reducing the severity of a data breach to individuals and businesses that would have data compromised by a data breach. There are four cost categories that contribute to the total cost of a data breach: detection and escalation, lost business, notification, and ex-post response (including credit monitoring, identity protection services, and more). While some costs, such as the cost of lost business due to lowered trust, are not relevant to DHS, DHS expects this rule to reduce other costs, such as notification and ex-post response (credit monitoring and identity protection services). Although there is no way to eliminate the risk of breach completely, the purpose of this rule is to mitigate the negative effects of breaches, which include identity theft.

The public will be better notified of breaches in their data, allowing for better self-monitoring for identity theft. In particular, the rule requires contractors to have in place procedures and capability to notify any individual whose PII and/or SPII was under the control of the contractor or resided in the information system at the time of an incident. At a minimum, this notification must include: a brief description of the incident; a description of the types of PII or SPII involved; a statement as to whether the PII or SPII was encrypted or protected by other means; steps individuals may take to protect themselves; what the contractor and/or the Government are doing to investigate the incident, to mitigate the incident, and to protect against any future incidents; and information identifying who individuals may contact for additional information. DHS is unable to monetize the benefit associated with notifying individuals that their data may be compromised because it is difficult to estimate the number of individuals who may have their data compromised and to monetize the benefit of notification. DHS is unable to monetize the benefit associated with notification because DHS cannot estimate the number of

[41] Cyentia Institute, *2020 Information Risk Insights Study* (Mar. 2020), *https://www.cyentia.com/wp-content/uploads/IRIS2020_cyentia.pdf.*

[42] Verizon, *2021 Data Breach Investigations Report* (May 2021), *https://www.verizon.com/business/en-nl/resources/reports/dbir/.*

[43] Based on Verizon DBIR analysis of breaches in 88 countries. *https://enterprise.verizon.com/resources/articles/s/how-to-minimize-your-mean-time-to-detect-a-breach/.*

[44] Michael Paye, ''Poor incident detection can cost your organization a fortune'' (Sept. 24, 2020), Security Magazine, *https://www.securitymagazine.com/articles/93173-poor-incident-detection-can-cost-your-organization-a-fortune.*

[45] Druce MacFarlane, ''The 3 hidden costs of incident response'' (May 10, 2018), CSO Online, *https://www.csoonline.com/article/3270940/the-3-hidden-costs-of-incident-response.html.*

[46] Michael Paye, ''Poor incident detection can cost your organization a fortune'' (Sept. 24, 2020), Security Magazine, *https://www.securitymagazine.com/articles/93173-poor-incident-detection-can-cost-your-organization-a-fortune* and AlertOps, ''MTTR vs MTBF vs MTTD vs MTTF'' (2021) *https://alertops.com/mttd-vs-mttf-vs-mtbf-vs-mttr/.*

individuals who require notification on an annual or per-incident basis. DHS does not track at the Department level the number of notifications required on either an annual or per-incident basis. Additionally, the number of individuals requiring notification varies from incident to incident. Because DHS cannot estimate the number of individuals who require notification on either an annual or per-incident basis, the Department cannot monetize the benefit of notification.

The final rule also will produce a benefit to individuals associated with providing credit monitoring services. Under the final rule, when directed by the contracting officer, contractors are required to provide credit monitoring services, including call center services, to any individual whose PII or SPII was under the control of the contractor, or resided in the information system, at the time of the incident for a period beginning on the date of the incident and extending not less than 18 months from the date the individual is notified. Credit monitoring services can be particularly beneficial to the affected public, as they can assist individuals in the early detection of identity theft as well as notify individuals of changes that appear in their credit report, such as creation of new accounts, changes to their existing accounts or personal information, or new inquiries for credit. Such notification affords individuals the opportunity to take steps to minimize any harm associated with unauthorized or fraudulent activity. DHS is unable to quantify the benefit associated with providing credit monitoring services because it is difficult to estimate the number of individuals who may require credit monitoring services.

Another benefit of the *Safeguarding of Controlled Unclassified Information* clause is expedited reporting timelines. Incident reporting requires a contractor to report all known or suspected incidents to the Component SOC, or the DHS Enterprise SOC if the Component SOC is not available, in accordance with *4300A Sensitive Systems Handbook,* Attachment F, *Incident Response.* All known or suspected incidents involving PII or SPII must be reported within 1 hour of discovery. All other incidents must be reported within 8 hours of discovery. Timely reporting of incidents is critical for proactive incident response and potentially faster incident resolution. Also, timely reporting prevents the impact of the incident from expanding, ensures incident response and mitigation activities are undertaken quickly, and ensures that individuals are timely notified of the possible or actual compromise of their PII and offered credit monitoring services when applicable. DHS is unable to quantify this benefit because it is difficult to quantify the impact of timely reporting on the severity of an incident.

4. Summary

DHS presents the estimated range of costs under the final rule in Exhibit 8. DHS estimates the final rule will have an annualized cost that ranges from $15.32 million to $17.28 million at a discount rate of 7 percent and a total 10-year cost that ranges from $107.62 million to $121.37 million at a discount rate of 7 percent. DHS was unable to quantify the cost savings or benefits associated with the rule. However, the final rule is expected to produce cost savings by reducing the time required to grant an ATO, reducing DHS time reviewing and reissuing proposals because contractors are better qualified, and reducing the time to identify a data breach. The final rule also produces benefits by better notifying the public when their data are compromised, requiring the provision of credit monitoring services so that the public can better monitor and avoid costly consequences of data breaches, and reducing the severity of incidents through timely incident reporting.

EXHIBIT 8—ESTIMATED MONETIZED COSTS OF THE FINAL RULE

[$2020 Millions]

	Costs		
	Low	Primary	High
2023	$28.93	$31.63	$33.79
2024	6.15	6.15	6.15
2025	6.15	6.15	6.15
2026	28.92	31.35	33.78
2027	6.15	6.15	6.15
2028	6.15	6.15	6.15
2029	28.92	31.35	33.78
2030	6.15	6.15	6.15
2031	6.15	6.15	6.15
2032	28.92	31.35	33.78
Undiscounted 10-Year Total	152.60	162.32	172.04
10-Year Total with Discount Rate of 3%	130.28	138.58	146.89
10-Year Total with Discount Rate of 7%	107.62	114.49	121.37
Annualized with Discount Rate of 3%	15.27	16.25	17.22
Annualized with Discount Rate of 7%	15.32	16.30	17.28

5. Regulatory Alternatives

DHS evaluated two alternatives to the chosen approach of independent assessment, which requires vendors to obtain an independent assessment from a third party to validate the security and privacy controls in place for an information system prior to submission of the security authorization package to the Government for review and acceptance. In general, when assessing compliance with a standard or set of requirements, there are three alternatives: (1) first-party attestation or self-certification; (2) second-party attestation (*i.e.,* internal independent); or (3) third-party attestation. While the first two options may be considered the least economically burdensome, third-party attestation is an accepted best practice in commercial industry as objectivity increases with independence. DHS has selected the chosen approach of requiring vendors to obtain an independent assessment from a third party to ensure a truly objective measure of an entity's compliance with the requisite security and privacy controls. Recent high-profile breaches of Federal information demonstrate the need for Departments, agencies, and industry to ensure that information

security protections are clearly, effectively, and consistently addressed and appropriately implemented in contracts. The benefits of using a third party to perform an independent assessment extends to the contractor, as the contractor can use the results of the independent assessment to demonstrate its cybersecurity excellence for customers other than DHS.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), hereafter jointly referred to as the ''RFA,'' requires Federal agencies engaged in rulemaking to assess the impact of regulations that will have a significant economic impact on a substantial number of small entities. The agency also is required to respond to public comments on the NPRM.[47] The Chief Counsel for Advocacy of the SBA did not submit public comments on the NPRM.

The Department believes that this final rule may have a significant economic impact on a substantial number of small entities. Therefore, the Department publishes this final regulatory flexibility analysis (FRFA) that builds on the assessment provided in the initial regulatory flexibility analysis (IRFA) published as part of the NPRM. The Department invited interested persons to submit comments on impacts to small entities during the proposed rule phase.

1. A Statement of the Need for, and Objectives of, the Rule

DHS has determined that the new rulemaking is needed to implement security and privacy measures to safeguard CUI and facilitate improved incident reporting to DHS. The final rule enables DHS more efficiently to identify, remediate, mitigate, and resolve incidents when they occur, not necessarily completely prevent them. DHS understands that there is no ''true'' way to completely prevent an incident from occurring. However, these measures are intended to decrease the likelihood of occurrence with full knowledge that there is no such thing as an ''unhackable'' system.

The final rule adds a new clause at 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* that ensures adequate protection of CUI. That new clause: (1) identifies CUI handling requirements and security processes and procedures applicable to Federal information systems, which include contractor information systems operated on behalf of the agency; (2) identifies incident reporting requirements, including timelines and required data elements, inspection provisions, and post-incident activities; and (3) requires certification of sanitization of government and government-activity-related files and information. Additionally, new clause 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* requires contractors to have in place procedures and the capability to notify and provide credit monitoring services to any individual whose PII or SPII was under the control of the contractor or resided in the information system at the time of the incident.

These measures are necessary because of the urgent need to protect CUI and respond appropriately when DHS contractors experience incidents with DHS information. Persistent and pervasive high-profile breaches of Federal information continue to demonstrate the need to ensure that information security protections are addressed clearly, effectively, and consistently in contracts. This final rule strengthens and expands existing HSAR language to ensure adequate security when contractor and/or subcontractor employees will have access to CUI; CUI will be collected or maintained on behalf of the agency; or Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI.

2. A Statement of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made to the Proposed Rule as a Result of Such Comments

The Department did not receive public comments on the IRFA.

3. The Response of the Agency to Any Comments Filed by the Chief Counsel for Advocacy of the SBA in Response to the Proposed Rule, and a Detailed Statement of Any Change Made to the Proposed Rule as a Result of the Comments

The Department did not receive comments from the Chief Counsel for Advocacy of the SBA.

4. A Description of and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why No Such Estimate is Available

a. Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization; (2) small governmental jurisdiction; or (3) small business. The Department used the entity size standards defined by SBA, in effect as of August 19, 2019, to classify businesses as small.[48] SBA establishes separate standards for individual 6-digit North American Industry Classification System (NAICS) codes, and standard cutoffs typically are based on either the average number of employees or the average annual receipts. For example, small businesses generally are defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[49]

b. Number of Small Entities

The Department collected employment and annual revenue data from the business information provider Data Axle and merged those data into FY 2020 Federal FPDS data. The FPDS data contained PSC information for each vendor identifying the type of service being provided to DHS. This dataset allowed the Department to identify the number and type of small entities in the FPDS data, and their PSC information, as well as their annual revenues. DHS identified 2,218 unique vendors with PSCs for FY 2020 that may be impacted by the final rule. Of those 2,218 vendors, the Department was able to obtain data matches of revenue or employees for 366 vendors in FY 2020. Duplicate vendors that appeared multiple times within the dataset were removed (*i.e.,* the same vendor appearing multiple times). The Department was unable to obtain data

[47] *See* 5 U.S.C. 604.

[48] SBA *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support-table-size-standards.*

[49] *See https://advocacy.sba.gov/resources/the-regulatory-flexibility-act* for details.

matches for 184 vendors in FY 2020. In order to prevent underestimating the number of small entities the final rule would affect, DHS conservatively considers all the nonmatched vendors as small entities for the purpose of this analysis. Of the 366 vendors with employee or revenue matches, the Department identified 265 unique vendors (or 48 percent of the sample) as small.[50] Within the 265 matched small vendors, the Department was unable to obtain revenue data for four vendors. These data points are displayed in Exhibit 9 below.

EXHIBIT 9—NUMBER OF SMALL ENTITIES

Parameter	Quantity	Proportion of sample (percent)
Population	3,203	
Population (unique entities)	2,218	
Minimum Required Sample	328	
Selected Sample	550	100
Nonmatched Sample Segment	184	33
Matched Sample Segment	366	67
Matched Small Entities	265	48
Sub-Sample Missing Revenue Data	4	2
Matched Non-Small Entities	101	18
Number of Small Entities Discovered in Research	449	82

In sum, the Department classified 449 vendors as small.[51] Of these unique small entities, 261 of them had revenue data available from Data Axle. The Department's analysis of the financial impact of this final rule on small entities is based on the number of small unique entities with revenue data (261).

To provide clarity on the industries impacted by this regulation, Exhibit 10 shows the number of unique small entities (265) in FY 2020 within each NAICS code at the 6-digit and 4-digit level.

EXHIBIT 10—NUMBER OF SMALL ENTITIES BY NAICS CODE

6-Digit NAICS	Description	Number of small employers	Percent of small employers
541511	Custom Computer Programming Services	21	8
443142	Electronics Stores	16	6
541618	Other Management Consulting Services	11	4
423610	Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers.	10	4
511210	Software Publishers20	10	4
541614	Process, Physical Distribution and Logistics Consulting Services	8	3
541330	Engineering Services	7	3
561990	All Other Support Services	7	3
238990	All Other Specialty Trade Contractors	6	2
561621	Security Systems Services (except Locksmiths)	6	2
Other NAICS		163	61
4-Digit NAICS	**Description**	**Number of small employers**	**Percent of small employers**
5416	Management, Scientific, and Technical Consulting Services	27	10
5415	Computer Systems Design and Related Services	26	10
4431	Electronics and Appliance Stores	16	6
4236	Household Appliances and Electrical and Electronic Goods Merchant Wholesalers	11	4
5413	Architectural, Engineering, and Related Services	10	4
5616	Investigation and Security Services	10	4
5112	Software Publishers	10	4
2389	Other Specialty Trade Contractors	7	3
5619	Other Support Services	7	3
5419	Other Professional, Scientific, and Technical Services	7	3
Other NAICS		134	49

A small percentage of entities in the sample segment are educational institutions or not-for-profit entities.[52] Using data with the profit/non-profit status of each vendor in the sample segment, we count the number of for-

[50] SBA *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* (Aug. 2019), *https://www.sba.gov/document/support-table-size-standards.*

[51] Calculation: 184 nonmatched entities + 265 matched entities = 449 small entities.

[52] Educational institutions include HBCUs, private universities or colleges, State-controlled institutions of higher learning, Tribal colleges, veterinary colleges, or other educational institutions.

profit and not-for-profit entities and the number of small and non-small entities.[53] We assume that all unspecified entities—those marked as neither educational institutions, non-profit organizations, or for-profit organizations—are for-profit businesses. Table 11 includes these data for both entities we were able to match and non-matched entities.

EXHIBIT 11—NUMBER OF SMALL ENTITIES

Parameter	Quantity	Proportion of sample (percent)
Selected Sample	550	100.0
Profit	496	90.2
Non-Profit	19	3.4
Educational Institution	6	1.1
Other	29	5.3

c. Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small entities from the baseline (*i.e.,* the 2017 proposed rule) to this final rule. We estimated the costs of obtaining an independent assessment and rule familiarization. Although the sample population of small entities identified in this analysis is 449, DHS does not anticipate the actual number of small entities impacted by the final rule to be of this magnitude. As discussed in the E.O. 12866 section, DHS expects 171 entities to be impacted by cost provisions annually. The Department anticipates these 171 entities would have a distribution of large and small entities, and impacts to the small entities, that follow the sample population's distribution of size and costs presented in this FRFA.

Small entities in the IT field will be subject to only the independent assessment, ongoing maintenance of continuous monitoring, and rule familiarization costs. DHS classified an entity as being in the IT field if their PSC began with a ''7'' or ''D,'' or if the PSC matched any of the following codes: 5810, 6350, AJ11, AJ21, AJ23, AJ43, R423, R430, R431, R611, and R615. Additionally, entities classified as non-ATO will be subject to only rule familiarization costs. DHS classified an entity as being non-ATO if their PSC and description was as follows: (1) S201—Housekeeping—Custodial Janitorial; (2) 6515—Medical and Surgical Instruments, Equipment, and Supplies; (3) S216—Housekeeping—Facilities Operations Support; (4) R614—Support—Administrative: Paper Shredding; or (5) U008—Education/Training—Training/Curriculum Development. The estimates included in this analysis are consistent with those presented in the E.O. 12866 section and include costs of rule familiarization, reporting and recordkeeping, and independent assessment.

The Department presents the impacts of the final rule on small entities as a percent of revenue in Exhibit 12 below.

EXHIBIT 12—SUMMARY OF SMALL ENTITY COSTS AS A PERCENT OF REVENUE

Impacts	50 Percent			75 Percent			90 Percent		
	Number of small entities	% of small entities	Cumulative %	Number of small entities	% of small entities	Cumulative %	Number of small entities	% of small entities	Cumulative %
<1%	39	15	15	34	13	13	29	1	11
1–5%	83	31	46	82	31	44	86	33	44
5–10%	48	18	64	47	18	62	42	16	59
10–25%	58	22	86	59	22	84	59	22	82
25–50%	23	9	95	27	10	94	26	10	92
>50%	13	5	100	15	6	100	22	8	100
Total	264			264			264		

DHS expects its contractors may choose to reflect these costs in the price and cost proposals they submit to the Department. Therefore, the Department conducted a sensitivity analysis with varying levels of passthrough assumed for small businesses. DHS does not assume a specific percentage of costs that vendors will pass on since some vendors may choose to pass on fewer costs in pursuance of a competitive advantage on their price. Therefore, the Department presents three scenarios using the primary estimates of the rule costs: (1) vendors pass on 50 percent of rule costs to the Department; (2) vendors pass on 75 percent of rule costs to the Department; and (3) vendors pass on 90 percent of rule costs to the Department. The results of the sensitivity analysis are displayed in Exhibit 13 below.

[53] The SBA's Office of Advocacy defines small organizations as not-for-profit entities that are independently owned and operated and not dominant in their field. For more information, visit *https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf.*

EXHIBIT 13—SENSITIVITY OF SMALL ENTITY COSTS ASSUMING DIFFERENT PASSTHROUGHS

Impacts	50 Percent			75 Percent			90 Percent		
	Number of small entities	% of small entities	Cumulative %	Number of small entities	% of small entities	Cumulative %	Number of small entities	% of small entities	Cumulative %
<1%	70	27	27	109	41	41	157	59	59
1–5%	100	38	64	99	38	79	85	32	92
5–10%	43	16	81	32	12	91	14	5	97
10–25%	38	14	95	19	7	98	8	3	100
25–50%	8	3	98	5	2	100	0	0	100
>50%	5	2	100	0	0	100	0	0	100
Total	264			264			264		

5. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The final rule has reporting and recordkeeping requirements impacting small entities. DHS needs information required by clauses 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* and 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* to implement the requirements for safeguarding against unauthorized contractor/subcontractor disclosure and inappropriate use of CUI that contractors and subcontractors may have access to during the course of contract performance. Reporting and recordkeeping for the SA package consists of the following: Security Plan, Contingency Plan, Contingency Plan Test Results, Configuration Management Plan, Security Assessment Plan, Security Assessment Report, and Authorization to Operate Letter. Additional documents that may be required include a Plan(s) of Action and Milestones and Interconnection Security Agreement(s). Additional requirements include an independent assessment, security review, renewal of the ATO (required every 3 years unless stated otherwise), and Federal reporting and continuous monitoring requirements.

6. A Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each of the Other Significant Alternatives to the Rule Considered by the Agency That Affects the Impact on Small Entities Was Rejected

The Department considered alternative requirements for independent assessment that would be less burdensome on small entities. In general, when assessing compliance with a standard or set of requirements, there are three alternatives: (1) first-party attestation or self-certification; (2) second-party attestation (*i.e.,* internal independent); or (3) third-party attestation. While the first two options may be considered the least economically burdensome, third-party attestation is an accepted best practice in commercial industry as objectivity increases with independence. DHS has selected the chosen approach of requiring vendors to obtain an independent assessment from a third party to ensure a truly objective measure of an entity's compliance with the requisite security and privacy controls. Recent high-profile breaches of Federal information demonstrate the need for departments, agencies, and industry to ensure that information security protections are clearly, effectively, and consistently addressed and appropriately implemented in contracts. The benefits of using a third party to perform an independent assessment extends to the contractor, as the contractor can use the results of the independent assessment to demonstrate its cybersecurity excellence for customers other than DHS.

The information security requirements associated with this rule are not geared toward a type of contractor; the requirements are based on the sensitivity of the information and the impact on the program, the Government, and security in the event CUI is breached. That standard would not vary based on the size of the entity. DHS has determined that the costs associated with compliance with the security requirements of this rule are a necessary expense to ensure DHS CUI is adequately protected and to produce the resulting benefits and cost savings that accrue to DHS, vendors, and the public from the provisions of the final rule, as discussed in the E.O. 12866 section.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. ch. 35) applies. The rule contains information collection requirements. Accordingly, DHS will be submitting a request for approval of a new information collection requirement concerning this rule to OMB under 44 U.S.C. 3501, *et seq.*

The collection requirements for this rule are based on two new clauses, 3052.204–7X, *Safeguarding of Controlled Unclassified Information,* and 3052.204–7Y, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.*

Overview of Information Collection:

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* Homeland Security Acquisition Regulation: Safeguarding of Controlled Unclassified Information.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* No form; OCPO.

(4) *Affected public who will be asked or required to respond; as well as a brief abstract:* The affected public is business or other for-profit institutions. DHS needs the information required by clauses 3052.204–7X and 3052.204–7Y to implement the requirements for safeguarding against unauthorized

contractor/subcontractor disclosure and inappropriate use of CUI that contractors and subcontractors may have access to during the course of contract performance. Responses are required for respondents to obtain or retain benefits.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated number of respondents for reporting is 1,028. The weighted average public reporting burden for this collection of information is estimated to be approximately 50 hours per response to comply with the requirements, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This weighted average is based on an estimated 36 hours per response to comply with the requirements when an ATO is not required and an estimated 120 hours to comply with the requirements when an ATO is required (*i.e.,* when a contractor is required to submit an SA package).[54] The SA package consists of the following: Security Plan, Contingency Plan, Contingency Plan Test Results, Configuration Management Plan, Security Assessment Plan, Security Assessment Report, and Authorization to Operate Letter. Additional documents that may be required include a Plan(s) of Action and Milestones and Interconnection Security Agreement(s). Additional requirements include an independent assessment, security review, renewal of the ATO (required every 3 years unless stated otherwise), and Federal reporting and continuous monitoring requirements. It is estimated that the number of recordkeepers associated with these clauses will be 1,028 and the estimated burden per response is 16 hours.

(6) *An estimate of the total public burden (in hours) associated with the information collection:* The total estimated annual hour burden associated with this collection is 67,820.

(7) *An estimate of the total public burden (in cost) associated with the information collection:* The estimated total annual cost burden associated with this collection of information is $4,476,120.

List of Subjects in 48 CFR Parts 3001, 3002, 3004 and 3052

Government procurement.

For reasons set out in the preamble, DHS amends chapter 30 of title 48 of the Code of Federal Regulations as set forth below.

■ 1. The authority citation for 48 CFR parts 3001, 3002, 3004, and 3052 is revised to read as follows:

Authority: 5 U.S.C. 301–302, 41 U.S.C. 1707, 41 U.S.C. 1702, 41 U.S.C. 1303(a)(2), 48 CFR part 1, subpart 1.3, and DHS Delegation Number 0702.

PART 3001—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 3001.106 amend paragraph (a) by adding a new OMB control number at the end of the list to read as follows:

3001.106 OMB Approval Under the Paperwork Reduction Act.

(a) * * *

OMB Control No. 1601–0023 (Safeguarding of Controlled Unclassified Information)

* * * * *

PART 3002—DEFINITIONS OF WORDS AND TERMS

■ 3. Amend section 3002.101 by adding the definitions ''Adequate security'', ''Controlled unclassified information (CUI)'', ''Federal information'', ''Federal information system'', ''Handling'', ''Information resources'', ''Information security'', and ''Information systems'' to read as follows:

Adequate security means security protections commensurate with the risk resulting from the unauthorized access, use, disclosure, disruption, modification, or destruction of information. This includes ensuring that information hosted on behalf of an agency and information systems and applications used by the agency operate effectively and provide appropriate confidentiality, integrity, and availability protections through the application of cost-effective security controls.

* * * * *

Controlled unclassified information (CUI) is any information the Government creates or possesses, or an entity creates or possesses for or on behalf of the Government (other than classified information) that a law, regulation, or Governmentwide policy requires or permits an agency to handle using safeguarding or dissemination controls. This definition includes the following CUI categories and subcategories of information:

(1) Chemical-terrorism Vulnerability Information (CVI) as defined in 6 CFR part 27, ''Chemical Facility Anti-Terrorism Standards,'' and as further described in supplementary guidance issued by an authorized official of the Department of Homeland Security (including the Revised Procedural Manual ''Safeguarding Information Designated as Chemical-Terrorism Vulnerability Information'' dated September 2008);

(2) Protected Critical Infrastructure Information (PCII) as set out in the Critical Infrastructure Information Act of 2002 (title XXII, subtitle B of the Homeland Security Act of 2002 as amended through Pub. L. 116–283), PCII's implementing regulations (6 CFR part 29), the PCII Program Procedures Manual, and any supplementary guidance officially communicated by an authorized official of the Department of Homeland Security, the PCII Program Manager, or a PCII Program Manager Designee;

(3) Sensitive Security Information (SSI) as defined in 49 CFR part 1520, ''Protection of Sensitive Security Information,'' as amended, and any supplementary guidance officially communicated by an authorized official of the Department of Homeland Security (including the Assistant Secretary for the Transportation Security Administration or designee), including Department of Homeland Security MD 11056.1, ''Sensitive Security Information (SSI)'' and, within the Transportation Security Administration, TSA MD 2810.1, ''SSI Program'';

(4) Homeland Security Agreement Information means information the Department of Homeland Security receives pursuant to an agreement with State, local, Tribal, territorial, or private sector partners that is required to be protected by that agreement. The Department receives this information in furtherance of the missions of the Department, including, but not limited to, support of the Fusion Center Initiative and activities for cyber information sharing consistent with the Cybersecurity Information Sharing Act of 2015;

(5) Homeland Security Enforcement Information means unclassified information of a sensitive nature lawfully created, possessed, or transmitted by the Department of Homeland Security in furtherance of its immigration, customs, and other civil and criminal enforcement missions, the unauthorized disclosure of which could adversely impact the mission of the Department;

(6) International Agreement Information means information the Department of Homeland Security receives that is required to be protected by an information sharing agreement or arrangement with a foreign government,

[54] Estimated hours weighted by 171 ATO vendors and 857 non-ATO vendors.

an international organization of governments or any element thereof, an international or foreign public or judicial body, or an international or foreign private or non-governmental organization;

(7) Information Systems Vulnerability Information (ISVI) means:

(i) Department of Homeland Security information technology (IT) systems data revealing infrastructure used for servers, desktops, and networks; applications name, version, and release; switching, router, and gateway information; interconnections and access methods; and mission or business use/need. Examples of ISVI are systems inventories and enterprise architecture models. Information pertaining to national security systems and eligible for classification under Executive Order 13526 will be classified as appropriate; and/or

(ii) Information regarding developing or current technology, the release of which could hinder the objectives of the Department, compromise a technological advantage or countermeasure, cause a denial of service, or provide an adversary with sufficient information to clone, counterfeit, or circumvent a process or system;

(8) Operations Security Information means Department of Homeland Security information that could be collected, analyzed, and exploited by a foreign adversary to identify intentions, capabilities, operations, and vulnerabilities that threaten operational security for the missions of the Department;

(9) Personnel Security Information means information that could result in physical risk to Department of Homeland Security personnel or other individuals whom the Department is responsible for protecting;

(10) Physical Security Information means reviews or reports illustrating or disclosing facility infrastructure or security vulnerabilities related to the protection of Federal buildings, grounds, or property. For example, threat assessments, system security plans, contingency plans, risk management plans, business impact analysis studies, and certification and accreditation documentation;

(11) Privacy Information includes both Personally Identifiable Information (PII) and Sensitive Personally Identifiable Information (SPII). PII refers to information that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual; and SPII is a subset of PII that if lost, compromised, or disclosed without authorization could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. To determine whether information is PII, DHS will perform an assessment of the specific risk that an individual can be identified using the information with other information that is linked or linkable to the individual. In performing this assessment, it is important to recognize that information that is not PII can become PII whenever additional information becomes available, in any medium or from any source, that would make it possible to identify an individual. Certain data elements are particularly sensitive and may alone present an increased risk of harm to the individual.

(i) Examples of stand-alone PII that are particularly sensitive include: Social Security numbers (SSNs), driver's license or State identification numbers, Alien Registration Numbers (A-numbers), financial account numbers, and biometric identifiers.

(ii) Multiple pieces of information may present an increased risk of harm to the individual when combined, posing an increased risk of harm to the individual. SPII may also consist of any grouping of information that contains an individual's name or other unique identifier plus one or more of the following elements:

(A) Truncated SSN (such as last 4 digits);

(B) Date of birth (month, day, and year);

(C) Citizenship or immigration status;

(D) Ethnic or religious affiliation;

(E) Sexual orientation;

(F) Criminal history;

(G) Medical information; and

(H) System authentication information, such as mother's birth name, account passwords, or personal identification numbers (PINs).

(iii) Other PII that may present an increased risk of harm to the individual depending on its context, such as a list of employees and their performance ratings or an unlisted home address or phone number. The context includes the purpose for which the PII was collected, maintained, and used. This assessment is critical because the same information in different contexts can reveal additional information about the impacted individual.

* * * * *

Federal information means information created, collected, processed, maintained, disseminated, disclosed, or disposed of by or for the Federal Government, in any medium or form.

Federal information system means an information system used or operated by an agency or by a contractor of an agency or by another organization on behalf of an agency.

Handling means any use of controlled unclassified information, including but not limited to marking, safeguarding, transporting, disseminating, re-using, and disposing of the information.

* * * * *

Information resources means information and related resources, such as personnel, equipment, funds, and information technology.

Information security means protecting information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide—

(1) Integrity, which means guarding against improper information modification or destruction, and includes ensuring information nonrepudiation and authenticity;

(2) Confidentiality, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and

(3) Availability, which means ensuring timely and reliable access to and use of information.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

* * * * *

PART 3004—ADMINISTRATIVE MATTERS

■ 4. Revise subpart 3004.4 to read as follows:

Subpart 3004.4—Safeguarding Classified and Controlled Unclassified Information Within Industry

3004.470–1 Scope.

This section implements DHS policies for assuring adequate security of unclassified facilities, information resources, and controlled unclassified information (CUI) during the acquisition lifecycle.

3004.470–2 Definitions.

As used in this subpart—

Incident means an occurrence that—

(1) Actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or availability of information or an information system; or

(2) Constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable use policies.

3004.470–3 Policy.

(a) DHS requires that CUI be safeguarded when it resides on DHS-owned and operated information systems, DHS-owned and contractor-operated information systems, contractor-owned and/or operated information systems operating on behalf of the Department, and any situation where contractor and/or subcontractor employees may have access to CUI because of their relationship with DHS. There are several Department policies and procedures (accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors*) that also address the safeguarding of CUI. Compliance with these policies and procedures, as amended, is required.

(b) DHS requires contractor employees that require recurring access to government facilities or access to CUI to complete such forms as may be necessary for security or other reasons, including the conduct of background investigations to determine fitness. Department policies and procedures that address contractor employee fitness are contained in Instruction Handbook Number 121–01–007, *The Department of Homeland Security Personnel Suitability and Security Program.* Compliance with these policies and procedures, as amended, is required.

3004.470–4 Contract Clauses.

(a) Contracting officers shall insert the basic clause at (HSAR) 48 CFR 3052.204–71, *Contractor Employee Access,* in solicitations and contracts when contractor and/or subcontractor employees require recurring access to government facilities or access to CUI. Contracting officers shall insert the basic clause with its Alternate I for acquisitions requiring contractor access to government information resources. For acquisitions in which contractor and/or subcontractor employees will not have access to government information resources, but the department has determined contractor and/or subcontractor employee access to CUI or government facilities must be limited to U.S. citizens and lawful permanent residents, the contracting officer shall insert the clause with its Alternate II. Neither the basic clause nor its alternates shall be used unless contractor and/or subcontractor employees will require recurring access to government facilities or access to CUI. Neither the basic clause nor its alternates should ordinarily be used in contracts with educational institutions.

(b)(1) Contracting officers shall insert the clause at (HSAR) 48 CFR 3052.204–72, *Safeguarding of Controlled Unclassified Information,* in solicitations and contracts where:

(i) Contractor and/or subcontractor employees will have access to CUI; or

(ii) CUI will be collected or maintained on behalf of the agency.

(2) Contracting officers shall insert the basic clause with its alternate when Federal information systems, which include contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI.

(c) Contracting officers shall insert the clause at (HSAR) 48 CFR 3052.204–73, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents,* in solicitations and contracts where contractor and/or subcontractor employees have access to PII.

PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Remove and reserve clause 3052.204–70.

■ 6. Revise clause 3052.204–71 to read as follows:

3052.204–71 Contractor employee access.

As prescribed in (HSAR) 48 CFR 3004.470–4(a), insert the following clause with appropriate alternates:

Contractor Employee Access (July 2023)

(a) *Controlled Unclassified Information (CUI)* is any information the Government creates or possesses, or an entity creates or possesses for or on behalf of the Government (other than classified information) that a law, regulation, or Governmentwide policy requires or permits an agency to handle using safeguarding or dissemination controls. This definition includes the following CUI categories and subcategories of information:

(1) Chemical-terrorism Vulnerability Information (CVI) as defined in 6 CFR part 27, ''Chemical Facility Anti-Terrorism Standards,'' and as further described in supplementary guidance issued by an authorized official of the Department of Homeland Security (including the Revised Procedural Manual ''Safeguarding Information Designated as Chemical-Terrorism Vulnerability Information'' dated September 2008);

(2) Protected Critical Infrastructure Information (PCII) as set out in the Critical Infrastructure Information Act of 2002 (title XXII, subtitle B of the Homeland Security Act of 2002 as amended through Pub. L. 116–283), PCII's implementing regulations (6 CFR part 29), the PCII Program Procedures Manual, and any supplementary guidance officially communicated by an authorized official of the Department of Homeland Security, the PCII Program Manager, or a PCII Program Manager Designee;

(3) Sensitive Security Information (SSI) as defined in 49 CFR part 1520, ''Protection of Sensitive Security Information,'' as amended, and any supplementary guidance officially communicated by an authorized official of the Department of Homeland Security (including the Assistant Secretary for the Transportation Security Administration or designee), including Department of Homeland Security MD 11056.1, ''Sensitive Security Information (SSI)'' and, within the Transportation Security Administration, TSA MD 2810.1, ''SSI Program'';

(4) Homeland Security Agreement Information means information the Department of Homeland Security receives pursuant to an agreement with State, local, Tribal, territorial, or private sector partners that is required to be protected by that agreement. The Department receives this information in furtherance of the missions of the Department, including, but not limited to, support of the Fusion Center Initiative and activities for cyber information sharing consistent with the Cybersecurity Information Sharing Act of 2015;

(5) Homeland Security Enforcement Information means unclassified information of a sensitive nature lawfully created, possessed, or transmitted by the Department of Homeland Security in furtherance of its immigration, customs, and other civil and criminal enforcement missions, the unauthorized disclosure of which could adversely impact the mission of the Department;

(6) International Agreement Information means information the Department of Homeland Security receives that is required to be protected by an information sharing agreement or arrangement with a foreign government, an international organization of governments or any element thereof, an international or foreign public or judicial body, or an international or foreign private or non-governmental organization;

(7) Information Systems Vulnerability Information (ISVI) means:

(i) Department of Homeland Security information technology (IT) systems data revealing infrastructure used for servers, desktops, and networks; applications name, version, and release; switching, router, and gateway information; interconnections and access methods; and mission or business use/need. Examples of ISVI are systems inventories and enterprise architecture models. Information pertaining to national security systems and eligible for classification under Executive Order 13526 will be classified as appropriate; and/or

(ii) Information regarding developing or current technology, the release of which could hinder the objectives of the Department, compromise a technological advantage or countermeasure, cause a denial of service, or provide an adversary with sufficient information to clone, counterfeit, or circumvent a process or system;

(8) Operations Security Information means Department of Homeland Security information that could be collected, analyzed, and exploited by a foreign adversary to identify intentions, capabilities, operations, and vulnerabilities that threaten operational security for the missions of the Department;

(9) Personnel Security Information means information that could result in physical risk to Department of Homeland Security personnel or other individuals whom the Department is responsible for protecting;

(10) Physical Security Information means reviews or reports illustrating or disclosing facility infrastructure or security vulnerabilities related to the protection of Federal buildings, grounds, or property. For example, threat assessments, system security plans, contingency plans, risk management plans, business impact analysis studies, and certification and accreditation documentation;

(11) Privacy Information includes both Personally Identifiable Information (PII) and Sensitive Personally Identifiable Information (SPII). PII refers to information that can be used to distinguish or trace an individual's identity, either alone, or when combined with other information that is linked or linkable to a specific individual; and SPII is a subset of PII that if lost, compromised, or disclosed without authorization could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. To determine whether information is PII, DHS will perform an assessment of the specific risk that an individual can be identified using the information with other information that is linked or linkable to the individual. In performing this assessment, it is important to recognize that information that is not PII can become PII whenever additional information becomes available, in any medium or from any source, that would make it possible to identify an individual. Certain data elements are particularly sensitive and may alone present an increased risk of harm to the individual.

(i) Examples of stand-alone PII that are particularly sensitive include: Social Security numbers (SSNs), driver's license or State identification numbers, Alien Registration Numbers (A-numbers), financial account numbers, and biometric identifiers.

(ii) Multiple pieces of information may present an increased risk of harm to the individual when combined, posing an increased risk of harm to the individual. SPII may also consist of any grouping of information that contains an individual's name or other unique identifier plus one or more of the following elements:

(A) Truncated SSN (such as last 4 digits);

(B) Date of birth (month, day, and year);

(C) Citizenship or immigration status;

(D) Ethnic or religious affiliation;

(E) Sexual orientation;

(F) Criminal history;

(G) Medical information; and

(H) System authentication information, such as mother's birth name, account passwords, or personal identification numbers (PINs).

(iii) Other PII that may present an increased risk of harm to the individual depending on its context, such as a list of employees and their performance ratings or an unlisted home address or phone number. The context includes the purpose for which the PII was collected, maintained, and used. This assessment is critical because the same information in different contexts can reveal additional information about the impacted individual.

(b) *Information Resources* means information and related resources, such as personnel, equipment, funds, and information technology.

(c) Contractor employees working on this contract must complete such forms as may be necessary for security or other reasons, including the conduct of background investigations to determine suitability. Completed forms shall be submitted as directed by the Contracting Officer. Upon the Contracting Officer's request, the Contractor's employees shall be fingerprinted or subject to other investigations as required. All Contractor employees requiring recurring access to government facilities or access to CUI or information resources are required to have a favorably adjudicated background investigation prior to commencing work on this contract unless this requirement is waived under departmental procedures.

(d) The Contracting Officer may require the Contractor to prohibit individuals from working on the contract if the Government deems their initial or continued employment contrary to the public interest for any reason, including, but not limited to, carelessness, insubordination, incompetence, or security concerns.

(e) Work under this contract may involve access to CUI. The Contractor shall access and use CUI only for the purpose of furnishing advice or assistance directly to the Government in support of the Government's activities, and shall not disclose, orally or in writing, CUI for any other purpose to any person unless authorized in writing by the Contracting Officer. For those Contractor employees authorized to access CUI, the Contractor shall ensure that these persons receive initial and refresher training concerning the protection and disclosure of CUI. Initial training shall be completed within 60 days of contract award and refresher training shall be completed every 2 years thereafter.

(f) The Contractor shall include this clause in all subcontracts at any tier where the subcontractor may have access to government facilities, CUI, or information resources.

(End of clause)

Alternate I (July 2023)

When the contract will require Contractor employees to have access to information resources, add the following paragraphs:

(g) Before receiving access to information resources under this contract, the individual must complete a security briefing; additional training for specific categories of CUI, if identified in the contract; and any nondisclosure agreement furnished by DHS. The Contracting Officer's Representative (COR) will arrange the security briefing and any additional training required for specific categories of CUI.

(h) The Contractor shall have access only to those areas of DHS information resources explicitly stated in this contract or approved by the COR in writing as necessary for performance of the work under this contract. Any attempts by Contractor personnel to gain access to any information resources not expressly authorized by the terms and conditions in this contract, or as approved in writing by the COR, are strictly prohibited. In the event of violation of this provision, DHS will take appropriate actions with regard to the contract and the individual(s) involved.

(i) Contractor access to DHS networks from a remote location is a temporary privilege for mutual convenience while the Contractor performs business for DHS. It is not a right, a guarantee of access, a condition of the contract, or government-furnished equipment (GFE).

(j) Contractor access will be terminated for unauthorized use. The Contractor agrees to hold and save DHS harmless from any unauthorized use and agrees not to request additional time or money under the contract for any delays resulting from unauthorized use or access.

(k) Non-U.S. citizens shall not be authorized to access or assist in the development, operation, management, or maintenance of Department IT systems under the contract, unless a waiver has been granted by the Head of the Component or designee, with the concurrence of both the Department's Chief Security Officer (CSO) and the Chief Information Officer (CIO) or their designees. Within DHS Headquarters, the waiver may be granted only with the approval of both the CSO and the CIO or their designees. In order for a waiver to be granted:

(1) There must be a compelling reason for using this individual as opposed to a U.S. citizen; and

(2) The waiver must be in the best interest of the Government.

(l) Contractors shall identify in their proposals the names and citizenship of all non-U.S. citizens proposed to work under the contract. Any additions or deletions of non-U.S. citizens after contract award shall also be reported to the Contracting Officer.

(End of clause)

Alternate II (June 2006)

* * * * *

(End of clause)

* * * * *

■ 7. Add section 3052.204–72 to read as follows:

3052.204–72 Safeguarding of Controlled Unclassified Information.

As prescribed in (HSAR) 48 CFR 3004.470–4(b), insert the following clause:

Safeguarding of Controlled Unclassified Information (July 2023)

(a) *Definitions.* As used in this clause—

Adequate Security means security protections commensurate with the risk resulting from the unauthorized access, use, disclosure, disruption, modification, or

destruction of information. This includes ensuring that information hosted on behalf of an agency and information systems and applications used by the agency operate effectively and provide appropriate confidentiality, integrity, and availability protections through the application of cost-effective security controls.

Controlled Unclassified Information (CUI) is any information the Government creates or possesses, or an entity creates or possesses for or on behalf of the Government (other than classified information) that a law, regulation, or Governmentwide policy requires or permits an agency to handle using safeguarding or dissemination controls. This definition includes the following CUI categories and subcategories of information:

(1) Chemical-terrorism Vulnerability Information (CVI) as defined in 6 CFR part 27, ''Chemical Facility Anti-Terrorism Standards,'' and as further described in supplementary guidance issued by an authorized official of the Department of Homeland Security (including the Revised Procedural Manual ''Safeguarding Information Designated as Chemical-Terrorism Vulnerability Information'' dated September 2008);

(2) Protected Critical Infrastructure Information (PCII) as set out in the Critical Infrastructure Information Act of 2002 (title XXII, subtitle B of the Homeland Security Act of 2002 as amended through Public Law 116–283), PCII's implementing regulations (6 CFR part 29), the PCII Program Procedures Manual, and any supplementary guidance officially communicated by an authorized official of the Department of Homeland Security, the PCII Program Manager, or a PCII Program Manager Designee;

(3) Sensitive Security Information (SSI) as defined in 49 CFR part 1520, ''Protection of Sensitive Security Information,'' as amended, and any supplementary guidance officially communicated by an authorized official of the Department of Homeland Security (including the Assistant Secretary for the Transportation Security Administration or designee), including Department of Homeland Security MD 11056.1, ''Sensitive Security Information (SSI)'' and, within the Transportation Security Administration, TSA MD 2810.1, ''SSI Program'';

(4) Homeland Security Agreement Information means information the Department of Homeland Security receives pursuant to an agreement with State, local, Tribal, territorial, or private sector partners that is required to be protected by that agreement. The Department receives this information in furtherance of the missions of the Department, including, but not limited to, support of the Fusion Center Initiative and activities for cyber information sharing consistent with the Cybersecurity Information Sharing Act of 2015;

(5) Homeland Security Enforcement Information means unclassified information of a sensitive nature lawfully created, possessed, or transmitted by the Department of Homeland Security in furtherance of its immigration, customs, and other civil and criminal enforcement missions, the unauthorized disclosure of which could adversely impact the mission of the Department;

(6) International Agreement Information means information the Department of Homeland Security receives that is required to be protected by an information sharing agreement or arrangement with a foreign government, an international organization of governments or any element thereof, an international or foreign public or judicial body, or an international or foreign private or non-governmental organization;

(7) Information Systems Vulnerability Information (ISVI) means:

(i) Department of Homeland Security information technology (IT) systems data revealing infrastructure used for servers, desktops, and networks; applications name, version, and release; switching, router, and gateway information; interconnections and access methods; and mission or business use/need. Examples of ISVI are systems inventories and enterprise architecture models. Information pertaining to national security systems and eligible for classification under Executive Order 13526 will be classified as appropriate; and/or

(ii) Information regarding developing or current technology, the release of which could hinder the objectives of the Department, compromise a technological advantage or countermeasure, cause a denial of service, or provide an adversary with sufficient information to clone, counterfeit, or circumvent a process or system;

(8) Operations Security Information means Department of Homeland Security information that could be collected, analyzed, and exploited by a foreign adversary to identify intentions, capabilities, operations, and vulnerabilities that threaten operational security for the missions of the Department;

(9) Personnel Security Information means information that could result in physical risk to Department of Homeland Security personnel or other individuals whom the Department is responsible for protecting;

(10) Physical Security Information means reviews or reports illustrating or disclosing facility infrastructure or security vulnerabilities related to the protection of Federal buildings, grounds, or property. For example, threat assessments, system security plans, contingency plans, risk management plans, business impact analysis studies, and certification and accreditation documentation;

(11) Privacy Information includes both Personally Identifiable Information (PII) and Sensitive Personally Identifiable Information (SPII). PII refers to information that can be used to distinguish or trace an individual's identity, either alone, or when combined with other information that is linked or linkable to a specific individual; and SPII is a subset of PII that if lost, compromised, or disclosed without authorization could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. To determine whether information is PII, the DHS will perform an assessment of the specific risk that an individual can be identified using the information with other information that is linked or linkable to the individual. In performing this assessment, it is important to recognize that information that is not PII can become PII whenever additional information becomes available, in any medium or from any source, that would make it possible to identify an individual. Certain data elements are particularly sensitive and may alone present an increased risk of harm to the individual.

(i) Examples of stand-alone PII that are particularly sensitive include: Social Security numbers (SSNs), driver's license or State identification numbers, Alien Registration Numbers (A-numbers), financial account numbers, and biometric identifiers.

(ii) Multiple pieces of information may present an increased risk of harm to the individual when combined, posing an increased risk of harm to the individual. SPII may also consist of any grouping of information that contains an individual's name or other unique identifier plus one or more of the following elements:

(A) Truncated SSN (such as last 4 digits);

(B) Date of birth (month, day, and year);

(C) Citizenship or immigration status;

(D) Ethnic or religious affiliation;

(E) Sexual orientation;

(F) Criminal history;

(G) Medical information; and

(H) System authentication information, such as mother's birth name, account passwords, or personal identification numbers (PINs).

(iii) Other PII that may present an increased risk of harm to the individual depending on its context, such as a list of employees and their performance ratings or an unlisted home address or phone number. The context includes the purpose for which the PII was collected, maintained, and used. This assessment is critical because the same information in different contexts can reveal additional information about the impacted individual.

Federal information means information created, collected, processed, maintained, disseminated, disclosed, or disposed of by or for the Federal Government, in any medium or form.

Federal information system means an information system used or operated by an agency or by a Contractor of an agency or by another organization on behalf of an agency.

Handling means any use of controlled unclassified information, including but not limited to marking, safeguarding, transporting, disseminating, re-using, storing, capturing, and disposing of the information.

Incident means an occurrence that—

(1) Actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or availability of information or an information system; or

(2) Constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable use policies.

Information Resources means information and related resources, such as personnel, equipment, funds, and information technology.

Information Security means protecting information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide—

(1) Integrity, which means guarding against improper information modification or

destruction, and includes ensuring information nonrepudiation and authenticity;

(2) Confidentiality, which means preserving authorized restrictions on access and disclosure, including means for protecting personal privacy and proprietary information; and

(3) Availability, which means ensuring timely and reliable access to and use of information.

Information System means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

(b) *Handling of Controlled Unclassified Information.* (1) Contractors and subcontractors must provide adequate security to protect CUI from unauthorized access and disclosure. Adequate security includes compliance with DHS policies and procedures in effect at the time of contract award. These policies and procedures are accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors.*

(2) The Contractor shall not use or redistribute any CUI handled, collected, processed, stored, or transmitted by the Contractor except as specified in the contract.

(3) The Contractor shall not maintain SPII in its invoicing, billing, and other recordkeeping systems maintained to support financial or other administrative functions. It is acceptable to maintain in these systems the names, titles, and contact information for the Contracting Officer's Representative (COR) or other government personnel associated with the administration of the contract, as needed.

(4) Any government data provided, developed, or obtained under the contract, or otherwise under the control of the Contractor, shall not become part of the bankruptcy estate in the event a Contractor and/or subcontractor enters bankruptcy proceedings.

(c) *Incident Reporting Requirements.* (1) Contractors and subcontractors shall report all known or suspected incidents to the Component Security Operations Center (SOC) in accordance with Attachment F, *Incident Response,* to DHS Policy Directive 4300A *Information Technology System Security Program, Sensitive Systems.* If the Component SOC is not available, the Contractor shall report to the DHS Enterprise SOC. Contact information for the DHS Enterprise SOC is accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors.* Subcontractors are required to notify the prime Contractor that it has reported a known or suspected incident to the Department. Lower tier subcontractors are required to likewise notify their higher tier subcontractor, until the prime contractor is reached. The Contractor shall also notify the Contracting Officer and COR using the contact information identified in the contract. If the report is made by phone, or the email address for the Contracting Officer or COR is not immediately available, the Contractor shall contact the Contracting Officer and COR immediately after reporting to the Component or DHS Enterprise SOC.

(2) All known or suspected incidents involving PII or SPII shall be reported within 1 hour of discovery. All other incidents shall be reported within 8 hours of discovery.

(3) CUI transmitted via email shall be protected by encryption or transmitted within secure communications systems. CUI shall be transmitted using a *FIPS 140–2/140–3 Security Requirements for Cryptographic Modules* validated cryptographic module identified on *https://csrc.nist.gov/projects/cryptographic-module-validation-program/validated-modules.* When this is impractical or unavailable, for Federal information systems only, CUI may be transmitted over regular email channels. When using regular email channels, Contractors and subcontractors shall not include any CUI in the subject or body of any email. The CUI shall be included as a password-protected attachment with the password provided under separate cover, including as a separate email. Recipients of CUI information will comply with any email restrictions imposed by the originator.

(4) An incident shall not, by itself, be interpreted as evidence that the Contractor or Subcontractor has failed to provide adequate information security safeguards for CUI or has otherwise failed to meet the requirements of the contract.

(5) If an incident involves PII or SPII, in addition to the incident reporting guidelines in Attachment F, *Incident Response,* to DHS Policy Directive 4300A *Information Technology System Security Program, Sensitive Systems,* Contractors shall also provide as many of the following data elements that are available at the time the incident is reported, with any remaining data elements provided within 24 hours of submission of the initial incident report:

(i) Unique Entity Identifier (UEI);

(ii) Contract numbers affected unless all contracts by the company are affected;

(iii) Facility CAGE code if the location of the event is different than the prime Contractor location;

(iv) Point of contact (POC) if different than the POC recorded in the System for Award Management (address, position, telephone, and email);

(v) Contracting Officer POC (address, telephone, and email);

(vi) Contract clearance level;

(vii) Name of subcontractor and CAGE code if this was an incident on a subcontractor network;

(viii) Government programs, platforms, or systems involved;

(ix) Location(s) of incident;

(x) Date and time the incident was discovered;

(xi) Server names where CUI resided at the time of the incident, both at the Contractor and subcontractor level;

(xii) Description of the government PII or SPII contained within the system; and

(xiii) Any additional information relevant to the incident.

(d) *Incident Response Requirements.*

(1) All determinations by the Department related to incidents, including response activities, will be made in writing by the Contracting Officer.

(2) The Contractor shall provide full access and cooperation for all activities determined by the Government to be required to ensure an effective incident response, including providing all requested images, log files, and event information to facilitate rapid resolution of incidents.

(3) Incident response activities determined to be required by the Government may include, but are not limited to, the following:

(i) Inspections;

(ii) Investigations;

(iii) Forensic reviews;

(iv) Data analyses and processing; and

(v) Revocation of the Authority to Operate (ATO), if applicable.

(4) The Contractor shall immediately preserve and protect images of known affected information systems and all available monitoring/packet capture data. The monitoring/packet capture data shall be retained for at least 180 days from submission of the incident report to allow DHS to request the media or decline interest.

(5) The Government, at its sole discretion, may obtain assistance from other Federal agencies and/or third-party firms to aid in incident response activities.

(e) *Certificate of Sanitization of Government and Government-Activity-Related Files and Information.* Upon the conclusion of the contract by expiration, termination, cancellation, or as otherwise indicated in the contract, the Contractor shall return all CUI to DHS and/or destroy it physically and/or logically as identified in the contract unless the contract states that return and/or destruction of CUI is not required. Destruction shall conform to the guidelines for media sanitization contained in NIST SP 800–88, *Guidelines for Media Sanitization.* The Contractor shall certify and confirm the sanitization of all government and government-activity related files and information. The Contractor shall submit the certification to the COR and Contracting Officer following the template provided in NIST SP 800–88, *Guidelines for Media Sanitization,* Appendix G.

(f) *Other Reporting Requirements.* Incident reporting required by this clause in no way rescinds the Contractor's responsibility for other incident reporting pertaining to its unclassified information systems under other clauses that may apply to its contract(s), or as a result of other applicable statutory or regulatory requirements, or other U.S. Government requirements.

(g) *Subcontracts.* The Contractor shall insert this clause in all subcontracts and require subcontractors to include this clause in all lower tier subcontracts when subcontractor employees will have access to CUI; CUI will be collected or maintained on behalf of the agency by a subcontractor; or a subcontractor information system(s) will be used to process, store, or transmit CUI.

(End of clause)

Alternate I (July 2023)

When Federal information systems, which include Contractor information systems operated on behalf of the agency, are used to collect, process, store, or transmit CUI, add the following paragraphs:

(h) *Authority to Operate.* The Contractor shall not collect, process, store, or transmit CUI within a Federal information system until an ATO has been granted by the

Component or Headquarters CIO, or designee. Once the ATO has been granted by the Government, the Contracting Officer shall incorporate the ATO into the contract as a compliance document. Unless otherwise specified in the ATO letter, the ATO is valid for 3 years. An ATO is granted at the sole discretion of the Government and can be revoked at any time. Contractor receipt of an ATO does not create any contractual right of access or entitlement. The Government's grant of an ATO does not alleviate the Contractor's responsibility to ensure the information system controls are implemented and operating effectively.

(1) *Complete the Security Authorization process.* The Security Authorization (SA) process shall proceed according to DHS Policy Directive 4300A *Information Technology System Security Program, Sensitive Systems* (Version 13.3, February 13, 2023), or any successor publication; and the *Security Authorization Process Guide,* including templates. These policies and templates are accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors.*

(i) *Security Authorization Package.* The SA package shall be developed using the government-provided Security Requirements Traceability Matrix and SA templates. The SA package consists of the following: Security Plan, Contingency Plan, Contingency Plan Test Results, Configuration Management Plan, Security Assessment Plan, Security Assessment Report, and Authorization to Operate Letter. Additional documents that may be required include a Plan(s) of Action and Milestones and Interconnection Security Agreement(s). The Contractor shall submit a signed copy of the SA package, validated by an independent third party, to the COR for review and approval by the Component or Headquarters CIO, or designee, at least 30 days prior to the date of operation of the information system. The Government is the final authority on the compliance of the SA package and may limit the number of resubmissions of modified documents.

(ii) *Independent Assessment.* Contractors shall have an independent third party validate the security and privacy controls in place for the information system(s). The independent third party shall review and analyze the SA package, and report on technical, operational, and management level deficiencies as outlined in NIST SP 800–53, *Security and Privacy Controls for Information Systems and Organizations,* or successor publication, accessible at *https://csrc.nist.gov/publications/sp.* The Contractor shall address all deficiencies before submitting the SA package to the COR for review.

(2) *Renewal of ATO.* Unless otherwise specified in the ATO letter, the Contractor shall renew the ATO every 3 years. The Contractor is required to update its SA package as part of the ATO renewal process for review and verification of security controls. Review and verification of security controls is independent of the system production date and may include onsite visits that involve physical or logical inspection of the Contractor environment to ensure controls are in place. The updated SA package shall be submitted for review and approval by the Component or Headquarters CIO, or designee, at least 90 days before the ATO expiration date. The Contractor shall update its SA package by one of the following methods:

(i) Updating the SA package in the DHS Information Assurance Compliance System; or

(ii) Submitting the updated SA package directly to the COR.

(3) *Security Review.* The Government may elect to conduct periodic reviews to ensure that the security requirements contained in the contract are being implemented and enforced. The Government, at its sole discretion, may obtain assistance from other Federal agencies and/or third-party firms to aid in security review activities. The Contractor shall afford DHS, the Office of the Inspector General, other government organizations, and Contractors working in support of the Government access to the Contractor's facilities, installations, operations, documentation, databases, networks, systems, and personnel used in the performance of this contract. The Contractor shall, through the Contracting Officer and COR, contact the Component or Headquarters CIO, or designee, to coordinate and participate in review and inspection activity by government organizations external to DHS. Access shall be provided, to the extent necessary as determined by the Government (including providing all requested images), for the Government to carry out a program of inspection, investigation, and audit to safeguard against threats and hazards to the integrity, availability, and confidentiality of government data or the function of computer systems used in performance of this contract and to preserve evidence of computer crime.

(4) *Federal Reporting and Continuous Monitoring Requirements.* Contractors operating information systems on behalf of the Government shall comply with Federal reporting and information system continuous monitoring requirements. Reporting requirements are determined by the Government and are defined in the Fiscal Year 2015 DHS Information Security Performance Plan, or successor publication, accessible at *https://www.dhs.gov/dhs-security-and-training-requirements-contractors.* The plan is updated on an annual basis. Annual, quarterly, and monthly data collection will be coordinated by the Government. The Contractor shall provide the Government with all information to fully satisfy Federal reporting requirements for information systems. The Contractor shall provide the COR with requested information within 3 business days of receipt of the request. Unless otherwise specified in the contract, monthly continuous monitoring data shall be stored at the Contractor's location for a period not less than 1 year from the date the data are created. The Government may elect to perform information system continuous monitoring and IT security scanning of information systems from government tools and infrastructure.

(End of clause)

■ 8. Add section 3052.204–73 to read as follows:

3052.204–73 Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.

As prescribed in (HSAR) 48 CFR 3004.470–4(c), insert the following clause:

3052.204–73 Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents (July 2023)

(a) *Definitions.* Privacy Information includes both Personally Identifiable Information (PII) and Sensitive Personally Identifiable Information (SPII). PII refers to information that can be used to distinguish or trace an individual's identity, either alone, or when combined with other information that is linked or linkable to a specific individual; and SPII is a subset of PII that if lost, compromised, or disclosed without authorization could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. To determine whether information is PII, the DHS will perform an assessment of the specific risk that an individual can be identified using the information with other information that is linked or linkable to the individual. In performing this assessment, it is important to recognize that information that is not PII can become PII whenever additional information becomes available, in any medium or from any source, that would make it possible to identify an individual. Certain data elements are particularly sensitive and may alone present an increased risk of harm to the individual.

(1) Examples of stand-alone PII that are particularly sensitive include: Social Security numbers (SSNs), driver's license or State identification numbers, Alien Registration Numbers (A-numbers), financial account numbers, and biometric identifiers.

(2) Multiple pieces of information may present an increased risk of harm to the individual when combined, posing an increased risk of harm to the individual. SPII may also consist of any grouping of information that contains an individual's name or other unique identifier plus one or more of the following elements:

(i) Truncated SSN (such as last 4 digits);

(ii) Date of birth (month, day, and year);

(iii) Citizenship or immigration status;

(iv) Ethnic or religious affiliation;

(v) Sexual orientation;

(vi) Criminal history;

(vii) Medical information; and

(viii) System authentication information, such as mother's birth name, account passwords, or personal identification numbers (PINs).

(3) Other PII that may present an increased risk of harm to the individual depending on its context, such as a list of employees and their performance ratings or an unlisted home address or phone number. The context includes the purpose for which the PII was collected, maintained, and used. This assessment is critical because the same

information in different contexts can reveal additional information about the impacted individual.

(b) *PII and SPII Notification Requirements.* (1) No later than 5 business days after being directed by the Contracting Officer, or as otherwise required by applicable law, the Contractor shall notify any individual whose PII or SPII was either under the control of the Contractor or resided in an information system under control of the Contractor at the time the incident occurred. The method and content of any notification by the Contractor shall be coordinated with, and subject to prior written approval by, the Contracting Officer. The Contractor shall not proceed with notification unless directed in writing by the Contracting Officer.

(2) All determinations by the Department related to notifications to affected individuals and/or Federal agencies and related services (*e.g.,* credit monitoring) will be made in writing by the Contracting Officer.

(3) Subject to government analysis of the incident and direction to the Contractor regarding any resulting notification, the notification method may consist of letters to affected individuals sent by first-class mail, electronic means, or general public notice, as approved by the Government. Notification may require the Contractor's use of address verification and/or address location services. At a minimum, the notification shall include:

(i) A brief description of the incident;

(ii) A description of the types of PII or SPII involved;

(iii) A statement as to whether the PII or SPII was encrypted or protected by other means;

(iv) Steps individuals may take to protect themselves;

(v) What the Contractor and/or the Government are doing to investigate the incident, mitigate the incident, and protect against any future incidents; and

(vi) Information identifying who individuals may contact for additional information.

(c) *Credit Monitoring Requirements.* The Contracting Officer may direct the Contractor to:

(1) Provide notification to affected individuals as described in paragraph (b).

(2) Provide credit monitoring services to individuals whose PII or SPII was under the control of the Contractor or resided in the information system at the time of the incident for a period beginning the date of the incident and extending not less than 18 months from the date the individual is notified. Credit monitoring services shall be provided from a company with which the Contractor has no affiliation. At a minimum, credit monitoring services shall include:

(i) Triple credit bureau monitoring;

(ii) Daily customer service;

(iii) Alerts provided to the individual for changes and fraud; and

(iv) Assistance to the individual with enrollment in the services and the use of fraud alerts.

(3) Establish a dedicated call center. Call center services shall include:

(i) A dedicated telephone number to contact customer service within a fixed period;

(ii) Information necessary for registrants/enrollees to access credit reports and credit scores;

(iii) Weekly reports on call center volume, issue escalation (*i.e.,* those calls that cannot be handled by call center staff and must be resolved by call center management or DHS, as appropriate), and other key metrics;

(iv) Escalation of calls that cannot be handled by call center staff to call center management or DHS, as appropriate;

(v) Customized Frequently Asked Questions, approved in writing by the Contracting Officer in coordination with the Component or Headquarters Privacy Officer; and

(vi) Information for registrants to contact customer service representatives and fraud resolution representatives for credit monitoring assistance.

(End of clause)

■ 9. In section 3052.212–70 amend paragraph (b) of the clause by:

■ a. Removing ''__3052.204–70, *Security Requirements for Unclassified Information Technology Resources*''

■ b. Revising the entry for 3052.204–71, *Contractor Employee Access,* and

■ c. Adding 3052.204–72, *Safeguarding of Controlled Unclassified Information* and 3052.204–73, *Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.*

The revision reads as follows:

3052.212–70 Contract terms and conditions applicable to DHS acquisition of commercial items.

Contract Terms and Conditions Applicable to DHS Acquisition of Commercial Items (July 2023)

* * * * *

(b) * * *

____3052.204–71 Contractor Employee Access.

____Alternate I

____Alternate II

____3052.204–72 Safeguarding of Controlled Unclassified Information.

____3052.204–73 Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.

* * * * *

Paul Courtney,

Chief Procurement Officer, Department of Homeland Security.

[FR Doc. 2023–11270 Filed 6–20–23; 8:45 am]

BILLING CODE 9110–9B–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Part VI

Federal Communications Commission

47 CFR Part 10
Emergency Alert System; Wireless Emergency Alerts; Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 10

[PS Docket No. 15–94; PS Docket No. 15–91; FCC 23–30; FR ID 146184]

Emergency Alert System; Wireless Emergency Alerts

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) proposes requirements for commercial mobile service providers (CMS Providers) that have elected to participate in the Wireless Emergency Alert system (WEA) to make WEA more accessible, including to people who primarily speak a language other than English or Spanish and people with disabilities who cannot access messages displayed in conventional formats. Additionally, the document proposes to weave WEA more seamlessly into people's lives through increased flexibility in whether an attention signal or vibration is triggered when a WEA is triggered. The document also proposes performance measures for WEA to satisfy and greater transparency for alerting stakeholders regarding where and on what devices they offer WEA as well as information about WEA performance. These requirements would assist the millions of people who do not speak English or Spanish, as well as those with disabilities, understand and respond to WEA messages, and result in a more precise and tailored use of WEA through increased flexibility and options for consumers and alerting authorities. With this *Further Notice of Proposed Rulemaking (Further Notice),* the Commission seeks comment on the proposed rules and any suitable alternatives.

DATES: Comments are due on or before July 21, 2023 and reply comments are due on or before August 21, 2023. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before August 21, 2023.

ADDRESSES: You may submit comments, identified by PS Docket No. 15–94; and PS Docket No. 15–91, by any of the following methods:

- *Federal Communications Commission's website: https://www.apps.fcc.gov/ecfs/.* Follow the instructions for submitting comments.
- *Mail:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. *See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy,* Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

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

FOR FURTHER INFORMATION CONTACT: For further information regarding this Further Notice, please contact Michael Antonino, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–7965, or by email to *michael.antonino@fcc.gov.*

For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Nicole Ongele, Office of Managing Director, Performance and Program Management, 202–418–2991, or by email to *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (NPRM), FCC 23–30, adopted April 20, 2023, and released April 21, 2023. This FNPRM addresses Wireless Emergency Alerts (WEA). Though we are not specifically proposing changes to our Part 11 rules regarding the Emergency Alert System (EAS), this FNPRM references both the EAS and WEA dockets and we have historically sought comment on WEA in both dockets, including the underlying NPRM to which this further notice connects. The full text of this document is available by downloading the text from the Commission's website at: *https://docs.fcc.gov/public/attachments/FCC-23-30A1.pdf.*

Synopsis

Introduction and Background

1. It is essential that the public be able to receive WEA messages in their native language and that alerting authorities better understand WEA performance. Accordingly, we propose to require CMS Providers that have elected to participate in WEA (Participating CMS Providers) take measures to:

- Make WEA more accessible, including to people who primarily speak a language other than English or Spanish and people with disabilities who cannot access messages displayed in conventional formats;
- Integrate WEA more seamlessly into people's lives through increased flexibility in whether the attention signal and/or vibration is triggered;
- Satisfy performance measures for WEA; and
- Provide alerting stakeholders with greater transparency regarding where and on what devices they offer WEA, as well as information about WEA performance.

Through these proposals, we intend to help the millions of people who primarily speak languages other than English or Spanish, as well as those with disabilities, better understand and take protective actions in response to WEA messages; facilitate the more tailored use of WEA through increased flexibility and options for the alerting authority and consumer; and provide alerting authorities with the information they need to use WEA with confidence.

2. WEA is a tool for authorized federal, state, and local government entities to geographically target alerts and warnings to WEA-capable mobile devices of Participating CMS Providers' subscribers. The Warning Alert and Response Network (WARN) Act establishes WEA as a voluntary system in which CMS providers may elect to participate and gives the Commission authority to adopt ''relevant technical standards, protocols, procedures and other technical requirements . . . necessary to enable commercial mobile service alerting capability for

commercial mobile service providers that voluntarily elect to transmit emergency alerts.'' Pursuant to this authority, the Commission has adopted requirements to prescribe WEA capabilities, WEA testing, and WEA election procedures. While participation by wireless providers is voluntary, those that offer the service must adhere to the technical and operational requirements established by the Commission. The Commission requires each CMS Provider to file an election with the Commission indicating whether it intends to transmit emergency alerts ''in whole or in part.'' Twenty one of the 76 wireless providers that elect to transmit alert messages, including the three nationwide service providers AT&T, Verizon Wireless, and T-Mobile, have elected to transmit emergency alert messages ''in part.'' A CMS Provider that elects, in whole or in part, not to transmit emergency alerts is also required to make that election in writing to the Commission, provide conspicuous notice at the point of sale of any devices that will not transmit emergency alerts, and notify its existing subscribers of this election. While Participating CMS Providers, including the three nationwide providers, serve the majority of wireless consumers, hundreds of wireless providers (over 450 of them) have elected not to transmit WEA alert messages.

3. Federal, state, local, tribal, and territorial emergency management agencies apply to the Federal Emergency Management Agency's (FEMA's) Integrated Public Alert and Warning System (IPAWS) Program Management Office to become authorized as alerting authorities. FEMA authorizes alerting authorities to issue WEA and other alerts through IPAWS either individually or as part of a Collaborative Operating Group (COGs) after they enter into a Memorandum of Agreement (MOA) with FEMA agreeing to certain rules of behavior.

4. The Commission does not currently require Participating CMS Providers to measure the performance of their WEA service. In 2016, the Commission proposed to require Participating CMS Providers to annually report on the performance of their WEA systems, and sought comment on whether Participating CMS Providers should log additional information about the WEA alert messages that they transmit to enable performance measurements, including at the mobile device where WEA alert messages are received. In 2018, the Commission sought additional comment on how WEA's performance should be measured and reported, and how the Commission should address inconsistent WEA delivery. In 2022, the Commission sought to refresh the issue of developing metrics for WEA performance and reporting standards to assist stakeholders with understanding the effectiveness of WEA in their alerting areas, and identify areas for improvement. We proposed that Participating CMS Providers report on reliability, speed, and accuracy to help stakeholders develop an understanding of the WEA system's end-to-end performance. We also sought comment on how these metrics should be defined and how the data should be logged and reported to the Commission.

5. In 2020, the Government Accountability Office (GAO) reviewed the federal response to natural disasters, and examined the Commission's oversight of WEA in particular. GAO observed that WEA usage has increased and now serves as the nation's primary alerting method. GAO noted that while the FCC collects test data from Emergency Alert System (EAS) tests, a similar mechanism does not exist for WEA. GAO found that, while the FCC has required Participating CMS Providers to implement new WEA capabilities, it ''has not developed goals and performance measures to help monitor how well the new capabilities perform during emergencies.'' GAO observed that ''because [the] FCC does not have specific goals and performance measures to monitor WEA improvements, [the] FCC will have difficulty assuring that these improvements are working as intended during emergencies and identifying areas where performance is lacking, which could undermine authorities' confidence in using IPAWS.'' Accordingly, GAO recommended that the FCC should develop measurable goals and performance measures for WEA. In response, the Commission stated it would ''complete geo-targeting pilot testing with selected local jurisdiction partner(s)'' and ''complete associated rulemaking to adopt performance measures for enhanced WEA capabilities, as appropriate.''

6. Over the years, the Communications Security, Reliability and Interoperability Council (CSRIC) has studied and reported on various aspects of the WEA system. In 2014, CSRIC IV discussed the possibility of including maps and other graphic information in WEA alert messages, concluding that more study was necessary. More recently, in 2022, CSRIC VIII examined the issue of WEA performance reporting and developed technical requirements for an application programming interface (API) that would allow WEA firmware to leverage native mobile device capabilities. CSRIC VIII recommended automated performance data reporting via email and discussed alternative ways to implement WEA performance reporting, including through the use of staged devices. CSRIC VII also recommended enhancements to WEA messages such as support for machine-based translation, location aware maps, and other multimedia content.

Discussion

A. Making WEA More Accessible

7. People with native languages other than English or Spanish, or people with disabilities, may be excluded during emergencies if they are not notified in a manner that they can understand. We tentatively conclude that WEA needs to do more to deliver essential warnings in languages and in a format that is most likely to reach those communities who need this information most. Accordingly, we propose to require Participating CMS Providers to ensure that the WEA-capable mobile devices they sell have the capacity to translate alert messages into most subscribers' alert language preferences and support multimedia content. We seek comment on these proposals as well as on any other actions that the Commission can take to empower alerting authorities to deliver emergency alerts in an accessible manner to everyone in their communities.

Enhancing WEA's Language Support

8. We propose to require Participating CMS Providers to take steps, described below, to ensure that their subscribers' WEA-capable mobile devices have the capacity to translate English-language alert messages that they receive into the default language preferences of most subscribers by taking advantage of machine translation technologies. This proposal would address alerting authorities' need to be able to communicate with people in their communities in languages other than English or Spanish, irrespective of the alerting authorities' in-house language translation capabilities.

9. We seek comment on the technical feasibility of this proposal. Based on recent feedback from industry participants, we believe machine translation technologies have matured sufficiently to support such a requirement. Just last month, for example, AT&T posited that ''software translation technologies are sufficiently mature to effectively support the translation of WEA alerts into the most commonly spoken languages'' and recommended that ''translation beyond

English and Spanish use the software translation capabilities provided by mobile device operating systems.'' CSRIC VIII also reports that ''[w]ith improvements in language translation technology, there is an opportunity to provide WEAs in the user-preferred language via language translation.'' Machine translation technologies such as Google Cloud Translation and Apple Translate are pre-installed on many WEA-capable mobile devices. A device-level API to leverage these applications could make WEA messages accessible to every major language group in the U.S. A machine translation application could access an English-language WEA message before it is presented to the subscriber by using this API, translate the English-language alert into the device's preferred language, and then present the translated alert instead of or in addition to the English-language version. Improvements in the accuracy and reliability of machine-based automatic translation technology also may have implications for expanding the distribution of emergency information over the Emergency Alert System (EAS) in languages other than English, as the Commission has noted in the past. We seek comment on the technical feasibility of this approach and on any other considerations for implementing machine translation technology, including its use in distributing information over EAS. Currently, Participating CMS Providers transmit Spanish-language versions of WEA messages created by alerting authorities so that they may be presented in addition to the English language version. As CSRIC VIII explained, ''[i]f multiple additional languages are included in the WEA broadcast, capacity limits may not allow for the expected behavior of the WEA system in the case of a crisis scenario with multiple live alerts in three or more languages.'' Should WEA messages presented in other languages also be presented in addition to, rather than instead of, the English-language version?

10. We propose to require the WEA-capable mobile devices that Participating CMS Providers sell to support the presentation of emergency alerts in the 13 most commonly spoken languages in the United States, in addition to English: Spanish, Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian. Best Buy Health/Lively suggests that the Commission should ''identify a specific group of commonly spoken languages to which WEAs will be expanded.'' We seek comment on whether we have identified the right set of languages for WEA to support.

11. We seek comment on the accuracy of machine translation technologies for these languages. Are there languages that, due to the accuracy and ease of machine translation, should be added to the list above? For which languages does machine translation perform most accurately and reliably? We invite commenters to submit information identifying the languages for which sufficiently accurate machine translation technology is currently available and estimating the number of years until the technology for machine translation of other languages will be sufficiently mature for this purpose. What metric(s) are commonly used to describe the accuracy of machine translation technologies? How accurate must machine translation be to effectively convey emergency information?

12. We also seek comment on whether existing mobile devices in the marketplace today have the capacity to support machine translation software. Would subscribers need to purchase new devices to benefit from machine translation for WEA? We seek comment on steps that we can take to eliminate obstacles to consumer access to machine translation for WEA messages. In addition to (or in lieu of) installing machine translation software on consumers' devices, could such software or functionality be deployed in Participating CMS Providers' networks or elsewhere in the framework for generating and distributing WEA messages?

13. *Template-based alerts.* We seek comment on alternative approaches to promoting multilingual WEA. We observe that the New York City Emergency Management Department supports multilingual alerting in 13 different languages in addition to English through its Notify NYC application. This application presents an English-language message, along with a link to 13 other pre-scripted translations. These alert message translations have been written by people fluent in the languages and vetted with native speakers from language communities. This allows alerts to reach communities of people who otherwise may not understand the alerts they receive. We seek comment on whether this approach could be supported by Participating CMS Providers and/or handset vendors in a modified manner that would eliminate the need to click on a URL. Instead, the pre-scripted translations for the most common alerts could be pre-installed and stored in the mobile device itself. These templates would be ''activated'' by a data element included in alert message metadata, which would prompt the mobile device to display the relevant template alert message in the mobile device's default language chosen by the consumer. We seek comment on which messages should be translated and pre-loaded into WEA firmware, and into which languages they should be translated. Could devices offered by Participating CMS Providers support the presentation of the most common alert messages in the 13 most commonly spoken languages in the United States in this manner? Could this be achieved by translating the most common alerts into these 13 languages and storing those translations at the device? In the event that a mobile device is configured with a default language preference other than one for which a translation exists, could the device default to displaying the alert in English?

14. We observe that Google and the United States Geological Survey (USGS) have partnered to deliver ShakeAlert earthquake early warning system messages to Android Mobile devices by supporting communication that triggers Android mobile devices to display alert content pre-installed on the mobile device. We seek comment on whether this approach would enable multilingual alerting and simultaneously alleviate industry concerns about bandwidth limitations. We seek comment on whether a data element would be able to be transmitted with a relatively small bandwidth.

15. We also observe that Dr. Jeanette Sutton, University of Albany, has been funded by the Department of Homeland Security to create a Message Design Dashboard that enables alerting authorities to quickly craft template alerts from prefabricated message elements. If the message elements that the Message Design Dashboard uses to create alert and warning messages were translated into languages other than English and stored at the mobile device, could mobile devices automatically translate this prefabricated alert message content? We also seek comment on whether there any other technological or practical approaches that would enable alerting authorities to deliver alert messages in languages that they do not, themselves, speak.

16. *American Sign Language.* We note that ASL is not derived from English, nor any spoken language. It is an independent linguistic system with morphological and grammatical complexity comparable to or exceeding that of spoken languages. Against this backdrop, we seek comment on whether

and how WEA might be improved to provide support for American Sign Language (ASL). Would a significant number of deaf and hard-of-hearing people benefit from having WEA messages presented in ASL format on their mobile devices in lieu of the conventional text format used for WEA messages? Could a pre-scripted, template-based approach work for ASL? Can video content be compressed for storage on the mobile device? Are there any other feasible solutions for ASL?

17. *Text-to-speech*. Many people with vision disabilities, including elderly people, rely on text-to-speech functionality to make text more accessible. While the WEA system does not incorporate text-to-speech functionality at present, many blind and low-vision subscribers may already have screen reading (text-to-speech) functionality installed on their mobile devices. We seek comment on the extent to which such applications are in use and on whether they can generate audible versions of WEA messages. CSRIC VIII recommends that WEA be enhanced to speak the name of the type of hazard to which a WEA message pertains in English and/or the user preferred language when the WEA message is presented on the device. We seek comment on whether Participating CMS Providers could support a text-to-speech functionality for the name of the hazard to which a WEA message pertains. Would this limited text-to-speech capability provide equal access to emergency information for those that rely upon it? Could Participating CMS Providers support text-to-speech for other alert message elements, like the geographic area to which the alert message applies or the entire WEA message? Could Participating CMS Providers support this text-to-speech functionality in English, Spanish, and other languages? We seek comment on the accuracy and reliability of such text-to-speech technologies and on whether the resulting audible information is comprehensible to most listeners. We invite commenters to identify the languages for which acceptable text-to-speech applications are currently available and those for which they are not. Can such technologies be tailored to generate information that can be understood by people who speak languages in different regional dialects or accents? For example, speakers of Cantonese Chinese may not be able to understand a spoken sentence in the Mandarin dialect or vice versa, even though all use the same written form of the language. Similarly, Spanish speakers accustomed to Mexican or Central American accents may find it difficult to follow Spanish spoken in an Argentinian or Castilian accent, and vice versa. Would text-to-speech enable people with vision disabilities to understand and act on the alerts they receive more readily? How should the risk that relying on text-to-speech functionality for WEA alert messages might yield confusing mispronunciations be weighed against the public benefits of vulnerable populations receiving alert messages? Would a template-based approach to supporting multilingual alerting facilitate the use of text-to-speech technologies because it would allow stakeholders an opportunity to verify the audio conversion of pre-fabricated messages for accuracy and accessibility?

Improving WEA's Effectiveness With Multimedia Content

18. We propose to require support for certain multimedia content in WEA messages and to sunset aspects of our existing WEA message requirements to free up bandwidth to support this capability. Alerting authorities currently do not have the ability to send multimedia content through WEA, despite a robust record demonstrating their desire to do so. Alerting authorities state that the ability to send multimedia content would improve emergency planning and response, provide additional information during emergencies, personalize threats, improve message comprehension for people with disabilities, and function as a way to reach people who do not speak English. In response, industry has expressed concerns about bandwidth limitations of cellular networks, possible delay of receipt of the alert message, and costs. Since the last time the Commission sought comment on these issues, CSRIC VIII issued a report that recommends WEA messages include a link to access ''location-aware'' maps. A location-aware map would depict the alert's target geographic area and the alert recipient's position in relation to the target area. CSRIC VIII suggests that this enhancement is feasible leveraging current technology and would promote public safety.

19. We propose to require Participating CMS Providers to support the sending of thumbnail-sized images in WEA messages over the air. ATIS' Feasibility Study for WEA Supplemental Text finds that Participating CMS Providers could support the transmission of an appropriately formatted, thumbnail-sized image using 0.013 megabytes of data. We seek comment on whether the image format contemplated by ATIS would minimize the burden that transmission of such data would impose on Participating CMS Providers while providing sufficient resolution to be accessible on modern mobile device displays. The National Center for Missing and Exploited Children (NCMEC) has long advocated for the Commission to enable them to transmit a thumbnail-sized image of a missing child within the body of a WEA alert, noting that ''in those cases in which AMBER Alert is credited for the safe rescue of a child 89% included a picture and/or vehicle and license plate information.'' Other alerting authorities support this proposal because of its ''obvious helpful implications.'' The Commission has received complaints indicating that the public may be finding that AMBER Alerts that do not contain an image of a missing child do not meaningfully enable the public to assist in the search for that child. Industry commenters generally oppose this proposal because of concerns about incompatibility with the cell broadcast method used for WEA and latency. Microsoft recommends that transmission of thumbnail-sized photos ''should be permitted only after applicable standards have been developed and only for AMBER Alerts which, while time sensitive, are better positioned than other types of emergency warnings to tolerate a 60-second latency.'' We seek comment on how long the delay caused by including a thumbnail-sized photo would be. Alerting authorities often use embedded references in WEA messages to direct the public to a website that contains information about a missing child, but the additional effort needed to click through a link to learn more about a child abduction and possible concerns over the legitimacy of embedded links may prevent many people from rendering assistance. Moreover, the web servers on which alerting authorities host emergency information often become congested, rendering their information unavailable. We tentatively conclude that including a picture of a missing child in the body of an AMBER Alert will make WEA AMBER Alerts significantly more attention-grabbing and, as a result, motivate more people to more effectively render assistance to law enforcement to search for a missing child. We seek comment on this view.

20. Such multimedia displays might yield benefits for WEAs concerning a broad range of emergencies beyond AMBER alerts. APCO states that, more broadly ''providing more detailed information about an emergency

through embedded multimedia would help reduce milling behavior and duplicative 9–1–1 calls.'' We seek comment on use cases other than AMBER Alerts where alerting authorities could improve the public's response to alerts and warnings by including thumbnail-sized images in their WEA messages, and whether the tradeoffs for bandwidth, latency, and other considerations would support this use.

21. We propose to free up bandwidth on the cell broadcast channel over which Participating CMS Providers have chosen to transmit alert messages. Are there any steps that can be taken to continue to provide active mobile devices that are incapable of receiving 360-character maximum alert messages with access to WEA while still freeing up bandwidth? For example, should we sunset the requirement to transmit a 90-character-maximum version of alerts in addition to the 360-character-maximum version? If adopted, by the time this rule becomes effective, we believe that the percentage of active mobile devices that are incapable of receiving 360-character alert messages is likely to be negligible. We seek comment on this proposal and on this view. Would this reduce the total number of bits needed to transmit an alert message? Could those bits be reallocated to other WEA functionalities, such as the transmission of thumbnail-sized images? We also seek comment on any other bandwidth saving measures that could be implemented to more effectively allocate available bandwidth.

22. We also propose to require Participating CMS Providers to support the presentation of ''location-aware maps'' in WEA messages. When the Commission last sought comment on this issue in 2016, alerting authorities were in favor of including location-aware maps in WEA messages to personalize alerts and bolster awareness. Industry commenters did not oppose. CSRIC VIII observes that ''maps are commonly used to depict alert location across a variety of alert dissemination methods (*e.g.,* TV, social media)'' and states that presenting WEA alert messages via mapping applications on the device ''could help the recipient better understand the boundaries of the Alert Area and the device's location relative to the Alert Area.'' CSRIC VIII concludes that location-aware maps should be incorporated into WEA such that alert message ''text is immediately displayed and an additional option to display a WEA map is provided.'' The map displayed by the native application would be enhanced by the target area information already included in WEA messages so that consumers could more easily comprehend that the alert message is intended for them and that they should promptly take responsive action. There would be no need for Participating CMS Providers to transmit additional information over the air to support this functionality. Would this approach of providing consumers with a link allowing them access to a location-aware map alleviate industry's concerns about bandwidth limitations? We seek comment on the benefits of including location-aware maps in WEA messages without having to transmit map data over the air. Are there any other technological approaches that could be taken to achieve this result?

23. In our discussion of multilingual alerting above, we seek comment on whether it is feasible for Participating CMS Providers to support the transmission of a data element that triggers mobile devices to display pre-installed, translated alert content. Could this same technological approach be leveraged to prompt mobile devices upon receipt of a WEA alert to display other media content pre-installed on the mobile device, such as infographics? Alerting authorities ask the Commission to enable them to send infographics that, for example, show alert recipients how to shelter in place. We note that the National Weather Service has created many potentially beneficial infographics relating to weather-based emergencies, such as guidelines to be followed before and during tornados, hurricanes, and floods. We seek comment on whether support for infographics would increase WEA's ability to prompt people to take protective actions during emergencies more quickly and effectively. What other media could be pre-installed on mobile devices and presented upon a receipt of a WEA message or signal that would improve public safety outcomes when events threaten life and property?

24. We seek to refresh the record on whether Participating CMS Providers could enable WEA messages to include a symbol set designed for emergency communications, such as that developed by the National Alliance for Public Safety GIS (NAPSG) Foundation and endorsed by FEMA IPAWS. When the Commission sought comment on these issues in 2016 and 2018, alerting authorities favored this proposal, stating that hazard symbols would ''allow for quicker comprehension and therefore increase accessibility, including for individuals who are deaf, hard of hearing, deafblind, and deaf with mobility issues.'' FEMA IPAWS states that ''symbols can help make public alerts and warnings more effective for people with disabilities, those with limited English proficiency, and the whole community.'' Industry commenters have historically opposed this proposal because of concerns about incompatibility with the cell broadcast technology used for WEA, questions about the utility of symbols, and the need for consumer education, but CSRIC VIII recommends that ''WEA message presentation include a standardized symbol representative of the event,'' and recommends that ATIS, public warning risk communications experts, and social scientists should develop standards and best practices and choose a symbol set to use. If we do require Participating CMS Providers to support the inclusion of symbols in WEA messages, should we require them to support a specific symbol set? If so, which one? As a technical matter, would Participating CMS Providers support symbols by transmitting them over the air or by pre-installing them on mobile devices? As a practical matter, what steps could alerting authorities or federal, state, local, tribal, and territorial government agencies take to educate the public about emergency communications symbols so that their receipt results in rapid comprehension and action? Would it be possible to ensure that graphics and links to images are readable by screen readers for persons who are blind or have low vision?

B. Integrating WEA More Seamlessly Into People's Lives

25. In the decade since WEA launched, alerting authorities have leveraged WEA for new and different types of circumstances. The incidence of active shooter incidents in the United States has risen precipitously. Climate conditions have resulted in wildfires grow more intense and destructive, and hurricanes cause more rainfall and increased coastal flooding. Alerting authorities have turned to WEA to help them to keep their communities safe in the face of these threats. We believe that WEA can and must improve to meet the challenge that evolving threats pose. Accordingly, we propose to allow alerting authorities more flexibility in how WEA messages are presented to accommodate different emergencies, while ensuring that people with disabilities are afforded access to information. We also propose measures to prevent unnecessary consumer opt-out and facilitate more effective public awareness testing. We seek comment on these proposals and on any additional measures that the Commission can take to ensure that WEA is a suitable tool to mitigate loss of life and property damage during today's most serious emergencies.

1. Allow Alerting Authorities More Flexibility in How WEA Messages Are Presented

26. The Commission's WEA rules do not give alerting authorities control over how mobile devices present the WEA audio attention signal or the vibration cadence. The mandatory presentation of the WEA audio attention signal and vibration cadence could prevent the use of WEA during an active shooter scenario, where the attention signal and vibration could draw the attacker's attention to those who need to stay hidden to stay safe. The mandatory presentation of these signals might also result in user annoyance and WEA opt-out, particularly where WEA is used in connection with a public health crisis such as the COVID–19 pandemic. Accordingly, we propose to require that Participating CMS Providers be able to send WEA messages, at the alerting authority's option, without triggering the audio attention signal and the vibration cadence. We seek comment on the relative benefits and burdens of this proposal, if adopted. Would providing alerting authorities the ability to customize how WEA messages are sent (*e.g.,* with or without the WEA audio attention signal and/or vibration cadence) make WEA safer to use during active shooter events and less intrusive (and thus more versatile) to use during public health emergencies or other less emergent but nevertheless important public safety situations? We seek comment on whether an alert received without the attention signal and/or vibration cadence could fail to grab alert recipients' attention during time-sensitive active shooter situations.

27. We seek comment on steps that the Commission can take to balance the need for alerting authorities to be able to suppress the presentation of the WEA attention signal with the need to present accessible alert messages to people with access and functional needs. In addition to the suppression of the WEA audio attention signal, should alerting authorities be able to suppress the vibration cadence? The WEA vibration cadence may result in a sound that gives away the location of a person in hiding or cause annoyance. It also may be necessary for consumers who are deaf or hard of hearing to know that they have received an emergency alert. Should we limit the suppression of the attention signal and/or the vibration cadence to specific circumstances (*e.g.,* active shooter) situations only, and if so, what should those situations be? Or, should we defer to the alerting authority to best accommodate and balance competing considerations without limitation? If we adopt requirements that WEA support text-to-speech, should alerting authorities also have discretion to suppress this capability? Finally, we ask commenters to identify whether and which standards and/or device-level software or firmware would need to be modified to enable this capability for alerting authorities. We seek comment on whether the 12 months that the Commission has previously allocated for the development of WEA standards would be sufficient for this purpose. If not, why not? We also seek comment on any other technical issues that may arise in implementing this functionality at the mobile device.

2. Prevent Unnecessary Consumer Opt-Out

28. We are concerned that members of the public might experience alert fatigue and might be annoyed by WEA's audio attention signal and vibration cadence, leading them to opt out of receiving WEA alert messages entirely. Consumers who have opted out of receiving WEA alert messages have no chance of receiving potentially life-saving emergency instructions through WEA. To remedy this, we propose to require Participating CMS Providers to provide their subscribers with the option to durably turn off WEA's audio attention signal and vibration cadence for all alerts. The Commission's rules allow for consumers to be able to mute the audio attention signal and vibration cadence. In 2016, we sought comment on whether the Commission should require Participating CMS Providers to support consumer choice by allowing consumers to receive WEAs with the audio attention signal and vibration cadence turned off by default as an alternative to opting out of WEA entirely. Microsoft Corporation, California Governor's Office of Emergency Services, and the New York City Emergency Management Department support allowing consumers to change their WEA delivery preferences, including by allowing them to receive WEAs without the attendant audio attention signal and vibration cadence. We seek to refresh the record on this issue. How do mobile device manufacturers operationalize silencing the WEA audio attention signal and vibration cadence when users set their devices to ''do not disturb'' mode? What other options do consumers have to personalize the audio attention signal and vibration cadence? We tentatively conclude that Participating CMS Providers should work with mobile device manufacturers to present this option to subscribers in the mobile device's WEA notification settings in addition to the current, binary choice to opt in or opt out. We seek comment on this approach.

29. We seek comment on whether giving consumers the option to suppress the presentation of the WEA audio attention signal and vibration cadence promotes consumer choice and would make it more likely that people interested in receiving alert messages—but not interested in being interrupted by them—can continue to receive potentially life-saving instructions intended for them. Given that most Americans check their cellphones frequently, we do not anticipate a lengthy delay in the time it takes for a consumer to view an alert. What other public safety and consumer benefits would attend this proposal, if adopted? We note, however, that if the rule is adopted, consumers who have already opted out of receiving alert messages may not be aware that the option to receive alert messages without being interrupted by them is available. How might this information be best shared with the public? Should Participating CMS Providers re-set WEA-capable mobile devices to their default opt-in status as part of their implementation of this proposal? Would they have the technical ability to do so? To what extent would CMS Providers require support from device manufacturers to support such a re-set and update? Could such a re-set take place without affecting other settings on a user's device (*e.g.,* location)? Should the customer be made aware of the attempted re-set, and if so, how? We seek comment on any alternatives that would help to ensure that the public is able to yield the public safety benefits of this proposal.

30. We seek comment on whether there are additional reasons why consumers commonly opt out of receiving WEA messages. Currently, when consumers receive an alert, some mobile device operating systems present the alert together with an option for the consumer to go to their WEA notification settings, where the only option presented is opt-out. Does this operating system functionality promote unnecessary WEA opt-out? We seek comment on alternative ways in which unnecessary consumer opt-out can be mitigated or prevented.

3. Facilitate More Effective WEA Public Awareness Exercises

31. We seek comment on whether our current rules governing State/Local WEA tests are impeding the ability of emergency managers to fully understand how WEA operates within their unique jurisdictions and circumstances and to

engage in important public awareness exercises. At present, our rules authorize Participating CMS Providers to transmit a State/Local WEA Test message, which consumers must affirmatively opt in to receive. Alerting authorities thus cannot conduct an end-to-end WEA test, where members of the public receive the test message by default, without receiving a waiver of the Commission's rules. In contrast, the Commission's rules allow EAS Participants to participate in two Live Code Tests per calendar year, provided that the entity conducting the test takes specified actions to make clear that the alert being sent is only a test. We continue to believe that State/Local WEA Tests are valuable tools for system readiness testing and proficiency training. To the extent State/Local WEA Tests are used for proficiency training and alerting authorities' system checks alone, the fact that the public does not receive State/Local WEA Tests by default is beneficial. This same attribute, however, prevents State/Local WEA Tests from being useful tools for raising public awareness about how to respond to emergencies that are likely to occur. Over the years, the Commission has granted waivers in certain circumstances to enable alerting authorities to test WEA using alerts that the public receives by default. In assessing these waivers, the Commission has balanced raising awareness about emergencies with protecting against alert fatigue.

32. Based on the experience we have gained from evaluating these waiver requests, we believe we can identify circumstances where it is beneficial for consumers to receive WEA test messages by default without conducting a case-by-case evaluation of waiver requests, going forward. Thus, we propose to authorize Participating CMS Providers to support up to two end-to-end WEA tests (in which consumers receive test messages by default) per alerting authority each year, provided that the alerting authority: (1) conducts outreach and notifies the public in advance of the planned WEA test and that no emergency is, in fact, occurring; (2) includes in its test message that the alert is only a test; (3) coordinates the test among Participating CMS Providers, state and local emergency authorities, relevant State Emergency Communications Committees (SECCs), and first responder organizations; and (4) provides notification to the public in widely accessible formats that the test is only a test. We note these conditions are the same conditions that attend alerting authorities' conduct of EAS Live Code Tests and the Commission has routinely conditioned waiver its rules to conduct public awareness exercises on these criteria. We seek comment on whether we should condition authorization on alerting authorities conducting certain types of outreach or on the outreach being completed a certain period of time before transmitting the test. We also seek comment on whether, as an additional condition to conduct public awareness exercises, alerting authorities should have to keep records on how they comply with the above-mentioned four conditions, and produce these records if requested by a Participating CMS Provider or the Commission. We believe that, by authorizing Participating CMS Providers to support up to two tests per alerting authority each year without filing waiver requests or obtaining our permission in advance, we can reduce unnecessary administrative burdens on alerting authorities, CMS Providers, and ourselves, and thereby eliminate a potential obstacle to conducting end-to-end WEA tests that advance several public interest goals. We seek comment on this proposal and on whether the same conditions that are appropriate for EAS tests are also relevant for such WEA system tests. We further propose that alerting authorities issue these WEA tests as ''Public Awareness Tests'' to make clear that the test messages will be sent to the public by default.

33. We seek comment on the benefits and costs of this proposal. Would this amendment of our rules facilitate more seamless joint exercises of EAS and the WEA system? Would they make the WEA system a more powerful tool for proactively warning the public in advance of emergencies, ultimately preparing them to take more effective protective actions in the event that an emergency actually occurs? We also seek comment on how this amendment of the rules may affect alert fatigue. Are the proposed rules restrictive enough to mitigate potential alert fatigue? Recognizing that alerting authorities may have overlapping jurisdictions (*e.g.,* a city, within a county, within a state), should we limit the number of tests to two per county (or other geographic area) per year, to ensure that alerting authorities coordinate with one another to prevent alert fatigue for their citizens? Are there any additional conditions or alternatives that could make WEA a more effective tool for raising public awareness about emergency situations likely to occur while mitigating the risk of alert fatigue?

C. Establishing a WEA Database To Promote Transparency About WEA Availability and Benchmark WEA Performance

34. We propose to modernize the WEA election process and facilitate access to WEA availability and performance information through the development of a Commission-hosted WEA Database. At present, to access information about WEA's availability in their jurisdictions, alerting authorities and the public must review all of the WEA election letters filed with the Commission. Even then, those letters are often unclear about whether a Participating CMS Provider participates in whole or in part and their level of support for WEA geographically and on different types of mobile devices. We anticipate that the WEA Database would be an interactive portal where CMS Providers submit information about the availability and performance of WEA on their networks, and where such information could be readily accessible to both alerting authorities and the public.

1. Reporting Information About WEA Availability

35. We propose to require all CMS Providers, irrespective of whether they elect to transmit WEA messages, to report their level of WEA participation in a WEA Database. In order for the WEA Database to be effective in providing a full understanding of WEA coverage, we propose the database should identify which CMS Providers offer WEA, in what geographic areas, and on which devices. In addition, this information must be current.

36. *Identify which wireless providers offer WEA.* We propose to require that CMS Providers identify whether they elect to participate in WEA in whole or in part, or whether they elect not to participate. If a CMS Provider elects to participate in part or not to participate at all, we propose that they provide an explanation or basis for this decision using free form text. CMS Providers should submit their election in the WEA Database regardless of whether they have previously filed in the docket. We propose that CMS Providers should also identify the entities on behalf of which they are filing. We seek comment on this proposal. It is often difficult for the Commission and alerting authorities to know which service providers are participating in WEA because CMS Providers take inconsistent approaches to disclosing the names of subsidiary companies on behalf of which their election is filed, any ''doing business as'' names under which they are offering

services that support WEA, and the names of Mobile Virtual Network Operators (MVNOs) and wireless resellers through which their network supports WEA. Should this responsibility be limited to entities with which CMS Providers have a contractual relationship? Are there any other relationships a CMS Provider's WEA election should capture to better identify wireless providers' WEA participation status? This proposed requirement would make WEA elections more uniform and provide a more complete picture of WEA's availability nationwide. To ease the burden of this proposal, the WEA Database would leverage any relevant information that is available through existing Commission systems like the Commission Registration System (CORES). We seek comment on the burdens such proposals would impose upon CMS Providers and on any alternative approaches that the Commission could take to accurately identify the universe of the entities that participate in WEA.

37. *Identify where WEA is Offered.* We propose to require CMS Providers to disclose the extent to which they offer WEA in the entirety of their geographic service area. We seek comment on this proposal. When CMS Providers elect to transmit WEA messages ''in part'' today, those elections often provide little information about what ''in part'' means as a practical matter. For example, they rarely specify whether there are geographic areas excluded from their WEA coverage. This could lead to confusion about the extent to which the public receives WEA messages. This is problematic from the standpoint of an alerting authority trying to plan for how it will reliably communicate with the public during an emergency. For example, during this past wildfire season, alerting authorities and the Commission struggled to identify whether the non-delivery of WEA alert messages in New Mexico was due to service degradation or the Participating CMS Providers' choice not to transmit WEA alert messages in the affected counties. Would information about the geographic areas where CMS Providers support WEA be helpful to alerting authorities during situations like the New Mexico wildfires?

38. For CMS Providers that report in the WEA Database that they are participating in WEA in whole, we propose to represent their geographic service area using the voice geographical information system (GIS) coverage area, which CMS Providers submit to the Commission as their mobile voice coverage area in the biannual Broadband Data Collection (BDC). We believe that the voice channel coverage area is a conservative estimate of the control channel which is used to deliver the WEA coverage. The estimate is conservative because voice communication has a higher bandwidth requirement than data transferred over the control channel, resulting in a smaller coverage area than the control channel. We believe that this conservative estimate may be appropriate to avoid misleading consumers into thinking they will receive a WEA where they will not. We seek comment on this approach. For those CMS Providers that do not support WEA through their entire geographic service area, we propose to require them to submit a GIS polygon coverage area that most accurately represents their WEA coverage area. We seek comment on whether these proposals would represent a cost-effective and accurate approach to reporting WEA availability, in a manner that would be readily understood by other stakeholders. Do the cost savings for Participating CMS Providers attendant to using a voice coverage shapefile already on file with the Commission outweigh the potential public safety benefit of a more precise representation of a WEA coverage area? Would a source of geospatial data other than shapefile be either less burdensome to produce or more beneficial to alerting authorities? We seek comment on any alternative ways of reporting this information and their associated benefits and costs.

39. Does information about the geographic availability of WEA need to be supplemented with additional information about WEA delivery to be useful to alerting authorities? For example, because our WEA rules require Participating CMS Providers to support WEA for roaming subscribers, would it be a more helpful representation of a WEA coverage area if Participating CMS Providers submitted a shapefile describing their WEA coverage area and any additional areas where they have a roaming agreement with another Participating CMS Provider? Do Participating CMS Providers have access to such information from roaming partners in the first instance? If not, we seek comment on whether to require Participating CMS Providers to provide a list of their roaming partners via the WEA database to allow the database to compile that coverage area information. Further, it is unclear from the record whether mobile assets (*e.g.,* cells on wheels (COWs), cells on light trucks (COLTs)) deployed to compensate for cell site outages were provisioned into providers' WEA systems. During emergencies, cell facilities that normally would be capable of transmitting WEA messages to a certain geographic area might not be available to do so. Should CMS Providers who file reports in the Disaster Information Reporting System (DIRS) regarding a particular emergency also include information about whether any COWs and COLTs deployed support WEA? We seek comment on the benefit to alerting authorities of knowing whether COWS/COLTS deployed in their area support WEA. Would the value of this information be enhanced if Participating CMS Providers also disclosed the location of those deployable assets? Should CMS Providers report if they do not support WEA when using certain network technologies (*e.g.,* a CMS Provider sends WEA messages on its 5G network, but not its 3G network)? Are there other kinds of information about WEA availability that CMS providers should be required to report, and if so, how would that information assist alerting authorities in protecting the public? We also seek comment on how this information, if required, should be reported to ease burdens and promote uniformity in reporting. For example, for network technology information, should CMS Providers be presented with simple checkboxes to indicate whether they offer WEA on all deployed generations of wireless network technology or on all available deployable mobile assets? Should the Commission use Participating CMS Providers' technology specific shapefiles submitted as part of the BDC for this purpose?

40. *Identify which devices support WEA.* Like geographic area, ''in part'' WEA elections rarely share information about the mobile devices that are capable of receiving WEA messages. While this information is provided by CMS Providers at the point of sale, it is prohibitively difficult for alerting authorities to aggregate that information from all possible points of sale, including by third-party retailers. For this reason, we propose to require Participating CMS Providers to report in the WEA Database all mobile devices that the Participating CMS Provider currently offers for sale that are WEA-capable. We seek comment on this proposal. By collecting this information in a uniform way in a single database, we believe that alerting authorities will be better able to understand how WEA messages will be received by individuals in their jurisdiction and better able to determine if WEA is an appropriate tool for their emergency

communications needs. For example, would this information help alerting authorities to understand the deployment status of new WEA capabilities, the availability of which may be dependent on Participating CMS Providers' and equipment manufacturers' decisions about whether to support deployed mobile devices with software updates? Most Participating CMS Providers do, though, maintain public online information relating to device WEA capabilities. How can we avoid creating confusion in light of the already existing public information? We note that our proposal, if adopted, would not shed light on the WEA capabilities of the installed base of mobile devices that connect to the Participating CMS Provider's network but are not sold by the Participating CMS Provider at the time of reporting. Does this create a predictable gap in alerting authorities' and the Commission's understanding of WEA's availability? How could Participating CMS Providers provide alerting authorities and the Commission with visibility into WEA capabilities of the mobile devices operating on the Participating CMS Provider's network but that they do not sell? Do all versions of a given make and model of mobile device have the same WEA capabilities, irrespective of where they are sold? Or, does a mobile device's WEA capabilities depend on firmware specific to Participating CMS Providers? We seek comment on any alternative approaches that might further reduce reporting burdens. We particularly encourage commenters to address other ways the Commission may leverage data CMS Providers already submit to the Commission to alleviate any burden attendant to reporting this information.

41. To modernize our rules and better support this proposed reporting requirement, we propose to update the definition of what constitutes a ''WEA-capable mobile device.'' We observe that as WEA's capabilities have evolved over the last several years, the definition of what is considered a WEA-capable mobile device has not evolved with it. As a result, mobile devices have continued to be considered ''WEA-capable'' even if they do not support the capabilities that have become central to WEA's effectiveness, such as supporting a 360-character message length or the inclusion of URLs. We are concerned that if the term ''WEA-capable'' continues to include any mobile device with at least partial WEA functionality, consumers might be confused and mistakenly believe that all ''WEA-capable'' mobile devices offer all WEA capabilities. Accordingly, we propose to amend our rules to define a ''WEA-capable mobile device'' as a mobile device that is compliant with the Part 10, Subpart E equipment requirements, and to make explicit that WEA-capable mobile devices must support the alert message requirements in Part 10, Subpart D (*e.g.,* support for the alert message classifications, national alert prioritization, WEA message elements, the 360-maximum character limit, geo-targeting, roaming, and support for both English- and Spanish-language alerts). We seek comment on this proposal. We also seek comment on any alternative approaches.

42. The Commission's rules currently define a ''mobile device'' for the purpose of WEA as ''[t]he subscriber equipment generally offered by CMS providers that supports the distribution of WEA Alert Messages.'' We observe that this definition does not account for mobile devices that do not support WEA messages. Accordingly, we propose to update the definition of a ''mobile device'' for the purpose of WEA as ''any customer equipment used to receive commercial mobile service.'' We seek comment on this proposal. We believe that this amended definition appropriately acknowledges the possibility that a mobile device does not support WEA, while also being broad enough to potentially include devices that are commonly considered to be mobile devices, such as tablets, wearables, or other non-smartphone devices. This amended definition may also increase access to WEA messages by individuals with disabilities who frequently rely on these devices for connecting to wireless services. Individuals with mobility or dexterity disabilities may find smaller devices too difficult to use; thus, these devices may accommodate those with such disabilities. We seek comment on whether these devices are capable of receiving WEAs. Would providing WEA to data-plan-enabled tablets and other devices that receive commercial mobile service allow individuals with disabilities (*e.g.,* individuals that lack the manual dexterity required to manipulate a smaller device) to receive WEA messages for the first time?

43. *Provide current information.* We propose to require that CMS Providers update the WEA Database within 30 days of a change in their WEA participation. Currently, our rules do not require CMS Providers to update their WEA election status when the nature of their WEA service profile changes and, in fact, most CMS Providers have not updated their election to transmit alert messages since filing their initial election in 2008. As a result, we are concerned that many WEA elections could now be outdated and do not accurately reflect WEA's current availability. We propose that a 30-day timeframe reflects an appropriate balance between affording CMS Providers adequate time to submit an update and providing stakeholders current information on WEA availability. We seek comment on this proposal. Rather than requiring that CMS Providers update their WEA elections within 30 days of a change in their participation, should updates be required periodically, irrespective of updates based on a change in their participation? If so, how often should those updates be required? The BDC requires filers to update their filings biannually (*i.e.,* twice each year). Would this biannual update approach work for WEA or would this result in alerting authorities frequently accessing outdated information in the WEA Database that undermines their emergency communication efforts? Alternatively, if changes to WEA availability are made infrequently, would a biannual filing be unnecessary?

2. Improving WEA's Performance To Make It a More Effective Life-Saving Tool

44. To improve the effectiveness of WEA, and consistent with the recommendations of the GAO, we propose to establish WEA performance minimums that Participating CMS Providers must satisfy for every WEA message they send. Press reports indicate that, due to deficiencies in Participating CMS Providers' implementation of WEA, many people are not receiving critical, timely information during life-threatening and time-sensitive emergencies, such as earthquakes or wildfires, while others are receiving information that is irrelevant to them, which degrades the value of the WEA system as a whole. When people receive alert messages not relevant to their geographic area, they may learn to ignore the WEA messages they receive or they may opt out of receiving WEA messages entirely. It is our understanding that inconsistent WEA performance may have led some emergency management agencies to delay becoming authorized as alerting authorities and may have caused others to limit their use of WEA. Are there other reasons why emergency management agencies may delay becoming authorized as alerting authorities or otherwise limit their use of WEA, such as the costs of establishing and maintaining alerting

capabilities with third party vendors? We seek comment on these issues.

45. *WEA Reliability.* To ensure that all WEA-capable mobile devices within a target area receive alerts intended for them, we propose to require Participating CMS Providers to meet a minimum requirement for the reliability with which they deliver WEA messages to their subscribers. We note that our rules already require WEA messages to be delivered to 100 percent of the target area. We are concerned that this requirement is not sufficient to ensure that the public can rely on their Participating CMS Provider to deliver to them promptly the WEA messages intended for them every time, including when they enter the alert's target area after the alert's initial transmission. We seek comment on an improvement to our existing minimum reliability requirement that is technically feasible and generally achievable across circumstances. For example, we seek comment on whether Participating CMS Providers should deliver WEA messages to all WEA-capable mobile devices that are within an alert message's target area at the time the Participating CMS Provider initially transmits the message. We also seek comment on whether Participating CMS Providers should deliver WEA messages to all WEA-capable mobile devices that enter the alert message's target area after the initial transmission, while the alert message is active. This approach would go one step further than our existing requirement by ensuring that the messages delivered to that area to be presented to the subscriber, regardless of whether the subscriber is in the target area at the time the alert is transmitted or enter the target area later, provided the alert remains active. Are there any technical challenges that may prevent all devices from receiving and presenting alerts? How can those challenges be addressed.

46. *WEA Accuracy.* The Commission's WEA rules require Participating CMS Providers to deliver WEA messages with no more than 0.1 of a mile overshoot unless, for example, mobile devices have location services disabled or legacy networks and devices could not be updated to support geofencing, in which case Participating CMS Providers are permitted to send an alert to their best approximation of the target area. We seek comment on whether these exceptions to the Commission's existing accuracy requirement remain necessary and, if not, we propose to sunset them. For example, we seek comment on whether WEA-capable mobile devices located more than 0.1 miles outside of a targeted area should suppress alerts for that area, regardless of whether its location services are enabled. We are concerned that this exception may be resulting in considerable WEA overshoot. We seek comment on the extent to which this exception is still necessary for modern WEA-capable mobile devices. Since the Commission adopted its enhanced WEA geo-targeting requirement, industry WEA stakeholders have changed the WEA functionality of mobile devices from being enabled by software to being enabled by firmware. As we have seen in other public safety contexts, even when a consumer disables location services, a CMS Provider may still access that data when necessary (*e.g.,* to support 9–1–1 calling). We seek comment on whether we should require location services to always be enabled for WEA on WEA-capable mobile devices, even if they are disabled for other uses.

47. We also seek on whether to eliminate the exception to those same geotargeting rules that exempts legacy networks and mobile devices that cannot be updated. Under this approach, mobile devices could not be considered ''WEA-capable'' unless they can comply with the geotargeting requirements. We believe this would be consistent with our proposal, discussed in greater detail above, to update the definition of ''WEA-capable mobile device'' to only include devices that support the alert message requirements in part 10, subpart D. We seek comment on this approach, and the likely effect of churn. We seek comment on whether any legacy CMS network facilities cannot be updated to support geofencing. If so, why? On what timeframe do Participating CMS Providers intend to remove these legacy network elements from their facilities?

48. We seek comment on other reasons why WEA-capable mobile devices may be falling short of meeting our existing geo-targeting requirements. Are these shortfalls related to the amount of time mobile devices are allowed to calculate their location before displaying the alert? Why might a mobile device be unable to calculate its location for the purposes of WEA within the permissible period, even when the device's location services are turned on and available to the WEA firmware? Is there another issue or problem with the geofencing solution being used in WEA-capable mobile devices? Alternatively, we invite industry stakeholders to submit test results or studies demonstrating that their devices strike the correct balance between presenting WEA messages in a timely and accurate manner.

49. *WEA Speed.* We propose to require Participating CMS Providers to satisfy minimum speed requirements, to ensure WEA messages are displayed as swiftly as possible during emergencies where every second counts. We seek comment on a minimum speed requirement that is technically feasible and generally achievable across circumstances. For example, we seek comment on whether Participating CMS Providers should present alerts within five minutes on 99% of WEA-capable mobile devices that have not opted out from receiving the alert and are within the target area? For devices that enter a targeted geographic area after the initial transmission of the alert, we propose that the five minutes be measured from the time that they entered the target area. Should we measure 5 minutes as the amount of time between receipt of the alert message at the Participating CMS Provider alert gateway and presentation of the alert on the device? We note that the ATIS WEA geofencing standard allows mobile devices to take up to four minutes and fifteen seconds to determine their location before defaulting to displaying the alert. To the extent that some devices may need additional time to confirm their locations, we believe that a requirement of five minutes provides sufficient time to do so. We believe that this approach would acknowledge that there may be localized complexities in the radio frequency environment that may prevent some devices from receiving the first transmission of an alert. Is five minutes the appropriate speed requirement for WEA, and if not, what should that requirement be? Are there any circumstances that may result in significant delay in the time between the transmission of an alert by a Participating CMS Provider and presentation by a WEA-capable mobile device? If so, how should we adjust our WEA speed metric to compensate? On the other hand, should we require more than 99% of opted-in WEA 3.0-capable devices to present WEA alerts within five minutes, and if so, why? Alternatively, we seek comment on the percentage of mobile devices that may be able to display an alert within one second. Would one second from receipt at the Participating CMS Provider alert gateway be an appropriate benchmark for the percentage of mobile devices that already have a location determination at the time they receive a WEA and therefore need to engage in limited additional processing before presenting the alert message? How else could we benchmark WEA's speed to reflect

latencies between receipt between Participating CMS Providers.

50. We seek comment on the public safety benefits of requiring Participating CMS Providers to optimize their network's performance to satisfy these performance minimums. Would these performance minimums make WEA a much more effective and dependable emergency communication tool? Would the adoption of these performance minimums cause more alerting authorities to use WEA, or motivate more emergency management agencies to become alerting authorities? If these performance metrics are not the right minimum benchmarks for WEA's performance, how should the Commission benchmark WEA's reliability, accuracy, and speed? We seek comment on any additional WEA performance data regarding how the public is currently receiving alerts and how that data should affect the adoption of minimum WEA performance minimums.

51. *Other WEA Performance Improvements.* As an alternative, or in addition to ensuring WEA's minimum performance as described above, we seek comment on whether to require Participating CMS Providers to take specific measures to improve WEA's reliability. Should we require Participating CMS Providers to retransmit alert messages at one-minute intervals throughout an alert's active period, as AT&T currently does? Other major Participating CMS Providers only broadcast an alert message a single time or a limited number of times after a delay of at least several minutes. We are concerned that this means that people entering the target area after the initial transmission may not receive the alert in a timely manner. We seek comment on whether this requirement would improve WEA's reliability, particularly among people that enter an alert's target area during an alert's active period, but after Participating CMS Providers' initial transmission of the alert. We also seek comment in the alternative on whether to require Participating CMS Providers to take specific measures to improve WEA's accuracy. Pursuant to WEA standards, receipt of a WEA message does not necessarily prompt geofencing-capable mobile devices to obtain a fresh location fix. Receipt of a WEA message prompts a geofencing-capable mobile device to determine its location, but if the mobile device has a stored record of its location, the mobile device may use that record rather than obtain a fresh location fix from the network, even if the location information stored on the mobile device is old and inaccurate. We seek comment on whether this is a deficiency in the standard that predictably leads the location information available to WEA to be less accurate than our 0.1 of a mile requirement. Should the message that Participating CMS Providers send to mobile devices to trigger them to obtain a location fix for the purpose of WEA geofencing prompt mobile devices to obtain a fresh location if the location fix that it has is not sufficiently accurate or fresh to comply with our existing WEA accuracy requirement? From where should mobile devices seek to retrieve this location fix (*e.g.,* GPS, A–GPS, device-based hybrid location) to best balance potentially competing concerns about accuracy and network impacts? What other potential technical measures could Participating CMS Providers implement to optimize the WEA system's reliability, accuracy, or speed?

3. Reporting Information About WEA's Performance

52. To help measure and enforce compliance with our proposed performance requirements, as well as to help public safety stakeholders understand how WEA works in their respective areas, we propose that Participating CMS Providers submit data to the Commission regarding WEA's reliability, accuracy and speed using the WEA Database. In doing so, we also address and build on the record developed in our *2022 Further Notice of Proposed Rulemaking* (*2022 FNPRM*), where public safety commenters argue that performance reporting would directly assist them in using WEA effectively, and that reliability, speed, and accuracy are the most important performance metrics on which Participating CMS Providers should report.

53. For each of the performance areas (reliability, accuracy, and speed), we seek comment on the data set that should be submitted to the Commission, as well as the source of data from which the data set should be derived. In each instance, data submitted should be sufficient to demonstrate compliance with the Commission's performance requirements across a variety of circumstances that reflect real-world conditions. We seek comment on whether this necessitates collecting raw data representing performance on individual mobile devices, or whether there are alternative viable ways to capture WEA performance as experienced by subscribers. What measures would handset manufacturers and OS vendors need to take to capture, store, and provide such information? What are the privacy implications of this proposal for users? Does this proposal raise implications for device manufacturers' security and privacy policies or for device costs? Can CMS Providers access or collect raw data at the device level? Does current technology allow for device manufacturers and Participating CMS Providers to connect location data to a customer's decision to opt-in to WEA participation? We seek comment on whether Participating CMS Providers should submit aggregated data and percentages on the performance of mobile devices as a whole for all alerts, or whether it is feasible to collect performance information from a sample, such as a randomized portion of all mobile devices or data about certain specified alerts. If commenters favor reporting performance information expressed as a percentage, we seek comment on the proposed equations by which Participating CMS Providers would calculate WEA's reliability, accuracy, and speed, as it would be important to adopt uniform equations across all providers.

54. We anticipate that data can be gathered at the device level that is derived from data elements that Participating CMS Providers can potentially log, such as unique alert message identifiers, the geographic target area, and the opt-in status of the device. We seek comment on the following Figure 2, which depicts our assessment of where data elements relevant to WEA performance could be available for logging by Participating CMS Providers and WEA-capable mobile devices.

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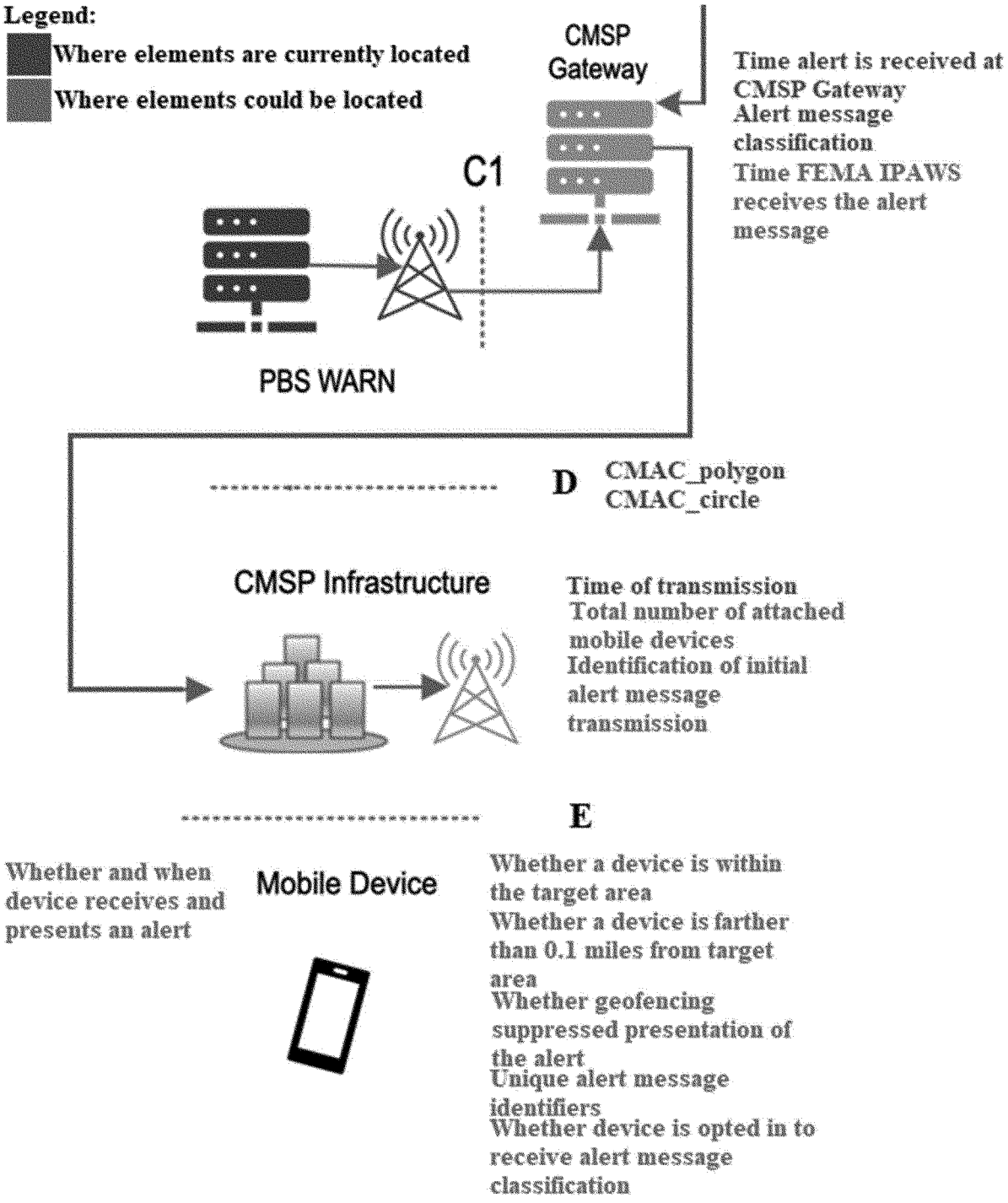

Figure 2: WEA Performance Reporting Architecture and WEA Data Elements

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Does Figure 2 accurately capture the data elements and their respective locations where Participating CMS Providers could potentially log them to measure WEA's performance? Is it technically feasible for Participating CMS Providers to log each of the data elements that currently reside in their network during WEA transmission, because Participating CMS Providers already log many such data elements under our rules. Is it technically feasible for WEA-capable mobile devices to receive a firmware update to enable them to log those data elements described above that are uniquely available at the mobile device, because mobile devices already log data about the tasks they perform as part of routine device processes? We seek comment on potential changes to standards and software that Participating CMS Providers, handset manufacturers, and handset OS vendors would need to complete to comply with this proposal, if adopted. We seek comment on any refinements that would make the collection of WEA performance data less burdensome and/or more effective.

55. We seek comment on how these data elements, as well as other information available to Participating CMS Providers, can be used to demonstrate WEA's performance. One approach would be for Participating CMS Providers to submit data to the Commission's WEA Database regarding the number of WEA-capable mobile devices located inside an alert message's geographic target area that are capable of receiving an alert and opted into sharing WEA performance information; the number of WEA-capable mobile devices located outside an alert message's geographic target area that are capable of receiving an alert (*e.g.,* mobile devices that meet the foregoing criteria and are connected to the cell facility that initially transmits the WEA message); the number of such devices located inside and outside the area that are opted into presenting the alert; and the number of those devices inside and outside of the area that presented the alert. Could the Commission use this data to calculate the percentage of devices in the target area that succeeded at displaying or suppressing an alert? For measuring WEA's speed, one approach would be for Participating CMS Providers to also submit to the Commission's WEA Database the times at which mobile devices received and presented an alert, as well as the time when the alert was received at a Participating CMS Provider's alert gateway. Could the Commission use this data to calculate WEA's speed? Are there any other ways the Commission should use these or other data elements to measure WEA performance?

56. Would Participating CMS Providers face technical challenges in collecting or reporting this information? While CSRIC VIII states that the total number of devices in the alert area is unknown and ''cannot be obtained without a complete redesign of existing cellular technology,'' we observe that a cell site can generate a record, at any given time, of how many mobile devices are attached to it. We seek comment on this assessment. We also seek comment on CSRIC VIII's view that it is not possible for Participating CMS Providers to know the number of devices in a targeted area that have opted into sharing WEA performance data. Is CSRIC VIII correct? What steps could be taken to improve the ability to Participating CMS Providers to obtain this information? CSRIC VIII finds that WEA-capable mobile devices currently do not know whether they are receiving the first WEA broadcast or a later WEA broadcast. Could Participating CMS Providers take measures to enable devices to identify the initial transmission?

57. We seek comment on the feasibility of measuring WEA's performance using staged devices, as contemplated by CSRIC VIII. Specifically, could Participating CMS Providers capture actionable information about WEA's performance by conducting regular testing using devices positioned in and around the target area of a Required Monthly Test (RMT)? Could such a testing and performance measurement requirement also leverage State/Local WEA Tests or leverage alerting authority and Participating CMS Provider volunteers? How would the resulting data differ in quality from data derived at the device level from real WEA activations? Would there be any limitations to the public safety benefits of measuring performance using staged devices? We seek comment on whether there would be any cost or time savings attendant to this approach if Participating CMS Providers had to update network and mobile device firmware to measure WEA's performance using staged devices.

58. We also seek comment on any privacy implications if information is collected at the mobile device level. In response to the 2022 FNPRM, some commenters raise consumer privacy concerns about the nature of the data that Participating CMS Providers would collect from mobile devices to support a reporting requirement, especially location data. We believe that Participating CMS Providers would not need to collect any personally identifiable information (PII) or customer proprietary network information (CPNI) to provide device-level data. Specifically, Participating CMS Providers would not have to collect precise location information. Rather, each WEA-capable mobile device would potentially have to log and provide to the Participating CMS Provider only whether the device was located inside the target area or farther than 0.1 miles from the target area. We seek comment on this view. We also note that CMS Providers already have access to location information about their customers' mobile devices by virtue of their provision of service. If, contrary to our expectations, CMS providers were required to collect precise location information to satisfy WEA reporting obligations, we would require CMS providers to protect that information subject to the same statutory and regulatory duties that apply to the most sensitive CPNI. We seek comment on this approach. We also seek comment on the other specific data elements that CMS Providers would need to collect to satisfy their reporting obligations and the extent to which the information types collected could be minimized to protect consumer privacy.

59. To further safeguard consumer privacy, in the event we were to proceed with a device-level approach, we propose that Participating CMS Provider should offer subscribers the ability to opt out of participating in the collection of information necessary to measure WEA's performance. We believe that Participating CMS Providers could enable this consumer choice by adding a simple, binary toggle switch to the existing WEA settings menu. We note that, by comparison, CSRIC VIII examines a method of automatically collecting WEA performance data from mobile devices whose users have opted in to share WEA performance analytic data with their wireless provider. Should we affirmatively prohibit Participating CMS Providers from collecting or using precise mobile device location information or any PII or CPNI for purposes of reporting this information to the Commission? Should we require Participating CMS Providers to timely and securely destroy any data gathered solely for the purpose of this collection? Should the mobile devices, Participating CMS Providers, or the WEA Database perform functions to further anonymize the data collected? We seek comment on other potential privacy impact mitigations. Our intent is to ensure that any approach to collecting performance data would not change wireless providers' existing access to mobile device location data or change the compliance status of their existing information collections under applicable privacy laws and regulations. We seek comment on any refinements to our proposals that would further this goal.

60. We seek comment on any alternative approaches to WEA performance reporting. For example, CSRIC VIII also recommends that the FCC consider a requirement for an automated email to convey WEA performance reporting information from Participating CMS Providers to an alerting authority or a centralized reporting location for each sent WEA. We seek comment on the utility of WEA performance information communicated by email directly to alerting authorities, either in addition or as an alternative to a WEA database. CSRIC VIII recommends that the details of this approach be worked out between alerting authorities, PBS, and Participating CMS Providers. We encourage WEA stakeholders to submit

a detailed proposals of how this alternative approach could work in practice.

61. *Reporting timeframe.* In what timeframe should Participating CMS Providers collect and submit WEA performance data to the WEA Database? To reduce the risk of wireless service performance degradation during an emergency, should Participating CMS Providers collect and report WEA performance data sufficiently outside of any actual activation of WEA? For example, Participating CMS Providers could submit data to the WEA Database within 24 hours of the issuance of the WEA message or State/Local WEA Test to which the performance data pertains. Would it be feasible for Participating CMS Providers to delay collecting WEA performance information until off-peak network hours? CSRIC VIII raises concerns, however, that ''[e]ven delayed automated reporting, triggered at a later time, carries that possibility of localized congestion during the reporting period.'' What timeframe would strike the right balance between timely performance reporting that provides relevant, actionable information, and the need to protect networks from congestion during actual emergencies?

4. Establishing a WEA Database

62. *Data submission.* We seek comment on the most cost-effective mechanism for CMS Providers to submit WEA elections and performance information into the WEA Database, while minimizing burdens on CMS Providers. We propose that WEA elections and WEA performance data be filed electronically using a web-based interface and, if feasible, an application programming interface (API). In addition to an API, what other tools or features should we consider when designing the data submission elements of the WEA Database to ease reporting burdens and improve efficiency? For example, would Participating CMS Providers prefer to submit information regarding the WEA-capable mobile devices they support either through a file upload or through a form, or should both options be available?

63. *Promote stakeholder understanding.* To promote transparency and address alert originators' need to better understand WEA performance in their respective areas, we propose to enable the WEA Database to provide information about WEA availability and performance. With respect to WEA availability information, we seek to ensure that the public has access to information about which service providers offer WEA, in which locations, and on what devices, so they are empowered to make the right decisions for their unique needs when they choose a mobile device and service plan. We seek comment on this proposal, and on whether the use of the WEA database is the most effective manner to convey this information.

64. We also seek comment on how the WEA Database can best meet consumers' and alerting authorities' need for information about WEA's performance. To maximize relevance for alert originators, we propose to provide performance data expressed as percentages of mobile devices satisfying our reliability, accuracy, and speed performance standards, and to provide this information on a per provider and per geographic area basis. We seek comment on this approach. For example, with respect to reliability, we propose to provide the percentages of devices that succeeded and failed at presenting the alert. We expect this would help alerting authorities better understand how many people within their jurisdictions would receive an alert, which would inform their decisions about how to use WEA in conjunction with other emergency communication tools. For accuracy, we propose to provide the percentages of devices outside of the geographic target area that failed to suppress the alert. We expect this would help alerting authorities better understand the extent of WEA message overshoot, which we expect would inform their future decisions about how to best target their alerts. For speed, we propose to provide the percentiles of time that CMS Providers take to both ensure an alert's receipt as well as the alert's presentation on mobile devices, following the CMS Provider's receipt of the alert at their alerting gateway (*i.e.,* the 10th, 25th, 50th, 90th, and 99th percentile time figures). We expect this would help alerting authorities better understand how quickly their alerts reach the public, which would inform their future decisions about the optimal times to send alerts and whether delays in the delivery of those alerts warrant the supplementary use of other emergency communication tools. We propose that alerting authorities be able to use the WEA Database to see WEA's performance both for their own activations and nationwide so that they can better contextualize any performance issues they may experience. We believe this approach would provide up-to-date information about WEA and thereby greatly improve alerting authorities' visibility into WEA. The database would allow alerting authorities to better understand WEA's reach when planning whether and how to use WEA during emergencies, thus increasing its value as a tool to protect life and property.

65. To avoid disclosing information that Participating CMS Providers may consider to be competitively sensitive, we do not propose to use the WEA Database to disclose the number of WEA-capable mobile devices that are located within the alert message's geographic target area at the time the Participating CMS Provider initially transmits the message or the number of WEA-capable mobile devices connected to cell facilities transmitting the alert message that are located farther than 0.1 miles outside of the message's geographic target area at the time the Participating CMS Provider initially transmits the alert message. We seek comment on this approach. We anticipate that using a dedicated database would be more efficient than the current practice of searching for WEA elections that have been filed directly in a docket one-by-one and downloading individual election letters, which are unlikely to be uniform in how they make their elections. We seek comments on our views. What alternative steps could we take to make WEA election information more accessible to relevant stakeholders?

66. *Public Access.* We propose that the contents of the WEA Database be available to the general public. We believe the general public has an interest in knowing whether and to what extent the WEA system is available in their local area, as well as whether the WEA system performs reliably in their local area. We also believe the public should have an informed expectation about the likelihood that they will receive alert messages that do not apply to them. We seek comment on these views. Will making WEA availability and performance information more readily available in the WEA database influence consumer purchasing decisions related to CMS service and mobile devices? Will this foster increased market competition around WEA performance? We seek comment on the extent to which emergency management agencies accessing the publicly available WEA Database that are not currently authorized by FEMA to issue alerts through IPAWS, might be encouraged to become authorized and, as a result, increase the availability of alert messages to unserved areas.

67. We observe that the WEA availability information that Participating CMS Providers would submit to the WEA Database is already publicly available, although not

aggregated with other WEA information. The information that Participating CMS Providers would supply to the WEA Database about their WEA coverage area is already publicly available through the National Broadband Map, which makes available for download the mobile voice coverage areas collected through the Broadband Data Collection. Similarly, many Participating CMS Providers already make publicly available information about the WEA-capable mobile devices that they offer at the point of sale. If we were to require Participating CMS Providers to disclose whether they make WEA available using currently deployed public cellular network technologies, that would likely require them to disclose information that is not currently public, but we do not believe that this disclosure would warrant confidential treatment either. The Commission grants the presumption of confidentiality to outage information submitted in NORS for reasons related to national security and competitive sensitivity, but we do not believe those same concerns exist here. We seek comment on our views.

68. We also do not believe that WEA performance information submitted in the WEA Database would warrant confidential treatment. We do not believe that the public availability of this information raises any concerns about national security or competitive sensitivity, and it would not include any PII or CPNI. Data submitted to the WEA Database under this proposal would already be aggregated and anonymized with other mobile device data by CMS Providers and could not be deanonymized to obtain any information about an individual mobile device's receipt of an alert message. Because of this aggregated, anonymized approach to data collection, the Commission does not anticipate that it will receive any CPNI or PII. Accordingly, we seek comment on whether WEA performance information requires confidential treatment or other data privacy protection and, if so, why. We note that since FEMA and the Commission began testing WEA on nationwide and regional bases in 2018, the Commission has regularly made publicly available after-action reports that describe WEA's performance during the exercise. Similarly, the WEA Database would make after-action performance analysis available to alerting authorities. We seek comment on why information about Participating CMS Providers' performance in the WEA Database should be treated confidentially when information about WEA's performance is already publicly available.

69. *Emergency management agency access.* Section 10.450(b) of the Commission's rules provides that ''[u]pon request from an emergency management agency, a Participating CMS Provider will disclose information regarding their capabilities for geo-targeting alert messages. A Participating CMS Provider is only required to disclose this information to an emergency management agency insofar as it would pertain to alert messages initiated by that emergency management agency, and only so long as the emergency management agency offers confidentiality protection at least equal to that provided by the Federal FOIA.'' Notwithstanding the fact that nationwide Participating CMS Providers have established contact information purposefully identified for WEA geo-targeting inquiries, alerting authorities have had difficulty obtaining this information. Accordingly, if the WEA performance reporting proposal we offer today is adopted, we propose to have it replace the existing requirement that Participating CMS Providers share information about WEA's reliability and accuracy upon request from emergency management agencies. We seek comment on this approach. What, if any, harms could arise from granting alerting authorities access to WEA data outside of their local area, alert and warning jurisdictions, or territory? Would public safety be better served if alerting authorities had visibility into the WEA system's availability and performance beyond their jurisdictional boundaries? For example, would it be beneficial for a state agency to have access to data showing the alert messages that its neighboring state transmits would likely overshoot into their state? Would access to additional WEA data beyond an alerting authority's jurisdiction provide a more complete picture of WEA system availability and performance, particularly for alerting authorities that have not yet used the WEA system, or have used it infrequently?

70. If any information in the WEA Database is determined to require confidential treatment, we seek comment on how to protect it. Should we adopt procedures for alerting authority eligibility, user account access, certification requirements, data security, and information sharing similar to those that we adopted for providing federal, state, Tribal, and territorial agencies with direct access to NORS and DIRS? Should any aspects of those procedures differ for the WEA database?

71. If we require credentialed access to the WEA Database, we propose that the WEA Database also include a public-facing portal that would allow the public to query if WEA is available on the mobile wireless network to which they may subscribe, at a specified address where they may live or work, and on specific mobile devices that they may have. If the query indicates WEA is not available, we propose that the WEA Database present the consumer with a description of Participating CMS Providers that offer WEA at their specified location and mobile device. We seek comment on this proposal.

D. Promoting Digital Equality

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

E. Compliance Timeframes

73. In this Section, we propose compliance timeframes for the proposals in this *Further Notice* that aim to strike an appropriate balance between the urgent public safety need for the contemplated improvements to WEA and wireless industry's need to develop standards, software, practices, and procedures to effectively comply. We note that, similar to the geotargeting rule, because the new capabilities would be dependent on device-level software, firmware, or hardware changes, they necessarily would not be available to alerting authorities and consumers on a ''flash cut'' basis. For each of these proposals, we seek comment on whether it would be appropriate to allow CMS Providers that are small- or medium-sized businesses additional time to comply. We seek comment on how we should define small- and medium-sized businesses in this context and whether we should make a distinction between nationwide and non-nationwide CMS Providers in this regard. We also seek comment on how much additional time, if any, small- or medium-sized businesses would reasonably need for compliance

with the proposals in this *Further Notice.*

74. *Enhancing WEA's Language Support.* For the rules we propose today requiring Participating CMS Providers' WEA-capable mobile devices to translate English-language alert messages that they receive into the subscriber's default language preference, we propose to set a compliance date of 30 months after the publication of final rules in the **Federal Register**. Depending on the approach used by Participating CMS Providers to satisfy this requirement, compliance with this proposal would necessitate updates to standards and firmware. We also note that CSRIC VIII directed ATIS to conduct a study to determine a feasible, accurate, and effective method for enhancing language support. The Commission has previously reasoned that it takes industry 30 months to comply with rules that implicate the need for updates to WEA standards and firmware—*i.e.,* 12 months to work through appropriate industry bodies to publish relevant standards; another 12 months for Participating CMS Providers and mobile device manufacturers to develop, test, and integrate firmware upgrades consistent with those standards; and 6 more months to deploy the new technology to the field during normal technology refresh cycles. We seek comment on the applicability of this approach and timeframe to these proposals. We believe that a machine-based translation approach to increasing WEA's language support, as contemplated by this Further Notice, is likely to only require updates to mobile devices, not to the CMS network, which potentially means less standards and firmware development would be needed. If the record supports the feasibility of that approach to compliance, should we require a shorter compliance deadline, and if so, what should that deadline be?

75. *Improving WEA's Effectiveness with Multimedia Content.* Our proposals to make WEA more accessible by requiring Participating CMS Providers to support sending thumbnail-sized images in WEA alerts and the integration of location-aware maps would implicate updates to standards and firmware in both the CMS network and at mobile devices. To give Participating CMS Providers sufficient time to complete the updates to standard and software necessary, we propose to set a compliance date for these requirements of 36 months from the publication of the rules in the **Federal Register**. We seek comment on this proposal. Would 36 months be sufficient time for all mobile devices that are still technically incompatible with the receipt of 360-character-maximum alerts to churn out of use by subscribers?

76. *Integrate WEA More Seamlessly into People's Lives.* For the rules we propose today that require Participating CMS Providers to be able to send WEA messages without triggering the audio attention signal and the vibration cadence and provide their subscribers with the option to turn off attention signal and vibration cadence, we propose to require Participating CMS Providers and mobile device manufacturers to comply within 30 months of the rules' publication in the **Federal Register**. We believe this compliance deadline is consistent with deadlines for past requirements that have necessitated updates to standards and firmware, as discussed above. We seek comment on this proposal. Can compliance with our proposal to allow subscribers to turn off the attention signal and vibration cadence be achievable only with updates to WEA standards and software at the mobile device? If so, can compliance be achieved in less time than 30 months?

77. *Facilitate More Effective WEA Public Awareness Exercises.* We propose that Participating CMS Providers would be authorized to support up to two annual end-to-end WEA tests per alerting authority 30 days after the Public Safety and Homeland Security Bureau issues a Public Notice announcing OMB approval of any new information collection requirements associated with this rule change. We do not believe that Participating CMS Providers would need to make any changes to support such public awareness testing because such tests would present to a Participating CMS Provider in a manner indistinguishable from any other WEA message. We seek comment on this proposals and our views.

78. *Establishing a WEA Database to Promote Transparency About WEA Availability and Benchmark WEA Performance.* We propose to set a compliance date of 30 months after the publication of final rules in the **Federal Register** or within 30 days of the Public Safety and Homeland Security Bureau's publication of a public notice announcing that the WEA Database is ready to accept filings, whichever is later, for the proposed rules requiring Participating CMS Providers to satisfy WEA performance minimums and submit reports measuring WEA's performance. We believe 30 months is appropriate because Participating CMS Providers will have to update standards and firmware to comply with the performance reporting requirements, and we believe that it is sensible for the performance minimums to go into effect at the same time that the Commission receives the performance measurement data that can assist with enforcing them. We seek comment on this approach. We also seek specific comment on whether to offer an extended compliance timeframe for Participating CMS Providers that are small- and medium-sized businesses, which may have different network resource constraints than the nationwide CMS Providers.

79. We propose to require CMS Providers to refresh their elections to participate in WEA using the WEA Database within 30 days of the Public Safety and Homeland Security Bureau's publication of a public notice announcing (1) OMB approval of any new information collection requirements and (2) that the WEA Database is ready to accept filings. We seek comment on this proposal. We note that the Commission gave wireless industry 30 days within to comply with the Commission's initial requirement to elect whether to participate in WEA. We anticipate that CMS providers would need to undertake the same measures as they did in their first WEA election to refresh their WEA election in compliance with this proposal, if adopted: assessing the extent to which they can agree to offer WEA in the entirety of their geographic service area, assessing the extent to which all mobile devices that they offer at the point of sale are WEA capable, and assessing their ability to comply with the Commission's technical and procedural WEA rules. To the extent that the requirements we propose to adopt would require additional data entry than was required in CMS Providers' first WEA elections, we believe that using the WEA Database's electronic interface would make the entry of that data achievable within 30 days. We seek comment on these views. We also seek comment on the extent to which pre-populating relevant information that the Commission already has available to it in the WEA Database can further ease the burden of compliance and make it easier for CMS Providers to comply with this requirement within 30 days. We seek comment on any other measures that we can take to facilitate timely compliance with this proposal by all CMS Providers. We do not believe that compliance with this proposal would present unique or heightened burdens to CMS Providers that are small- or medium-sized businesses. We seek comment on this view.

F. Benefit-Cost Analysis

80. In this section, we seek comment on whether we can reasonably expect the minimum benefit resulting from the improvements to WEA we propose today to exceed their maximum cost. We estimate that the proposed rules, both separately and jointly, would improve the effectiveness of WEA and bring benefits through improved public safety outcomes. We estimate the maximum, aggregated cost of compliance with the proposals in this Further Notice would be $39.9 million as a one-time cost and $422,500 as an annually recurring cost. Although most of the benefits are difficult to quantify, we believe they outweigh the overall costs of the proposed rules.

1. Benefits

81. We seek comment on the benefits of the proposals in this Further Notice taken together. We are cognizant of the fact that, as a general matter, it is impossible to assign precise dollar values to changes to WEA that improve the public's safety, life, and health. We also believe that these proposals will result in benefits measurable in terms of lives saved and injuries and property damage prevented. We seek comment on developments in social science that add support to or refute the premise that effective alerts and warnings help to move people more effectively to take protective actions during emergencies. We seek comment on how to quantify the value of the improvements to public safety outcomes that result from faster and more effective protective actions during disasters. Are there situations where, had the Commission implemented the improvements to WEA on which we seek comment today, deaths and injuries could have been prevented or mitigated? We seek comment on the extent to which the improved alert message accessibility and personalization features that we propose in this Further Notice would improve the effectiveness of WEA alert messages and reduce ''milling'' behavior. We seek comment on whether our proposals to integrate WEA more seamlessly into people's lives will increase the rate of consumer opt-in to WEA or otherwise result in more people receiving and effectively responding to potentially life-saving instructions from alerting authorities during emergencies. We also seek comment on any enhancements to our proposals that would make WEA more likely to save lives, prevent injuries, and protect properties. Would the adoption of our proposed rules, such as WEA alert tests and accessible WEA Database, also provide additional benefits to alerting authorities, for instance, reducing costs of analyzing alerts' performance? We seek further comment on the benefits of our proposals taken individually and jointly.

82. *Enhancing WEA's Language Support.* We tentatively conclude that the benefit of the proposed WEA language support is likely to be significant. Currently, the 76 CMS Providers participating in WEA send alerts to 75% of mobile phones in the country. Among the 26 million people who do not primarily speak English or Spanish, nearly 15.4 million speak primarily one of the 12 languages that we propose to integrate into the WEA system in addition to English and Spanish. Assuming 75% of these individuals are covered by the WEA system, approximately 10 million people who have been receiving WEA alerts in languages they cannot comprehend would understand the content of WEA alerts under the proposed WEA language support. Even if alerts reach just 1% of this population per year (*i.e.,* nearly 100,000 people) the potential of WEA to prevent property damage, injuries, and deaths could be enormous.

83. *Improving WEA's Effectiveness with Multimedia Content.* We tentatively conclude that the proposed requirement of support for multimedia content in WEA messages, including ''location-aware maps'' and thumbnail-sized images, will result in enhanced effectiveness of the messages. Images can strengthen communications by stimulating attention, conveying large amount of information in a short amount of time, and promoting information retention. Therefore, requiring support for multimedia content is likely to raise receivers' attention and situational awareness and lead to improved public safety. Although the benefit is difficult to quantify, it is likely to dwarf the small costs associated with the inclusion of multimedia content in WEA messages. Given the small size of such content (*e.g.,* thumbnail-sized image using 0.013 megabytes of data), we anticipate the additional cost to transmit it to be negligible. We seek comment and data on this assessment. We also anticipate that transmitting location-aware maps and thumbnail-sized images in WEA alert messages would not cause significant delays in alert transmission. We seek comment on this assessment.

84. *Allow Alerting Authorities More Flexibility in how WEA Messages are Presented.* We believe that allowing alerting authorities more flexibility in deciding how WEA messages are presented, such as suppressing the audio attention signal and vibration cadence in an active shooter scenario, could help reduce casualties. According to the FBI, there were 61 active shooter incidents in 2021, resulting in 243 casualties—including 103 deaths and 140 injuries, excluding to the shooters. It is reasonable to assume that suppressing the audio attention signal and vibration cadence during an active-shooting scenario could reduce casualties by discretely warning the public, yielding substantial benefits to public safety. We seek comment on statistics and data related to the benefits through the reduction of casualties resulting from the messaging flexibility. Although suppressing the audio attention signal and vibration cadence may not be warranted in all situations, we believe that alerting authorities would be in the best position in determining whether a specific situation warrants the adjustment in how messages are presented so the adverse impact of inattention would be minimized. We also believe allowing alerting authorities this flexibility would be technically feasible at a minimal expense, and hence the proposed rule would likely result in net benefits. We seek comment on our assessment.

85. *Prevent Unnecessary Consumer Opt-out.* We believe that offering an alternative in addition to the binary choices between opt-out and opt-in may help retain consumers on the WEA system. The Commission's rules already allow for consumers to mute the audio attention signal and vibration cadence when users set their devices to ''do not disturb'' mode. Outside of these ''do not disturb'' windows, consumers would find ''opt-out'' to be the only option to avoid the distraction of WEA alerts. Without the third option that allows consumers to silently receive all WEA alerts, consumers are likely to opt out from WEA if they still find the audio attention signal and vibration cadence interrupting. For those who already opted out from WEA, adding this muting option does not make them any worse off and may even cause some of them to opt in again. Therefore, we believe this proposed rule can prevent unnecessary consumer opt-out and result in improvement in public safety outcomes. Although this proposal would require collaboration between wireless providers and device manufacturers, we believe the technical difficulties and costs should be small. As a result, we tentatively conclude that the proposed rule would enhance public safety at a minimal cost. We seek

comment on this assessment and any believe that CMS Providers would incur any cost to comply with our proposal to allow evidence and data to support or correct our assessment.

86. *Facilitate More Effective WEA Public Awareness Exercises.* We propose to authorize Participating CMS Providers to support up to two annual end-to-end WEA tests per alerting authority, consistent with EAS test rules. We believe harmonizing WEA and EAS test rules would improve the effectiveness of public awareness exercises and reduce consumer alert fatigue when such tests are better coordinated than tested separately. We do not alerting authorities to conduct two public awareness tests per year. Therefore, we believe this proposal will bring net benefits to the public. We seek comment on these assessments.

87. *Establishing a WEA Database to Promote Transparency about WEA Availability and Benchmark WEA Performance.* We believe that establishing measurable goals and performance measures for WEA will improve the speed, accuracy and reliability of WEA messages. The public will benefit from improved and targeted usage of WEA alert messages. Greater accuracy in sending alert messages will result in less overshoot, which in turn will mean that fewer people will receive alert messages not intended for them and will be less likely to take unnecessary action or opt out of receiving alert messages. We seek comment on the benefits of establishing benchmarks that will make WEA faster, more accurate, and more reliable. We seek comment on whether improving WEA performance would encourage greater and more effective usage of WEA. Would alerting authorities be more likely to issue an alert message if they knew it would be received by the people for whom it was intended while not being received by people for whom it was not intended? Will improving WEA also result in more emergency management agencies investing the time, effort, and resources necessary to become authorized as alerting authorities? We seek comment on the benefit of emergency management agencies using alert messages both more often and more effectively. Will improved performance cause current alerting authorities to use WEA in circumstances they might have hesitated to use them previously? We seek comment on these benefits.

88. The proposed WEA Database would provide a nationwide WEA availability and performance dataset. We believe that giving the Commission, FEMA, alerting authorities, and consumers access to this dataset through a graphical user interface and data visualization tool will significantly improve their understanding of how WEA works in practice. We believe that understanding how WEA works in practice will help alerting authorities to use WEA more effectively, enable consumers to use their mobile devices as preparedness tools, and enable the Commission and FEMA to more effectively discharge their responsibilities as stewards of the nation's alert and warning capability. We seek comment on this view. As discussed above, emergency management agencies may be declining to use the WEA system in situations where it could save lives because they lack information about, and confidence in, how WEA works in practice. We seek comment on our tentative conclusion that implementing a WEA Database will increase alerting authorities' confidence in and use of the WEA system by providing visibility and assurances. We seek comment on whether the WEA Database would also promote the public interest by providing alerting authorities with information as to where their alerts will not reach intended recipients and their need to employ alternate methods of notifying the public of emergency situations. We also seek comment on whether WEA availability and performance information would promote public confidence in WEA and influence consumer choice when deciding from which CMS provider to purchase service. As a result, would market forces be more likely to incentivize additional CMS Providers to elect to transmit emergency alerts or to improve the availability of the WEA service that they offer? How would Participating CMS Providers, emergency managers, and the public benefit if some among the over 450 CMS Providers that have elected not to participate in WEA started transmitting WEA alert messages? We seek comment on whether greater knowledge of WEA's coverage, in terms of geographic areas and network technologies, would encourage providers to increase their support for WEA. We seek additional comment on other benefits that can be gleaned from WEA availability and performance reporting.

2. Costs

89. We seek comment on the costs that Participating CMS Providers would expect to incur as a result of their compliance with the rule changes we propose in this Further Notice. We anticipate that these rules will lead Participating CMS Providers to incur costs associated with modifying standards and software, and recordkeeping and reporting costs. We seek comment on whether adopting all these proposals as a package may result in a cost savings as opposed to having to modify standards and software in response to several, incremental policy changes.

90. We estimate that Participating CMS Providers would incur a $39.9 million one-time cost to update the WEA standards and software necessary to comply the proposals in this Further Notice. This figure consists of approximately a $814,000 cost to update applicable WEA standards and approximately a $39.1 million cost to update applicable software. We quantify the cost of modifying standards as the annual compensation for 30 network engineers compensated at the national average for their field ($120,650/year; $58/hour), plus annual benefits ($60,325/year; 29/hour) working for the amount of time that it takes to develop a standard (one hour every other week for one year, 26 hours) for 12 distinct standards. We quantify the cost of modifying software as the annual compensation for a software developer compensated at the national average for their field ($120,990/year), plus annual benefits ($60,495/year) working for the amount of time that it takes to develop software (ten months) at each of the 76 CMS Providers that participate in WEA. We quantify the cost of testing these modifications (including integration testing, unit testing and failure testing) to require 12 software developer compensated at the national average for their field working for two months at each of the 76 CMS Providers that participate in WEA. In quantifying costs for software development, we have used the same framework since 2016 for changes to software ranging from developing new standards to enhanced geo-targeting. Does this remain an appropriate framework to describe the costs of software or firmware updates needed to comply with the proposals in this Further Notice? We seek comment on these cost estimates and the underlying cost methodology we are using.

91. We also seek comment on specific costs of reporting and recordkeeping related to reporting information about WEA's availability and performance in the WEA Database. We expect costs associated with our proposals related to WEA availability reporting to be negligible for Participating CMS Providers that participate in WEA in whole or that otherwise offer WEA in the entirety of their geographic service area because such Participating CMS

Providers have already provided the Commission with the shapefile data needed to fulfill a significant aspect of their reporting obligation in furtherance of their obligations to support the Commission's Broadband Data Collection. We seek comment on this view. For CMS Providers participating in WEA in part that may need to tailor shapefiles to reflect the extent of its WEA coverage, what, if any, costs would they incur to recreate or reformat shapefiles to depict the extent of its WEA coverage? In the Supporting Document of Study Area Boundary Data Reporting in Esri Shapefile Format, the Office of Information and Regulatory Affairs estimates that it takes an average of 26 hours for a data scientist to modify a shapefile. We believe submitting WEA availability information in shapefile format should require less time than modifying a shapefile. Therefore, we believe 26 hours would be an upper bound of the time required for a Participating CMS Provider to report its WEA availability in shapefile format. Given that the median wage rate is $48.52/hour for data scientists, with a 45% markup for benefits, we arrive at $70.40 as the hourly compensation rate for a data scientist. We estimate an aggregate cost of WEA availability reporting to be approximately $139,000 (≈ $70.40 per hour × 26 hours × 76 providers), which may be recurring on an annual basis since availability may change and need to be updated over time. We seek comment on our estimates of the time and costs Participating CMS Providers have to spend on gathering and submitting WEA's availability information in GIS shapefile format in the WEA Database?

92. We acknowledge that our proposed rules on collecting the data necessary to measure WEA's reliability, accuracy, and speed for each alert in a WEA Database would incur some operating costs for Participating CMS Providers. However, we believe that once Participating CMS Providers upgrade the standards and software necessary to automate WEA performance reporting, we expect that the process of data collection and data submission would require minimal human intervention. Although we anticipate such performance reporting would be largely automated once it is set up, we estimate a routine administrative monitoring cost that Participating CMS Providers may still incur when they file the performance report for each alert incident. We estimate that, for each alert, a provider will need an office administrator, who is compensated at $27 hour, to spend 0.5 hours in monitoring each data transmission. At the aggregate level, we believe there will be 21,000 performance reports transmitted to the WEA database, resulting in a $283,500 annual recurring cost at the aggregate level. We seek comment on our estimates and alternative approaches to assess recordkeeping and reporting costs for WEA performance reporting.

93. Because CMS Providers' participation in WEA is voluntary, Participating CMS Providers may opt out of participating in WEA if they decide the costs of the proposed rules are too burdensome. Despite the voluntary nature of the program and potential Participating CMS Providers' opt-out, it is our belief that they have incurred significant good will from their voluntary Participation in WEA over the last decade that justifies their continued participation. Therefore, we anticipate that existing Participating CMS Providers are very unlikely to withdraw their participation in the WEA system if the performance standards and reporting requirements are adopted. We seek comment on this assessment and any forecast and data to support or refute our assessment. We seek comment on whether there are any other types of costs that we should consider as relevant to our analysis. Are there alternative methods of achieving our goals in these areas that would present Participating CMS Providers with lesser burdens? If so, we seek comment on costs associated with these alternative methods. We also seek costs on any modifications that we could implement to our proposed rules to limit the burden of compliance on entities considered to be small- or medium-sized businesses.

Procedural Matters

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

95. *Ex Parte Rules—Permit-But-Disclose.* This proceeding this Notice initiates shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

96. *Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible impact of the rule and policy changes contained in this Further Notice of Proposed Rulemaking. The IRFA is set forth in Appendix B.

97. *Filing Requirements—Comments and Replies.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47

CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *https://www.fcc.gov/ecfs/.*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.
- Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19.
- During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

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

99. *Additional Information.* For further information regarding Notice, please contact *WEA@fcc.gov,* or Michael Antonino, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–0695, or by email to *michael.antonino@fcc.gov.*

Initial Paperwork Reduction Act of 1995 Analysis

This *Further Notice of Proposed Rulemaking* seeks comment on potential new or revised proposed information collection requirements. If the Commission adopts any new or revised final information collection requirements when the final rules are adopted, the Commission will publish a notice in the **Federal Register** inviting further comments from the public on the final information collection requirements, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3501–3520). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection requirements contained in this document, as required by the PRA. Public and agency comments on the PRA proposed information collection requirements are due August 21, 2023. Comments should address: (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; (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; and (e) way to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Pubic Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Initial Regulatory Flexibility Analysis

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

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

2. In the *Further Notice,* the Commission acts to (1) develop measurable goals and performance measures for WEA by proposing the adoption of WEA performance metrics and establishing the WEA Database and performance requirements, (2) make WEA more accessible by enhancing WEA's language support and effectiveness with multimedia content, and (3) integrate WEA more seamlessly into people's lives by improving active shooter and public health alerts, preventing unnecessary consumer opt-out, and facilitating more effective WEA public awareness exercises

3. The *Further Notice* contains specific proposals upon which the Commission seeks comment including: proposing definitions for reliability, accuracy, and speed, and setting benchmarks based on these definitions that Participating CMS Providers would be required to meet; requiring Participating CMS Providers to submit data regarding WEA availability and performance into a WEA Database to be shared with FEMA and authorized alerting authorities; translating alerts into the thirteen most commonly spoken languages in the United States and storing them at the mobile device to be displayed when an alerting authority deems relevant; sending thumbnail-sized images in alerts over the air; incorporating location-aware maps into WEA by utilizing an API; allowing alerting authorities to send alerts without the associated attention signal and vibration cadence; allowing consumers to cache their receipt of WEA; and proposing to authorize two annual end-to-end WEA tests per alerting authority.

B. Legal Basis

4. The proposed action is authorized pursuant to sections 1, 2, 4(i), 4(n), 301, 303(b), 303(e), 303(g), 303(j), 303(r), 307, 309, 316, 403, and 706 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(n), 301, 303(b), 303(e), 303(g), 303(j), 303(r), 307, 309, 316, 403, 544(g), and 606; The Warning, Alert and Response Network (WARN) Act, WARN Act §§ 602(a), (b), (c), (f), 603, 604, and 606, 47 U.S.C. 1201(a),(b),(c), (f), 1203, 1204 and 1206.

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

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of, the number of

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

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

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

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

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

10. *Broadband Personal Communications Service.* The broadband personal communications services (PCS) spectrum encompasses services in the 1850–1910 and 1930–1990 MHz bands. The closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (except Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

11. Based on Commission data as of November 2021, there were approximately 5,060 active licenses in the Broadband PCS service. The Commission's small business size standards with respect to Broadband PCS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. In auctions for these licenses, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years. Winning bidders claiming small business credits won Broadband PCS licenses in C, D, E, and F Blocks.

12. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

13. *Narrowband Personal Communications Services.* Narrowband Personal Communications Services *(Narrowband PCS)* are PCS services operating in the 901–902 MHz, 930–931 MHz, and 940–941 MHz bands. PCS services are radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

14. According to Commission data as of December 2021, there were approximately 4,211 active *Narrowband PCS* licenses. The Commission's small business size standards with respect to *Narrowband PCS* involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of these licenses, the Commission defined a

''small business'' as an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is defined as an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. Pursuant to these definitions, 7 winning bidders claiming small and very small bidding credits won approximately 359 licenses. One of the winning bidders claiming a small business status classification in these *Narrowband PCS* license auctions had an active license as of December 2021.

15. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

16. *Wireless Communications Services.* Wireless Communications Services (WCS) can be used for a variety of fixed, mobile, radiolocation, and digital audio broadcasting satellite services. Wireless spectrum is made available and licensed for the provision of wireless communications services in several frequency bands subject to Part 27 of the Commission's rules. Wireless Telecommunications Carriers (except satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

17. The Commission's small business size standards with respect to WCS involve eligibility for bidding credits and installment payments in the auction of licenses for the various frequency bands included in WCS. When bidding credits are adopted for the auction of licenses in WCS frequency bands, such credits may be available to several types of small businesses based average gross revenues (small, very small and entrepreneur) pursuant to the competitive bidding rules adopted in conjunction with the requirements for the auction and/or as identified in the designated entities section in part 27 of the Commission's rules for the specific WCS frequency bands.

18. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

19. *700 MHz Guard Band Licensees.* The 700 MHz Guard Band encompasses spectrum in 746–747/776–777 MHz and 762–764/792–794 MHz frequency bands. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

20. According to Commission data as of December 2021, there were approximately 224 active 700 MHz Guard Band licenses. The Commission's small business size standards with respect to 700 MHz Guard Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, five winning bidders claiming one of the small business status classifications won 26 licenses, and one winning bidder claiming small business won two licenses. None of the winning bidders claiming a small business status classification in these 700 MHz Guard Band license auctions had an active license as of December 2021.

21. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

22. *Lower 700 MHz Band Licenses.* The lower 700 MHz band encompasses spectrum in the 698–746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

23. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses. The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding

credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding $15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

24. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

25. *Upper 700 MHz Band Licenses.* The upper 700 MHz band encompasses spectrum in the 746–806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758–763 MHz and 788–793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

26. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses. The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

27. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

28. *Advanced Wireless Services (AWS)—(1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3*); 2000–2020 MHz and 2180–2200 MHz (AWS–4). Spectrum is made available and licensed in these bands for the provision of various wireless communications services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

29. According to Commission data as December 2021, there were approximately 4,472 active AWS licenses. The Commission's small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses. In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.

30. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

31. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the

Instructional Television Fixed Service (ITFS)). Wireless cable operators that use spectrum in the BRS often supplemented with leased channels from the EBS, provide a competitive alternative to wired cable and other multichannel video programming distributors. Wireless cable programming to subscribers resembles cable television, but instead of coaxial cable, wireless cable uses microwave channels.

32. In light of the use of wireless frequencies by BRS and EBS services, the closest industry with a SBA small business size standard applicable to these services is Wireless Telecommunications Carriers (*except* Satellite). The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

33. According to Commission data as December 2021, there were approximately 5,869 active BRS and EBS licenses. The Commission's small business size standards with respect to BRS involves eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of BRS licenses, the Commission adopted criteria for three groups of small businesses. A very small business is an entity that, together with its affiliates and controlling interests, has average annual gross revenues exceed $3 million and did not exceed $15 million for the preceding three years, a small business is an entity that, together with its affiliates and controlling interests, has average gross revenues exceed $15 million and did not exceed $40 million for the preceding three years, and an entrepreneur is an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. Of the ten winning bidders for BRS licenses, two bidders claiming the small business status won 4 licenses, one bidder claiming the very small business status won three licenses and two bidders claiming entrepreneur status won six licenses. One of the winning bidders claiming a small business status classification in the BRS license auction has an active licenses as of December 2021.

34. The Commission's small business size standards for EBS define a small business as an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $55 million for the preceding five (5) years, and a very small business is an entity that, together with its affiliates, its controlling interests and the affiliates of its controlling interests, has average gross revenues that are not more than $20 million for the preceding five (5) years. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

35. *The Educational Broadcasting Services.* Cable-based educational broadcasting services fall under the broad category of the Wired Telecommunications Carriers industry. The Wired Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband internet services.

36. The SBA small business size standard for this industry classifies businesses having 1,500 or fewer employees as small. U.S. Census Bureau data for 2017 show that there were 3,054 firms in this industry that operated for the entire year. Of this total, 2,964 firms operated with fewer than 250 employees. Thus, under this size standard, the majority of firms in this industry can be considered small. Additionally, according to Commission data as of December 2021, there were 4,477 active EBS licenses. The Commission estimates that the majority of these licenses are held by non-profit educational institutions and school districts and are likely small entities.

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

38. *Software Publishers.* This industry comprises establishments primarily engaged in computer software publishing or publishing and reproduction. Establishments in this industry carry out operations necessary for producing and distributing computer software, such as designing, providing documentation, assisting in installation, and providing support services to software purchasers. These establishments may design, develop, and publish, or publish only. The SBA small business size standard for this industry classifies businesses having annual receipts of $41.5 million or less as small. U.S. Census Bureau data for 2017 indicate that 7,842 firms in this industry operated for the entire year. Of this number 7,226 firms had revenue of less than $25 million. Based on this data, we conclude that a majority of firms in this industry are small.

39. *Noncommercial Educational (NCE) and Public Broadcast Stations.* Noncommercial educational broadcast stations and public broadcast stations are television or radio broadcast stations which under the Commission's rules are eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and are owned and operated by a public agency or nonprofit private foundation, corporation, or association; or are owned and operated by a municipality which transmits only noncommercial programs for education purposes.

40. The SBA small business size standards and U.S. Census Bureau data classify radio stations and television broadcasting separately and both categories may include both noncommercial and commercial stations. The SBA small business size standard for both radio stations and television broadcasting classify firms having $41.5 million or less in annual receipts as small. For Radio Stations, U.S. Census Bureau data for 2017 show that 1,879 of the 2,963 firms that operated during that year had revenue of less than $25 million per year. For Television Broadcasting, U.S. Census Bureau data for 2017 show that 657 of the 744 firms that operated for the entire year had revenue of less than $25,000,000. While the U.S. Census Bureau data does not indicate the number of non-commercial stations, we estimate that under the applicable SBA size standard the majority of noncommercial educational broadcast stations and public broadcast stations are small entities.

41. According to Commission data as of December 31, 2022, there were 4,590 licensed noncommercial educational radio and television stations. In addition, the Commission estimates as of December 31, 2022, there were 383 licensed noncommercial educational (NCE) television stations, 383 Class A TV stations, 1,912 LPTV stations and 3,122 TV translator stations. The Commission does not compile and otherwise does not have access to financial information for these stations that permit it to determine how many stations qualify as small entities under the SBA small business size standards. However, given the nature of these services, we will presume that all noncommercial educational and public broadcast stations qualify as small entities under the above SBA small business size standards.

42. *Radio Stations.* This industry is comprised of establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies firms having $41.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 2,963 firms operated in this industry during that year. Of this number, 1,879 firms operated with revenue of less than $25 million per year. Based on this data and the SBA's small business size standard, we estimate a majority of such entities are small entities.

43. The Commission estimates that as of December 31, 2022, there were 4,484 licensed commercial AM radio stations and 6,686 licensed commercial FM radio stations, for a combined total of 11,170 commercial radio stations. Of this total, 11,168 stations (or 99.98%) had revenues of $41.5 million or less in 2021, according to Commission staff review of the BIAKelsey Media Access Pro Online Database (MAPro) on January 13, 2023, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates that as of December 31, 2022, there were 4,207 licensed noncommercial (NCE) FM radio stations, 2,015 low power FM (LPFM) stations, and 8,950 FM translators and boosters. The Commission however does not compile, and otherwise does not have access to financial information for these radio stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these radio station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

44. We note, however, that in assessing whether a business concern qualifies as ''small'' under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of ''small business'' requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific radio or television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and is therefore possibly over-inclusive. An additional element of the definition of ''small business'' is that the entity must be independently owned and operated. Because it is difficult to assess these criteria in the context of media entities, the estimate of small businesses to which the rules may apply does not exclude any radio or television station from the definition of a small business on this basis and similarly may be over-inclusive.

45. *FM Translator Stations and Low-Power FM Stations.* FM translators and Low Power FM Stations are classified in the industry for Radio Stations. The Radio Stations industry comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies firms having $41.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 2,963 firms operated during that year. Of that number, 1,879 firms operated with revenue of less than $25 million per year. Therefore, based on the SBA's size standard we conclude that the majority of FM Translator stations and Low Power FM Stations are small. Additionally, according to Commission data, as of December 31, 2022, there were 8,950 FM Translator Stations and 2,015 Low Power FM licensed broadcast stations. The Commission however does not compile and otherwise does not have access to information on the revenue of these stations that would permit it to determine how many of the stations would qualify as small entities. For purposes of this regulatory flexibility analysis, we presume the majority of these stations are small entities.

46. *Television Broadcasting.* This industry is comprised of ''establishments primarily engaged in broadcasting images together with sound.'' These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA small business size standard for this industry classifies businesses having $41.5 million or less in annual receipts as small. 2017 U.S. Census Bureau data indicate that 744 firms in this industry operated for the entire year. Of that number, 657 firms had revenue of less than $25,000,000. Based on this data we estimate that the majority of television broadcasters are small entities under the SBA small business size standard.

47. As of December 31, 2022, there were 1,375 licensed commercial television stations. Of this total, 1,282 stations (or 93.2%) had revenues of $41.5 million or less in 2021, according to Commission staff review of the BIAKelsey Inc. Media Access Pro Online Television Database (MAPro) on January 13, 2023, and therefore these

licensees qualify as small entities under the SBA definition. In addition, the Commission estimates as of December 31, 2022, there were 383 licensed noncommercial educational (NCE) television stations, 383 Class A TV stations, 1,912 LPTV stations and 3,122 TV translator stations. The Commission however does not compile, and otherwise does not have access to financial information for these television broadcast stations that would permit it to determine how many of these stations qualify as small entities under the SBA small business size standard. Nevertheless, given the SBA's large annual receipts threshold for this industry and the nature of these television station licensees, we presume that all of these entities qualify as small entities under the above SBA small business size standard.

48. *Cable and Other Subscription Programming.* The U.S. Census Bureau defines this industry as establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (*e.g.,* limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. The SBA small business size standard for this industry classifies firms with annual receipts less than $41.5 million as small. Based on U.S. Census Bureau data for 2017, 378 firms operated in this industry during that year. Of that number, 149 firms operated with revenue of less than $25 million a year and 44 firms operated with revenue of $25 million or more. Based on this data, the Commission estimates that the majority of firms operating in this industry are small.

49. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for the purpose of cable rate regulation. Under the Commission's rules, a ''small cable company'' is one serving 400,000 or fewer subscribers nationwide. Based on industry data, there are about 420 cable companies in the U.S. Of these, only seven have more than 400,000 subscribers. In addition, under the Commission's rules, a ''small system'' is a cable system serving 15,000 or fewer subscribers. Based on industry data, there are about 4,139 cable systems (headends) in the U.S. Of these, about 639 have more than 15,000 subscribers. Accordingly, the Commission estimates that the majority of cable companies and cable systems are small.

50. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, contains a size standard for a ''small cable operator,'' which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' For purposes of the Telecom Act Standard, the Commission determined that a cable system operator that serves fewer than 677,000 subscribers, either directly or through affiliates, will meet the definition of a small cable operator based on the cable subscriber count established in a 2001 Public Notice. Based on industry data, only six cable system operators have more than 677,000 subscribers. Accordingly, the Commission estimates that the majority of cable system operators are small under this size standard. We note however, that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

51. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $35 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 71 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 48 providers have 1,500 or fewer employees. Consequently using the SBA's small business size standard, a little more than one-half of these providers can be considered small entities.

52. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.* dial-up ISPs) or voice over internet protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

53. *Direct Broadcast Satellite (''DBS'') Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic ''dish'' antenna at the subscriber's location. DBS is included in the Wired Telecommunications Carriers industry which comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.

54. The SBA small business size standard for Wired Telecommunications Carriers classifies firms having 1,500 or fewer employees as small. U.S. Census

Bureau data for 2017 show that 3,054 firms operated in this industry for the entire year. Of this number, 2,964 firms operated with fewer than 250 employees. Based on this data, the majority of firms in this industry can be considered small under the SBA small business size standard. According to Commission data however, only two entities provide DBS service—DIRECTV (owned by AT&T) and DISH Network, which require a great deal of capital for operation. DIRECTV and DISH Network both exceed the SBA size standard for classification as a small business. Therefore, we must conclude based on internally developed Commission data, in general DBS service is provided only by large firms.

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

55. We expect the actions proposed in the *Further Notice,* if adopted, will impose additional reporting, recordkeeping and other compliance obligations on small as well as other entities who are Participating CMS Providers voluntarily participating in WEA.

56. At this time the Commission cannot quantify the cost of compliance for small entities to comply with the proposals and all of the matters that we seek comment on in the *Further Notice.* However, we have conducted an analysis estimating the total costs that would be incurred by all Participating CMS providers as a group. We anticipate that the proposed rules will result in costs associated with modifying standards and software, and recordkeeping and reporting costs for Participating CMS Providers. In the *Further Notice,* we seek comment whether adopting all these proposals as a package may result in a cost savings as opposed to having to modify standards and software in response to several, incremental policy changes. Based on our analysis, it is likely that small entities will have to hire professionals to comply with our proposals, if adopted. Below we discuss some anticipated reporting, recordkeeping and other compliance obligations and our cost analysis estimating certain costs.

57. *WEA Database.* The Commission proposes the creation of a Commission-hosted WEA Database that would contain WEA availability and performance information. All small and other Participating CMS Providers would be required to report their level of WEA participation in the WEA Database regardless of whether they elect to transmit WEA messages. Participating CMS Providers that elect to transmit WEA alert messages will be required to elect to participate and electronically file the participation election in the WEA Database. Participating CMS Providers' WEA election should state whether they elect to participate in WEA in whole, in part, or whether they elect not to participate. Their filings would also be required to identify the entities on behalf of which they are filing (including the subsidiary companies on behalf of which their election is filed, the ''doing business as'' names under which the Participating CMS Provider offers WEA, and the Mobile Virtual Network Operators (MVNOs) and wireless resellers through which the Participating CMS Provider offers WEA), specify the geographic locations in which they do and do not offer WEA, and identify the mobile devices that the Participating CMS Provider offers that are WEA-capable. We also propose to require that Participating CMS Providers' WEA Database filing include the names of all wireless service providers that use their network to deliver WEA messages to the public (or do not deliver WEA messages at all, in the case of entities electing not to participate in WEA) and identify all mobile devices that the Participating CMS Provider offers that are WEA-capable. Additionally, we propose to require small and other Participating CMS Providers to update the WEA Database within 30 days of any change in their participation in WEA.

58. *Performance Measures Reporting.* In the *Further Notice,* we propose performance measures for reliability, accuracy, and speed that small and other Participating CMS Providers will be required to meet for each WEA message it sends and to provide performance data to the Commission.

59. *Language and Multimedia Support.* To make WEA messages more accessible and to expand their reach, in the *Further Notice* we propose to require small and other Participating CMS Providers' WEA-capable mobile devices to translate English-language alert messages that they receive into the subscriber's default language preference. If adopted, compliance with this obligation will require small and other Participating CMS providers to support Chinese, Tagalog, Vietnamese, Arabic, French, Korean, Russian, Haitian Creole, German, Hindi, Portuguese, and Italian, in addition to English and Spanish alerts. Our proposed requirements that Participating CMS Providers transmit ''thumbnail-sized'' images in WEA alert messages could also improve accessibility for individuals with disabilities and individuals that do not speak English. To comply with our proposed multimedia support requirement small and other Participating CMS Providers would also be required support mobile devices' presentation of maps that include at least the following elements: shape of the target area; user location relative to the target area and a graphical representation of the geographic area in which both the targeted area and user are located.

60. *Cost Estimates.* The Commission estimates a $39.9 million one-time cost for all Participating CMS Providers to update the WEA standards and software necessary to comply with our proposed WEA availability reporting, automated WEA performance reporting, support for template alerting in the twelve most common languages in addition to English and Spanish, support for multimedia infographic alerting, support for incorporating location-aware maps into WEA through an API, enabling of alerting authorities to send alerts without the associated attention signal, allowing of consumers to cache their receipt of WEA, and support for additional testing. This figure consists of approximately $814,000 to update the applicable WEA standards and approximately $39.1 million to update the applicable software. The Commission estimates a $422,500 annually recurring cost for all Participating CMS Providers to report WEA availability and performance information to the WEA Database. This figure consists of approximately $139,000 to report information about the availability of WEA and $285,500 to report information about WEA's performance.

61. We derived the one-time $39.9 million cost estimate based on several calculations. Our estimate to update the applicable WEA standards is based on the cost of modifying standards using annual compensation for 30 network engineers compensated at the national average for their field ($120,650/year or $58/hour), plus annual benefits ($60,325/year or 29/hour) working for the amount of time that it takes to develop a standard (one hour every other week for one year, 26 hours) for 12 distinct standards. This is calculated as follows: 30 network engineers × ($58 + $29) per hour per network engineer × 26 hours per standard × 12 standards = $814,320, a figure that we round to $814,000 to avoid the false appearance of precision in our estimate. Our cost estimate to implement the necessary software changes calculated the cost of modifying software as the annual compensation for a software developer compensated at the national average for

their field ($120,990/year), plus annual benefits ($60,495/year) working for the amount of time that it takes to develop software (ten months) at each of the 76 CMS Providers that participate in WEA.

62. In the Supporting Document of Study Area Boundary Data Reporting in Esri Shapefile Format, the Office of Information and Regulatory Affairs estimates that it takes an average of 26 hours for a data scientist to modify a shapefile. We believe submitting WEA availability information in shapefile format should require less time than modifying a shapefile. Therefore, we believe 26 hours would be an upper bound of the time required for a Participating CMS Provider to report its WEA availability in shapefile format. Given that the median wage rate is $48.52/hour for data scientists, with a 45% markup for benefits, we arrive at $70.40 as the hourly compensation rate for a data scientist. We estimate an aggregate cost of WEA availability reporting to be approximately $139,000 (≈ $70.40 per hour × 26 hours × 76 providers), which may be recurring on an annual basis since availability may change and need to be updated over time.

63. We expect that the process of data collection and data submission would require minimal human intervention. Although we anticipate such performance reporting would be largely automated once it is set up, we estimate a routine administrative monitoring cost that Participating CMS Providers may still incur when they file the performance report for each alert incident. We estimate that, for each alert, a provider will need an office administrator, who is compensated at $27 hour, to spend 0.5 hours in monitoring each data transmission. At the aggregate level, we believe there will be 21,000 performance reports transmitted to the WEA database, resulting in a $283,500 annual recurring cost at the aggregate level. Given that WEA was used 70,000 times over the last decade, we estimate that 7,000 alerts (= 70,000/10 years) were issued per year. According to 2022 Communications Marketplace Report, nearly 95% of consumers have at least three wireless provider options in their areas. Therefore, we estimate that the total number of performance reports that need to be filed would be 21,000 (= 7,000 alerts × 3 providers per alert). Assuming each alert take an additional 0.5 hours for an office administrator to process for Participating CMS Provider at a compensation rate of $27 per hour, the total additional recurring cost is $283,500 (= $27/hour × 0.5 hours × 21,000 reports) per year.

64. To help the Commission more fully evaluate the cost of compliance for small entities should our proposals be adopted, in the *Further Notice,* we request comments on the cost implications of our proposals and ask whether there are more efficient and less burdensome alternatives (including cost estimates) for the Commission to consider. We expect the information we received in comments including cost and benefit analyses, to help the Commission identify and evaluate relevant matters for small entities, including compliance costs and other burdens that may result from the proposals and inquiries we make in the *Further Notice.*

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

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

66. The Commission has taken steps to minimize the impact of the proposals in the *Further Notice* as a general matter, and specifically targeting small entities, has sought comment on the extent to which we can limit the overall economic impact of these proposed requirements if we provide increased flexibility for small entities. We believe that the proposals to improve and enhance WEA in the *Further Notice,* are the most efficient and least burdensome approach. Below we discuss some specific actions taken and alternatives considered by the Commission in the *Further Notice.*

67. *Making WEA More Accessible.* Our proposals to make WEA more accessible considered feedback and information from industry participants and the Communications Security, Reliability and Interoperability Council VIII (CSRIC VIII) which provided real-world insight to better inform the Commission on currently available technologies that could be leveraged to accomplish our objectives in a cost-effective manner. Requiring small and other Participating CMS providers to support the most common languages spoken in the U.S. is based on our belief that machine language translation technologies have matured sufficient to support such a requirement. Industry information supports our belief and CSRIC VIII reports Participating CMS Providers may be able to leverage machine translation technologies such as Google Cloud Translation and Apple Translate that is pre-installed on many WEA-capable mobile devices using an application programming interface (API) to make WEA messages accessible to every major language group in the U.S. Our proposal of the expanded language support requirement with an approach that gives small Participating CMS Providers the potential to leverage existing technologies that are already pre-installed in many of their WEA capable handsets should reduce the economic impact for small Participating CMS Providers.

68. To support multilingual WEA, we also considered template-based alerts which are being utilized by the New York City Emergency Management Department through its Notify NYC application to support multilingual alerting in 14 different languages. This application presents an English-language message, along with a link to 13 other pre-scripted translations. The alert message translations have been written by people fluent in the languages and vetted with native speakers from language communities. In the *Further Notice* we seek comment on our proposed requirement and on alternative approaches to promoting multilingual WEA.

69. *More Seamless Integration of WEA.* To integrate WEA more seamlessly into people's lives we took actions to facilitate more effective WEA public awareness exercises. We propose allowing small and other Participating CMS Providers to support up to two annual end-to-end WEA tests per alerting authority that the consumers receive by default, provided that the alerting authority: (1) conducts outreach and notifies the public in advance of the planned WEA test and that no emergency is, in fact, occurring; (2) include in its test message that the alert is only a test; (3) coordinates the test among Participating CMS Providers, state and local emergency authorities, relevant State Emergency Communications Committees (SECCs), and first responder organizations, and (4) provides notification to the public in widely accessible formats that the test is only a test. If adopted, this proposal would remove the requirement for small and other alerting authorities to request

waiver for up to two annual end-to-end WEA tests and the associated costs of making such a request. Moreover, the proposed conditions are the same conditions applicable for alerting authorities to conduct EAS Live Code Tests.

70. *Establishing a WEA Database to Promote Transparency about WEA Availability and Benchmark WEA Performance.* In the *Further Notice* we propose to adopt reliability, accuracy and speed benchmarks for WEA, and performance minimums that small and other Participating CMS Providers must satisfy to improve the effectiveness of WEA, and that are consistent with the recommendations in the Government Accountability Office (GAO) Report. We also propose to require small and other Participating CMS Providers to submit performance reliability, accuracy, and speed data for all WEA alert messages and for State/Local WEA Tests.

71. Further, as an alternative, or in addition to, the requirements proposed above to ensure WEA's minimum performance, we considered and seek comment on whether to require small and other Participating CMS Providers to take measures to improve WEA's reliability and accuracy, and on what other potential technical measures we could require to optimize the reliability, accuracy, or speed of the WEA system.

72. We also considered in the alternative, and in the *Further Notice* seek comment on, the feasibility of measuring WEA's performance using staged devices as proposed by CSRIC VIII. Regarding this alternative we inquire, (1) whether small and other Participating CMS Providers could capture actionable information about WEA's performance by conducting regular testing using devices positioned in and around the target area of a Required Monthly Test (RMT); (2) could such a testing and performance measurement requirement also leverage State/Local WEA Tests or leverage alerting authority volunteers to supplement their own; (3) whether small and other Participating CMS Providers could use staged devices to annually measure WEA's performance on a representative sample of handsets and in representative environments, including dense urban, urban, suburban, and rural areas; (4) whether, and if so, how the resulting data collected would differ in quality from the data that we propose to collect today and (5) whether there would be any limitations to the public safety benefits of measuring performance using staged devices. We seek comment these inquiries, and on whether there would be any cost or time savings associated with this approach if small and other Participating CMS Providers had to update network and mobile device firmware to measure WEA's performance using staged devices.

73. *WEA Database.* In the preceding section we discussed our proposal in the *Further Notice* to create a Commission-hosted WEA database containing information filed by small and other Participating CMS Providers that would allow alerting authorities to access and review information about WEA's availability and performance in their jurisdictions. We anticipate that the WEA Database would be an interactive portal where small and other Participating CMS Providers submit information about the availability and performance of WEA on their networks, and where such information could be readily accessible to Participating CMS Providers, alerting authorities, and the public. Our decision to propose the creation of a WEA Database contemplated what would be the most cost-effective mechanism for small and other Participating CMS Providers to submit WEA elections and performance information into the WEA Database. Consistent with this objective, in the *Further Notice* we propose to support electronic filings for WEA elections that leverage GIS shapefiles, drop-down menus, and freeform text where appropriate. We envision that WEA performance data that only requires entry of specific numbers or times would be simpler and less costly to submit. We also recognize however, that our proposal may require filings to be made frequently, particularly as updated lists of WEA-capable mobile devices or new performance data on new alerts need to be submitted. Thus, we considered how to best approach data collection for the WEA Database while minimizing costs and other burdens for small and other Participating CMS Providers, such as whether to utilize an application programming interface (API) that would facilitate the automated filing of data. We seek comment on these matters in the *Further Notice,* as well as input on other factors the Commission should consider when designing the data submission elements of the WEA database.

74. There may be alternative approaches to our WEA Database for performance reporting that might strike a better balance between the need that the Commission has identified to provide alerting authorities with access to WEA performance information, while limiting the impact of countervailing considerations, such as costs, development time, or privacy concerns. An alternative recommended by CSRIC VIII proposes a requirement that would use an automated email to convey WEA performance reporting information from Participating CMS Providers to an alerting authority or a centralized reporting location for each sent WEA. CSRIC VIII recommends that the details of this approach should be worked out between alerting authorities, PBS, and Participating CMS Providers. In the *Further Notice,* we seek comment on the utility of WEA performance information communicated by email directly to alerting authorities, either in addition or as an alternative to a WEA database, and encourage WEA stakeholders to file detailed proposals of how this alternative approach could work in practice.

75. *Compliance Timeframe.* To minimize any significant impact our proposed rules may have on small entities, as an alternative to the compliance timeframes we propose in the *Further Notice* we inquire and seek comment on whether it is appropriate to allow Participating CMS Providers that are small- or medium-sized businesses additional time to comply. The compliance deadline in the *Further Notice* for the proposed rules to enhance WEA's language support and integrate WEA more seamlessly into people's lives is 30 months after the publication of final rules in the **Federal Register**. The compliance deadline in the *Further Notice* for the proposed rules to improve WEA's effectiveness with multimedia content is 36 months after the publication of final rules in the **Federal Register**. To facilitate more effective WEA public awareness exercises, Participating CMS Providers would be authorized to support up to two annual end-to-end WEA tests per alerting authority 30 days after the Public Safety and Homeland Security Bureau issues a Public Notice announcing OMB approval of any new information collection requirements associated with this rule change.

76. The compliance deadline in the *Further Notice* for the proposed rules associated with developing measurable goals and performance measures for WEA is 30 months after the publication of final rules in the **Federal Register** or within 30 days of the Public Safety and Homeland Security Bureau's publication of a public notice announcing that the WEA Database is ready to accept filings, whichever is later. This includes the proposed rules requiring small and other Participating CMS Providers to satisfy WEA performance minimums and submit reports measuring WEA's performance. Further, we seek specific comment on

whether to offer an extended compliance timeframe for Participating CMS Providers that are small- and medium-sized businesses, which may have different network resource constraints than the nationwide Participating CMS Providers. Additionally, we propose to require Participating CMS Providers to refresh their elections to participate in WEA using the WEA Database within 30 days of the Public Safety and Homeland Security Bureau's publication of a public notice announcing, (1) OMB approval of any new information collection requirements and (2) that the WEA Database is ready to accept filings and seek comment on this proposal.

77. The Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments filed in response to the *Further Notice,* including costs and benefits analyses. Having data on the costs and economic impact of proposals and approaches will 'allow the Commission to better evaluate options and alternatives to minimize any significant economic impact on small entities that may result from the proposals and approaches raised in the *Further Notice.* The Commission's evaluation of this information will shape the final alternatives it considers to minimize any significant economic impact that may occur on small entities, the final conclusions it reaches and any final rules it promulgates in this proceeding.

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

78. None.

List of Subjects in 47 CFR Part 10

Communications common carriers.

Federal Communications Commission.

Katura Jackson,

Federal Register Liaison Officer.

Proposed Rules

For the reasons set forth above, Part 10 of title 47 of the Code of Federal Regulations is amended as follows:

PART 10—WIRELESS EMERGENCY ALERTS

■ 1. The authority citation for part 10 is revised to read as follows:

Authority: 47 U.S.C §§ 151, 152, 154(i), 154(n), 301, 303(b), 303(e), 303(g), 303(j), 303(r), 307, 309, 316, 403, 544(g), 6061201(a), (b), (c), (f), 1203, 1204, 1206.

■ 2. Amend § 10.10 by revising paragraph (j), redesignating paragraphs (k) and (l) as paragraphs (l) and (m), and adding paragraph (k) to read as follows:

§ 10.10 Definitions.

* * * * *

(j) *Mobile Devices.* Any customer equipment used to receive commercial mobile service.

(k) *WEA-Capable Mobile Devices.* Mobile devices, as defined paragraph (j) of this section, that support the Subpart E Equipment Requirements.

* * * * *

■ 3. Revise § 10.210 to read as follows:

§ 10.210 WEA participation election procedures.

(a) A CMS provider that elects to transmit WEA Alert Messages must elect to participate in part or in whole, as defined by § 10.10(l) and (m), and shall electronically file in the Commission's WEA Database attesting that the Provider:

(1) Agrees to transmit such alerts in a manner consistent with the technical standards, protocols, procedures, and other technical requirements implemented by the Commission; and

(2) Commits to support the development and deployment of technology for the ''C'' interface, the CMS provider Gateway, the CMS provider infrastructure, and mobile devices with WEA functionality and support of the CMS provider selected technology.

(b) A CMS Provider that elects to participate in WEA must disclose the following information in their election filed in the Commission's WEA Database:

(1) The entities on behalf of which the Participating CMS Provider files its election, including the subsidiary companies on behalf of which their election is filed, the ''doing business as'' names under which a Participating CMS Provider offers WEA, and the Mobile Virtual Network Operators (MVNOs) and wireless resellers through which the Participating CMS Provider offers WEA;

(2) The extent to which the Participating CMS Provider offers WEA in the entirety of their geographic service area, as demonstrated by the following:

(i) a map of their wireless coverage area in shapefile format;

(ii) to the extent that it differs from their wireless coverage area specified in response to paragraph (b)(2)(i) of this section, a map of the geographic areas to which they elect to transmit WEA alert messages in shapefile format.

(3) The extent to which all WEA-capable mobile devices that the Participating CMS Provider offers at the point of sale are WEA-capable, as demonstrated by the following:

(i) the mobile devices, as defined in § 10.10(j), that the Participating CMS Provider offers at their point of sale;

(ii) the WEA-capable mobile devices, as defined in § 10.10(k), that the Participating CMS Provider offers at their point of sale.

(c) If the terms of a CMS Provider's WEA participation change in any manner described by paragraph (b) of this section, it must update the information about its WEA participation disclosed pursuant to that paragraph within 30 days such that the information in the WEA Database accurately reflects the terms of their WEA participation.

(d) A CMS Provider that elects not to transmit WEA Alert Messages shall file electronically in the Commission's WEA Database attesting to that fact, and include the subsidiary companies, the CMS Provider's ''doing business as'' names, MVNOs, and wireless resellers on behalf of which the election is filed.

(e) CMS Providers shall file their elections electronically into the WEA Database.

■ 4. Revise § 10.280 to read as follows:

§ 10.280 Subscribers' right to opt out of WEA notifications.

(a) CMS providers may provide their subscribers with the option to opt out of the ''Child Abduction Emergency/ AMBER Alert,'' ''Imminent Threat Alert'' and ''Public Safety Message'' classes of Alert Messages.

(b) CMS providers shall provide their subscribers with a distinct option to durably turn off WEA's audio attention signal and vibration cadence for all alerts received.

(c) CMS providers shall provide their subscribers with the option to opt out of the collection of WEA performance analytic information described by § 10.500(i).

(d) CMS providers shall provide their subscribers with a clear indication of what each option means, and provide examples of the types of messages the customer may not receive as a result of opting out.

■ 5. Amend § 10.330 by adding paragraph (d) to read as follows

§ 10.330 Provider infrastructure requirements.

* * * * *

(d) Collecting the data elements necessary to measure WEA's performance, as defined in section 10.360.

■ 6. Amend § 10.350 by adding paragraph (d) to read as follows:

§ 10.350 WEA testing and proficiency training requirements.

* * * * *

(d) *Public Awareness Tests.* Participating CMS Providers may participate in no more than two (2) WEA System tests per calendar year that the public receives by default to raise public awareness, provided that the entity conducting the test:

(i) Conducts outreach and notifies the public before the test that live event codes will be used, but that no emergency is, in fact, occurring;

(ii) To the extent technically feasible, states in the test message that the event is only a test;

(iii) Coordinates the test among Participating CMS Providers and with state and local emergency authorities, the relevant SECC (or SECCs, if the test could affect multiple states), and first responder organizations, such as PSAPs, police, and fire agencies); and,

(iv) Provides in widely accessible formats the notification to the public required by this paragraph that the test is only a test and is not a warning about an actual emergency.

■ 7. Add § 10.360 to subpart C to read as follows:

§ 10.360 Performance Reporting.

Participating CMS Providers are required to transmit performance data to the Commission's WEA Database regarding WEA's reliability, accuracy and speed.

■ 8. Revise § 10.450 to read as follows:

§ 10.450 Geographic targeting.

(a) This section establishes minimum requirements for the geographic targeting of Alert Messages. A Participating CMS Provider will determine which of its network facilities, elements, and locations will be used to geographically target Alert Messages. A Participating CMS Provider must deliver any Alert Message that is specified by a circle or polygon to an area that matches the specified circle or polygon.

(b) A Participating CMS Provider is considered to have matched the target area they meet both of the following conditions:

(1) *Reliability.* Deliver an Alert Message to 100 percent of WEA-capable Mobile Devices that are located within a Participating CMS Provider's WEA coverage area and are located within an Alert Message's geographic target area during an Alert Message's active period.

(2) *Accuracy.* Do not present an Alert Message on mobile devices located farther than 0.1 miles outside the Alert Message's target area.

■ 9. Revise § 10.460 to read as follows:

§ 10.460 WEA Transmission Speed.

No more than 5 minutes shall elapse for 99% of mobile devices from the time that a Participating CMS Provider receives an alert message at the CMS Alert Gateway and the time that mobile devices present the alert message based on aggregated, annualized data submitted to the WEA Database.

■ 10. Add § 10.490 to subpart D to read as follows:

§ 10.490 Multimedia support.

(a) Participating CMS Providers are required to transmit ''thumbnail-sized'' images in WEA alert messages. A thumbnail sized image meets or exceeds each of the following parameters: 1.5″ x 1.5″ in size with a resolution of 72 dots per inch consisting of 120 x 120 pixels in 8 bit color scale.

(b) Participating CMS Providers are required support mobile devices' presentation of maps that include at least the following elements:

1. Shape of the target area

2. User location relative to the target area

3. A graphical representation of the geographic area in which both the targeted area and user are located.

■ 11. Amend § 10.500 by revising paragraph (e) and adding paragraphs (i) and (j) to read as follows:

§ 10.500 General requirements.

* * * * *

(e) Extraction of alert content in English or translation of alert content into the subscriber's preferred language;

* * * * *

(i) Logging and making available to the CMS network the data elements necessary to measure WEA's performance, as defined in § 10.360;

(j) Any additional functions necessary to support the Subpart D Alert Message Requirements

■ 12. Amend § 10.520 by adding paragraph (f) to read as follows:

§ 10.520 Common audio attention signal.

* * * * *

(f) Participating CMS Providers and mobile device manufacturers must provide alerting authorities with the option to send WEA Alert Messages without triggering the audio attention signal.

■ 13. Amend § 10.530 by adding paragraph (d) to read as follows:

§ 10.530 Common vibration cadence.

* * * * *

(d) Participating CMS Providers and mobile device manufacturers must provide alerting authorities with the option to send WEA Alert Messages without triggering the common vibration cadence.

[FR Doc. 2023–12725 Filed 6–20–23; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL REGISTER

Vol. 88 Wednesday,
No. 118 June 21, 2023

Part VII

Department of the Treasury

Office of the Comptroller of the Currency

Federal Reserve System

Federal Deposit Insurance Corporation

National Credit Union Administration

Consumer Financial Protection Bureau

Federal Housing Finance Agency

12 CFR Parts 34, 225, 323, et al.
Quality Control Standards for Automated Valuation Models; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 34

[Docket No. OCC–2023–0002]

RIN 1557–AD87

FEDERAL RESERVE SYSTEM

12 CFR Part 225

[Docket No. R–1807]

RIN 7100–AG60

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 323

RIN 3064–AE68

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 722 and 741

[Docket No. NCUA–2023–0019]

RIN 3133–AE23

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1026

[Docket No. CFPB–2023–0025]

RIN 3170–AA57

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1222

RIN 2590–AA62

Quality Control Standards for Automated Valuation Models

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury; Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); National Credit Union Administration (NCUA); Consumer Financial Protection Bureau (CFPB); and Federal Housing Finance Agency (FHFA).

ACTION: Notice of proposed rulemaking and request for comment.

SUMMARY: The OCC, Board, FDIC, NCUA, CFPB, and FHFA (collectively, the agencies) invite comment on a proposed rule to implement the quality control standards mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) for the use of automated valuation models (AVMs) by mortgage originators and secondary market issuers in determining the collateral worth of a mortgage secured by a consumer's principal dwelling. Under the proposal, the agencies would require institutions that engage in certain credit decisions or securitization determinations to adopt policies, practices, procedures, and control systems to ensure that AVMs used in these transactions to determine the value of mortgage collateral adhere to quality control standards designed to ensure a high level of confidence in the estimates produced by AVMs; protect against the manipulation of data; seek to avoid conflicts of interest; require random sample testing and reviews; and comply with applicable nondiscrimination laws.

DATES: Comments must be received by August 21, 2023.

ADDRESSES: Interested parties are encouraged to submit written comments jointly to all of the agencies. Commenters should use the title ''Quality Control Standards for Automated Valuation Models'' to facilitate the organization and distribution of comments among the agencies. The agencies invite interested parties to submit written comments to:

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal. Please use the title ''Quality Control Standards for Automated Valuation Models'' to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal—Regulations.gov:* Go to *https://regulations.gov/.*

Enter ''Docket ID OCC–2023–0002'' in the Search Box and click ''Search.'' Public comments can be submitted via the ''Comment'' box below the displayed document information or by clicking on the document title and then clicking the ''Comment'' box on the top-left side of the screen. For help with submitting effective comments, please click on ''Commenter's Checklist.'' For assistance with the *Regulations.gov* site, please call 1–866–498–2945 (toll free) Monday–Friday, 9 a.m.–5 p.m. ET, or email *regulationshelpdesk@gsa.gov.*

- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket ID OCC–2023–0002'' in your comment. In general, the OCC will enter all comments received into the docket and publish the comments on the *Regulations.gov* website without change, including any business or personal information provided such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this action by the following method:

- *Viewing Comments Electronically—Regulations.gov:* Go to *https://regulations.gov/.*

Enter ''Docket ID OCC–2023–0002'' in the Search Box and click ''Search.'' Click on the ''Dockets'' tab and then the document's title. After clicking the document's title, click the ''Browse All Comments'' tab. Comments can be viewed and filtered by clicking on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Comments Results'' options on the left side of the screen. Supporting materials can be viewed by clicking on the ''Browse Documents'' tab. Click on the ''Sort By'' drop-down on the right side of the screen or the ''Refine Results'' options on the left side of the screen checking the ''Supporting & Related Material'' checkbox. For assistance with the *Regulations.gov* site, please call 1–866–498–2945 (toll free) Monday–Friday, 9 a.m.–5 p.m. ET, or email *regulationshelpdesk@gsa.gov.*

The docket may be viewed after the close of the comment period in the same manner as during the comment period.

Board: You may submit comments, identified by Docket No. R–1807 and RIN No. 7100 AG60, by any of the following methods:

- *Agency Website: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Email: regs.comments@federalreserve.gov.* Include the docket number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Ann Misback, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW, Washington, DC 20551.

In general, all public comments will be made available on the Board's website at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, and will not be modified to remove confidential, contact or any identifiable information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. during Federal business weekdays. Please call (202) 452–3684 to make an appointment to visit the Board and inspect comments.

FDIC: The FDIC encourages interested parties to submit written comments. Please include your name, affiliation, address, email address, and telephone number(s) in your comment. You may submit comments to FDIC, identified by RIN 3064–AE68, by any of the following methods:

- *FDIC Website: https://www.fdic.gov/resources/regulations/federal-register-publications/.* Follow the instructions for submitting comments on the FDIC's website.
- *Mail:* James P. Sheesley, Assistant Executive Secretary, Attention: Comments/Legal OES (RIN 3064–AE68), Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.
- *Hand Delivery/Courier:* Comments may be hand delivered to the guard station at the rear of the 550 17th Street NW building (located on F Street NW) on business days between 7:00 a.m. and 5:00 p.m.
- *Email: comments@fdic.gov.* Comments submitted must include ''RIN 3064–AE68'' in the subject line of the message.

Public Inspection: Comments received, including any personal information provided, may be posted without change to *https://www.fdic.gov/resources/regulations/federal-register-publications/.* Commenters should submit only information that the commenter wishes to make available publicly. The FDIC may review, redact, or refrain from posting all or any portion of any comment that it may deem to be inappropriate for publication, such as irrelevant or obscene material. The FDIC may post only a single representative example of identical or substantially identical comments, and in such cases will generally identify the number of identical or substantially identical comments represented by the posted example. All comments that have been redacted, as well as those that have not been posted, that contain comments on the merits of this notice will be retained in the public comment file and will be considered as required under all applicable laws. All comments may be accessible under the Freedom of Information Act.

NCUA: You may submit written comments, identified by RIN 3133–AE23, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments for Docket Number NCUA–2023–0019.
- *Mail:* Address to Melane Conyers-Ausbrooks, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you are unable to access public comments on the internet, you may contact NCUA for alternative access by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

CFPB: You may submit comments, identified by Docket No. CFPB–2023–0025 by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: 2023AVMQualityControl@cfpb.gov.* Include Docket No. CFPB–2023–0025 in the subject line of the message.
- *Mail/Hand Delivery/Courier:* Comment Intake—CFPB–2023–0025, Consumer Financial Protection Bureau, c/o Legal Division Docket Manager, 1700 G Street NW, Washington, DC 20552.

Instructions: The CFPB encourages the early submission of comments. All submissions should include the agency name and docket number for this rulemaking. Because paper mail in the Washington, DC, area and at the CFPB is subject to delay commenters are encouraged to submit comments electronically. In general, the CFPB will post all comments received without change to *https://www.regulations.gov.*

The CFPB will make all comments, including attachments and other supporting materials, part of the public record and subject to public disclosure. You should not include proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals. The CFPB will not edit comments to remove any identifying or contact information.

FHFA: You may submit your comments, identified by regulatory identification number (RIN) 2590–AA62, by any of the following methods:

- *Agency website: www.fhfa.gov/open-for-comment-or-input.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. If you submit your comment to the Federal eRulemaking Portal, please also send it by email to FHFA at *RegComments@fhfa.gov* to ensure timely receipt by the agency. Please include ''RIN 2590–AA62'' in the subject line of the message.
- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590–AA62, Federal Housing Finance Agency, Fourth Floor, 400 Seventh Street SW, Washington, DC 20219. Deliver the package to the Seventh Street entrance Guard's Desk, First Floor, on business days between 9 a.m. and 5 p.m.
- *U.S. Mail, United Parcel Service, Federal Express, or Other Mail Service:* The mailing address for comments is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590–AA62, Federal Housing Finance Agency, Fourth Floor, 400 Seventh Street SW, Washington, DC 20219. Please note that all mail sent to FHFA via U.S. Mail is routed through a national irradiation facility, a process that may delay delivery by approximately two weeks.

FHFA invites comment on all aspects of the proposed amendments and will take all comments into consideration before adopting amendments through a final rule. FHFA will post copies of all comments received without change on the FHFA website at *http://www.fhfa.gov,* and will include any personal information you provide, such as your name, address, email address, and telephone number. In addition, the FHFA will make copies of all comments received available for examination by the public through the electronic rulemaking docket for this proposed rule also located on the FHFA website.

FOR FURTHER INFORMATION CONTACT:

OCC: G. Kevin Lawton, Appraiser (Real Estate Specialist), (202) 649–7152; Mitchell Plave, Special Counsel, (202) 649–5490; or Joanne Phillips, Counsel; or Marta Stewart-Bates, Counsel, Chief Counsel's Office, (202) 649–5500; Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Board: Anna Lee Hewko, Associate Director, (202) 530–6260; Andrew Willis, Manager, Policy Development

Section, (202) 912–4323; Carmen Holly, Lead Financial Institution Policy Analyst, (202) 973–6122; Devyn Jeffereis, Senior Financial Institution Policy Analyst, (202) 365–2467, Division of Supervision and Regulation; Jay Schwarz, Assistant General Counsel, (202) 452–2970; Matthew Suntag, Senior Counsel, (202) 452–3694; Derald Seid, Senior Counsel, (202) 452–2246; Trevor Feigleson, Counsel, (202) 452–3274, David Imhoff, Attorney (202) 452–2249, Legal Division, Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551. For users of telephone systems via text telephone (TTY) or any TTY-based Telecommunications Relay Services, please call 711 from any telephone, anywhere in the United States.

FDIC: Patrick J. Mancoske, Senior Examination Specialist, Division of Risk Management Supervision, (202) 898–7032; Lauren A. Whitaker, Counsel, Legal Division, (202) 898–3872; Navid K. Choudhury, Counsel, Legal Division, (202) 898–6526, *nchoudhury@fdic.gov;* Mark Mellon, Counsel, Legal Division, (202) 898–3884; Mark T. Heil, Senior Financial Economist, Division of Insurance and Research, (202) 898–7232; or Stuart Hoff, Senior Policy Analyst, Division of Depositor and Consumer Protection, (202) 898–3852, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429. For the hearing impaired only, TDD users may contact (202) 925–4618.

NCUA: Policy and Accounting: Victoria Nahrwold, Associate Director; Naghi H. Khaled, Director of Credit Markets; or Simon Hermann, Senior Credit Specialist; Office of Examination and Insurance at (703) 518–6360; National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314, *Legal:* Ian Marenna, Associate General Counsel for Regulations and Legislation; John H. Brolin, Senior Staff Attorney; or Ariel Pereira, Senior Staff Attorney; Office of General Counsel, at (703) 518–6540; National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

CFPB: Shaakira Gold-Ramirez, Counsel; Pedro De Oliveira, Joseph Devlin, Thomas Dowell, Joan Kayagil, or Melissa Stegman, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov.*

FHFA: Julie Giesbrecht, Senior Policy Analyst, Office of Housing and Regulatory Policy, (202) 557–9866, *Julie.Giesbrecht@fhfa.gov;* Karen Heidel, Assistant General Counsel, Office of General Counsel, (202) 649–3073; or *Karen.Heidel@fhfa.gov.* For TTY/TRS users with hearing and speech disabilities, dial 711 and ask to be connected to any of the contact numbers above.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1473(q) of the Dodd-Frank Act amended title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (title XI) [1] to add a new section 1125 relating to the use of automated valuation models (AVMs) in valuing real estate collateral securing mortgage loans (section 1125).[2] The term ''automated valuation model'' is commonly used to describe computerized real estate valuation models used for a variety of purposes, including loan underwriting and portfolio monitoring.[3] Section 1125 defines an AVM as ''any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.'' [4] The quality control standards proposed in this rule are applicable only to AVMs used in connection with making credit decisions or covered securitization determinations regarding a mortgage (covered AVMs), as defined in this proposed rule.

Section 1125 directs the agencies to promulgate regulations to implement quality control standards regarding AVMs.[5] Section 1125 requires that AVMs, as defined in the statute, adhere to quality control standards designed to ''(1) ensure a high level of confidence in the estimates produced by AVMs; (2) protect against the manipulation of data; (3) seek to avoid conflicts of interest; (4) require random sample testing and reviews; and (5) account for any other such factor that the agencies determine to be appropriate.'' [6] As required by section 1125, the agencies consulted with the staff of the Appraisal Subcommittee (ASC) and the Appraisal Standards Board of the Appraisal Foundation (ASB) as part of promulgating this rule.

Driven in part by advances in database and modeling technology and the availability of larger property datasets, the mortgage industry has begun to use AVMs with increasing frequency as part of the real estate valuation process. For example, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) (collectively, the GSEs) may use proprietary AVMs in their collateral valuation processes. While advances in AVM technology and data availability have the potential to contribute to lower costs and shorter turnaround times in the performance of property valuations, it is important that institutions using such tools take appropriate steps to ensure the credibility and integrity of the valuations produced by AVMs.[7]

A. Existing Guidance Relating to the Use of AVMs

Since 2010, the OCC, Board, FDIC, and NCUA have provided supervisory guidance on the use of AVMs by their regulated institutions in Appendix B to the Interagency Appraisal and Evaluation Guidelines (Guidelines).[8] The Guidelines recognize that an institution may use a variety of analytical methods and technological tools in developing real estate valuations, provided the institution can demonstrate that the valuation method is consistent with safe and sound banking practices. The Guidelines recognize that the establishment of policies and procedures governing the selection, use, and validation of AVMs, including steps to ensure the accuracy, reliability, and independence of an AVM, is a sound banking practice.[9] In addition to Appendix B of the Guidelines, the OCC, Board, and FDIC have issued guidance on model risk management practices (Model Risk Management Guidance) that provides supervisory guidance on validation and testing of models.[10]

The NCUA is not a party to the Model Risk Management Guidance. The NCUA monitors the model risk efforts of federally insured credit unions through its supervisory approach by confirming that the governance and controls for an AVM are appropriate based on the size and complexity of the transaction; the risk the transaction poses to the credit union; and the capabilities and resources of the credit union.

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[1] 12 U.S.C. 3331 *et seq.*

[2] Public Law 111–203, 124 Stat. 1376, 2198 (2010), *codified at* 12 U.S.C. 3354.

[3] *See Interagency Appraisal and Evaluation Guidelines,* 75 FR 77450, 77468 (Dec. 10, 2010).

[4] 12 U.S.C. 3354(d).

[5] 12 U.S.C. 3354(b).

[6] 12 U.S.C. 3354(a).

[7] *See, e.g.,* U.S. Department of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation* 103–107 (July 2018), *available at https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf.*

[8] *See supra,* note 3. The Guidelines were adopted after notice and comment.

[9] *Id.*

[10] *See Supervisory Guidance on Model Risk Management,* OCC Bulletin 2011–12 (Apr. 4, 2011); Federal Reserve Board SR Letter 11–7 (Apr. 4, 2011); and *Guidance on Model Risk Management,* FDIC FIL–22–2017 (June 7, 2017).

The CFPB and FHFA are not parties to the Guidelines or the Model Risk Management Guidance. The FHFA has separately issued model risk management guidance that provides the FHFA's supervisory expectations for its regulated entities in the development, validation, and use of models.[11]

The agencies have also provided guidance on managing the risk inherent in the use of third-party service providers, such as outside entities that provide AVMs and AVM services.[12] Institutions that make use of third parties are reminded that they remain responsible for ensuring that third parties, in performing their activities, comply with applicable laws and regulations, including the safety and soundness requirements established by the OCC, Board, FDIC, and NCUA. These guidance documents address the characteristics, governance, and operational effectiveness of a financial institution's risk management program for outsourced activities.

II. The Proposed Rule

The agencies are inviting comment on a proposed rule to implement quality control standards for the use of AVMs that are covered by this proposal. The agencies' proposed rule would require that mortgage originators and secondary market issuers adopt policies, practices, procedures, and control systems to ensure that AVMs used in certain credit decisions or covered securitization determinations adhere to quality control standards designed to meet specific quality control factors. The proposed rule would not set specific requirements for how institutions are to structure these policies, practices, procedures, and control systems. This approach would provide institutions the flexibility to set quality controls for AVMs as appropriate based on the size of the institution and the risk and complexity of transactions for which they will use AVMs covered by this proposed rule. As modeling technology continues to evolve, this flexible approach would allow institutions to refine their policies, practices, procedures, and control systems as appropriate. The agencies' existing guidance related to AVMs would remain applicable.

A. Scope of the Proposed Rule

The quality control standards in section 1125 of title XI apply to AVMs ''used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.'' [13] The proposed rule would implement the statute by applying the quality control standards when an AVM is being used to make a determination of collateral value, as opposed to other uses such as monitoring value over time or validating an already completed valuation. Determinations of collateral value are generally made in connection with credit decisions or covered securitization determinations as defined in this proposed rulemaking, for example when determining a new value before originating a purchase-money mortgage or placing a loan in a securitization pool.

Other uses of AVMs, such as for portfolio monitoring, do not involve making a determination of collateral value, and thus are not within the scope of the proposed rule. The agencies are further proposing that the rule would not cover the use of AVMs in the development of an appraisal by a certified or licensed appraiser, nor in the review of the quality of already completed determinations of collateral value (completed determinations). The proposed rule would cover the use of AVMs in preparing evaluations required for certain real estate transactions that are exempt from the appraisal requirements under the appraisal regulations issued by the OCC, Board, FDIC, and NCUA, such as transactions that have a value below the exemption thresholds in the appraisal regulations.[14]

Section 1125(c)(1) provides that compliance with regulations issued under section 1125 shall be enforced by, ''with respect to a financial institution, or subsidiary owned and controlled by a financial institution and regulated by a Federal financial institution regulatory agency, the Federal financial institution regulatory agency that acts as the primary Federal supervisor of such financial institution or subsidiary.'' [15] Section 1125(c)(1) applies to a subsidiary of a financial institution only if the subsidiary is (1) owned and controlled by a financial institution, and (2) regulated by a Federal financial institution regulatory agency. Section 1125(c)(2) provides that compliance with regulations issued under section 1125 shall be enforced by, ''with respect to other participants in the market for appraisals of 1-to-4 unit single family residential real estate, the Federal Trade Commission, the Bureau of Consumer Financial Protection, and a State attorney general.'' [16]

The NCUA has long acknowledged that subsidiaries of federally insured credit unions—also referred to as credit union service organizations (CUSOs)—and their employees are not subject to regulation by the NCUA as contemplated by Congress under statutory provisions similar to section 1125(c).[17] This proposal would not alter that position. The NCUA, unlike the Federal banking agencies that do have supervisory and regulatory authority over subsidiaries of their regulated institutions, does not have authority to supervise or examine subsidiaries owned and controlled by federally insured credit unions.[18] Rather, the NCUA's regulations only indirectly affect CUSOs. For example, part 712 and § 741.222 of the NCUA's regulations permit federally insured credit unions to invest only in CUSOs that conform to

[11] *See Model Risk Management Guidance,* FHFA Advisory Bulletin 2013–07 (Nov. 20, 2013).

[12] *See Third-Party Relationships: Risk Management Guidance,* OCC Bulletin 2013–29 (Oct. 31, 2013); *Third-Party Relationships: Frequently Asked Questions to Supplement OCC Bulletin 2013–29,* OCC Bulletin 2020–10 (March 5, 2020); *Guidance on Managing Outsourcing Risk,* Federal Reserve Board SR Letter 13–9 (Dec. 3, 2013); *Third-Party Risk Guidance for Managing Third-Party Risk,* FDIC FIL–44–2008 (June 6, 2008); *Evaluating Third Party Relationships,* NCUA Supervisory Letter 07–01 (Oct. 2007); *Oversight of Third-Party Provider Relationships,* Advisory Bulletin 2018–08 (Sept. 28, 2018); and CFPB, *Compliance Bulletin and Policy Guidance; 2016–02, Service Providers* (Oct. 31, 2016).

[13] 12 U.S.C. 3354(d).

[14] *See* 12 CFR 34.43(b) (OCC); 12 CFR 225.62(c) (Board); 12 CFR 323.3(b) (FDIC); and 12 CFR 722.3(d) (NCUA). Under the NCUA's rule, an ''evaluation'' is described as a ''written estimate.'' 12 CFR 722.3(d).

[15] 12 U.S.C. 3354(c)(1) (emphasis added). The term ''Federal financial institutions regulatory agencies'' means the Board, the FDIC, the OCC, the former OTS, and the NCUA. 12 U.S.C. 3350(6). Title III of the Dodd-Frank Act provides that the OCC is now the Federal financial institutions regulatory agency for Federal savings associations. Title III of the Dodd-Frank Act also provides that the FDIC is the Federal financial institutions regulatory agency for State savings associations. Finally, the Dodd-Frank Act provides that the Board is responsible for regulation of savings and loan holding companies. The term ''financial institution'' means an insured depository institution as defined in 12 U.S.C. 1813 or an insured credit union as defined in 12 U.S.C. 1752. *See* 12 U.S.C. 3350(7).

[16] 12 U.S.C. 3354(c)(2).

[17] *See Registration of Mortgage Loan Originators,* 75 FR 51623, 51626 (Aug. 23, 2010) (applying similar reasoning to the licensing of mortgage loan originators who were employees of CUSOs under the Secure and Fair Enforcement for Mortgage Licensing Act of 2008); and *Minimum Requirements for Appraisal Management Companies,* 80 FR 32657, 32665 (Aug. 10, 2015) (applying similar reasoning to the registration and regulation of appraisal management company CUSOs under 12 U.S.C. 3353).

[18] *See, e.g.,* Bank Service Company Act, 12 U.S.C. 1861–1867; NCUA, Third-Party Vendor Authority 7–10 (March 2022) *available at https://ncua.gov/files/publications/regulation-supervision/third-party-vendor-authority.pdf;* and Financial Stability Oversight Council, 2021 Annual Report 125 (2021) *available at https://home.treasury.gov/system/files/261/FSOC2021AnnualReport.pdf.*

certain specified requirements.[19] Given that the authority under section 1125(c)(1), in the context of federally insured credit unions, applies to subsidiaries owned and controlled by a federally insured credit union [20] and regulated by the NCUA,[21] the NCUA would not take action to enforce the requirements of this rule under section 1125(c)(1), if the rule is made final, with respect to CUSOs. Rather, under section 1125(c)(2), the Federal Trade Commission, the CFPB, and State attorneys general would have enforcement authority over CUSOs, whether owned by a State or federally chartered credit union, in connection with a final AVM rule.[22] Accordingly, the second sentence in proposed § 722.201(b)(1) would provide that subpart B of part 722 of the NCUA's regulations applies to credit unions insured by the NCUA that are mortgage originators or secondary market issuers.

The NCUA is also proposing to amend § 741.203(b) to clearly include the proposed AVM regulations in the NCUA's list of regulatory provisions applicable to federally insured, state-chartered credit unions. Accordingly, proposed § 741.203(b) would provide that insured credit unions must adhere to the requirements stated in part 722 of this chapter.

1. AVMs Used in Connection With Making Credit Decisions

The proposed rule would apply to AVMs used in connection with making a credit decision. The proposed rule would define ''credit decision,'' in part, to include a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage. The scope provision of the proposed regulatory text would expressly exclude the use of AVMs in monitoring the quality or performance of mortgages or mortgage-backed securities. The use of AVMs solely to monitor a creditor's mortgage portfolio would not be a credit decision under the proposed rule because the lending institution has already made the credit decision. The scope of the proposed rule would include, for example, decisions regarding originating a mortgage, modifying the terms of an existing loan, or renewing, increasing, or terminating a line of credit. The proposed rule uses the term ''credit decision'' to help clarify that the proposed rule would cover these various types of decisions.

The proposal to limit the scope of the rule to credit decisions and covered securitization determinations reflects the statutory definition of AVM, which focuses on the use of an AVM ''by mortgage originators and secondary market issuers to *determine* the collateral worth of a mortgage secured by a consumer's principal dwelling.'' [23] The proposed rule would distinguish between using AVMs to determine the value of collateral securing a mortgage and using AVMs to monitor, verify, or validate a previous determination of value (*e.g.,* the proposed rule would not cover a computerized tax assessment used to verify the valuation made during the origination process).[24] The proposed rule focuses on those aspects of mortgage and securitization transactions where the value of collateral is typically determined.

Loan modifications and other changes to existing loans. The proposed rule would cover the use of AVMs in deciding whether to change the terms of an existing mortgage even if the change does not result in a new mortgage origination, as long as a ''mortgage originator'' or ''secondary market issuer,'' or servicers that work on the originator's or secondary market issuer's behalf, uses the AVM to determine the value of a mortgage secured by a consumer's principal dwelling. For example, the proposed rule would cover AVMs used in making decisions to deny a loan modification or to confirm collateral values, such as when there is a request to change or release collateral. In relevant part, section 1125 provides that an AVM is ''any computerized model used by mortgage originators and secondary market issuers *to determine the collateral worth* of a mortgage. . . . '' [25] The agencies' view is that the phrase ''determine the collateral worth'' broadly covers instances where mortgage originators and secondary market issuers use AVMs in connection with making credit decisions. Under the proposal, the agencies consider mortgage originators and secondary market issuers or servicers that work on their behalf to be using AVMs in connection with making a credit decision when they use AVMs to modify or to change the terms of existing loans.

Question 1. How, if at all, could the agencies' proposal to cover loan modifications and other changes to existing loans be made clearer?

Home equity line of credit (HELOC) reductions or suspensions. The proposed rule would cover AVMs used in deciding whether or to what extent to reduce or suspend a HELOC. The proposed rule would apply to AVMs used in connection with making credit decisions. The agencies consider mortgage originators and secondary market issuers to be using AVMs in connection with making a credit decision when they use AVMs to decide whether or to what extent to reduce or suspend a HELOC.

Question 2. Part II.B of this **SUPPLEMENTARY INFORMATION** *discusses the proposed definitions of mortgage originator and secondary market issuer. To what extent do financial institutions purchase or service HELOCs without engaging in mortgage originator or secondary market issuer activities as defined by the proposed rule?*

Question 3. How might a rule covering only AVM usage by mortgage originators and secondary market issuers disadvantage those entities vis-à-vis their competitors?

2. AVMs Used by Secondary Market Issuers

The language of section 1125 includes not only mortgage originators, but also secondary market issuers. Given that the statute refers to secondary market issuers and the primary business of secondary market issuers is to securitize mortgage loans and to sell those mortgage-backed securities to investors, the proposed rule would cover AVMs used in securitization determinations. In addition, covering AVMs used in securitizations could potentially protect the safety and soundness of institutions and protect consumers and investors by reducing the risk that secondary market issuers will misvalue homes. For example, misvaluation by secondary market issuers could in turn incentivize mortgage originators to originate misvalued loans when making lending decisions.[26] Such misvaluations could

[19] 12 CFR part 712.

[20] The term ''financial institution'' means an insured depository institution as defined in 12 U.S.C. 1813 or an insured credit union as defined in 12 U.S.C. 1752. *See* 12 U.S.C. 3350(7).

[21] 12 U.S.C. 3354(c)(1).

[22] 12 U.S.C. 3354(c)(2).

[23] 12 U.S.C. 3354(d) (emphasis added).

[24] Many secondary market transactions by regulated entities require an appraisal unless an appraisal consistent with regulatory standards was obtained at the time of origination. *See* 12 CFR 43.43(a)(8) (OCC); 12 CFR 225.63(a)(8) (Board); 12 CFR 323.3(a)(8) (FDIC); 12 CFR 722.3(a)(5) (NCUA).

[25] 12 U.S.C. 3354(d) (emphasis added).

[26] For example, the 2008 financial crisis was precipitated in part by secondary market issuers that ''lowered the credit quality standards of the mortgages they securitized'' and mortgage originators that ''took advantage of these lower credit quality securitization standards . . . to relax the underwriting discipline in the loans they issued'' because, ''[a]s long as they could resell a mortgage to the secondary market, they didn't care about its quality.'' Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report,* at 425 (2011), *available at https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.*

pose a risk of insufficient collateral for financial institutions and secondary market participants and could limit consumers' refinancing and selling opportunities.[27]

Appraisal waivers. The proposed rule would define ''covered securitization determination'' to include determinations regarding, among other things, whether to waive an appraisal requirement for a mortgage origination (appraisal waiver decisions).[28] Under the proposal, a secondary market issuer that uses AVMs in connection with making appraisal waiver decisions would be required to have policies, practices, procedures, and control systems in place to ensure that the AVM supporting those appraisal waiver decisions adheres to the rule's quality control standards. In contrast, a mortgage originator that requests an appraisal waiver decision from a secondary market issuer would not need to ensure that the AVM used to support the waiver meets the rule's quality control standards because the secondary market issuer would be using the AVM to make the appraisal waiver decision in this context, not the mortgage originator.

For example, both GSEs have appraisal waiver programs and are the predominant issuers of appraisal waivers in the current mortgage market.[29] To determine whether a loan qualifies for an appraisal waiver under either GSE program, a mortgage originator submits the loan casefile to the GSE's automated underwriting system with an estimated value of the property (for a refinance transaction) or the contract price (for a purchase transaction). The GSE then processes that information through its internal model, which may include use of an AVM, to determine the acceptability of the estimated value or the contract price for the property. If the GSE's analysis determines, among other eligibility parameters, that the estimated value or contract price meets its risk thresholds, the GSE offers the lender an appraisal waiver.[30]

In this example, when the GSEs use AVMs to determine whether the mortgage originator's estimated collateral value or the contract price meets acceptable thresholds for issuing an appraisal waiver offer, the GSEs would be making a ''covered securitization determination'' under the proposed rule. As a result, the proposed rule would require the GSEs, as secondary market issuers, to maintain policies, practices, procedures, and control systems designed to ensure that their use of such AVMs adheres to the rule's quality control standards. On the other hand, when a mortgage originator submits a loan to determine whether a GSE will offer an appraisal waiver, the mortgage originator would not be making a ''covered securitization determination'' under the proposed rule because the GSE would be using its AVM to make the appraisal waiver decision in this context. As a result, the mortgage originator would not be responsible for ensuring that the GSEs' AVMs comply with the proposed rule's quality control standards.

Question 4. To what extent do secondary market issuers other than the GSEs issue appraisal waivers?

Question 5. Please address the feasibility of mortgage originators performing quality control reviews of the AVMs that secondary market issuers use to evaluate appraisal waiver requests. What, if any, consequences would such an approach have for mortgage originators' use of appraisal waiver programs?

Other uses by secondary market issuers. The proposed rule would define ''covered securitization determination'' to include determinations regarding, among other things, structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.[31] Monitoring collateral value in mortgage-backed securitizations after the securities have already been issued would not be a covered securitization determination.

The proposed rule would cover AVM usage if and when a secondary market issuer uses an AVM as part of a new or revised value determination in connection with covered securitization determinations. For example, the GSEs use the origination appraised value or the estimated value in appraisal waivers when issuing mortgage-backed securities. Hence, AVMs are not used by the GSEs to make a new or revised value determination in connection with MBS issuances. However, because the GSEs provide guarantees of timely payment of principal and interest on loans that are included in an MBS, they are obligated to purchase loans that are in default from MBS loan pools. The GSEs may modify such loans and subsequently re-securitize them as new MBS offerings. In these instances, the GSEs may use an AVM to estimate collateral value for investor transparency and disclosure. AVMs used in this manner by the GSEs would be considered covered securitization determinations because there are new or revised value determinations.

As discussed in part II.A.3 of this **SUPPLEMENTARY INFORMATION**, the proposed rule distinguishes between secondary market issuers using AVMs to determine the value of collateral securing a mortgage versus using AVMs solely to review completed value determinations. For example, AVMs used solely to review appraisals obtained during mortgage origination would not be covered by the proposed rule.

Question 6. The agencies are proposing to include securitizations within the scope of the proposed rule where the AVM is being used to determine collateral value for loans being considered for inclusion in pools collateralizing mortgage-backed securities. To what extent do secondary market issuers use AVMs to determine collateral value in securitizations?

Question 7. Would covering uses of AVMs for securitizations hinder small entities' access to secondary market liquidity and, if so, how might such impacts be mitigated?

Question 8. What would be the advantages and disadvantages of exempting federally backed securitizations from the AVM quality control standards?

Question 9. Are the compliance obligations of lenders and securitizers clear under this proposed rule?

3. AVM Uses Not Covered by the Proposed Rule

Uses of AVMs by appraisers. The proposed rule would not cover use of an AVM by a certified or licensed appraiser

[27] *See, e.g., Appraisals for Higher-Priced Mortgage Loans,* 78 FR 10367, 10418 (Feb. 13, 2013).

[28] On March 1, 2023, Fannie Mae began a transition in terminology away from ''appraisal waivers'' and to ''value acceptance.'' As stated in the March 1 announcement, ''value acceptance is being used in conjunction with the term 'appraisal waiver' to better reflect the actual process of using data and technology to accept the lender-provided value. We are moving away from implying that an appraisal is a default requirement.'' *See Fannie Mae Provides Updates Regarding Valuation Modernization | Fannie Mae.*

[29] *See* Fannie Mae, *Appraisal Waivers, available at https://singlefamily.fanniemae.com/originating-underwriting/appraisal-waivers* (last visited January 26, 2023); Freddie *Mac, Automated Collateral Evaluation* (ACE), *available at https://sf.freddiemac.com/tools-learning/loan-advisor/our-solutions/ace-automated-collateral-evaluation.*

[30] *See* Fannie Mae, *Appraisal Waivers, available at https://singlefamily.fanniemae.com/originating-underwriting/appraisal-waivers;* Freddie Mac, *Automated Collateral Evaluation (ACE), available at https://sf.freddiemac.com/tools-learning/loan-advisor/our-solutions/ace-automated-collateral-evaluation.*

[31] *See, e.g., Asset Backed Securities,* 70 FR 1505, 1544 (Jan. 7, 2005) (examples of asset characteristics that are ''material'' include LTV ratios); *Appraisals for Higher-Priced Mortgage Loans,* 78 FR 78519, 78533 (Dec. 26, 2013) (''[t]he credit risk holder of the existing obligation might obtain a valuation . . . to estimate LTV for determining the appropriate securitization pool for the loan.'').

in developing an appraisal.[32] This approach reflects the fact that, while appraisers may use AVMs in preparing appraisals, they must achieve credible results in preparing an appraisal under the Uniform Standards of Professional Appraisal Practice (USPAP) and its interpreting opinions.[33] As such, an appraiser must make a valuation conclusion that is supportable independently and does not rely on an AVM to determine the value of the underlying collateral. The agencies also note that it may be impractical for mortgage originators and secondary market issuers to adopt policies, procedures, practices, and control systems to ensure quality controls for AVMs used by the numerous independent appraisers with which they work.

Question 10. How often are AVMs used by certified or licensed appraisers to develop appraisals?

Question 11. What would be the advantages and disadvantages of excluding AVMs used by certified or licensed appraisers in developing appraisal valuations?

Under the appraisal regulations issued by the OCC, FRB, and FDIC, lenders regulated by those agencies are required to obtain ''evaluations'' for certain transactions that fall within exceptions in the appraisal regulations.[34] Evaluations must be consistent with safe and sound banking practices.

The proposed rule would cover AVMs used in the process of preparing evaluations. This distinction between appraisals and evaluations reflects that USPAP standards and appraiser credentialing are not required for individuals who prepare evaluations. The proposed rule's coverage of AVMs used in the process of preparing evaluations also reflects the more extensive use of, and reliance on, AVMs within the evaluation function.

Reviews of completed collateral valuation determinations. The proposed rule would not cover AVMs used in reviews of completed collateral value determinations, given that the underlying appraisal or evaluation determines the value of the collateral, rather than the review of the appraisal or evaluation. The appraisal or evaluation review serves as a separate and independent quality control function.[35] The agencies note that the proposed rule does not make distinctions based on the amount of time between the completed collateral valuation determination and the subsequent review; if an AVM is solely being used to review the completed determination, such AVM use is not covered by the proposed rule regardless of how soon the AVM is used after that determination.

Question 12. What would be the advantages and disadvantages of including AVMs that are used in reviews of completed determinations within the scope of the proposed rule? To what extent do institutions use AVMs in reviewing completed determinations?

Question 13. What, if any, additional clarifications would be helpful for situations where an AVM would or would not be covered by the proposed rule?

B. Definitions

1. Automated Valuation Model

The Dodd-Frank Act defines an AVM, for purposes of section 1125, as ''any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.'' [36] The proposed rule would define an AVM as any computerized model used by mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage. The proposed definition is substantively identical to the definition in section 1125 but reflects common terminology and clarifies that the determination of value relates to the dwelling.

Question 14. What, if any, other definitions of AVM would better reflect current practice with respect to the use of AVMs to determine the value of residential real estate securing a mortgage?

2. Control Systems

The proposal would define control systems as the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that institutions use to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations. The agencies intend for institutions to use control systems that are appropriate for the size and complexity of their mortgage origination and securitization businesses.

Question 15. What, if any, alternate definitions would be more suitable than the proposed definition of control systems? What challenges, if any, would be involved in integrating control systems for AVMs into existing control systems?

3. Covered Securitization Determination

The proposed rule would define ''covered securitization determination'' to mean a determination regarding (1) whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer, or (2) structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations. Monitoring collateral value in mortgage-backed securitizations after they have already been issued would not be covered securitization determinations.

Question 16. Would the proposed definition of a covered securitization determination hinder small entities' access to secondary market liquidity and, if so, how might such impacts be mitigated?

Question 17. Other than the uses discussed in the proposed rule, are there other ways that AVMs are used in the securitization process? Is the scope of the proposed definition of ''covered securitization determination'' appropriate and, if not, how should the agencies expand or narrow the definition?

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[32] The appraisal regulations issued by the OCC, Board, FDIC, and NCUA set forth, among other requirements, minimum standards for the performance of real estate appraisals in connection with federally related transactions. *See* 12 CFR part 34, subpart C (OCC); 12 CFR part 208, subpart E, and 12 CFR part 225, subpart G (Board); 12 CFR part 323 (FDIC); and 12 CFR part 722 (NCUA). The CFPB proposes to codify the AVM requirements in Regulation Z, 12 CFR part 1026, and to cross-reference Regulation Z § 1026.35(c)(1)(i), which defines ''certified or licensed appraiser'' as a person who is certified or licensed by the State agency in the State in which the property that secures the transaction is located, and who performs the appraisal in conformity with USPAP and the requirements applicable to appraisers in title XI, and any implementing regulations in effect at the time the appraiser signs the appraiser's certification.

[33] *See* USPAP STANDARDS RULE 1–1, GENERAL DEVELOPMENT REQUIREMENTS (''In developing a real property appraisal, an appraiser must . . . be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal''); *see also* Advisory Opinion 37 (AO–37) on Computer Assisted Valuation Tools.

[34] *See* 12 CFR 34.43(b) (OCC); 12 CFR 225.62(c) (Board); and 12 CFR 323.3(b) (FDIC); *see also Interagency Appraisal and Evaluation Guidelines,* 75 FR at 77460 (discussing transactions that require evaluations under the appraisal rules and providing recommendations for evaluation development).

[35] Appraisals are subject to appropriate review under the appraisal regulations. *See* 12 CFR 34.44(c); (OCC); 12 CFR 225.64(c) (Board); 12 CFR 323.4(c) (FDIC); 12 CFR 722.4(c) (NCUA). While these reviews are independent of, and subsequent to, the underlying appraisals and evaluations, the reviews generally take place before the final approval of a mortgage loan.

[36] 12 U.S.C. 3354(d).

4. Credit Decision

The proposal would define credit decision to mean a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage. The proposed definition of credit decision would include a decision whether to extend new or additional credit or change the credit limit on a line of credit. Monitoring the value of the underlying real estate collateral in their mortgage originators' loan portfolios would not be a credit decision for the purposes of this proposed rule. This reflects the fact that the collateral worth of a mortgage is generally determined in connection with credit decisions or covered securitizations rather than when the value of the collateral supporting a mortgage is monitored or verified.

Question 18. What, if any, clarifications are needed for the definition of the term ''credit decision''?

Question 19. What, if any, other decisions should the agencies include within the definition of credit decision?

5. Dwelling

The section 1125 definition of AVM refers to a mortgage secured by a ''consumer's principal dwelling.'' [37] The OCC, Board, FDIC, NCUA, and FHFA would define dwelling to mean a residential structure that contains one to four units, whether or not that structure is attached to real property. The term would include an individual condominium unit, cooperative unit, factory-built housing, or manufactured home, if any of these are used as a residence. The proposed definition of dwelling also would provide that a consumer can have only one principal dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling would be considered the principal dwelling.[38]

The CFPB proposes to codify the AVM requirements in Regulation Z, 12 CFR part 1026, which generally implements the Truth in Lending Act (TILA). The definition of dwelling proposed by the other agencies is consistent with the CFPB's existing Regulation Z.[39] Unlike TILA, title XI generally does not limit its coverage to credit transactions that are primarily for personal, family, or household purposes.[40] Because this rulemaking is conducted pursuant to title XI rather than TILA, the CFPB proposes to revise Regulation Z §§ 1026.1, .2, .3, and .42, and related commentary, to clarify that this rule would apply when a mortgage is secured by a consumer's principal dwelling, even if the mortgage is primarily for business, commercial, agricultural, or organizational purposes.[41]

Question 20. What, if any, alternate definitions would be more suitable than the proposed definition of dwelling and the approach to what is a principal dwelling?

Question 21. Should the rule define the meaning of ''consumer'' or is that term commonly understood?

Question 22. Because the CFPB proposes to apply its existing Regulation Z definitions of ''dwelling'' and ''consumer,'' the CFPB invites comment on whether, for purposes of the AVM requirements, it should amend its definitions and associated commentary to address particular circumstances, consistent with the objectives of section 1125. Should the rule exclude from coverage AVMs used only in making determinations of the worth of particular residential structures or AVMs used only in extending credit to a trust where a non-obligor individual uses the residence as their principal dwelling? Should the rule include language to address special circumstances, such as dwellings purchased by active-duty military personnel for their future permanent residence while assigned temporarily to a different duty station? Please provide any supporting explanation and data.

6. Mortgage

Section 1125(d) defines an AVM with reference to determining ''the collateral worth of a mortgage secured by a consumer's principal dwelling.'' [42] Section 1125 does not define ''mortgage.'' Because the statute does not refer to ''mortgage loans'' or ''mortgage credit,'' but rather uses the word ''mortgage,'' the proposal would define ''mortgage'' to broadly cover the mortgage market as fully as the statute appears to envision, in the language of section 1125(d) and throughout section 1125. Consequently, for this purpose, the agencies would adopt in part the Regulation Z definition of ''residential mortgage transaction,'' [43] which existed at the time the statute was passed. The proposal would define the term mortgage to mean a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

Question 23. What, if any, alternate definitions would be more suitable than the proposed definition of mortgage?

Question 24. What are the benefits and disadvantages of including purchase money security interests arising under installment land contracts in the definition of mortgage? Please provide any data or information you have about the use of AVMs in this market segment.

7. Mortgage Originator

For purposes of this proposal, the agencies would adopt the definition of mortgage originator contained in TILA.[44] Although section 1125 of title XI does not define the term mortgage originator, a recent amendment to title XI (section 1127) adopted the TILA definition of mortgage originator by cross reference.[45] The OCC, Board, and FDIC implemented the same definition in their appraisal regulations.[46] Implementing the same definition in this proposal would maintain consistency in the usage of this term

[37] 12 U.S.C. 3354(d).

[38] The NCUA notes that under its regulations, a Federal credit union may make a mortgage loan to a member for a maturity of up to 40 years if the loan is secured by a one-to-four family dwelling that is or will be the principal residence of the member-borrower, among other requirements. 12 CFR 701.21(g). The use of the term ''principal residence'' in § 701.21(g) of the NCUA's regulations is distinct from the term ''principal dwelling'' used in this proposed rule. The proposed definition of ''dwelling'' and the condition that the dwelling is or will be a principal dwelling within one year for purposes of this proposed AVM rule would not change what type of dwelling is considered to be a principal residence under the NCUA's regulations, the parameters of which are drawn directly from the Federal Credit Union Act. 12 U.S.C. 1757(5)(A)(i). If this proposed rule is adopted as a final rule, the NCUA would issue a clarifying statement to assist Federal credit unions in distinguishing the two requirements.

[39] *See* 12 CFR 1026.2(a)(19) (definition of ''dwelling'') and 1026.2(a)(24) (definition of ''residential mortgage transaction''). The phrase ''consumer's principal dwelling'' is used in the Regulation Z provisions on valuation independence. 12 CFR 1026.42. Regulation Z generally defines ''consumer'' as a natural person to whom consumer credit is offered or extended. 12 CFR 1026.2(a)(11). The CFPB notes that pursuant to Regulation Z comments 2(a)(11)–3 and 3(a)–10, consumer credit includes credit extended to trusts for tax or estate planning purposes and to land trusts.

[40] *See* 12 CFR 1026.2(a)(12) (definition of ''consumer credit'').

[41] Therefore, the exemptions in 12 CFR 1026.3 would not apply to the requirements established by the CFPB under this rule.

[42] 12 U.S.C. 3354(d).

[43] 12 CFR 1026.2(a)(24).

[44] 15 U.S.C. 1602(dd)(2).

[45] 12 U.S.C. 3356(a)(1).

[46] *See* 12 CFR 34.43(a)(14) (OCC), 225.63(a)(15) (Board), and 323.3(a)(14) (FDIC).

with other sections of title XI and the agencies' appraisal regulations.

As proposed, the term mortgage originator generally would include creditors as defined by 15 U.S.C. 1602(g), notwithstanding that the definition of mortgage originator at 15 U.S.C. 1602(dd)(2) excludes creditors for certain other purposes.[47] While the term mortgage originator is broad enough to include mortgage brokers, in practice, brokers generally would not be covered by the proposed rule when they do not engage in the type of credit or securitization decisions covered under the proposal.

Based on the exception provided at 15 U.S.C. 1602(dd)(2)(G), the term mortgage originator would generally exclude servicers as defined by 15 U.S.C. 1602(dd)(7) as well as their employees, agents, and contractors. Consistent with the interpretation published in the CFPB's 2013 Loan Originator Compensation Rule, a person is a servicer with respect to a particular transaction only after it is consummated and that person retains or obtains its servicing rights.[48] In addition, whether a person is a servicer under the mortgage originator definition depends on the type of activities the person performs.

An entity that otherwise meets the definition of servicer at 15 U.S.C. 1602(dd)(7) is a ''mortgage originator'' for purposes of 15 U.S.C. 1602(dd)(2) only if it performs any of the activities listed in 15 U.S.C. 1602(dd)(2)(A) for a transaction that constitutes a new extension of credit, including a refinancing or an assumption. As a result, the proposed rule would apply to servicers and their employees, agents, and contractors if, in connection with new extensions of credit, they both use covered AVMs to engage in credit decisions and perform any of the activities listed in 15 U.S.C. 1602(dd)(2)(A). Once a servicer meets this definition of mortgage originator, the servicer would be required to comply with the requirements of this proposed rule any time it uses an AVM to determine the collateral worth of a mortgage secured by a consumer's principal dwelling, including those instances where the use of an AVM does not involve a new extension of credit such as a loan modification or a reduction of a home equity line of credit.

Question 25. What, if any, alternate definitions would be more suitable than the definition of mortgage originator proposed?

Question 26. Would the proposed definition of mortgage originator disadvantage any covered entities vis-à-vis their market competitors?

8. Secondary Market Issuer

The agencies are proposing to define secondary market issuer as any party that creates, structures, or organizes a mortgage-backed securities transaction. The agencies propose to define secondary market issuer in this manner due to the statutory focus in section 1125 on ''issuers'' and ''determin[ing] the collateral worth'' of a mortgage. This type of determination, as opposed to verification or monitoring of such determination, would typically take place in the secondary market in connection with the creation, structuring, and organization of a mortgage-backed security.

A number of parties may be involved in the securitization process and this proposed definition is designed to ensure coverage of entities responsible for the core decisions required for the issuance of mortgage-backed securities, including making determinations of the value of collateral securing the loans in the securitization transaction.

Question 27. What, if any, alternate definitions would be more suitable than the proposed definition of secondary market issuer? What, if any, additional types of entities should the agencies include in the definition? Should the definition cover fewer types of entities and, if so, which entities should not be covered?

Question 28. Would the proposed definition of secondary market issuer hinder small entities' access to secondary market liquidity and, if so, how might the agencies mitigate such impacts?

Question 29. What, if any, other terms should be defined in the proposed rule?

C. Quality Control Standards

1. Proposed Requirements for the First Four Quality Control Factors

The proposed rule would require mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third party or affiliate, to adopt and maintain policies, practices, procedures, and control systems to ensure that AVMs used in these transactions adhere to quality control standards designed to ensure a high level of confidence in the estimates produced; protect against the manipulation of data; seek to avoid conflicts of interest; and require random sample testing and reviews. This approach would allow mortgage originators and secondary market issuers the flexibility to set their quality control standards for covered AVMs as appropriate based on the size of their institution and the risk and complexity of transactions for which they will use covered AVMs.

These quality control factors are consistent with practices that many participants in the mortgage lending market already follow and with the guidance described in part I.A of this **SUPPLEMENTARY INFORMATION** that applies to many regulated institutions that would be subject to this rule. For example, Appendix B of the Guidelines contains detailed guidance for institutions seeking to establish policies, practices, procedures, and control systems to ensure the accuracy, reliability, and independence of AVMs. The requirement for quality control standards in the proposed rule is also consistent with model risk guidance, as discussed earlier. In line with the agencies' service provider guidance, regardless of whether mortgage originators and secondary market issuers use their own AVMs or make use of third-party AVMs, the proposed rule would require the mortgage originators and secondary market issuers to adopt and maintain policies, practices, procedures, and control systems to ensure that AVMs adhere to the rule's requisite quality control standards.

The agencies considered whether to propose more prescriptive requirements for the use of AVMs and decided not to do so. Different policies, practices, procedures, and control systems may be appropriate for institutions with different business models and risk profiles, and a more prescriptive rule could unduly restrict institutions' efforts to set their risk management practices accordingly. In addition, as noted earlier, guidance is already in place to assist regulated institutions in using AVMs in a safe and sound manner, and institutions that are not regulated by the agency or agencies providing the guidance may still look to the guidance for assistance with compliance. The agencies also considered that the statute does not require the agencies to set prescriptive standards for AVMs. For these reasons, a rule requiring institutions to develop policies, practices, procedures, and control systems designed to satisfy the requirement for quality control standards may more effectively carry

[47] 15 U.S.C. 1602(dd)(2).

[48] *Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z),* 78 FR 11280, 11306 (Feb. 15, 2013).

out the purposes of section 1125 than a more prescriptive rule.[49]

Question 30. Is additional guidance needed on how to implement the quality control standards to protect the safety and soundness of financial institutions and protect consumers beyond the existing supervisory guidance described in part I.A of this **SUPPLEMENTARY INFORMATION***? Should such additional guidance explain how a regulated entity would implement quality control for an AVM used or provided by a third party?*

Question 31. In what ways, if any, would a more prescriptive approach to quality control for AVMs be a more effective means of carrying out the purposes of section 1125 relative to allowing institutions to develop tailored policies, practices, procedures, and control systems designed to satisfy the requirement for quality control standards? If so, what would be the key elements of such an alternative approach?

2. Specifying a Nondiscrimination Quality Control Factor

Section 1125 provides the agencies with the authority to ''account for any other such factor'' that the agencies ''determine to be appropriate.'' [50] Based on this authority, the agencies propose to include a fifth factor that would require mortgage originators and secondary market issuers to adopt policies, practices, procedures, and control systems to ensure that AVMs used in connection with making credit decisions or covered securitization determinations adhere to quality control standards designed to comply with applicable nondiscrimination laws.

Existing nondiscrimination laws apply to appraisals and AVMs and institutions have a preexisting obligation to comply with all Federal laws, including Federal nondiscrimination laws. For example, the Equal Credit Opportunity Act (ECOA) and its implementing Regulation B bar discrimination on a prohibited basis in any aspect of a credit transaction.[51] The agencies have long recognized that this prohibition extends to using different standards to evaluate collateral,[52] which would include the design or use of an AVM in any aspect of a credit transaction in a way that would treat an applicant differently on a prohibited basis or result in unlawful discrimination against an applicant on a prohibited basis. Similarly, the Fair Housing Act prohibits unlawful discrimination in all aspects of residential real estate-related transactions, including appraisals of residential real estate.[53]

As with models more generally, there are increasing concerns about the potential for AVMs to produce property estimates that reflect discriminatory bias, such as by replicating systemic inaccuracies and historical patterns of discrimination. Models could discriminate because of the data used or other aspects of a model's development, design, implementation, or use.[54] Attention to data is particularly important to ensure that AVMs do not rely on data that incorporate potential bias and create discrimination risks. Because AVMs arguably involve less human discretion than appraisals, AVMs have the potential to reduce human biases. Yet without adequate attention to ensuring compliance with Federal nondiscrimination laws, AVMs also have the potential to introduce discrimination risks. Moreover, if models such as AVMs are biased, the resulting harm could be widespread because of the high volume of valuations that even a single AVM can process. These concerns have led to an increased focus by the public and the agencies on the connection between nondiscrimination laws and AVMs.

While existing nondiscrimination law applies to an institution's use of AVMs, the agencies propose to include a fifth quality control factor relating to nondiscrimination to heighten awareness among lenders of the applicability of nondiscrimination laws to AVMs. Specifying a fifth factor on nondiscrimination would create an independent requirement for institutions to establish policies, practices, procedures, and control systems to specifically address nondiscrimination, thereby further mitigating discrimination risk in their use of AVMs. Specifying a nondiscrimination factor may also increase confidence in AVM estimates and support well-functioning AVMs. In addition, specifying a nondiscrimination factor could help protect against potential safety and soundness risks, such as operational, legal, and compliance risks, associated

[49] The agencies have, in other contexts, allowed institutions to adjust their compliance programs in a way that reflects institution-specific factors, such as an institution's size and complexity and the nature and scope of its lending activities. *See, e.g., Interagency Guidelines Establishing Standards for Safety and Soundness,* 12 CFR part 30, Appendix A (OCC); 12 CFR part 208, Appendix D–1 (Board); 12 CFR part 364, Appendix A (FDIC) (requiring institutions to have internal controls and information systems for implementing operational and managerial standards that are appropriate to their size and the nature, scope and risk of their activities); 12 CFR 34.62 (OCC); 12 CFR 208.51 (Board); 12 CFR 365.2 (FDIC) (requiring institutions to adopt policies that establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate): *Interagency Guidelines Establishing Information Security Standards,*12 CFR part 30, Appendix B, (OCC); 12 CFR part 208, Appendix D–2 (Board); 12 CFR part 364, Appendix B (FDIC); 12 CFR part 748, Appendix A (NCUA) (requiring institutions to implement a comprehensive written information security program that is appropriate to the size and complexity of the institution and the nature and scope of its activities); and 12 CFR 41.90 (OCC); 12 CFR 222.90 (Board); 12 CFR 334.90 (FDIC) (requiring that banks establish policies and procedures for the detection, prevention, and mitigation of identity theft). *See also Guidelines Establishing Standards for Residential Mortgage Lending Practices,*12 CFR part 30, Appendix C (OCC) (providing that residential mortgage lending activities should reflect standards and practices appropriate for the size and complexity of the bank and the nature and scope of its lending activities); 12 CFR 1007.104 (CFPB) (requiring policies and procedures regarding the registration of mortgage loan originators that are appropriate to the nature, size, complexity, and scope of the financial institution's mortgage lending activities); and 12 CFR 1026.36(j) (CFPB) (requiring policies and procedures regarding mortgage loan origination that are appropriate to the nature, size, complexity, and scope of the mortgage lending activities of the depository institution and its subsidiaries).

[50] 12 U.S.C. 3354(a)(5).

[51] 15 U.S.C. 1691(a) (prohibiting discrimination on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity) or marital status, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program), or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act); *see also* 12 CFR part 1002. This prohibition includes discrimination on the prohibited basis characteristics of ''the neighborhood where the property offered as collateral is located.'' 12 CFR part 1002, supp. I, para. 2(z)–1.

[52] *See* Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending,* 59 FR 18266, 18268 (Apr. 15, 1994) (noting that under both ECOA and the Fair Housing Act, a lender may not, because of a prohibited factor, use different standards to evaluate collateral).

[53] 42 U.S.C. 3605 (prohibiting discrimination because of race, color, religion, national origin, sex, handicap, or familial status in residential real estate-related transactions); 42 U.S.C. 3605(b)(2) (defining ''real estate-related transactions'' to include the ''selling, brokering, or appraising of residential real property.''); *see also* 24 CFR part 100; note 50, *supra.*

[54] In other contexts, models and data have the potential to be a source of bias and may cause consumer harm if not designed, implemented, and used properly. *See generally,* Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues* (Jan. 2016), *available at https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf;* Reva Schwartz et al., *A Proposal for Identifying and Managing Bias in Artificial Intelligence,* Nat'l Inst. of Standards & Tech., U.S. Department of Commerce (June 2021), *available at https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270-draft.pdf. See also* Andreas Fuster et al., *Predictably Unequal? The Effects of Machine Learning on Credit Markets,* 77 J. of Fin. 5 (Feb. 2022), *available at https://doi.org/10.1111/jofi.13090;* Emily Bembeneck, et al., *To Stop Algorithmic Bias, We First Have to Define It,* Brookings Inst. (Oct. 21, 2021), *available at http://brookings.edu/research/to-stop-algorithmic-bias-wefirst-have-to-define-it/.*

with failure to comply with nondiscrimination laws.

In proposing to add a fifth quality control factor on nondiscrimination, the agencies note that compliance with applicable nondiscrimination laws with respect to AVMs may be indirectly reflected within and related to three of the first four statutory quality control factors. For example, the first factor requires quality control standards designed to ensure a high level of confidence in the estimates produced by AVMs. AVMs that reflect discriminatory bias in the data or discriminatory assumptions could affect confidence in AVM outputs and may also result in a form of data manipulation, particularly with respect to model assumptions and in the interactions among variables in a model, which bears on the second quality control factor in section 1125. The fourth quality control factor requires random sample testing and reviews of AVMs. The proposed fifth factor on nondiscrimination may include an array of tests and reviews, including fair lending reviews, which would support the general requirement for random sampling testing and review in section 1125. The first four factors do not, however, expressly address quality control measures relating to compliance with nondiscrimination laws.

Requiring institutions using AVMs covered by this proposed rule to adopt fair lending compliance policies and practices would be consistent not only with current law but also with well-established fair lending guidance. The OCC, Board, FDIC, NCUA, CFPB, and FHFA have issued statements and other materials setting forth principles the agencies will consider to identify discrimination.[55] The OCC, Board, FDIC, NCUA, and CFPB have further underscored the importance of robust consumer compliance management to prevent consumer harm in the Interagency Policy Statement on the Use of Alternative Data in Credit Underwriting (Alternative Data Policy Statement). In the Alternative Data Policy Statement, the agencies emphasized that ''[r]obust compliance management includes appropriate testing, monitoring and controls to ensure consumer protection risks are understood and addressed.'' [56] In addition, the CFPB has published procedures for CFPB examiners to assess an institution's fair lending related risks and controls related to the use of models—including, potentially, AVMs—in the credit decision process.[57]

The agencies propose that institutions would have the flexibility to design fair lending policies, procedures, practices, and control systems that are in compliance with fair lending laws and take into account their business models, as discussed in part II.C.1 of this **SUPPLEMENTARY INFORMATION** regarding the first four quality control factors.

The agencies seek comment on the proposal to specify a nondiscrimination quality control factor, including ways they could facilitate compliance for smaller financial institutions and whether additional clarity should be provided to assist institutions in complying with the proposed fifth factor.

Question 32. What are the advantages and disadvantages of specifying a fifth quality control factor on nondiscrimination? What, if any, alternative approaches should the agencies consider?

Question 33. To what extent is compliance with nondiscrimination laws with respect to covered AVMs already encompassed by the statutory quality control factors requiring a high level of confidence in the estimates produced by covered AVMs, protection against the manipulation of data, and random sampling and reviews? Should the agencies incorporate nondiscrimination into those factors rather than adopt the fifth factor as proposed? Would specifying a nondiscrimination quality control factor in the rule be useful in preventing market-distorting discrimination in the use of AVMs?

Question 34. What are the advantages and disadvantages of a flexible versus prescriptive approach to the nondiscrimination quality control factor?

Question 35. Are lenders' existing compliance management systems and fair lending monitoring programs able to assess whether a covered AVM, including the AVM's underlying artificial intelligence or machine learning, applies different standards or produces disparate valuations on a prohibited basis? If not, what additional guidance or resources would be useful or necessary for compliance?

Question 36. What, if any, other approaches should the agencies consider for incorporating nondiscrimination requirements in this proposed rule?

D. Request for Comments

The agencies invite comments on all other aspects of the proposed rulemaking.

E. Proposed Implementation Period

The agencies propose an effective date of the first day of a calendar quarter following the 12 months after publication in the **Federal Register** of any final rule based on this proposal. This extended effective date would give institutions time to come into compliance with the rule. The agencies seek comment on this extended implementation period.

Question 37. In addition to providing time for implementation, in what other ways should the agencies facilitate implementation for small entities?

III. CFPB Small Business Review Panel

While Federal agencies generally must consider the impact that their proposed rules could have on small entities, the Regulatory Flexibility Act (RFA),[58] as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) [59] and the Dodd-Frank Act, imposes on the CFPB additional requirements with respect to small entities.

Specifically, the CFPB must convene and chair a Small Business Review Panel (Panel) whenever it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[60]

[55] *See, e.g.,* Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending,* 59 FR 18266 (Apr. 15, 1994), *available at https://www.govinfo.gov/content/pkg/FR-1994-04-15/html/94-9214.htm;* Interagency Fair Lending Examination Procedures (Aug. 2009), *available at https://www.ffiec.gov/PDF/fairlend.pdf;* CFPB, *Examination Procedures—ECOA* (Oct. 2015), *available at https://files.consumerfinance.gov/f/documents/201510_cfpb_ecoa-narrative-and-procedures.pdf;* Federal Housing Finance Agency, *Policy Statement on Fair Lending,* 86 FR 36199 (July 9, 2021), *available at https://www.govinfo.gov/content/pkg/FR-2021-07-09/pdf/2021-14438.pdf.*

[56] *Id. Interagency Statement on the Use of Alternative Data in Credit Underwriting* (Dec. 2019), *available at https://files.consumerfinance.gov/f/documents/cfpb_interagency-statement_alternative-data.pdf;* CFPB, *Supervisory Highlights: Summer 2013,* 5–11 (Aug. 2013), *available at https://files.consumerfinance.gov/f/201308_cfpb_supervisory-highlights_august.pdf* (discussing the pillars of a well-functioning CMS). *See also* Federal Financial Institutions Examination Council (FFIEC), *Notice and Final Guidance, Uniform Interagency Consumer Compliance Rating System,* 81 FR 79473 (Nov. 14, 2016), *available at https://www.ffiec.gov/press/PDF/FFIEC_CCR_SystemFR_Notice.pdf* (''in developing the revised CC Rating System, the Agencies believed it was also important for the new rating system to establish incentives for institutions to promote consumer protection by preventing, self-identifying, and addressing compliance issues in a proactive manner. Therefore, the revised rating system recognizes institutions that consistently adopt these compliance strategies.'').

[57] CFPB, *ECOA Baseline Review Module* 2, 6 (Apr. 2019), *available at https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_ecoa-baseline-exam-procedures_2019-04.pdf).*

[58] 5 U.S.C. 601 *et seq.*

[59] Public Law 104–121, 110 Stat. 857 (1996) (5 U.S.C. 609) (amended by Dodd-Frank Act section 1100G).

[60] 5 U.S.C. 609(b).

This Panel must consist of the Chief Counsel for Advocacy of the Small Business Administration (Advocacy) [61] and full-time employees from both the CFPB and the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).[62] Additionally, the Panel must collect feedback regarding the proposed rule under consideration from a group of small entity representatives (SERs) that the rule likely would cover if it were implemented.[63] Within 60 days of convening, the Panel must issue a report that documents the SERs' feedback and presents the Panel's recommendations.[64]

In preparation for convening a Panel for this rulemaking and to help facilitate the Panel's outreach to SERs, the CFPB issued an Outline of Proposals and Alternatives under Consideration (SBREFA Outline) on February 23, 2022.[65] The CFPB then convened a Panel for this rulemaking on March 14, 2022, and held two Panel outreach meetings during March 15–16, 2022, conducted online via video conference.[66] Sixteen SERs participated in this process through written and/or oral feedback. The SERs included representatives from community banks, credit unions, non-depository mortgage lenders, and mortgage brokers.

On May 13, 2022, the CFPB released the Final Report of the Panel on the CFPB's Proposals and Alternatives Under Consideration for the AVM Rulemaking (SBREFA Panel Report).[67] The SBREFA Panel Report includes the following:

- A description of the proposals that are being considered by the CFPB and that were reviewed by the Panel;
- Background information on small entities that would likely be subject to those proposals and on the particular SERs selected to advise the Panel;
- A discussion of the feedback from and recommendations made by the SERs; [68] and
- A discussion of the findings and recommendations of the Panel.[69]

The CFPB also invited other stakeholders to submit feedback on the SBREFA Outline. Feedback from these other stakeholders on the SBREFA Outline was not considered by the Panel and is not reflected in the SBREFA Panel Report but will be placed on the public docket for this notice. The CFPB received 11 submissions from a variety of other stakeholders, including trade associations, a coalition of consumer and civil rights groups, AVM developers and testers, a research center, and a not-for-profit corporation responsible for setting appraiser standards and qualifications.

As it prepared this proposed rule with the other agencies, the CFPB considered the feedback it received from SERs and other stakeholders (collectively, SBREFA feedback) and the findings and recommendations of the Panel. The CFPB has summarized the feedback, findings, and recommendations that it received during the SBREFA process in part III.A of this **SUPPLEMENTARY INFORMATION**.[70]

A. Summary of SBREFA Feedback and Panel Findings and Recommendations

In their feedback on the SBREFA Outline, SERs and other stakeholders (collectively, SBREFA commenters) generally expressed support for the rulemaking's goal of ensuring AVM accuracy. Many SBREFA commenters noted that AVMs potentially save time and money but also cautioned that they would need to have greater confidence in AVMs before broadly expanding their usage of them. While acknowledging that AVM developers are entitled to maintain trade secrets and protect their intellectual property rights, several SBREFA commenters expressed concern that AVM developers do not provide sufficient transparency regarding how they calculate AVM values.

SBREFA commenters expressed some support for greater standardization of AVM testing and reporting but cautioned that prescriptive regulations could threaten innovation and increase costs. The SBREFA Panel recommended that the CFPB continue to explore ways to minimize the burden to small entities of the AVM rule in light of SERs' concerns about compliance costs generally and their feedback regarding the potential additional costs and delays that could result if the industry substituted current AVM usage with appraisals.

While acknowledging that Congress has required the rulemaking agencies to issue a rule, SBREFA commenters generally expressed a preference for the less prescriptive, principles-based option presented in the SBREFA Outline, along with nonbinding guidance to aid in compliance with that rule. The not-for-profit corporation responsible for setting appraiser standards and qualifications recommended its USPAP as a starting point for flexible AVM regulations. A coalition of consumer and civil rights groups also provided various examples for a principles-based framework in an appendix to their submission.

SBREFA commenters generally supported aligning definitions in the AVM rule with definitions in existing financial regulations to simplify compliance. Some SERs and a trade association recommended that the AVM rule incorporate a transaction-based exemption threshold, such as not covering portfolio loans under $400,000. Other SERs asked the CFPB to consider an asset-size threshold to exempt small entities from the rule. However, a coalition of consumer and civil rights groups advocated for the rule's coverage to be as broad as possible.

Several SBREFA commenters stated that it would be beneficial to have a governmental or not-for-profit accrediting body for AVMs, so that AVM users could rely on such accreditation for complying with the AVM rule. Several SERs and other stakeholders also advocated for greater information sharing regarding the GSEs' AVMs.

1. Defining ''Consumer's Principal Dwelling''

The section 1125 definition of AVM refers to a mortgage secured by a

[61] Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA.

[62] 5 U.S.C. 609(b)(3).

[63] 5 U.S.C. 609(b)(4).

[64] 5 U.S.C. 609(b)(5).

[65] CFPB, *Small Business Advisory Review Panel For Automated Valuation Model (AVM) Rulemaking—Outline of Proposals and Alternatives Under Consideration* (Feb. 23, 2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_outline-of-proposals_2022-02.pdf.*

[66] In advance of the Panel outreach meetings, the CFPB, Advocacy, and OIRA also held six online conferences with the SERs to describe the small business review process, obtain important background information about each SER's current business practices, and familiarize the SERs with selected portions of the SBREFA Outline.

[67] CFPB, *Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Automated Valuation Model (AVM) Rulemaking* (May 13, 2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_final-report_2022-05.pdf.* The CFPB's SBREFA Outline and related materials, as well as the CFPB's presentation slides framing the discussion during the Panel outreach meetings, are appended to the SBREFA Panel Report. *See* SBREFA Panel Report at app. D through F.

[68] In addition to oral feedback, ten of the 16 SERs provided written feedback, which is appended to the SBREFA Panel Report at Appendix B.

[69] As required by the RFA, the CFPB considers the Panel's findings in its initial regulatory flexibility analysis, as set out in part V of this **SUPPLEMENTARY INFORMATION**.

[70] The SBREFA Panel Report provides a more complete summary of feedback from the SERs and the findings and recommendations of the Panel. The CFPB's documents and content from its SBREFA process for this rulemaking should not be construed to represent the views or recommendations of the Board, OCC, FDIC, NCUA, or FHFA.

consumer's principal dwelling. The terms ''consumer,'' ''dwelling,'' and ''principal dwelling'' are not defined in title XI, although the Dodd-Frank Act also added the phrase ''consumer's principal dwelling'' into provisions of title XI that address appraisal management company requirements and broker price opinions.[71] During the SBREFA process, the CFPB presented to the SERs an approach that would base the scope of ''consumer's principal dwelling'' on how that phrase is used in the Regulation Z § 1026.42 provisions on valuation independence.[72]

Coverage of ''consumers.'' For most purposes Regulation Z defines ''consumer'' as a natural person to whom consumer credit is offered or extended.[73] The SBREFA Outline noted that, for certain purposes, the scope of the Regulation Z term ''consumer'' may apply to additional persons.[74] The SBREFA Outline noted further that, unlike TILA, section 1125 does not limit its coverage to credit transactions that are primarily for personal, family, or household purposes.[75] Therefore, the SBREFA Outline advised the SERs that the CFPB was considering proposing language to clarify that its implementation of AVM standards in Regulation Z does not exclude from section 1125 coverage any mortgage for which the proceeds are used for other purposes, as long as the mortgage is secured by a consumer's principal dwelling.[76]

The SERs provided a variety of observations about extending the AVM requirements to business-purpose loans and defining the term ''consumer'' to include persons other than a natural person. In addition to addressing the scope of coverage generally and consistency with existing definitions, the SERs discussed valuation costs, processing times, and business practices.[77] The SBREFA Panel recommended that the CFPB leverage existing definitions in Regulation Z but consider whether adjustments should be made to apply the AVM standards to business-purpose loans and loans to trusts and limited liability companies.

Coverage of ''dwelling'' and limiting coverage to ''principal'' dwelling. The section 1125 definition of AVM refers to determining the collateral worth of a mortgage secured by a consumer's principal dwelling. During the SBREFA process, the CFPB indicated it was considering definitions of dwelling and principal dwelling that are very similar to their treatment in the proposed rule, but the CFPB also addressed the possibility of limiting the definitions' scope to transactions in which the mortgage is secured by a lien on real property. The SBREFA Outline cited to the CFPB's appraisal independence requirements in Regulation Z § 1026.42 as an approach under consideration for clarifying whether second and vacation homes and new construction would be considered principal dwellings.

Regarding the definition of ''dwelling,'' SERs discussed considerations relevant to limiting application of the AVM quality control standards to mortgages secured by real property, including alternative valuation guides and sampling challenges.[78] A coalition of consumer and civil rights groups urged adoption of a broad definition of dwelling and suggested considering adopting the Fair Housing Act definition of dwelling.[79]

Regarding what would be a ''principal'' dwelling, the SERs discussed considerations for applying the AVM standards to second homes, vacation homes, and new construction.[80] One SER commented on the importance of considering how coverage might apply to active military personnel who are purchasing a home for their future permanent residence while assigned temporarily to a different duty station. One trade association supported leveraging existing definitions for key terms in the AVM rule, including dwelling and consumer's principal dwelling. The SBREFA Panel recommended that the CFPB (i) consider whether limiting coverage to dwellings secured by liens on real property, and extending coverage to second homes and vacation homes, would be consistent with the purposes of section 1125; and (ii) clarify whether mortgages secured by undeveloped land, manufactured homes, and other structures used as dwellings would be covered by the quality control standards. The SBREFA Panel also recommended that the CFPB assess whether any adjustment or clarification of the AVM rule would be appropriate to accommodate the special circumstances of active-duty military personnel. Finally, the SBREFA Panel recommended that the CFPB seek comment on whether coverage of the AVM rule should vary from the definition of principal dwelling used in other statutes and CFPB regulations, including as applied to new construction.

2. Defining ''Mortgage''

Section 1125 defines an AVM by reference to determining ''the collateral worth of a mortgage,'' [81] but does not define the term ''mortgage.'' In the SBREFA process, the CFPB was considering proposing two alternative definitions of ''mortgage.'' The first alternative would define ''mortgage'' as an extension of credit secured by a dwelling. The second alternative would define it as a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a dwelling.

Most SERs did not express a preference for one definition over the other, but some did request further clarity on what types of transactions would be covered, and others asked that the definition be coordinated with existing regulatory definitions. Two SERs preferred the first mortgage definition. One of those SERs suggested that the first definition of mortgage was easier to understand, and the other SER preferred the first definition because it did not appear to include installment sales contracts, which it said could be understood to include consumer purchases for improvements to a home (for example, financing an HVAC system).[82]

A coalition of consumer and civil rights groups commenting on the definition of mortgage preferred the second definition because it was

[71] *See* Dodd-Frank Act section 1473(f)(4), adding section 1121(11) to title XI, codified at 12 U.S.C. 3350(11)): and Dodd-Frank Act section 1473(r), adding section 1126(a) to title XI, codified at 12 U.S.C. 3355(a), respectively.

[72] The appraisal management company provisions in title XI include a requirement that appraisal management companies apply valuation independence standards established under TILA. 12 U.S.C. 3353(a)(4). TILA is implemented in the CFPB's Regulation Z, 12 CFR part 1026 (Regulation Z). The CFPB implemented the valuation independence standards in Regulation Z § 1026.42 and is proposing to also implement its AVM standards in § 1026.42.

[73] *See* 12 CFR 1026.2(a)(11).

[74] To see how the CFPB has interpreted and applied the definition of ''consumer'' in Regulation Z, *see* comments 2(a)(11)–1 through 4 and comment 3(a)–10 in Regulation Z, Supplement I.

[75] *See* 12 CFR 1026.2(a)(12) (definition of ''consumer credit'').

[76] The terms ''dwelling'' and ''principal dwelling'' are discussed separately in this section.

[77] *See* SBREFA Panel Report at section 8.13.

[78] *See* SBREFA Panel Report at section 8.13.

[79] *See* 42 U.S.C. 3602(b) (''Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.'').

[80] *See* SBREFA Panel Report at section 8.13.

[81] 12 U.S.C. 3354(d). Section 1125 focuses on mortgages ''secured by a consumer's principal dwelling.'' *Id.*

[82] The CFPB notes that the second definition, which the agencies are proposing today, limits the ''installment sales contract'' reference to ''purchase money'' transactions.

broader and would protect consumers using installment sales contracts, who the stakeholder said are often Black homebuyers. A trade association did not think that installment land contracts should be included.

The SBREFA Panel recommended that the CFPB attempt to coordinate a definition of ''mortgage'' with preexisting regulations, to the extent feasible.

3. Defining ''Mortgage Originator''

Section 1125 covers AVMs used by ''mortgage originators,'' but does not define the term.[83] In the SBREFA Outline, the CFPB indicated that it was considering a definition of ''mortgage originator'' that potentially could cover persons who are loan originators, creditors, and/or, under limited circumstances, servicers for purposes of Regulation Z.[84] Four SERs, a trade association, and a coalition of consumer and civil right groups expressed support for a definition of ''mortgage originator'' that relies on definitions from existing consumer financial laws because they believe that would simplify implementation of any future final rule and/or minimize the compliance burden on small businesses. The SBREFA Panel also endorsed this approach in its recommendations.[85]

Although there was support among SERs and other stakeholders for defining ''mortgage originator'' based on definitions in existing consumer financial laws, six SERs and a coalition of consumer and civil rights groups indicated that the CFPB should consider alternative existing definitions for the term. These alternative definitions included defining ''mortgage originator'' (i) by reference to the term's use in other consumer financial laws, such as SAFE Act, Regulation G, or Regulation X, (ii) by reference to a person's current licensure status, or (iii) by reference to a person's function, such as covering lenders but not mortgage brokers or servicers. One SER in particular expressed concern that the definition of ''mortgage originator'' should not apply to mortgage brokers because, even though mortgage brokers commonly are considered ''loan originators,'' they rarely use AVMs and have no control over the valuation methods or vendors used in mortgage transactions.

In addition to receiving requests from SERs asking it to consider alternative definitions for the term ''mortgage originator,'' the CFPB also received comments from three SERs regarding the scope of the definition of the term ''mortgage originator.'' Two SERs asked the CFPB to consider applying a transaction-based or asset-based threshold that would exclude small entities from the scope of the definition of the term ''mortgage originator.'' Another SER asked the CFPB to ensure that any definition of the term ''mortgage originator'' it ultimately adopts will apply equally to both traditional market participants and financial technology firms.

4. Defining ''Secondary Market Issuer''

Section 1125 uses, but does not define, the term ''secondary market issuers''; specifically, the statute defines an AVM by reference to computerized models ''used by mortgage originators and secondary market issuers to determine the collateral worth'' of certain mortgages.[86] In the SBREFA Outline, the CFPB discussed two alternative definitions of the term ''secondary market issuer.'' The first alternative would define the term to include only entities that issue asset-backed securities collateralized by mortgages (mortgage securities). The second alternative would define the term more broadly to mean an issuer, guarantor, insurer, or underwriter of mortgage securities. Most SERs and other stakeholders providing feedback on the SBREFA Outline did not express specific views regarding these alternatives, but a coalition of consumer and civil rights groups as well as one SER supported the broader definition. The SBREFA Panel recommended that the CFPB continue to explore the extent to which a broader or narrower definition of ''secondary market issuer'' would further the statutory purposes of section 1125, along with the benefits and costs of such approach.

5. Types of AVM Uses

Section 1125 defines an AVM as any computerized model ''used by mortgage originators and secondary market issuers to determine the collateral worth'' of certain mortgages.[87] In the SBREFA Outline, the CFPB noted that, depending on how that phrase in the statute is implemented, the rule's quality control requirements might cover a variety of AVM uses by mortgage originators and secondary market issuers.

Underwriting versus non-underwriting AVM uses. Section 1125 focuses on AVMs used to ''determine'' the collateral worth. In the SBREFA Outline, the CFPB discussed focusing the rule on AVMs used in making underwriting decisions. Some SERs and trade associations providing feedback on the SBREFA Outline supported that approach. However, a coalition of consumer and civil rights groups advocated for the rule to broadly cover uses of AVMs to produce any valuation estimate whatsoever. The SBREFA Panel recommended that the CFPB continue to explore the extent to which limiting the rule's coverage to uses of AVMs for underwriting decisions would sufficiently further the statutory purposes of section 1125, along with the benefits and costs of such an approach. The SBREFA Panel also recommended that the CFPB consider clarifying whether, and to what extent, the proposed rule distinguishes between AVMs used before and after the origination of a mortgage.

Loan modifications and other changes to existing loans. Section 1125 focuses on AVMs used to ''determine'' the collateral worth. Among specific types of AVM uses, the CFPB's SBREFA Outline explored whether the rule should apply in instances where a mortgage originator, secondary market issuer, or service provider for a mortgage originator or secondary market issuer uses an AVM to determine the value of collateral in order to support a decision to modify or to change the terms of an existing loan. Specifically, the SBREFA Outline presented two alternatives. Under the first alternative, the rule would cover AVMs used in transactions that result in a consumer receiving a new mortgage origination. Under this alternative, the rule would cover a transaction like a refinancing, but not a transaction like a loan modification that would not result in a new mortgage origination. Under the second alternative, the rule would cover any AVM used to decide whether to change the terms of an existing mortgage even if the change does not result in a new mortgage origination, so long as a ''mortgage originator'' or ''secondary market issuer,'' or a service provider acting on behalf of a mortgage originator or a secondary market issuer, uses the AVM to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.

[83] 12 U.S.C. 3354(d).

[84] *Small Business Advisory Review Panel for Automated Valuation Model (AVM) Rulemaking, Outline of Proposals and Alternatives under Consideration* 14–15 (Feb. 23, 2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_outline-of-proposals_2022-02.pdf.*

[85] *Final Report of Small Business Review Panel on the CFPB's Proposals and Alternatives under Consideration for the Automated Valuation Model (AVM) Rulemaking* 39 (May 13, 2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_final-report_2022-05.pdf.*

[86] 12 U.S.C. 3354(d). Section 1125 focuses on mortgages ''secured by a consumer's principal dwelling.'' *Id.*

[87] 12 U.S.C. 3354(d). Section 1125 focuses on mortgages ''secured by a consumer's principal dwelling.'' *Id.*

With respect to the two alternatives, SERs generally expressed a preference for the CFPB's first alternative over the second. One SER stated that they preferred a rule that did not cover loan modifications and other changes to existing loans, even if it ultimately covered refinancing transactions, because such a rule would have lower implementation costs. That SER further explained that consolidating the AVM quality control processes in their institution's origination functions (including refinancings) would be less burdensome than building processes for multiple use cases. Several SERs expressed concern that the second alternative could negatively impact consumers who are pursuing loss mitigation options. Specifically, those SERs stated that AVMs are quicker and less costly than appraisals, but that the second alternative could discourage use of AVMs in favor of appraisals during the loss mitigation process, which, in turn, would harm consumers by increasing both property valuation costs and application processing times. One SER also asked the CFPB to clarify whether the first alternative would apply to transactions that are withdrawn or denied in addition to transactions that are consummated.

The CFPB also received feedback on these alternatives from a trade association. That trade association stated that their members supported the first alternative because they wanted to exclude AVMs used in loan modifications from the scope of the rule. The trade association further stated that their members did not support the second alternative presented in the SBREFA Outline because, in their view, it both was inconsistent with title XI's directive to apply quality control standards to mortgage originators and would place additional burdens on the processing of loan workouts for distressed borrowers.

Credit line reductions or suspensions. Section 1125 focuses on AVMs used to ''determine'' the collateral worth of a mortgage secured by a consumer's principal dwelling. Among specific types of AVM uses, in the SBREFA Outline, the CFPB was considering whether or not the rule would cover AVMs used in deciding whether or to what extent to reduce or suspend a home equity line of credit. SERs discussed balancing the consumer protections of covering credit line reductions or suspensions against the burdens of such regulation. One SER noted that AVMs used in determining credit line reductions or suspensions ought to be covered from a consumer protection standpoint. Another SER noted that such decisions occur only a couple times a year at their institution, and the burden of additional regulations could cause servicers like them to abandon the use of AVMs for such purposes. The SBREFA Panel recommended that the CFPB continue to explore the extent to which a rule not covering uses of AVMs for credit line reductions and suspensions would sufficiently further the statutory purposes of section 1125, along with the benefits and costs of such approach. The Panel also recommended that the CFPB consider whether covering such uses only for mortgage originators and secondary market issuers disadvantages entities vis-à-vis competitors that acquire mortgages but are not mortgage originators or secondary market issuers.

Uses of AVMs by appraisers. Section 1125 applies to AVMs used by ''mortgage originators'' and ''secondary market issuers,'' respectively.[88] Third-party appraisers generally would not be mortgage originators or secondary market issuers; thus, appraisers themselves generally would not be covered by the eventual rule. But, as discussed in part I.A of this **SUPPLEMENTARY INFORMATION**, regulated entities—including mortgage originators and secondary market issuers—are responsible for managing risk inherent in the use of third-party service providers, such as appraisers.[89]

In the SBREFA Outline, the CFPB indicated that it was considering whether or not the rule would cover an AVM when a mortgage originator (or secondary market issuer) relies on an appraisal developed by a certified or licensed appraiser (appraiser), notwithstanding that the appraiser used the AVM in developing an appraisal. Several SERs and a trade association advocated for not covering such AVMs uses; they explained that mortgage originators and secondary market issuers should not be responsible for appraisers' AVM usage because appraisers are already subject to other Federal and State regulation and supervision. The SERs further stated that, given other Federal laws requiring valuation independence,[90] mortgage originators have limited ability to oversee appraisers' use of AVMs. A coalition of consumer and civil rights groups urged that the rule should cover AVMs used by appraisers and stated that there are gaps in the training and licensing of appraisers. The SBREFA Panel recommended that the CFPB continue to assess the extent to which a rule not covering appraisers' uses of AVMs would sufficiently further the statutory purposes of section 1125.

Securitization. Section 1125 focuses on AVMs used to ''determine'' the collateral worth of a mortgage secured by a consumer's principal dwelling. Among specific types of AVM uses, in the SBREFA Outline, the CFPB was considering whether or not the rule would cover a secondary market issuer's use of an AVM in the offer and sale of mortgage securities. Most SERs and other stakeholders providing feedback on the SBREFA Outline did not express specific views regarding whether to cover AVMs used in securitization, but one SER expressly advocated for not covering such uses because, otherwise, the rule would create a cost burden and hinder access to the secondary market, particularly for small mortgage originators. Another SER stated that most small entities do not securitize loans and that they would be discouraged from doing so if the eventual rule covered AVMs used in securitization. A coalition of consumer and civil rights groups advocated for the rule's coverage to be as broad as possible. The not-for-profit corporation responsible for setting appraiser standards and qualifications expressed concern regarding securitization creating moral hazard for mortgage origination because securitizers often provide funding to originators in exchange for loans with weak representations and warranties that may result in originators having little to no incentive for accurate valuations. The SBREFA Panel recommended that the CFPB continue to explore the extent to which a rule not covering uses of AVMs in securitizations would sufficiently further the statutory purposes of section 1125, along with the benefits and costs of such an approach.

Reviews of completed determinations. Section 1125 focuses on AVMs used to ''determine'' the collateral worth of a mortgage secured by a consumer's principal dwelling. Among specific types of AVM uses, in the SBREFA Outline, the CFPB considered whether or not the rule would cover AVMs used in a subsequent review of a completed

[88] 12 U.S.C. 3354(d).

[89] *See supra* note 12.

[90] For consumer credit transactions secured by a consumer's principal dwelling, TILA section 129E, 15 U.S.C. 1639e, and its implementing regulations require valuation independence by, for example, prohibiting material misrepresentation of property value and conflicts of interest for persons preparing valuations or performing valuation management functions. CFPB: 12 CFR 1026.42; Board: 12 CFR 226.42; *see Truth in Lending,* 75 FR 66554 (Oct. 28, 2010) (interim final rule); *see also Truth in Lending,* 75 FR 80675 (Dec. 23, 2010) (correction). TILA section 129E(g)(2) directed the Board to issue an interim final rule. 15 U.S.C. 1639e(g)(2).

appraisal or other completed determination of collateral value (completed determination). Several SERs and a trade association expressly advocated for not covering such AVM uses, including a SER that stated requiring quality control of AVMs when they are, in turn, being used to quality control already completed determinations would be an excessive amount of quality control and would not provide additional benefit—but would increase the cost of credit for consumers. A coalition of consumer and civil rights groups advocated for the rule's coverage to be as broad as possible.

The SBREFA Panel recommended that the CFPB continue to explore the extent to which a rule not covering uses of AVMs for subsequent reviews of completed determinations would sufficiently further the statutory purposes of section 1125, along with the benefits and costs of such an approach. The SBREFA Panel also recommended that the CFPB consider clarifying in the proposed rule whether, and to what extent, the proposed rule makes distinctions based on the amount of time between the completed determination and the subsequent review.

Appraisal waivers. Section 1125 focuses on AVMs used to ''determine'' the collateral worth of certain mortgages. In the SBREFA Outline, the CFPB indicated that it was considering a rule that would exclude a mortgage originator's use of AVMs for appraisal waiver programs where the secondary market issuer's use of an AVM is covered instead. Specifically, the CFPB indicated that it was considering two potential options. One option was to exclude the mortgage originator's use of the secondary market issuer's AVM for appraisal waiver programs. The second option was to exclude the mortgage originator's use of any AVM used exclusively to determine whether a loan qualifies for an appraisal waiver program or to generate a value estimate exclusively for an appraisal waiver program. SERs were supportive of a proposed rule not covering a mortgage originator's use of AVMs for appraisal waiver programs where the secondary market issuer's use of an AVM is covered instead. One SER appreciated that such an approach did not increase compliance burden on mortgage originators, while another SER indicated that secondary market issuers, especially the GSEs, were in a better position to perform quality control reviews of their AVMs than the mortgage originators requesting the appraisal waiver evaluations.

6. Options for the First Four Quality Control Standards

Section 1125 requires that AVMs adhere to quality control standards designed to: (1) ensure a high level of confidence in the estimates produced; (2) protect against the manipulation of data; (3) seek to avoid conflicts of interest; (4) require random sample testing and reviews; and (5) account for any other such factor that the agencies determine to be appropriate. Section 1125(b) requires the agencies to promulgate regulations to implement these quality control standards.

In the SBREFA process, the CFPB was considering proposing two alternative methods for compliance in regard to the first four AVM quality control factors. In the first alternative (principles-based option), the CFPB was considering proposing to require regulated institutions to adopt and maintain their own policies, practices, procedures, and control systems to ensure that AVMs used for covered transactions adhere to quality control standards designed to meet those factors, but not proposing specific requirements for those policies, practices, procedures, and control systems. For the second alternative regarding the quality control factors (prescriptive option), the CFPB was considering proposing a prescriptive rule with more detailed and specific requirements in regard to the quality control factors.

SERs overwhelmingly expressed support for the first option the CFPB presented, which would require covered entities to develop policies and procedures that would achieve the quality control standards but would not set specific requirements for those policies and procedures. For example, one SER explained that their institution focuses on the risk assessed, especially the dollar amount of the loan, and the first option would allow them to maintain that focus. That SER further stated that a more prescribed approach would increase their costs and affect their ability to offer services that utilize AVMs, and that the CFPB should allow AVM use to evolve rather than shut down useful innovation with specific controls. Another SER said that low-risk home equity loans for relatively small amounts should not have to meet the same requirements as half-million-dollar loans and that, otherwise, the small-dollar mortgages would become unaffordable. One SER stated that a prescriptive rule would result in a complex and expansive regulation because it would need to address risk factors across many aspects of the market, including product type, geographic area, loan purpose and loan size.[91]

Almost all other stakeholders who commented on the quality control options in the SBREFA Outline preferred the principles-based approach, largely for the same reasons that the SERs did. Some of these stakeholders, particularly those involved in the appraisal and valuation market, suggested that the CFPB should try to foster standardization in the market, while also allowing flexibility. Several of these commenters suggested that the market would benefit from some form of credential or certification for AVM providers.

The SBREFA Panel recommended that the CFPB consider providing additional clarity in the notice of proposed rulemaking (NPRM) on what the rule would require of small entities in order to comply with the quality control standards and seek comment on improving that clarity. In addition, the Panel recommended that the CFPB consider seeking comment in the NPRM on potential methods to facilitate compliance targeted on small financial institutions. The Panel further suggested that such methods considered could include clear instruction on how a small entity can monitor compliance regarding use of third-party AVM vendors. The CFPB notes that the proposed rule requests comment on the possible use of additional guidance.

7. Specifying a Nondiscrimination Quality Control Standard

Section 1125 provides the agencies the authority to account for any other such factor that the agencies determine to be appropriate.[92] In the SBREFA process, the CFPB was considering proposing that it exercise its authority under section 1125 to specify a fifth quality control factor designed to ensure that AVMs used for covered transactions comply with applicable nondiscrimination laws. The CFPB was considering proposing two alternative methods—a principles-based option or a prescriptive option—for compliance with the nondiscrimination factor,

[91] The SERs also discussed other topics besides the direct question of whether the CFPB should adopt the policies and procedures or the prescriptive rule options, such as their current policies and procedures and their concerns about lacking the expertise to effectively monitor AVM vendor compliance with the rule. *See* CFPB, *Final Report of the Small Business Review Panel on the CFPB's Proposals and Alternatives Under Consideration for the Automated Valuation Model (AVM) Rulemaking* 24–30 (May 13, 2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_final-report_2022-05.pdf.*

[92] 12 U.S.C. 3354(a)(5).

consistent with the first four quality control factors.

During the SBREFA process, SERs uniformly voiced concern regarding how they can assess AVM compliance with applicable nondiscrimination law or know that they are in violation of the law. SERs stated that it is impractical for them to assess AVM fair lending performance because they are not equipped to validate the algorithms that AVM providers use. SERs commented that, as small institutions, they do not have the staff, the data, or the scale to assess AVM model results meaningfully. In addition, SERs stated that lenders do not have access to the data or methodology used by the AVM because the data is proprietary.

SERs expressed that it is important to ensure fairness in AVM development and application, including ensuring that AVMs do not rely on data that results in inadvertent discrimination. However, SERs stated that the burden should be on AVM providers to comply with nondiscrimination requirements, and the providers should be regulated.

In addition, SERs expressed that there is sufficient fair lending regulatory infrastructure already in place and that adding a fair lending requirement to the quality control standards for AVMs would be duplicative and, therefore, unnecessary. SERs further stated that the other four quality control standards required by statute already account for fair lending compliance.

A number of other stakeholders, including several trade associations, echoed many of the SERs' concerns about specifying a nondiscrimination quality control standard. A coalition of consumer and civil rights groups stated that while they fully support the addition of nondiscrimination as a fifth quality control standard, the agencies should incorporate nondiscrimination into each of the quality control standards, asserting that fair lending risk should not be separated from safety and soundness risk.

The SBREFA Panel recommended that the CFPB consider providing additional clarity in the NPRM on what the rule would require of institutions in order to comply with a nondiscrimination quality control factor and seek comment on improving that clarity. In addition, the Panel recommended that the CFPB consider seeking comment in the NPRM on potential methods to facilitate compliance targeted on small financial institutions, such as providing clear and simple instructions, allowing some form of safe harbor, or some other method or methods. Such methods considered could include clear instruction on how a small entity can monitor compliance regarding use of third-party AVM vendors.

8. Implementation Period

Title XIV of the Dodd-Frank Act requires an implementation period within 12 months after issuance of the interagency final rule.[93] Many SERs and an AVM testing company providing feedback on the SBREFA Outline stated that small entities would need more than the statutory 12-month period to comply with the eventual rule. Those stakeholders highlighted the potential nondiscrimination quality control factor as an aspect of the potential rule that would be particularly time consuming to implement. One SER and a trade association stated that the implementation period should be at least 12 months while a research center estimated only six months would be necessary. The SBREFA Panel recommended that the CFPB continue to explore the appropriateness of an implementation period longer than 12 months.

IV. Paperwork Reduction Act

Certain provisions of the proposed rule contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act (PRA) of 1995.[94] In accordance with the requirements of the PRA, the agencies may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a current Office of Management and Budget (OMB) control number.

The proposed rule would establish quality control standards mandated by the Dodd-Frank Act for the use of AVMs by mortgage originators and secondary market issuers in determining the collateral worth of a mortgage secured by a consumer's principal dwelling. Section 1473(q) of the Dodd-Frank Act amended title XI to add section 1125 relating to the use of AVMs in valuing real estate collateral securing mortgage loans. Section 1125 directs the agencies to promulgate regulations to implement quality control standards regarding AVMs.

The proposed rule would require supervised mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, to adopt and maintain policies, practices, procedures, and control systems to ensure that AVMs used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

The quality control standards in the proposed rule are applicable only to covered AVMs, which are AVMs as defined in the proposed rule. The proposed rule would require the regulated mortgage originators and secondary market issuers to adopt policies, practices, procedures, and control systems to ensure that AVMs adhere to the specified quality control standards whenever they use covered AVMs while engaging in certain credit decisions or covered securitization determinations.

As a result, the proposed rule creates new recordkeeping requirements. The agencies are revising their current information collections related to real estate appraisals and evaluations. The OMB control number for the OCC is 1557–0190, the Board is 7100–0250, the FDIC is 3064–0103, and the NCUA is 3133–0125. These information collections will be extended for three years, with revision. In addition to accounting for the PRA burden incurred as a result of this proposed rule, the agencies are also updating and aligning their information collections with respect to the hourly burden associated with the Guidelines.

The information collection requirements contained in this proposed rule have been submitted by the OCC, the FDIC, and the NCUA to the OMB for review and approval under section 3507(d) of the PRA [95] and section 1320.11 of the OMB's implementing regulations.[96] The Board reviewed the proposed rule under the authority delegated to the Board by OMB.

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the agencies' functions, including whether the information has practical utility;

(b) The accuracy of the estimate of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on

[93] 12 U.S.C. 1400(c)(1)(B).

[94] 44 U.S.C. 3501–3521.

[95] 44 U.S.C. 3507(d).

[96] 5 CFR 1320.

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.

All comments will become a matter of public record. Comments on the collections of information should be sent to the address listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer by mail to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503, or by facsimile to 202–395–6974; or email to *oira_submission@omb.eop.gov,* Attention, Federal Banking Agency Desk Officer.

Proposed Information Collection

Title of Information Collection: Recordkeeping and Disclosure Requirements and Provisions Associated with Real Estate Appraisals and Evaluations.

Frequency of Response: Annual and event generated.

Affected Public: Businesses, other for-profit institutions, and other not-for-profit institutions.

Respondents:

OCC: National banks, Federal savings associations.

Board: State member banks (SMBs), bank holding companies (BHCs), nonbank subsidiaries of BHCs, savings and loan holding companies (SLHCs), nondepository subsidiaries of SLHCs, Edge and agreement corporations, U.S. branches and agencies of foreign banks, and any nonbank financial company designated by FSOC to be supervised by the Board.

FDIC: Insured state nonmember banks and state savings associations, insured state branches of foreign banks.

NCUA: Private Sector: Not-for-profit institutions.

General Description of Report:

For federally related transactions, title XI requires regulated institutions [97] to obtain appraisals prepared in accordance with USPAP promulgated by the Appraisal Standards Board of the Appraisal Foundation. Generally, these standards include the methods and techniques used to estimate the market value of a property as well as the requirements for reporting such analysis and a market value conclusion in the appraisal. Regulated institutions are expected to maintain records that demonstrate that appraisals used in their real estate-related lending activities comply with these regulatory requirements.

The proposed rule would require supervised mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, to adopt and maintain policies, practices, procedures, and control systems to ensure that AVMs used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

Current Action: The proposed rule creates new recordkeeping requirements in connection with adopting and maintaining policies, practices, procedures, and control systems. The agencies estimate that the new recordkeeping burden associated with the proposed rule would result in an implementation burden of 13.33 hours per respondent and an annual ongoing burden of 5 hours per respondent. In addition to accounting for the PRA burden incurred as a result of this proposed rule, the agencies are also updating and aligning their information collections (IC) with respect to the hourly burden associated with the Guidelines. This would result in an annual ongoing burden of 10 hours per respondent for recordkeeping and an annual ongoing burden of 5 hours per respondent for disclosure.

OCC Burden

TABLE 1—SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 1557–0190]

Requirement	Citations	Number of respondents	Burden hours per respondent	Total number of hours annually
Recordkeeping: Resolution stating plans for use of property.	§ 7.1024(d)	6	5	30
Recordkeeping: ARM loan documentation must specify indices to which changes in the interest rate will be linked.	§ 34.22(a); § 160.35(b)	164	6	984
Recordkeeping: Appraisals must be written and contain sufficient information and analysis to support engaging in the transaction.	§ 34.44	976	1,465 responses per respondent @5 minutes per response.	119,072
Recordkeeping: Written policies (reviewed annually) for extensions of credit secured by or used to improve real estate.	§ 34.62; appendix A to subpart D to part 34; § 160.101; appendix A to § 160.101.	1,413	30	42,390
Recordkeeping: Real estate evaluation policy to monitor OREO.	§ 34.85	9	5	45
Recordkeeping: New IC 1—AVM Rule—Policies and Procedures (Implementation).	Proposed § 34.222	342	13.33 hours (40 hours divided by 3 years).	4,559
Recordkeeping: New IC 2—AVM Rule—Policies and Procedures (Ongoing).	Proposed § 34.222	342	5	1,710
Recordkeeping: New IC 3—Interagency Appraisal and Evaluation Guidelines—Policies and Procedures.	N/A	976	10	9,760

[97] National banks, Federal savings associations, SMBs and nonbank subsidiaries of BHCs, insured state nonmember banks and state savings associations, and insured state branches of foreign banks.

TABLE 1—SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued

[OMB No. 1557–0190]

Requirement	Citations	Number of respondents	Burden hours per respondent	Total number of hours annually
Reporting: Procedure to be followed when seeking to use an alternative index.	§ 34.22(b); § 160.35(d)(3)	249	6	1,494
Reporting: Prior notification of making advances under development or improvement plan for OREO.	§ 34.86	6	5	30
Disclosure: Default notice to debtor at least 30 days before repossession, foreclosure, or acceleration of payments.	§ 190.4(h)	42	2	84
Disclosure: New IC 4—Interagency Appraisal and Evaluation Guidelines.	N/A	976	5	4,880
Total Annual Burden Hours				185,038

Board Burden

TABLE 2—SUMMARY OF ESTIMATED ANNUAL BURDEN

[FR Y–30; OMB No. 7100–0250]

FR Y–30	Estimated number of respondents	Estimated annual frequency	Estimated average hours per response	Estimated annual burden hours
Recordkeeping				
Sections 225.61–225.67 for SMBs	701	519	5 minutes	30,318
Sections 225.61–225.67 for BHCs and nonbank subsidiaries of BHCs	4,714	25	5 minutes	9,821
Guidelines	5,415	1	10	54,150
Policies and Procedures AVM rule (Initial setup)	2,088	1	13.3	27,770
Policies and Procedures AVM rule (Ongoing)	2,088	1	5	10,440
Disclosure				
Guidelines	5,415	1	5	27,075
Total Annual Burden Hours				159,574

FDIC Burden

TABLE 3—SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3064–0103]

Information collection (obligation to respond)	Type of burden (frequency of response)	Average annual number of respondents	Number of responses per respondent	Time per response (hours/minutes)	Annual burden (hours)
Recordkeeping Requirements Associated with Real Estate Appraisals and Evaluations (Mandatory).	Recordkeeping (On Occasion).	3,038	250	5 minutes (0.083)	63,039
New IC 1—AVM Rule—Policies and Procedures—Implementation (Mandatory).	Recordkeeping (Annual).	1,042	1	13.33 hours (40 hours divided by 3 years).	13,890
New IC 2—AVM Rule—Policies and Procedures—Ongoing (Mandatory).	Recordkeeping (Annual).	1,042	1	5 hours	5,210
New IC 3—2010 Guidelines—Policies and Procedures—Ongoing (Mandatory).	Recordkeeping (Annual).	3,038	1	10 hours	30,380
New IC 4—2010 Guidelines—Disclosure—Ongoing (Mandatory).	Disclosure (Annual).	3,038	1	5 hours	15,190
Total Annual Burden Hours					127,709

NCUA Burden

TABLE 4—SUMMARY OF ESTIMATED ANNUAL BURDEN

[OMB No. 3133–0125]

Information collection	Type of burden	Average annual number of respondents	Number of responses per respondent	Time per response (hours)	Annual burden (hours)
Recordkeeping Requirements Associated with Real Estate Appraisals and Evaluations.	Recordkeeping (On Occasion).	3648	618	0.0825	187,872
New IC 1—AVM Rule—Policies and Procedures—Implementation.	Recordkeeping (Annual)	365	1	13.33	4,863
New IC 2—AVM Rule—Policies and Procedures—Ongoing.	Recordkeeping (Annual)	365	1	5	1,824
New IC 3—2010 Guidelines—Policies and Procedures—Ongoing.	Recordkeeping (Annual)	3648	1	10	36,480
New IC 4—2010 Guidelines—Disclosure—Ongoing.	Disclosure (Annual)	3648	1	5	18,240
Total Annual Burden Hours	.....	.....	.....	.....	249,279

The CFPB, in consultation with OMB, and the FHFA do not believe that they have any supervised entities that will incur burden as a result of this proposed rule and therefore will not be making a submission to OMB. Comments are invited on this determination by the CFPB and the FHFA.

V. Regulatory Flexibility Act Analysis

A. OCC

The RFA requires an agency, in connection with a proposed rule, to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities (defined by the Small Business Administration (SBA) for purposes of the RFA to include commercial banks and savings institutions with total assets of $850 million or less and trust companies with total revenue of $47.5 million or less) or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The OCC has assessed the burden of the proposed rule and has determined that the costs associated with the proposed rule would be limited to reviewing the rule; ensuring that existing practices, procedures, and control systems adequately address the four statutory quality control standards; and adopting policies, practices, procedures, and control systems to ensure that AVMs adhere to quality control standards designed to comply with applicable nondiscrimination laws. To estimate expenditures, the OCC reviewed the costs associated with the activities necessary to comply with the proposed rule. These include an estimate of the total time required to implement the proposed rule and the estimated hourly wage of bank employees who may be responsible for the tasks associated with achieving compliance with the proposed rule. The OCC used a bank employee compensation rate of $120 per hour.[98]

The OCC currently supervises approximately 661 small entities.[99] The proposed rule would impact approximately 614 of these small entities. The OCC estimates the annual cost for small entities to comply with the proposed rule would be approximately $21,600 per bank (180 hours × $120 per hour). In general, the OCC classifies the economic impact on a small entity as significant if the total estimated impact in one year is greater than 5 percent of the small entity's total annual salaries and benefits or greater than 2.5 percent of the small entity's total non-interest expense. Based on these thresholds, the OCC estimates that the proposed rule would have a significant economic impact on 26 small entities, which is not a substantial number. In general, for RFA purposes, the OCC classifies substantial as 5 percent or more of OCC-supervised small entities. Therefore, the OCC concludes that the proposed rule would not have a significant economic impact on a substantial number of small entities.

B. Board

The Board is providing an initial regulatory flexibility analysis with respect to this proposal. The RFA requires an agency to consider whether the rules it proposes will have a significant economic impact on a substantial number of small entities. In connection with a proposed rule, the RFA requires an agency to prepare an Initial Regulatory Flexibility Analysis describing the impact of the rule on small entities or to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities. An initial regulatory flexibility analysis must contain (1) a description of the reasons why action by the agency is being considered; (2) a succinct statement of the objectives of, and legal basis for, the proposed rule; (3) a description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; (5) an identification, to the extent practicable, of all relevant Federal rules

[98] To estimate wages the OCC reviewed May 2021 data for wages (by industry and occupation) from the U.S. Bureau of Labor Statistics (BLS) for credit intermediation and related activities (NAICS 5220A1). To estimate compensation costs associated with the rule, the OCC uses $119.63 per hour, which is based on the average of the 90th percentile for six occupations adjusted for inflation (6.1 percent as of Q1 2022), plus an additional 32.8 percent for benefits (based on the percent of total compensation allocated to benefits as of Q4 2021 for NAICS 522: credit intermediation and related activities).

[99] The OCC bases its estimate of the number of small entities on the SBA's size thresholds for commercial banks and savings institutions, and trust companies, which are $850 million and $47.5 million, respectively. Consistent with the General Principles of Affiliation in 13 CFR 121.103(a), the OCC counts the assets of affiliated financial institutions when determining whether to classify an OCC-supervised institution as a small entity. The OCC uses December 31, 2022, to determine size because a ''financial institution's assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* footnote 8 of the SBA's *Table of Size Standards.*

which may duplicate, overlap with, or conflict with the proposed rule; and (6) a description of any significant alternatives to the proposed rule which accomplish its stated objectives.

The Board has considered the potential impact of the proposal on small entities in accordance with the RFA. Based on its analysis and for the reasons stated below, the proposal is not expected to have a significant economic impact on a substantial number of small entities. Nevertheless, the Board is publishing and inviting comment on this initial regulatory flexibility analysis. The Board will consider whether to conduct a final regulatory flexibility analysis after any comments received during the public comment period have been considered.

1. Reasons Why Action Is Being Considered by the Board

As discussed above, the Dodd-Frank Act amended title XI to add a new section governing the use of AVMs in mortgage lending and directing the agencies to promulgate regulations to implement specified quality control standards. The proposal serves to implement this statutory mandate.

2. The Objectives of, and Legal Basis for, the Proposal

The proposed rule would implement statutorily mandated quality control standards for the use of AVMs. The Board would adopt the proposal pursuant to section 1125 of title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[100]

3. Estimate of the Number of Small Entities

The proposal would apply to Board-regulated small entities that are mortgage originators or secondary market issuers. There are approximately 472 state member banks and approximately 2,799 bank holding companies and savings and loan holding companies that qualify as small entities for purposes of the RFA.[101]

4. Description of the Compliance Requirements of the Proposal

The proposal would require Board-regulated small entities that are mortgage originators or secondary market issuers to adopt and maintain policies, practices, procedures, and control systems to ensure that AVMs used in credit decisions or covered securitization determinations adhere to specified quality control standards. These quality control standards must ensure a high level of confidence in the estimates produced, protect against the manipulation of data, avoid conflicts of interest, and require random sample testing and reviews and comply with applicable nondiscrimination laws. To the extent that small entities do not already maintain adequate policies, practices, procedures, and control systems, they could incur administrative costs to do so. It is likely that the majority of Board-regulated small entities that are mortgage originators or secondary market issuers either do not use AVMs in credit decisions or covered securitization determinations would already be in compliance with the proposed specified standards or could become compliant with relatively minor modifications to their current practices.[102]

Board staff estimates that impacted Board-supervised small entities would spend 160 hours establishing or modifying policies, practices, procedures, and control systems, at an hourly cost of $99.32.[103] The estimated aggregate initial administrative costs of the proposal to Board-supervised small entities amount to $7,500,646 or $15,891.00 per bank[104] and ongoing costs are expected to be small when measured by small entities' annual expenses.

5. Consideration of Duplicative, Overlapping, or Conflicting Rules and Significant Alternatives to the Proposal

The Board has not identified any Federal statutes or regulations that would duplicate, overlap, or conflict with the proposal. The Board is required by statute to promulgate regulations to implement the quality control standards required under section 1125 of title XI, and thus no significant alternatives are available.[105]

Question 38. How frequently do bank holding companies and savings and loan holding companies that meet the definition of small entity use AVMs to engage in making credit decisions or securitization determinations?

Question 39. Is the number of hours estimated to establish policies, procedures and control systems to comply with the rule realistic for small institutions. If not, what number is hours would be more appropriate?

C. FDIC

The RFA generally requires an agency, in connection with a proposed rule, to prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities.[106] However, an initial regulatory flexibility analysis is not required if the agency certifies that the proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The SBA has defined ''small entities'' to include banking organizations with total assets of less than or equal to $850 million.[107] Generally, the FDIC considers a significant economic impact

[100] 12 U.S.C. 3354.

[101] Under regulations issued by the SBA, a small entity includes a depository institution, bank holding company, or savings and loan holding company with total assets of $850 million or less. *See Small Business Size Standards: Adjustment of Monetary-Based Size Standards, Disadvantage Thresholds, and 8(a) Eligibility Thresholds for Inflation,* 87 FR 69118 (Nov. 17, 2022). Consistent with the General Principles of Affiliation in 13 CFR 121.103, the Board counts the assets of all domestic and foreign affiliates when determining if the Board should classify a Board-supervised institution as a small entity. Small entity information for state member banks is based on Reports of Condition and Income average assets from September 30, 2022. Small entity information for bank holding companies and savings holding companies is based on average assets reflected in June 30, 2022 *Parent Company Only Financial Statements for Small Holding Companies* (FR Y–9SP) data.

[102] For example, the Board has provided guidance to most such entities on use of AVMs. *See Interagency Appraisal and Evaluation Guidelines,* 75 FR 77450, 77468 (Dec. 10, 2010).

[103] To estimate wages, the Federal Reserve reviewed May 2021 estimates for wages (by industry and occupation) from the BLS for credit intermediation and related activities (NAICS 5220A1). To estimate compensation costs associated with the rule. the Federal Reserve uses $99.32 per hour, which is based on the average of the 90th percentile for six occupations adjusted for inflation (2 percent as of Q1 2021), plus an additional 33.4 percent for benefits (based on the percent of total compensation allocated to benefits as of Q4 2020 for NAICS 522: credit intermediation and related activities). The number of hours, 160, to establish policies, procedures and control systems is an estimate based on supervisory experience.

[104] This analysis assumes that the majority of credit decision and securitization determinations are performed at depository institutions. Therefore, only the number of State member depository institutions that are small entities, 472, are included in the calculation of administrative costs. The impact on the majority of small bank holding companies and savings and loan holding companies is expected to be minimal.

[105] 12 U.S.C. 3354.

[106] 5 U.S.C. 601 *et seq.*

[107] The SBA defines a small banking organization as having $850 million or less in assets, where an organization's ''assets are determined by averaging the assets reported on its four quarterly financial statements for the preceding year.'' *See* 13 CFR 121.201 (as amended by the SBA on Nov. 17, 2022, *Small Business Size Standards: Adjustment of Monetary-Based Size Standards, Disadvantage Thresholds, and 8(a) Eligibility Thresholds for Inflation,* published at 87 FR 69118, effective December 19, 2022). In its determination, the ''SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates.'' *See* 13 CFR 121.103. Following these regulations, the FDIC uses an insured depository institution's affiliated and acquired assets, averaged over the preceding four quarters, to determine whether the insured depository institution is ''small'' for the purposes of RFA.

to be a quantified effect in excess of 5 percent of total annual salaries and benefits or 2.5 percent of total noninterest expenses. The FDIC believes that effects in excess of one or more of these thresholds typically represents a significant economic impact for an FDIC-supervised institution.

The FDIC does not believe that the proposed rule, if adopted, would have a significant economic effect on a substantial number of small institutions. However, since some expected effects of the proposed rule are difficult to assess or accurately quantify given current information, the FDIC has included an Initial RFA Analysis in this section.

1. Why Action Is Being Considered

This action would fulfill the statutory mandate in the Dodd-Frank Act that the agencies promulgate regulations to implement quality control standards for AVMs used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.[108]

2. Policy Objectives of, and Legal Basis for, the Proposed Rule

Policy objectives. The overarching policy objectives of this proposed rule are to promote credibility and integrity in the use of AVMs for the purpose of residential mortgage lending valuation, thereby supporting safe and sound banking practices as well as helping ensure compliance with applicable nondiscrimination laws. If adopted, the proposed rule would achieve these objectives by, among other things, incorporating the principles stated in existing guidance [109] through requiring regulated financial institutions to adopt and maintain policies, practices, procedures, and control systems to ensure that AVMs adhere to a set of quality control standards, and by directly linking nondiscrimination law to institutions' AVM policies, practices, procedures, and controls. Further, as discussed above in Section II of the **SUPPLEMENTARY INFORMATION**, the proposal provides institutions the flexibility to tailor their quality control standards for AVMs as appropriate based on the size of the institutions and the risk and complexity of transactions for which they will use covered AVMs.

Legal basis. The Dodd-Frank Act amended title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 by adding a new section 1125 requiring AVMs to adhere to certain quality control standards. Section 1125 directs the FDIC, OCC, FRB, NCUA, CFPB, and FHFA in consultation with the staff of the Appraisal Subcommittee and the Appraisal Standards Board of the Appraisal Foundation, to promulgate regulations to implement quality control standards regarding covered AVMs.[110] The proposed rule would require institutions that engage in certain credit decisions or securitization determinations to adopt policies, practices, procedures, and control systems designed to ensure that AVMs used in determining the value of mortgage collateral secured by a consumer's principal dwelling to adhere to quality control standards designed to: ensure a high level of confidence in the estimates produced by AVMs; protect against the manipulation of data; seek to avoid conflicts of interest; require random sample testing and reviews; and account for any other such factor that the agencies determine to be appropriate. The agencies exercised their statutory authority to propose a fifth quality control standard that would require institutions to adopt policies, practices, procedures, and control systems to ensure that AVMs adhere to quality control standards designed to assure compliance with applicable nondiscrimination laws.

3. Initial Regulatory Flexibility Act Analysis

A description and an estimate of the number of small institutions to which the proposed rule will apply. As of December 31, 2022, there were 3,038 FDIC-supervised institutions, and 2,356 of them were small institutions for the purposes of the RFA.[111] Of these, 2,284 FDIC-supervised small institutions reported a non-zero value for mortgagees on their books.[112] Therefore, the FDIC estimates that 2,284 small institutions could be subject to the proposed rule. The FDIC lacks data on the number of small FDIC-supervised institutions that use AVMs for their mortgage originations. Subject matter experts believe that up to approximately 10 percent of all FDIC-supervised institutions currently use an AVM for mortgage origination decisions, loan modification decisions, and securitization decisions covered by the proposed rule. However, based on supervisory experience, these experts believe a smaller percentage of small FDIC-supervised institutions use AVMs because they believe AVM use is strongly positively correlated with institution size.

Expected Effects. The costs and benefits discussed in this section apply to any small FDIC-supervised institution that would be directly subject to the proposed rule, in particular the 2,284 FDIC-supervised small institutions estimated to be affected by the proposed rule.

Costs. The proposed rule would, if adopted, generally reflect existing Guidelines, supervisory expectations, and statutory obligations regarding the use of AVMs by supervised institutions. As mentioned, since 2010, the FDIC has provided supervisory Guidelines on the use of AVMs by its regulated institutions.[113] The FDIC believes the covered institutions [114] using AVMs, including small institutions, have considered the Guidelines in developing policies, procedures, practices, and control systems, and therefore should also be consistent with the proposed rule's quality control standards 1 through 4. This belief is supported by a review of ten years of FDIC bank examination reports, which revealed that just 0.2 percent of the examinations flagged shortcomings in AVM management practices.[115] This suggests that the labor hours required to implement the four quality control standards would be relatively modest.

The fifth quality control standard is consistent with existing applicable nondiscrimination laws. For example, the ECOA and its implementing Regulation B, bar discrimination on a prohibited basis in any aspect of a credit

[108] The legal basis is described in item (2) below.

[109] The guidance is discussed below. It consists of FDIC guidance on appraisals and evaluation and FDIC guidance on model risk.

[110] 12 U.S.C. 3354(a) through (b).

[111] Based on Call Reports data as of December 31, 2022.

[112] Based on Call Reports data as of December 31, 2022. The variable LNRERES represents balances for 1–4 family residential real estate loans.

[113] The FDIC provides guidance on the use of AVMs by their regulated institutions in Appendix B to the Interagency Appraisal and Evaluation Guidelines (''Guidelines'') (75 FR 77450, Dec. 10, 2010). The Guidelines advise that institutions should establish policies, practices, and procedures governing the selection, use, and validation of AVMs, including steps to ensure the accuracy, reliability, and independence of an AVM. In addition, the FDIC has issued guidance on model risk management practices (Model Risk Guidance) that provides supervisory guidance on validation and testing of computer-based financial models (FDIC FIL–22–2017, dated June 7, 2017). *See generally* Section I.A. of **SUPPLEMENTARY INFORMATION**.

[114] The term ''covered institutions'' refers to financial institutions that would be subject to the proposed rule.

[115] The search of nearly 22,000 FDIC Reports of Examination from June 2011 to June 2021 revealed just 44 instances of a flag indicating an institution's AVM use or management practices needed to improve. Therefore, 99.8 percent of the examination reports do not mention AVM practices and imply satisfactory practices (or no AVM use).

transaction.[116] Similarly, the Fair Housing Act [117] prohibits unlawful discrimination in all aspects of residential real estate-related transactions, including valuations of residential real estate. However, the FDIC has not previously issued guidance or regulations that directly address nondiscrimination laws as it relates to expected or required AVM policies, procedures, practices, and controls. As a result, some covered institutions may not have fully integrated nondiscrimination laws directly into their AVM policies and risk management practices.

As mentioned, the FDIC lacks information on the labor hours and costs that would be incurred by covered institutions to comply with the proposed rule. Therefore, it assumes that small FDIC-supervised institutions would expend 120 labor hours, on average, to comply with the proposed rule during the first year of implementation, and 40 labor hours, on average, in each successive year. This estimate assumes that in the first year, institutions would need to review and understand the implications of the newly enacted rule, conduct a review of their own policies, practices, procedures, and controls for their consistency with the rule, identify any deficiencies, and take corrective actions as needed. In the second year, the institutions' expected costs would be lower on average, as they limit their actions to primarily reviewing and maintaining their compliance.

This analysis subdivides the assumed compliance-related average labor hours spent by covered institutions into two types: (1) burdens under the Paperwork Reduction Act (PRA), and (2) those for non-PRA compliance activities. For PRA burdens, based on supervisory experience the agency assumes that on average, covered FDIC-supervised small institutions using AVMs for originations or modifications would spend 40 hours in the first year and 5 hours in each subsequent year to meet the recordkeeping requirements.

The FDIC believes non-PRA requirements may impose additional burdens on small institutions. For the first four quality control standards, these requirements may include, for example, back-testing of AVM outputs relative to property sale prices to understand the degree of confidence they merit, and the development and implementation of safeguards against data manipulation. The agency believes covered small institutions' additional non-PRA compliance activities that are attributable to the proposed rule would be relatively modest for the first four quality control standards, largely because the 2010 Guidelines already encourage them to conduct such activities. Covered small institutions may initially expend greater levels of effort to comply with the fifth quality control standard. The FDIC lacks data on the time required by the institutions to develop and implement the nondiscrimination quality control standard.

Based on supervisory experience and subject matter expertise, the FDIC assumes that all non-PRA compliance activities would average 80 hours per institution in the first year of the proposed rule's adoption and 35 hours in subsequent years. Summing assumed burden hours for both PRA (recordkeeping) activities and non-PRA activities associated with the proposed rule, the FDIC estimates that average first year compliance labor hours per covered institution would equal 120 (40 PRA + 80 non-PRA), and second year compliance labor hours would equal 40 (5 PRA + 35 non-PRA). These combined compliance labor hours represent total estimated regulatory burden hours attributable to the proposed rule.

This method multiplies the assumed average number of hours per year required to comply with the proposed rule by the weighted average estimated total compensation rate for each labor category expected to be involved in associated activities.[118] The resulting product represents the cost estimate.

The FDIC lacks access to data on the number of small FDIC-supervised institutions that use AVMs for mortgage originations or loan modifications for owner-occupied residential real estate, making it difficult to estimate reliably the AVM use rates by covered small institutions. Therefore, this illustrative exercise presents three sets of potential cost figures. An upper-bound estimate assumes that all small FDIC-supervised institutions that have residential real estate loan balances use an AVM. A second estimate assumes that 10 percent of small FDIC-supervised institutions with mortgage balances use an AVM (an intermediate estimate is also presented). These assumed AVM use rates exceed the expected rates for small institutions, according to subject matter experts who suggest that only a small fraction use them in practice. Therefore, the FDIC believes that the resulting range of cost estimates likely tends to overestimate potential compliance costs.

The analysis assumes the current number of FDIC-supervised small institutions with residential mortgage lending activity (2,284) is representative of the number of covered institutions in the year of implementation and in successive years. The aggregate estimated compliance costs would span the range from (assuming a 10 percent AVM use rate) $2.6 million in the first year and $0.9 million [119] in the second, to $26.4 million in the first year and $8.8 million [120] in successive years (assuming 100 percent AVM adoption). An intermediate assumed 35 percent AVM use rate would generate estimated first-year costs of $9.2 million and subsequent year costs of $3.0 million.[121]

Further analysis shows that the estimated costs described above would not impose a significant economic impact on a substantial number of small institutions. The method estimates the average cost per institution by multiplying the assumed number of labor hours in each year by the estimated weighted average hourly labor cost rate. This yields the average costs per institution in year 1 (approximately

[116] 15 U.S.C. 1691(a) (prohibiting discrimination on the basis of race, color, religion, national origin, sex or marital status, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act); *see also* 12 CFR part 1002.

[117] 42 U.S.C. 3605 (prohibiting discrimination because of race, color, religion, national origin, sex, handicap, or familial status in residential real estate-related transactions); 42 U.S.C. 3605(b)(2) (defining ''real estate-related transactions'' to include the ''selling, brokering, or appraising of residential real property''); *see also* 24 CFR part 100.

[118] The assumed distribution of occupation groups involved in the actions taken by institutions in response to the proposed rule in year 1 include Financial Analysts (40 percent of hours), Compliance Officers (40 percent), Lawyers (15 percent), and Executives and Managers (5 percent). In year 2 and beyond, the assumed distribution is Financial Analysts (50 percent of hours), Compliance Officers (40 percent), Lawyers (5 percent), and Executives and Managers (5 percent). These combinations of occupations results in an overall estimated hourly total compensation rate of $96.57. This average rate is derived from the BLS' Specific Occupational Employment and Wage Estimates, and BLS' Cost of Employee Compensation data.

[119] Calculations are as follows. Lower estimate: Year 1: $2.6 million = 274,080 hours × $96.57 per hour × 10% AVM use rate. Year 2: $0.9 million = 91,360 hours × $96.57 per hour × 10% use rate.

[120] Upper-bound estimate: Year 1: $26.4 million = 274,080 hours × $96.57 per hour × 100% AVM use rate. Year 2: $8.8 million = 91,360 hours × $96.57 per hour × 100% use rate.

[121] Year 1: $9.2 million = 274,080 hours × $96.57 × 35% use rate. Year 2: $3.0 million = 91,360 hours × $96.57 × 35% use rate. The 35 percent assumed AVM use rate is based on internal analysis of 2021–22 Y–14M data by the FRB and applies to large institutions not regulated by the FDIC. Under the assumption that AVM use rates are strongly positively correlated with institution size, this analysis expects this use figure substantially exceeds the actual rate applicable to FDIC-supervised small institutions.

$11,600) and year 2 (approximately $3,900).[122] The method compares these average costs to each covered institution's annual labor costs and annual non-interest expenses to ascertain whether they may face substantial economic impacts. Year 1 estimated average costs exceed the 5 percent threshold of annual salaries and benefits for 11 (0.48 percent) of the institutions, and year 2 average costs do not surpass the threshold for any of the institutions. Similarly, year 1 estimated average costs top the 2.5 percent threshold of annual noninterest expenses for 11 (0.48 percent) of the institutions, and year 2 average costs do not exceed the threshold for any of the institutions.

The compliance costs incurred by any one covered institution is likely to vary with the volume of covered AVM activity, the degree to which current AVM compliance activities differ from the robust quality control standards in the proposed rule, or the usage of in-house or third-party AVM service providers.

Benefits. If adopted, the proposed rule would confer public benefits by promoting the credibility and integrity of residential real estate valuations used by covered institutions, thereby supporting their safe and sound operations, and helping ensure that the use of AVMs by institutions is consistent with nondiscrimination laws. These benefits cannot be reliably quantified by the FDIC.

These benefits are predicated on the premise that some institutions would enhance their AVM policies, practices, procedures, and controls in response to the proposal's first four quality control standards, despite most institutions already generally following the principles in existing Guidelines. At the same time, the fifth standard may be more likely to generate changes in institutions' policies and procedures and potential associated benefits, than their responses to the first four standards. Generally, to the extent the proposal drives actions that result in more accurate and credible AVM valuations of residential real estate, it may contribute to more efficient underwriting, lending decisions, and risk management among covered institutions. Such effects may be derived through multiple channels, for example:

—*Improved risk information and its impacts:* Improved valuation accuracy would be expected to result in more precise residential property credit risk assessment and pricing. Generally, valuation error, whether generated by an AVM or appraiser, may reduce the precision of risk measurement and pricing, for instance, by distorting loan-to-value (LTV) ratios. This misvaluation affects both the immediate transaction and the downstream users of valuation data to inform loan decisions, valuations of comparable properties, and default risk estimation.[123] More accurate risk information would be expected to enhance loan performance [124] and reduce loss-given-default [125] by more tightly matching loan decisions and terms to actual risk exposures. In the aggregate, more accurate risk information may promote the safety and soundness of the financial system by reducing the likelihood of large negative asset valuation shocks and by enhancing economy-wide mortgage default estimates.[126] For example, research identifies flawed home appraisals as a contributor to the 2008 financial crisis.[127]

—*Potentially more equitable mortgage lending outcomes.* Despite statutory obligations requiring nondiscrimination in all aspects of residential real estate transactions, including property valuations, preliminary research continues to find evidence of disparities in residential property values along racial and ethnic lines,[128] mortgage approval rates, and lending terms.[129] Additionally, research suggests that appraised values that more frequently result in valuations below sales contract prices in minority neighborhoods may play a role in disparities for housing-related outcomes.[130]

Imprecision in AVM results may contribute to the propagation of racial and ethnic disparities through two channels. First, AVMs using comparable sales as inputs may include sale prices

[122] The estimated average cost per institution is the same for all assumed AVM use rates.

[123] *See* Calem et al. (2021). Calem, Paul S., Lauren Lambie-Hanson, Leonard I. Nakamura, and Jeanna H. Kenney, 2021, ''Appraising Home Purchase Appraisals.'' *Real Estate Economics* 49: 134–168.

[124] Agarwal et al. (2015) and Lacour-Little and Malpezzi (2003) find evidence that inaccurate collateral valuations are associated with increased loan default rates. Agarwal, Sumit, Itzhak Ben-David, and Vincent Yao, 2015, ''Collateral Valuation and Borrower Financial Constraints: Evidence from the Residential Real Estate Market.'' *Management Science* 61: 2220–2240. Lacour-Little, Michael and Stephen Malpezzi, 2003, ''Appraisal Quality and Residential Mortgage Default: Evidence from Alaska.'' *Journal of Real Estate Finance and Economics* 27: 211–233.

[125] Carillo et al. (2022) find evidence that larger markups in home purchase transactions are associated with greater losses to lenders, conditional on loan default. Carillo, Paul E., William M. Doerner, and William D. Larson, 2022, ''House Price Markups and Mortgage Defaults.'' *Journal of Money, Credit, and Banking* (online early view).

[126] Carillo et al. (2022) argue that LTV miscalculation can reduce the reliability of aggregate default estimates.

[127] *See* Ben-David (2011), Nakamura (2010), Eriksen (2019). Ben-David, Itzhak, 2011, ''Financial Constraints and Inflated Home Prices during the Real Estate Boom.'' *American Economic Journal: Applied Economics* 3: 55–87. Eriksen, Michael D., Hamilton B. Fout, Mark Palim, and Eric Rosenblatt, 2019, ''The Influence of Contract Prices and Relationships on Appraisal Bias.'' *Journal of Urban Economics* 111: 132–143.

[128] The average value of single-family homes in majority White communities ($424,810) in the U.S. was more than double that of single-family homes in majority Black ones ($169,855) in 2018. Neal, Michael, Sarah Strochak, Linna Zhu, and Caitlin Young, 2020, ''How Automated Valuation Models Can Disproportionately Affect Majority Black Neighborhoods.'' Urban Institute Housing Finance Policy Center.

[129] Analysis of data from the Federal Housing Administration and from the GSEs shows that mortgage loan interest rates for home purchases charged by lenders to equivalent-risk minority borrowers have been persistently elevated relative to rates for non-minority borrowers, especially in high minority share neighborhoods. Bartlett, Robert, Adair Morse, Richard Stanton, and Nancy Wallace, 2022, ''Consumer Lending Discrimination in the Fintech Era.'' *Journal of Financial Economics* 143: 30–56. Research suggests that elevated loan denial rates among Black borrowers is largely explained by differences in applicant risk characteristics and other underwriting factors but still estimates a 2 percentage point greater denial rate for Black applicants after controlling for them. Bhutta, Neil, Aurel Hizmo, and Daniel Ringo, 2022, ''How Much Does Racial Bias Affect Mortgage Lending? Evidence from Human and Algorithmic Credit Decisions.'' Finance and Economics Discussion Series 2022–067. Federal Reserve Board.

[130] Research by Freddie Mac found that 7 percent of appraisals in majority White census tracts had appraisal values below sales contract prices, while majority Black tracts had 12 percent, and majority Latino tracts had 15 percent of appraisal values below contract prices. At the individual borrower level, it showed that 6 percent of White applicants' appraisal values fell below their sales contract prices, while this occurred for 8 percent of Black applicants, and 9 percent of Latino applicants. Freddie Mac, 2021, ''Racial and Ethnic Valuation Gaps in Home Purchase Appraisals.'' Economic and Housing Research Note. Studies of appraisal valuation differences by race for home refinancing find smaller gaps. Controlling for unobserved factors across groups, Pinto and Peter (2022) estimate that appraised values for refinancing for Black homeowners is 0.5 percent lower than for Whites for comparable properties within the same Census tract. Using their preferred valuation metric, Ambrose, et al. (2023) find that appraisals for refinancings discount the value of Black-owned homes by 4 percent and the value of Hispanic-owned homes by 2 percent, relative to the valuations of White-owned homes. Pinto, Edward and Tobias Peter, 2022, ''How Common is Appraiser Racial Bias—An Update.'' American Enterprise Institute Housing Center. Ambrose, Brent, James Conklin, N. Edward Coulson, Moussa Diop, and Luis Lopez, 2023, ''Do Appraiser and Borrower Race Affect Mortgage Collateral Valuation?'' SSRN working paper. Research by Fout and Yao (2016) shows that low appraisals substantially increase the likelihood of lower sales prices (from 8 percent for all other appraisals to 51 percent for significantly low appraisals) and delayed/cancelled home sales (from 25 percent to 32 percent). Fout, Hamilton and Vincent Yao, 2016, ''Housing Market Effects of Appraising Below Contract.'' Fannie Mae white paper.

that were below original contract prices due in part to prior appraisals that more commonly undervalue homes in minority communities. Second, less precise AVM valuations in these communities may influence institutions' credit decisions and lending terms to account for the associated risk, potentially making it more difficult for borrowers to obtain financing. Publicly available research on AVM valuation results in minority communities is limited. This preliminary research demonstrates that AVM home valuations in predominantly Black neighborhoods have persistently exhibited substantially greater percentage error rates than AVM valuations in predominantly White neighborhoods.[131] To the extent that the proposed rule fosters actions by covered small institutions that result in more accurate AVM home valuations, this may help to mitigate the potential role of AVMs in persistent disparities in home valuations and their associated impacts.

Overall, the FDIC expects the benefits outlined above, if realized, to contribute to the safety and soundness of the financial system, the institutions, and to the well-being of their customers.

4. An Identification, to the Extent Practicable, of all Relevant Federal Rules Which May Duplicate, Overlap With, or Conflict With the Proposed Rule

The FDIC has not identified any likely duplication, overlap, and/or potential conflict with this proposed rule and any other Federal rule.

5. A Description of Any Significant Alternatives to the Proposed Rule That Accomplish its Stated Objectives.

The FDIC considered the alternative of not including the nondiscrimination element of the proposed rule. However, the FDIC considers the proposed rule to be a more appropriate alternative because research continues to find evidence of disparities in residential property values along racial and ethnic lines, mortgage approval rates and lending terms, despite existing statutory obligations that prohibit discrimination.[132] The ECOA and its implementing Regulation B, bar discrimination on a prohibited basis in any aspect of a credit transaction. Similarly, the Fair Housing Act prohibits unlawful discrimination in all aspects of residential real estate-related transactions, including appraisals of residential real estate. However, preliminary research has demonstrated that AVM home valuations in predominantly Black neighborhoods have persistently exhibited substantially greater percentage error rates than those in predominantly White neighborhoods.[133] Therefore, the FDIC considers the proposed rule to be an appropriate alternative because it establishes a required quality control standard that may foster ongoing and consistent review of AVMs and their output for imprecision or bias.

The FDIC invites comments on all aspects of the supporting information provided in this RFA section. In particular, would this proposed rule have any significant effects on small institutions that the FDIC has not identified?

D. NCUA

The RFA generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment, unless the agency certifies it will not have a *significant* economic impact on a *substantial* number of small entities.[134]

The RFA establishes terms for various subgroups that potentially qualify as a ''small entity''—including ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [135] Federally insured credit unions (FICUs), as not-for-profit enterprises, are ''small organizations,'' within the broader meaning of ''small entity.'' Moreover, the RFA permits a regulator (such as the NCUA) to sharpen the definition of ''small organization'' as appropriate for agency activities—provided that definition is subjected to public comment and published in the **Federal Register**.[136] The NCUA's Interpretive Ruling and Policy Statement (IRPS) 15–1 defined ''small entity'' as any FICU with less than $100 million in assets.[137] IRPS 15–1 (with this definition) was published in the **Federal Register**, and the NCUA solicited and reviewed public comments on this definition.[138]

As of December 31, 2022, there were 4,760 FICUs, of which 2,981 (62.6 percent) qualified as ''small entities'' by holding fewer than $100 million in assets.[139] For reasons noted below, the NCUA does not believe the proposed regulatory amendments will have a *significant* economic impact on a *substantial* number of small entities. That said, because most FICUs are small entities and some rule effects are difficult to assess *ex ante,* the NCUA opted to conduct an Initial Regulatory Flexibility Act Analysis.

1. Why Action Is Being Considered

The proposed rule would fulfill the statutory mandate in the Dodd-Frank Act requiring agencies to promulgate quality-control standards for AVMs used by mortgage originators and secondary-market issuers to value principal dwellings used as collateral.

2. Policy Objectives of, and Legal Basis for, the Proposed Rule

The NCUA is proposing the rulemaking to: (1) promote credit union safety and soundness by enhancing the integrity of collateral valuation for residential mortgage lending; and (2) help ensure credit unions comply with all applicable nondiscrimination laws. The legal basis for this rule is section 1125 of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as added by the Dodd-Frank Act—which directs covered agencies (in consultation with the staff of the Appraisal Subcommittee and Appraisal Standards Board of the Appraisal Foundation) to promulgate regulations with AVM quality-control standards.[140] The statute charges the NCUA with enforcing the regulations with respect to financial institutions, defined in Title XI to include Federally

[131] Neal, et al. (2020) and Zhu, Linna, Michael Neal, and Caitlyn Young, 2022, ''*Revisiting Automated Valuation Model Disparities in Majority-Black Neighborhoods, New Evidence Using Property Condition and Artificial Intelligence.*'' Urban Institute Housing Finance Policy Center. However, the studies find the absolute error magnitudes are generally similar across neighborhoods of different racial and ethnic makeups.

[132] *See* Neal, et al. (2020), Ambrose, et al. (2023), Bartlett, et al. (2022), and Bhutta, et al. (2022).

[133] Neal, et al. (2020) and Zhu, et al. (2022).

[134] 5 U.S.C. 601 *et seq.*

[135] 5 U.S.C. 601.

[136] 5 U.S.C. 601(4).

[137] 80 FR 57512 (Sept. 24, 2015).

[138] IRPS 15–1 was preceded by IRPS 81–4, which defined ''small entity'' as any FICU with fewer than $1 million in assets (46 FR 29248 (June 1, 1981)). The NCUA Board updated the definition in 2003 to include FICUs holding fewer than $10 million in assets with IRPS 03–2 (68 FR 31949 (May 29, 2003)). In 2013, IRPS 13–1 increased the threshold to under $50 million in assets (78 FR 4032 (Jan. 18, 2013)). In addition, the Board pledged to review the RFA threshold after two years and thereafter on a three-year cycle, as part of its routine cycle of regulatory review.

[139] These figures come from the *Quarterly Credit Union Data Summary 2022 Q4,* pages i-iii, available at: *https://ncua.gov/files/publications/analysis/quarterly-data-summary-2022-Q4.pdf.* The *Data Summary,* in turn, is compiled using mandatory quarterly 5300 (*i.e.,* call report) and Profile submissions from supervised credit unions.

[140] 12 U.S.C. 3354.

insured credit unions, for which the NCUA is the primary Federal supervisor.[141]

3. Description and Estimate of the Number of Small Institutions Subject to Proposed Rule

The proposed rule would apply to FICUs relying on AVMs in their residential mortgage-lending decisions. Year-end 2022 data indicate 1,876 small-entity FICUs held residential real estate loans (1st or junior liens).[142]

The NCUA does not currently require supervised credit unions to note in their quarterly data submissions whether AVMs are used in mortgage originations/modifications for owner-occupied residential real estate. In its Initial Regulatory Flexibility Analysis elsewhere in this **SUPPLEMENTARY INFORMATION**, the FDIC notes ''subject matter experts believe that up to approximately 10 percent of all FDIC-supervised institutions currently use an AVM for mortgage origination decisions, loan modification decisions, and securitization decisions covered by the proposed rule.'' Applying this 10-percent estimate suggests the proposed rule could apply to up to 188 ''small entity'' credit unions. The FDIC notes that AVM use is likely strongly positively correlated with institution size. Given the small size of most FICUs, it is likely far fewer than 10 percent use AVMs in residential-mortgage underwriting.[143] To be conservative, the 10-percent is used as an upper bound in the following analysis.

4. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

As noted, since 2010, the OCC, Board, FDIC, and NCUA have provided supervisory guidance on AVM use to regulated institutions in Appendix B to the Interagency Appraisal and Evaluation Guidelines (Guidelines).[144] The Guidelines recommend that institutions establish policies, practices, and procedures governing the selection, use, and validation of AVMs—including steps to ensure accuracy, reliability, and independence.[145] The quality-control standards in the proposed rule are consistent with those in the Guidelines, existing supervisory expectations, and statutory nondiscrimination requirements. The NCUA believes the proposed rule would largely serve to make explicit standards that have been communicated through less formal, more varied means for over ten years. Accordingly, the NCUA anticipates compliance costs for ''small'' credit unions would likely be minimal.

Based on interviews with examiners and supervisors (about experience with rules largely codifying existing practice as well as the specifics of the AVM rule), the NCUA estimates the upper-bound for compliance burden is 33 labor hours annually. The upper-bound estimate for AVM usage of 188 credit unions implies the aggregate compliance burden should not exceed 6,204 hours. To put this figure in context, the 1,876 credit unions under $100 million with residential mortgages on their books paid their employees an average of $32.56 per hours in salary and benefits.[146] The upper-bound compliance estimate of 6,204 hours, therefore, implies an upper bound on aggregate cost of $202,002.[147] Viewed another way, this aggregate cost is only 0.008 percent of total 2022 non-interest expense for ''small'' credit unions.[148] These figures suggest the compliance cost of the proposed rule would not impose a significant burden on a substantial number of ''small entities.'' [149]

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap With, or Conflict With the Proposed Rule

The NCUA has not identified any likely duplication, overlap, or potential conflict with this proposed rule and any other Federal rule.

6. Any Significant Alternatives to the Proposed Rule That Accomplish its Stated Objectives

As noted, the proposed rule implements a statutory mandate, thereby limiting the ability of covered agencies to consider alternatives. That said, agencies did exercise authority provided by section 1125 to include the nondiscrimination quality-control factor (given continued evidence of disparities in residential property lending terms along racial and ethnic lines). Further, covered agencies determined this factor should impose little additional burden, given that institutions have a preexisting obligation to comply with all Federal law, including Federal nondiscrimination laws.[150]

The NCUA invites comments on all aspects of the supporting information provided in this RFA section. The NCUA is particularly interested in comments on any significant effects on small entities that the agency has not identified.

E. CFPB

The RFA [151] generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements. These analyses must ''describe the impact of

[141] *See* 12 U.S.C. 3350(7).

[142] At year-end 2022, median asset size for commercial banks was $324.7 million—compared with $53.6 million for credit unions. Moreover, as noted, 62.6 percent of credit unions held fewer than $100 million in assets; the comparable year-end 2022 figure for commercial banks was 16.2 percent.

[143] Discussions with NCUA examiners and supervisors supported the notion 10 percent is an extreme upper bound.

[144] *See supra,* note 3. The Guidelines were adopted after notice and comment.

[145] Because such a small percentage of credit unions actively relied on AVMs at the time, written NCUA guidance was not as detailed as that provided by the banking agencies. Nonetheless, expectations for safe-and-sound use have been conveyed through the supervisory process to FICUs employing AVMs in residential mortgage lending.

[146] This figure was obtained by dividing 2022 total compensation expense for the 1,876 credit unions by the product of full-time equivalent employees (17,115), 52 weeks per years, and 40 hours per week.

[147] There are other good reasons to believe 6,204 hours in an upper bound. The proposed rule should, for example, ease compliance with existing supervisory guidance/expectations by making the exact ''rules of the game'' more explicit. In theory, this applies to all covered institutions. But, given the small size of credit unions—the median number full-time equivalent employees for the 1,876 ''small entities'' with residential mortgages at year-end 2022 was *seven*—time savings from any reduction in supervisory ambiguity are particularly valuable. Moreover, following the now explicit guidance should result in fewer safety-and-soundness and fair-lending issues (which are particularly burdensome for small credit unions to address because of thin staff).

[148] Viewed still another way, $202,002 is less than one-third of the standard deviation of total non-interest expense for the 1,876 small credit unions.

[149] Of course, estimates of a modest impact based on central tendency do not exclude the possibility the compliance costs will prove meaningful for some small credit unions. The NCUA believes, however, additional costs in these cases will mostly reflect the need to correct safety-and-soundness or compliance deficiencies now in sharper relief because of increased supervisory focus on AVMs—not the rule *per se.*

[151] 5 U.S.C. 601 *et seq.*

[152] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposed rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of SBA regulations and reference to the NAICS classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

the proposed rule on small entities.'' [152] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[153] If it will have such an impact, the CFPB is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[154] The CFPB has not certified that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the CFPB convened and chaired a SBREFA Panel to consider the impact of the proposed rule on small entities that would be subject to that rule and to obtain feedback from representatives of such small entities. The SBREFA Panel for this rulemaking is discussed in part III of the **SUPPLEMENTARY INFORMATION**. The CFPB is also publishing an IRFA. Among other things, the IRFA estimates the number of small entities that will be subject to the proposed rule and describes the impact and regulatory burden of that rule on those entities. The IRFA for this rulemaking follows this discussion.

Section 603(b) of the RFA sets forth the required elements of the IRFA. Section 603(b)(1) requires the IRFA to contain a description of the reasons that the agency is considering action.[155] Section 603(b)(2) requires a succinct statement of the objectives of, and the legal basis for, the proposed rule.[156] The IRFA further must contain a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.[157] Section 603(b)(4) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for the preparation of the report or record.[158] In addition, the CFPB must identify, to the extent practicable, all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule.[159] Furthermore, the CFPB must describe any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.[160] Finally, as amended by the Dodd-Frank Act, RFA section 603(d) requires that the IRFA include a description of any projected increase in the cost of credit for small entities, a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any increase in the cost of credit for small entities (if such an increase in the cost of credit is projected), and a description of the advice and recommendations of representatives of small entities relating to the cost of credit issues.[161]

1. Description of the Reasons Agency Action Is Being Considered

As discussed in part I of the **SUPPLEMENTARY INFORMATION**, section 1473(q) of the Dodd-Frank Act amended title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 to add a new section 1125. Section 1125 directs the agencies to promulgate regulations for quality control standards for AVMs, which are ''any computerized model used by mortgage originators and secondary market issuers to determine the collateral worth of a mortgage secured by a consumer's principal dwelling.'' [162] Specifically, section 1125 requires that AVMs meet quality control standards designed to ensure a high level of confidence in the estimates produced by AVMs; protect against the manipulation of data; seek to avoid conflicts of interest; require random sample testing and reviews; and account for any other such factor that the agencies determine to be appropriate.

The proposed rule effectuates Congress's mandate to the agencies to adopt rules to implement quality control standards for AVMs. For a further description of the reasons agency action is being considered, see the background discussion for the proposed rule in part I of the **SUPPLEMENTARY INFORMATION**.

2. Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The objectives of the proposed rule include protecting consumers and protecting Federal financial and public policy interests in real estate related transactions. To achieve these objectives, the proposed rule would require mortgage originators and secondary market issuers to adopt policies, practices, procedures, and control systems to ensure that covered AVMs adhere to quality control standards designed to meet specific quality control factors. The legal basis for the proposed rule is section 1125 of title XI; section 1125 was established by section 1473(q) of the Dodd-Frank Act.[163]

In addition to the first four statutory factors, section 1125 provides the agencies with the authority to account for any other such factor that the agencies determine to be appropriate.[164] Based on this authority, the agencies propose to include a fifth factor that would require mortgage originators and secondary market issuers to adopt policies, practices, procedures, and control systems to ensure that covered AVMs adhere to quality control standards designed to comply with applicable nondiscrimination laws.

The objectives of, and legal basis for, the proposed rule are further discussed in parts I and II of the **SUPPLEMENTARY INFORMATION**.

3. Description of and, Where Feasible, Provision of an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

A ''small business'' is determined by application of SBA regulations in reference to the North American Industry Classification System (NAICS) classification and size standards.[165] Under such standards, the CFPB identified three categories of small nondepository entities that may be subject to the proposed provisions: (1) real estate credit companies; (2) secondary market financing companies; and (3) other activities related to credit intermediation (which includes mortgage loan servicers).

The following table summarizes the CFPB's estimate of the number and industry of entities that may be affected by the proposed rule:

[153] 5 U.S.C. 605(b).

[154] 5 U.S.C. 609.

[155] 5 U.S.C. 603(b)(1).

[156] 5 U.S.C. 603(b)(2).

[157] 5 U.S.C. 603(b)(3).

[158] 5 U.S.C. 603(b)(4).

[159] 5 U.S.C. 603(b)(5).

[160] 5 U.S.C. 603(c).

[161] 5 U.S.C. 603(d)(1); Dodd-Frank Act section 1100G(d)(1), 124 Stat. 2112.

[162] 12 U.S.C. 3354(d).

[163] Public Law 111–203, 124 Stat. 1376, 2198 (2010) (codified at 12 U.S.C. 3354).

[164] 12 U.S.C. 3354(b).

[165] The current SBA size standards are found on SBA's website, Small Bus. Admin., *Table of size standards* (Dec. 19, 2022), *https://www.sba.gov/document/support-table-size-standards.*

TABLE A—ESTIMATED NUMBER OF SMALL ENTITIES BY INDUSTRY

NAICS	Industry	SBA small entity threshold	Estimate total entities in 2017	Estimate number of small entities in 2017	Estimate number of small entities in 2022
522292	Real Estate Credit	$41.5m	3,289	2,904	3,672
522294	Secondary Market Financing	41.5m	115	106	134
522390	Other Activities Related to Credit Intermediation	22.0m	566	566	716
Column Total			3,970	3,576	4,521

Note: *See* footnote 148 for methodology to extrapolate 2017 numbers to 2022.
Source: 2017 County Business Patterns and Economic Census (Release Date: 5/28/2021).

In developing these estimates, the CFPB chose assumptions that would likely overcount the number of small entities and explains this reasoning in detail herein. Thus, the true number of small entities is likely to be less than the estimates reported. The following paragraphs describe the categories of entities that the CFPB expects would be affected by the proposed rule.

Real Estate Credit companies (NAICS 522292). This industry encompasses establishments primarily engaged in lending funds with real estate as collateral, including mortgage companies and real estate credit lenders. Economic Census data states that there were 3,289 nondepository institutions (nondepositories) in 2017 that engaged in real estate credit and whose use of AVMs might be covered by the proposed rule. The SBA established a revenue threshold for small entities of average annual receipts of less than $41.5 million. The Economic Census provides data for the number of small entities with less than $40 million and less than $50 million in revenue, but not less than $41.5 million in revenue. Using the conservative threshold of $50 million, the CFPB estimates that about 2,904 of these 3,289 institutions were small entities in 2017. This estimate is most likely an overcount because this NAICS industry also includes firms involved in construction lending, farm mortgages, and Federal land banks, which might not be covered by the proposed rule. Lastly, due to a lack of more recent data in the Economic Census, the CFPB scales up the 2017 estimate by a factor of 1.2643 to obtain a 2022 estimate of 3,672 small entities.[166]

Secondary market financing companies (NAICS 522294). This industry encompasses establishments primarily engaged in buying, pooling, and repackaging loans for sale to others on the secondary market, including collateralized mortgage obligation issuers and real estate mortgage investment conduits. Economic Census data states that there were 115 nondepository secondary market financing companies in 2017 whose use of AVMs might be covered by the proposed rule. This industry has a size standard threshold of less than $41.5 million in average annual receipts. However, the Economic Census only reports breakdowns in number of firms with less than $15 million and less than $100 million in revenue. Using the more conservative threshold of less than $100 million, the CFPB estimates that 106 secondary market financing companies were small entities in 2017. This estimate is most likely an overcount because this NAICS industry also includes firms involved in secondary market financing of student loans and other debt products, which might not be covered by the AVM rule. Lastly, due to a lack of more recent data in the Economic Census, the CFPB scales up the 2017 estimate by a factor of 1.2643 (same as before) to obtain a 2022 estimate of 134 small entities.

Other Activities Related to Credit Intermediation (NAICS 522390). This industry encompasses establishments primarily engaged in facilitating credit intermediation (except mortgage and loan brokerage; and financial transactions processing, reserve, and clearinghouse activities), and includes loan servicing firms. NAICS 522390 is a broader category than the previous two categories discussed in this section. Some examples of business activity in this NAICS industry are check cashing services, loan servicing, money transmission services, payday lending services, and traveler's check issuance services, but only loan servicing would fall under the proposed rule. To account for this broader categorization, using Economic Census data on number of establishments in this NAICS industry broken down by the North American Product Classification System (NAPCS), the CFPB filtered NAICS 522390 by the relevant NAPCS collection codes: (a) Residential Mortgage Loans and (b) Other Secured or Guaranteed Home Loans to Consumers. The filtered count of the number of establishments is 566. However, these data do not provide the number of firms, each of which may consist of one or more establishments. Thus, the CFPB uses the most conservative assumption—that each firm has only one establishment—to estimate the number of firms covered by the proposed rule to be (at most) 566 in 2017. Furthermore, data broken down by firm/establishment size are unavailable, so the CFPB assumes the most conservative extreme that all 566 of these firms are small entities. Lastly, due to a lack of more recent data in the Economic Census, the CFPB scales up the 2017 estimate by a factor of 1.2643 (same as before) to obtain a 2022 estimate of 716 small entities.

Finally, only small entities that themselves, or through or in cooperation with a third-party or affiliate, utilize AVMs in credit decisions or covered securitization determinations would be covered by the rule if finalized as proposed. The remaining small entities might opt for alternative valuation methods not involving AVMs. Due to the lack of data on the usage of AVMs by small entities in credit decisions or covered securitization determinations, the CFPB follows the FDIC and makes the following assumption: the range of AVM usage lies between 10% (lower bound) and 100% (upper bound). Applying this assumption to the estimated total number of small entities results in the estimated range of covered

[166] According to U.S. Bureau of Economic Analysis, ''Gross Output by Industry'' (*https://apps.bea.gov/iTable/?reqid=150&step=2&isuri=1&categories=gdpxind,* accessed 3/8/2023), from 2017Q3 to 2022Q3 (the latest available data at the time of writing), the finance sector (NAICS 52) gross output expanded from $2,836.7 billion to $ 3,586.5 billion, a 26.43 percent increase. Thus, the CFPB scales up the number of entities in 2017 by a factor of 1.2643 and rounds to the nearest whole number.

small entities shown in the following table:

TABLE B—ESTIMATED LOWER AND UPPER BOUNDS OF COVERED SMALL ENTITIES IN 2022

	Lower bound	Upper bound
Est. Number of Covered Small Entities	452	4,521
Assumed Proportion of Small Entities Using AVMs	10%	100%

In summary, the CFPB estimates that between 452 and 4,521 small entities would be covered by the rule if finalized as proposed.

In this analysis, the CFPB also considered including other NAICS categories, most notably ''Mortgage and Nonmortgage Loan Brokers'' (NAICS 522310). This industry includes establishments primarily engaged in arranging loans by bringing borrowers and lenders together on a commission or fee basis. Based on this definition, the CFPB believes that this industry is generally not involved in credit decisions or covered securitization determinations and would not likely be covered by the rule if finalized as proposed.

4. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Would Be Subject to the Requirement and the Type of Professional Skills Necessary for the Preparation of the Report

The proposed rule would not impose new reporting or recordkeeping requirements for CFPB respondents but would impose new compliance requirements on small entities subject to the proposal. The proposed requirements and the costs associated with them are discussed herein.

Entities will likely have to spend time and resources reading and understanding the regulation and developing the required policies, practices, procedures, and control systems for their employees to follow to ensure compliance, in addition to engaging a legal team to review their draft policies, practices, procedures, and control systems. Costs associated with drafting compliance policies, practices, procedures, and control systems are likely to be higher for institutions who use AVMs for a more diverse set of circumstances. Such entities would likely need to tailor guidance for each specific use case. Small entities would also likely have to implement training of staff that utilize AVM output for covered purposes.

Costs to small entities. The CFPB expects that if finalized as proposed, the rule might impose one-time and ongoing costs on small nondepository entities who use AVMs in valuing real estate collateral securing mortgage loans. The CFPB has preliminarily identified three categories of costs that make up the components necessary for a nondepository institution to comply with the proposed rule. Those categories are drafting and developing policies, practices, procedures, and control systems; verifying compliance; and training staff and third parties. Nondepositories would incur the bulk of these costs in the first year. However, the CFPB anticipates that nondepositories would incur some ongoing costs in subsequent years, such as updating policies, practices, procedures, and control systems, continuing review for compliance, and training new staff. Following the FDIC, the CFPB assumes that the ongoing annual costs would be one-third of the one-time first-year costs.

Using the cost methodology outlined in the SBREFA Panel Report, the CFPB estimates that the one-time costs in the first year for each covered small nondepository entity would be the following: $7000 for drafting and developing policies, practices, procedures, and control systems, $10,000 for verifying compliance, and $6000 for training. Thus, the total costs per entity would be $23,000 in the first year and $7667 for each subsequent year.

The CFPB calculates the overall market impact of the proposed rule on small entities by multiplying the costs per entity by the estimated number of covered small entities. The CFPB estimates that the overall market impact of one-time costs in the first year for covered small nondepositories would be between $10,396,000 and $103,983,000. The CFPB estimates that the overall market impact of ongoing costs in each subsequent year for covered small nondepositories would be between $3,465,333 and $34,661,000 per year. The ranges in estimated impact are wide due to uncertainty surrounding the percentage of small entities using AVMs in credit decisions or covered securitization determinations.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

As discussed in the SBREFA Panel Report, the CFPB as well as SERs identified other title XI, TILA, and ECOA laws and implementing regulations related to determining the collateral worth of a mortgage that have potentially duplicative, overlapping, or conflicting requirements with section 1125.[167] Title XI and the prudential agencies' implementing regulations require a licensed or certified appraiser for certain transactions.[168] TILA section 129H [169] and its implementing regulations require lenders to obtain an appraisal by a certified or licensed appraiser—and in some cases two appraisals—for certain higher-risk transactions (termed ''higher-priced mortgage loans'' or ''HPMLs'' in the regulations).[170]

In addition to these Federal laws and regulations requiring a licensed or certified appraiser for various transactions, other Federal laws and regulations broadly address determining the collateral worth of a mortgage, whether using an appraisal, AVM, or other method. For consumer credit transactions secured by a consumer's principal dwelling, TILA section 129E [171] and its implementing regulations require valuation independence by, for example, prohibiting material misrepresentation of property value and conflicts of

[167] CFPB, *Final Report of Small Business Review Panel on the CFPB's Proposals and Alternatives under Consideration for the Automated Valuation Model (AVM) Rulemaking* 37 (May 13, 2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_final-report_2022-05.pdf.*

[168] *See, e.g.,* 12 U.S.C. 3331; 75 FR 77450, 77465 (Dec. 10, 2010); 12 CFR 34.43(a)(1) through (14) (OCC); 12 CFR 225.63(a)(1) through (15) (Board); 12 CFR 323.3(a)(1) through (14) (FDIC); 12 CFR 722.3(a)(1) through (6) (NCUA).

[169] 15 U.S.C. 1639h (added by Dodd-Frank Act section 1471).

[170] CFPB: 12 CFR 1026.35(a) and (c); OCC: 12 CFR part 34, subpart G and 12 CFR part 164, subpart B; Board: 12 CFR 226.43; NCUA: 12 CFR 722.3(a); FHFA: 12 CFR part 1222, subpart A. The FDIC adopted the CFPB's version of the regulations. *See* 78 FR 10368, 10370 (Feb. 13, 2013).

[171] 15 U.S.C. 1639e (added by Dodd-Frank Act section 1472).

interest for persons preparing valuations or performing valuation management functions.[172] Title XI, as amended by the Dodd-Frank Act, provides in part that, ''[i]n conjunction with the purchase of a consumer's principal dwelling, broker price opinions may not be used as the primary basis to determine the value of a piece of property for the purpose of a loan origination of a residential mortgage loan secured by such piece of property.'' [173] ECOA section 701(e) [174] and its implementing regulation, Regulation B, generally require creditors to provide applicants for first-lien loans on a dwelling with copies of written valuations developed in connection with an application.[175]

Moreover, in the SBREFA Outline the CFPB discussed how valuations are subject to other provisions of ECOA and other Federal nondiscrimination laws.[176] For example, ECOA and Regulation B bar discrimination on a prohibited basis in any aspect of a credit transaction.[177] This prohibition extends to using different standards to evaluate collateral,[178] which would include the design or use of an AVM in any aspect of a credit transaction in a way that would treat an applicant differently on a prohibited basis or result in unlawful discrimination against an applicant on a prohibited basis. Similarly, the Fair Housing Act prohibits unlawful discrimination in all aspects of residential real estate-related transactions, including appraisals of residential real estate.[179]

SERs also provided suggestions of other potentially related Federal statutes and regulations. A SER expressly highlighted that the prudential agencies' title XI regulations for residential mortgages set a dollar-based threshold for requiring an appraisal. Another SER stated that many of the prudential agencies' safety and soundness regulations, including liquidity and interest rate risk management regulations, have potential intersections with section 1125. Some SERs also identified other statutes they believe have some potential intersections with section 1125, including the Fair Credit Reporting Act (FCRA),[180] the Gramm-Leach-Bliley Act (GLBA),[181] and HMDA.[182]

The CFPB is evaluating these suggestions and requests comment on them and the extent to which other Federal statutes or regulations might impose duplicative, overlapping, or conflicting requirements with this proposed rule implementing section 1125. The CFPB further requests comment on methods to minimize such conflicts to the extent they might exist.

6. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

In drafting this proposed rule, the CFPB considered a number of alternatives, including those considered as part of the SBREFA process. Many of the alternatives considered would result in greater costs to small entities than would the proposal. For example, the CFPB considered proposing a prescriptive rule with more detailed and specific requirements, and the CFPB considered proposing a rule that would also cover the use of AVMs solely to review completed value determinations (*e.g.,* to review appraisals). Since such alternatives would result in a greater economic impact on small entities than the proposal, they are not discussed here.

The CFPB also considered alternatives that might have resulted in a smaller economic impact on small entities than does the proposal. Some of these alternatives are briefly described and their impacts relative to the proposed provisions are discussed herein.

Coverage of loan modifications and other changes to existing loans. The CFPB considered proposing a rule that would exclude AVMs used in loan modifications not resulting in new mortgage originations. As discussed in part III of the **SUPPLEMENTARY INFORMATION**, during the SBREFA process SERs generally favored that approach. The CFPB understands that the proposed rule's coverage of loan modifications and other changes to existing loans would introduce additional burden to small entities. However, the CFPB has preliminarily determined that this coverage would aid in fulfilling the consumer protection objective of section 1125. For consumers seeking loss mitigation, obtaining an AVM valuation that adheres to the quality control standards in the proposed rule during the loan modification process would be particularly important for their financial decision-making and outcomes, given they are already in financial distress. The CFPB seeks comment on the likely impact of this coverage aspect of the proposed rule on the compliance costs of small entities.

Coverage of credit line reductions or suspensions. The CFPB considered proposing a rule that would not cover AVMs used solely in deciding whether or to what extent to reduce or suspend a home equity line of credit. As discussed in part III of the **SUPPLEMENTARY INFORMATION**, during the SBREFA process SERs discussed balancing the consumer protections of covering credit line reductions or suspensions against the burdens of such regulation. The CFPB understands that the proposed rule's coverage of credit line reductions and suspensions would introduce additional burden to small entities. However, the CFPB has preliminarily determined that this coverage would aid in fulfilling the consumer protection objective of section 1125. Credit line reductions and suspensions impose hardship on consumers, who now face greater credit constraints and reduced financial options. Obtaining an AVM valuation that adheres to the quality control standards in the proposed rule during the credit decision process is particularly important for these consumers, given the potential for improving consumer financial outcomes. The CFPB seeks comment on

[172] CFPB: 12 CFR 1026.42; Board: 12 CFR 226.42; *see* 75 FR 66554 (Oct. 28, 2010) (interim final rule); 75 FR 80675 (Dec. 23, 2010) (correction). TILA section 129E(g)(2) directed the Board to issue an interim final rule. 15 U.S.C. 1639e(g)(2).

[173] Dodd-Frank Act section 1473(r), 124 Stat. 2198–99 (codified at 12 U.S.C. 3355) (adding section 1126 to FIRREA). Under FIRREA section 1126, a ''broker price opinion'' means ''an estimate prepared by a real estate broker, agent, or sales person that details the probable selling price of a particular piece of real estate property and provides a varying level of detail about the property's condition, market, and neighborhood, and information on comparable sales, but does not include an automated valuation model.'' 12 U.S.C. 3355(b).

[174] 15 U.S.C. 1691(e) (amended by Dodd-Frank Act section 1474).

[175] 12 CFR 1002.14.

[176] CFPB, *Small Business Advisory Review Panel for Automated Valuation Model Rulemaking Outline of Proposals under Consideration* 23–25 (2022), *available at https://files.consumerfinance.gov/f/documents/cfpb_avm_outline-of-proposals_2022-02.pdf.*

[177] 15 U.S.C. 1691(a) (prohibiting discrimination on the basis of race, color, religion, national origin, sex or marital status, age (provided the applicant has the capacity to contract), because all or part of the applicant's income derives from any public assistance program, or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act); *see also* 12 CFR part 1002.

[178] *See* Interagency Task Force on Fair Lending, *Policy Statement on Discrimination in Lending,* 59 FR 18266, 18268 (Apr. 15, 1994) (noting that under both ECOA and the Fair Housing Act, a lender may not, because of a prohibited factor, use different standards to evaluate collateral).

[179] 42 U.S.C. 3605 (prohibiting discrimination because of race, color, religion, national origin, sex, handicap, or familial status in residential real estate-related transactions); 42 U.S.C. 3605(b)(2) (defining ''real estate-related transactions'' to include the ''selling, brokering, or appraising of residential real property.''); *see also* 24 CFR part 100.

[180] 15 U.S.C. 1681 *et seq.*

[181] Public Law 106–102, 113 Stat. 1338 (1999).

[182] 12 U.S.C. 2801 *et seq.*

the likely impact of this coverage aspect of the proposed rule on the compliance costs of small entities.

Nondiscrimination quality control factor. The CFPB considered proposing a rule that would not specify a nondiscrimination quality control factor. As discussed in part III of the **SUPPLEMENTARY INFORMATION**, during the SBREFA process, SERs expressed concern regarding the nondiscrimination quality control factor. In particular, SERs noted the impracticality of having small entities assess fair lending performance of AVMs provided by third parties, as well as noting concerns that this nondiscrimination quality control factor potentially duplicates other fair lending regulatory infrastructure. The CFPB understands that the proposed rule's nondiscrimination quality control factor would introduce additional burden to small entities. However, the CFPB has preliminarily determined that this factor would aid in fulfilling the consumer protection objective of section 1125. There is a long history of housing market discrimination in the United States, including misvaluation of property owned by minority consumers, as observed in biases in the appraisal process.[183] Misvaluations limit credit access for minority consumers, potentially leading to worse financial outcomes by hampering home ownership and wealth accumulation among minority consumers.

The CFPB acknowledges that for small entities with a limited volume of AVM valuation observations, detecting discrimination in AVMs may not be feasible. Nevertheless, there are other steps small entities could take towards satisfying the nondiscrimination quality control factor. For example, the SBREFA process described various points in the valuation process where humans interact with AVMs and make decisions regarding AVM usage and application of AVM outputs; having policies, practices, procedures, and control systems in place that ensure such human interactions and decision-making comply with applicable nondiscrimination laws would be feasible for small entities. As another example, in choosing third-party AVM providers, small entities can do research into how providers assess and account for discrimination in their AVMs and opt for providers who have taken such factors into consideration.

The CFPB seeks comment on the likely impact of the nondiscrimination quality control factor of the rule if finalized as proposed on the compliance costs of small entities.

7. Discussion of Impact on Cost of Credit for Small Entities

The CFPB believes that there will be little to no impact on the cost of credit incurred by small entities covered by the proposed rule. Should a covered small entity apply for a business loan, the lender is unlikely to consider that covered small entity's use of AVMs or their compliance with the proposed rule in their credit pricing or credit extension decisions.

During the SBREFA process, the CFPB asked SERs about this possible impact, but they did not provide feedback on how their credit or their lending to small businesses would be affected by the rule. This lack of feedback is consistent with the above assertions.

F. FHFA

The RFA requires that a regulation that has a significant economic impact on a substantial number of small entities, small businesses, or small organizations must include an initial regulatory flexibility analysis describing the regulation's impact on small entities. FHFA need not undertake such an analysis if the Agency has certified that the regulation will not have a significant economic impact on a substantial number of small entities (5 U.S.C 605(b)). FHFA has considered the impact of the proposed rule under the RFA and FHFA certifies that the proposed rule, if adopted as a final rule, will not have a significant economic impact on a substantial number of small entities because the regulation only applies to Fannie Mae and Freddie Mac, which are not small entities for purposes of the RFA.

VI. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The agencies have sought to present the proposed rule in a simple and straightforward manner and invite comment on the use of plain language. For example:

- Have the agencies organized the material to suit your needs? If not, how could they present the rule more clearly?
- Are the requirements in the rule clearly stated? If not, how could the rule be more clearly stated?
- Do the regulations contain technical language or jargon that is not clear? If so, which language requires clarification?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the regulation easier to understand? If so, what changes would achieve that?
- Is this section format adequate? If not, which of the sections should be changed and how?
- What other changes can the agencies incorporate to make the regulation easier to understand?

VII. Riegle Community Development and Regulatory Improvement Act of 1994

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act (RCDRIA),[184] in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions (IDIs), each Federal banking agency must consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, section 302(b) of RCDRIA requires new regulations and amendments to regulations that impose additional reporting, disclosures, or other new requirements on IDIs generally to take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.[185]

The Federal banking agencies note that comment on these matters has been solicited in other sections of this **SUPPLEMENTARY INFORMATION** section and that the requirements of RCDRIA will be considered as part of the overall rulemaking process. The Federal banking agencies invite comments that will further inform the Federal banking agencies' consideration of RCDRIA.

VIII. OCC Unfunded Mandates Reform Act of 1995 Determination

The OCC analyzed the proposed rule under the factors set forth in the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532). Under this analysis, the OCC considered whether the proposed rule includes a Federal

[183] Interagency Task Force on Property Appraisal and Valuation Equity (PAVE), *Action Plan to Advance Property Appraisal and Valuation Equity: Closing the Racial Wealth Gap by Addressing Mis-valuations for Families and Communities of Color* 2–4 (Mar. 2022), *available at https://pave.hud.gov/sites/pave.hud.gov/files/documents/PAVEActionPlan.pdf.*

[184] 12 U.S.C. 4802(a).

[185] 12 U.S.C. 4802.

mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $182 million or more in any one year.[186]

The burden associated with the proposed rule would be limited to reviewing the rule, ensuring that existing practices, procedures, and control systems adequately address the four statutory quality control standards, and adopting policies, practices, procedures, and control systems to ensure that AVMs adhere to quality control standards designed to comply with applicable nondiscrimination laws. The OCC estimates that expenditures to comply with the proposed rule's mandates would be approximately $20.1 million (180 hours × $120 per hour × 931 banks = $20.1 million). For this reason, the OCC has determined that this proposed rule would not result in expenditures by State, local, and Tribal governments, or the private sector, of $182 million or more in any one year. Accordingly, the OCC has not prepared a written statement to accompany this proposal.

IX. NCUA Executive Order 13132 on Federalism

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. This proposed rule would not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. Although the AVM statute and the proposed rule apply to federally insured, state-chartered credit unions, the NCUA does not believe that the rule would change the relationship between the NCUA and State regulatory agencies. The NCUA would anticipate coordinating with State regulatory agencies to implement and enforce the rule after it is adopted as part of its ongoing coordination with these agencies. Accordingly, the NCUA believes that the effect of this change on the states would be limited. The NCUA has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

X. NCUA Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.[187]

XI. Severability

Each of the agencies preliminarily intend that, if any provision of the proposed rule, if adopted as final, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect.

List of Subjects

12 CFR Part 34

Appraisal, Appraiser, Banking, Banks, Consumer protection, Credit, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

12 CFR Part 225

Administrative practice and procedure, Banks, banking, Federal Reserve System, Holding companies, Investments, Reporting and recordkeeping requirements, Securities.

12 CFR Part 323

Banks, banking, Mortgages, Reporting and recordkeeping requirements, Savings associations.

12 CFR Part 722

Appraisal, Appraiser, Credit unions, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

12 CFR Part 741

Credit, Credit Unions.

12 CFR Part 1026

Advertising, Banks, Banking, Consumer protection, Credit, Credit unions, Mortgages, National banks, Reporting and recordkeeping requirements, Savings associations, Truth in lending.

12 CFR Part 1222

Appraisals, Government sponsored enterprises, Mortgages.

[186] The OCC estimates the UMRA inflation adjustment using the change in the annual U.S. GDP Implicit Price Deflator between 1995 and 2022, which are the most recent annual data available. The deflator was 71.300 in 1995 and 129.511 in 2022, resulting in an inflation adjustment factor of 1.82 (129.511/71.300 = 1.816 and $100 million × 1.82 = $182 million).

[187] Public Law 105–277, 112 Stat. 2681 (1998).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Chapter I

Authority and Issuance

For reasons set out in the joint preamble, the Office of the Comptroller of the Currency proposes to amend part 34 of chapter I of title 12 of the Code of Federal Regulations to read as follows:

PART 34—REAL ESTATE LENDING AND APPRAISALS

■ 1. The authority citation for part 34 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.,* 25b, 29, 93a, 371, 1465, 1701j–3, 1828(o), 3331 *et seq.,* 5101 *et seq.,* and 5412(b)(2)(B).

■ 2. Subpart I is added to part 34 to read as follows:

Subpart I—Quality Control Standards for Automated Valuation Models Used for Mortgage Lending Purposes

Sec.

§ 34.220 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to section 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 3354, as added by section 1473(q) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376, 2198 (2010)).

(b) *Purpose and scope.* (1) The purpose of this subpart is to implement the quality control standards in section 3354 of title 12 for the use of automated valuation models in determining the value of collateral in connection with making a credit decision or covered securitization determination regarding a mortgage or mortgage-backed security. This subpart applies to entities regulated by the OCC that are mortgage originators or secondary market issuers.

(2) This subpart does not apply to the use of automated valuation models in:

(i) Monitoring of the quality or performance of mortgages or mortgage-backed securities;

(ii) Reviews of the quality of already completed determinations of the value of collateral; or

(iii) The development of an appraisal by a certified or licensed appraiser.

§ 34.221 Definitions.

As used in this subpart:

(a) *Automated valuation model* means any computerized model used by

mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage.

(b) *Control systems* means the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that are used to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations.

(c) *Covered securitization determination* means a determination regarding:

(1) Whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer; or

(2) Structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.

(d) *Credit decision* means a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage, including a decision whether to extend new or additional credit or change the credit limit on a line of credit.

(e) *Dwelling* means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, factory-built housing, or manufactured home, if it is used as a residence. A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this subpart.

(f) *Mortgage* means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

(g) *Mortgage originator* has the meaning given in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

(h) *Secondary market issuer* means any party that creates, structures, or organizes a mortgage-backed securities transaction.

§ 34.222 Quality control standards.

Mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, must adopt and maintain policies, practices, procedures, and control systems to ensure that automated valuation models used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, the Board proposes to amend part 225 of chapter II of title 12 of the Code of Federal Regulations, as follows:

PART 225—BANK HOLDING COMPANIES AND CHANGE IN BANK CONTROL (REGULATION Y)

■ 3. The authority citation for part 225 is revised to read as follows:

Authority: 12 U.S.C. 1817(j)(13), 1818, 1828(o), 1831i, 1831p–1, 1843(c)(8), 1844(b), 1972(1), 3106, 3108, 3310, 3331–3351, 3354, 3906, 3907, and 3909; 15 U.S.C. 1681s, 1681w, 6801 and 6805.

■ 4. Add subpart O to part 225 as follows:

Subpart O—Quality Control Standards for Automated Valuation Models Used for Mortgage Lending Purposes

Sec.

Subpart O—Quality Control Standards for Automated Valuation Models Used for Mortgage Lending Purposes

§ 225.350 Authority, purpose and scope.

(a) *Authority.* (1) *In general.* This subpart is issued pursuant to section 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 3354, as added by section 1473(q) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376, 2198 (2010)), as well as under the Federal Reserve Act, as amended (12 U.S.C. 221 *et seq.*); the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841 *et seq.*); the Home Owners' Loan Act of 1933 (12 U.S.C. 1461 *et seq.*); section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5365); and the International Banking Act of 1978, as amended (12 U.S.C. 3101 *et seq.*).

(2) Nothing in this part shall be read to limit the authority of the Board to take action under provisions of law other than 12 U.S.C. 3354, including but not limited to action to address unsafe or unsound practices or conditions, or violations of law or regulation, under section 8 of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818).

(b) *Purpose and scope.* (1) The purpose of this subpart is to implement the quality control standards in section 3354 of title 12 for the use of automated valuation models in determining the value of collateral in connection with making a credit decision or covered securitization determination regarding a mortgage or a mortgage-backed security. This subpart applies to entities and institutions regulated by the Board (Board-regulated institutions) that are mortgage originators or secondary market issuers.

(2) This subpart does not apply to the use of automated valuation models in:

(i) Monitoring of the quality or performance of mortgages or mortgage-backed securities;

(ii) Reviews of the quality of already completed determinations of the value of collateral; or

(iii) The development of an appraisal by a certified or licensed appraiser.

§ 225.351 Definitions.

As used in this subpart:

Automated valuation model means any computerized model used by mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage.

Control systems means the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that are used to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations.

Covered securitization determination means a determination regarding:

(1) Whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer; or

(2) Structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.

Credit decision means a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage, including a decision whether to extend

new or additional credit or change the credit limit on a line of credit.

Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, factory-built housing, or manufactured home, if it is used as a residence. A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this subpart.

Mortgage means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

Mortgage originator has the meaning given in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

Secondary market issuer means any party that creates, structures, or organizes a mortgage-backed securities transaction.

§ 225.352 Quality control standards.

Mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, must adopt and maintain policies, practices, procedures, and control systems to ensure that automated valuation models used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

Federal Deposit Insurance Corporation

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the joint preamble, the FDIC proposes to amend part 323 of chapter III of title 12 of the Code of Federal Regulations as follows:

PART 323—APPRAISALS

■ 5. The authority citation for part 323 continues to read as follows:

Authority: 12 U.S.C. 1818, 1819(a) (''Seventh'' and ''Tenth''), 1831p–1 and 3331 *et seq.*

■ 6. Add subpart C to part 323 to read as follows:

Subpart C—Quality Control Standards for Automated Valuation Models Used for Mortgage Lending Purposes

Sec.

§ 323.15 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to section 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 3354, as added by section 1473(q) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1376, 2198 (2010)).

(b) *Purpose and scope.* (1) The purpose of this subpart is to implement the quality control standards in section 3354 of title 12 for the use of automated valuation models in determining the value of collateral in connection with making a credit decision or covered securitization determination regarding a mortgage or mortgage-backed security. This subpart applies to entities regulated by the FDIC that are mortgage originators or secondary market issuers.

(2) This subpart does not apply to the use of automated valuation models in:

(i) Monitoring of the quality or performance of mortgages- or mortgage-backed securities;

(ii) Reviews of the quality of already completed determinations of the value of collateral; or

(iii) The development of an appraisal by a certified or licensed appraiser.

§ 323.16 Definitions.

As used in this subpart:

Automated valuation model means any computerized model used by mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage.

Control systems means the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that are used to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations.

Covered securitization determination means a determination regarding:

(1) Whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer; or

(2) Structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.

Credit decision means a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage, including a decision whether to extend new or additional credit or change the credit limit on a line of credit.

Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, factory-built housing, or manufactured home, if it is used as a residence. A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this subpart.

Mortgage means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

Mortgage originator has the meaning given in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

Secondary market issuer means any party that creates, structures, or organizes a mortgage-backed securities transaction.

§ 323.17 Quality control standards.

Mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, must adopt and maintain policies, practices, procedures, and control systems to ensure that automated valuation models used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 722 and Part 741

Authority and Issuance

For the reasons discussed above in the joint preamble, the NCUA Board proposes to amend 12 CFR parts 722 and 741 as follows:

PART 722—APPRAISALS

■ 7. The authority citation for part 722 continues to read as follows:

Authority: 12 U.S.C. 1766, 1789, and 3331 *et seq.* Section 722.3(a) is also issued under 15 U.S.C. 1639h.

■ 8. Redesignate §§ 722.1 through 722.7 as §§ 722.101 through 722.107 under the following subpart A heading:

Subpart A—Appraisals Generally

Sec.

■ 9. Add subpart B to read as follows:

Subpart B—Quality Control Standards for Automated Valuation Models Used for Mortgage Lending Purposes

Sec.

Subpart B—Quality Control Standards for Automated Valuation Models Used for Mortgage Lending Purposes

§ 722.201 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued pursuant to section 1125 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 3354, as added by section 1473(q) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, 124 Stat. 1375, 2198 (2010)).

(b) *Purpose and scope.* (1) The purpose of this subpart is to implement the quality control standards in section 3354 of title 12 for the use of automated valuation models in determining the value of collateral in connection with making a credit decision or covered securitization determination regarding a mortgage or mortgage-backed security. This subpart applies to credit unions insured by the NCUA that are mortgage originators or secondary market issuers.

(2) This subpart does not apply to the use of automated valuation models in:

(i) Monitoring of the quality or performance of mortgages or mortgage-backed securities;

(ii) Reviews of the quality of already completed determinations of the value of collateral; or

(iii) The development of an appraisal by a certified or licensed appraiser.

§ 722.202 Definitions.

As used in this subpart:

Automated valuation model means any computerized model used by mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage.

Control systems means the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that are used to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations.

Covered securitization determination means a determination regarding:

(1) Whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer; or

(2) Structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.

Credit decision means a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage, including a decision whether to extend new or additional credit or change the credit limit on a line of credit.

Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, factory-built housing, or manufactured home, if it is used as a residence. A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this subpart.

Mortgage means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

Mortgage originator has the meaning given in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

Secondary market issuer means any party that creates, structures, or organizes a mortgage-backed securities transaction.

§ 722.203 Quality control standards.

Mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, must adopt and maintain policies, practices, procedures, and control systems to ensure that automated valuation models used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

PART 741—Requirements for Insurance

■ 10. The authority citation for part 741 is revised to read as follows:

Authority: 12 U.S.C. 1757, 1766(a), 1781–1790, 1790d, 3331 *et seq;* 31 U.S.C. 3717.

■ 11. Revise § 741.203(b) to read as follows:

§ 741.203 Minimum loan policy requirements.

* * * * *

(b) Adhere to the requirements stated in part 722 of this chapter.

* * * * *

CONSUMER FINANCIAL PROTECTION BUREAU

Authority and Issuance

For reasons set out in the joint preamble, the CFPB proposes to amend Regulation Z, 12 CFR part 1026, as follows:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 12. The authority citation for part 1026 is revised to read as follows:

Authority: 12 U.S.C. 2601, 2603–2605, 2607, 2609, 2617, 3353, 3354, 5511, 5512, 5532, 5581; 15 U.S.C. 1601 *et seq.*

Subpart A—General

■ 13. Amend § 1026.1 by adding paragraph (c)(6) to read as follows:

§ 1026.1 Authority, purpose, coverage, organization, enforcement, and liability.

* * * * *

(c) * * *

(6) The requirements of § 1026.42(i) apply to certain persons regardless of whether they are creditors and even if the mortgage, as defined in § 1026.42(i)(2)(v), is primarily for business, commercial, agricultural, or organizational purposes.

* * * * *

■ 14. Amend § 1026.2 by revising paragraph (a)(11) to read as follows:

§ 1026.2 Definitions and rules of construction.

(a) * * *

(11) *Consumer* means a cardholder or natural person to whom consumer credit is offered or extended. However, for purposes of rescission under §§ 1026.15 and 1026.23, the term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person's ownership interest in the dwelling is or will be subject to the security interest. For purposes of § 1026.42(i), the term means a natural person to whom credit is offered or extended, even if the credit is primarily for business, commercial, agricultural, or organizational purposes. For purposes of §§ 1026.20(c) through (e), 1026.36(c), 1026.39, and 1026.41, the term includes a confirmed successor in interest.

* * * * *

■ 15. Amend § 1026.3 by adding paragraph (i) to read as follows:

§ 1026.3 Exempt transactions.

* * * * *

(i) The exemptions in this section are not applicable to § 1026.42(i) (Quality Control Standards for Automated Valuation Models).

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 16. Amend § 1026.42 by revising paragraph (a) and adding paragraph (i) to read as follows:

§ 1026.42 Valuation independence.

(a) *Scope.* Except for paragraph (i) of this section, this section applies to any consumer credit transaction secured by the consumer's principal dwelling. Paragraph (i) of this section applies to any mortgage, as defined in paragraph (i)(2)(v), secured by the consumer's principal dwelling, even if the mortgage is primarily for business, commercial, agricultural, or organizational purposes.

* * * * *

(i) *Quality Control Standards for Automated Valuation Models*—(1) *Scope.* The purpose of this paragraph (i) is to implement quality control standards for the use of automated valuation models in determining the value of collateral in connection with making a credit decision or covered securitization determination regarding a mortgage or mortgage-backed security. This paragraph (i) applies to the use of automated valuation models by any mortgage originator or secondary market issuer, other than either a financial institution as defined in 12 U.S.C. 3350(7), or a subsidiary owned and controlled by such a financial institution and regulated by one of the Federal financial institutions regulatory agencies as defined in 12 U.S.C. 3350(6). This paragraph (i) does not apply to the use of automated valuation models in:

(i) Monitoring of the quality or performance of mortgages or mortgage-backed securities;

(ii) Reviews of the quality of already completed determinations of the value of collateral; or

(iii) The development of an appraisal by a certified or licensed appraiser as defined in § 1026.35(c)(1)(i).

(2) *Definitions.* As used in this paragraph (i):

(i) *Automated valuation model* means any computerized model used by mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage.

(ii) *Control systems* means the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that are used to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations.

(iii) *Covered securitization determination* means a determination regarding:

(A) Whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer; or

(B) Structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.

(iv) *Credit decision* means a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage, including a decision whether to extend new or additional credit or change the credit limit on a line of credit.

(v) *Mortgage* means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

(vi) *Mortgage originator* has the meaning given in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

(vii) *Secondary market issuer* means any party that creates, structures, or organizes a mortgage-backed securities transaction.

(3) *Quality control standards.* Mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, must adopt and maintain policies, practices, procedures, and control systems to ensure that automated valuation models used in these transactions adhere to quality control standards designed to:

(i) Ensure a high level of confidence in the estimates produced;

(ii) Protect against the manipulation of data;

(iii) Avoid conflicts of interest;

(iv) Require random sample testing and reviews; and

(v) Comply with applicable nondiscrimination laws.

■ 17. Amend Supplement I to Part 1026 by:

■ a. Under Section 1026.2—Definitions and Rules of Construction, in 2(a)(19)—Dwelling, revise paragraph 1 and add paragraph 4;

■ b. Under Section 1026.3—Exempt Transactions, add paragraph 2; and

■ c. Under Section 1026.42—Valuation Independence:

■ i. Under 42(a) Scope, revise paragraph 2;

■ ii. Under Paragraph 42(b)(2), revise paragraph 1.

■ iii. Add heading section 42(i) Quality Control Standards for Automated Valuation Models.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Section 1026.2—Definitions and Rules of Construction

* * * * *

2(a)(19) Dwelling

1. *Scope.* A dwelling need not be the consumer's *principal* residence to fit the definition, and thus a vacation or second home could be a dwelling. However, for purposes of the definition of residential mortgage transaction, the right to rescind, and the application of automated valuation model requirements, a dwelling must be the principal residence of the consumer. (*See* the commentary to §§ 1026.2(a)(24), 1026.15, 1026.23, and 1026.42).

* * * * *

4. *Automated valuation models.* For purposes of the application of the automated

valuation model requirements in § 1026.42(i), a consumer can have only one principal dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of applying this definition to a particular transaction. (*See* the commentary to § 1026.2(a)(24)).

* * * * *

Section 1026.3—Exempt Transactions

* * * * *

2. *Relationship to § 1026.42(i).* As provided in § 1026.3(i), the provisions in § 1026.42(i) governing the use of automated valuation models apply even if the transactions in which automated valuation models are used would otherwise be exempt under this section.

* * * * *

Section 1026.42—Valuation Independence

42(a) Scope

* * * * *

2. *Consumer's principal dwelling.* Except for section 1026.42(i), section 1026.42 applies only if the dwelling that will secure a consumer credit transaction is the principal dwelling of the consumer who obtains credit. Section 1026.42(i) applies if the dwelling that will secure a mortgage, as defined in § 1026.42(i)(2)(v), is the principal dwelling of the consumer who obtains credit, even if the mortgage is primarily for business, commercial, agricultural, or organizational purposes. The term ''dwelling'' is defined in § 1026.2(a)(19). Comments 2(a)(19)–4 and 42(b)(2)–1 discuss the term ''principal dwelling.''

42(b) Definitions

* * * * *

Paragraph 42(b)(2)

1. *Principal dwelling.* The term ''principal dwelling'' has the same meaning under § 1026.42(b) and (i) as under §§ 1026.2(a)(24), 1026.15(a), and 1026.23(a). *See* comments 2(a)(19)–4, 2(a)(24)–3, 15(a)(1)–5, and 23(a)–3. The term ''dwelling'' is defined in § 1026.2(a)(19).

* * * * *

42(i) Quality Control Standards for Automated Valuation Models

Paragraph 42(i)(2)(vi)

1. *Creditors.* The term mortgage originator includes creditors, notwithstanding that the definition of mortgage originator at 15 U.S.C. 1602(dd)(2) excludes creditors for certain other purposes.

2. *Servicers.* The term mortgage originator generally excludes servicers and their employees, agents, and contractors. However, a person is a servicer with respect to a particular transaction only after it is consummated, and that person retains or obtains its servicing rights. Therefore, the term mortgage originator includes a servicer and its employees, agents, or contractors when they perform mortgage originator activities for purposes of 15 U.S.C. 1602(dd)(2) with respect to any transaction that constitutes a new extension of credit, including a refinancing or a transaction that obligates a different consumer on an existing debt.

* * * * *

CHAPTER XII—FEDERAL HOUSING FINANCE AGENCY

Authority and Issuance

For the reasons discussed in the joint preamble, the Federal Housing Finance Agency proposes to amend 12 CFR part 1222 as set forth below:

PART 1222—APPRAISALS

■ 18. The authority citation for part 1222 is revised to read as follows:

Authority: 12 U.S.C. 3354(b); 12 U.S.C. 4501 *et seq.;* 12 U.S.C. 4526; and 15 U.S.C. 1639h.

■ 19. Add subpart C to part 1222 to read as follows:

Subpart C—Quality Control Standards For Automated Valuation Models

Sec.

§ 1222. 27 Authority, purpose, and scope.

(a) *Authority.* This subpart is issued by the Federal Housing Finance Agency pursuant to 12 U.S.C. 4501 *et seq.,* 12 U.S.C. 4526, section 1125 of FIRREA, 12 U.S.C. 3354, as added by section 1473(q) of the Dodd-Frank Act.

(b) *Purpose and scope.* (1) The purpose of this subpart is to implement the quality control standards in section 3354 of title 12 for the use of automated valuation models in determining the value of collateral in connection with making a credit decision or covered securitization determination regarding a mortgage or mortgage-backed security. This subpart applies to entities regulated by the Federal Housing Finance Agency.

(2) This subpart does not apply to the use of automated valuation models in:

(i) Monitoring of the quality or performance of mortgages or mortgage-backed securities;

(ii) Reviews of the quality of already completed determinations of the value of collateral; or

(iii) The development of an appraisal by a certified or licensed appraiser.

§ 1222.28 Definitions.

As used in this subpart:

Automated valuation model means any computerized model used by mortgage originators and secondary market issuers to determine the value of a consumer's principal dwelling collateralizing a mortgage.

Control systems means the functions (such as internal and external audits, risk review, quality control, and quality assurance) and information systems that are used to measure performance, make decisions about risk, and assess the effectiveness of processes and personnel, including with respect to compliance with statutes and regulations.

Covered securitization determination means a determination regarding:

(1) Whether to waive an appraisal requirement for a mortgage origination in connection with its potential sale or transfer to a secondary market issuer, or

(2) Structuring, preparing disclosures for, or marketing initial offerings of mortgage-backed securitizations.

Credit decision means a decision regarding whether and under what terms to originate, modify, terminate, or make other changes to a mortgage, including a decision whether to extend new or additional credit or change the credit limit on a line of credit.

Dwelling means a residential structure that contains one to four units, whether or not that structure is attached to real property. The term includes an individual condominium unit, cooperative unit, factory-built housing, or manufactured home, if it is used as a residence. A consumer can have only one ''principal'' dwelling at a time. Thus, a vacation or other second home would not be a principal dwelling. However, if a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within a year or upon the completion of construction, the new dwelling is considered the principal dwelling for purposes of this subpart.

Mortgage means a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained in a consumer's principal dwelling.

Mortgage originator has the meaning given in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

Secondary market issuer means any party that creates, structures, or organizes a mortgage-backed securities transaction.

§ 1222.29 Quality control standards.

Mortgage originators and secondary market issuers that engage in credit decisions or covered securitization determinations themselves, or through or in cooperation with a third-party or affiliate, must adopt and maintain policies, practices, procedures, and control systems to ensure that automated valuation models used in these transactions adhere to quality control standards designed to:

(a) Ensure a high level of confidence in the estimates produced;

(b) Protect against the manipulation of data;

(c) Avoid conflicts of interest;

(d) Require random sample testing and reviews; and

(e) Comply with applicable nondiscrimination laws.

Michael J. Hsu,

Acting Comptroller of the Currency.

By order of the Board Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Dated at Washington, DC, on May 31, 2023.

James P. Sheesley,

Assistant Executive Secretary.

Rohit Chopra,

Director, Consumer Financial Protection Bureau.

Sandra L. Thompson,

Director, Federal Housing Finance Agency.

Melane Conyers-Ausbrooks,

Secretary of the Board, National Credit Union Administration.

[FR Doc. 2023–12187 Filed 6–20–23; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P; 7535–01–P; 8070–01–P; 4810–AM–P

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Federal Register

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Wednesday, June 21, 2023

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