



FEDERAL REGISTER

Vol. 88 Friday,
No. 139 July 21, 2023

Pages 46951–47350

OFFICE OF THE FEDERAL REGISTER



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Notice of July 19, 2023

The President

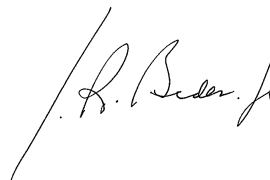
Continuation of the National Emergency With Respect to Transnational Criminal Organizations

On July 24, 2011, by Executive Order 13581, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the activities of significant transnational criminal organizations.

On March 15, 2019, by Executive Order 13863, the President took additional steps to deal with the national emergency with respect to significant transnational criminal organizations in view of the evolution of these organizations as well as the increasing sophistication of their activities, which threaten international political and economic systems and pose a direct threat to the safety and welfare of the United States and its citizens, and given the ability of these organizations to derive revenue through widespread illegal conduct, including acts of violence and abuse that exhibit a wanton disregard for human life as well as many other crimes enriching and empowering these organizations.

Significant transnational criminal organizations continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. For these reasons, the national emergency declared in Executive Order 13581 on July 24, 2011, under which additional steps were taken in Executive Order 13863 on March 15, 2019, must continue in effect beyond July 24, 2023. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to significant transnational criminal organizations declared in Executive Order 13581.

This notice shall be published in the *Federal Register* and transmitted to the Congress.



THE WHITE HOUSE,
July 19, 2023.

[FR Doc. 2023-15644
Filed 7-20-23; 8:45 am]
Billing code 3395-F3-P

Rules and Regulations

Federal Register

Vol. 88, No. 139

Friday, July 21, 2023

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA-2023-1241; Special Conditions No. 25-838-SC]

Special Conditions: Textron Aviation, Inc. Model 560XL(XLS+) Airplane; Electronic System Security Protection From Unauthorized External Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Textron Aviation, Inc. (Textron) Model 560XL(XLS+) airplane. This airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is associated with the installation of an electronic networks system architecture that will allow increased connectivity to and access from external sources (e.g., operator networks, wireless devices, internet connectivity, service provider satellite communications, electronic flight bags, etc.) to the airplane's previously isolated electronic assets (networks, systems, and databases). The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Textron Aviation, Inc. on July 21, 2023. Send comments on or before September 5, 2023.

ADDRESSES: Send comments identified by Docket No. FAA-2023-1241 using any of the following methods:

- **Federal eRegulations Portal:** Go to <https://www.regulations.gov/> and follow the online instructions for sending your comments electronically.

- **Mail:** Send comments to Docket Operations, M-30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

- **Hand Delivery or Courier:** Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- **Fax:** Fax comments to Docket Operations at 202-493-2251.

- **Docket:** Background documents or comments received may be read at <https://www.regulations.gov/> at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Thuan T. Nguyen, Avionics Software & Components Unit, AIR-626D, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206-231-3365; email Thuan.T.Nguyen@faa.gov.

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA finds, pursuant to 14 CFR 11.38(b), that new comments are unlikely, and notice and comment prior to this publication are unnecessary.

Privacy

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to <https://www.regulations.gov/>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal

contact received about these special conditions.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to Thuan T. Nguyen, Avionics Software & Components Unit, AIR-626D, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206-231-3365; email Thuan.T.Nguyen@faa.gov. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so without incurring delay. The FAA may change these special conditions based on the comments received.

Background

On June 30, 2021, Textron Aviation, Inc. applied for an Amended Type Certificate (ATC) for the installation of a digital systems architecture that will allow increased connectivity to and

access from external network sources, (e.g., operator networks, wireless devices, internet connectivity, service provider satellite communications, electronic flight bags, etc.) to the airplane's previously isolated electronic assets (networks, systems, and databases). The Textron Model 560XL(XLS+) airplane, which is a derivative of the Model 560XL currently approved under Type Certificate No. A22CE, is a two-engine transport category airplane. The maximum seating capacity is 12 passengers and 2 crew members. The maximum takeoff weight is 20,200 to 20,330 pounds, depending on the specific variant.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Textron Aviation, Inc. must show that the Model 560XL(XLS+) airplane, as changed, continues to meet the applicable provisions of the regulations listed in Type Certificate No. A22CE or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (e.g., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Textron Model 560XL(XLS+) airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for an ATC to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Textron Model 560XL(XLS+) airplane must comply with the exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Textron Model 560XL(XLS+) airplane will incorporate a novel or unusual design feature, which is the installation of a digital systems architecture that will allow increased connectivity to and access from external

network sources, (e.g., operator networks, wireless devices, internet connectivity, service provider satellite communications, electronic flight bags, etc.) to the airplane's previously isolated electronic assets (networks, systems, and databases).

Discussion

The Textron Model 560XL(XLS+) airplane electronic system architecture and network configuration is novel or unusual for commercial transport airplanes because it may allow increased connectivity to and access from external network sources, airline operations, and maintenance networks, to the airplane control domain and airline information services domain. The airplane's control domain and airline information-services domain perform functions required for the safe operation and maintenance of the airplane. Previously, these domains had very limited connectivity with external network sources. This data network and design integration creates a potential for unauthorized persons to access the aircraft-control domain and airline information-services domain, and presents security vulnerabilities related to the introduction of computer viruses and worms, user errors, and intentional sabotage of airplane electronic assets (networks, systems, and databases) critical to the safety and maintenance of the airplane.

The existing FAA regulations did not anticipate these networked airplane-system architectures. Furthermore, these regulations and the current guidance material do not address potential security vulnerabilities, which could be exploited by unauthorized access to airplane networks, data buses, and servers. Therefore, these special conditions ensure that the security (*i.e.*, confidentiality, integrity, and availability) of airplane systems is not compromised by unauthorized wired or wireless electronic connections. This includes ensuring that the security of the airplane's systems is not compromised during maintenance of the airplane's electronic systems. These special conditions also require the applicant to provide appropriate instructions to the operator to maintain all electronic-system safeguards that have been implemented as part of the original network design so that this feature does not allow or introduce security threats.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Textron Model 560XL(XLS+) airplane. Should Textron Aviation, Inc. apply at a later date for ATC to modify any other model included on Type Certificate No. A22CE to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only a certain novel or unusual design feature on the Textron Model 560XL(XLS+) airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, and 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Textron Model 560XL(XLS+) airplane for airplane electronic unauthorized external access.

1. The applicant must ensure airplane electronic-system security protection from access by unauthorized sources external to the airplane, including those possibly caused by maintenance activity.

2. The applicant must ensure airplane electronic system security threats are identified and assessed, and that effective electronic system security protection strategies are implemented to protect the airplane from all adverse impacts on safety, functionality, and continued airworthiness.

3. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the airplane is maintained, including all post-type-certification modifications that may have an impact on the approved electronic-system security safeguards.

Issued in Kansas City, Missouri, on July 17, 2023.

Patrick R. Mullen,

Manager, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2023–15467 Filed 7–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 25**

[Docket No. FAA–2023–1242; Special Conditions No. 25–839–SC]

Special Conditions: Textron Aviation, Inc. Model 560XL(XLS+) Airplane; Electronic System Security Protection From Unauthorized Internal Access

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Textron Aviation, Inc. (Textron) Model 560XL(XLS+) airplane. This airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is associated with the installation of a digital system that contains a wireless and hardwired network with hosted application functionality that allows access, from a source internal to the airplane, to the airplane's internal electronic component. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Textron Aviation, Inc. on July 21, 2023. Send comments on or before September 5, 2023.

ADDRESSES: Send comments identified by Docket No. FAA–2023–1242 using any of the following methods:

- *Federal eRegulations Portal:* Go to <https://www.regulations.gov/> and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

• *Docket:* Background documents or comments received may be read at <https://www.regulations.gov/> at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Thuan T. Nguyen, Avionics Software & Components Unit, AIR–626D, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3365; email Thuan.T.Nguyen@faa.gov.

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA finds, pursuant to 14 CFR 11.38(b), that new comments are unlikely, and notice and comment prior to this publication are unnecessary.

Privacy

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to <https://www.regulations.gov/>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about these special conditions.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and the indicated comments will not be placed in the public docket of these special

conditions. Send submissions containing CBI to Thuan T. Nguyen, Avionics Software & Components Unit, AIR–626D, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service, Federal Aviation Administration, 2200 South 216th Street, Des Moines, Washington 98198; telephone and fax 206–231–3365; email Thuan.T.Nguyen@faa.gov. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments, and will consider comments filed late if it is possible to do so without incurring delay. The FAA may change these special conditions based on the comments received.

Background

On June 30, 2021, Textron Aviation, Inc. applied for an amended type certificate (ATC) for the installation of a digital system that contains a wireless and hardwired network with hosted application functionality that allows access, from sources internal to the airplane, to the airplane's internal electronic components. The Textron Model 560XL(XLS+) airplane, which is a derivative of the Model 560XL currently approved under Type Certificate No. A22CE, is a two-engine transport category airplane. The maximum seating capacity is 12 passengers and 2 crew members. The maximum takeoff weight is 20,200 to 20,330 pounds, depending on the specific variant.

Type Certification Basis

Under the provisions of title 14, Code of Federal Regulations (14 CFR) 21.101, Textron must show that the Model 560XL(XLS+) airplane, as changed, continues to meet the applicable provisions of the regulations listed in Type Certificate No. A22CE or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (e.g., 14 CFR part 25) do not contain adequate or appropriate safety standards

for the Textron Model 560XL(XLS+) airplane because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for an ATC to modify any other model included on the same type certificate to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Textron Model 560XL(XLS+) airplane must comply with the exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Textron Model 560XL(XLS+) airplane will incorporate a novel or unusual design feature, which is the installation of a digital system that contains a wireless and hardwired network with hosted application functionality that allows access, from sources internal to the airplane, to the airplane's internal electronic components.

Discussion

The Textron Model 560XL(XLS+) airplane electronic system architecture and network configuration change is novel or unusual for commercial transport airplanes because it is composed of several connected wireless and hardwired networks. This proposed system and network architecture is used for a diverse set of airplane functions, including:

- Flight-safety related control and navigation systems,
- Airline business and administrative support, and
- Passenger entertainment.

The airplane's control domain and airline information services domain of these networks perform functions required for the safe operation and maintenance of the airplane. Previously, these domains had very limited connectivity with other network sources. This network architecture creates a potential for unauthorized persons to access the aircraft control domain from sources internal to the airplane, and presents security vulnerabilities related to the

introduction of computer viruses and worms, user errors, and intentional sabotage of airplane electronic assets (networks, systems, and databases) critical to the safety and maintenance of the airplane.

The existing FAA regulations did not anticipate these networked airplane-system architectures. Furthermore, these regulations and the current guidance material do not address potential security vulnerabilities, which could be exploited by unauthorized access to airplane networks, data buses, and servers. Therefore, these special conditions ensure that the security (*i.e.*, confidentiality, integrity, and availability) of airplane systems will not be compromised by unauthorized wireless or hardwired electronic connections from within the airplane. These special conditions also require the applicant to provide appropriate instruction to the operator to maintain all electronic-system safeguards that have been implemented as part of the original network design so that this feature does not allow or reintroduce security threats.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Textron Model 560XL(XLS+) airplane. Should Textron apply at a later date for an amended type certificate to modify any other model included on Type Certificate No. A22CE to incorporate the same novel or unusual design feature, these special conditions would apply to that model as well.

Conclusion

This action affects only a certain novel or unusual design feature on Textron Model 560XL(XLS+) airplane. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, and 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type

certification basis for the Textron 560XL(XLS+) airplane for airplane electronic-system internal access.

1. The applicant must ensure that the design provides isolation from, or airplane electronic-system security protection against, access by unauthorized sources internal to the airplane. The design must prevent inadvertent and malicious changes to, and all adverse impacts upon, airplane equipment, systems, networks, and other assets required for safe flight and operations.

2. The applicant must establish appropriate procedures to allow the operator to ensure that continued airworthiness of the airplane is maintained, including all post-type-certification modifications that may have an impact on the approved electronic-system security safeguards.

Issued in Kansas City, Missouri, on July 17, 2023.

Patrick R. Mullen,

Manager, Technical Innovation Policy Branch, Policy and Innovation Division, Aircraft Certification Service.

[FR Doc. 2023–15468 Filed 7–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2021–1035; Special Conditions No. 25–819–SC]

Special Conditions: Airbus Model A321neo XLR Airplane; Side-Stick Controller—Controllability and Maneuverability

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus Model A321neo XLR airplanes. The airplane will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport-category airplanes. This design feature is side-stick controllers for pitch and roll control. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: This action is effective on Airbus on July 21, 2023. Send comments on or before September 5, 2023.

ADDRESSES: Send comments identified by Docket No. FAA–2021–1035 using any of the following methods:

- **Federal eRegulations Portal:** Go to <https://www.regulations.gov/> and follow the online instructions for sending your comments electronically.

- **Mail:** Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.

- **Hand Delivery or Courier:** Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

- **Fax:** Fax comments to Docket Operations at 202–493–2251.

Privacy: Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in title 14, Code of Federal Regulations (14 CFR) 11.35, the FAA will post all comments received without change to <https://www.regulations.gov/>, including any personal information you provide. The FAA will also post a report summarizing each substantive verbal contact received about these special conditions.

Confidential Business Information: Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to these special conditions contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to these special conditions, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and the indicated comments will not be placed in the public docket of these special conditions. Send submissions containing CBI to Troy Brown, Performance and Environment Unit, AIR–621A, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 1801 S Airport Rd., Wichita, KS 67209–2190; telephone and

fax 405–666–1050; email troy.a.brown@faa.gov. Comments the FAA receives, which are not specifically designated as CBI, will be placed in the public docket for these special conditions.

Docket: Background documents or comments received may be read at <https://www.regulations.gov/> at any time. Follow the online instructions for accessing the docket or go to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Troy Brown, Performance and Environment Unit, AIR–621A, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service, Federal Aviation Administration, 1801 S Airport Rd., Wichita, KS 67209–2190; telephone and fax 405–666–1050; email troy.a.brown@faa.gov.

SUPPLEMENTARY INFORMATION: The substance of these special conditions has been published in the **Federal Register** for public comment in several prior instances with no substantive comments received. Therefore, the FAA finds, pursuant to § 11.38(b), that new comments are unlikely, and notice and comment prior to this publication are unnecessary.

Comments Invited

The FAA invites interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

The FAA will consider all comments received by the closing date for comments. The FAA may change these special conditions based on the comments received.

Background

On September 16, 2019, Airbus applied for an amendment to Type Certificate No. A28NM to include the new Model A321neo XLR airplanes, which include the Model A321–271NY and –253NY airplanes. These airplanes are twin-engine, transport-category airplanes with seating for 244 passengers and a maximum takeoff weight of 222,000 pounds.

Type Certification Basis

Under the provisions of 14 CFR 21.101, Airbus must show that the Model A321neo XLR airplanes meet the applicable provisions of the regulations listed in Type Certificate No. A28NM, or the applicable regulations in effect on

the date of application for the change, except for earlier amendments as agreed upon by the FAA.

If the Administrator finds that the applicable airworthiness regulations (e.g., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Airbus Model A321neo XLR airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, these special conditions would also apply to the other model under § 21.101.

In addition to the applicable airworthiness regulations and special conditions, the Airbus Model A321neo XLR airplanes must comply with the fuel-vent and exhaust-emission requirements of 14 CFR part 34, and the noise-certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in § 11.19, in accordance with § 11.38, and they become part of the type certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A321neo XLR airplanes will incorporate the following novel or unusual design feature: Side-stick controllers for pitch and roll control.

Discussion

These proposed special conditions for the Airbus A321neo XLR airplane address the novel features of the side-stick controllers. The A321neo XLR will incorporate side-stick controllers controlling a fly-by-wire (FBW) electronic flight control system (EFCS). This system provides an electronic interface between the pilot's flight controls and the flight control surfaces for both normal and failure states, and it generates the actual surface commands that provide for stability augmentation and control about all three airplane axes. In addition, pilot control authority may be uncertain, because the side-stick controllers are not mechanically interconnected as with conventional wheel and column controls.

Current FAA regulations do not specifically address the use of side-stick controllers for pitch and roll control.

The unique features of the side stick must therefore be demonstrated through flight and simulator tests to have suitable handling and control characteristics when considering the following:

1. The handling-qualities tasks and requirements of the Airbus Model A321neo XLR airplane special conditions, and other 14 CFR part 25 requirements for stability, control, and maneuverability, including the effects of turbulence.

2. *General ergonomics*: Armrest comfort and support, local freedom of movement, displacement angle suitability, and axis harmony.

3. Inadvertent input in turbulence.

4. Inadvertent pitch-roll crosstalk.

The FAA Handling Qualities Rating Method (HQR) of Appendix E of the *Flight Test Guide for Certification of Transport Category Airplanes*, AC 25-7D, may be, but is not required to be, used to show compliance.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions apply to Airbus Model A321neo XLR airplanes. Should Airbus apply later for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on one model series of airplanes. It is not a rule of general applicability.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

Authority Citation

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A321neo XLR airplanes.

(a) *Pilot Strength*. In lieu of the “strength of pilots” limits of § 25.143(d) for pitch and roll, and in lieu of the specific pitch force requirements of

§§ 25.145(b) and 25.175(d), the following applies:

The applicant must show that the temporary and maximum prolonged force levels for the side-stick controllers are suitable for all expected operating conditions and configurations, whether normal or non-normal.

(b) *Controller Coupling*. The electronic side-stick controller coupling design must provide for corrective and/or overriding control inputs by either pilot with no unsafe characteristics. Annunciation of controller status must be provided and must not be confusing to the flightcrew.

(c) *Pilot Control*. The applicant must show by flight tests that the use of side-stick controllers does not produce unsuitable pilot-in-the-loop control characteristics when considering precision path control tasks and turbulence. In addition, pitch and roll control-force sensitivity and displacement sensitivity must be compatible, so that normal inputs on one control axis will not cause significant unintentional inputs on the other.

Issued in Kansas City, Missouri, on July 17, 2023.

Patrick R. Mullen,

Manager, Technical Policy Branch, Policy and Standards Division, Aircraft Certification Service.

[FR Doc. 2023-15466 Filed 7-20-23; 8:45 am]

BILLING CODE 4910-13-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1270

[CPSC Docket No. CPSC-2013-0022]

Safety Standard for Adult Portable Bed Rails

AGENCY: Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The U.S. Consumer Product Safety Commission (Commission or CPSC) has determined that there is an unreasonable risk of injury and death associated with entrapment and other hazards from adult portable bed rails (APBRs). CPSC has identified 284 fatal incidents related to entrapment by APBRs between January 2003 and December 2021. To address the risk, the Commission is promulgating a rule under the Consumer Product Safety Act (CPSA) to require that APBRs meet the requirements of the existing voluntary standard for APBRs, with modifications. CPSC estimates that the final rule will

provide up to \$298 million per year in societal benefits, while the costs associated with the rule’s requirements are expected to be approximately \$2 million per year.

DATES: The rule is effective on August 21, 2023. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of August 21, 2023.

FOR FURTHER INFORMATION CONTACT: Will Cusey, Small Business Ombudsman, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7945 or (888) 531-9070; email: sbo@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Statutory Authority

In 2013, the CPSC received two requests to initiate rulemaking proceedings under the Consumer Product Safety Act (CPSA) to address an unreasonable risk of injury associated with APBRs. Gloria Black, the National Consumer Voice for Quality Long-Term Care, Consumer Federation of America, and 60 other organizations submitted one request; Public Citizen Health Research Group submitted the other request. Collectively, the petitioners stated that many of the deaths and injuries involving APBRs result from asphyxiation caused by entrapment within openings of the APBR rail or between the rail and the mattress or bed frame. The petitioners requested that the CPSC initiate rulemaking proceedings under section 8 of the CPSA to ban all APBRs. Alternatively, petitioners requested that the Commission initiate a rulemaking under section 9 of the CPSA to promulgate mandatory standards, including warning labels, to reduce the unreasonable risk of asphyxiation and entrapment posed by APBRs. Petitioners also requested action under section 27(e) of the CPSA to require manufacturers of APBRs to provide performance and technical data regarding the safety of their products.

The CPSC docketed the petition requests as a single petition: Petition CP 13-1, Petition Requesting a Ban or Standard on APBRs under the CPSA. On June 4, 2013, the Commission published a notice in the **Federal Register** seeking public comment on the petition. 78 FR 33393. Also in 2013, ASTM International (ASTM) formed the ASTM F15.70 subcommittee to begin developing a voluntary standard for APBRs.

On April 23, 2014, staff sent a briefing package on APBRs to the Commission

(Staff's 2014 briefing package).¹ In that briefing package, staff recommended the Commission defer a decision on the petition until a voluntary standard for APBRs was developed and evaluated by staff. On April 29, 2014, the Commission voted to defer the petition pending ASTM's further work on a voluntary standard.

On April 28, 2015, the Commission voted again to defer a decision on the petition to allow the ASTM voluntary standard development process additional time to continue. Throughout this period, staff participated in the ASTM F15.70 subcommittee to develop the voluntary standard for APBRs. In August 2017, ASTM published the voluntary standard, ASTM F3186–17, *Standard Specification for Adult Portable Bed Rails and Related Products*.

On July 15, 2020, staff provided the Commission its review of ASTM F3186–17 (Staff's 2020 briefing package).² Staff indicated that ASTM F3186–17 would adequately address the hazards identified in the known incident reports if there were certain modifications to the labeling, warning statements, and instructional literature requirements and to physical test requirements. However, when staff assessed compliance to the voluntary standard, staff found no market compliance with the voluntary standard.

In June 2020, CPSC's Office of Compliance sent a letter to 19 known APBR manufacturers, urging industry members to stop manufacturing, distributing, and selling APBRs that do not comply with ASTM F3186–17. Staff also continued to engage actively at the ASTM F15.70 subcommittee meetings. Staff presented and explained its testing results to the subcommittee members, provided the subcommittee with Compliance's letter to industry, supplied updated incident data for the subcommittee's review, and participated as technical experts on all subcommittee task groups.

On March 9, 2022, staff sent to the Commission another briefing package regarding ASTM F3186–17 (Staff's 2022 briefing package).³ That briefing package updated the Staff's 2020 briefing package with incident data that

included all known APBR safety incidents from January 2003 through September 2021. In addition, Staff's 2022 briefing package discussed the results of the two rounds of testing staff had conducted on APBRs, and the continuing lack of compliance with ASTM's voluntary standard. Staff recommended that the Commission grant the petition and direct staff to prepare a notice of proposed rulemaking (NPR) to address the entrapment hazards associated with APBRs. On March 16, 2022, the Commission voted to grant Petition CP 13–1 and directed staff to proceed with a draft NPR.

On September 21, 2022, staff sent the Commission an NPR briefing package for APBRs.⁴ On October 13, 2022, the Commission voted to publish the NPR for APBRs in the **Federal Register**. On November 9, 2022, the Commission published its NPR in the **Federal Register**, determining preliminarily that there is an unreasonable risk of injury and death associated with entrapment hazards from APBRs. To address those risks, the Commission proposed a rule under the CPSA that would require APBRs to meet the requirements of the ASTM F3186–17 voluntary standard, with modifications. 87 FR 67586. The Commission received seven written comments regarding the NPR. Although the Commission offered an opportunity for interested parties to present oral comments on the NPR, the Commission did not receive any requests to provide oral comments.

In this final rule, the Commission determines that APBRs pose an unreasonable risk of injuries and deaths associated with entrapment hazards.⁵ To address this risk, the Commission adopts ASTM F3186–17, with modifications, to improve the safety of APBRs. The information discussed in this preamble is derived primarily from CPSC staff's briefing package for the NPR and briefing package for the final rule (staff's final rule briefing package).⁶

⁴ Available at: <https://www.cpsc.gov/s3fs-public/ProposedRuleSafetyStandardforAdultPortableBedRails.pdf?VersionId=Ypa89Iczh13C40Tq7EJRSMZzoatChft1>.

⁵ On July 5, 2023, the Commission voted 4–0 to approve this document. Chair Hoehn-Saric and Commissioner Trumka issued statements in connection with their votes available at: <https://www.cpsc.gov/About-CPSC/Chairman/Alexander-Hoehn-Saric/Statement/Statement-of-Chair-Alexander-Hoehn-Saric-on-Issuance-of-a-Final-Safety-Standard-for-Adult-Portable-Bed-Rails-and-https://www.cpsc.gov/About-CPSC/Commissioner/Richard-Trumka/Statement/CPSC-Finalizes-Rock-Solid-New-Safety-Rule-for-Adult-Bedrails-Saving-Lives-and-300M-a-Year-in-Costs-to-Americans>.

⁶ Available at: <https://www.cpsc.gov/s3fs-public/Final-Rule-Safety-Standard-for-Adult-Portable-Bed-Rails.pdf?VersionId=CUfr4q0N1VaGv2o8jnGyQziiWcg8qfu3>.

This final rule is authorized by the CPSA, 15 U.S.C. 2051–2084. Section 7(a) of the CPSA authorizes the Commission to promulgate a mandatory consumer product safety standard that sets forth performance or labeling requirements for a consumer product if such requirements are reasonably necessary to prevent or reduce an unreasonable risk of injury. 15 U.S.C. 2056(a). Section 9 of the CPSA specifies the procedure that the Commission must follow to issue a consumer product safety standard under section 7 of the CPSA. In accordance with section 9, the Commission is issuing this final rule for APBRs.

According to section 9(f)(1) of the CPSA, before promulgating a consumer product safety rule the Commission must consider, and make appropriate findings to be included in the rule, on the following issues:

- The degree and nature of the risk of injury that the rule is designed to eliminate or reduce;
- The approximate number of consumer products subject to the rule;
- The need of the public for the products subject to the rule and the probable effect the rule will have on utility, cost, or availability of such products; and
- Any means to achieve the objective of the rule while minimizing adverse effects on competition, manufacturing, and commercial practices.

15 U.S.C. 2058(f)(1).

Under section 9(f)(3) of the CPSA, to issue a final rule, the Commission must find that the rule is “reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product” and that issuing the rule is in the public interest. *Id.* 2058(f)(3)(A) and (B). Additionally, if a voluntary standard addressing the risk of injury has been adopted and implemented, the Commission must find that:

- The voluntary standard is not likely to eliminate or adequately reduce the risk of injury, or
- Substantial compliance with the voluntary standard is unlikely.

Id. 2058(f)(3)(D). The Commission also must find that expected benefits of the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirements that would adequately reduce the risk of injury. *Id.* 2058(f)(3)(E) and (F).

II. The Subject Products

Several types of bed rails under CPSC jurisdiction are available to consumers.⁷

⁷ Information on adult bed rails regulated by the U.S. Food and Drug Administration (FDA) is

¹ Available at: https://www.cpsc.gov/s3fs-public/pdfs/foia_PetitionCP131RequestforBanorStandardforAdultPortableBedRail.pdf.

² Available at: <https://www.cpsc.gov/s3fs-public/Update%20on%20Petition%20CP%2013-1%20-%20Requesting%20a%20Ban%20or%20Mandatory%20Standard%20on%20Adult%20Portable%20Bed%20Rails.pdf?kiDixW5Z7x9xcOqjxSeS3QpvsdpdQMBY>.

³ Available at: <https://www.cpsc.gov/s3fs-public/Petition-Requesting-a-Ban-or-Standard-on-Adult-Portable-Bed-Rails-Petition-CP-13-1.pdf>.

ASTM F3186–17 (section 1.2) describes “portable bed rails and related products” as products installed by consumers and “not designed as part of the bed by the bed manufacturer.”

Generally, APBRs within CPSC’s jurisdiction include products that are installed or used alongside a bed by consumers and are intended to reduce the risk of falling from the bed, assist

the consumer in repositioning in the bed, or assist the consumer in transitioning into or out of the bed. Figure 1 below shows four common types of APBRs.

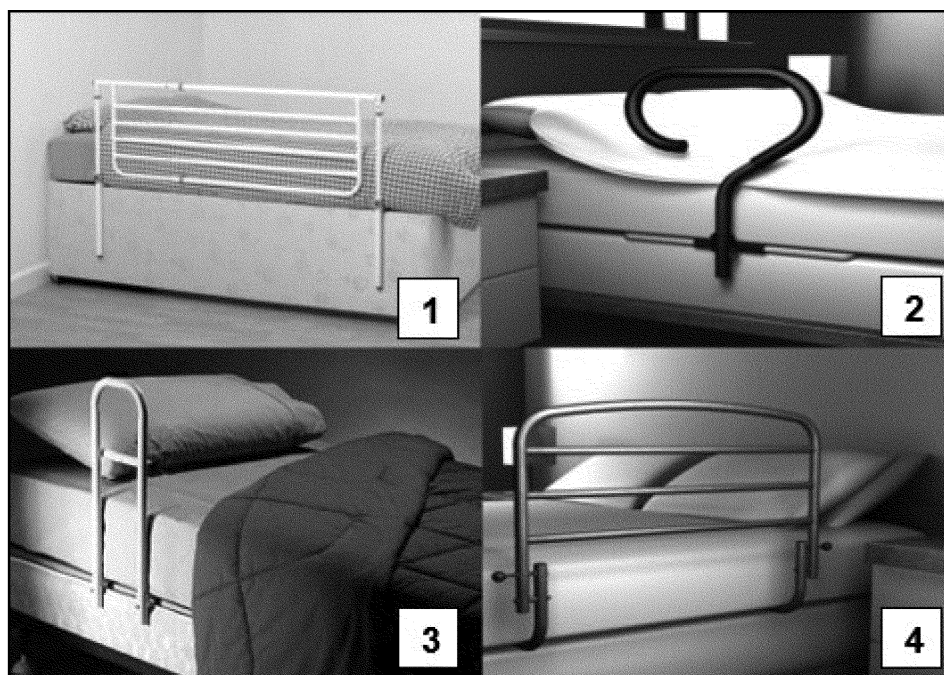


Figure 1: General examples of APBR types – (1) Full-Length Bed Rail, (2) Bed Cane, (3) Bed Handle, and (4) Half-Length Bed Rail

Because of the similarity in design and means of attachment to the side of the bed, products intended for both types of uses can present the same potential entrapment hazards, as discussed in section III of this preamble.

In September and October 2021, CPSC staff conducted an online search that identified 12 firms supplying 65 distinct APBR models. Retail prices for the identified APBR models ranged from \$38 to \$275. Based on an interview with one APBR manufacturer’s representative and market information from the identified APBR models, CPSC staff estimates that in 2021, the mean retail price was \$50 per APBR; total market revenues were approximately \$9 million; and the number of APBRs sold that year was approximately 180,000 units. See Tab C of the staff’s briefing package for the final rule for additional details.

III. Risk of Injury

In the NPR proceeding, CPSC staff summarized the data on deaths and injuries involving APBRs. See Tab A: Division of Hazard Analysis: Directorate for Epidemiology (EPHA) of the staff NPR briefing package. In particular, staff reviewed Consumer Product Safety Risk Management System (CPSRMS) injury cases and National Electronic Injury Surveillance System (NEISS) injury cases that occurred in the period from January 1, 2003, through December 31, 2021. The Commission received no comments on that analysis. The final regulatory analysis is substantively the same as the preliminary analysis.

A. CPSRMS Reports

Staff identified a total of 332 incident reports for the period January 2003 to December 2021. Of these, 310 were reports of fatalities, and 22 were reports of nonfatal incidents. Most of the

incidents were identified from death certificates, medical examiner reports, or coroner reports. Death certificate data often have lag time of approximately two to three years from the initial date of reporting. As the APBR data in CPSRMS are heavily reliant on death certificates, data collection is ongoing and incident data for 2020 and 2021 should be considered incomplete and likely to increase.

The remaining incidents were extracted from various sources including newspaper clippings, consumer reports, and manufacturer and retailer reports to CPSC. These documents contain limited information on incident scenarios. The age range of victims in the 305 fatal incidents for which age was reported was 14 to 103 years. More than 75 percent of the incident victims were age 70 or older, and almost 80 percent of the reported fatalities involved victims 70 or older.

available at: www.fda.gov/medical-devices/bed-rail-safety/safety-concerns-about-bed-rails. FDA regulations do not reference “bed rails” or “bed handles”; rather, they refer to “movable and latchable side rails.” See 21 CFR 880.5100, 880.5110, 880.5120. Bed rails that are an accessory

or appurtenance to regulated hospital beds are considered by the FDA to have a medical purpose and to be devices subject to FDA jurisdiction. APBRs intended for use with a non-FDA regulated bed and that are not otherwise a medical device fall under the CPSC’s jurisdiction regardless of the

bed’s location (e.g., long-term care facility, hospice, or residence). ASTM F3186–17 (section 1.3) covers both APBRs that meet the definition of a medical device and APBRs that are not medical devices.

Table 1 below presents the distribution of these APBR incidents by age.

TABLE 1—DISTRIBUTION OF REPORTED APBR-RELATED INCIDENTS BY AGE

Age group (years)	Fatalities	Nonfatalities	Total
13–29	7	0	7
30–59	30	0	30
60–69	22	0	22
70–79	47	2	49
80–89	124	2	126
90 or older	75	1	76
Unknown/Unspecified	5	17	22
Total	310	22	332

Source: CPSRMS (2003–2021).

Table 2 details the distribution of incident victims and incident fatalities these APBR-related incidents by gender. were female. Approximately 70 percent of all

TABLE 2—DISTRIBUTION OF REPORTED APBR-RELATED INCIDENTS BY GENDER

Gender	Fatalities	Nonfatalities	Total
Male	88	7	95
Female	221	8	229
Unknown/Unspecified	1	7	8
Total	310	22	332

Source: CPSRMS (2003–2021).

Approximately 50 percent of all APBR-related incidents and fatalities occurred at home. Other commonly reported locations included nursing homes, assisted living facilities, and residential institutions.⁸ Table 3 below shows the frequency of each location reported.

TABLE 3—DISTRIBUTION OF REPORTED APBR-RELATED INCIDENTS BY LOCATION

Location	Fatalities	Nonfatalities	Total
Home	158	6	164
Nursing Home	50	0	50
Assisted Living Facility	40	2	42
Residential Institution	14	0	14
Other*	23	0	23
Unknown/Not Reported	25	14	39
Total	310	22	332

Source: CPSRMS (2003–2021).

* Includes care home/center, foster home, group home, retirement center, adult family home and hospice.

The majority of reports, 58 percent, indicated that the victim suffered from at least one underlying medical condition. Almost 34 percent were reported to have more than one medical condition. Table 4 below summarizes the most common underlying medical conditions reported.

TABLE 4—DISTRIBUTION OF REPORTED APBR-RELATED INCIDENTS BY MEDICAL CONDITION

Condition	Fatalities	Nonfatalities	Total
Cardiovascular disease	87	0	87
Alzheimer's/Dementia/Mental	73	0	73
Mobility/Paralysis/Stroke	20	0	20
Parkinson's disease	17	1	18
Pulmonary disease	11	0	11

⁸ All of these reported incidents occurred with APBRs that were identified as being within the CPSC's jurisdiction.

TABLE 4—DISTRIBUTION OF REPORTED APBR-RELATED INCIDENTS BY MEDICAL CONDITION—Continued

Condition	Fatalities	Nonfatalities	Total
Cancer	7	0	7
Cerebral palsy	6	0	6
Multiple sclerosis	5	0	5
Other*	21	0	21
Unknown/Not Reported	123	21	144

Source: Staff briefing memorandum in the staff package for the final rule.

B. NEISS Reports

Between January 2003 and December 2021, there were an estimated 79,500 injuries related to adult bed rails treated in hospital emergency departments (EDs) across the United States. There was a statistically significant increasing trend in injuries during this period. In

the vast majority of NEISS cases, there was insufficient information available in the case narrative for CPSC staff to determine whether the bed rail product involved was specifically an adult portable bed rail, or another type of bed rail; only one case narrative specifies the product involved as an adult portable bed rail. Hence, the estimates

presented in Table 5, which provides an overview of the estimated number of adult bed rail-related injuries per year, may be an overestimate. An estimated injury rate per 100,000 population has also been calculated, based on estimates of population ages 13 and older provided by the U.S. Census Bureau.

TABLE 5—NEISS ESTIMATES FOR INJURIES RELATED TO ADULT BED RAILS, JANUARY 2003–DECEMBER 2021

Year	Estimate	Sample size	Injury Rate ⁹
2003	4,500	98	1.88
2004	3,400	82	1.39
2005	3,900	94	1.61
2006	3,400	72	1.38
2007	4,300	98	1.73
2008	4,200	102	1.67
2009	3,600	98	1.42
2010	4,000	100	1.56
2011	3,700	95	1.44
2012	3,100	81	1.20
2013	4,700	127	1.79
2014	4,400	108	1.66
2015	4,600	112	1.73
2016	3,700	91	1.36
2017	4,900	128	1.81
2018	4,300	104	1.55
2019	4,500	112	1.63
2020	5,100	113	1.82
2021	5,100	131	1.83
Total	79,500	1,946	.....

Source: Staff briefing memorandum in staff package for the final rule.

The vast majority (88 percent) of the ED patients were treated and released or examined and released without treatment, while approximately 11 percent were hospitalized or held for observation. There was only one NEISS case that involved a death; the remaining 1,945 involving nonfatal injuries. The one NEISS case involving a death is separate from any of the CPSRMS incidents, and it was unclear what specific type of product was involved.

C. Hazard Patterns

As explained in Tabs B and C of staff's NPR briefing package, the vast

majority of incident victims in CPSRMS were members of vulnerable populations.

- More than 75 percent of the victims were age 70 or older.
- More than 80 percent of the reported fatalities involved victims ages 70 or older.
- Fifty-eight percent of victims suffered from at least one underlying medical condition.
- Almost 34 percent of victims were reported to have more than one medical condition.

Staff grouped the hazard types into four categories based on the bed rail's role in the incident. The categories are

listed in order of highest to lowest frequency.

- *Rail Entrapment*: There were 284 fatalities and two not-fatal injuries related to rail entrapment. This category includes incidents in which the victim was caught, stuck, wedged, or trapped between the mattress/bed and the bed rail, between bed rail bars, between a commode and rail, between the floor and rail, between the night table and rail, or between a dresser and rail. Based on the narratives, the most frequently injured body parts were the neck and head.

- *Falls*: There were 23 deaths, one nonfatal knee fracture, and one non-

⁹ Obtained by dividing NEISS estimates by U.S. Census Bureau population estimate for the respective year (for ages 13+). Latest data can be

found at: National Population by Characteristics: 2020–2021 ([census.gov](https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html)), <https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html>.

injury incident related to falls. This category includes incidents in which the victim fell off the bed, fell and hit the bed rail, or hit and fell near the bed rail, and fell after climbing over the bed rail.

- *Structural Integrity*: There were 11 incidents related to structural component problems (weld of bed rail broke and bed rail not sturdy). This category includes one laceration, one head bump, one bruise, two unspecified injuries, and six non-injury incidents.

- *Miscellaneous*: There were 10 incidents with miscellaneous problems (hanging on the bed rail after garment got caught, hand, arm, or leg laceration, pinched radial nerve against the bed rail, complaint about a misleading label, complaint about a bed rail that was noncompliant with the ASTM standard, and a claim against a bed rail manufacturer about an unspecified issue). This category includes three deaths, three lacerations, one pinched nerve, one unspecified injury, and two non-injury incidents.

Rail entrapment, the most common hazard pattern among all reported incidents, accounted for more than 90 percent (284 of 310) of the fatal incidents. A review of the In-Depth Investigations (IDIs)¹⁰ showed that the victims were typically found with their torso between the product and the mattress frame, with their neck resting on the lower bar. Three other hazard patterns were also reported: (1) chin resting on the bar; (2) slumped backwards, partially suspended with the thorax lodged and compressed in the gap between the rail and mattress; and (3) slumped through the bar opening. The medical examiners in these cases listed the cause of death as “positional asphyxia,” with an additional list of “underlying factors” or “contributory causes.” Staff’s analysis of the data revealed that the head and neck were the body parts most frequently entrapped, with positional asphyxia (neck against rail) identified as the most common cause of death. Neck compression, with or without airway blockage, can result in death, even when the body remains partially supported, because blood vessels taking blood to and from the brain and the carotid sinuses are located in soft tissues of the neck and are relatively unprotected.

The vast majority of nonfatal incident reports (all reports except one) did not list any underlying medical condition. Of the 310 fatal incidents,

approximately 34 percent reported the victim to have multiple medical conditions, and approximately 58 percent of incidents reported at least one underlying medical condition. Preexisting chronic medical conditions or disorders included Alzheimer’s disease, dementia, and other mental limitations; Parkinson’s disease; cerebral palsy; multiple sclerosis; Lesch-Nyhan syndrome; amyotrophic lateral sclerosis; cancer; cardiovascular disease; and pulmonary disease. Other conditions included victims with stroke, paralysis, seizures, heavy sedation, and drug ingestion. These factors can limit mobility or mental acuity and contribute to the risk of death by entrapment, because individuals with these conditions are particularly vulnerable and often cannot respond to the danger and free themselves. As discussed in Tab B of the staff’s NPR briefing package, adult aging issues can contribute to entrapments, including age-related declines in muscular strength, muscular power, motor control and coordination, and balance. Consumers 70 years and older, who are the victims in most APBR-related fatalities, are especially vulnerable to such age-related declines.

CPSC staff identified falls as the second most common hazard pattern associated with APBRs, accounting for 25 incidents (8 percent), 23 of which resulted in a fatality. Staff found that most falls associated with APBRs involve the victim falling against or striking the APBR. A minority of fall-related incidents, according to staff’s review, involved the victim deliberately climbing over the APBR.

IV. ASTM F3186–17

To issue a final rule under section 9(f)(3) of the CPSA if a voluntary standard addressing the risk of injury has been adopted and implemented, the Commission must find that:

- The voluntary standard is not likely to eliminate or adequately reduce the risk of injury, or

- Substantial compliance with the voluntary standard is unlikely.

Staff’s review of ASTM F3186–17 shows that the voluntary standard, with modifications, is likely to eliminate or adequately reduce the entrapment hazards associated with ABPRs. The Commission determines, however, that the voluntary standard is not likely to eliminate or adequately reduce the risk of entrapments on ABPRs without modifications. In addition, based on testing of ABPRs conducted by CPSC staff as discussed below, the Commission determines that substantial compliance with the voluntary standard

is unlikely. Accordingly, in the final rule the Commission incorporates by reference ASTM F3186–17, with modifications, to address the entrapment hazards associated with APBRs.

A. Assessment of ASTM F3186–17 Performance Requirements

1. Terminology

ASTM F3186–17 establishes performance requirements for APBRs, including requirements for resistance to entrapment, marking and labeling, and instructional literature. Section 3.1.1 of ASTM F3186–17 defines “adult portable bed rail” as:

[A]n adjacent type bed rail, grab bar, assistive bar, transfer aid, cane, or rail (henceforth identified as the product or products) intended by the manufacturer to be installed on, against, or adjacent to an adult bed. The product may vary in lengths (for example, full, half, or partial rails, grab bar or handle or transfer post or pole) and is intended by the manufacturer to aid the bed occupant in moving on the bed surface, in entering or exiting the bed, to minimize the possibility of falling out of bed, or for other similar purposes. This includes similar products that are likely to be used for these purposes even if this is not explicitly stated by the manufacturer. However, the standard does not address all products that might be so used, for example, a chair.

ASTM F3186–17 (section 3.1.2) defines “adjacent type bed rail” as:

[A] portable bed rail or related product in which the guard portion (portion that an adult would contact when rolling toward the mattress edge) is essentially a vertical plane or pole that is positioned against the side of the mattress.

The Commission determines that these definitions are appropriate for addressing hazards associated with APBRs that: (1) are installed or used along the side of a bed and intended to reduce the risk of falling from the bed; (2) assist the consumer in repositioning in the bed; or (3) assist the consumer in transitioning into or out of the bed.

2. General Requirements

Section 5 of ASTM F3186–17 sets out general requirements. Section 5.1 requires that there will be no hazardous sharp points or edges. Section 5.2 states that any exposed parts shall be smooth and free from rough edges. Section 5.3 requires that products covered by the standard that are installed on an adjustable bed that articulates must meet the performance requirements when the bed is in either the flat or articulated position. General requirements mandating smooth edges on exposed parts improve safety by preventing potential lacerations or skin

¹⁰ IDIs contain summaries of reports of investigations into events surrounding product-related injuries or incidents based on victim/witness interviews.

injuries from APBRs. In addition, testing APBR products on articulating beds allows assessment of openings that could potentially lead to entrapment after the bed is adjusted from the flat position to the articulated position.

3. Performance Requirements

In addition to the general requirements, several performance requirements in ASTM F3186–17 are intended to address the risk of injury associated with APBRs. These include requirements for assembly, structural integrity, retention system performance, and fall and entrapment prevention.

a. Misassembly and Misinstallation

Effectively addressing the entrapment hazard associated with APBRs depends upon, among other things, consumers assembling and installing the product properly. ASTM F3186–17 includes performance requirements intended to improve the likelihood that the APBR will be assembled and installed properly. For example:

- Section 6.1 sets forth a requirement for products to include a retention system, which maintains the installed product in position without requiring readjustment of the components. This retention system must be permanently attached to the APBR once it has been assembled and must not be removable without the use of a tool.

- Section 6.2 includes structural integrity requirements that require the product to withstand testing without deforming or changing dimensions.

- Section 6.5 requires that structural components and retention system components must not be capable of being misassembled, which the standard defines as the APBR being assembled in

a way that appears functional but would not meet the retention system (section 6.1), structural integrity (section 6.2), entrapment (section 6.3), or openings (section 6.4) requirements.

The requirement that retention systems be permanently attached to the APBR once it has been assembled, and removable only with a tool, reduces the likelihood that consumers will misplace the retention system and increases the likelihood that consumers, including secondary users, will continue to use the retention system. The requirement that structural and retention system components not be misassembled reduces the risk of injury or death that could arise from the consumer omitting key parts of the APBR (e.g., a center rail) during assembly, in ways that could result in entrapment or other hazards.

b. Falls

Falls were the second most common hazard pattern in the incident data, accounting for 25 incidents (8 percent). If the fall was triggered by the APBR becoming dislodged, or if its position shifted, then these incidents potentially may be addressed by the voluntary standard's structural integrity testing and the requirement of a permanently attached retention system to maintain the installed product in position. However, some fall-related incidents involved the victim deliberately climbing over the APBR and this requirement may not prevent such consumers from falling over the bed rail.

c. Entrapment Testing

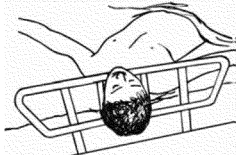
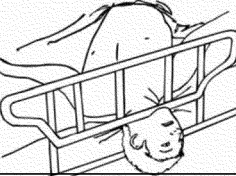
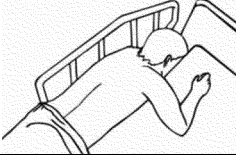
Staff identified entrapment as the most prevalent hazard pattern among the incidents. Section 6.3 of ASTM F3186–17 requires products to be tested

to assess the potential for entrapment in four different zones. These zones represent four of the seven sectors identified by the FDA in its 2006 guidance document, Hospital Bed System Dimensional and Assessment Guidance to Reduce Entrapment (FDA, 2006), as potential areas of entrapment in hospital bed systems.¹¹ APBRs present a similar entrapment hazard in these four zones. ASTM F3186–17 specifies the FDA probe to test entrapment zones.

Section 8.4 defines the four entrapment zones tested under ASTM F3186–17, which are: (1) within the product; (2) between rail support(s) and the bed mattress, when applicable, under the product; (3) between the product and the mattress; and (4) between the underside of the end of the product and the mattress. Entrapment testing to ASTM F3186–17 is performed using the anthropometric “entrapment test probe,” which is the cone and cylinder tool described in the 2006 FDA guidance document (section 7.2). In addition, some entrapment testing requires using a force gauge to test the force applied on the test probe (section 7.3). Table 6 below, describes the four entrapment zones, with illustrations from the 2006 FDA guidance document of sample entrapments within each of these zones.

¹¹ The FDA guidance document is available at: <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/hospital-bed-system-dimensional-and-assessment-guidance-reduce-entrapment>. (FDA, 2016) Three of the zones identified in the FDA guidance (Zone 5, Zone 6, and Zone 7) are not applicable to APBRs, or could not be tested for entrapment, and therefore, they are excluded from ASTM F3186–17.

Table 6: ASTM F3186 – 17 Entrapment Zones

<i>Zone 1: Within the Product</i> Entrapment in any open space within the perimeter of the APBR	
<i>Zone 2: Between Rail Support(s) and the Bed Mattress, When Applicable, Under the Product</i> Entrapment under the bottom edge of the APBR, between the rail supports or next to a single rail support, against the mattress	
<i>Zone 3: Between the Product and the Mattress</i> Entrapment in the space between the inside surface of the APBR and the side of the mattress	
<i>Zone 4: Between the Underside of the End of the Product and the Mattress</i> Entrapment under the lowermost portion of the end of the APBR, against the mattress	

Staff's review of the rail entrapment incidents, test requirements, and test methods showed that most of the reported entrapment fatalities involved one of the four zones listed above. Specifically, staff could determine the

entrapment location of 214 of the 284 fatal incidents, and all but six of these cases occurred in one of the four zones of entrapment tested in ASTM F3186–17, as shown in Table 7 below. Based on this analysis, it is likely that most of

the 70 incidents for which there was insufficient information to identify the location of the entrapment also involved one of these four zones. See staff's briefing packages for the NPR and the final rule.

TABLE 7—RAIL ENTRAPMENT INCIDENT LOCATIONS RELATIVE TO ASTM F3186–17 ENTRAPMENT ZONES

Rail entrapment location	Entrapment testing location	Number of fatalities
Between APBR and mattress	Zone 2, 3, or 4	200
Within APBR itself	Zone 1	8
Against outside of APBR	None	5
Between APBR and headboard	None (Zone 6)	1
Unknown location	Unknown	70
Total .....	.....	284

Staff's evaluation found that APBR entrapments predominantly occur in Zones 1 through 4, and this is consistent with the FDA's finding that these four zones accounted for about 80 percent of hospital bed rail entrapment events reported to the FDA. FDA's recommended dimensional limits for these zones and the anthropometric test probe serve as the basis for the entrapment requirements of ASTM F3186–17. CPSC's review indicates that the performance requirements in the standard, which are based on identified entrapment patterns and related anthropometric data, would effectively address the entrapment hazard patterns related to APBRs with modifications,

discussed below, to eliminate or adequately reduce the unreasonable risk of injury of entrapments.

d. Labeling, Warning, and Instructional Literature Requirements

Section 9.1 of ASTM F3186–17 specifies that the labeling on the APBR and its retail packaging must be marked with the type and size of beds and mattresses, including the mattress thickness range for which the APBR is intended. In addition, the labeling and retail packaging on the APBR must state the appropriate distance between an installed APBR and the headboard or footboard of the bed. ASTM F3186–17 requires labeling on the product and its

retail packaging to indicate how to correctly install the APBR at the specified distance from the headboard or footboard to prevent entrapment. This hazard is addressed by requiring labeling on the APBR to state the appropriate distance between an installed APBR and the headboard or footboard of the bed. Section 9.1 also specifies that all on-product labels must be permanent.

Section 9.2 establishes requirements for warning statements that must appear on the APBR and its retail packaging, instructions, and digital or print advertising. The warning statements must be easy to understand, and any other labels or written instructions

provided along with the required statements cannot contradict or confuse the meaning of the required warnings or otherwise be misleading.

Section 11 specifies requirements for instructional literature that must accompany APBRs. The instructions provided must be easy to read and understand; include assembly, installation, maintenance, cleaning, operation, and adjustment instructions and warnings, where applicable; include drawings or diagrams to provide a better understanding of set up and operation of the product; include drawings that depict all the entrapment zones; and include all warning statements specified in section 9.2, including warnings about product damage or misalignment.

Although requirements for labeling, warning, and instructional requirements are less effective at reducing hazards than product designs that directly address known hazards, these requirements in the standard improve

safety by addressing risks that may not be eliminated through design.

Although many provisions of ASTM F3186–17 do improve safety, for the reasons discussed in section V. of the preamble of the NPR, the Commission determines that, without additional modifications, the voluntary standard is insufficient to eliminate or adequately reduce the unreasonable risk of injury of entrapments from APBRs.

B. Assessment of Compliance to ASTM F3186–17

Staff conducted two rounds of market compliance testing to ASTM F3186–17: the first round in 2018 and 2019, the second round in 2021. In both rounds, no APBRs met all requirements of ASTM F3186–17. All products failed at least one critical mechanical requirement, such as retention strap performance, structural integrity, and entrapment. As described in Tabs C and D of the staff's NPR briefing package and the staff's final rule briefing package, an APBR that fails any one mechanical

performance requirement could result in a fatal entrapment. Furthermore, all products failed the labeling, warning, and instructional requirements. This section discusses market compliance with ASTM F3186–17.

1. 2018–2019 Market Compliance Testing

From 2018 through 2019, staff of CPSC's Directorate for Laboratory Sciences, Division of Mechanical Engineering, tested 35 randomly selected APBR models for compliance with ASTM F3186–17. That voluntary standard became effective in August 2017. APBRs were purchased in 2018. Staff found that none of the 35 sampled products conformed to the voluntary standard. As shown in Table 8 below, compliance varied depending on the relevant section of the voluntary standard. Overall, 33 APBR models did not meet the entrapment performance requirements, and none of the 35 models met the labeling, warnings, or instructional literature requirements.

TABLE 8—ASTM F3186–17, 2018 APBR MARKET COMPLIANCE TESTING RESULT SUMMARY

Section	Title	Number of failed samples	Failure rate (percent)
(Of 35 Total Samples Tested)			
General Requirements:			
5.1	Hazardous Points/Edges	0	0
5.2	Jagged Surfaces	0	0
5.3	Articulated Beds	0	0
Performance Requirements:			
6.1	Retention Systems	28	80
6.2	Structural Integrity	15	43
6.3	Entrapment	33	94
6.4	Openings	0	0
6.5	Misassembled Products	8	23
Labels and Warnings Requirements:			
9.1	Labeling	35	100
9.2	Warning Statements	35	100
Instructional Literature:			
11	Instructional Literature	35	100

Of the 35 APBR models staff tested, 33 failed at least one of the entrapment requirements for the four different zones in and around the APBR. In other words, 94 percent of samples had at least one major zone where a body part could be entrapped. Furthermore, many samples failed the entrapment requirements in multiple zones: 14 failed the Zone 1 entrapment requirement; 27 failed Zone 2; 11 failed Zone 3; and 6 failed Zone 4.

Testing conducted by staff also revealed high failure rates for several other sections of the ASTM standard, including the retention system requirements (28 of 35 samples), and

structural integrity requirements (15 of 35 samples). These types of failures indicate that the product may not stay rigidly in place after installation and will not adequately support the consumer during normal use conditions, such as leaning against the product. Not meeting these requirements thus significantly increases the likelihood of entrapment and fall hazards.

Retention system failures occurred when components were not permanently attached to the product, the retention strap permanently deflected or detached during the free

end pull test,¹² or the retention system did not restrain the product during entrapment testing. Structural integrity failures occurred when the APBR did not extend at least 4 inches over the top of the thickest recommended mattress, or when fasteners loosened or detached during testing, causing the product to change dimensions.

All 35 models failed the labeling, warning, and instructional literature requirements. None of the 35 models

¹² The ASTM standard does not define “free-end.” The final rule defines “free-end” as the location on the retention system that is designed to produce a counter force; it may be a single distinct point or a location on a loop.

fully met the following requirements: section 9.1 for retail packaging and product labels; section 9.2, which specifies that warning statements must appear on the product, its retail package, and its instructions; and section 11's requirement to include instructional literature with required warning statements. None of the samples adequately instructed consumers how to safely install the APBR; nor did the samples adequately inform consumers of the known hazards related to APBRs. Detailed testing results are provided in Appendix A of the staff's NPR briefing package.

2. 2021 Market Compliance Testing

In 2021, staff conducted a second round of product testing to ASTM F3186–17 to determine if the additional time and outreach efforts by staff since 2018 were sufficient for manufacturers

to increase their overall level of compliance to the standard. A representative total of 17 APBR products were procured for testing: these included all of the eight APBR models that staff identified as new to the market since the 2018 analysis, and nine additional, randomly selected models from the remaining models available in the market. The nine randomly selected models were products previously identified in the 2018 analysis as available for purchase at that time and were again included in 2021 to account for any changes to those models that may have improved their compliance to the voluntary standard.

The 2021 testing, like the 2018 analysis, was designed to assess overall compliance to the voluntary standard, with a focus on certain sections of ASTM F3186–17 including Retention

Systems, Structural Integrity, Entrapment, Openings, Misassembled Products, Warning Statements, and Instructional Literature. All 17 samples failed at least one of these performance requirements. Detailed testing results are provided in Appendix B of the staff's NPR briefing package. Because performance testing of a sample was stopped after failing to meet at least one performance requirement, the data collected may not account for all the potential nonconformities for each product.

Additionally, none of the 17 models met the labeling, warnings, and instructional literature requirements. As shown in Table 9 below, the failure modes of this analysis are similar to those in the 2018 analysis, indicating little-to-no significant change in the market over this time.

TABLE 9—ASTM F3186–17, 2021 APBR MARKET COMPLIANCE TESTING RESULT SUMMARY

Section	Title	Number of failed samples	Number of samples tested
General Requirements:			
5.1	Hazardous Points/Edges	0	17
5.2	Jagged Surfaces	0	17
5.3	Articulated Beds		0
Performance Requirements:			
6.1	Retention Systems	13	17
6.2	Structural Integrity	7	7
6.3	Entrapment	14	16
6.4	Openings		0
6.5	Misassembled Products	1	1
Labels and Warnings Requirements:			
9.1	Labeling	17	17
9.2	Warning Statements	17	17
Instructional Literature:			
11	Instructional Literature	17	17

3. CPSC Section 15 Compliance Actions 2021–2022

CPSC has issued five public warnings regarding specific APBRs that did not comply with ASTM F3186–17. In April 2021, CPSC warned consumers to stop using three models of APBRs manufactured by Bed Handles, Inc., because the products pose an entrapment hazard.¹³ Bed Handles, Inc., manufactured approximately 193,000 units of the bed rails, and CPSC is aware of four entrapment deaths associated with the product.

In December 2021, CPSC announced voluntary recalls of APBRs manufactured by three firms, due to the

entrapment hazard and risk of death by asphyxia posed by their products:

- Drive DeVilbiss Healthcare (496,100 units, 2 deaths);¹⁴
- Compass Health Brands (104,900 units, 3 deaths);¹⁵ and
- Essential Medical Supply, Inc. (272,000 units, 1 death).¹⁶

In June 2022, CPSC warned consumers to stop using 10 models of APBRs manufactured and sold by Mobility Transfer Systems, Inc. from 1992 to 2021, and by Metal Tubing

USA, Inc. in 2021 and 2022. Three entrapment deaths involving one of these models have occurred.¹⁷ Neither of the two manufacturers agreed to conduct a recall. Approximately 285,000 units were manufactured.

4. Market Compliance Testing Summary

The Commission determines that, without additional modifications as discussed in the NPR and below, the voluntary standard is insufficient to eliminate or adequately reduce the unreasonable risk of injury of entrapments presented by APBRs. Moreover, based on staff's test results showing that there is no market compliance with the voluntary

¹³ Press Release (PR) #21–122, <https://www.cpsc.gov/Newsroom/News-Releases/2021/CPSC-Warns-Consumers-to-Stop-Use-of-Three-Models-of-Adult-Portable-Bed-Rails-Manufactured-by-Bed-Handles-Inc-Due-to-Entrapment-Asphyxia-Hazard>.

¹⁴ PR #22–025, <https://www.cpsc.gov/Recalls/2022/Drive-DeVilbiss-Healthcare-Recalls-Adult-Portable-Bed-Rails-After-Two-Deaths-Entrapment-and-Asphyxiation-Hazards>.

¹⁵ PR #22–040, <https://www.cpsc.gov/Recalls/2022/Compass-Health-Brands-Recalls-Carex-Adult-Portable-Bed-Rails-After-Three-Deaths-Entrapment-and-Asphyxiation-Hazards>.

¹⁶ PR #22–039, <https://www.cpsc.gov/Recalls/2022/Essential-Medical-Supply-Recalls-Adult-Portable-Bed-Rails-Due-to-Entrapment-and-Asphyxia-Hazard-One-Death-Reported>.

¹⁷ PR #22–148, <https://www.cpsc.gov/Newsroom/News-Releases/2022/CPSC-Urges-Consumers-to-Immediately-Stop-Use-of-Mobility-Transfer-Systems-Adult-Portable-Bed-Rails-Due-to-Entrapment-and-Asphyxia-Hazard-Three-Deaths-Reported>.

standard, the Commission determines that substantial compliance to a voluntary adult portable bed rail safety standard is unlikely. Accordingly, the Commission rule incorporates by reference, ASTM F3186–17 with modifications, to require ABPR manufacturers to comply with the fundamental requirements of the mandatory standard and thereby improve safety.

V. Response to Comments

CPSC received seven written comments during the NPR comment period. The comments are available on: www.regulations.gov, by searching under docket number CPSC–2013–0022. For more details about the comments CPSC received on the NPR, see the final rule staff briefing package. This section describes key issues raised in the comments and CPSC's responses to them.

A. Banning APBRs

Comments: Four commenters addressed the issue of banning APBRs. Public Citizen urged the CPSC to withdraw its proposed rule and instead promulgate a rule under section 8 of the CPSA, declaring all currently marketed adult bed rails to be banned hazardous products. National Center for Health Research (NCHR), National Consumer Voice for Quality Long-Term Care (Consumer Voice), and California Advocates for Nursing Home Reform (CANHR) commented that they do not support a ban at this time. However, they stated that they would support a ban on APBRs if the final rule is adopted and proves to be ineffective in preventing deaths and injuries resulting from APBR entrapment.

Response: At this time there is not sufficient evidence to support a ban on APBRs under section 8 of the CPSA. Under section 8 of the CPSA, to issue a ban, the Commission must find:

- a consumer product is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and
- no feasible consumer product safety standard under this Act would adequately protect the public from the unreasonable risk of injury associated with such product.

15 U.S.C. 2057. The Commission finds the final rule, promulgated under section 9, will adequately address the unreasonable risk of fatal and non-fatal injuries related to APBR entrapment. However, after the final rule is effective, staff will monitor data they become available, assessing the efficacy of the final rule.

B. Comments on Alternatives to Using APBRs and on Qualitative or Quantitative Value of APBRs

Comment: Gloria Black, NCHR, Consumer Voice, Public Citizen, and CANHR identified several alternatives to using APBRs, such as: bed trapezes, adjustable beds, non-slip mattress pads, bed exit alarms, body pillows, and medical attendees.¹⁸ Gloria Black specifically identified “no cost options” including lowering the bed or placing the mattress on the floor to prevent falls, placing cushioning on the floor to prevent serious injury, and placing a sturdy nightstand or table next to the bed to assist individuals in getting in and out of bed. Additionally, CANHR stated that APBRs are “used primarily as physical restraints for the convenience of others, and almost always unnecessary and in nursing homes” and per “the Nursing Home Reform Law of 1987’s prohibition of physical restraints for the convenience of staff, safe alternatives to prevent injury from falls have been practiced for decades in compliant facilities.”

Two comments addressed the qualitative or quantitative value of APBRs. Sarina Martin expressed a general concern that a ban on APBRs will increase the risk of falls in long-term care facilities. Consumer Voice was unaware of any qualitative or quantitative evidence concerning the utility that APBRs have for consumers relative to products that might be used as substitutes in the event APBRs are banned. However, Consumer Voice noted some consumers have expressed fears that a ban could limit their ability to leave their beds, lead to a decline in mobility and functioning and therefore increase their dependency, and result in decreased quality of life due to greater isolation.

Response: A ban on APBRs could leave consumers without a product that provides them with mobility and independence. APBR products help consumers by aiding them in safely staying in a bed and providing them with a safe grip for getting in/out of a bed and repositioning while in bed. Such products are particularly useful for consumers who live in a personal residence, rather than in a hospital or care facility, as supervision or assistance may be less readily available in a home environment. However, considering the number of fatal and non-fatal injuries

from APBRs, the Commission considers the requirements for APBRs in the final rule to be necessary to address the risks. Consumers may choose to use alternatives to APBRs, but while these alternatives have been available to consumers, many injuries and deaths continue to occur. These alternatives alone have not adequately reduced the unreasonable risk of injury and death presented by APBRs, and thus the final rule is needed to address the identified hazards.

C. The Effect of the Proposed Rule on Long Term Care Facilities

Comment: Sarina Marlin expressed a general concern regarding the effect of the proposed rule on long-term care facilities. Ms. Marlin asserted that data from staff’s NPR package indicates that a disproportionate number of recorded fatalities associated with APBRs occur in home settings when compared to Long Term Care Facilities.

Response: The fatality location ratios quoted by Ms. Marlin are drawn from the preamble of the NPR, in which staff identified 158, 50, 40, and 14 fatalities associated with APBR entrapment in homes, nursing homes, assisted living facilities, and residential institutions, respectively. Without knowing the level of exposure in these different treatment settings, one cannot infer that there are fewer fatalities per APBR in professional settings than in the home, or that APBRs in professional settings do not pose significant risk to the public, without knowing the number of APBRs in use in each setting. CPSC staff did not, and does not, possess this information nor data from which estimates of the number of APBRs in use in each setting may be drawn. No such information was submitted by the commenter. However, given that APBRs are marketed primarily to individual consumers, staff assesses that APBRs are more likely to be found in homes than in professional settings.¹⁹

The Commission disagrees with the commenter’s assertion that an undue impact will occur to long term care facilities. In the NPR’s Preliminary Regulatory Analysis, CPSC staff considered the effect of the proposed rule on APBR price, the dead weight loss (the lost consumer and producer surplus resulting from price-induced decrease in APBR sales) associated with the price change, cost, and net benefits. Staff estimated the proposed rule would increase manufacturer costs in the first year by approximately \$5.40 per APBR,

¹⁸ A bed trapeze is a product that consumers can use to get in and out of bed or change position while in bed. It typically consists of a horizontal bar suspended from a metal frame. Bed trapezes are typically larger than adjacent-type bed rails and are therefore less portable.

¹⁹ Professional care facilities may use a variety of products, including APBRs and hospital bed rails, depending on the needs of the patient.

of which \$4.00 is expected to be passed on to APBR consumers (including commercial enterprises) in the form of higher prices. A \$4.00 increase in APBR price represents less than 0.01 percent of the annual cost of a private room in an assisted living facility, and approximately half that already tiny percentage for a private room in a nursing home, which staff does not consider an undue burden for these facilities.²⁰

D. Hole Size Requirements

Comment: Louis A. Ferreira, of Stoel Rives, LLP, representing Stander, Inc. (Stander), a seller of APBRs, suggests that the NPR's proposal to regulate the sizes of holes or slots that extend entirely through a wall section on an APBR is not reasonably necessary to prevent or reduce an unreasonable risk

of injury. Stander disagreed with the Commission's proposal to make the opening requirements consistent with standards for other products such as Children's Portable Bed Rails and instead suggests that the final rule should only correct consistency errors concerning dimensions in section 6.4 of the voluntary standard. Stander claimed that "the size of the holes do[es] not increase the risk of a fall of entrapment" and that "[t]here is not even evidence in the record that would support a conclusion that finger entrapment in the holes of an adult bed rail have ever caused an injury."

Response: As reported in Tab A of the staff briefing package for the NPR, about 7,400 of the estimated 79,500 adult bed rail-related injuries treated in emergency departments from 2003 to

2021 were hand or finger injuries. Of these, about 3,400 were identified as injuries to fingers, most of which involved crushing or laceration.²¹

Section 6.4 of ASTM F3186–17 addresses the risk of finger entrapment and laceration in small holes or openings. Changes to this section are necessary to correct errors and inconsistent measurement references. Specifically, in stating the dimensions of the rods used to conduct testing, the standard inaccurately refers to 13 mm as the equivalent to $\frac{5}{8}$ in. (whereas $\frac{5}{8}$ in. is approximately 16 mm). Also, while the standard allows different dimensions for holes or slots that do not exceed $\frac{1}{4}$ in. in depth, it refers to a drawing depicting a hole up to ".375 (9.53 mm) deep," or $\frac{3}{8}$ in., shown below in Figure 2.

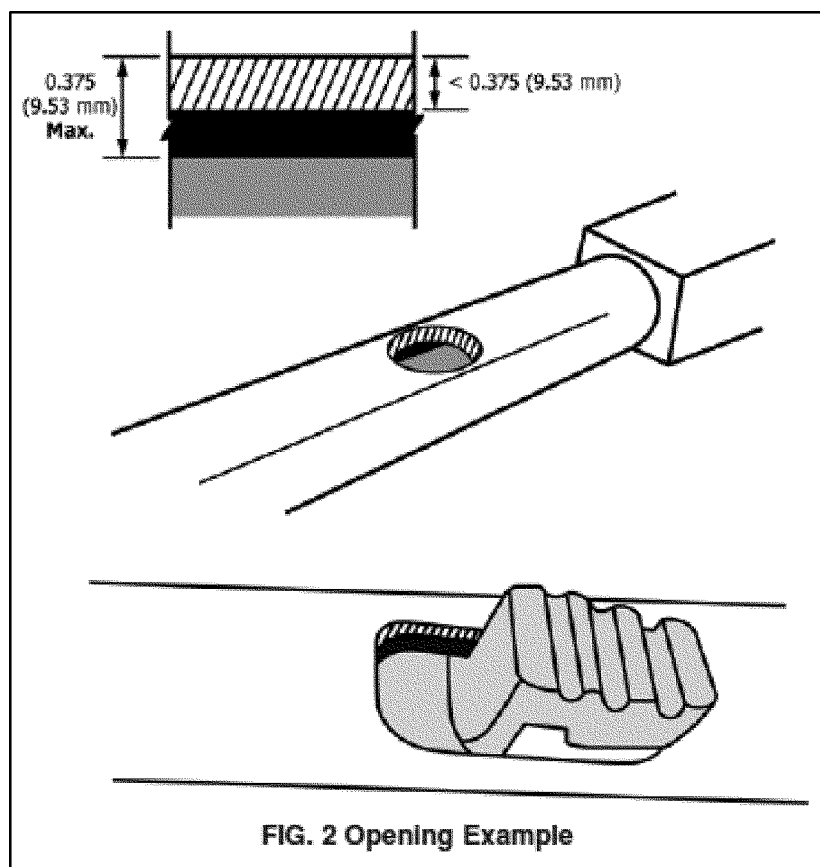


Figure 2: Illustration from Figure 2 of ASTM F3186 – 17, Section 6.4

Further, the proposed changes in the NPR are necessary to adequately address the risk of injury because the hole

dimensions referenced by the commenter are not effective in protecting vulnerable adult populations.

Vulnerable adults are often smaller and more frail than other populations of adults and are more likely to use APBR

²⁰ Genworth Financial, Inc., estimates the national median annual cost for a private room in assisted care facilities and nursing homes in the

United States in 2021 at \$54,000 and \$108,405. Median Cost of Nursing Home, Assisted Living, & Home Care | Genworth.

²¹ NEISS data can be searched by the public through the CPSC NEISS On-Line Query System—<https://www.cpsc.gov/cgibin/neissquery/home.aspx>.

products. The proposed changes in the NPR align the rule with other established children's product regulations that prevent hazards to a range of finger sizes that covers both children and adult users simultaneously.²²

The Commission therefore concludes the language proposed in the NPR is necessary to address the range of foreseeable consumer exposures to potentially hazardous holes in APBRs. Therefore, no change will be made to the final rule based on this comment.

E. Proposed Entrapment Test Modifications

Comment: Luis A. Ferreira, representing Stander, suggested that staff's proposed entrapment test modifications are ambiguous and inadequate. Stander expresses concern "that the ASTM Standard with the proposed modifications could be misinterpreted, and a product fail the test, not because of any unreasonable risk posed by the bed rail, but simply because a mattress is selected for testing that is so soft that the probe can be pulled beneath the bottom rail of the

APBR." Stander suggests making changes to the proposed entrapment test requirements of the NPR.

Response: ASTM F3186–17 does not have a specific definition for "entrapment zone." Based on the commenter's interpretation of the entrapment test methods, the voluntary standard may not adequately describe what an entrapment zone is and why it is tested.

Each entrapment zone test addresses specific hazard patterns that are identified in both the FDA guidance document as well as staff's findings from the incident data. The hazard patterns associated with each entrapment zone are described below.

- Zone 1 testing addresses head-first entry into fully bounded openings within the structure of the rail.
- Zone 2 testing addresses head-first entry under the rail into any opening between the mattress compressed by the weight of a consumer's head and a section of the bedrail longer than 4.7 in.
- Zone 3 testing addresses entry of the head into a gap between the inside surface along the length of the rail and the mattress compressed by the weight of a consumer's head.

- Zone 4 addresses neck-first entrapment between the rail and mattress compressed by the weight of a consumer's head and neck at the ends of the rail.

We disagree with Stander's interpretations that entrapment zone hazards only exist where there are visible openings. According to the CPSC staff's analysis of the incident data, the area "between the rail and mattress" is the most common location for entrapment. The hazards related to each zone are present regardless of the locations of the supports but are dependent on the design of the rail in relation to the anthropometric dimensions of the user.

For example, per Zone 2, the known hazard is head-first entry under the rail in any section longer than the anthropometric head dimension of the entrapment test probe, which is 4.7 inches. Therefore, in Figure 3 below, both the left and right areas should meet Zone 2 requirements, in addition to the other applicable tests, to ensure the product adequately addresses the known hazard.

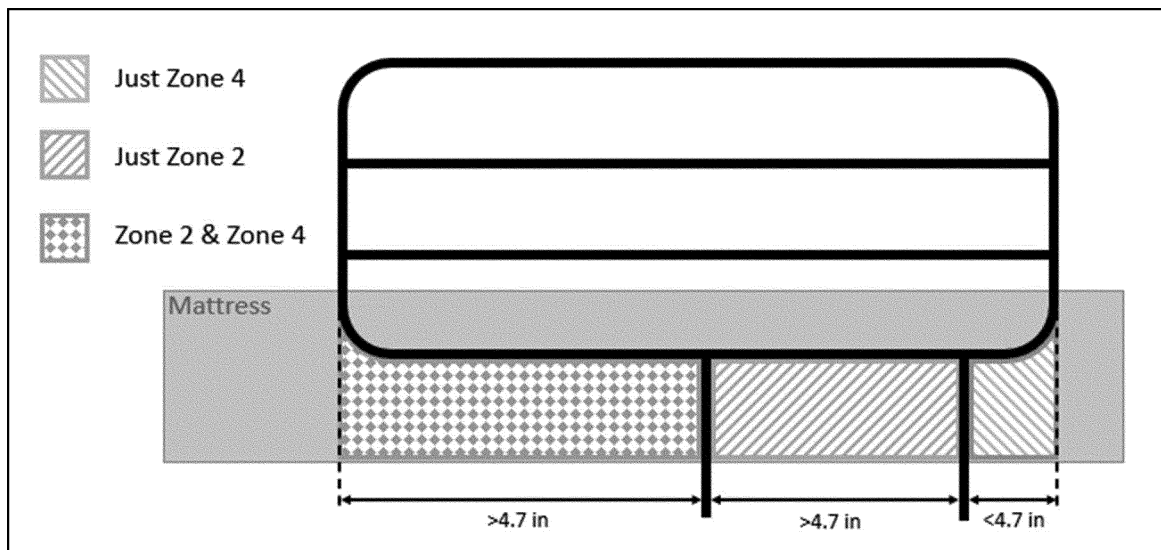


Figure 3: General example of areas subject to Zone 2 requirements.

Safety testing should represent known hazard modes, including the displacement caused by consumers moving or pushing into the mattress or product, which may create an opening that was not previously visible. During entrapment zone testing, the positioning

and application of the force via a force gauge must be realistic and representative of all reasonably foreseeable scenarios of consumer behavior. In many cases, applying the force to the probe by attaching a force gauge below the bottom of the rail is the

most accurate representation of the worst case of this foreseeable hazard scenario. Additionally, in contrast to the current voluntary standard, entrapment hazards are not present only in the "largest opening" of a product. Entrapment hazards may exist in several

²² It is also foreseeable that children may interact with APBRs, such as when visiting grandparents.

The NPR's proposed modifications to the voluntary

standard would protect children without creating any new hazards for adults.

areas depending on the product configuration and installation.

To ensure entrapment hazards are adequately addressed, products must be assessed in all areas that may constitute an entrapment zone. Therefore, in response to this comment, the Commission has revised the language in the final rule as follows:

- Adding a global definition for “entrapment zone” to the draft rule, which will clarify what areas must be tested.
- Removing language from the test methodology that may have led test personnel to unnecessarily restrict locations and orientations of the placement of the entrapment test probe for testing.
- Improving instructions for test personnel to apply forces in a manner that is more representative of the entrapment hazards.

F. Removing Mattress Thickness Selection for Testers

Comment: Louis A. Ferreira, representing Stander, suggests that the proposed addition of section 7.1.3 of the NPR’s proposed rule to the voluntary standard’s requirements is not reasonably necessary to prevent or reduce an unreasonable risk of injury. Staff’s proposal for this additional section would allow testers to select for testing a mattress that is up to 1.5 in. (38 mm) thicker or thinner than the range specified by the manufacturer. Standard asserts that “there is no evidence in the record that a consumer has ever suffered an injury because they used an adult bed rail on the wrong size mattress.”

Response: Mattress thickness has a direct bearing on the entrapment hazard. ASTM F3186–17 defines Zones 2, 3, and 4 in relation to the product and the mattress. A mattress that is too thin can result in larger entrapment zones, posing a greater risk of entrapment. On the other hand, an APBR used with a mattress that is too thick can lead to an APBR failing to meet the standard’s structural integrity performance requirement, found in section 6.2, which states that the top of the bed rail must extend 4 inches above the mattress.

Staff has found that most APBR models can be installed and adjusted regardless of mattress thickness, and the hazard created by using an APBR on an incompatible mattress will not be apparent to the typical consumer. Therefore, it is preferable to design out hazards rather than rely on consumers to follow warnings and instructions.

Indeed, it is foreseeable that some consumers will use APBRs with mattresses that are not within the

manufacturer’s recommended thickness range. During APBR testing, staff found that a mattress’s true thickness typically differs from the thickness advertised by the mattress manufacturer. Consumers are unlikely to measure their mattress prior to purchasing an APBR, or they may not measure it accurately. Additionally, consumers may not have information about the mattress thickness when they purchase APBRs for use by another person, or for use on a hotel or guest bed. Finally, consumers who transfer existing APBRs to a new mattress may not take any action to ensure that the APBR is appropriate for the new mattress’s thickness.

The mattress thickness variability requirements in the final rule anticipates these and similar foreseeable scenarios. The requirement covers a limited range of mattresses beyond what is advertised to account for the known hazards outside of the “compatible” range.

G. Language Modifications for Mattress Thickness Selection

Comment: Consumer Voice notes that language in the proposed modifications to the voluntary standard could potentially allow manufacturers to avoid providing consumers a recommended mattress thickness range for their products. Consumer Voice requested removing this language from the final rule.

Response: The Commission agrees with Consumer Voice. Section 9.1.1.3 of the voluntary standard requires manufacturers to list a recommended thickness range. The final rule will remove “If the manufacturer does not recommend” and other related language from the proposed additions to sections 6.2.1 and 7.1 of the voluntary standard to avoid manufacturers potentially not providing consumers a recommended mattress thickness range for their products.

H. Banning Retention Straps

Comment: Consumer Voice requested staff ban the use of straps as a means of attaching the product to a bed. Consumer Voice asserts that the use of straps to attach an APBR to a bed greatly increases the risk of improper assembly and the likelihood of harm, and that straps can stretch and become loose over time.

Response: Banning retention straps would unnecessarily restrict APBR designs. The proposed modifications to the requirements of the standard, such as the requirement for a warning on an “installation component,” will adequately address known hazards associated with APBRs and increase the

likelihood of consumers installing the retention strap. CPSC staff has not identified any strangulation or other hazards specifically associated with retention straps, and therefore there is not sufficient evidence to support banning retention straps.

I. Modifying the Proposed Definition of “Conspicuous”

Comment: Consumer Voice expressed concerns that the proposed definition of “conspicuous,” adopted from section 3.1.3 of the voluntary standard, is too narrow. Consumer Voice suggests modifying the proposed definition in the voluntary standard to increase the requirements for visibility of warning labels on the product. Specifically, Consumer Voice recommends that the definition be revised so that “conspicuous” labels/components be visible to both the consumer and a person standing near the unit from at least two different positions.

Response: The definition of “conspicuous” in section 3.1.3 requires certain labels to be visible from one position rather than 2 positions, as proposed by the commenter. The commenter’s recommended alternative definition does not provide sufficient guidance regarding the two positions in which warning labels would be required to be visible, and it could foreseeably be interpreted such that two viewing positions are only marginally different. Therefore, the commenter’s proposed definition of “conspicuous” does not represent a substantive improvement to safety.

J. Adding “Conspicuous” to Warning Labeling Requirements

Comment: Consumer Voice recommended that the term “conspicuous” should not be deleted from the warning label placement requirements in section 9.2.7, as proposed in § 1270.2(b)(18)(i) of the NPR. Consumer Voice claimed the removal of the word would weaken the requirement and make the product less safe.

Response: The warning in section 9.2.7 of ASTM F3186 is directly related to product installation. As discussed in the NPR briefing package, the warning should draw attention to the installation component and encourage its use during installation (16 CFR part 1224, the children’s bed rail standard, has this same warning requiring it to be on an “installation” component). Therefore, it is unnecessary for the warning on the product to be conspicuous in the manufacturer’s recommended use position. Additionally, ASTM F3186–17 requires separate warnings that address

entrapment hazards and securing the APBR to the bed that are required to be placed on a conspicuous component of the product and/or packaging/instructions. Therefore, the warning in section 9.2.7 should be on an installation component but is not required to be conspicuous for the reasons discussed above.

K. Making Compliance Testing Records Publicly Available

Comment: Consumer Voice requested an additional requirement that manufacturers provide consumers with records of compliance testing upon request.

Response: Manufacturers and importers of APBRs will be required to issue a General Certificate of Conformity (GCC) under section 14 of the CPSA and 16 CFR part 1110 for the APBR mandatory standard. A GCC requires manufacturers or importers to certify that their general use products comply with all applicable consumer product safety rules (or similar rules, bans, standards, or regulations) under any law enforced by the Commission for that product. A GCC must accompany the applicable product or shipment of products covered by the certificate. A manufacturer or importer must furnish the GCC to distributors or retailers. Based on the available information there is not significant evidence indicating that the commenter's proposed requirement that manufacturers also provide records of compliance testing directly to consumers will substantially decrease the known hazards related to APBRs given the existing GCC framework.

L. Reorganizing Labeling Requirements

Comment: Consumer Voice argued that the labeling and warning requirements for retail packaging, instructions, and the product labels set out in the proposed rule are confusing and contradictory. Consumer Voice specifically suggested reorganizing the labeling requirements.

Response: We do not agree with Consumer Voice's proposed change to the proposed rule. The current requirement in ASTM F3186–17, which is included in the final rule, clearly states the required location for each warning.

M. Adding Labeling Requirements for Intended Use

Comment: Consumer Voice suggested adding labeling requirements to include information about the intended use of APBRs and for whom the products are designed.

Response: APBR manufacturers should specify how their product(s) function in their instructions and on their product packaging. However, staff's familiarity with existing ABPRs' marketing, packaging, labeling, and appearance leads staff to assess that consumers are likely to understand that the products are designed for elderly users and/or adult users with disabilities/inhibited movement, so the Commission finds that additional recommended labeling is unnecessary.

N. Adding Email Address to Contact Information Requirements

Comment: Consumer Voice argues that email is an increasingly used form of communication, and including an email will make contacting manufacturers more accessible for consumers. Consumer Voice requests that the final rule should require manufacturers to include their email address in addition to the other contact information currently required.

Response: The required contact information already in the standard is adequate for consumers to contact the manufacturer. We do not have any evidence indicating that requiring an email address will decrease known hazards related to APBR products.

O. Adding Language to Warning Statements

Comment: Consumer Voice suggests adding to the language throughout the final rule's warning statements, specifically by including a discussion of the risk of "serious injury or death from entrapment."

Response: Each warning clearly states that improper use and/or installation can lead to entrapment and death. Therefore, no change to the final rule is necessary based on this comment.

P. Adding Drawings in Instructional Literature Requirements

Comment: Consumer Voice recommends requiring manufacturers to include drawings in the instructions that depict potential examples of entrapment to allow consumers to better understand the potential hazards of APBRs.

Response: Section 11.1 of the APBR voluntary standard, ASTM F3186–17 includes a similar requirement and is incorporated by reference in the final rule. Manufacturers are required to include drawings of all entrapment zones (Zones 1–4). The FDA drawings are provided as a reference in Appendix X1.1 but manufacturers are free to use their own illustrations should they choose to do so.

Q. Stockpiling

Comment: Consumer Voice and CANHR, submitted comments in favor of the stockpiling provision proposed in the NPR. No comments objecting to the proposed stockpiling provision were submitted. Therefore, the prohibition on stockpiling will be finalized as proposed.

R. Effective Date

Comments: Three commenters submitted comments regarding the effective date. Consumer Voice and CANHR were in favor of the 30-day effective date. Louis A. Ferreira, representing Stander, urged that the rule should not prohibit Stander from selling existing stock of APBRs that are compliant with the ASTM F3186–17 standard.

Consumer Voice considered the 30-day effective date to be appropriate and fair, and stated that "manufacturers should not need more than 30 days." They also commented that the ASTM standards went into effect in 2017 and that "[f]ive years is more than enough time to understand the standards and take the steps necessary to comply." CANHR "support[ed] the staff's recommendation not to issue the new rule with an introduction time more than 30 days" while also noting that the ASTM voluntary standard has been available to manufacturers and other interested parties since 2017.

Stander states, "Stander has made a significant investment to produce product consistent with the existing ASTM Standard" and "it would require a least a year to sell its existing stock that is compliant with the existing ASTM Standard but not the modified ASTM Standard." Stander further states that "[a]s the CPSC has found that the compliance with the existing ASTM Standard is sufficient to eliminate the 'unreasonable' risks posed by APBRs, CPSC should expressly allow manufacturers a reasonable period of time to sell existing stock that complies with the current ASTM Standard." Stander "believes that a reasonable period to sell its ASTM Standard compliant stock would be one year."

Response: No commenter contends that a 30-day period is insufficient for manufacturers to come into compliance with the final rule. However, Stander expressed concerns regarding selling their existing stock of APBRs. The final rule does not prohibit Stander from selling its existing stock that was manufactured before publication of the final rule in the **Federal Register**.

Finally, for clarity, we disagree with Stander's claim that "the CPSC has

found the compliance with the existing ASTM Standard is sufficient to eliminate the ‘unreasonable’ risks posed by APBRs.” In the NPR, the Commission preliminarily determined that the combined requirements of the voluntary standard—with the proposed modifications that were deemed necessary—would adequately reduce unreasonable risk and injury associated with APBR entrapment. 87 FR 67586. The Commission did not find the voluntary standard *by itself* sufficient to address the unreasonable risk posed by APBRs. That approach is unchanged for the final rule.

VI. Description of the Final Rule

The Commission determines that ASTM F3186–17, with modifications to improve safety, will address all known product hazard modes associated with APBRs, particularly entrapment. The provisions of the final rule are described below.

A. Section 1270.1—Scope, Application, and Effective Date

Section 1270.1 provides that new part 1270 establishes a consumer product safety standard for APBRs manufactured after the effective date of the final rule. This section is being finalized as proposed.

B. Section 1270.2—Requirements for Adult Portable Bed Rails

Section 1270.2 of the final rule sets forth the requirements for APBRs. Section 1270.2(a) requires each APBR to comply with all applicable provisions of ASTM F3186–17. Section 1270.2(a) is being finalized as proposed.

Section 1270.2(b) provides the requirements for APBRs in addition to those based on ASTM F3186–17. Most of the requirements of § 1270.2(b) are being finalized as proposed in the NPR. Detailed descriptions and justifications for the proposed requirements can be found in the preamble of the NPR and the staff briefing package for the NPR. Several provisions of proposed § 1270.2(b) have been revised in the final rule in response to comments. For additional information regarding the comments that resulted in changes to the final rule and a detailed summary of the comments and responses see section V. of this preamble and the staff briefing package for the final rule. Below is a description of the changes made from the proposed rule to the final rule. In addition to the changes described below to the final rule, non-substantive conforming, editorial edits, and changes to numbering and cross references were made in the final rule for consistency and accuracy.

1. Section 1270.2(b)(1)

A comment from APBR seller Stander indicated that the proposed rule is ambiguous regarding the testing of entrapment zones. ASTM F3186–17 does not define the term “entrapment zone.” The preamble of the NPR referenced both the FDA guidance document and incident data to explain how the entrapment zones will be identified, and the different ways entrapment can occur within the entrapment zones. However, adding a global definition for “entrapment zone” to the final rule will clarify what areas must be tested. Therefore, § 1270.2(b)(1)(i) of the final rule includes a new definition for “entrapment zone,” which is defined as “An area, gap, or opening that can potentially capture or restrain a person’s body part. Hazardous openings may not always be visible prior to testing.” The three original definitions in proposed § 1270.2(b)(1) have been renumbered from proposed § 1270.2(b)(1)(i) through (iii) to § 1270.2(b)(1)(ii) through (iv) in the final rule to account for the addition of the new definition of entrapment zone in § 1270.2(b)(1)(i) of the final rule.

2. Section 1270.2(b)(3)

Based on Stander’s comment that recommended revisions to the proposed language for mattress thickness selection, the Commission is removing from § 1270.2(b)(3)(i) of the final rule language that could be interpreted as exempting manufacturers from including a range of compatible mattress thicknesses, which is contradictory to the intent of the standard.

3. Section 1270.2(b)(8)

A comment from Consumer Voice was submitted indicating that the original proposed language seems to create an alternative requirement for manufacturers that do not provide a recommended thickness range, as required by section 9.1.1.3 of the voluntary standard. Based on the comment, § 1270.2(b)(8)(i) of the final rule adds an additional range that will increase safety by accounting for foreseeable differences between nominal and actual mattress thicknesses, as well as consumer mattress selection that deviates from manufacturer recommendations.

4. Section 1270.2(b)(9)

Proposed § 1270.2(b)(9) contained the introductory instruction “In addition to complying with section 7.2 of ASTM F3186–17”, when it should have read “Instead of complying with section 7.2 of ASTM F3186–17”. The final rule has been revised to correct this error.

5. Section 1270.2(b)(11) and (13)

Based on a comment from Stander, the language in proposed § 1270.2(b)(11)(i) and (b)(13)(i) has been revised in the final rule to remove restrictions on how the probe and force should be applied, and thereby better represent the known hazard patterns and ensure consistent interpretations of the test methods. Applying the force perpendicular to the 2.4-inch end of the probe may not always emulate the potential hazard of head or limb entrapment. Therefore, the language in § 1270.2(b)(11)(i) and (b)(13)(i) of the final rule has been revised to “in the direction most likely to lead to failure of the requirement” to make it clearer and more easily understood by safety testing personnel.

6. Section 1270.2(b)(12)

Also based on a comment from Stander, § 1270.2(b)(12)(i) has been revised in the final rule to remove restrictions on how the probe and force should be applied to better represent the known hazard patterns. The language in § 1270.2(b)(12)(i) of the final rule has been revised to read “at the angle most likely to allow it to pass through” to make it clearer and more easily understood by safety testing personnel.

7. Section 1270.2(b)(14) (previously proposed § 1270.2(b)(13)(ii))

The requirements of proposed § 1270.2(b)(13)(ii) in the NPR have been renumbered as revised § 1270.2(b)(14) in the final rule. Therefore, proposed § 1270.2(b)(14) through (19) have been renumbered as § 1270.2(b)(15) through (20) in the final rule. Revised § 1270.2(b)(14) has been modified from the proposed rule because proposed § 1270.2(b)(13) introductory text incorrectly stated that the language “Instead of complying with [the applicable ASTM provision]” applied to both § 1270.2(b)(13)(i) and (ii). The introductory instructional text for proposed § 1270.2(b)(13)(ii) should have read “In addition to complying with [the applicable ASTM provision]”. Therefore, in the final rule, § 1270.2(b)(14) has been revised to provide the correct introductory text.

Additionally, § 1270.2(b)(14)(i) in the final rule has been revised from proposed § 1270.2(b)(13)(ii). Stander raised concerns about the location of Zone 2 on bed rails with multiple supports. Zone 2 testing is meant to address head-first entry under the rail into any opening between the mattress compressed by the weight of a consumer’s head and a section of the bedrail. Bed rails that have overhanging

elements longer than 4.7 inches can allow the passage of the head in a manner consistent with identified Zone 2 entrapment hazards regardless of the number or location of vertical support rails. 4.7 inches is the diameter of the test probe and encompasses the 5th percentile female head breadth. Therefore, revised § 1270.2(b)(14)(i) clarifies which areas should be included in Zone 2 testing along with adding a new figure 1 illustration that visually depicts the clarifying language.

C. Section 1270.3—Prohibited Stockpiling

In the NPR, the Commission proposed an anti-stockpiling provision to prevent firms from manufacturing large quantities of non-compliant APBRs before the rule takes effect. This section makes it a prohibited act, for the period of time between the date of **Federal Register** publication of the final rule and the effective date of the final rule, for manufacturers and importers to manufacture or import APBRs at a rate that is greater than 105 percent of the rate at which they manufactured or imported APBRs during the base period of sales for the manufacturer or importer. The prohibited stockpiling provision is being finalized as proposed.

D. Findings in Appendix A to the Part

The findings required by section 9 of the CPSA are discussed throughout the preamble of this rule and set forth in appendix A to part 1270. While the findings have updated for the final rule, they are substantively the same as the proposed findings in the NPR.

VII. Final Regulatory Analysis

Pursuant to section 9(f)(2) of the Consumer Product Safety Act, publication of a final rule must include a final regulatory analysis containing:

- A description of the potential benefits and potential costs of the rule, including any benefits or costs that cannot be quantified in monetary terms, and an identification of those likely to receive the benefits and bear the costs.
- A description of any alternatives to the final rule which were considered by the Commission, together with a summary description of their potential benefits and costs and a brief explanation of the reasons why these alternatives were not chosen.
- A summary of any significant issues raised by the comments submitted during the public comment period in response to the preliminary regulatory analysis, and a summary of the assessment by the Commission of such issues.

A. Final Description of Potential Benefits and Costs of the Rule

Since the publication of the NPR in the **Federal Register** on November 9, 2022, the Commission has not identified any material changes in the APBR market, or in the data used in the preliminary analysis of benefits and costs. Though some of the comments on the NPR described possible economic impacts of the rule, none of the comments specifically addressed or otherwise suggested changes to the preliminary regulatory analysis. Therefore, the final regulatory analysis for the final rule discussed below is substantively unchanged from the analysis described in the preamble of the NPR and in Tab G of the staff NPR briefing package, as explained in Tab C of the final rule briefing package.

CPSC's assessment of the final rule's potential benefits and costs is that the quantifiable benefits of the rule are in the range of \$66.75 million per year (assuming a 25% efficacy rate for the rule's requirements) to \$200.24 million per year (assuming a 75% efficacy rate). The costs associated with the rule's requirements to prevent the hazards associated with APBRs are expected to be \$2.01 million per year. On a per product basis, the benefits of the final rule are estimated to be between \$110.59 per APBR (25% efficacy) and \$331.78 per APBR (75% efficacy), and the costs are estimated at \$3.34 per APBR. All these amounts are in 2021 dollars using a discount rate of 3 percent. The Commission's analysis is based on incident reports for entrapments, only. Although APBRs may have been involved in other deaths or injuries, such as falls, those incidents are not considered in the benefit-cost analysis because there are limited details involving such incidents, and it is unclear what percentage, if any, of fall incidents would be prevented by the final rule.

1. Benefits of the Final Rule

The expected benefits and costs of the final rule are discussed below. The most common hazard pattern among all reported incidents is rail entrapment, accounting for more than 90 percent (284 of 310) of the fatal incidents. CPSC uses the period 2010 through 2019 for its rates of fatalities because, at the time of the NPR, it was the most recent 10-year window where all or nearly all incidents have been reported. The NPR identified 158 deaths from entrapment that occurred from 2010 through 2019. This number accounts for 92 percent of observed death incidents; the remaining 8 percent were caused by underlying

incidents that may or may not be prevented by the final rule. To forecast entrapment deaths into the future, CPSC used death rates per million APBRs in conjunction with its forecast of APBRs in use throughout the study period. The NPR assumed deaths would stay the same as the average rates observed between 2010 to 2019: 31.9 deaths per million APBRs.

To estimate the societal costs of entrapment deaths, CPSC applies the value of statistical life (VSL). VSL is an estimate used in benefit-cost analysis to place a value on reductions in the likelihood of premature deaths. The VSL does not place a value on individual lives, but rather, it represents an extrapolated estimate, based on the rate at which individuals trade money for small changes in mortality risk. CPSC specifically applies the estimate of the VSL developed by the U.S. Environmental Protection Agency (EPA). The EPA estimate of the VSL, when adjusted for inflation, is \$10.5 million in 2021 dollars. CPSC multiplies the VSL by the number of forecasted deaths throughout the study period to calculate societal costs of deaths from entrapment in the absence of the final rule.

We further assume that the number of firms and ABPR models in use will tend to be stable in future years around the values in 2022: 12 firms and 65 models. The market for APBRs is expected to grow at an average rate of 2.01 percent per between 2024 and 2053 as a result of an aging U.S. population. Assuming the rate of incidents per million APBRs stays constant, an industry of this size would result in an average of 32 deaths from entrapment per year. At a VSL of \$10.5 million (2021 dollars), the annualized present value of the potential benefits of the final rule is \$298.11 million.

The Commission has not included non-fatal injuries in the foregoing benefit-cost assessment because for many incidents involving such injuries, there is not sufficient information to determine whether they would be prevented by the final rule. However, non-fatal injuries have been quantified and monetized in a sensitivity analysis as a potential upper limit to assess the benefits of this final rule. Further, the requirements of the final rule are expected to address the 92 percent of deaths caused by entrapment. However, because we do not assume the final rule will eliminate all deaths caused by entrapment, we assessed potential benefits for the final rule under three scenarios, estimating benefits at 75 percent, 50 percent, and 25 percent of the 92 percent baseline efficacy.

At these rates under varying conservative assumptions (*i.e.*, likely to underestimate the benefits of the rule), CPSC estimates the annualized benefits of the final rule to be \$200.24 million, \$133.49 million, and \$66.75 million,

respectively. As discussed below, annualized costs associated with the final requirements to prevent APBR hazards are estimated to be approximately \$2 million. This results in net quantifiable benefits of \$198.23

million, \$131.48 million, and \$64.74 million on an annualized basis under these various scenarios that assume reduced benefits. Table 10 summarizes the projected benefits of the final rule.

TABLE 10—BENEFITS OF THE FINAL RULE

Benefits discounted at 3%	Effective rates		
	75%	50%	25%
Total Benefits (2024–2053 in \$B)	\$3.92	\$2.62	\$1.31
Annualized Benefits (in \$M)	200.24	133.49	66.75
Per-Unit Benefits (in \$)	331.78	221.19	110.59

2. Costs of the Final Rule

The Commission's regulatory assessment of the costs of the final rule assumes that 100 percent of manufacturers will fully redesign their APBR models to comply with ASTM F3186–17, with the final rule's modifications. Like the benefits estimation, the time span of the cost analysis covers a 30-year period that starts in 2024, which is the expected year of implementation of the final rule. This cost analysis presents all cost estimates in 2021 dollars. This cost analysis also discounts costs in the future and uses a 3 percent discount rate to estimate their present value.

The cost of implementing APBR requirements to address entrapment

hazards includes the costs manufacturers incur to redesign existing models and produce new designs to comply with the final rule, as well as any additional cost of producing the APBR that is associated with its redesign. Manufacturers would likely incur expenditures in design labor, design production, design validation, and compliance testing. CPSC staff's review indicates that once existing models have been redesigned with a working solution, new models can adapt the solution at a minimal cost.

Manufacturers can transfer some, or all, of the increased production cost to consumers through price increases. In the first year, the Commission expects producer manufacturing costs to

increase by \$5.40 per APBR, of which \$4.00 per APBR is expected to be passed on to the consumer in the form of higher prices. At the margins, some producers may exit the market because their increased marginal costs now exceed the increase in market price. Likewise, a fraction of consumers would now probably be excluded from the market because the increased market price exceeds their personal price threshold for purchasing an APBR. Deadweight loss is the measure of the losses faced by marginal producers and consumers who are forced out of the market due to the new requirements of the final rule. Table 11 summarizes the projected costs of the final rule:

TABLE 11—TOTAL COST OF THE FINAL RULE

Costs of proposed rule	Total cost (\$M)	Present value (\$M)
Cost of Redesigning Existing Models	\$2.75	\$2.59
Cost of Production of Redesigned APBRs	60.43	35.65
Deadweight Loss	2.07	1.23

3. Net Benefits of the Final Rule

Table 12 displays net benefits (difference between benefits and costs) and the benefit-cost ratio (benefits

divided by costs) to assess the cost-benefit relationship of the final rule. The table displays these metrics using annualized benefits for the three

scenarios: 75 percent, 50 percent, and 25 percent efficacy rates. These metrics show the draft final rule's benefits well exceed costs in each scenario.

TABLE 12—ANNUALIZED NET BENEFITS OF FINAL RULE

Annualized net benefits (\$M, discounted at 3%)	Portion of benefits achieved over the baseline efficacy rate of redesigned APBRs		
	75%	50%	25%
Benefits	\$200.24	\$133.49	\$66.75
Costs	\$2.01	\$2.01	\$2.01
Net Benefits (Benefits – Costs)	\$198.23	\$131.48	\$64.73
B/C Ratio	99.45	66.30	33.15

Table 13 compares the benefits and costs on a per-unit basis, to add a

marginal value perspective. These metrics again show the final rule's

benefits well exceed costs in each scenario.

TABLE 13—PER-APBR NET BENEFITS OF THE FINAL RULE

Per unit net benefits (\$, discounted at 3%)	Portion of benefits achieved over the baseline efficacy rate of redesigned APBRs		
	75%	50%	25%
Benefits	\$331.78	\$221.19	\$110.59
Costs	\$3.34	\$3.34	\$3.34
Net Benefits (Benefits – Costs)	\$328.45	\$217.85	\$107.26
B/C Ratio	99.45	66.30	33.15

B. Voluntary Standard

Based on staff’s evaluation of ASTM F3186–17, the Commission determines that ASTM F3186–17, with appropriate modifications, will address the entrapment hazard presented by APBRs. As discussed in the preamble of the NPR, and Tabs C and D of both the staff’s NPR briefing package and the staff’s final rule briefing package, CPSC staff collected sample populations of APBR models and tested them, first in 2018 through 2019, and then again in 2021. In each instance, all APBRs examined by staff failed to comply with one or more substantive requirements of ASTM F3186–17.

CPSC staff also conducted informal interviews with five firms in January and February 2018, to determine if the firms were familiar with the ASTM standard, if they believed their products conformed to the standard, and if they believed other suppliers would conform to the standard. Four firms indicated they were familiar with the standard; one stated that their products already conformed; two indicated some modifications were required to bring their products into compliance; and two expressed uncertainty as to whether they would put warning labels required by the voluntary standard on their product. One firm expressed concern that if they applied the required warnings to their product and competitors did not, then consumers would believe their products were more hazardous than competing APBRs without warning labels, causing the firm to lose market share.

Accordingly, CPSC testing and informal interviews showed that for the period 2018–2021 there was not substantial industry compliance with the voluntary standard. Furthermore, substantial future industry compliance is unlikely because firms have had several years to comply with the voluntary standard and, despite repeated outreach and testing, no APBRs are known to comply with all

the requirements in the voluntary standard.

C. Alternatives to the Final Rule

The Commission considered six alternatives to the final rule adopted here: (1) take no regulatory action; (2) continue to conduct recalls of APBRs instead of promulgating a rule; (3) conduct an educational campaign instead of promulgating a rule; (4) ban APBRs from the market; (5) require enhanced safety warnings without other requirements; and (6) implement the rule with a later effective date. The Commission finds that none of these alternatives would adequately address the hazards associated with APBRs.

1. No Regulatory Action

If the Commission opted to take no regulatory action, the industry foreseeably would continue in its current state, and consumers would remain at risk of entrapment and strangulation from APBRs. Rates of injuries and deaths would likely increase with the use of APBRs over time, and the estimated \$298.11 million average annualized societal costs would continue to be incurred by consumers in the form of deaths and injuries. Therefore, the Commission does not find this alternative would address the unreasonable risk of injury associated with APBRs.

2. Conduct Recalls Instead of Promulgating a Final Rule

The Commission could seek voluntary or mandatory recalls of APBRs that present a substantial product hazard. With this alternative, manufacturers could continue producing noncompliant products without incurring any additional costs to modify or test APBRs for compliance with the final rule. Furthermore, recalls only apply to an individual manufacturer and product, but do not extend to similar hazardous products. Recalls also occur only after consumers have purchased and used such products with possible resulting deaths or injuries due to exposure to the

hazard. Additionally, recalls can only address products that are already on the market but do not directly prevent unsafe products from entering the market. Recalls have removed several APBR models from the U.S market since 2021. However, despite these efforts, APBR sales volume remains at, or near, the 2020 pre-recall level and non-compliant APBRs remain widely available for purchase, which is to be expected given the APBR market’s low barriers to entry. Therefore, a significant portion of the estimated \$298.11 million average annualized societal costs would likely continue to be incurred by consumers in the form of deaths and injuries. Further, even if recalls had reduced the size of the APBR market or the share of the market comprised of non-compliant APBRs, staff assesses the rule’s benefits still would exceed the rule’s costs. The final rule provides significant benefits that far exceed costs even if the draft final rule is only 75%, 50%, or 25% effective. Therefore, the Commission does not find this alternative would address the unreasonable risk of injury associated with APBRs.

3. Conduct Education Campaigns

The Commission could issue press releases or use marketing techniques to warn consumers about the entrapment and strangulation hazards associated with APBRs, instead of issuing a mandatory rule. Information and marketing campaigns may reduce the number of injuries and societal costs associated with APBR entrapment and strangulation hazards. However, marketing campaigns have historically been less effective than designing the hazard out of the product or guarding the consumer from the hazard in the first instance. Information and marketing campaigns warning customers of APBR entrapment and strangulation hazards are not likely to be as effective in reducing the risk of injury as the final rule. Therefore, the Commission does not find this alternative would adequately address

the unreasonable risk of injury associated with APBRs.

4. Ban APBRs From the Market

The Commission could ban APBRs under CPSA section 8. Staff weighed quantifiable and unquantifiable factors concerning the utility of APBR use in making a recommendation regarding this alternative. The use of APBRs provides many unquantifiable benefits to users, including mobility, ease of access to beds, protection against falls, and the potential for at-home care. If the Commission promulgated a rule banning APBRs, the benefits from reduced deaths and injuries would be similar to this final rule, or potentially even greater. However, the value of individual users' lost utility could outweigh the incremental benefits of this approach. Considering both the quantifiable and unquantifiable costs and benefits, staff assessed that the net benefits of this alternative are likely less than those of the final rule. In addition, under CPSA section 8, the Commission may only declare a product to be a banned hazardous product if no feasible consumer product safety standard would adequately protect the public from the unreasonable risk of injury associated with APBRs. 15 U.S.C. 2057. The Commission finds that this final rule would adequately protect the public from this risk. Therefore, the Commission does not adopt the alternative of a ban on APBRs.

5. Enhanced Safety Warnings on APBRs

The Commission could require enhanced safety warnings on APBRs. Yet the warning labels currently on APBRs have not produced the desired results of reducing entrapment and strangulation injuries and deaths. In general, safety warnings that rely on consumers to alter their behavior to avoid the hazard are less effective than designing the hazard out of the product or guarding the consumer from the hazard in the first instance. Due to the likely continued use of APBRs at similar rates and patterns of use despite warnings, much of the estimated \$298.11 million average annualized societal costs would continue to be incurred by consumers in the form of deaths and injuries. Therefore, the Commission does not find this alternative would adequately address the unreasonable risk of injury associated with APBRs.

6. Later Effective Date

The Commission could issue the rule with an effective date later than the proposed 30 days, allowing APBR firms additional time to meet the

requirements of the final rule. However, the APBR industry likely will be able to comply quickly with the final rule because the modifications needed do not require extensive product redesign, and because manufacturers have long had notice of the requirements of ASTM F3186–17. Delaying implementation of the rule would allow the sale of non-compliant products for a longer period of time, which would likely result in higher social costs, in the form of fatal and non-fatal APBR entrapment injuries from products not subject to the requirements of the final rule, in exchange for a limited reduction in the cost of compliance to suppliers. In addition, no commenters stated any opposition to the 30-day effective date. Therefore, the Commission does not find this alternative would adequately address the unreasonable risk of injury associated with APBRs.

VIII. Final Regulatory Flexibility Analysis

When an agency is required to publish a notice of proposed rulemaking, the Regulatory Flexibility Act (5 U.S.C. 601–612) generally requires that the agency prepare an initial regulatory flexibility analysis (IRFA) for the NPR and a final regulatory flexibility analysis (FRFA) for the final rule. 5 U.S.C. 603, 604. These analyses must describe the impact that the rule would have on small businesses and other entities. The FRFA must contain:

- (1) a statement of the need for and objectives of the rule;
- (2) significant issues raised by commenters on the IRFA, the agency's assessment of those issues, and changes made to the result as a result of the comments;
- (3) a response to any comments filed by the Chief Counsel for Advocacy of the U.S. Small Business Administration (Advocacy), and changes made as a result of those comments;
- (4) a description and estimate of the number of small entities to which the rule will apply;
- (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- (6) steps the agency has taken to minimize the significant economic impact on small entities, consistent with the objective of the applicable statute, including the factual, policy, and legal reasons for selecting the alternative in

the final rule and why other alternatives were rejected.

The full regulatory flexibility analysis provided in Tab D of staff's final rule briefing package is summarized below.

A. Need For and Objective of the Final Rule

The purpose of the final rule is to reduce deaths and injuries resulting from entrapment, falls, and other APBR hazards. CPSC identified 310 fatal injuries and 1,946 nonfatal injuries associated with APBR hazards in the years 2003 through 2021. CPSC assesses compliance with the voluntary standard, ASTM F3186–17, with modifications, would substantially reduce fatal and nonfatal injuries associated with APBR hazards. Accordingly, the Commission finds that a mandatory rule is reasonably necessary to reduce the unreasonable risk of injury of entrapments from APBRs.

B. Significant Issues Raised by Comments

Seven comments were submitted in response to the NPR. Some of the comments described possible economic impacts of the rule, including economic impacts on firms, the utility of the product for consumers, costs associated with the product hazards, and alternative actions that the Commission could take. However, none of the comments specifically addressed, or resulted in changes to, the initial regulatory flexibility analysis. A summary of the significant issues with possible economic impacts and a summary of staff's assessment of such issues is contained in section V of the preamble and in the Appendix to Tab C of the staff's briefing package for the final rule. The Chief Counsel for Advocacy of the Small Business Administration did not file a comment on the NPR.

C. Small Entities to Which the Rule Will Apply

The final rule will apply to all manufacturers and importers of APBRs. CPSC has identified seven U.S. APBR manufacturers that meet the SBA criteria for small businesses. Importers of APBRs could be wholesale or retail distributors. CPSC identified one U.S. APBR firm in these categories that could be considered a small business.

D. Compliance, Reporting, and Recordkeeping Requirements of Final Rule

The final rule establishes a performance requirement for APBRs and test procedures that suppliers would

have to meet to sell APBRs in the United States. Specifically, the final rule requires APBRs sold in the United States to comply with the ASTM F3186–17 standard, with modifications. CPSC expects most APBR manufacturers, including those considered small by SBA standards, would incur costs associated with bringing their APBRs into compliance with the final rule, as well as costs related to testing and issuing a GCC.

In accordance with section 14 of the CPSA, manufacturers would have to issue a GCC for each APBR model, certifying that the model complies with the final rule. According to section 14(a)(1) of the CPSA, GCCs must be based on a test of each product, or a reasonable testing program; and GCCs must be provided to all distributors or retailers of the product. The manufacturer would have to comply with 16 CFR part 1110 concerning the content of the GCC, retention of the associated records, and all other applicable requirements.

E. Impact on Small Entities

Generally, CPSC considers an impact to be potentially significant if it exceeds 1 percent of a firm's gross revenue. The initial cost to comply with the final rule appears to exceed 1 percent of reported annual revenue for 3 of the 7 manufacturers identified as small businesses. For these 3 APBR manufacturers, the economic impact of the proposed rule is expected to be significant. As discussed in Tab D of staff's final rule briefing package, to achieve compliance with the final rule's performance requirements, APBR suppliers would incur costs from redesigning, retooling, and testing. CPSC staff estimates this cost to be \$42,239 per model in the first year. Staff estimates the additional production cost for labor and material to be \$5.40 per unit produced in the first year, of which \$4.00 is expected to be passed on to the consumer. CPSC has identified one possible importer of APBRs from foreign suppliers that would be considered small businesses based on SBA size standards. For this small importer, the cost of certification testing is unlikely to exceed 1 percent of annual revenue. Additionally, the foreign manufacturers are likely to provide a GCC certification on which the small importer can rely. Furthermore, given that the APBR industry is expected to continue to grow, CPSC does not anticipate foreign manufacturers exiting the industry because of the implementation of the final rule. Therefore, the final rule will not have a significant economic impact on APBR importers.

F. Other Significant Alternatives to the Rule Considered

Section VII.C. of this preamble provides a detailed discussion of six alternatives to the final rule that were considered and why those alternatives were rejected. While the alternatives could reduce the burden on small entities, none of the alternatives are consistent with achieving the rule's objective of improving consumer safety by protecting consumers from entrapment by APBRs.

IX. Incorporation by Reference

The Commission is incorporating by reference ASTM F3186–17, *Standard Specification for Adult Portable Bed Rails and Related Products*. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, section IV. of this preamble summarizes the major provisions of ASTM F3186–17 that the Commission incorporates by reference into 16 CFR part 1270. The standard itself is reasonably available to interested parties. Until the final rule takes effect, a read-only copy of ASTM F3186–17 is available for viewing, at no cost, on ASTM's website at: <https://www.astm.org/CPSC.htm>. Once the rule takes effect, a read-only copy of the standard will be available for viewing, at no cost, on the ASTM website at: <https://www.astm.org/READINGLIBRARY/>. Interested parties can also schedule an appointment to inspect a copy of the standard at CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, telephone: (301) 504–7479; email: cpsc-os@cpsc.gov. Interested parties can purchase a copy of ASTM F3186–17 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 USA; telephone: (610) 832–9585; www.astm.org.

X. Paperwork Reduction Act

This rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction

Act of 1995 (PRA; 44 U.S.C. 3501–3521). The preamble to the NPR discussed the information collection burden of the proposed rule and specifically requested comments on the accuracy of CPSC's estimates. 87 FR 67586 (Nov. 9, 2022). The NPR described the provisions of the proposed rule and provided an estimate of the annual reporting burden for the rule under the PRA. *See* 87 FR 67605. The estimated burden of this collection of information is unchanged from the NPR. CPSC did not receive any comments regarding the information collection burden in the NPR through OMB. OMB has assigned control number 3041–0192 to this information collection.

XI. Effective Date

The Administrative Procedure Act (APA) generally requires that the effective date of a rule be at least 30 days after publication of a final rule. 5 U.S.C. 553(d). Section 9(g)(1) of the CPSA states that a consumer product safety rule shall specify the date such rule is to take effect, and that the effective date must be at least 30 days after promulgation but cannot exceed 180 days from the date a rule is promulgated, unless the Commission finds, for good cause shown, that a later effective date is in the public interest and publishes its reasons for such finding.

The Commission proposed in the NPR an effective date of 30 days after publication of the final rule in the **Federal Register**. The Commission received no negative comments on the proposed effective date and has determined the proposed 30-day effective date is appropriate and will be finalized as proposed. ASTM F3186–17 has been in existence since August 2017, and agency staff has conducted outreach efforts to make firms aware of the requirements of the standard. Accordingly, manufacturers already are familiar with the requirements of ASTM F3186–17 and should be ready and able to comply with the requirements included in the final rule. The rule applies to all APBRs manufactured after the effective date.

XII. Certification

As discussed in section VIII.D. of this preamble, in accordance with section 14 of the CPSA manufacturers would have to issue a GCC for each APBR model, certifying that the product complies with the final rule.

XIII. Preemption

Executive Order 12988, Civil Justice Reform (Feb. 5, 1996), directs agencies to specify the preemptive effect of a

rule. 61 FR 4729 (Feb. 7, 1996). The rule for APBRs is issued under the authority of the CPSA. 15 U.S.C. 2051–2089. Section 26 of the CPSA provides that when a consumer product safety standard under the CPSA is in effect that applies to a risk of injury associated with a consumer product, “no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal Standard.” 15 U.S.C. 2075(a). Thus, the final rule for APBRs preempts non-identical state or local requirements for APBRs that are designed to protect against the same risk of injury.

States or political subdivisions of a state may apply for an exemption from preemption regarding a consumer product safety standard, and the Commission may issue a rule granting the exemption if it finds that the state or local standard: (1) provides a significantly higher degree of protection from the risk of injury or illness than the CPSA standard; and (2) does not unduly burden interstate commerce. *Id.* 2075(c).

XIV. Environmental Considerations

Generally, the Commission’s regulations are considered to have little or no potential for affecting the human environment, and environmental assessments and impact statements are not usually required. *See* 16 CFR 1021.5(a). The final rule is not expected to have an adverse impact on the environment and is considered to fall within the “categorical exclusion” for the purposes of the National Environmental Policy Act. 16 CFR 1021.5(c).

XIV. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs determines whether a rule qualifies as a “major rule.”

Pursuant to the CRA, OMB’s Office of Information and Regulatory Affairs has determined that this rule qualifies as a “major rule,” as defined in 5 U.S.C.

804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General and postpone enforcement of the rule during the congressional review period specified in the CRA.

XV. Findings

As explained, the CPSA requires the Commission to make certain findings when issuing a consumer product safety standard. 15 U.S.C. 2058(f)(1), (f)(3). These findings are stated in appendix A to part 1270 and are based on information provided throughout this preamble and the staff’s briefing packages for the proposed and final rules.

List of Subjects in 16 CFR Part 1270

Administrative practice and procedure, Adult portable bed rails, Consumer protection, Incorporation by reference.

■ For the reasons discussed in the preamble, the Commission amends title 16 of the Code of Federal Regulations by adding part 1270 to read as follows:

PART 1270—SAFETY STANDARD FOR ADULT PORTABLE BED RAILS

Sec.

1270.1 Scope, application, and effective date.

1270.2 Requirements for adult portable bed rails.

1270.3 Prohibited stockpiling.

Appendix A to Part 1270—Findings Under the Consumer Product Safety Act

Authority: 15 U.S.C. 2056, 15 U.S.C. 2058, and 5 U.S.C. 553.

§ 1270.1 Scope, application, and effective date.

This part establishes a consumer product safety standard for adult portable bed rails manufactured after August 21, 2023.

§ 1270.2 Requirements for adult portable bed rails.

(a) Except as provided in paragraph (b) of this section, each adult portable bed rail must comply with all applicable provisions of ASTM F3186–17, *Standard Specification for Adult Portable Bed Rails and Related Products*, approved on August 1, 2017. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at the U.S. Consumer Product Safety Commission and at the National Archives and Records Administration (NARA). Contact the U.S. Consumer Product Safety

Commission at: Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, MD 20814, telephone (301) 504–7479, email cpsc-os@cpsc.gov. For information on the availability of this material at NARA, email fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html. A read-only copy of the standard is available for viewing on the ASTM website at <https://www.astm.org/READINGLIBRARY/>. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959; telephone (610) 832–9585; www.astm.org.

(b) Comply with the ASTM F3186–17 standard with the following changes:

(1) In addition to complying with the definitions in section 3.1 of ASTM F3186–17, comply with the following definitions:

(i) *Entrapment zone*. An area, gap, or opening that can potentially capture or restrain a person’s body part. Hazardous openings may not always be visible prior to testing.

(ii) *Initial assembly*. The first assembly of the product components after purchase, and prior to installing on the bed.

(iii) *Initial installation*. The first installation of the product onto a bed or mattress.

(iv) *Installation component*.

Component(s) of the bed rail that is/are specifically designed to attach the bed and typically located under the mattress when in the manufacturer’s recommended use position.

(2) Instead of complying with section 6.1.3 of ASTM F3186–17, comply with the following:

(i) Permanently attached retention system components shall not be able to be removed without the use of a tool after initial assembly.

(ii) [Reserved]

(3) In addition to complying with section 6.2.1 of ASTM F3186–17, comply with the following:

(i) The test personnel shall choose a mattress and product setting configuration that results in the most severe condition per test requirement (see paragraph (b)(8)(i) of this section).

(ii) [Reserved]

(4) Instead of complying with section 6.3.3 of ASTM F3186–17, comply with the following:

(i) *Zone 3*. When tested in accordance with section 8.4.5 of ASTM F3186–17, the horizontal centerline on the face of the 4.7 in (120 mm) end of the test probe (see paragraph (b)(9)(i) of this section) shall be above the highest point of the uncompressed mattress.

(ii) [Reserved]

(5) Instead of complying with section 6.4.1 of ASTM F3186–17, comply with the following:

(i) Holes or slots that extend entirely through a wall section of any rigid material less than 0.375 in (9.53 mm) thick and admit a 0.210 in (5.33 mm) diameter rod shall also admit a 0.375 in (9.53 mm) diameter rod. Holes or slots that are between 0.210 in (5.33 mm) and 0.375 in (9.53 mm) and have a wall thickness less than 0.375 in (9.53 mm) but are limited in depth to 0.375 in (9.53 mm) maximum by another rigid surface shall be permissible (see Opening Example in Figure 2 of ASTM F3186–17).

(ii) [Reserved]

(6) Instead of complying with section 6.5.1 of ASTM F3186–17, comply with the following:

(i) Any structural components and retention system components of a product covered by this specification that require consumer assembly or adjustment, or components that may be removed by the consumer without the use of a tool, shall not be able to be misassembled when evaluated to (see paragraph (b)(7)(i) of this section).

(ii) [Reserved]

(7) Instead of complying with section 6.5.2 of ASTM F3186–17, comply with the following:

(i) *Determining misassembled product.* A product covered by this specification shall be considered misassembled if it appears to be functional under any condition and it does not meet the requirements of sections 6.1 through 6.4 of ASTM F3186–17.

(ii) [Reserved]

(8) In addition to complying with section 7.1 of ASTM F3186–17, comply with the following:

(i) Mattress thickness ranges used for testing shall be up to 1.5 in. (38 mm) larger or smaller than the range specified by the manufacturer. Test personnel shall choose a mattress and

product setting configuration that provide the most severe condition for each test requirement in the standard.

Note 1 to paragraph (b)(8)(i): The technology and consumer preferences for bedding are highly variable and continuously changing. Therefore, they cannot be reasonably accounted for within this standard. Test facilities and personnel should consider current bedding trends and all types of mattresses that may foreseeably be used with the product when making a test mattress selection.

(ii) [Reserved]

(9) Instead of complying with section 7.2 of ASTM F3186–17, comply with the following:

(i) *Entrapment test probe.* The test probe used for the entrapment tests shall be as described in the Food and Drug Administration (FDA) Guidance Document, “Hospital Bed System Dimensional and Assessment Guidance to Reduce Entrapment,” which can be found at: www.fda.gov/regulatory-information/search-fda-guidance-documents/hospital-bed-system-dimensional-and-assessment-guidance-reduce-entrapment. The test probe can be independently manufactured per the dimensional constraints in the guidance document or purchased from Bionix, 5154 Enterprise Blvd., Toledo, OH 43612, 800–551–7096, www.bionix.com. Videos illustrating use of the test probe are available at: www.youtube.com/c/BionixLLC/search.

(ii) [Reserved]

(10) Substitute the following text as the content of Note 1 in section 8.4 of ASTM F3186–17:

(i) The tests described in this section are similar to those described in the referenced FDA Guidance Document.

(ii) [Reserved]

(11) Instead of complying with section 8.4.3.4 of ASTM F3186–17, comply with the following:

(i) If the test probe does not pull through freely, attach the force gauge and exert a 22.5 lbf (100 N) pulling force to the 2.4 in (60 mm) cylindrical end of

the entrapment test probe in the direction most likely to lead to failure of the requirement. If the 4.7 in (120 mm) end of the cone does not enter any of the openings, this space passes the test. If the 4.7 in (120 mm) end of the test probe cone does enter any of the openings, this space fails the test.

(ii) [Reserved]

(12) Instead of complying with section 8.4.4.3 of ASTM F3186–17, comply with the following:

(i) Insert the 2.4 in (60 mm) end of the cone into the opening at the angle most likely to allow it to pass through. Insert the cone into the opening until it is in full contact with the product. The mattress shall only be compressed by the weight of the cone.

(ii) [Reserved]

(13) Instead of complying with section 8.4.4.4 of ASTM F3186–17, comply with the following:

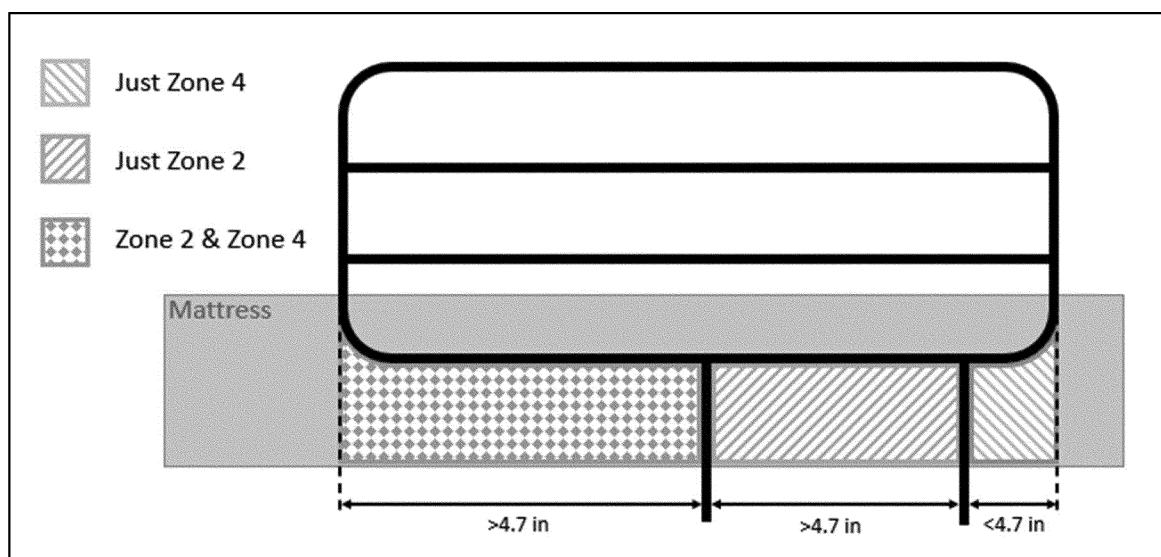
(i) If the test probe does not pull through freely use the force gauge to exert a 22.5 lbf (100 N) pulling force to the 2.4 in (60 mm) cylindrical end of the cone in the direction most likely to lead to failure of the requirement.

(ii) [Reserved]

(14) In addition to complying with section 8.4.4 of ASTM F3186–17, comply with the following:

(i) If a horizontal section of the rail greater than 4.7 in exists along the bottom of the rail, that section must also meet the Zone 2 requirements regardless of the number or location of the supports. Repeat testing described in section 8.4.4.3 of ASTM F3186–17 (see paragraph (b)(12)(i) of this section) and section 8.4.4.4 of ASTM F3186–17 (see paragraph (b)(13)(i) of this section) for all applicable entrapment zones. Figure 1 to this paragraph (b)(14)(i) shows a general example of areas subject to Zone 2 requirements.

Figure 1 to paragraph (b)(14)(i)—General Example of Areas Subject to Zone 2 Requirements



(ii) [Reserved]
 (15) Instead of complying with section 8.4.5.4 of ASTM F3186–17, comply with the following:

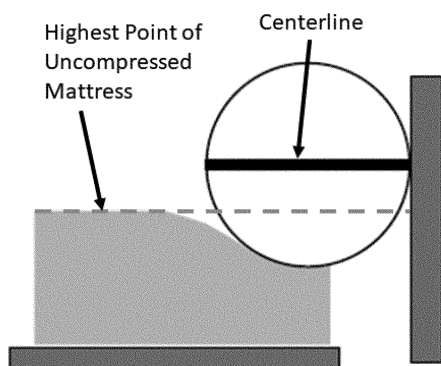
(i) Turn the cone until the line on the face of the 4.7 in (120 mm) end is horizontal and let the cone sink into the space by its own weight.

(A) If the line on the face of the 4.7 in (120 mm) end of the cone is above the highest point of the uncompressed mattress, as shown in Figure 2 to this paragraph (b)(15)(i), the space passes the test.

(B) If the line on the face of the 4.7 in (120 mm) end of the cone is at or

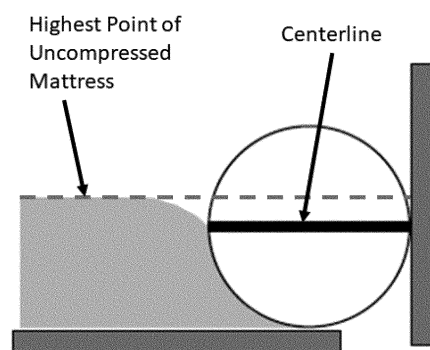
below the highest point of the uncompressed mattress, as shown in Figure 2 to this paragraph (b)(15)(i), the space fails the test.

Figure 2 to paragraph (b)(15)(i)—Zone 3 Test: (a) Pass, (b) Fail



a: Zone 3 Pass Criteria

(Centerline **above** highest point of uncompressed mattress)



b: Zone 3 Fail Criteria

(Centerline **below** highest point of uncompressed mattress)

(ii) [Reserved]

(16) In addition to complying with section 8.6.3 of ASTM F3186–17, use the following definition:

(i) The “free end” is defined as the location on the retention system that is designed to produce a counter force; it may be a single distinct point or a location on a loop.

(ii) [Reserved]

(17) Instead of complying with section 9.1.1.3 of ASTM F3186–17, comply with the following:

(i) That the product is to be used only with the type and size of mattress and bed, including the range of thickness of mattresses, specified by the manufacturer of the product. If beds with head or footboards are allowed, the distance between the head or footboard and the placement of the product shall be indicated to be >12.5 in (318 mm).

(ii) [Reserved]

(18) Instead of complying with section 9.2.5 of ASTM F3186–17, comply with the following:

(i) Each product's retail package and instructions shall include the warning statements in Figure 3 to this paragraph (b)(18)(i).

Figure 3 to paragraph (b)(18)(i)—
 Warning Statements for Product Retail Package and Instruction

▲WARNING**ENTRAPMENT, STRANGULATION, SUFFOCATION AND FALL HAZARDS**

Gaps in and around this product can entrap and kill. People with Alzheimer's disease or dementia, or those who are sedated, confused, or frail are at increased risk of entrapment and strangulation. People attempting to climb over this product are at increased risk of injury or death from falls. Always make sure this product is properly secured to bed. If product can move away from bed or mattress, it can lead to entrapment and death.

(ii) [Reserved]
(19) Instead of complying with section 9.2.7 of ASTM F3186–17, comply with the following:

(i) At least one installation component of the product must be labeled with the entrapment warning in Figure 4 to this paragraph (b)(19)(i).

Figure 4 to paragraph (b)(19)(i)—
Entrapment Warning

▲WARNING – ENTRAPMENT HAZARD

NEVER use product without properly securing it to bed. Incorrect installation can allow product to move away from mattress, bed frame and/or head or foot boards, which can lead to entrapment and death.

(ii) [Reserved]
(20) Instead of complying with section 11.1.1.3 of ASTM F3186–17, comply with the following:

(i) In addition to contacting the manufacturer directly, consumers can report problems to the CPSC at its website SaferProducts.gov or call 1–800–638–2772.

(ii) [Reserved]

§ 1270.3 Prohibited stockpiling.

(a) *Prohibited acts.* Manufacturers and importers of adult portable bed rails (APBRs) shall not manufacture or import APBRs that do not comply with the requirements of this part between July 21, 2023, and August 21, 2023, at a rate that is greater than 105 percent of the rate at which they manufactured or imported APBRs during the base period for the manufacturer or importer.

(b) *Base period.* The base period for APBRs is the calendar month with the median manufacturing or import volume within the last 13 months immediately preceding July 21, 2023.

Appendix A to Part 1270—Findings Under the Consumer Product Safety Act

The Consumer Product Safety Act requires that the Commission, in order to issue a standard, make the following findings and include them in the rule. 15 U.S.C. 2058(f)(3). Because of this, the facts and determinations in these findings apply as of the date the rule was issued, July 21, 2023.

A. Degree and Nature of the Risk of Injury. Between January 2003 and December 2021, there were 332 incident reports concerning adult portable bed rails (APBRs) in the Consumer Product Safety Risk Management System (CPSRMS). Of these, 310 were reports of fatalities, and 22 were nonfatal. Rail entrapment is the most prevalent hazard pattern among the incidents. There were 284

fatal incidents related to rail entrapment, accounting for more than 90 percent of all fatal incidents, and 2 nonfatal incidents. Falls were the second most common hazard pattern in the incident data, accounting for 25 incidents (8 percent of all incidents). There were 23 fatalities from falls.

B. Number of Consumer Products Subject to the Rule. An estimated 12 firms supply 65 distinct APBR models. In 2021, the number of APBRs sold was approximately 180,000 units.

C. Need of the Public for the Products and Probable Effect on Utility, Cost, and Availability of the Product.

(1) APBRs are installed or used alongside a bed by consumers to: reduce the risk of falling from the bed; assist the consumer in repositioning in the bed; or assist the consumer in transitioning into or out of the bed. Because the rule is a performance standard that allows for the sale of compliant APBRs, it is not expected to have any impact on the utility of the product.

(2) The cost of compliance to address entrapment hazards includes the costs manufacturers incur to redesign existing models and produce new designs to comply with the mandatory standard, the cost of producing the redesigned APBR, dead weight loss. To redesign existing and new models, manufacturers would likely incur expenditures in design labor, design production, design validation, and compliance testing. CPSC estimates these costs to be \$42,239 per model in the first year. Manufacturers would also incur costs to produce the redesigned APBRs, however, these costs likely closely match existing production costs and therefore incremental cost is expected to be negligible. Dead weight loss refers to the lost producer and consumer surplus from reduced quantities of APBRs sold and consumed due to rule-induced price increases. Producer surplus represents the foregone profit opportunities, meaning the amount that price exceeds marginal cost for those units no longer produced. Consumer surplus represents the foregone utility from

consumption, meaning the amount that willingness to pay exceeds price for units no longer consumed. In the first year, producer manufacturing costs are expected to increase by \$5.40 per APBR, of which \$4.00 per APBR is expected to be passed on to the consumer in the form of higher prices. The resultant decrease in the number of APBRs sold and consumed is expected to generate a dead weight loss of less than \$70,000 per year nationwide, so the rule is not expected to have any significant impact on the availability of APBRs.

D. Any Means to Achieve the Objective of the Rule, While Minimizing Adverse Effects on Competition and Manufacturing. (1) The rule reduces entrapment and other hazards on APBRs while minimizing the effect on competition and manufacturing. Because the rule is based on an existing voluntary standard, and because of CPSC's outreach efforts, APBR manufacturers are generally aware of the requirements. Manufacturers can transfer some, or all, of the increased production cost to consumers through price increases. At the margins, some producers may exit the market because their increased marginal costs now exceed the increase in market price. Likewise, a very small fraction of consumers may be excluded from the market if the increased market price exceeds their personal price threshold for purchasing an APBR.

(2) The Commission considered alternatives to the rule to minimize impacts on competition and manufacturing including: take no regulatory action; continue to conduct recalls of APBRs instead of promulgating a rule; conduct an educational campaign instead of promulgating a rule; ban APBRs from the market; require enhanced safety warnings without other requirements; and implement the rule with a longer effective date. The Commission determines that none of these alternatives would adequately reduce the risk of deaths and injuries associated with APBR entrapment and other hazards presented by APBRs.

E. The rule (including its effective date) is reasonably necessary to eliminate or reduce an unreasonable risk of injury. Incident data show 284 fatal incidents related to rail entrapment between January 2003 and December 2021. The incident data show that these incidents continue to occur and are likely to increase because APBR manufacturers do not comply with the voluntary standard and the market for ABPRs is forecast to grow. The rule establishes performance requirements to address the risk of entrapments associated with ABPRs. Given the fatal and serious injuries associated with entrapments on APBRs, the Commission finds that the rule and its effective date are necessary to address the unreasonable risk of injury associated with APBRs.

F. Public Interest. The rule addresses an unreasonable risk of entrapments and other hazards associated with APBRs. Adherence to the requirements of the rule would reduce deaths and injuries from APBR entrapment incidents; thus, the rule is in the public interest.

G. Voluntary Standards. If a voluntary standard addressing the risk of injury has been adopted and implemented, then the Commission must find that the voluntary standard is not likely to eliminate or adequately reduce the risk of injury or substantial compliance with the voluntary standard is unlikely.

(1) The Commission determines that, absent modification, the voluntary standard is not likely to eliminate or adequately reduce the risk of injury of entrapments on APBRs. The Commission also determines that ASTM F3186–17, with the modifications described in § 1270.2, is likely to adequately reduce the risk of injury associated with APBRs. Entrapment is the most prevalent hazard pattern among the deaths and injuries associated with APBRs. The entrapment test methods specified in the voluntary standard require products to be tested to assess the potential for entrapment in four different zones. The four entrapment zones required to be tested each address specific types of entrapment as follows: head-first entry into fully bounded openings within the structure of the bed rail; head-first entry under the rail into any opening between the mattress and the bed rail; entry of the head into a gap between the inside surface along the length of the bed rail and the compressed mattress; and neck-first entrapment between the ends of the bed rail and the compressed mattress. Most of the reported entrapment fatalities involved one of the four zones listed. In 214 out of 284 fatal incidents, the entrapment location was identified and all but six of these cases occurred in one of the four zones of entrapment tested in ASTM F3186–17.

(2) The Commission determines that modifications to the voluntary standard are needed to improve safety. Such modifications include: providing additional definitions for product assembly and installation to ensure their consistent and differentiated use throughout the standard; adding requirements for manufacturers to take into account the range of mattress thicknesses to ensure safe use of the product and provide testers with additional guidance for selecting the mattress thickness during

the test setup; addressing inconsistencies with stated dimensions to ensure consistent dimensional tolerances; and providing additional clarity for Zone 1 and 2 test setup and methods, additional guidance for identifying potential Zone 2 openings, and updated requirements for Zone 3 testing consistency.

(3) The Commission determines that substantial compliance with the voluntary standard is unlikely. CPSC conducted two rounds of market compliance testing to ASTM F3186–17: the first round in 2018 and 2019, the second round in 2021. In both rounds, no APBRs met all requirements of ASTM F3186–17. All products failed at least one critical mechanical requirement, such as retention strap performance, structural integrity, and entrapment. All products failed the labeling, warning, and instructional requirements.

H. Reasonable Relationship of Benefits to Costs. (1) The benefits expected from the rule bear a reasonable relationship to its cost. The rule reduces the entrapment hazard and other hazards associated with APBRs, and thereby reduces the societal costs of the resulting injuries and deaths. The rule is expected to address the 92 percent of deaths caused by entrapment, resulting in potential societal benefits of \$298.11 million. Benefits additionally were assessed under three scenarios derived from this expected efficacy, estimating benefits at: 75 percent, 50 percent, and 25 percent of their potential value. Under these three scenarios, the estimated quantifiable annualized benefits of the rule are approximately \$200.24 million, \$133.49 million, and \$66.75 million, respectively. The costs associated with the rule's requirements to prevent the hazards associated with APBRs are expected to be approximately \$2.01 million per year. On a per product basis, the estimated benefits of the rule are approximately \$331.78, \$221.19, and \$110.59 per APBR when assessed at 75 percent, 50 percent, and 25 percent of their potential value, respectively, and the costs are approximately \$3.34 per APBR. All these amounts are in 2021 dollars using a discount rate of 3 percent.

(2) The requirements of the rule, with modifications, are expected to address 92 percent of deaths caused by entrapment. Even under the most conservative assumption that only 25 percent of the potential benefits are achieved, every \$1 in costs for the market to adopt the rule equates to approximately \$33.15 in benefits to society. The estimated annualized net benefits of the rule are approximately \$198.23 million, \$131.48 million, and \$64.74 million, at when benefits are assessed at 75 percent, 50 percent, and 25 percent of their potential value, respectively.

I. Least-Burdensome Requirement that Would Adequately Reduce the Risk of Injury. The Commission considered six alternatives to the rule including: take no regulatory action; continue to conduct recalls of APBRs instead of promulgating a rule; conduct an educational campaign without a rule; ban APBRs from the market entirely; require enhanced safety warnings without other requirements; and implement the rule with a longer effective date. Although most of these

alternatives may be a less burdensome alternative to the rule, the Commission determines that none of the alternatives would adequately reduce the risk of deaths and injuries associated with APBRs that is addressed by the rule while still preserving the product's utility to consumers.

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2023–15189 Filed 7–20–23; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1306

[Docket No. DEA–469]

RIN 1117–AB45

Partial Filling of Prescriptions for Schedule II Controlled Substances

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final rule.

SUMMARY: On July 22, 2016, the Comprehensive Addiction and Recovery Act of 2016 became law. One provision of the Comprehensive Addiction and Recovery Act of 2016 amended the Controlled Substances Act to allow for the partial filling of prescriptions for schedule II controlled substances under certain conditions. The Drug Enforcement Administration (DEA) is amending its regulations to conform to this statutory provision, as well as to provide direction on gaps not addressed by legislation. DEA will also be amending its regulations to update a cross-reference in a paragraph that will be redesignated with this final rule.

DATES: This final rule is effective August 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Scott A. Brinks, Regulatory Drafting and Policy Support Section, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, Virginia 22152; Telephone: (571) 776–3882.

SUPPLEMENTARY INFORMATION:

I. Legal Authority

On July 22, 2016, the President signed the Comprehensive Addiction and Recovery Act (CARA) of 2016 into law as Public Law 114–198. Section 702(a) of the CARA amended 21 U.S.C. 829 of the Controlled Substances Act (CSA) by adding subsection (f) to allow a pharmacist to partially fill a prescription for a schedule II controlled substance under certain conditions.

Specifically, subsection (f)(1) allows such partial filling where requested by the prescribing practitioner or the patient provided that all of the following conditions are satisfied: (1) The partial filling must not be prohibited by State law; (2) the prescription must be written and filled in accordance with the CSA, DEA regulations, and State law; and (3) the total quantity dispensed in all partial fillings must not exceed the total quantity prescribed. In addition, subsection (f)(2) provides that the remaining portions of a partially filled prescription for a schedule II controlled substance, if filled, must be filled no later than 30 days after the date on which the prescription is written, unless the prescription is issued as an emergency oral prescription, in which case the remaining portion, if filled, must be filled no later than 72 hours after it was issued.

This final rule is revising DEA regulations to incorporate the foregoing statutory provision. In addition, DEA is further revising its regulations to address regulatory requirements not addressed by section 702(a) of the CARA. This provision does not address how the prescribing practitioner should indicate that a prescription for a schedule II controlled substance must be partially filled. Likewise, it does not specify how a pharmacist should record the partial filling of such a prescription. However, it does provide that partial filling of prescriptions for a schedule II controlled substance is permitted if the prescription is written and filled in accordance with, among other things, regulations issued by DEA. 21 U.S.C. 829(f)(1)(B). Accordingly, Congress gave DEA explicit authorization to fill in any gaps in the regulatory scheme not addressed by Congress itself in section 702(a) of the CARA. DEA is exercising this authority by issuing this rule to give practitioners and pharmacists clear guidance in this area, and to allow for proper auditing by DEA.

II. Background

There is potential for benefit to patients and society as a result of this rule. For patients, partial filling could lower the cost of prescriptions by reducing the quantity of unused schedule II controlled substances due to not needing to continue on drug therapy. Reducing the dispensing of schedule II controlled substances that are ultimately not needed would also help to reduce the risk that the patient might develop physical dependence or an addiction to opioids or other schedule II controlled substances. The existence of unused drugs in U.S.

households contributes to growing rates of substance misuse of prescription drugs among Americans. Keeping and storing unused medications in households pose several risks related to diversion, accidental overdose, and consumption of spoiled substances.¹ Reducing the quantity of unused schedule II controlled substances would reduce the risk of diversion.

III. Summary of the Notice of Proposed Rulemaking

DEA published a notice of proposed rulemaking (NPRM) in the **Federal Register** on December 4, 2020, providing an opportunity for comments to be submitted. 85 FR 78282. The comment period closed February 2, 2021. While DEA invited comments on the entire NPRM, DEA specifically pointed commenters to the then proposed changes to 21 CFR 1306.13(b)(3), (4), and (5), which were filling in gaps not addressed by section 702(a) of the CARA. The other proposed amendments to 21 CFR 1306.13(b)(1) and (2) merely reiterated the statutory requirements of section 702(a) of the CARA, and therefore, cannot be changed.

IV. Discussion of Regulatory Text Comments

DEA received 37 comments on the NPRM. Commenters included a nonprofit organization representing hospitals, a trade association representing chain drug stores, an association representing pharmacy boards, three professional pharmacist associations, practicing nurses and nurse practitioner students, and other individual or anonymous commenters. Most commenters generally supported the rule with some of those supporters also raising issues of concern or desiring clarification. Some commenters who opposed the rule primarily expressed concern about the impact on individuals with chronic pain, mistakenly assuming that the rule, if finalized, would require a prescription for a schedule II controlled substance to be partially filled. In fact, the rule simply proposed amending DEA's regulations to allow an option for a prescription for a schedule II controlled substance to be partially filled, if requested by the prescribing practitioner or patient. The comments are summarized below, along with DEA's responses.

¹ "Safe Disposal of Unused Controlled Substances: Current Challenges and Opportunities for Reform," Avalere, <http://www.ncdoi.com/osfm/safekids/documents/omd/safedisposalofunusedcontrolledsubstancesreport.pdf>.

General Opposition to Provisions Mandated by Congress

Issue: Several commenters expressed opposition to provisions of the rule that were mandated by Congress, stating that the government should not interfere with the prescribing of medicine.

Response: As discussed in the NPRM, the provisions which are directly from the CARA cannot be modified. DEA has to allow both the patient and the practitioner to request partial fills. However, because DEA was granted the authority to fill in gaps not addressed by the CARA, DEA is able to create regulations to direct the manner which the partial fill is to be requested and recorded. Also, the government may be involved in the prescribing of medicine, as agencies such as Indian Health Services, Department of Veterans Affairs, Department of Defense, and Bureau of Prisons can serve as the healthcare provider.

General Requirements for Partial Filling

Issue: Commenters expressed concern over DEA's stance in the proposed rule's preamble and in the proposed amendment at 21 CFR 1306.13(b)(1)(ii) regarding the validity of a prescription. Specifically, commenters urged DEA to reconsider its position, expressed in the proposed rule, of interpreting a prescription to be invalid if the quantity exceeds the limits of state law. An association asked for clarification and guidance when the partial fill is the result of limitations set by state or local law. One association stated that this is inconsistent with DEA policy that was set forth in a DEA policy letter dated August 24, 2011, and that DEA will cause confusion amongst healthcare providers. The association's comment included a quote from this DEA policy letter, which stated "DEA expects that when information is missing from or needs to be changed on a Schedule II controlled substance prescription, pharmacists use their professional judgment and knowledge of state and Federal laws and policies to decide whether it is appropriate to make changes to that prescription." Commenters stated that this conflicts with the position taken in the proposed rule and that it also is inconsistent with many state laws, which allow a prescription written in excess of state limits to still be considered valid. Furthermore, commenters stated that multiple State Boards of Pharmacy have also issued guidance saying that state laws do not require pharmacists to confirm the validity of higher quantity prescriptions for schedule II controlled substances with the prescribing

pharmacist, due to states having exceptions to their quantity limits. Finally, multiple commenters asked DEA to clarify the actions that pharmacists will be allowed to do regarding the partial filling of a prescription for a schedule II controlled substance and to revise the proposed regulatory text to ensure pharmacists can continue changing the partial fill quantities when prescriptions are written in excess of state limits.

DEA Response: In the NPRM's preamble, DEA acknowledged that many states have begun enacting partial fill laws and limiting the amounts allowed to be prescribed for initial prescriptions.² DEA referenced the CARA which states that a prescription for a schedule II controlled substance may be partially filled if the act of doing so is not prohibited by state law, and the prescription is written and filled in accordance with DEA regulations and state law. 21 U.S.C. 829(f)(1).

DEA wishes to clarify that where state law provides exceptions or exemptions for prescriptions for schedule II controlled substances which exceed the state limit for quantity, the prescription is not considered in violation of the CARA. DEA notes that in the NPRM, the stance was taken that a prescription written in excess of state law would be considered invalid. However, in light of information received from commenters, DEA has learned that states have begun implementing laws and issuing guidance to address prescriptions written in excess of state law quantity limits.

In acknowledgement of those states' actions, DEA will not consider a prescription for a schedule II controlled substance to be invalid when written in excess of the state limit, when the state has provided an exception or exemption. In light of the comments discussed above, DEA is not adopting the final two sentences of the proposed regulatory language for 21 CFR 1306.13(b)(1)(ii), which had proposed to provide that, "A prescription written for a quantity that exceeds the limits of State law is not a valid prescription, therefore, the prescription may not be filled as written. Because such a prescription is not valid, it also cannot be partially filled."

Regarding the commenters' request to change the regulatory text to allow pharmacists the authority to modify prescriptions by fixing the amount of the partial fill so that it is not in excess of a state's limit, DEA declines to make such a change. DEA considers the August 2011 policy letter—referenced

by several commenters—to be a guidance document which is no longer in effect. The only guidance documents currently in effect are those which are located on DEA's website in the guidance portal.³ This policy letter is not in the guidance portal. DEA's regulations do not provide for a pharmacist to modify a prescription for a schedule II controlled substance. Where a pharmacist knows that a modification is needed to address the amount being in excess of the state's limit (and the state does not have an exception or exemption in place), the pharmacist should use their knowledge of state laws and state guidance and return the prescription to the prescribing practitioner.

Request of Partial Fill by a Practitioner

Issue: There were twenty-two comments received discussing the proposed amendment for 21 CFR 1306.13(b)(3). Many of the comments received regarding the request of partial fills from a practitioner stated that this proposed addition to DEA's regulations provides clear guidance to prescribers, and will encourage practitioners to prescribe schedule II controlled substances sparingly. There were also comments with a few suggested modifications and requests for clarifications on the proposed regulatory text for practitioner requested partial fills.

Commenters stated that practitioners rarely request a partial fill when the prescription is first issued, and they usually do not choose this option until it is presented by the pharmacist to them. A few associations and other commenters suggested that DEA explicitly recognize that the prescriber may authorize a partial fill at a later date, following a consultation with a pharmacist, constituting an amendment to the original prescription. In effect, many of the commenters requested the authorization for pharmacists to dispense a partial fill for the prescription without requiring the prescribing practitioner to issue a new prescription.

DEA Response: DEA appreciates all of the comments received in response to the proposed amendments for the partial fills requested by practitioners. DEA joins the commenters in hoping that this will help address the opioid

and overdose crisis and encourage practitioners to consider all options available when prescribing schedule II controlled substances.

Through this rulemaking, DEA has come to understand that many practitioners do not request partial fills on prescriptions for schedule II controlled substances initially. Instead, the request comes after the pharmacist receives the prescription and then contacts the prescribing practitioner to discuss that prescription. In response to the commenters' concerns, DEA wants to clarify in 21 CFR 1306.13(b)(3) that a partial fill may be authorized by the prescribing practitioner during subsequent communication between the pharmacist and practitioner following the date after the prescription was first issued. This authorization would still be considered a request by the practitioner and a new prescription will not be required.

Through this final rule, the pharmacist must add the partial fill request to the prescription for a schedule II controlled substance by notating on the prescription "Authorized by Practitioner to Partial Fill." The annotation must also include the name of the practitioner they spoke with, the date and time of the communication, and the pharmacist's initials.

DEA's regulations do not provide for pharmacists to modify prescriptions for schedule II controlled substances. As such, DEA does not consider the notations made by the pharmacist, as a result of the subsequent communication with a practitioner after the prescription was issued, to be an amendment or modification to the prescription. DEA declines the commenters' request to grant authorization for pharmacists to amend or modify prescriptions for schedule II controlled substances.

Request of a Partial Fill by a Patient

Issue: DEA received fifteen comments addressing the proposed provision for 21 CFR 1306.13(b)(4), most in support of partial fill by patient request. Many of the commenters also provided suggestions or sought clarification on issues presented in the questions in the "Economic Impact" section of the NPRM.⁴ Those issues are addressed later in "Discussion of Economic Comments" section.

Some commenters stated that this proposed amendment was too narrow of an interpretation of Congressional intent in the CARA. A commenter also said that it conflicts with the Federal Health Insurance Portability and

² 85 FR 78282, 78284, December 4, 2020.

³ See Guidance Documents (usdoj.gov) at <https://apps.deadiversion.usdoj.gov/guidance/#no-back-button>. Last accessed April 25, 2022. The guidance document portal is a website where individuals can access all of DEA's current guidance. The guidance documents are not binding and lack the force and effect of law, and therefore, not to be used as a substitute for regulation.

⁴ 85 FR 78282, 78290.

Accountability Act (HIPAA) privacy requirements found at 45 CFR 164.510(b)(3),⁵ which set the standard for limited uses and disclosures of protected health information (PHI) when the individual is not present. Specifically, a commenter noted that DEA, in the proposed rule, interpreted “patient,” as used in the CARA, to not include a member of the patient’s household. Commenters stated caregivers should be authorized to request a partial fill of prescriptions without the involvement of the patient, as many caregivers/representatives are dropping off and/or picking up prescriptions on behalf of the patient. Commenters also gave the example of a caregiver for a minor child or a caregiver for a dependent adult who has a medical power of attorney as someone who should be authorized to make the partial fill request. A commenter further stated that because patients are not usually initiating the partial fill request (without the suggestion/involvement of the pharmacist), they are unlikely to send a written request with the caregiver or call ahead to the pharmacy to make such a request.

Commenters also suggested that doctors should educate patients on the option to request partial fill of prescriptions, otherwise a patient may not make the request on their own. It was suggested this should include potential risk, and proper disposal, and address patients’ fears associated with both schedule II controlled substances and the partial fill process. This would promote patient-centered care and empower patients with the opportunity to contribute to their own treatment plan.

A commenter suggested that the partial fill request by the patient only be allowed with an accompanying recommendation by the pharmacist because the pharmacist would be more knowledgeable than the patient about patient tolerance and compliance history. Others maintained that the pharmacist should not have to concur with the patient on whether a partial fill is best for the patient, and that a pharmacist should be granted the authority to dispense the partial fill to the patient without the patient’s requesting or consenting to the partial fill. One commenter provided an

example to show that a pharmacist is more knowledgeable than the patient about how long a patient may need to take a prescription to address short-term pain management.

DEA Response: The comments pertaining to the questions in the economic impact section of the NPRM are addressed later in the “Discussion of Economic Comments” section.

With regard to allowing a partial fill at the request of a caregiver, DEA recognizes there is the possibility that there are situations where a caregiver is aware of the benefit for a partial fill request while the ultimate user (the patient) is unable to provide the request, however the possibility for abuse of this authority is greater than the possible benefit. Typically, the patient’s right to request, or not request, a partial fill of their prescription is their right to exercise; the caregiver’s authority is borne of the patient’s requests, and the division of authority should be maintained accordingly. Usually in those situations where a patient is unable to make the request themselves, a caregiver would also participate in the patient’s interaction with the prescribing practitioner. Their concerns would be addressed with the prescribing practitioner and the prescribing practitioner would be able to issue a prescription with a partial fill request.

While DEA understands the concerns regarding the HIPAA regulations, it should also be noted that the CARA only authorizes the “patient”—not a member of the patient’s household or the patient’s caregiver—to make such request. DEA’s interpretation of section 829(f) of the CSA is not too narrow, as that section only refers to “the patient or the practitioner that wrote the prescription” making the request for the partial fill. However, DEA acknowledges that in the case of a minor (under age 18), a parent or legal guardian is often the responsible party for the care of the child and therefore, is updating the regulatory text to allow the parent or legal guardian to make a partial fill request on behalf of the child. In addition, DEA also understands that there are instances where an adult patient may have a caregiver who is named as their agent in the adult patient’s medical power of attorney; therefore, DEA is updating the final regulatory text to allow a caregiver who is the agent named in the adult patient’s medical power of attorney to request a partial fill on behalf of that adult patient.

It is always good practice for a patient and their doctor to engage in open dialog about the potential risks, proper

disposal, and addressing the patient’s fears associated with both schedule II controlled substances and the partial fill process. It is not, however, within the purpose of this rule, or the mission of DEA to involve itself in the practice of medicine or to enforce the elements of good patient education beyond providing rules, policy, and enforcement.

Last, if a patient is requesting a partial fill then they are already taking good steps to mitigate any potential harm or damage that could come as a result of receiving the full prescription. A pharmacist would more than likely want to encourage the partial fill alternative rather than suggest against making the request. If a patient’s tolerance and compliance history is at issue, then a partial fill request would be best in mitigating any potential addiction behavior and diversion risks. In the event that a pharmacist does not want to have the consent of the patient for a partial fill, the pharmacist still has the option of suggesting a partial fill to the prescribing practitioner. Together, a pharmacist and the prescribing practitioner would be well-equipped with the knowledge to determine the dosage quantity necessary to manage a patient’s short-term pain.

Recording of Practitioner’s Partial Fill Request by a Pharmacy

Issue: There were six comments related to the proposed amendment in 21 CFR 1306.13(b)(5)(i), some of which discussed the recording requirement in relation to the economic impact. The commenters requested clarification of the pharmacist’s recordkeeping requirements for fulfilling partial fill requests by prescribing practitioners and patients, specifically regarding electronic recording of dispensing for written records when requested by a practitioner. Commenters stated that the recordation by the pharmacy is warranted and expressed appreciation towards DEA for not requiring a pharmacist to notate a partial fill request by a patient when the prescribing practitioner had already included the request on the prescription, unless the patient is asking for an even smaller amount. However, another commenter believes that the recordkeeping requirements are redundant and the regulatory text should be revised to just require pharmacists to make an annotation in the electronic dispensing record.

DEA Response: As proposed in the NPRM, and being finalized in this rule, 21 CFR 1306.13(b)(5)(i) will require the pharmacist to notate the quantity dispensed on the face of the written

⁵ This provision states that a “covered entity may use professional judgment and its experience with common practice to make reasonable inferences of the individual’s best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions . . . or other similar forms of [PHI].” A covered entity under HIPAA is a health care provider, health plan, or health care clearinghouse involved in the transmission of PHI. See 5 U.S.C. 164.103 and 164.104(a).

prescription, in the written record of the emergency oral prescription, or in the record of the electronic prescription. When it is an electronic prescription, the quantity dispensed, date dispensed, and the dispenser must be linked to the record of the electronic prescription. However, due to commenters' concerns as well as common practices of DEA's Diversion Investigators, DEA is updating the regulatory text to allow the option for pharmacists to fulfill recordkeeping requirements for paper or emergency oral prescriptions using the pharmacy's electronic recordkeeping system.

The comments which also discussed the economic impact of recording the practitioner's partial fill request are addressed below in the "Discussion of Economic Comments" section.

Recording of Patient's Partial Fill Request by a Pharmacy

Issue: DEA received fifteen comments related to the proposed amendment in 21 CFR 1306.13(b)(5)(ii). Comments included appreciation for the clear communication of the requirements established by this rule, while others suggested modifications.

Of the commenters requesting modifications, several commenters suggested that DEA revise the proposed language to allow pharmacists to satisfy the recordkeeping requirement by making an annotation in the electronic dispensing record, regardless of the format of the original prescription. Commenters stated that DEA is creating a redundant requirement by requiring a notation of the quantity dispensed on the face of the written prescription, in the written record of the emergency oral prescription, or in the record of the electronic prescription.

Lastly, commenters suggested that DEA eliminate the proposed dispensing recordkeeping requirement when a prescriber has already instructed a partial fill and the patient requests less than the instructions, as the total quantity dispensed compared to the total quantity prescribed will be obvious based on the dispensing record.

DEA Response: DEA recognizes that commenters found the NPRM to be clear in setting forth these recordkeeping requirements, as it was the intention to be clear in presenting and discussing the requirements that will be implemented with this final rule.

As stated in the previous response to issues identified for the practitioner's partial fill request, DEA is changing the regulatory text to allow pharmacists to satisfy the recordkeeping requirement by using the pharmacy's electronic system regularly used for recordkeeping. DEA notes that Diversion Investigators

regularly look at the pharmacy's electronic system for paper prescriptions also.

Regarding the notation of prescriptions based on the prescribing practitioners' method, written prescriptions, emergency oral prescriptions, or electronic prescriptions, this rule acknowledges that different types of prescriptions exist. Accordingly, the various types of prescriptions may require varying methods for annotation of the partial fill option to prevent over dispensing of controlled substances. This results in the illusion of redundancy because of the numerous means by which the partial fill can be requested.

Regarding the comment on the required documentation when a patient requests a lesser partial fill amount than that specified by the prescribing practitioner, DEA maintains that it is necessary for the dispensing pharmacist to annotate the patient's request.

Because of the justifications already established in 21 CFR 1306.13 for partial fill dispensing of a prescription for a schedule II controlled substance (e.g., 1306.13(a) partial filling due to inability of the pharmacy to supply the full quantity), and the legal mandate by the CARA for the patient's right to request a partial fill, it is necessary that annotation be made for any partial fill requests that may be different from the partial fill amount requested by the prescribing practitioner. The documentation of these modifications from the prescribing practitioner's original instruction of partial fill, at the request of the patient, helps to prevent any suspicion of diversion due to deviation from the original prescription. DEA does not interpret the CARA to allow any "assumption" for a justification of a more limited dispensing than originally requested.

Effective Date of Final Rule

Issue: An association requested that the effective date of the rule be set at six months after the publication of the final rule. The association stated that pharmacies will need adequate time to update their systems, policies, and procedures to be in compliance with the new requirements.

DEA Response: DEA acknowledges the association's concern regarding being in compliance with DEA's regulations. However, DEA notes that many, if not all, electronic pharmacy systems already have the ability to show partial fills. Also, many systems may have a free text field that would allow a pharmacist to use for additional notes. In addition, since many states have already implemented partial filling

regulations, DEA further believes that many pharmacies already have the needed systems to effectuate the allowance of partial fills. DEA notes that many of the policies and procedures that this association may view as a need to be updated are not so involved that pharmacies would need more than 30 days. As such, DEA is making this rule effective 30 days after the publication of the final rule.

Other Issues

Issue: DEA received a comment from an association which requested clarification and written guidance in addressing cases when a pharmacist is unable to supply the full quantity in a prescription for a schedule II controlled substance, as well as three additional situations. One of the additional situations, "Situation 2," pertains to when the prescription quantity exceeds the quantity limits set by state or local law. This situation has already been addressed above in the "General Requirements" Section. "Situation 1" asks for guidance to be provided when dealing with a partial fill resulting from a health plan insurer's benefit rules. For "Situation 3," the association wants guidance on how to proceed when the pharmacy has a policy which limits the quantity that can be dispensed at a time.

DEA Response: DEA has already implemented regulations addressing a partial fill as a result of a pharmacy being unable to supply the full quantity in a prescription for a schedule II controlled substance. Pursuant to 21 CFR 1306.13(a), the partial fill is permissible and the pharmacist has to make a notation of the quantity supplied on the face of the written prescription, the written record of the emergency oral prescription, or in the electronic prescription record. In addition, the remaining portion may be filled within 72 hours of the first partial filling. If the pharmacy cannot fill the remainder in that time, they are to notify the prescribing practitioner.

Situations (1) and (3) are not subject to section 702 of the CARA, as these would not be requests by the patient nor practitioner for a partial filling. For either of these situations to be covered by this rulemaking, they would need to be considered a request by the patient or the practitioner. In these situations, the pharmacist should discuss options for filling the prescription with the prescribing practitioner. Furthermore, in Situation (1), a patient's decision to receive the full prescribed amount despite health plan coverage limitation would also fall outside of section 702 of the CARA, as it would not be a partial fill request.

Out of Scope Comments

DEA appreciates all comments that were received during the comment period. DEA received some general comments which were outside of the scope of this rule. They did not touch on the actual changes to the proposed regulatory text, nor did they answer any of the economic questions that were put forth.

V. Discussion of Economic Analysis Comments

The NPRM contained a Regulatory Analysis section which assessed the economic implications of this rulemaking. DEA examined the costs and costs savings associated with this rulemaking, as well as considered three regulatory approaches regarding the need to require notification when a partial fill is requested by the patient. DEA stated that this was an evaluation of activities that were not previously permitted before the CARA amended the CSA to add 21 U.S.C. 829(f), and therefore, it was difficult to estimate the level of participation for partial filling of a prescription for a schedule II controlled substance. As such, DEA also asked eight questions of the public related to the economic impact of the NPRM.

Costs and Costs Savings

Issue: Many of the commenters questioned whether the patient will be charged two co-pays, stating that the filling of the remainder of the prescription should not create an additional financial burden for the patient. They further stated that this rule should have a positive economic impact because it should result in a lower co-pay, and if the remainder of the prescription needs to be filled, the additional co-pay should add up to be the same amount as a full co-pay. An association requested for DEA to state how a partial fill should be adjudicated by pharmacies to calculate out-of-pocket costs, so that access issues for patients are not created. Multiple commenters stated that this rule would have a positive impact because the unused prescriptions should decrease demand for opioids, making the drug prices lower. They also noted that implementing partial fills can reduce waste, cost, misuse, and abuse potential.

Commenters stated that the rule would increase the time, cost, and overall waste for practitioners by increasing the time spent writing and transmitting prescriptions. Commenters referenced an increased need to educate patients and practitioners, and that DEA should calculate this into the overall

increased-cost (Economic Impact) of this rule. One association in particular mentioned that while there is the potential to reduce the amount of unused drugs, they questioned whether there will be a significant cost savings. The association explained that most patients pay a co-pay which does not necessarily decrease based upon small changes in drug quantity. They also expressed the concern that if co-pays are not reduced for partial fills, then a patient may pay multiple co-pays, resulting in more money out of pocket.

Associations showed much support for Alternative 3, which was chosen by DEA, commenting that they support allowing pharmacists to dispense partial fills requested by the patients, without requiring notification to, or consent from, the prescribing practitioner. Commenters believe that this alternative places the least amount of burden on pharmacists, practitioners, and patients because it does not pose a threat to patient safety and allows a pharmacist to dispense the remainder of the full prescription. However, one association expressed concern that DEA's estimated time that it takes a pharmacist to record a partial fill (10 seconds) is too low, and recommended that DEA conduct a more in depth study to accurately determine the recording time. In addition, this association stated that it would be a larger time, cost, and administrative burden placed upon pharmacists in filling the remainder of the prescription, and advocated for pharmacists to be adequately reimbursed.

Commenters suggested that Alternative 3 will facilitate rule utilization by allowing a pharmacist to dispense per a patient's request independently of the prescriber. They opined that governmental regulation is not the most appropriate way to limit misuse and diversion. The commenters stated that partial fills requested by a patient should not require consent from a practitioner. They further commented that not requiring consent from a practitioner would reduce cost and burden to the practitioner, pharmacist, and patient. Commenters expressed that allowing a pharmacist to dispense the partial fill as requested by the patient without consent of the prescriber is the most cost-effective approach. One of these commenters stated that a provider would not refuse a partial fill request by the patient during this opioid epidemic.

DEA Response: DEA understands the concerns of co-pay affordability expressed by commenters and agrees that partial fills should not create an additional financial burden on patients. DEA joins the commenters in hoping the implementation of this rule will create

a positive economic incentive for all parties to request partial fills. DEA did not receive comments from industry regarding co-pays for partial fills. The intent of this rule is to implement section 702(a) of the CARA that amended the CSA to allow for the partial filling of prescriptions for schedule II controlled substances under certain conditions. DEA does not have the authority to mandate how a pharmacy or an insurance company may charge for partial fills.

To estimate the prescriber's cost of specifying partial fill instructions on the prescription, DEA considered the entire duration of the interaction between the prescriber and the patient, as well as the prescription writing and transmittal process. While any additional time to specify the quantity to be dispensed in the partial filling is minimal, especially, when viewed in relation to the entire duration of the medical interaction between the prescriber and the patient, DEA estimates each partial fill requested by the prescriber will require 10 additional seconds for the prescriber to specify the quantity to be dispensed. DEA believes 10 seconds is a reasonable estimate and the corresponding cost is included in the economic analysis.

While DEA agrees that educating prescribers and patients regarding the option to partial fill may increase the likelihood of instructing or requesting a partial fill, DEA does not plan to require prescribers or pharmacies to inform patients due to the potential burdens. DEA informs prescribers and pharmacies of such issues through various routine conferences and outreach such as: Practitioner Diversion Awareness Conferences and Pharmacy Diversion Awareness Conferences.

Regarding the association's concern that the estimated burden to pharmacies is too low, DEA selected Alternative 3 to minimize burden to prescribers, patients, and pharmacies. While DEA always appreciates comments, the issue of the estimated burden being too low was not raised in any other comments, indicating it was not considered an issue of note. Additionally the absence of any suggested alternative for the process study or improved estimation leaves little room to directly address the comment. For these reasons DEA declines to revise the estimate. DEA believes the burden estimates contained in this rule are reasonable estimates.

DEA appreciates the support for Alternative 3. DEA estimates this alternative minimizes the burden placed on patients, prescribers, and pharmacists.

Questions From the Regulatory Analysis Section on Benefits and Costs

Below are the eight questions asked in the NPRM to help determine the economic impact of this final rule. DEA has summarized the applicable comments received and addressed them, as applicable.

1. *Why do so many prescriptions for schedule II controlled substances result in unused dosages?*

Comments: No comments were received in response to this question.

2. *Would prescribers start using this proposed regulatory provision and start giving instructions for partial filling of schedule II controlled substances, or are there other factors that are likely not to result in prescribers giving partial filling instructions?*

Comments: Commenters pointed to the willingness of a practitioner to start giving instructions for partial filling, but stated their belief that many patients may be reluctant to change. A commenter stated that many of the patients are used to seeing their longstanding family providers who frequently prescribed the schedule II controlled substances without assessing other treatment options first. The commenters expressed that when practitioners attempt to discontinue prescribing these substances and have the patient use other treatment options, patients do not tolerate the change well, forcing practitioners to renew the prescriptions as they are, without partial fill instructions.

Commenters also provided feedback with discussions of how a practitioner giving partial filling instructions would increase the amount of time a provider spends writing and sending prescriptions, and increase the amount of education needed for a patient to understand the available options for filling a prescription. The commenters explained that a practitioner giving partial fill instructions will increase the visit time with each patient, and stated that DEA needs to calculate and include this extra time in the economic impact discussion of the final rule.

DEA Response: While DEA appreciates the opinions stated in the comments, DEA believes that they were speculative in nature. As there was no additional data provided that would warrant revision of DEA's estimated number of partial fills at the direction of the prescriber, no change to the estimate will be made.

Regarding the time that partial fill instructions would require, DEA took the physical requirements of writing the additional information into consideration in developing the

Economic Impact Analysis. The additional time to specify the quantity to be dispensed in the partial filling is minimal, especially when viewed in relation to the entire duration of the medical interaction between the prescriber and the patient. DEA estimates, for both the NPRM and this Final Rule, that each partial fill requested by the prescriber will require 10 additional seconds for the prescriber to specify the quantity to be dispensed. The resulting cost to prescribers is included in the regulatory analysis section below.

3. *How often would a prescriber instruct partial filling of a prescription for a schedule II controlled substance?*

Comments: Some commenters asserted that it is extremely rare for a prescriber to instruct that a prescription be partially filled. They added that it is only after a consultation with a pharmacist that the option is made available to the patient which indicates that prescribing practitioners are not utilizing and are not educating their patients on the option for partial fill.

DEA Response: As stated in an earlier response to comments, this final rule makes changes to proposed 21 CFR 1306.13(b)(3) so that a prescriber instructing a partial fill after a consultation with a pharmacist is considered as a partial fill at the request of the prescriber. DEA did not receive information that would allow DEA to refine the percent of the partial fill opportunity that will be realized as a result of this rule.

4. *Is it reasonable to anticipate a prescriber will exercise professional judgment and foresight in determining when partial fill would be most appropriate, resulting in a minimal number of patients returning for the remainder of the partially filled prescription or experiencing pain because they run out of medication? Would prescribers be likely to use consistent criteria for determining when to give partial refills? Given that the majority of schedule II prescriptions are not fully utilized, should prescribers request partial fills in most cases?*

Comments: Commenters stated that practitioners receive extensive training and are skilled in relaying facts and concerns to their patients. They further stated that most practitioners have the patient's best interests and health at heart and they will do what they can to facilitate best practices and patient safety.

Many commenters expressed concern regarding biases held by practitioners. Specifically, these commenters voiced concern that without criteria to go along with this rule, practitioners will use

their implicit biases to dictate when they choose to prescribe partial fills for a patient. Commenters stated that these biases are a result of racial and ethnic disparities in healthcare. One commenter gave an example that Black patients are less likely to be prescribed pain medications and they receive lower dosage amounts. A commenter also explained that there are some tribes with high rates of opioid addiction and therefore, some practitioners may prescribe less quantity or choose a partial fill for them based off assumptions rather than real risks for addiction.

DEA Response: While DEA did not get answers to the last part of this question, it is apparent that many commenters are concerned that instructions for partial fills will not be given equally across the board. DEA appreciates the commenters' concern and understands that this is a significant cause for concern. However, DEA does not regulate the practice of medicine and it is expected that practitioners would do so without bias. DEA's regulations are an extension of the CARA, and only serve to implement that legislation which was passed by Congress. While this issue may be of significant concern, it is therefore outside the authority granted to DEA by the CSA. DEA did not receive information that would allow DEA to refine the economic analysis.

5. *How likely are patients to request partial filling at the pharmacy when the prescriber has not given instructions for a partial fill on the prescription?*

Comments: The comments received by DEA stated that a patient would probably ask for the full prescription on the day that their pain is high, as they probably think the pain will remain at that level throughout their recovery. A commenter opined that when patients are suffering from an acute problem, it is unlikely that they would opt for partial fills because that would require two trips to the pharmacy in 72 hours versus one trip. Other commenters stated that patients are less likely to request a partial fill on their own when they do not know much about the prescribed drug and expected outcomes. They also said that patients need to have discussed with their practitioners the potential risks, proper disposal, and any of the patient's fears.

In addition, commenters expressed concern that socioeconomic factors could negatively impact the filling of the remainder of the prescriptions, as patients may not be able to afford the remainder of the prescription. These commenters stated that patients may not be able to afford the medicine, with possible additional co-pay fees, or may

lack the means for transportation to and from the pharmacy. Commenters further stated that patients may alternatively request the partial fill because they know that they will not need the entire amount prescribed and they want to limit the exposure for themselves or their households to the controlled substances.

DEA Response: DEA acknowledges that a current state of intense pain could influence one's ability to recognize that the level of pain will diminish over time. DEA encourages patients that are informed by their provider about the option of partial filling to discuss their options with the pharmacist and, with the pharmacist's help, make the best choice for their situations. DEA did not receive information that would allow DEA to refine the economic analysis.

6. *Is it reasonable to assume that a patient interested in a partial filling of a schedule II controlled substance would request the prescriber to provide instructions on the prescription?*

Comments: DEA did not receive any comments specifically offering feedback on this question. However, DEA received comments offering insight for the other questions which helped DEA gain insight about the answer to this question. The commenters offered insight that a patient may face transportation issues or may be in so much pain at the time that the prescription would be written that they would not want a partial fill.

DEA Response: While DEA did not receive any feedback directed towards this question, DEA notes that responses to other questions helped DEA gain insight to this situation. DEA understands that some patients may experience hardships with getting to and from the pharmacy. DEA also acknowledges that there are times when a patient's pain may be so intense that they cannot recognize the likelihood that the pain will diminish with time. The comments received did not include information that would allow DEA to refine the economic impact analysis.

7. *Is it reasonable to assume that when prescribers do not request a partial fill patients will generally not request a partial fill?*

Comments: While DEA did not receive comments that specifically addressed this question, it is reasonable to infer from the comments in general that patients may not request a partial fill when their practitioner did not prescribe it. As previously observed, commenters mentioned that many patients may choose to receive the entire quantity that was prescribed for various reasons. The commenters explained that a patient may know that

they will have a hard time returning to the pharmacy due to lack of transportation. Commenters also stated a patient may feel that they are in so much pain that they would need the entire amount. In addition, commenters mentioned that patients may not know that they can request a partial fill.

DEA Response: DEA appreciates the comments received that allowed for inference on answers to this question. While DEA wished to collect additional information to aid in the understanding of and possible refinements to the economic impact of this rule, no responses provided any such information that facilitated refining the existing economic analysis.

8. *Questions for industry including private and public plans and entitlements:*

a. *What are likely requirements for co-pay in a partial filling?*

b. *Would the co-pay be reduced?*

c. *Would there be a co-pay when a patient returns for filling the remainder of a partially filled prescription (full amount or reduced amount)?*

d. *Would a patient likely spend less on a partial fill than on a full prescription?*

e. *If so, would requesting two or more partial fills likely cost the patient more than filling the full prescription initially?*

Comments: No comments specifically answered these questions. Many commenters hoped that this provision would not result in a multiple co-pay charge. One association in particular voiced concern regarding partial fills resulting in double co-pays for patients. Commenters hoped that this would mean a lower co-pay for a partial fill, otherwise there would not be any savings.

DEA Response: DEA acknowledges and understands the commenters' concerns. With this rulemaking, DEA is not setting guidelines for insurance companies. DEA does not have the authority to mandate how insurance companies should charge their customers. DEA had hoped to receive feedback from insurance companies so that DEA could offer more guidance to the public, however no insurance companies provided comments on this question. DEA notes that its regulations already allow partial fills for prescriptions for schedules III–V controlled substances⁶ and in instances of limited supply, for schedule II

controlled substances.⁷ DEA anticipates that insurance companies would follow the same methods for assessing co-pays for prescriptions for schedule II controlled substances as it currently does for prescriptions for schedule III–V controlled substances. However, DEA cannot be sure of that theory; therefore, DEA defers to insurance companies on how they will handle co-pays for partial fills. DEA did not receive information that would necessitate refining the economic analysis.

VI. Provisions Being Implemented in the Final Rule

DEA is implementing and finalizing the proposed regulatory text with modifications, discussed below, to clarify concerns brought forth by commenters. As proposed, to implement the partial filling provisions of CARA for prescriptions for schedule II controlled substances, DEA is redesignating existing paragraphs (b) and (c) of 21 CFR 1306.13 as paragraphs (c) and (d), respectively. This final rule places the provisions for partial filling in new paragraph (b). Here, registrants will find the requirements for patients and practitioners to request partial fills under certain circumstances and the involved notation by the prescriber to specify the partial fill request, as well as the involved recording by the pharmacy of the partial filling itself.

General Requirements—21 CFR 1306.13(b)(1)

All of the “General requirements” provisions are being implemented as proposed, with the exception of 21 CFR 1301.13(b)(1)(ii). Generally, the prescribing practitioner or a patient must request a partial fill for a prescription for a schedule II controlled substance. Such a prescription may be partially filled if it is not prohibited by State law and it is written in accordance with the CSA, DEA regulations, and State law. Also, the total quantity dispensed in all of the partial fillings cannot exceed the total quantity prescribed by the practitioner.

In the NPRM, the preamble and the regulatory text in 21 CFR 1301.13(b)(1)(ii) stated that a prescription was invalid if it set forth a dispensing quantity of a controlled substance that exceeded the state limits, and therefore would be ineligible for a partial filling. In light of the public comments, as well as various

⁶ DEA regulations for partial filling of prescriptions for a controlled substance listed in schedules III, IV, and V are contained in 21 CFR 1306.23.

⁷ Partial fills of prescriptions for a controlled substance listed in schedules III–V are allowed through 21 CFR 1306.13. 21 CFR 1306.13(a) states when a partial fill of a prescription for a schedule II controlled substance is allowed due to limited supply at the pharmacy.

implemented state legislation and guidance providing exemptions or exceptions for prescriptions written in excess of the state limits, DEA will not implement that portion of the proposed amendment, and is deleting the final two sentences of the proposed regulatory text as a result.

Time Limitations—21 CFR 1301.13(b)(2)

DEA is adding 21 CFR 1301.13(b)(2) as proposed. After the first partial fill of the prescription for a schedule II controlled substance is filled, if a patient chooses to fill the remainder, the remaining portions must be filled no later than 30 days after the date of the prescription. However, when it is an emergency oral prescription, the remainder, if filled, must be filled no later than 72 hours after the date of the prescription.

Partial Fill Request by the Practitioner—21 CFR 1306.13(b)(3)

DEA is adding 21 CFR 1306.13(b)(3) which will require the practitioner to specify the quantity to be dispensed in the partial filling on the face of the written prescription, in the written record of the emergency oral prescription, or in the record of the electronic prescription. This information must be included on the prescription, along with other information required for issuing a prescription under 21 CFR 1306.05, at the time it is signed by the practitioner. In the case of an emergency oral prescription, this information must be given when the prescription is being communicated by the prescribing practitioner to the pharmacist. This approach ensures that the practitioner's intent regarding partial filling is made clear to the pharmacist, and is properly memorialized in the dispensing records.

The term “record of the electronic prescription” is being used in place of the term “electronic prescription record,” which was utilized in the NPRM. The previous term, “electronic prescription record,” was ambiguous and could imply a hard-copy/written prescription being tracked electronically by a pharmacist after receipt. The new term, “record of the electronic prescription,” clarifies a prescription that is generated and transmitted electronically, and is having a record attached by the prescription-tracking software utilized by the pharmacist.

This final rule amends the proposed provision to authorize a practitioner to stipulate a partial fill or refill at a later date than when issuing the original prescription, after an oral consultation between the practitioner and the pharmacist, and specifies that the

pharmacist must annotate the discussion on the prescription as stipulated in 21 CFR 1306.13(b)(5)(i).

Partial Fill Request by the Patient—21 CFR 1306.13(b)(4)

This provision is being finalized to allow a patient to request the partial filling of a prescription for a schedule II controlled substance at the pharmacy, even if the prescribing practitioner did not specify a request for a partial filling, as provided in 21 CFR 1306.13(b)(3). Section 702(a) of the CARA does not place any limitations on how the patient may make a partial fill request. In addition, DEA recognizes that many post-surgery patients may have a difficult time visiting the pharmacy in person. Therefore, this rule does not require an in-person request by the patient, but instead allows alternative pathways for the patient to make such a request and specify the amount to be filled (e.g., phone call by the patient to the pharmacist, or a signed written note from the patient and delivered by a family member to the pharmacist). As proposed and discussed earlier, the partial fill can only be requested by the patient, not a member of the patient's household or a caregiver. However, this final rule is revising the proposed provision to also allow others to request a partial filling where the patient is a minor child (under age 18) or an adult who has named their caregiver as their agent in the adult patient's medical power of attorney. In those situations, DEA authorizes the parent or legal guardian for the minor child and the caregiver named as the agent in the medical power of attorney for the adult patient to request the prescription for the schedule II controlled substance to be partially filled in the same manner that a patient may request the partial fill: in person, in writing if signed by the parent or legal guardian (for the minor child) or the caregiver named in the medical power of attorney (for the adult patient), or by a phone call from the parent or legal guardian (for the minor child) or the caregiver named in the medical power of attorney (for the adult patient) to the pharmacist. Finally, where a practitioner has requested the partial filling of a prescription, neither the patient, a parent or legal guardian (in the case of a minor), nor the caregiver named in the medical power of attorney (for the adult patient) may request a partial filling in an amount greater than that specified by the practitioner.

Pharmacy's Recording of the Partial Fill of a Schedule II Controlled Substance

When Requested by the Prescribing Practitioner—21 CFR 1306.13(b)(5)(i)

This provision specifies how a pharmacist must record a partial fill of a prescription for a schedule II controlled substance when a practitioner makes such a request pursuant to 21 CFR 1306.13(b)(3), as discussed above. When presented with a prescription properly specifying a partial filling request, the pharmacist must record the partial filling in a manner similar to that required under the existing regulations for other circumstances.⁸ Specifically, upon each such partial filling request, the dispensing pharmacist must make a notation of the quantity dispensed on the face of the written prescription or in the pharmacy's electronic recordkeeping system, in the written record or in the pharmacy's electronic recordkeeping system of the emergency oral prescription, or in the record of the electronic prescription. For electronic prescriptions, there must be an electronic prescription record, and the record must be permanently attached to the electronic prescription. Also, for each such partial filling, the pharmacy must maintain a record with the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for schedule III and IV prescription refills. For electronic prescriptions specifically, pharmacy applications must allow required information pertaining to the quantity, date, and the dispenser to be linked to each electronic controlled substance prescription record (as also required by 21 CFR 1311.205(b)(10)).

These above provisions were as proposed with slight changes for clarification. As previously stated, the term “record of the electronic prescription” has been used in place of the term “electronic prescription record” here also to ensure the understanding that DEA is referring to a prescription that is generated and transmitted electronically. Also, as said above DEA is also allowing the notation of the quantity dispensed to be notated in the pharmacy's electronic records due to the regular business practices of pharmacies, as well as common

⁸ Longstanding DEA regulations, which are not be changed by this rule, also allow the partial filling of a schedule II prescription where the pharmacist is unable to supply the full quantity called for in the prescription (21 CFR 1306.13(a)), the patient in a long-term care facility (21 CFR 1306.13(b)), or the patient has a terminal illness (21 CFR 1306.13(c)).

practices of DEA's Diversion Investigators.

This final rule is revising the proposed regulatory text to allow for where the prescribing practitioner conveys his or her request for a partial filling after issuing the prescription, and is based upon an oral consultation with the pharmacist. In those situations, the dispensing pharmacist must notate such discussion with the following: "Authorized by Practitioner to Partial Fill," the name of the practitioner, the date and time of the discussion, and the pharmacist's initials.

When Requested by the Patient—21 CFR 1306.13(b)(5)(ii)

With the addition of 21 CFR 1306.13(b)(5)(ii), when partially filling a prescription for a schedule II controlled substance at the request of the patient, the caregiver of an adult patient who is named in their medical power of attorney, or a parent or legal guardian of a minor patient (under age 18), the pharmacist must make the same notation on the prescription as when partially filling a prescription as requested by the prescribing practitioner on the initial prescription. Also, just as with the pharmacy's recording requirements when the prescribing practitioner is the requester, if the prescription is electronic, then the notation must be linked to the record of the electronic prescription. Since the prescription will not contain the partial fill instructions from the prescriber, this rule also requires the pharmacist to indicate on the prescription who specifically requested the partial fill (*i.e.*, whether it is the patient, parent or legal guardian of a minor patient, or caregiver of an adult patient named in the adult patient's medical power of attorney). On all of such partial fill requests and filling, the pharmacist must record: (1) "The [patient, parent or legal guardian of a minor patient, or caregiver of an adult patient named in a medical power of attorney, whichever is applicable] requested partial fill on [date such request was made]," and (2) the quantity dispensed. As referenced in the section *Partial Fill Request by Patient*, where a practitioner has requested the partial filling of a prescription, the patient, parent or legal guardian, or caregiver of an adult patient may not request a partial filling in an amount greater than that specified by the practitioner.

Here also, the regulatory text is being finalized with slight changes. As mentioned above, DEA is finalizing the regulatory text using the term "record of the electronic prescription" in place of the term "electronic prescription

record." Also with finalizing this provision, DEA is allowing the pharmacist to notate the quantity dispensed in the pharmacy's electronic records.

Additional Regulatory Text Change—Re-Designated 21 CFR 1306.13(d)(1)

As previously stated, DEA is finalizing this rule with changes for clarification in regards to the options which the pharmacy can notate the partial fill for recordkeeping requirements. This final rule adds the partial fill requirements of section 702(a) of the CARA into 21 CFR 1306.13(b) and redesignates existing paragraphs (b) and (c) as paragraphs (c) and (d), respectively. In the redesignated 21 CFR 1306.13(d) in this final rule, there is a reference in existing paragraph (c)(1) to 21 CFR 1306.13(b), which DEA is updating with this rule. DEA is changing that reference in redesignated paragraph (d)(1) to 21 CFR 1306.13(c).

Regulatory Analysis

Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

This rule was developed in accordance with the principles of Executive Orders (E.O.) 12866 and 13563. E.O. 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, public health and safety, and environmental advantages; distributive impacts; and equity). E.O. 13563 is supplemental to and reaffirms the principles, structures, and definitions governing regulatory review as established in E.O. 12866. The E.O. classifies a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O.

DEA expects that this rule will have an annual effect on the economy of \$100 million or more in cost savings and therefore is an economically significant regulatory action. The analysis of benefits and costs is below. In the NPRM, DEA welcomed all comments that would narrow the uncertainties in the presented analysis. Furthermore, DEA asked prescribers, patients, and health care industry, including insurance companies, eight specific questions. None of the comments contained enough information for DEA to update the economic analysis. Therefore, the analysis and conclusions below remain unchanged from the analysis contained in the NPRM.

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined to be a significant regulatory action under E.O. 12866, and therefore has been submitted to the Office of Management and Budget (OMB) for review.

I. Need for the Rule

As discussed above, the CARA was signed into law on July 22, 2016. One provision of the CARA amended the CSA to allow for the partial filling of prescriptions for schedule II controlled substances under certain conditions, providing flexibilities to prescribers and patients. Specifically, section 702(a) of the CARA amended 21 U.S.C. 829 by adding new subsection (f), which allows a pharmacist to partially fill a prescription for a schedule II controlled substance where requested by the prescribing practitioner or the patient. Subsection (f) further provides that for such partial filling to be lawful under the CSA, all of the following conditions must be satisfied: (1) The partial filling must not be prohibited by State law; (2) the prescription must be written and filled in accordance with the CSA, DEA regulations, and State law; and (3) the total quantity dispensed in all partial fillings must not exceed the total quantity prescribed. In addition, subsection (f) provides that the remaining portions of a partially filled prescription for a controlled substance in schedule II, if filled, must be filled no later than 30 days after the date on which the prescription is written, unless the prescription is issued as an emergency oral prescription, in which case the remaining portions, if filled, must be filled no later than 72 hours after it was issued.

II. Alternative Approaches

When the prescriber requests the partial fill on the paper or electronic prescription, or after consultation with

a pharmacist, the pharmacy's actions are straightforward. The pharmacist dispenses the prescription according to the prescriber's partial fill instructions and makes the required notations on the prescription, and the pharmacy maintains the required dispensing records. However, DEA considered three regulatory alternatives regarding the required notifications when the partial fill is at the request of the patient. DEA considered whether the pharmacist should: (1) Notify the prescribing practitioner or the prescribing practitioner's agent of the patient's request to partially fill the prescription, and obtain the prescribing practitioner's consent for the quantity; (2) notify the prescribing practitioner or the prescribing practitioner's agent of the patient's partial fill request, but not require the prescribing practitioner's consent; or (3) simply dispense the partial fill as requested without any notification or consent. As the pharmacist's requirement for notification or consent is the only difference between the alternatives, the alternatives analysis below only examines the estimated cost of notification or consent. A complete discussion of benefits and costs is described in the following section.

Alternative 1: Obtain Prescribing Practitioner's Consent for the Partial Fill Quantity Prior to Dispensing

The first alternative would require the prescribing practitioner's consent for the quantity to be dispensed before the pharmacist dispenses a partial fill at the patient's request. Upon receiving a patient's request for a partial fill, the pharmacist would contact the prescribing practitioner or the prescribing practitioner's agent, and

confirm that the prescribing practitioner concurs with the requested partial fill quantity. After confirmation, the pharmacist would dispense the partial fill and make the required notation on the prescription. The notation includes the method of notification (e.g., telephone, email, voicemail) and the person notified.

DEA estimates obtaining consent would require six minutes from each of the parties involved: the pharmacist to request consent, the prescribing office to review the request and for the prescribing practitioner or practitioner's agent to give consent, and the patient to wait while consent is received. To estimate the cost, DEA used the following labor wage and employment cost rates from the U.S. Department of Labor, Bureau of Labor Statistics (BLS). The following occupations' median hourly wages were noted:⁹

- *Pharmacist requesting consent:* 29–1051 Pharmacists, \$60.64.

- *Prescriber's representative to give consent:* 43–6033 Medical Secretaries, \$17.19.¹⁰

- *Patient:* 00–0000 All Occupations, \$18.54.

Additionally, a load of 42.7 percent for benefits was applied to the median hourly wages to obtain loaded median hourly wages below:¹¹

- *Pharmacist requesting consent:* 29–1051 Pharmacists, \$86.53.

- *Prescriber's representative to give consent:* 43–6033 Medical Secretaries, \$24.53.

- *Patient:* 00–0000 All Occupations, \$26.51.

Therefore, the estimated cost of obtaining consent (six minutes per occurrence) would cost the pharmacy \$8.65, the prescriber \$2.45, and the patient \$2.65, for a total \$13.85 per occurrence.

While DEA does not have a strong basis to estimate the number of instances the patient will request partial filling of a prescription for schedule II control substance, in the Cost Savings discussion below, the estimated total prescriptions for potential partial filling is 36,375,279. DEA used the midpoint between 0 and 100 percent—half (18,187,640)—to estimate the cost savings. DEA does not know all the reasons a patient may request a partial fill, but believes a patient requesting a partial filling of a prescription for a schedule II controlled substance may seek a partial fill because: the patient is aware of the potential risks of excess opioids in the household, the patient does not want excess opioids in the household, the patient believes he or she will not need all the dosages prescribed, and there is no additional cost or logistical burden as a result of the partial fill. DEA further believes that patients are likely to follow the instructions of prescribers, and estimates only a small minority of the estimated 18,187,640 requests for partial fills will be at the request of the patient. For the purposes of this analysis, DEA assumes 10 percent, or 1,818,764 partial fills will be at the request of the patient. Applying the cost per occurrence to the number of occurrences, this alternative is estimated to cost pharmacies approximately \$15.7 million per year for the pharmacists to obtain consent, prescribing practitioners approximately \$4.5 million per year to give consent, and patients \$4.8 million while waiting for the pharmacist to obtain consent from the prescribing practitioner or practitioner's agent for a total \$25 million per year. The table below summarizes this calculation.

TABLE 1—SUMMARY CALCULATION FOR ALTERNATIVE 1

	Loaded hourly wage (\$)	Time required (hours)	Cost per occurrence (\$)	Number of occurrences	Total cost (\$M)
Pharmacy	86.53	0.1	8.65	1,818,764	15.7
Prescriber's representative	24.53	0.1	2.45	1,818,764	4.5
Patient	26.51	0.1	2.65	1,818,764	4.8
Total	N/A	N/A	13.75	N/A	25.0

This alternative was not selected. It is contrary to the plain language of the

statutory text, which allows a patient to request a partial fill without obtaining

the practitioner's consent. Although this alternative ensures consideration of the

⁹ BLS, May 2018 National Occupational Employment and Wage Estimates, United States. https://www.bls.gov/oes/current/oes_nat.htm. (Accessed 2/6/2020.)

¹⁰ In this alternative, while the prescriber would be involved in providing consent, the time requirement on the prescriber is assumed to be

minimal, and thus excluded. The primary economic impact would be based on the time requirement for the prescriber's representative.

¹¹ BLS, "Employer Costs for Employee Compensation—September 2019" (ECEC) reports that average benefits for private industry is 29.9 percent of total compensation. The 29.9 percent of

total compensation equates to 42.7 percent (29.9%/70.1%) load on wages and salaries.

partial fill by the prescribing practitioner, DEA believes this alternative is unnecessarily burdensome. While DEA does not have a basis to estimate the likelihood of the prescribing practitioner denying consent for partial fills, DEA assumes denials would be rare. The patient may request a partial fill for a variety of reasons, and a partial fill request does not necessarily mean that the remaining portions of the prescription will not be filled. Requiring consent prior to the pharmacist's dispensing the partial fill would be unnecessarily burdensome, and, thus, this alternative was not selected.

Alternative 2: Notify the Prescribing Practitioner of the Partial Fill Quantity After Dispensing

The second alternative would require notification to the prescribing

practitioner or the prescribing practitioner's agent of the quantity dispensed upon the patient's request for the partial fill. In this scenario, the prescribing practitioner's consent for the partial fill would not be required. Instead, the pharmacist would partially fill the prescription based on the patient's request, notify the prescribing practitioner or the prescribing practitioner's agent of the quantity dispensed, and make the required notation on the prescription. The notation is the same method as for Alternative 1.

DEA estimates notifying the prescribing practitioner will require three minutes from each of the parties involved: the pharmacist to contact the prescribing office to give notice and the prescribing office to receive and review

notice. Using the same BLS occupations and loaded median hourly wages as Alternative 1, the estimated cost of each notification (three minutes per occurrence) would cost the pharmacy \$4.33 and the prescriber \$1.23 for a total \$5.56 per occurrence.

Applying the same estimate of 1,818,764 partial fills, as in Alternative 1, this alternative is estimated to cost pharmacies approximately \$7.9 million per year for the pharmacists to give notice and prescribing practitioners approximately \$2.2 million per year to receive and review notice. The table below summarizes this calculation.

TABLE 2—SUMMARY CALCULATION FOR ALTERNATIVE 2

	Loaded hourly wage (\$)	Time required (hours)	Cost per Occurrence (\$)	Number of occurrences	Total cost (\$M)
Pharmacy	86.53	0.05	4.33	1,818,764	7.9
Prescriber's representative	24.53	0.05	1.23	1,818,764	2.2
Total	N/A	N/A	5.56	N/A	10.1

This alternative was not selected. DEA believes that this alternative is also unnecessarily burdensome. Although this alternative would ensure that the prescribing practitioner is made aware of the partial filling of the prescription and could react to this information if needed, it would cause an additional compliance-burden on both the pharmacy and prescribing practitioner.

Alternative 3: Dispense Partial Fill as Requested Without Consent of, or Notification to, the Prescribing Practitioner

The third alternative would not require the consent of, or notification to, the prescribing practitioner described in Alternatives 1 or 2, respectively. In this alternative, the pharmacist would partially fill the prescription based on the patient's request and make the required notation on the prescription. This alternative results in no notification-related cost to the pharmacy or prescriber.

This alternative was selected. Although a partial fill at the request of the patient may represent a departure from the prescribing practitioner's dispensing instructions, this alternative is the least burdensome to the pharmacy, prescribing practitioner, and the patient. Additionally, a partial fill does not preclude the eventual

dispensing of the full amount prescribed. Under this rule, patients requesting a partial fill would be entitled to request that the pharmacist fill the remainder of the prescription within a 30-day window. This alternative would result in no additional consent or notification-related costs and would not impose dispensing delays on patients requesting a partial fill. A further discussion of the benefits and costs of this alternative is described below. While the initial proposed alternative did not include the possibility of a parent or legal guardian making the request on behalf of a minor and a caregiver named in a medical power of attorney making the request on behalf of an adult patient, the inclusion of these provisions in the final rule does not change the advantages of this alternative or the economic analysis discussed below. When the patient is a minor or an adult patient who has a caregiver, the parent, legal guardian, or caregiver is often the person filling the prescription and may request partial filling with minimal economic impact.

III. Analysis of Benefits and Costs

This rule allows partial fills of prescriptions for schedule II controlled substances at the request of the patient (including the parent or legal guardian of a minor or the caregiver of an adult

named in a medical power of attorney) or the prescribing practitioner, if not prohibited by State law. The rule also includes time limitations on filling the remaining portions of a partially filled prescription for a schedule II controlled substance, and additional provisions for how a practitioner may request that a prescription for a schedule II controlled substance be partially filled, and how a pharmacy must record the partial filling of a prescription for a schedule II controlled substance.

DEA examined the benefits, costs, and cost savings associated with this rule.

Benefits

DEA does not know all the reasons a prescriber or patient might request a partial fill of a prescription. However, as discussed in the Cost Savings section below, a significant portion of filled opioid prescriptions go unused, leading to the excess opioids being kept by the patient that could end up being for improper use, diversion, or improper disposal. Partial filling is expected to reduce the quantity of unused schedule II controlled substances, which would decrease the risk of diversion, and the risk that patients or others may develop physical dependence or an addiction to prescribed scheduled II controlled substances.

The supply of unused drugs in U.S. households contributes to concerns related to opioids and illicit drug use. Keeping and storing unused medications in households poses several risks related to misuse, diversion, accidental overdose, and consumption of spoiled substances.¹² Many patients receive their first opioid prescription after a surgical procedure and frequently retain the majority of unused medication, which could potentially be sold illegally or misused by the patient. In addition, unused medication can be diverted and used by other members of the patient's household, friends of the patient, or sold. According to the National Institute on Drug Abuse, 21 to 29 percent of patients prescribed opioids for chronic pain misuse them,¹³ between 9.1 and 12.2 percent prescribed opioids for chronic pain develop an opioid use disorder,¹⁴ an estimated 4 to 6 percent who misuse prescription opioids transition to heroin,^{15 16 17} and about 80 percent of people who use heroin first misused prescription opioids.¹⁸ According to one journal article, "multiple studies have reported an increased risk of new persistent opioid use after prescription of opioids for acute pain in opioid naïve patients. Even patients who undergo relatively minor low-pain surgery are at increased risk of long term opioid use."¹⁹ According to the Substance Abuse and Mental Health Administration (SAMHSA), 47.2 percent of people who

misused pain relievers in the past year obtained the last pain reliever they misused "from a friend or relative in some way (*i.e.*, being given them, buying them, or taking them without asking)." ²⁰ Also, although opioid medications are effective in managing acute pain after surgery, even short-term use of opioids can lead to long-term dependence.²¹

The total U.S. economic burden (healthcare costs, criminal justice costs, and lost productivity costs) of prescription opioid misuse in 2013 was estimated to be \$78.5 billion, based on the 1.935 million Americans estimated to meet the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) criteria for opioid use disorder.²² This economic burden equates to approximately \$41,600 per person with opioid use disorder.²³ DEA estimates approximately \$41,600 in societal benefit accrues each time we prevent an individual from developing opioid use disorder. This rule is expected to lower the prevalence of opioid misuse and thereby reduce rates of opioid addiction. While DEA has no basis to quantify the amount of misuse that will be prevented, DEA anticipates that reductions in opioid dispensing will reduce the amount of unused opioid medications in American homes, thereby reducing opportunities for medication sharing and other forms of diversion. This, in turn will have a real and significant benefit by reducing misuse and development of opioid use disorder.

Cost Savings

This rule is estimated to lower the amount of schedule II medications dispensed and, therefore, expenditures on prescriptions. It is also expected to reduce the number of unused schedule II controlled substances requiring disposal. To quantify the cost savings, DEA estimated the cost of excess medicine and calculated the approximate percent cost savings

opportunity that may be realized by this rule.

In 2017, 163,683,029 prescriptions for schedule II controlled substances were filled for "acute" pain, with a total retail cost of \$11,807,297,373, or an average retail cost of \$72.14 per prescription.²⁴ The prescription data includes a data field that indicates whether the condition being treated is "acute" or "chronic." The figure excludes schedule II controlled substances generally prescribed for chronic conditions, *i.e.*, amphetamine, lisdexamfetamine, methamphetamine, and methylphenidate. DEA believes prescriptions for "acute" conditions are more likely to be partially filled. Therefore, DEA estimates 163,683,029 prescriptions represent the total number of prescriptions that may be partially filled per year. However, many States have already passed laws or adopted regulations limiting the quantity of schedule II controlled substances that may be dispensed pursuant to a prescription. For example, in 2016, Massachusetts became the first state to pass a law to limit first time opioid prescriptions to seven days.²⁵ Since 2016, many other States have passed similar laws limiting the prescribing of opioids for acute pain. These limits generally range from a 3 to 14-day supply.²⁶ As of September 2019, 36 States have placed limits on the amount of opioids that can be prescribed by doctors.²⁷ The limits in five of those States apply only to Medicaid recipients, and two States have no pill or day limits, but require doctors to prescribe the lowest effective dose.²⁸ Based on review of state limits for prescribing of opioids, DEA estimates there are 34 states with pill or day limits in place, representing 68.7 percent of the U.S. population.²⁹ DEA believes

¹² "Safe Disposal of Unused Controlled Substances: Current Challenges and Opportunities for Reform," Avalere, <http://www.ncdoi.com/osfm/safekids/documents/omd/safedisposalofunusedcontrolledsubstancesreport.pdf>.

¹³ Vowles KE, McEntee ML, Julnes PS, Frohe T, Ney JP, van der Goes DN. Rates of opioid misuse, abuse, and addiction in chronic pain: a systematic review and data synthesis. *Pain* 156(4):569–576. (2015).

¹⁴ Katherine M Keyes, and Caroline Rutherford. Prevalence of addiction in chronic pain: reanalysis of Vowles et al., 2015. *Pain* 163(5):e693–e695. (2022).

¹⁵ Muhuri PK, Gfroerer JC, Davies MC. Associations of Nonmedical Pain Reliever Use and Initiation of Heroin Use in the United States. *CBHSQ Data Rev.* August 2013.

¹⁶ Cicero TJ, Ellis MS, Surratt HL, Kurtz SP. The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years. *JAMA Psychiatry* 71(7):821–826. (2014).

¹⁷ Carlson RG, Nahhas RW, Martins SS, Daniulaityte R. Predictors of transition to heroin use among initially non-opioid dependent illicit pharmaceutical opioid users: A natural history study. *Drug Alcohol Depend* 160:127–134. doi:10.1016 (2016).

¹⁸ See note 15.

¹⁹ "Prescription of opioids for acute pain in opioid naïve patients," 2019, Carlos A Pino, MD, Melissa Covington, MD, *Uptodate.com*, Wolters Kluwer. <https://www.uptodate.com/contents/prescription-of-opioids-for-acute-pain-in-opioid-naïve-patients>.

²⁰ SAMHSA, The National Survey on Drug Use and Health: 2020 <https://www.samhsa.gov/data/data-we-collect/nsduh-national-survey-drug-use-and-health>.

²¹ Empowering Post-Surgical Patients to Improve Opioid Disposal: A Before and After Quality Improvement Study. Jessica M. Hasak, Carrie L. Roth Bettlach, Katherine B. Santosa, Ellen L. Larson, Jean Stroud, Susan E. Mackinnon. *Journal of the American College of Surgeons* 2017.

²² Florence CS, Zhou C, Luo F & Xu L, *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States, 2013*, 54 *Med Care* 901 (2016). DEA's 2017 National Drug Threat Assessment also references this estimate for total economic burden of prescription drug misuse.

²³ \$78.5 billion/1.935 million patients = \$40,568 per patient.

²⁴ IQVIA Data 2017. Prescriptions for "acute pain" were used to differentiate from "chronic" conditions, which are limited to prescriptions for amphetamine. \$11,807,297,373/163,683,029 = \$72.14.

²⁵ "Opioid Prescribing Limits Across the States," Marilyn Bullock, PharmD, BCPS, FCCM, 2/5/2019, pharmacytimes.com.

²⁶ *Ibid.*

²⁷ "Opioid prescription limits and policies by state." https://ballotpedia.org/Opioid_prescription_limits_and_policies_by_state. (Accessed 2/3/2020.)

²⁸ *Ibid.*

²⁹ For the purposes of this discussion, "State" includes Puerto Rico and the District of Columbia. Population estimates are based on the U.S. Census Bureau's 2019 population estimates. The 34 States that have pill or day limits are: Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina,

partial fill provisions under this rule are likely to have an impact on the remaining states without opioid prescription limits, representing 31.3 percent of the U.S. population. Applying this percentage, DEA estimates 51,232,788 (31.3 percent) of the 163,683,029 total prescriptions may be partially filled. According to a 2017 study of post-surgical patients who were prescribed opioids, only 29 percent used the entire prescription, leaving 71 percent of post-surgical patients with excess opioids.³⁰ The study found that patients prescribed opioids after surgery consumed, on average, only 33 percent of the prescribed medication.³¹ Based on that finding, DEA estimates 71 percent of patients will not use all controlled substance prescriptions. DEA therefore estimates that 36,375,279 (71 percent) of the estimated 51,232,788 prescriptions in states without controlled substance prescribing or dispensing limits will not be fully utilized, presenting an opportunity for cost savings from partial fills.

Assuming a typical partial fill request is for 50 percent of the prescription, and as discussed above, a patient is not likely to return to fill the remaining portion of the prescription, the estimated savings from the remaining unfilled portions is 50 percent of the average cost per prescription (\$72.14) or \$36.07. Multiplying the estimated savings per prescription of \$36.07 by the number of prescriptions available for cost savings (36,375,279) results in \$1,312,035,331 in potential cost savings per year. However, DEA does not have a basis to estimate the actual number or percentage of prescriptions for schedule II controlled substances issued in these states that will be partially filled, and therefore cannot estimate likely aggregate savings based on this methodology. For the purposes of this analysis, DEA estimates 50 percent of potential savings, or \$656,028,165 (representing 18,187,640 partially filled prescriptions) will be realized as annual cost savings from reduced schedule II

controlled substance dispensing. DEA does not have a basis to estimate the impact of this rule on payments to pharmacies, in terms of price per dosage units, co-pays, insurance reimbursements, etc., or who would realize the cost savings.

In addition to the cost savings from not dispensing remaining portions of partially filled prescriptions, DEA anticipates cost savings from the reduced need to dispose of unused medications. Patients dispose of unused drugs in a variety of ways, including throwing them in the trash, flushing them down the toilet, pouring them down the sink drain, taking them to the pharmacy or physician's office, or taking them to a drug take back site or event. In a two-phased study using a convenience sample in Southern California, researchers found that only 13 percent of people surveyed either disposed of their medications by taking them to the pharmacy or to the physician's office.³² For the purpose of this analysis, DEA assumes that only 13 percent of people with leftover schedule II medications dispose of their unused medications in this way. It is likewise estimated that two-thirds of dispensed medications in the United States are unused by patients.³³ Based on DEA's assumption that a typical partial fill represents 50 percent of the prescription, and that the average partially filled prescription represents 67 pills, DEA estimates the average number of excess pills is 34 ($50\% \times 67$ pills) per full prescription filled.³⁴ To calculate the total cost savings for patients not needing to dispose of their unused schedule II controlled substances, DEA first multiplied the estimated number of partial fill prescriptions by the average disposal pill count to get a total of 618,379,760 pills ($18,187,640 \times 34$). To estimate the number of pills being disposed of by patients through pharmacies, physician offices, or take back days, DEA multiplied the total number of pills (618,679,760) by 13 percent to get 80,389,369 pills. Using the average cost

per disposal of \$5.60/pound collected,³⁵ and the estimate of pound/pill of .0069,³⁶ the total cost savings for unused pills not needing to be disposed of is \$3,106,245 ($80,389,369 \times \$5.60 \times .0069$). The remaining 87 percent of pills that are not properly disposed of are assumed to be either thrown away in the trash (62.7 percent), flushed down the toilet (18 percent), disposed of in the sink (4.3 percent), not disposed of and stored (17.4 percent), and other (8 percent).³⁷ Therefore, the total annual cost savings of this rule is \$659,134,410 ($\$656,028,165 + \$3,106,245$).

Costs

DEA estimates there is a cost to prescribers associated with the time burden of writing instructions for partial fill prescriptions.

Partial filling of a prescription for a schedule II controlled substance, pursuant to this rule, may be requested by the prescriber or the patient. The prescriber may request a partial fill by specifying the quantity to be dispensed in the partial filling on the face of the written prescription or in the pharmacy's electronic records, in the written record or the pharmacy's electronic records of the emergency oral prescription, or in the record of the electronic prescription record, along with other information required in 21 CFR 1306.05. A practitioner may authorize a partial fill at a date after which the prescription was issued, after consultation with a pharmacist. While any additional time to specify the quantity to be dispensed in the partial filling may be minimal, especially when viewed in relation to the entire duration of the medical interaction between the prescriber and the patient, DEA estimates each partial fill requested by the prescriber will require 10 additional seconds for the prescriber to specify the quantity to be dispensed. Based on BLS' mean hourly wage for "29-1060 Physicians and Surgeons" of \$101.43 and a 42.7 percent load for benefits, the

Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia.

³⁰ Empowering Post-Surgical Patients to Improve Opioid Disposal: A Before and After Quality Improvement Study. Jessica M. Hasak, Carrie L. Roth Bettlach, Katherine B. Santosa, Ellen L. Larson, Jean Stroud, Susan E. Mackinnon. Journal of the American College of Surgeons 2017. The purpose of the study was to determine whether providing an educational brochure would improve disposal methods of excess opioids. The study found 35 of 128 participants not given the educational brochure used the entire prescription, and 40 of 130 participants given the educational brochure used the entire prescription. Combining the two groups, 75 (29%) of 258 participants used the entire prescription.

³¹ Ibid.

³² "Taking Stock of Medication Wastage: Unused Medications in US Households." NeuroImage, Academic Press, 16 Oct. 2014, www.sciencedirect.com/science/article/pii/S1551741114003337?via%3Dihub.

³³ Ibid.

³⁴ IMS Health IQVIA Data 2017. The 67 average number of pills dispensed was determined by dividing the total number of extended units in 2017 by the total number of prescriptions (10,921,740,149/163,683,029). From IQVIA's data dictionary, the term "extended units"—"represents the total number (new plus refill) of dispensed tablets, capsules, milliliters, and so forth. For solids, this is the number of tablets; for creams, grams; and liquids, mls."

³⁵ Siler, S., Duda, S., Brown, R., Gbemudu, J., Weiner, S., & Glaudemans, J. (n.d.). Safe Disposal of Unused Controlled Substances. Retrieved September 21, 2018, from <http://www.ncdoi.com/osfm/safekids/documents/omd/safedisposalofunusedcontrolledsubstancesreport.pdf>.

³⁶ <http://michigan-open.org/statewide-drug-takeback-event-nets-900-pounds-of-opioids-more/>.

³⁷ "Taking Stock of Medication Wastage: Unused Medications in US Households." NeuroImage, Academic Press, 16 Oct. 2014, www.sciencedirect.com/science/article/pii/S1551741114003337?via%3Dihub. Percentages are of improper disposal methods only. There were other choices on the survey: take it to the pharmacy (11.2 percent) and take it to the physician's office (1.8 percent). The percentages do not add to 100 percent because respondents were allowed to select more than one method.

estimated loaded hourly wage for a prescriber is \$144.74.³⁸ Therefore, the 10 additional seconds to specify the quantity to be dispensed equates to \$0.40.³⁹ As discussed in the Cost Savings discussion above, DEA does not have a basis to estimate the percentage of the estimated 36,375,279 prescriptions per year available for partial filling that would be partially filled pursuant to this rule. Therefore, for the purposes of this analysis, DEA estimates the mid-point (50 percent), or 18,187,640 prescriptions per year, will be partially filled at the request of the prescriber at an annual cost of \$7,275,056.

When a prescribing practitioner has properly specified his or her intent to partially fill a prescription for a schedule II controlled substance, this rule will require the pharmacist to record the partial filling in a manner similar to that required under the existing regulations for other circumstances.⁴⁰ Specifically, the dispensing pharmacist must make a notation of the quantity dispensed on the face of the written prescription or in the pharmacy's electronic records, in the written record or the pharmacy's electronic records of the emergency oral prescription, or in the record of the electronic prescription (similar to current requirements under 21 CFR 1306.13(a) when the pharmacist is unable to supply the full quantity called for in a prescription for a schedule II controlled substance). When the pharmacist partially fills a prescription, after the prescriber has conveyed this request in a consultation with a pharmacist in accordance with paragraph (b)(3), the pharmacist must note the following: "Authorized by Practitioner to Partial Fill," the name of the practitioner, the date and time of the discussion, and the pharmacist's initials. Also, for each such partial filling (whether requested by the

prescriber on the prescription or after consultation with the pharmacist), the pharmacy must maintain a record with the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for prescription refills of schedule III and IV controlled substances. DEA believes the most common scenario will be that the partial fill information is entered into a computerized system, in an existing data field; then, an adhesive label with relevant information will be printed, and subsequently affixed to the prescription container. When partially filling a prescription for a schedule II controlled substance at the patient's request, the pharmacist must make the same notation on the prescription as when partially filling a prescription at the request of the prescribing practitioner, along with additional information indicating that the patient requested the partial fill. While DEA believes documenting the quantities dispensed for each filled prescription is a usual and ordinary activity for a pharmacist, DEA estimates that it may require 10 additional seconds for a pharmacist to record a partial fill, pursuant to this rule. Based on an estimated loaded median hourly rate of \$86.53 for a pharmacist, from the alternatives analysis above, the 10 additional seconds to record partial fills equates to \$0.24.⁴¹ As discussed above, DEA does not have a basis to estimate the percentage of the estimated 36,375,279 prescriptions per year that will be partially filled. Therefore, for the purposes of this analysis, DEA estimates the mid-point (50 percent), or 18,187,640 prescriptions per year will be partially filled, requiring recording of the partial fill by the pharmacist at an annual cost of \$4,365,034.

If a patient received a partial fill pursuant to this rule, and then returns to the pharmacy to receive another partial fill, or the remainder of the initial prescription, the pharmacist will require some additional time to fill the prescription. For example, if filling the remainder of the partial fill required 10 additional minutes, based on the estimated loaded median hourly rate of \$86.53 for a pharmacist, that additional time will equate to a cost of \$14.42. Additionally, there will be a similar cost to the patient to potentially make an additional trip to the pharmacy and waiting for the prescription to be filled. However, DEA estimates these additional interactions will be minimal. As discussed earlier in reference to the

2017 study of post-surgical patients who were prescribed opioids, 71 percent of patients in the study did not use the entire prescription, and on average the patients only used 33 percent of the prescribed opioids. If prescribers and patients randomly asked for partial fills, only a small minority of patients will return for the remainder of the prescription. However, DEA does not anticipate the request for partial fills, at the request of the prescriber or the patient, to be random. Rather, DEA anticipates prescribers will exercise professional judgment and foresight in determining when a partial fill is best suited. DEA does not believe a partial fill will be requested by the prescriber when the prescriber believes the patient is likely to need all of the prescribed medication. Furthermore, while this rule will permit patients to request partial fills, DEA believes patients are unlikely to request a partial fill. Rather, the patient will follow the prescriber's instruction, based on consultation between the prescriber and the patient. Therefore, DEA believes any increase in the number of patient-pharmacy interactions related to patient-requested partial fills and resulting burden would likely be *de minimis*. DEA estimates the total cost of this rule is \$11,640,090 (\$7,275,056 to prescribers and \$4,365,034 to pharmacies) per year.

Discussion of Uncertainties

This analysis evaluates the economic impact of activities that were previously not permitted. Therefore, DEA does not have a strong basis to estimate the level of participation in these activities, including partial filling of prescriptions for schedule II controlled substances by prescribers and patients, and how insurance companies will react to these partial filling of prescriptions.

This analysis is highly sensitive to the percentage of prescriptions being partially filled, and the percentage of partially filled prescriptions with patients returning for remainder of the partially filled prescription.

For example, if prescribers and patients in States with no opioid prescription pill or day limits requested a partial fill of 50 percent of the prescription amount for all 71 percent of prescriptions where not all drugs are used, the estimated cost savings from not dispensing the full prescriptions increases to \$1,312,035,331 (representing 36,375,279 partially filled prescriptions). Because DEA does not have a good basis to estimate the potential cost savings that will be realized, for the purposes of this analysis, DEA assumes the mid-point (50 percent), or \$656,028,165

³⁸ BLS, May 2018 National Occupational Employment and Wage Estimates, United States. https://www.bls.gov/oes/current/oes_nat.htm. (Accessed 2/6/2020.) BLS, "Employer Costs for Employee Compensation—September 2019" (ECEC) reports that average benefits for private industry is 29.9 percent of total compensation. The 29.9 percent of total compensation equates to 42.7 percent (29.9%/70.1%) load on wages and salaries. $\$101.43 \times 1.427 = \$144.74$. The "median" hourly rate is generally preferred. However, the median hourly rate for this occupation code was not available; thus, the "mean" was used. While it is likely some of the partial fill instructions will be written by a mid-level practitioner, i.e., nurse practitioner, physician's assistant, etc., or a nurse (in preparation for the prescriber's signature), DEA believes this loaded hourly rate is a reasonably conservative estimate.

³⁹ 10 seconds $\times$ (1 hour/3,600 seconds) $\times$ \$144.74/hour = \$0.40.

⁴⁰ See note 2.

⁴¹ 10 seconds $\times$ (1 hour/3,600 seconds) $\times$ \$86.53/hour = \$0.24.

(representing 18,187,640 partially filled prescriptions) will be realized as cost savings from not dispensing excess schedule II controlled substances. An estimate of zero percent will result in zero cost savings. As the percentage of cases where partial fills are requested increases, the estimated cost savings increase proportionally.

DEA anticipates prescribers will exercise professional judgment and foresight in determining when a partial fill is best suited. DEA does not believe a partial fill will be requested by the prescriber when the prescriber believes the patient is likely to need all of the prescribed medicine, resulting in a minimal number of patients returning for the remainder of the partially filled prescription. Furthermore, while this rule will permit patients to request partial fills, DEA believes patients are unlikely to request a partial fill. Rather, the patient will follow the prescriber's instruction, based on consultation between the prescriber and the patient.

Finally, this analysis excluded any anticipated impact of this rule on payments to pharmacies, in terms of price per dosage units, co-pays, insurance reimbursements, etc., or who would realize the cost savings.

Summary

In summary, DEA estimates that the total cost savings of this rule will be \$659 million per year, and the total cost will be \$12 million per year, for a net cost savings of \$647 million per year (rounded to the nearest million dollars) over the next five years. Due to the fluid nature of the national opioid crisis and legislative activity in State government, DEA believes using a five-year term for the analysis is reasonable. At a three percent discount rate, the net present value of the cost savings over a 5-year period is \$2,965 million. At a seven

percent discount rate, the present value of the cost savings is \$2,655 million.

Executive Order 12988, Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, to eliminate drafting errors and ambiguity, minimize litigation, provide a clear legal standard of affected conduct, and promote simplification and burden reduction.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications warranting the application of Executive Order 13132. This rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This rule does not have tribal implications warranting the application of Executive Order 13175. It does not have substantial direct effects on one or more Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Regulatory Flexibility Act

The Administrator, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601–612, has reviewed this rule and by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities.

This rule includes provisions regarding partial fill of prescriptions for

schedule II controlled substances. This rule will allow partial fills of such prescriptions at the request of the patient or the prescribing practitioner, if not prohibited by State law. A request for partial fill can be made by the patient, a caregiver named in an adult patient's medical power of attorney, or parent or legal guardian of a minor patient. This rule also includes time limitations on filling the remaining portions of a partially filled prescription for a schedule II controlled substance and additional provisions for how a practitioner may request that a prescription for a schedule II controlled substance be partially filled, how a patient may request that a prescription for a schedule II controlled substance be partially filled, and how a pharmacy must record the partial filling of a prescription for a schedule II controlled substance. While not all practitioners may write prescriptions with partial fill instructions, and not all pharmacies may receive prescriptions for partial fill, these registrants (or entities that employ these registrants) will still be subject to the partial fill provisions contained in this rule.

This rule primarily affects prescribers of schedule II controlled substances and the pharmacies that fill those prescriptions. While prescribers are generally individual practitioners, for the purposes of this analysis, DEA includes industries that employ prescribers. In Table 3, DEA estimates the industries that will be affected by this rule, as described by the North American Industry Classification System (NAICS). This list is not intended to include an exhaustive list of all employers of prescribers of schedule II controlled substances, but rather a representation of primary industries that employ them.

TABLE 3—AFFECTED INDUSTRIES, SIX-DIGIT NAICS CODE

NAICS	NAICS description.
446110	Pharmacies and Drug Stores.
621111	Offices of Physicians (except Mental Health Specialists).
621210	Offices of Dentists.
621491	HMO Medical Centers.
621493	Freestanding Ambulatory Surgical and Emergency Centers.
622110	General Medical and Surgical Hospitals.

The U.S. Census Bureau's Statistics of U.S. Businesses (SUSB) publishes the number of firms, employment, and revenue by firm size and industry. To estimate the number of small businesses affected, DEA compared the 2012 SUSB data, the most recent data available containing revenue by firm size and

industry,⁴² to the U.S. Small Business

⁴² "Number of small businesses: Small entity counts, employment, and revenues . . . number of small entities when the size standard is based on revenue [Link to: https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx]." <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/rfa-data-resources-for-federal-agencies>. (Accessed 2/4/2020.)

Administration (SBA) size standards.⁴³ DEA estimates a total 326,033 entities,

⁴³ U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, Effective August 19, 2019. <https://www.sba.gov/document/support-table-size-standards>. (Accessed 2/4/2020.)

of which 318,362 are small entities, will be affected by this rule. Table 4 details

the number of entities, SBA size standard, and estimated number of

small entities for each affected industry.⁴⁴

TABLE 4—ESTIMATED NUMBER OF AFFECTED SMALL ENTITIES

NAICS	NAICS description	Firms	SBA size standard, annual revenue (\$M)	Small entities
446110	Pharmacies and Drug Stores	18,852	30.0	18,503
621111	Offices of Physicians (except Mental Health Specialists)	174,901	12.0	170,287
621210	Offices of Dentists	125,151	8.0	124,689
621491	HMO Medical Centers	104	35.0	81
621493	Freestanding Ambulatory Surgical and Emergency Centers	4,121	16.5	3,603
622110	General Medical and Surgical Hospitals	2,904	41.5	1,199
Total ...	.....	326,033	N/A	318,362

Partial filling of a prescription for a schedule II controlled substance, pursuant to this rule, may be requested by the prescriber or the patient. The prescriber may request a partial fill by specifying the quantity to be dispensed in the partial filling on the face of the written prescription, written record of the emergency oral prescription, or in the electronic prescription record, along with other information required in 21 CFR 1306.05. A practitioner may authorize a partial fill at a date after which the prescription was issued, after consultation with a pharmacist. While any additional time to specify the quantity to be dispensed in the partial filling may be minimal, especially when viewed in relation to the entire duration of the medical interaction between the prescriber and the patient, DEA estimates each partial fill requested by the prescriber will require 10 additional seconds for the prescriber to specify the quantity to be dispensed. As discussed in the Costs section above, based on BLS' mean hourly wage for "29–1060 Physicians and Surgeons" of \$101.43 and a 42.7 percent load for benefits, the estimated loaded hourly wage for a prescriber is \$144.74. Therefore, the 10 additional seconds to specify the quantity to be dispensed equates to \$0.40.⁴⁵ As discussed in the Cost Savings discussion above, DEA does not have a basis to estimate the percentage of the estimated 36,375,279 prescriptions per year available for partial filling that would be partially filled pursuant to this rule. Therefore, for the purposes of this analysis, DEA estimates the mid-point (50 percent), or 18,187,640 prescriptions per year will be partially filled at the request of the

prescriber at a cost of \$7,275,056. This cost of \$7,275,056 equates to an average of \$24 per firm, excluding pharmacies.⁴⁶

When a prescribing practitioner has properly specified his or her intent to partially fill a prescription for a schedule II controlled substance, this rule will require the pharmacist to record the partial filling in a manner similar to that required under the existing regulations for other circumstances.⁴⁷ Specifically, the dispensing pharmacist must make a notation of the quantity dispensed on the face of the written prescription or in the pharmacy's electronic records, in the written record or the pharmacy's electronic records of the emergency oral prescription, or in the record of the electronic prescription (similar to current requirements under 21 CFR 1306.13(a) when the pharmacist is unable to supply the full quantity called for in the schedule II prescription). Also, for each such partial filling, the pharmacy must maintain a record with the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for schedule III and IV prescription refills. DEA believes the most common scenario will be that the partial fill information is entered into a computerized system, in an existing data field; then, an adhesive label with relevant information will be printed, and subsequently affixed to the prescription container. When partially filling a prescription for a schedule II controlled substance at the patient's request, the pharmacist must make the same notation on the prescription as when partially filling a prescription at

the request of the prescribing practitioner, along with additional information indicating that the patient requested the partial fill. While DEA believes documenting the quantities dispensed for each filled prescription is a usual and ordinary activity for a pharmacist, DEA estimates that it may require 10 additional seconds for the pharmacist to record a partial fill, pursuant to this rule. Based on an estimated loaded median hourly rate of \$86.53 for a pharmacist, from the alternatives analysis above, the 10 additional seconds to record partial fills equates to \$0.24.⁴⁸ As discussed in the Cost Savings section above, DEA does not have a basis to estimate the percentage of the estimated 36,375,279 prescriptions per year that will be partially filled. Therefore, for the purposes of this analysis, DEA estimates the mid-point (50 percent), or 18,187,640 prescriptions per year will be partially filled, requiring recording of the partial fill by the pharmacist at an annual cost of \$4,365,034. This cost of \$4,365,034 equates to an average of \$232 per firm for pharmacies.⁴⁹

The average cost of \$24 per firm for prescribers, and \$232 per firm for pharmacies is a very high estimate for small entities, as small prescribing firms are expected to request less than an average number of partial fills per firm, and small pharmacies are expected to fill less than average partial fills per firm. Although these are high estimates, these costs were compared to the average annual revenue for the smallest of small entities. The average cost ranges from 0.009 percent of revenue for the smallest of small hospitals, and 0.487 percent for the smallest of small

⁴⁴ For the purposes of this analysis, "firms" and "entities" are used synonymously.

⁴⁵ $10 \text{ seconds} \times (1 \text{ hour}/3,600 \text{ seconds}) \times (\$101.43/\text{hour} \times 1.427) = \$0.40$.

⁴⁶ $326,033 \text{ total affected firms} - 18,852 \text{ pharmacies and drug stores} = 307,181 \text{ firms that employ prescribers}$. $\$7,275,056/307,181 = \$24$ (rounded to nearest whole dollar).

⁴⁷ See note 2.

⁴⁸ $10 \text{ seconds} \times (1 \text{ hour}/3,600 \text{ seconds}) \times (\$60.64/\text{hour} \times 1.427) = \$0.24$.

⁴⁹ $\$4,365,034/18,852 = \$232$ (rounded to nearest whole dollar).

pharmacies. The table below

summarizes this analysis for each of the industry codes.

TABLE 5—AVERAGE COST AS PERCENT OF REVENUE

NAICS	NAICS description	Firm size in receipts (\$)	Firms	Revenue (\$1,000)	Revenue per firm (\$)	Cost per firm (\$)	Cost as percent of revenue (%)
446110	Pharmacies and Drug Stores	<100,000	757	36,066	47,643	232	0.487
621111	Offices of Physicians (except Mental Health Specialists)	<100,000	15,275	771,280	50,493	24	0.048
621210	Offices of Dentists	<100,000	8,701	452,125	51,962	24	0.046
621491	HMO Medical Centers	<100,000	24	1,266	52,750	24	0.045
621493	Freestanding Ambulatory Surgical and Emergency Centers	<100,000	223	11,879	53,269	24	0.045
622110	General Medical and Surgical Hospitals	* 100,000–499,999	14	3,812	272,286	24	0.009

* Revenue data not available for “<100,000.” Examined smallest size with available revenue data.
Source: SUSB.

After normalizing the cost for revenue size of the affected firms by dividing the total cost by the total revenue for the affected industry, the cost as percent of revenue is much lower. As an industry,

the cost as percent of revenue is 0.0005 percent and 0.0018 percent for prescribing firms and pharmacies, respectively. These percentages represent all firms, including small

firms. The table below summarizes the normalized cost as percentage of revenue.

TABLE 6—AVERAGE COST AS PERCENT OF REVENUE, NORMALIZED

NAICS	NAICS description	Firm size in receipts	Firms	Revenue (\$1,000)	Cost (\$)	Cost as percent of revenue (%)
446110 ...	Pharmacies and Drug Stores	All firms	18,852	236,277,373	4,365,034	0.0018
621111 ...	Offices of Physicians (except Mental Health Specialists)	All firms	174,901	402,159,295	7,275,056	0.0005
621210 ...	Offices of Dentists	All firms	125,151	104,740,291	.....	.....
621491 ...	HMO Medical Centers	All firms	104	7,124,698	.....	.....
621493 ...	Freestanding Ambulatory Surgical and Emergency Centers	All firms	4,121	24,084,457	.....	.....
622110 ...	General Medical and Surgical Hospitals	All firms	2,904	826,654,913	.....	.....

Source: SUSB.

If a patient received a partial fill pursuant to this rule, and then returns to the pharmacy to receive another partial fill, or the remainder of the initial prescription, the pharmacist will require some additional time to fill the prescription. For example, if filling the remainder of the partial fill required ten additional minutes, based on the estimated loaded median hourly rate of \$86.53 for a pharmacist, that additional time will equate to a cost of \$14.42. However, DEA estimates these additional interactions will be minimal. As discussed earlier in reference to the 2017 study of post-surgical patients who were prescribed opioids, 71 percent of patients in the study did not use the entire prescription, and on average the patients only used 33 percent of the prescribed opioids. If prescribers and patients randomly asked for partial fills, only a small minority of patients will return for the remainder of the prescription. However, DEA does not anticipate the request for partial fills, at the request of the prescriber or the patient, to be random. Rather, DEA anticipates prescribers will exercise professional judgement and foresight in

determining when a partial fill is best suited. DEA does not believe a partial fill will be requested by the prescriber when the prescriber believes the patient is likely to need all of the prescribed medicine. Furthermore, while the rule would permit patients to request partial fills, DEA believes patients are unlikely to request a partial fill. Rather, the patient will follow the prescriber's instructions, based on consultation between the prescriber and the patient. Therefore, DEA believes any increase in the number of patient-pharmacy interactions related to patient-requested partial fills and resulting burden is *de minimis*.

Therefore, DEA's evaluation of economic impact by size category indicates that the rule will not have a significant economic impact on a substantial number of these small entities.

Unfunded Mandates Reform Act of 1995

In accordance with the Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501 *et seq.*, DEA has determined and certifies that this action will not result in any Federal mandate

that may result “in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year.” Therefore, neither a Small Government Agency Plan nor any other action is required under the UMRA of 1995.

Congressional Review Act

This rule is a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This rule will result in an annual effect on the economy of \$100,000,000 or more; DEA estimates this rule will result in an annual cost savings of \$659 million and a net cost savings of \$647 million over five years. However, it will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. DEA has submitted a copy of this final rule to both Houses of

Congress and to the Comptroller General.

Paperwork Reduction Act of 1995

Pursuant to section 3507(d) of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3507(d)), DEA has identified the following collections of information related to this rule. This rule will create additional recordkeeping requirements for pharmacies regarding partial fills. A person is not required to respond to a collection of information unless it displays a valid OMB control number. Copies of existing information collections approved by OMB may be obtained at <http://www.reginfo.gov/public/do/PRAMain>.

A. Collections of Information Associated With the Rule

Title: Recordkeeping Requirements for Partial Fills of Prescriptions for Schedule II Controlled Substances.

OMB Control Number: 1117–NEW.

DEA Form Number: N/A.

DEA is requiring pharmacies to create and maintain certain records relating to partial fills of prescriptions for schedule II controlled substances. When presented with a prescription for a schedule II controlled substance, on which the prescribing practitioner has properly specified his/her intent that the prescription be partially filled, the pharmacist will be required to record the partial filling in a manner similar to that required under the existing regulations (for other circumstances).⁵⁰ Specifically, upon each such partial filling requested by the prescribing practitioner, the dispensing pharmacist must make a notation of the quantity dispensed on the face of the written prescription, in the written record of the emergency oral prescription, or in the electronic prescription record (as is currently required under 21 CFR 1306.13(a) when the pharmacist is unable to supply the full quantity called for in the prescription). Where there is an oral consultation between the pharmacist and the prescribing practitioner after the prescription is issued, in which the prescribing practitioner conveys his or her request for a partial filling after issuing the prescription, the dispensing pharmacist must notate such discussion with the following: “Authorized by Practitioner to Partial Fill,” the name of the practitioner, the date and time of the

discussion, and the pharmacist’s initials. For electronic prescriptions, there needs to be an electronic prescription record and the record needs to be permanently attached to the electronic prescription. Also, for each such partial filling, the pharmacy will be required to maintain a record with the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for schedule III and IV prescription refills. For electronic prescriptions specifically, pharmacy applications will need to allow required information pertaining to the quantity, date, and the dispenser to be linked to each electronic controlled substance prescription record (as currently required by 21 CFR 1311.205(b)(10)).

Upon partially filling a prescription for a schedule II controlled substance at the request of a patient, a caregiver named in an adult patient’s medical power of attorney, or parent or legal guardian of a minor patient, dispensing pharmacists will need to make a notation of the following on the face of the written prescription, in the written record of the emergency oral prescription, or in the record of the electronic prescription: (1) “The [patient, parent or legal guardian of a minor patient, or caregiver of an adult patient named in a medical power of attorney, whichever is applicable] requested partial fill on [date such request was made]” and (2) the quantity dispensed. In addition, for each such partial filling, the pharmacy will need to maintain a record of dispensing that includes the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for schedule III and IV prescriptions. For electronic prescriptions specifically, such required information pertaining to the quantity dispensed, date dispensed, and the dispenser will need to be linked to each electronic controlled substance prescription record.

DEA estimates the following number of respondents and burden associated with this collection of information:

- *Number of respondents:* 68,676.
- *Frequency of response:* Per occurrence (264.83255 per year, calculated).
- *Number of responses:* 18,187,640 per year.
- *Burden per response:* 0.002777778 hour (10 seconds).
- *Total annual hour burden:* 50,521 hours.

The activities described in this information collection are usual and

ordinary business activities and no additional cost is anticipated.

If you need additional information, please contact the Regulatory Drafting and Policy Support Section (DPW), Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrisette Drive, Springfield, Virginia 22152; Telephone: (571) 776–2265.

Any additional comments on this collection of information may be sent in writing to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for DOJ, Washington, DC 20503. Please state that your comments refer to RIN 1117–AB45/Docket No. DEA–469.

Signing Authority

This document of the Drug Enforcement Administration was signed on July 18, 2023, by Administrator Anne Milgram. That document with the original signature and date is maintained by DEA. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DEA **Federal Register** Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of DEA. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

List of Subjects in 21 CFR Part 1306

Drug traffic control, Prescription drugs.

For the reasons set out above, DEA amends part 1306 as follows:

PART 1306—PRESCRIPTIONS

- 1. The authority citation for part 1306 continues to read as follows:

Authority: 21 U.S.C. 821, 823, 829a, 831, 871(b) unless otherwise noted.

- 2. In § 1306.13:
 - a. Redesignate paragraphs (b) and (c) as paragraphs (c) and (d);
 - b. Add a new paragraph (b); and
 - c. Amend newly redesignated paragraph (d)(1) by removing the cross-reference “§ 1306.13(b)” and adding in its place the cross-reference “§ 1306.13(c)”.

The addition and reads as follows:

§ 1306.13 Partial filling of prescriptions.

* * * * *

(b) Partial filling of a prescription for a schedule II controlled substance at the request of the prescribing practitioner or patient:

(1) *General requirements.* A prescription for a schedule II controlled

⁵⁰ Longstanding DEA regulations, which are not be changed by this rule, also allow the partial filling of a schedule II prescription where the pharmacist is unable to supply the full quantity called for in the prescription (§ 1306.13(a)) and for a patient in a long-term care facility or with a terminal illness (§ 1306.13(b) and (c)).

substance may be partially filled if all of the following conditions are satisfied:

- (i) It is not prohibited by State law;
- (ii) The prescription is written and filled in accordance with the Act, this chapter, and State law.
- (iii) The partial fill is requested by the patient, by one acting on behalf of the patient (parent or legal guardian of a minor patient, or caregiver of an adult patient named in a medical power of attorney), or by the practitioner who wrote the prescription; and

(iv) The total quantity dispensed in all partial fillings does not exceed the total quantity prescribed.

(2) *Time limitations on filling the remaining portions of a partially filled prescription for a schedule II controlled substance.* If all the conditions of paragraph (b)(1) of this section are satisfied, and the prescription is partially filled, remaining portions of a partially filled prescription for a schedule II controlled substance, if filled, must be filled not later than 30 days after the date on which the prescription is written, except that in the case of an emergency oral prescription, as described in subsection 309(a) of the Act (21 U.S.C. 829(a)), the remaining portions of a partially filled prescription for a schedule II controlled substance, if filled, must be filled not later than 72 hours after the prescription is issued.

(3) *How a practitioner may request that a prescription for a schedule II controlled substance be partially filled.* Where a practitioner issues a prescription for a schedule II controlled substance and wants the prescription to be partially filled, the practitioner must specify the quantity to be dispensed in each partial filling on the face of the written prescription, in the written record of the emergency oral prescription, or in the record for an electronic prescription. After consultation with a pharmacist, a practitioner may authorize a partial fill for the prescription at a date after which the prescription was initially issued; however, the prescription must be filled not later than 30 days after the date on which the prescription is written, except that in the case of an emergency oral prescription, as described in subsection 309(a) of the Act (21 U.S.C. 829(a)), the remaining portions of a partially filled prescription for a schedule II controlled substance, if filled, must be filled not later than 72 hours after the prescription is issued. The pharmacist must notate this subsequent request in accordance with paragraph (b)(5) of this section. All required information in this paragraph, except that of an authorization for

partial filling at a later date, must be included on the prescription, along with the other information required by § 1306.05, at the time the practitioner signs the prescription, or in the case of an emergency oral prescription, this information must be communicated by the prescribing practitioner to the pharmacist at the time that the oral communication is taking place.

(4) *How a patient or one acting on a patient's behalf may request that a prescription for a schedule II controlled substance be partially filled.* A patient may request that his/her prescription for a schedule II controlled substance be partially filled. A caregiver named in an adult patient's medical power of attorney may request the adult patient's prescription be partially filled. When a patient is a minor (under age 18), a parent or legal guardian of the minor may request the prescription be partially filled. Where a practitioner has requested the partial filling of a prescription in accordance with paragraph (b)(3) of this section, neither the patient, the parent or legal guardian (in the case of a minor), nor the caregiver of an adult patient named in a medical power of attorney may request a partial filling in an amount greater than that specified by the practitioner. A request by the patient, the adult patient's caregiver named in the medical power of attorney, or the parent/legal guardian of a minor patient may be made: in person; in writing if signed by the patient, the adult patient's caregiver named in the medical power of attorney, or the parent/legal guardian of a minor patient; or by a phone call to the pharmacist from the patient, the adult patient's caregiver named in the medical power of attorney, or the parent/legal guardian of a minor patient.

(5) *How a pharmacy must record the partial filling of a prescription for a schedule II controlled substance.* (i) Upon partially filling a prescription at the request of the prescribing practitioner, as requested when the prescriber issued the prescription, in accordance with paragraph (b)(3) of this section, the pharmacist must make a notation of the quantity dispensed on the face of the written prescription or in the pharmacy's electronic records, in the written record or the pharmacy's electronic records of the emergency oral prescription, or in the record of the electronic prescription. When the pharmacist partially fills a prescription, after the prescriber has conveyed this request in a consultation with a pharmacist in accordance with paragraph (b)(3), the pharmacist must note the following: "Authorized by Practitioner to Partial Fill," the name of

the practitioner, the date and time of the discussion, and the pharmacist's initials. In addition, for each such partial filling (whether requested by the prescriber on the prescription or after consultation with the pharmacist), the pharmacy must maintain a record of dispensing that includes the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for schedule III and IV prescription refills. For electronic prescriptions specifically, such required information pertaining to the quantity dispensed, date dispensed, and the dispenser must be linked to each electronic controlled substance prescription record.

(ii) Upon partially filling a prescription at the request of the patient, the caregiver of an adult patient who is named in their medical power of attorney, or a parent or legal guardian of a minor patient, in accordance with paragraph (b)(4) of this section, the pharmacist must make a notation of the following on the face of the written prescription or in the pharmacy's electronic records, in the written record or the pharmacy's electronic records of the emergency oral prescription, or in the record of the electronic prescription: (I) "The [patient, parent or legal guardian of a minor patient, or caregiver of an adult patient named in a medical power of attorney] requested partial fill on [date such request was made]" and (II) the quantity dispensed. In addition, for each such partial filling, the pharmacy must maintain a record of dispensing that includes the date of each dispensing, the name or initials of the individual who dispensed the substance, and all other information required by 21 CFR 1306.22(c) for schedule III and IV prescriptions. For electronic prescriptions specifically, such required information pertaining to the quantity dispensed, date dispensed, and the dispenser must be linked to each electronic controlled substance prescription record.

* * * * *

Scott Brinks,

Federal Register Liaison Officer, Drug Enforcement Administration.

[FR Doc. 2023-15508 Filed 7-20-23; 8:45 am]

BILLING CODE 4410-09-P

DEPARTMENT OF THE INTERIOR**Office of Natural Resources Revenue****30 CFR Parts 1202 and 1206**

[Docket No. ONRR–2022–0002; DS63644000 DR2000000.CH7000 223D1113RT]

RIN 1012–AA34

Partial Repeal of Consolidated Federal Oil & Gas and Federal & Indian Coal Reform

AGENCY: Office of Natural Resources Revenue (“ONRR”), Interior.

ACTION: Final rule.

SUMMARY: ONRR is republishing and revising certain subparts of its regulations to implement an order and judgment from the United States District Court for the District of Wyoming that vacated the Federal and Indian coal valuation provisions of the 2016 Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform rule. ONRR is further making non-substantive punctuation and grammatical corrections as part of this republication.

DATES: This rule is effective on January 1, 2017, because the District Court vacated certain provisions of the rule that became effective on that date (81 FR 43338).

FOR FURTHER INFORMATION CONTACT: For questions, contact Ginger Hensley, Regulatory Specialist, Appeals & Regulations, ONRR, by email at ONRR_RegulationsMailbox@onrr.gov.

SUPPLEMENTARY INFORMATION:**I. Background****A. ONRR Regulations**

ONRR performs oil, gas, coal, solid minerals, and geothermal minerals revenue management responsibilities for the Secretary of the Interior (“Secretary”). See U.S. Department of the Interior Departmental Manual (“Departmental Manual”), 112 DM 34.1 (Sept. 9, 2020). ONRR regulations are published at 30 CFR Chapter XII. The regulations contain 18 parts addressing different aspects of minerals revenue management. This final rule covers Part 1202—Royalties and Part 1206—Product Valuation.

B. District Court Orders and Judgment

On July 1, 2016, ONRR published the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Reform Rule (“2016 Valuation Rule”). See 81 FR 43338–43402. The 2016 Valuation Rule revised the Federal oil and gas and Federal and Indian coal sections of Parts

1202 and 1206, effective January 1, 2017. *Id.* at 43338.

On June 12, 2019, industry members and trade organizations filed a lawsuit in the United States District Court for the District of Wyoming to challenge the 2016 Valuation Rule. See *Petition for Review, Cloud Peak Energy Inc. v. U.S. Dep’t of the Interior*, No. 19–CV–120–SWS, ECF No. 1.

On September 8, 2021, the District Court issued an Order Upholding in Part and Reversing in Part the 2016 Valuation Rule (“the Order”). *Cloud Peak Energy Inc. v. U.S. Dep’t of the Interior*, 559 F. Supp. 3d 1203 (D. Wyo. 2021). The Order states that “the new valuation methods for [F]ederal and Indian coal must be vacated.” *Id.* at 1208. It further states that “[a]s the coal-specific 2016 Valuation Rule provisions have never been put into practice (due to the earlier preliminary injunction), the pre-2016 valuation methodologies for [F]ederal and Indian coal shall continue to govern.” *Id.* at 1226. The District Court’s judgment (“District Court’s Judgment”) was entered the same day and states: “the [F]ederal and Indian coal valuation provisions of the 2016 Valuation Rule are hereby set aside and vacated.” *Id.* Because no party sought review of the portions of the District Court’s Order and Judgment applicable to Federal and Indian coal, the District Court’s vacatur of the Federal and Indian coal valuation provisions is final. Accordingly, to ensure the rules applicable to Federal and Indian coal, as determined by the District Court, appear in the Code of Federal Regulations, ONRR must publish a final rule containing the coal valuation regulations in effect before the 2016 Valuation Rule.

C. Recodification and Revision**1. Recodification of Part 1202, Subpart F**

Prior to the 2016 Valuation Rule, Subpart F of Part 1202 contained only § 1202.250, concerning overriding royalty interests. Part 1206, Subpart F, 1206.253, and Part 1206, Subpart J, Section 1206.452 addressed what coal is subject to Federal or Indian royalties. The 2016 Valuation Rule consolidated and moved §§ 1206.253 and 1206.452 to Part 1202, Subpart F, § 1202.251. See 81 FR 43369.

This final rule recodifies Part 1202 Subpart F—Coal as it appeared prior to the 2016 Valuation Rule. As further discussed below, this final rule also recodifies Part 1206, Subparts F and J, including §§ 1206.253 and 1206.452. This effectively removes § 1202.251 from Part 1202 and returns the

regulatory language addressing what coal is subject to royalties to Part 1206.

2. Recodification of Part 1206, Subparts F and J

Prior to the 2016 Valuation Rule, Part 1206 contained Subparts F—Federal Coal and J—Indian Coal. These Subparts set forth various provisions for the valuation of Federal and Indian Coal, including definition sections at §§ 1206.251 and 1206.451. The 2016 Valuation Rule retained but substantially revised Subparts F and J. See 81 FR 43369–43402. This final rule recodifies the prior Subparts F and J, including the definition sections at §§ 1206.251 and 1206.451, as those Subparts appeared prior to the 2016 Valuation Rule.

3. Revisions to §§ 1206.20, 1206.251, and 1206.451

Prior to the 2016 Valuation Rule, Part 1206, Subpart A—General Provisions contained only § 1206.10, which discussed information collection requirements. Additionally, Part 1206, Subparts C—Federal Oil, D—Federal Gas, F—Federal Coal, and J—Indian Coal contained definition sections at §§ 1206.101, 1206.151, 1206.251 and 1206.451, respectively.

The 2016 Valuation Rule changed the title of Part 1206, Subpart A to “General Provisions and Definitions,” added § 1206.20 titled “What Definitions Apply to this Part?,” and consolidated and moved the definitions from §§ 1206.101, 1206.151, 1206.251, and 1206.451 to § 1206.20. See 81 FR 43369–43372. Some of these consolidated definitions contain, in part, language only applicable to coal. For example, after broadly defining the term “lessee,” § 1206.20 clarified that “lessee” also includes “[i]n the case of leases for Indian coal or Federal coal, an operator, payor, or other person with no lease interest who makes payments on the lessee’s behalf.”

Because the District Court vacated only the Federal and Indian coal valuation provisions of the 2016 Valuation Rule, this final rule retains, in part, § 1206.20. To implement the District Court’s Order and Judgment, however, this final rule removes from § 1206.20 the definitions of the following coal-specific terms: “Ad valorem lease,” “Coal,” “Coal cooperative,” “Coal washing,” “Region,” “Short ton,” “Tonnage,” and “Washing allowance.” This final rule further revises the definitions of the following terms in § 1206.20 to remove coal-specific language: “Gross proceeds,” “Lessee,” “Marketable

condition,” “Net Output,” “Sale,” and “Transportation allowance.”

Prior to the 2016 Valuation Rule, Part 1206, Subparts F and J used, but did not define, the terms “affiliate,” “designee,” “lease products,” “misconduct,” “payor,” “processing,” and “sale.” The 2016 Valuation Rule defined these terms in § 1206.20. See 81 FR 43369–43372. Because other Subparts of Part 1206 also use these terms, this final rule leaves these definitions in § 1206.20. To recodify the version of the Federal and Indian coal valuation provisions in effect prior to the 2016 Valuation Rule, however, this final rule adds introductory text to §§ 1206.20, 1206.251 and 1206.451 stating that the definitions in § 1206.20 do not apply to Subparts F and J, and that the definitions in §§ 1206.251 and 1206.451 apply to their respective subparts.

II. Procedural Matters

ONRR finds good cause to issue this final rule without notice and opportunity for public comment under 5 U.S.C. 553(b)(B). The publication of this final rule was necessitated by the District Court’s Order and Judgment that vacated the Federal and Indian coal valuation provisions of the 2016 Valuation Rule. Because ONRR is acting to comply with a final court order, public comment is unnecessary.

Additionally, a 30-day period between publication of a final rule and its effective date is not required by 5 U.S.C. 553(d) because the District Court’s Order and Judgment found that pre-2016 valuation provisions shall continue to govern Federal and Indian coal.

A. Regulatory Planning and Review (*Executive Orders 12866 and 13563*)

Executive Order (“E.O.”) 12866 provides that the Office of Information and Regulatory Affairs (“OIRA”) of the Office of Management and Budget (“OMB”) will review all significant rules. This final rule is not significant because it does not change the law in any way and only publishes the current law as established by the District Court’s Order and Judgment.

E.O. 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 further emphasizes those 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. ONRR has demonstrated, however, good cause to issue this final rule without notice and opportunity for public comment pursuant to 5 U.S.C. 553(b)(B) because this final rule is published to comply with the District Court’s Order and Judgment.

B. Regulatory Flexibility Act

The Department of the Interior (“the Department”) certified that the 2016 Valuation Rule did not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). See 81 FR 43367. Thus, a Regulatory Flexibility Analysis and a Small Entity Compliance Guide were not required. Similarly, the republication of the coal valuation regulations that were in effect prior to the 2016 Valuation Rule does not require a Regulatory Flexibility Analysis and Small Entity Compliance Guide.

C. Congressional Review Act

The republication of the coal valuation regulations in effect prior to the 2016 Valuation Rule is not considered a major rule under the Congressional Review Act (5 U.S.C. 804(2)). This final rule:

- (1) Does not have an annual effect on the economy of \$100 million or more.
- (2) Does not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions.
- (3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates Reform Act

The republication of the Federal and Indian coal valuation provisions in effect prior to the 2016 Valuation Rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. This final rule does not have a significant or unique effect on State, local, or Tribal governments or the private sector. Therefore, ONRR is not required to provide a statement under the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*) because this final rule is not an unfunded mandate.

E. Takings (*E.O. 12630*)

Under the criteria in E.O. 12630, section 2, this final rule has no significant takings implications. Hence, this final rule does not impose conditions or limitations on the use of any private property and does not require a Takings Implication Assessment.

F. Federalism (*E.O. 13132*)

Under the criteria in E.O. 13132, section 1, this final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement. This final rule does not impose administrative costs on States or local governments and does not substantially and directly affect the relationship between the Federal and State governments. Thus, a Federalism summary impact statement is not required.

G. Civil Justice Reform (*E.O. 12988*)

This final rule complies with the requirements of E.O. 12988. Specifically, this final rule:

- (1) Meets the criteria of section 3(a), which requires that ONRR review all regulations to eliminate errors and ambiguity to minimize litigation.
- (2) Meets the criteria of section 3(b)(2), which requires that all regulations be written in clear language using clear legal standards.

H. Consultation With Indian Tribal Governments (*E.O. 13175*)

ONRR strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and in recognition of their right to self-governance and Tribal sovereignty. ONRR evaluated this final rule and the criteria in E.O. 13175 and determined that the final rule will not have substantial direct effects on Federally recognized Indian Tribes. Thus, consultation under ONRR’s Tribal consultation policy is not required.

I. Paperwork Reduction Act

This final rule does not contain any new information collection requirements or meet the definition of “collection of information” under 44 U.S.C. 3502(3). A submission to OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) is not required.

J. National Environmental Policy Act

This final rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 (“NEPA”) is not

required because this final rule implements a court order to vacate the 2016 Valuation Rule's Federal and Indian coal amendments. See 43 CFR 46.210(i) and the Departmental Manual, 516 DM 15.4.D. ONRR determined that this final rule does not involve any of the extraordinary circumstances under 43 CFR 46.215 that would require further analysis under NEPA. The procedural changes resulting from these amendments have no consequence with respect to the physical environment. This final rule will not alter in any material way natural resource exploration, production, or transportation.

K. Effects on the Energy Supply (E.O. 13211)

This final rule is not a significant energy action under the definition in E.O. 13211 and, therefore does not require a Statement of Energy Effects.

L. Clarity of This Regulation

ONRR is required by E.O. 12866 (section 1(b)(12)), E.O. 12988 (section 3(b)(1)(B)), and E.O. 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule ONRR publishes must:

- (1) Be logically organized.
- (2) Use the active voice to address readers directly.
- (3) Use common, everyday words and clear language rather than jargon.
- (4) Be divided into short sections and sentences.
- (5) Use lists and tables wherever possible.

If you feel that ONRR has not met these requirements, send your comments to ONRR.RegulationsMailbox@onrr.gov. To guide ONRR in developing future changes to this final rule, your remarks should be as specific as possible. For example, you should tell ONRR the numbers of the sections or paragraphs that are not clearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

List of Subjects

30 CFR Part 1202

Coal, Continental shelf, Government contracts, Indian lands, Mineral royalties, Natural gas, Oil and gas exploration, Public lands—mineral resources, Reporting and recordkeeping requirements.

30 CFR Part 1206

Coal, Continental shelf, Government contracts, Indian lands, Mineral royalties, Oil and gas exploration,

Public lands—mineral resources, Reporting and recordkeeping requirements.

Howard Cantor,

Acting Director, Office of Natural Resources Revenue.

Authority and Issuance

For the reasons discussed in the preamble and to comply with the District Court's Order and Judgment, ONRR amends 30 CFR parts 1202 and 1206 as set forth below:

PART 1202—ROYALTIES

- 1. The authority citation for part 1202 is revised to read as follows:

Authority: 5 U.S.C. 301 *et seq.*, 25 U.S.C. 396, 396a *et seq.*, 398, 398a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart F—Coal

§ 1202.251 [Removed]

- 2. Remove § 1202.251.

PART 1206—PRODUCT VALUATION

- 3. The authority citation for part 1206 is revised to read as follows:

Authority: 5 U.S.C. 301 *et seq.*, 25 U.S.C. 396, 396a *et seq.*, 398, 398a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

Subpart A—General Provisions and Definitions

- 4. Amend § 1206.20 by:
- a. Adding introductory text;
 - b. Removing the definitions of “Ad valorem lease”, “Coal”, “Coal cooperative”, and “Coal washing”;
 - c. Revising the definitions for “Gross proceeds”, “Lessee”, “Marketable condition”, and “Net output”;
 - d. Removing the definition of “Region”;
 - e. Revising the definition of “Sale”;
 - f. Removing the definitions of “Short ton” and “Tonnage”;
 - g. Revising the definition of “Transportation allowance”; and
 - h. Removing the definition of “Washing allowance”.

The revisions read as follows:

§ 1206.20 What definitions apply to this part?

The definitions in this section do not apply to subparts F and J of this part.

* * * * *

Gross proceeds means the total monies and other consideration accruing for the disposition of any of the following:

(1) *Oil*. Gross proceeds also include, but are not limited to, the following examples:

(i) Payments for services such as dehydration, marketing, measurement, or gathering which the lessee must perform at no cost to the Federal Government.

(ii) The value of services, such as salt water disposal, that the producer normally performs but that the buyer performs on the producer's behalf.

(iii) Reimbursements for harboring or terminalling fees, royalties, and any other reimbursements.

(iv) Tax reimbursements, even though the Federal royalty interest may be exempt from taxation.

(v) Payments made to reduce or buy down the purchase price of oil produced in later periods by allocating such payments over the production whose price that the payment reduces and including the allocated amounts as proceeds for the production as it occurs.

(vi) Monies and all other consideration to which a seller is contractually or legally entitled but does not seek to collect through reasonable efforts.

(2) *Gas, residue gas, and gas plant products*. Gross proceeds also include, but are not limited to, the following examples:

(i) Payments for services such as dehydration, marketing, measurement, or gathering that the lessee must perform at no cost to the Federal Government.

(ii) Reimbursements for royalties, fees, and any other reimbursements.

(iii) Tax reimbursements, even though the Federal royalty interest may be exempt from taxation.

(iv) Monies and all other consideration to which a seller is contractually or legally entitled, but does not seek to collect through reasonable efforts.

* * * * *

Lessee means any person to whom the United States, an Indian Tribe, and/or individual Indian mineral owner issues a lease, and any person who has been assigned all or a part of record title, operating rights, or an obligation to make royalty or other payments required by the lease. Lessee includes any person who has an interest in a lease.

* * * * *

Marketable condition means lease products which are sufficiently free from impurities and otherwise in a condition that they will be accepted by a purchaser under a sales contract typical for the field or area for Federal oil and gas.

* * * * *

Net output means the quantity of gas residue gas and each gas plant product that a processing plant produces.

* * * * *

Sale means a contract between two persons where:

(1) The seller unconditionally transfers title to the oil, gas, or gas plant product to the buyer and does not retain any related rights, such as the right to buy back similar quantities of oil, gas, or gas plant product from the buyer elsewhere;

(2) The buyer pays money or other consideration for the oil, gas, or gas plant product; and

(3) The parties' intent is for a sale of the oil, gas, or gas plant product to occur.

* * * * *

Transportation allowance means a deduction in determining royalty value for the reasonable, actual costs that the lessee incurs for moving:

(1) Oil to a point of sale or delivery off of the lease, unit area, or communitized area. The transportation allowance does not include gathering costs.

(2) Unprocessed gas, residue gas, or gas plant products to a point of sale or delivery off of the lease, unit area, or communitized area, or away from a processing plant. The transportation allowance does not include gathering costs.

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■ 5. Revise Subpart F to read as follows:

Subpart F—Federal Coal

Sec.

1206.250 Purpose and scope.

1206.251 Definitions.

1206.252 Information collection.

1206.253 Coal subject to royalties—general provisions.

1206.254 Quality and quantity measurement standards for reporting and paying royalties.

1206.255 Point of royalty determination.

1206.256 Valuation standards for cents-per-ton leases.

1206.257 Valuation standards for ad valorem leases.

1206.258 Washing allowances—general.

1206.259 Determination of washing allowances.

1206.260 Allocation of washed coal.

1206.261 Transportation allowances—general.

1206.262 Determination of transportation allowances.

1206.263 [Reserved]

1206.264 In-situ and surface gasification and liquefaction operations.

1206.265 Value enhancement of marketable coal.

Subpart F—Federal Coal

§ 1206.250 Purpose and scope.

(a) This subpart is applicable to all coal produced from Federal coal leases. The purpose of this subpart is to establish the value of coal produced for royalty purposes, of all coal from Federal leases consistent with the mineral leasing laws, other applicable laws and lease terms.

(b) If the specific provisions of any statute or settlement agreement between the United States and a lessee resulting from administrative or judicial litigation, or any coal lease subject to the requirements of this subpart, are inconsistent with any regulation in this subpart then the statute, lease provision, or settlement shall govern to the extent of that inconsistency.

(c) All royalty payments made to the Office of Natural Resources Revenue (ONRR) are subject to later audit and adjustment.

§ 1206.251 Definitions.

The definitions in § 1206.20 do not apply to this subpart. For purposes of this subpart:

Ad valorem lease means a lease where the royalty due to the lessor is based upon a percentage of the amount or value of the coal.

Allowance means a deduction used in determining value for royalty purposes. Coal washing allowance means an allowance for the reasonable, actual costs incurred by the lessee for coal washing. Transportation allowance means an allowance for the reasonable, actual costs incurred by the lessee for moving coal to a point of sale or point of delivery remote from both the lease and mine or wash plant.

Area means a geographic region in which coal has similar quality and economic characteristics. Area boundaries are not officially designated and the areas are not necessarily named.

Arm's-length contract means:

(1) A contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that contract. For purposes of this subpart, two persons are affiliated if one person controls, is controlled by, or is under common control with another person. For purposes of this subpart, based on the instruments of ownership of the voting securities of an entity, or based on other forms of ownership:

(i) Ownership in excess of 50 percent constitutes control;

(ii) Ownership of 10 through 50 percent creates a presumption of control; and

(iii) Ownership of less than 10 percent creates a presumption of noncontrol which ONRR may rebut if it demonstrates actual or legal control, including the existence of interlocking directorates.

(2) Notwithstanding any other provisions of this subpart, contracts between relatives, either by blood or by marriage, are not arm's-length contracts. The ONRR may require the lessee to certify ownership control. To be considered arm's-length for any production month, a contract must meet the requirements of this definition for that production month as well as when the contract was executed.

Audit means a review, conducted in accordance with generally accepted accounting and auditing standards, of royalty payment compliance activities of lessees or other interest holders who pay royalties, rents, or bonuses on Federal leases.

BLM means the Bureau of Land Management of the Department of the Interior.

Coal means coal of all ranks from lignite through anthracite.

Coal washing means any treatment to remove impurities from coal. Coal washing may include, but is not limited to, operations such as flotation, air, water, or heavy media separation; drying; and related handling (or combination thereof).

Contract means any oral or written agreement, including amendments or revisions thereto, between two or more persons and enforceable by law that with due consideration creates an obligation.

Gross proceeds (for royalty payment purposes) means the total monies and other consideration accruing to a coal lessee for the production and disposition of the coal produced. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as crushing, sizing, screening, storing, mixing, loading, treatment with substances including chemicals or oils, and other preparation of the coal to the extent that the lessee is obligated to perform them at no cost to the Federal Government. Gross proceeds, as applied to coal, also includes but is not limited to reimbursements for royalties, taxes or fees, and other reimbursements. Tax reimbursements are part of the gross proceeds accruing to a lessee even though the Federal royalty interest may be exempt from taxation. Monies and other consideration, including the forms of consideration identified in this paragraph, to which a lessee is contractually or legally entitled but which it does not seek to collect through

reasonable efforts are also part of gross proceeds.

Lease means any contract, profit-share arrangement, joint venture, or other agreement issued or approved by the United States for a Federal coal resource under a mineral leasing law that authorizes exploration for, development or extraction of, or removal of coal—or the land covered by that authorization, whichever is required by the context.

Lessee means any person to whom the United States issues a lease, and any person who has been assigned an obligation to make royalty or other payments required by the lease. This includes any person who has an interest in a lease as well as an operator or payor who has no interest in the lease but who has assumed the royalty payment responsibility.

Like-quality coal means coal that has similar chemical and physical characteristics.

Marketable condition means coal that is sufficiently free from impurities and otherwise in a condition that it will be accepted by a purchaser under a sales contract typical for that area.

Mine means an underground or surface excavation or series of excavations and the surface or underground support facilities that contribute directly or indirectly to mining, production, preparation, and handling of lease products.

Net-back method means a method for calculating market value of coal at the lease or mine. Under this method, costs of transportation, washing, handling, etc., are deducted from the ultimate proceeds received for the coal at the first point at which reasonable values for the coal may be determined by a sale pursuant to an arm's-length contract or by comparison to other sales of coal, to ascertain value at the mine.

Net output means the quantity of washed coal that a washing plant produces.

Netting is the deduction of an allowance from the sales value by reporting a one line net sales value, instead of correctly reporting the deduction as a separate line item on the form ONRR-4430.

Person means by individual, firm, corporation, association, partnership, consortium, or joint venture.

Sales type code means the contract type or general disposition (e.g., arm's-length or non-arm's-length) of production from the lease. The sales type code applies to the sales contract, or other disposition, and not to the arm's-length or non-arm's-length nature of a transportation or washing allowance.

Spot market price means the price received under any sales transaction when planned or actual deliveries span a short period of time, usually not exceeding one year.

§ 1206.252 Information collection.

The information collection requirements contained in this subpart have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The forms, filing date, and approved OMB control numbers are identified in part 1210 of this subchapter.

§ 206.253 Coal subject to royalties—general provisions.

(a) All coal (except coal unavoidably lost as determined by BLM under 43 CFR part 3400) from a Federal lease subject to this part is subject to royalty. This includes coal used, sold, or otherwise disposed of by the lessee on or off the lease.

(b) If a lessee receives compensation for unavoidably lost coal through insurance coverage or other arrangements, royalties at the rate specified in the lease are to be paid on the amount of compensation received for the coal. No royalty is due on insurance compensation received by the lessee for other losses.

(c) If waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time the recovered coal is used, sold, or otherwise finally disposed of. The royalty rate shall be that rate applicable to the production method used to initially mine coal in the waste pile or slurry pond; *i.e.*, underground mining method or surface mining method. Coal in waste pits or slurry ponds initially mined from Federal leases shall be allocated to such leases regardless of whether it is stored on Federal lands. The lessee shall maintain accurate records to determine to which individual Federal lease coal in the waste pit or slurry pond should be allocated. However, nothing in this section requires payment of a royalty on coal for which a royalty has already been paid.

§ 1206.254 Quality and quantity measurement standards for reporting and paying royalties.

For all leases subject to this subpart, the quantity of coal on which royalty is due shall be measured in short tons (of 2,000 pounds each) by methods prescribed by the BLM. Coal quantity information will be reported on appropriate forms required under 30 CFR part 1210 of this subchapter.

§ 1206.255 Point of royalty determination.

(a) For all leases subject to this subpart, royalty shall be computed on the basis of the quantity and quality of Federal coal in marketable condition measured at the point of royalty measurement as determined jointly by BLM and ONRR.

(b) Coal produced and added to stockpiles or inventory does not require payment of royalty until such coal is later used, sold, or otherwise finally disposed of. ONRR may ask BLM to increase the lease bond to protect the lessor's interest when BLM determines that stockpiles or inventory become excessive so as to increase the risk of degradation of the resource.

(c) The lessee shall pay royalty at a rate specified in the lease at the time the coal is used, sold, or otherwise finally disposed of, unless otherwise provided for at § 1206.256(d).

§ 1206.256 Valuation standards for cents-per-ton leases.

(a) This section is applicable to coal leases on Federal lands which provide for the determination of royalty on a cents-per-ton (or other quantity) basis.

(b) The royalty for coal from leases subject to this section shall be based on the dollar rate per ton prescribed in the lease. That dollar rate shall be applicable to the actual quantity of coal used, sold, or otherwise finally disposed of, including coal which is avoidably lost as determined by BLM pursuant to 43 CFR part 3400.

(c) For leases subject to this section, there shall be no allowances for transportation, removal of impurities, coal washing, or any other processing or preparation of the coal.

(d) When a coal lease is readjusted pursuant to 43 CFR part 3400 and the royalty valuation method changes from a cents-per-ton basis to an ad valorem basis, coal which is produced prior to the effective date of readjustment and sold or used within 30 days of the effective date of readjustment shall be valued pursuant to this section. All coal that is not used, sold, or otherwise finally disposed of within 30 days after the effective date of readjustment shall be valued pursuant to the provisions of § 1206.257, and royalties shall be paid at the royalty rate specified in the readjusted lease.

§ 1206.257 Valuation standards for ad valorem leases.

(a) This section is applicable to coal leases on Federal lands which provide for the determination of royalty as a percentage of the amount of value of coal (ad valorem). The value for royalty purposes of coal from such leases shall

be the value of coal determined under this section, less applicable coal washing allowances and transportation allowances determined under §§ 1206.258 through 1206.262, or any allowance authorized by § 1206.265. The royalty due shall be equal to the value for royalty purposes multiplied by the royalty rate in the lease.

(b)(1) The value of coal that is sold pursuant to an arm's-length contract shall be the gross proceeds accruing to the lessee, except as provided in paragraphs (b)(2), (3), and (5) of this section. The lessee shall have the burden of demonstrating that its contract is arm's-length. The value which the lessee reports, for royalty purposes, is subject to monitoring, review, and audit.

(2) In conducting reviews and audits, ONRR will examine whether the contract reflects the total consideration actually transferred either directly or indirectly from the buyer to the seller for the coal produced. If the contract does not reflect the total consideration, then the ONRR may require that the coal sold pursuant to that contract be valued in accordance with paragraph (c) of this section. Value may not be based on less than the gross proceeds accruing to the lessee for the coal production, including the additional consideration.

(3) If ONRR determines that the gross proceeds accruing to the lessee pursuant to an arm's-length contract do not reflect the reasonable value of the production because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then ONRR shall require that the coal production be valued pursuant to paragraph (c)(2)(ii), (iii), (iv), or (v) of this section, and in accordance with the notification requirements of paragraph (d)(3) of this section. When ONRR determines that the value may be unreasonable, ONRR will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's reported coal value.

(4) ONRR may require a lessee to certify that its arm's-length contract provisions include all of the consideration to be paid by the buyer, either directly or indirectly, for the coal production.

(5) The value of production for royalty purposes shall not include payments received by the lessee pursuant to a contract which the lessee demonstrates, to ONRR's satisfaction, were not part of the total consideration paid for the purchase of coal production.

(c)(1) The value of coal from leases subject to this section and which is not sold pursuant to an arm's-length contract shall be determined in accordance with this section.

(2) If the value of the coal cannot be determined pursuant to paragraph (b) of this section, then the value shall be determined through application of other valuation criteria. The criteria shall be considered in the following order, and the value shall be based upon the first applicable criterion:

(i) The gross proceeds accruing to the lessee pursuant to a sale under its non-arm's-length contract (or other disposition of produced coal by other than an arm's-length contract), provided that those gross proceeds are within the range of the gross proceeds derived from, or paid under, comparable arm's-length contracts between buyers and sellers neither of whom is affiliated with the lessee for sales, purchases, or other dispositions of like-quality coal produced in the area. In evaluating the comparability of arm's-length contracts for the purposes of these regulations, the following factors shall be considered: Price, time of execution, duration, market or markets served, terms, quality of coal, quantity, and such other factors as may be appropriate to reflect the value of the coal;

(ii) Prices reported for that coal to a public utility commission;

(iii) Prices reported for that coal to the Energy Information Administration of the Department of Energy;

(iv) Other relevant matters including, but not limited to, published or publicly available spot market prices, or information submitted by the lessee concerning circumstances unique to a particular lease operation or the saleability of certain types of coal;

(v) If a reasonable value cannot be determined using paragraph (c)(2)(i), (ii), (iii), or (iv) of this section, then a net-back method or any other reasonable method shall be used to determine value.

(3) When the value of coal is determined pursuant to paragraph (c)(2) of this section, that value determination shall be consistent with the provisions contained in paragraph (b)(5) of this section.

(d)(1) Where the value is determined pursuant to paragraph (c) of this section, that value does not require ONRR's prior approval. However, the lessee shall retain all data relevant to the determination of royalty value. Such data shall be subject to review and audit, and ONRR will direct a lessee to use a different value if it determines that the reported value is inconsistent with the requirements of these regulations.

(2) Any Federal lessee will make available upon request to the authorized ONRR or State representatives, to the Inspector General of the Department of the Interior or other persons authorized to receive such information, arm's-length sales value and sales quantity data for like-quality coal sold, purchased, or otherwise obtained by the lessee from the area.

(3) A lessee shall notify ONRR if it has determined value pursuant to paragraph (c)(2)(ii), (iii), (iv), or (v) of this section. The notification shall be by letter to the Director for Office of Natural Resources Revenue of his/her designee. The letter shall identify the valuation method to be used and contain a brief description of the procedure to be followed. The notification required by this section is a one-time notification due no later than the month the lessee first reports royalties on the form ONRR-4430 using a valuation method authorized by paragraph (c)(2)(ii), (iii), (iv), or (v) of this section, and each time there is a change in a method under paragraph (c)(2)(iv) or (v) of this section.

(e) If ONRR determines that a lessee has not properly determined value, the lessee shall be liable for the difference, if any, between royalty payments made based upon the value it has used and the royalty payments that are due based upon the value established by ONRR. The lessee shall also be liable for interest computed pursuant to § 1218.202 of this subchapter. If the lessee is entitled to a credit, ONRR will provide instructions for the taking of that credit.

(f) The lessee may request a value determination from ONRR. In that event, the lessee shall propose to ONRR a value determination method, and may use that method in determining value for royalty purposes until ONRR issues its decision. The lessee shall submit all available data relevant to its proposal. The ONRR shall expeditiously determine the value based upon the lessee's proposal and any additional information ONRR deems necessary. That determination shall remain effective for the period stated therein. After ONRR issues its determination, the lessee shall make the adjustments in accordance with paragraph (e) of this section.

(g) Notwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing to the lessee for the disposition of produced coal less applicable provisions of paragraph (b)(5) of this section and less applicable allowances determined pursuant to §§ 1206.258 through 1206.262 and 1206.265.

(h) The lessee is required to place coal in marketable condition at no cost to the Federal Government. Where the value established under this section is determined by a lessee's gross proceeds, that value shall be increased to the extent that the gross proceeds has been reduced because the purchaser, or any other person, is providing certain services, the cost of which ordinarily is the responsibility of the lessee to place the coal in marketable condition.

(i) Value shall be based on the highest price a prudent lessee can receive through legally enforceable claims under its contract. Absent contract revision or amendment, if the lessee fails to take proper or timely action to receive prices or benefits to which it is entitled, it must pay royalty at a value based upon that obtainable price or benefit. Contract revisions or amendments shall be in writing and signed by all parties to an arm's-length contract, and may be retroactively applied to value for royalty purposes for a period not to exceed two years, unless ONRR approves a longer period. If the lessee makes timely application for a price increase allowed under its contract but the purchaser refuses, and the lessee takes reasonable measures, which are documented, to force purchaser compliance, the lessee will owe no additional royalties unless or until monies or consideration resulting from the price increase are received. This paragraph shall not be construed to permit a lessee to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of coal.

(j) Notwithstanding any provision in these regulations to the contrary, no review, reconciliation, monitoring, or other like process that results in a redetermination by ONRR of value under this section shall be considered final or binding as against the Federal Government or its beneficiaries until the audit period is formally closed.

(k) Certain information submitted to ONRR to support valuation proposals, including transportation, coal washing, or other allowances under § 1206.265, is exempted from disclosure by the Freedom of Information Act, 5 U.S.C. 522. Any data specified by the Act to be privileged, confidential, or otherwise exempt shall be maintained in a confidential manner in accordance with applicable law and regulations. All requests for information about determinations made under this part are to be submitted in accordance with the Freedom of Information Act regulation of the Department of the Interior, 43 CFR part 2.

§ 1206.258 Washing allowances—general.

(a) For ad valorem leases subject to § 1206.257, ONRR shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to wash coal, unless the value determined pursuant to § 1206.257 was based upon like-quality unwashed coal. Under no circumstances will the authorized washing allowance and the transportation allowance reduce the value for royalty purposes to zero.

(b) If ONRR determines that a lessee has improperly determined a washing allowance authorized by this section, then the lessee shall be liable for any additional royalties, plus interest determined in accordance with § 1218.202 of this subchapter, or shall be entitled to a credit without interest.

(c) Lessees shall not disproportionately allocate washing costs to Federal leases.

(d) No cost normally associated with mining operations and which are necessary for placing coal in marketable condition shall be allowed as a cost of washing.

(e) Coal washing costs shall only be recognized as allowances when the washed coal is sold and royalties are reported and paid.

§ 1206.259 Determination of washing allowances.

(a) *Arm's-length contracts.* (1) For washing costs incurred by a lessee under an arm's-length contract, the washing allowance shall be the reasonable actual costs incurred by the lessee for washing the coal under that contract, subject to monitoring, review, audit, and possible future adjustment. The lessee shall have the burden of demonstrating that its contract is arm's-length. ONRR's prior approval is not required before a lessee may deduct costs incurred under an arm's-length contract. The lessee must claim a washing allowance by reporting it as a separate line entry on the Form ONRR-4430.

(2) In conducting reviews and audits, ONRR will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from the lessee to the washer for the washing. If the contract reflects more than the total consideration paid, then the ONRR may require that the washing allowance be determined in accordance with paragraph (b) of this section.

(3) If ONRR determines that the consideration paid pursuant to an arm's-length washing contract does not reflect the reasonable value of the washing because of misconduct by or between

the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then ONRR shall require that the washing allowance be determined in accordance with paragraph (b) of this section. When ONRR determines that the value of the washing may be unreasonable, ONRR will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's washing costs.

(4) Where the lessee's payments for washing under an arm's-length contract are not based on a dollar-per-unit basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent. Washing allowances shall be expressed as a cost per ton of coal washed.

(b) Non-arm's-length or no contract.

(1) If a lessee has a non-arm's-length contract or has no contract, including those situations where the lessee performs washing for itself, the washing allowance will be based upon the lessee's reasonable actual costs. All washing allowances deducted under a non-arm's-length or no contract situation are subject to monitoring, review, audit, and possible future adjustment. The lessee must claim a washing allowance by reporting it as a separate line entry on the Form ONRR-4430. When necessary or appropriate, ONRR may direct a lessee to modify its estimated or actual washing allowance.

(2) The washing allowance for non-arm's-length or no contract situations shall be based upon the lessee's actual costs for washing during the reported period, including operating and maintenance expenses, overhead, and either depreciation and a return on undepreciated capital investment in accordance with paragraph (b)(2)(iv)(A) of this section, or a cost equal to the depreciable investment in the wash plant multiplied by the rate of return in accordance with paragraph (b)(2)(iv)(B) of this section. Allowable capital costs are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the wash plant.

(i) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes, rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(ii) Allowable maintenance expenses include: Maintenance of the wash plant; maintenance of equipment; maintenance labor; and other directly

allocable and attributable maintenance expenses which the lessee can document.

(iii) Overhead attributable and allocable to the operation and maintenance of the wash plant is an allowable expense. State and Federal income taxes and severance taxes, including royalties, are not allowable expenses.

(iv) A lessee may use either paragraph (b)(2)(iv)(A) or (B) of this section. After a lessee has elected to use either method for a wash plant, the lessee may not later elect to change to the other alternative without approval of the ONRR.

(A) To compute depreciation, the lessee may elect to use either a straight-line depreciation method based on the life of equipment or on the life of the reserves which the wash plant services, whichever is appropriate, or a unit of production method. After an election is made, the lessee may not change methods without ONRR approval. A change in ownership of a wash plant shall not alter the depreciation schedule established by the original operator/lessee for purposes of the allowance calculation. With or without a change in ownership, a wash plant shall be depreciated only once. Equipment shall not be depreciated below a reasonable salvage value.

(B) ONRR shall allow as a cost an amount equal to the allowable capital investment in the wash plant multiplied by the rate of return determined pursuant to paragraph (b)(2)(v) of this section. No allowance shall be provided for depreciation. This alternative shall apply only to plants first placed in service or acquired after March 1, 1989.

(v) The rate of return must be the industrial rate associated with Standard and Poor's BBB rating. The rate of return must be the monthly average rate as published in Standard and Poor's Bond Guide for the first month for which the allowance is applicable. The rate must be redetermined at the beginning of each subsequent calendar year.

(3) The washing allowance for coal shall be determined based on the lessee's reasonable and actual cost of washing the coal. The lessee may not take an allowance for the costs of washing lease production that is not royalty bearing.

(c) *Reporting requirements—(1) Arm's-length contracts.* (i) The lessee must notify ONRR of an allowance based on incurred costs by using a separate line entry on the Form ONRR-4430.

(ii) ONRR may require that a lessee submit arm's-length washing contracts and related documents. Documents

shall be submitted within a reasonable time, as determined by ONRR.

(2) *Non-arm's-length or no contract.*

(i) The lessee must notify ONRR of an allowance based on the incurred costs by using a separate line entry on the Form ONRR-4430.

(ii) For new washing facilities or arrangements, the lessee's initial washing deduction shall include estimates of the allowable coal washing costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the washing system or, if such data are not available, the lessee shall use estimates based upon industry data for similar washing systems.

(iii) Upon request by ONRR, the lessee shall submit all data used to prepare the allowance deduction. The data shall be provided within a reasonable period of time, as determined by ONRR.

(d) *Interest and assessments.* (1) If a lessee nets a washing allowance on the Form ONRR-4430, then the lessee shall be assessed an amount up to 10 percent of the allowance netted not to exceed \$250 per lease sales type code per sales period.

(2) If a lessee erroneously reports a washing allowance which results in an underpayment of royalties, interest shall be paid on the amount of that underpayment.

(3) Interest required to be paid by this section shall be determined in accordance with § 1218.202 of this subchapter.

(e) *Adjustments.* (1) If the actual coal washing allowance is less than the amount the lessee has taken on Form ONRR-4430 for each month during the allowance reporting period, the lessee shall pay additional royalties due plus interest computed under § 1218.202 of this subchapter from the date when the lessee took the deduction to the date the lessee repays the difference to ONRR. If the actual washing allowance is greater than the amount the lessee has taken on Form ONRR-4430 for each month during the allowance reporting period, the lessee shall be entitled to a credit without interest.

(2) The lessee must submit a corrected Form ONRR-4430 to reflect actual costs, together with any payment, in accordance with instructions provided by ONRR.

(f) *Other washing cost determinations.* The provisions of this section shall apply to determine washing costs when establishing value using a net-back valuation procedure or any other procedure that requires deduction of washing costs.

§ 1206.260 Allocation of washed coal.

(a) When coal is subjected to washing, the washed coal must be allocated to the leases from which it was extracted.

(b) When the net output of coal from a washing plant is derived from coal obtained from only one lease, the quantity of washed coal allocable to the lease will be based on the net output of the washing plant.

(c) When the net output of coal from a washing plant is derived from coal obtained from more than one lease, unless determined otherwise by BLM, the quantity of net output of washed coal allocable to each lease will be based on the ratio of measured quantities of coal delivered to the washing plant and washed from each lease compared to the total measured quantities of coal delivered to the washing plant and washed.

§ 1206.261 Transportation allowances—general.

(a) For ad valorem leases subject to § 1206.257, where the value for royalty purposes has been determined at a point remote from the lease or mine, ONRR shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to:

(1) Transport the coal from a Federal lease to a sales point which is remote from both the lease and mine; or

(2) Transport the coal from a Federal lease to a wash plant when that plant is remote from both the lease and mine and, if applicable, from the wash plant to a remote sales point. In-mine transportation costs shall not be included in the transportation allowance.

(b) Under no circumstances will the authorized washing allowance and the transportation allowance reduce the value for royalty purposes to zero.

(c)(1) When coal transported from a mine to a wash plant is eligible for a transportation allowance in accordance with this section, the lessee is not required to allocate transportation costs between the quantity of clean coal output and the rejected waste material. The transportation allowance shall be authorized for the total production which is transported. Transportation allowances shall be expressed as a cost per ton of cleaned coal transported. (2) For coal that is not washed at a wash plant, the transportation allowance shall be authorized for the total production which is transported. Transportation allowances shall be expressed as a cost per ton of coal transported.

(3) Transportation costs shall only be recognized as allowances when the

transported coal is sold and royalties are reported and paid.

(d) If, after a review and/or audit, ONRR determines that a lessee has improperly determined a transportation allowance authorized by this section, then the lessee shall pay any additional royalties, plus interest, determined in accordance with § 1218.202 of this subchapter, or shall be entitled to a credit, without interest.

(e) Lessees shall not disproportionately allocate transportation costs to Federal leases.

§ 1206.262 Determination of transportation allowances.

(a) *Arm's-length contracts.* (1) For transportation costs incurred by a lessee pursuant to an arm's-length contract, the transportation allowance shall be the reasonable, actual costs incurred by the lessee for transporting the coal under that contract, subject to monitoring, review, audit, and possible future adjustment. The lessee shall have the burden of demonstrating that its contract is arm's-length. The lessee must claim a transportation allowance by reporting it as a separate line entry on the Form ONRR-4430.

(2) In conducting reviews and audits, ONRR will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from the lessee to the transporter for the transportation. If the contract reflects more than the total consideration paid, then the ONRR may require that the transportation allowance be determined in accordance with paragraph (b) of this section.

(3) If ONRR determines that the consideration paid pursuant to an arm's-length transportation contract does not reflect the reasonable value of the transportation because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then ONRR shall require that the transportation allowance be determined in accordance with paragraph (b) of this section. When ONRR determines that the value of the transportation may be unreasonable, ONRR will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's transportation costs.

(4) Where the lessee's payments for transportation under an arm's-length contract are not based on a dollar-per-unit basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent for the purposes of this section.

(b) *Non-arm's-length or no contract.*

(1) If a lessee has a non-arm's-length contract or has no contract, including those situations where the lessee performs transportation services for itself, the transportation allowance will be based upon the lessee's reasonable actual costs. All transportation allowances deducted under a non-arm's-length or no contract situation are subject to monitoring, review, audit, and possible future adjustment. The lessee must claim a transportation allowance by reporting it as a separate line entry on the Form ONRR-4430. When necessary or appropriate, ONRR may direct a lessee to modify its estimated or actual transportation allowance deduction.

(2) The transportation allowance for non-arm's-length or no-contract situations shall be based upon the lessee's actual costs for transportation during the reporting period, including operating and maintenance expenses, overhead, and either depreciation and a return on undepreciated capital investment in accordance with paragraph (b)(2)(iv)(A) of this section, or a cost equal to the depreciable investment in the transportation system multiplied by the rate of return in accordance with paragraph (b)(2)(iv)(B) of this section. Allowable capital costs are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the transportation system.

(i) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes; rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(ii) Allowable maintenance expenses include: Maintenance of the transportation system; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(iii) Overhead attributable and allocable to the operation and maintenance of the transportation system is an allowable expense. State and Federal income taxes and severance taxes and other fees, including royalties, are not allowable expenses.

(iv) A lessee may use either paragraph (b)(2)(iv)(A) or (B) of this section. After a lessee has elected to use either method for a transportation system, the lessee may not later elect to change to the other alternative without approval of ONRR.

(A) To compute depreciation, the lessee may elect to use either a straight-line depreciation method based on the life of equipment or on the life of the reserves which the transportation system services, whichever is appropriate, or a unit of production method. After an election is made, the lessee may not change methods without ONRR approval. A change in ownership of a transportation system shall not alter the depreciation schedule established by the original transporter/lessee for purposes of the allowance calculation. With or without a change in ownership, a transportation system shall be depreciated only once. Equipment shall not be depreciated below a reasonable salvage value.

(B) ONRR shall allow as a cost an amount equal to the allowable capital investment in the transportation system multiplied by the rate of return determined pursuant to paragraph (b)(2)(v) of this section. No allowance shall be provided for depreciation. This alternative shall apply only to transportation facilities first placed in service or acquired after March 1, 1989.

(v) The rate of return must be the industrial rate associated with Standard and Poor's BBB rating. The rate of return must be the monthly average rate as published in Standard and Poor's Bond Guide for the first month for which the allowance is applicable. The rate must be redetermined at the beginning of each subsequent calendar year.

(3) A lessee may apply to ONRR for exception from the requirement that it compute actual costs in accordance with paragraphs (b)(1) and (2) of this section. ONRR will grant the exception only if the lessee has a rate for the transportation approved by a Federal agency or by a State regulatory agency (for Federal leases). ONRR shall deny the exception request if it determines that the rate is excessive as compared to arm's-length transportation charges by systems, owned by the lessee or others, providing similar transportation services in that area. If there are no arm's-length transportation charges, ONRR shall deny the exception request if:

(i) No Federal or State regulatory agency costs analysis exists and the Federal or State regulatory agency, as applicable, has declined to investigate under ONRR timely objections upon filing; and

(ii) The rate significantly exceeds the lessee's actual costs for transportation as determined under this section.

(c) *Reporting requirements—(1)*

Arm's-length contracts. (i) The lessee must notify ONRR of an allowance based on incurred costs by using a

separate line entry on the form ONRR–4430.

(ii) ONRR may require that a lessee submit arm's-length transportation contracts, production agreements, operating agreements, and related documents. Documents shall be submitted within a reasonable time, as determined by ONRR.

(2) *Non-arm's-length or no contract.*

(i) The lessee must notify ONRR of an allowance based on the incurred costs by using a separate line entry on Form ONRR–4430.

(ii) For new transportation facilities or arrangements, the lessee's initial deduction shall include estimates of the allowable coal transportation costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the transportation system or, if such data are not available, the lessee shall use estimates based upon industry data for similar transportation systems.

(iii) Upon request by ONRR, the lessee shall submit all data used to prepare the allowance deduction. The data shall be provided within a reasonable period of time, as determined by ONRR.

(iv) If the lessee is authorized to use its Federal- or State-agency-approved rate as its transportation cost in accordance with paragraph (b)(3) of this section, it shall follow the reporting requirements of paragraph (c)(1) of this section.

(d) *Interest and assessments.* (1) If a lessee nets a transportation allowance on Form ONRR–4430, the lessee shall be assessed an amount of up to 10 percent of the allowance netted not to exceed \$250 per lease sales type code per sales period.

(2) If a lessee erroneously reports a transportation allowance which results in an underpayment of royalties, interest shall be paid on the amount of that underpayment.

(3) Interest required to be paid by this section shall be determined in accordance with § 1218.202 of this subchapter.

(e) *Adjustments.* (1) If the actual coal transportation allowance is less than the amount the lessee has taken on Form ONRR–4430 for each month during the allowance reporting period, the lessee shall pay additional royalties due plus interest computed under § 1218.202 of this subchapter from the date when the lessee took the deduction to the date the lessee repays the difference to ONRR. If the actual transportation allowance is greater than amount the lessee has taken on Form ONRR–4430 for each month during the allowance reporting period, the lessee shall be entitled to a credit without interest.

(2) The lessee must submit a corrected Form ONRR–4430 to reflect actual costs, together with any payments, in accordance with instructions provided by ONRR.

(f) *Other transportation cost determinations.* The provisions of this section shall apply to determine transportation costs when establishing value using a net-back valuation procedure or any other procedure that requires deduction of transportation costs.

§ 1206.263 [Reserved]

§ 1206.264 In-situ and surface gasification and liquefaction operations.

If an ad valorem Federal coal lease is developed by in-situ or surface gasification or liquefaction technology, the lessee shall propose the value of coal for royalty purposes to ONRR. The ONRR will review the lessee's proposal and issue a value determination. The lessee may use its proposed value until ONRR issues a value determination.

§ 1206.265 Value enhancement of marketable coal.

If, prior to use, sale, or other disposition, the lessee enhances the value of coal after the coal has been placed in marketable condition in accordance with § 1206.257(h), the lessee shall notify ONRR that such processing is occurring or will occur. The value of that production shall be determined as follows:

(a) A value established for the feedstock coal in marketable condition by application of the provisions of § 1206.257(c)(2)(i) through (iv); or,

(b) In the event that a value cannot be established in accordance with paragraph (a) of this section, then the value of production will be determined in accordance with § 1206.257(c)(2)(v) and the value shall be the lessee's gross proceeds accruing from the disposition of the enhanced product, reduced by ONRR-approved processing costs and procedures including a rate of return on investment equal to two times the Standard and Poor's BBB bond rate applicable under § 1206.259(b)(2)(v).

■ 6. Revise subpart J to read as follows:

Subpart J—Indian Coal

Sec.

1206.450 Purpose and scope.

1206.451 Definitions.

1206.452 Coal subject to royalties—general provisions.

1206.453 Quality and quantity measurement standards for reporting and paying royalties.

1206.454 Point of royalty determination.

1206.455 Valuation standards for cents-per-ton leases.

1206.456 Valuation standards for ad valorem leases.

1206.457 Washing allowances—general.

1206.458 Determination of washing allowances.

1206.459 Allocation of washed coal.

1206.460 Transportation allowances—general.

1206.461 Determination of transportation allowances.

1206.462 [Reserved]

1206.463 In-situ and surface gasification and liquefaction operations.

1206.464 Value enhancement of marketable coal.

Subpart J—Indian Coal

§ 1206.450 Purpose and scope.

(a) This subpart prescribes the procedures to establish the value, for royalty purposes, of all coal from Indian Tribal and allotted leases (except leases on the Osage Indian Reservation, Osage County, Oklahoma).

(b) If the specific provisions of any statute, treaty, or settlement agreement between the Indian lessor and a lessee resulting from administrative or judicial litigation, or any coal lease subject to the requirements of this subpart, are inconsistent with any regulation in this subpart, then the statute, treaty, lease provision, or settlement shall govern to the extent of that inconsistency.

(c) All royalty payments are subject to later audit and adjustment.

(d) The regulations in this subpart are intended to ensure that the trust responsibilities of the United States with respect to the administration of Indian coal leases are discharged in accordance with the requirements of the governing mineral leasing laws, treaties, and lease terms.

§ 1206.451 Definitions.

The definitions in § 1206.20 do not apply to this subpart. For purposes of this subpart:

Ad valorem lease means a lease where the royalty due to the lessor is based upon a percentage of the amount or value of the coal.

Allowance means an approved, or an ONRR-initially accepted deduction in determining value for royalty purposes. Coal washing allowance means an allowance for the reasonable, actual costs incurred by the lessee for coal washing, or an approved or ONRR-initially accepted deduction for the costs of washing coal, determined pursuant to this subpart. Transportation allowance means an allowance for the reasonable, actual costs incurred by the lessee for moving coal to a point of sale or point of delivery remote from both the lease and mine or wash plant, or an approved ONRR-initially accepted deduction for costs of such

transportation, determined pursuant to this subpart.

Area means a geographic region in which coal has similar quality and economic characteristics. Area boundaries are not officially designated and the areas are not necessarily named.

Arm's-length contract means a contract or agreement that has been arrived at in the marketplace between independent, nonaffiliated persons with opposing economic interests regarding that contract. For purposes of this subpart, two persons are affiliated if one person controls, is controlled by, or is under common control with another person. For purposes of this subpart, based on the instruments of ownership of the voting securities of an entity, or based on other forms of ownership: ownership in excess of 50 percent constitutes control; ownership of 10 through 50 percent creates a presumption of control; and ownership of less than 10 percent creates a presumption of noncontrol which ONRR may rebut if it demonstrates actual or legal control, including the existence of interlocking directorates. Notwithstanding any other provisions of this subpart, contracts between relatives, either by blood or by marriage, are not arm's-length contracts. ONRR may require the lessee to certify ownership control. To be considered arm's-length for any production month, a contract must meet the requirements of this definition for that production month, as well as when the contract was executed.

Audit means a review, conducted in accordance with generally accepted accounting and auditing standards, of royalty payment compliance activities of lessees or other interest holders who pay royalties, rents, or bonuses on Indian leases.

BIA means the Bureau of Indian Affairs of the Department of the Interior. *BLM* means the Bureau of Land Management of the Department of the Interior.

Coal means coal of all ranks from lignite through anthracite.

Coal washing means any treatment to remove impurities from coal. Coal washing may include, but is not limited to, operations such as flotation, air, water, or heavy media separation; drying; and related handling (or combination thereof).

Contract means any oral or written agreement, including amendments or revisions thereto, between two or more persons and enforceable by law that with due consideration creates an obligation.

Gross proceeds (for royalty payment purposes) means the total monies and

other consideration accruing to a coal lessee for the production and disposition of the coal produced. Gross proceeds includes, but is not limited to, payments to the lessee for certain services such as crushing, sizing, screening, storing, mixing, loading, treatment with substances including chemicals or oils, and other preparation of the coal to the extent that the lessee is obligated to perform them at no cost to the Indian lessor. Gross proceeds, as applied to coal, also includes but is not limited to reimbursements for royalties, taxes or fees, and other reimbursements. Tax reimbursements are part of the gross proceeds accruing to a lessee even though the Indian royalty interest may be exempt from taxation. Monies and other consideration, including the forms of consideration identified in this paragraph, to which a lessee is contractually or legally entitled but which it does not seek to collect through reasonable efforts are also part of gross proceeds.

Indian allottee means any Indian for whom land or an interest in land is held in trust by the United States or who holds title subject to Federal restriction against alienation.

Indian Tribe means any Indian Tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians for which any land or interest in land is held in trust by the United States or which is subject to Federal restriction against alienation.

Lease means any contract, profit-share arrangement, joint venture, or other agreement issued or approved by the United States for an Indian coal resource under a mineral leasing law that authorizes exploration for, development or extraction of, or removal of coal—or the land covered by that authorization, whichever is required by the context.

Lessee means any person to whom the Indian Tribe or an Indian allottee issues a lease, and any person who has been assigned an obligation to make royalty or other payments required by the lease. This includes any person who has an interest in a lease as well as an operator or payor who has no interest in the lease but who has assumed the royalty payment responsibility.

Like-quality coal means coal that has similar chemical and physical characteristics.

Marketable condition means coal that is sufficiently free from impurities and otherwise in a condition that it will be accepted by a purchaser under a sales contract typical for that area.

Mine means an underground or surface excavation or series of excavations and the surface or

underground support facilities that contribute directly or indirectly to mining, production, preparation, and handling of lease products.

Net-back method means a method for calculating market value of coal at the lease or mine. Under this method, costs of transportation, washing, handling, etc., are deducted from the ultimate proceeds received for the coal at the first point at which reasonable values for the coal may be determined by a sale pursuant to an arm's-length contract or by comparison to other sales of coal, to ascertain value at the mine.

Net output means the quantity of washed coal that a washing plant produces.

ONRR means the Office of Natural Resources Revenue of the Department of the Interior.

Person means by individual, firm, corporation, association, partnership, consortium, or joint venture.

Sales type code means the contract type or general disposition (e.g., arm's-length or non-arm's-length) of production from the lease. The sales type code applies to the sales contract, or other disposition, and not to the arm's-length or non-arm's-length nature of a transportation or washing allowance.

Spot market price means the price received under any sales transaction when planned or actual deliveries span a short period of time, usually not exceeding one year.

§ 1206.452 Coal subject to royalties—general provisions.

(a) All coal (except coal unavoidably lost as determined by BLM pursuant to 43 CFR group 3400) from an Indian lease subject to this part is subject to royalty. This includes coal used, sold, or otherwise disposed of by the lessee on or off the lease.

(b) If a lessee receives compensation for unavoidably lost coal through insurance coverage or other arrangements, royalties at the rate specified in the lease are to be paid on the amount of compensation received for the coal. No royalty is due on insurance compensation received by the lessee for other losses.

(c) If waste piles or slurry ponds are reworked to recover coal, the lessee shall pay royalty at the rate specified in the lease at the time the recovered coal is used, sold, or otherwise finally disposed of. The royalty rate shall be that rate applicable to the production method used to initially mine coal in the waste pile or slurry pond; i.e., underground mining method or surface mining method. Coal in waste pits or slurry ponds initially mined from

Indian leases shall be allocated to such leases regardless of whether it is stored on Indian lands. The lessee shall maintain accurate records to determine to which individual Indian lease coal in the waste pit or slurry pond should be allocated. However, nothing in this section requires payment of a royalty on coal for which a royalty has already been paid.

§ 1206.453 Quality and quantity measurement standards for reporting and paying royalties.

For all leases subject to this subpart, the quantity of coal on which royalty is due shall be measured in short tons (of 2,000 pounds each) by methods prescribed by the BLM. Coal quantity information will be reported on appropriate forms required under part 1210 of this subchapter.

§ 1206.454 Point of royalty determination.

(a) For all leases subject to this subpart, royalty shall be computed on the basis of the quantity and quality of Indian coal in marketable condition measured at the point of royalty measurement as determined jointly by BLM and ONRR.

(b) Coal produced and added to stockpiles or inventory does not require payment of royalty until such coal is later used, sold, or otherwise finally disposed of. ONRR may ask BLM or BIA to increase the lease bond to protect the lessor's interest when BLM determines that stockpiles or inventory become excessive so as to increase the risk of degradation of the resource.

(c) The lessee shall pay royalty at a rate specified in the lease at the time the coal is used, sold, or otherwise finally disposed of, unless otherwise provided for at § 1206.455(d).

§ 1206.455 Valuation standards for cents-per-ton leases.

(a) This section is applicable to coal leases on Indian Tribal and allotted Indian lands (except leases on the Osage Indian Reservation, Osage County, Oklahoma) which provide for the determination of royalty on a cents-per-ton (or other quantity) basis.

(b) The royalty for coal from leases subject to this section shall be based on the dollar rate per ton prescribed in the lease. That dollar rate shall be applicable to the actual quantity of coal used, sold, or otherwise finally disposed of, including coal which is avoidably lost as determined by BLM pursuant to 43 CFR part 3400.

(c) For leases subject to this section, there shall be no allowances for transportation, removal of impurities, coal washing, or any other processing or preparation of the coal.

(d) When a coal lease is readjusted pursuant to 43 CFR part 3400 and the royalty valuation method changes from a cents-per-ton basis to an ad valorem basis, coal which is produced prior to the effective date of readjustment and sold or used within 30 days of the effective date of readjustment shall be valued pursuant to this section. All coal that is not used, sold, or otherwise finally disposed of within 30 days after the effective date of readjustment shall be valued pursuant to the provisions of § 1206.456, and royalties shall be paid at the royalty rate specified in the readjusted lease.

§ 1206.456 Valuation standards for ad valorem leases.

(a) This section is applicable to coal leases on Indian Tribal and allotted Indian lands (except leases on the Osage Indian Reservation, Osage County, Oklahoma) which provide for the determination of royalty as a percentage of the amount of value of coal (ad valorem). The value for royalty purposes of coal from such leases shall be the value of coal determined pursuant to this section, less applicable coal washing allowances and transportation allowances determined pursuant to §§ 1206.457 through 1206.461, or any allowance authorized by § 1206.464. The royalty due shall be equal to the value for royalty purposes multiplied by the royalty rate in the lease.

(b)(1) The value of coal that is sold pursuant to an arm's-length contract shall be the gross proceeds accruing to the lessee, except as provided in paragraphs (b)(2), (3), and (5) of this section. The lessee shall have the burden of demonstrating that its contract is arm's-length. The value which the lessee reports, for royalty purposes, is subject to monitoring, review, and audit.

(2) In conducting reviews and audits, ONRR will examine whether the contract reflects the total consideration actually transferred either directly or indirectly from the buyer to the seller for the coal produced. If the contract does not reflect the total consideration, then ONRR may require that the coal sold pursuant to that contract be valued in accordance with paragraph (c) of this section. Value may not be based on less than the gross proceeds accruing to the lessee for the coal production, including the additional consideration.

(3) If ONRR determines that the gross proceeds accruing to the lessee pursuant to an arm's-length contract do not reflect the reasonable value of the production because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty

to the lessor to market the production for the mutual benefit of the lessee and the lessor, then ONRR shall require that the coal production be valued pursuant to paragraph (c)(2)(ii), (iii), (iv), or (v) of this section, and in accordance with the notification requirements of paragraph (d)(3) of this section. When ONRR determines that the value may be unreasonable, ONRR will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's reported coal value.

(4) ONRR may require a lessee to certify that its arm's-length contract provisions include all of the consideration to be paid by the buyer, either directly or indirectly, for the coal production.

(5) The value of production for royalty purposes shall not include payments received by the lessee pursuant to a contract which the lessee demonstrates, to ONRR's satisfaction, were not part of the total consideration paid for the purchase of coal production.

(c)(1) The value of coal from leases subject to this section and which is not sold pursuant to an arm's-length contract shall be determined in accordance with this section.

(2) If the value of the coal cannot be determined pursuant to paragraph (b) of this section, then the value shall be determined through application of other valuation criteria. The criteria shall be considered in the following order, and the value shall be based upon the first applicable criterion:

(i) The gross proceeds accruing to the lessee pursuant to a sale under its non-arm's-length contract (or other disposition of produced coal by other than an arm's-length contract), provided that those gross proceeds are within the range of the gross proceeds derived from, or paid under, comparable arm's-length contracts between buyers and sellers neither of whom is affiliated with the lessee for sales, purchases, or other dispositions of like-quality coal produced in the area. In evaluating the comparability of arm's-length contracts for the purposes of these regulations, the following factors shall be considered: price, time of execution, duration, market or markets served, terms, quality of coal, quantity, and such other factors as may be appropriate to reflect the value of the coal;

(ii) Prices reported for that coal to a public utility commission;

(iii) Prices reported for that coal to the Energy Information Administration of the Department of Energy;

(iv) Other relevant matters including, but not limited to, published or publicly available spot market prices, or

information submitted by the lessee concerning circumstances unique to a particular lease operation or the salability of certain types of coal;

(v) If a reasonable value cannot be determined using paragraph (c)(2)(i), (ii), (iii), or (iv) of this section, then a net-back method or any other reasonable method shall be used to determine value.

(3) When the value of coal is determined pursuant to paragraph (c)(2) of this section, that value determination shall be consistent with the provisions contained in paragraph (b)(5) of this section.

(d)(1) Where the value is determined pursuant to paragraph (c) of this section, that value does not require ONRR's prior approval. However, the lessee shall retain all data relevant to the determination of royalty value. Such data shall be subject to review and audit, and ONRR will direct a lessee to use a different value if it determines that the reported value is inconsistent with the requirements of these regulations.

(2) An Indian lessee will make available upon request to the authorized ONRR or Indian representatives, or to the Inspector General of the Department of the Interior or other persons authorized to receive such information, arm's-length sales and sales quantity data for like-quality coal sold, purchased, or otherwise obtained by the lessee from the area.

(3) A lessee shall notify ONRR if it has determined value pursuant to paragraph (c)(2)(ii), (iii), (iv), or (v) of this section. The notification shall be by letter to the Director for Office of Natural Resources Revenue or his/her designee. The letter shall identify the valuation method to be used and contain a brief description of the procedure to be followed. The notification required by this section is a one-time notification due no later than the month the lessee first reports royalties on the Form ONRR-4430 using a valuation method authorized by paragraph (c)(2)(ii), (iii), (iv), or (v) of this section, and each time there is a change in a method under paragraph (c)(2)(iv) or (v) of this section.

(e) If ONRR determines that a lessee has not properly determined value, the lessee shall be liable for the difference, if any, between royalty payments made based upon the value it has used and the royalty payments that are due based upon the value established by ONRR. The lessee shall also be liable for interest computed pursuant to § 1218.202 of this subchapter. If the lessee is entitled to a credit, ONRR will provide instructions for the taking of that credit.

(f) The lessee may request a value determination from ONRR. In that event, the lessee shall propose to ONRR a value determination method, and may use that method in determining value for royalty purposes until ONRR issues its decision. The lessee shall submit all available data relevant to its proposal. ONRR shall expeditiously determine the value based upon the lessee's proposal and any additional information ONRR deems necessary. That determination shall remain effective for the period stated therein. After ONRR issues its determination, the lessee shall make the adjustments in accordance with paragraph (e) of this section.

(g) Notwithstanding any other provisions of this section, under no circumstances shall the value for royalty purposes be less than the gross proceeds accruing to the lessee for the disposition of produced coal less applicable provisions of paragraph (b)(5) of this section and less applicable allowances determined pursuant to §§ 1206.457 through 1206.461 and 1206.464.

(h) The lessee is required to place coal in marketable condition at no cost to the Indian lessor. Where the value established pursuant to this section is determined by a lessee's gross proceeds, that value shall be increased to the extent that the gross proceeds has been reduced because the purchaser, or any other person, is providing certain services, the cost of which ordinarily is the responsibility of the lessee to place the coal in marketable condition.

(i) Value shall be based on the highest price a prudent lessee can receive through legally enforceable claims under its contract. Absent contract revision or amendment, if the lessee fails to take proper or timely action to receive prices or benefits to which it is entitled, it must pay royalty at a value based upon that obtainable price or benefit. Contract revisions or amendments shall be in writing and signed by all parties to an arm's-length contract, and may be retroactively applied to value for royalty purposes for a period not to exceed two years, unless ONRR approves a longer period. If the lessee makes timely application for a price increase allowed under its contract but the purchaser refuses, and the lessee takes reasonable measures, which are documented, to force purchaser compliance, the lessee will owe no additional royalties unless or until monies or consideration resulting from the price increase are received. This paragraph shall not be construed to permit a lessee to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of coal.

(j) Notwithstanding any provision in these regulations to the contrary, no review, reconciliation, monitoring, or other like process that results in a redetermination by ONRR of value under this section shall be considered final or binding as against the Indian Tribes or allottees until the audit period is formally closed.

(k) Certain information submitted to ONRR to support valuation proposals, including transportation, coal washing, or other allowances pursuant to §§ 1206.457 through 1206.461 and 1206.464, is exempted from disclosure by the Freedom of Information Act, 5 U.S.C. 522. Any data specified by the Act to be privileged, confidential, or otherwise exempt shall be maintained in a confidential manner in accordance with applicable law and regulations. All requests for information about determinations made under this part are to be submitted in accordance with the Freedom of Information Act regulation of the Department of the Interior, 43 CFR part 2. Nothing in this section is intended to limit or diminish in any manner whatsoever the right of an Indian lessor to obtain any and all information as such lessor may be lawfully entitled from ONRR or such lessor's lessee directly under the terms of the lease or applicable law.

§ 1206.457 Washing allowances—general.

(a) For ad valorem leases subject to § 1206.456, ONRR shall, as authorized by this section, allow a deduction in determining value for royalty purposes for the reasonable, actual costs incurred to wash coal, unless the value determined pursuant to § 1206.456 was based upon like-quality unwashed coal. Under no circumstances will the authorized washing allowance and the transportation allowance reduce the value for royalty purposes to zero.

(b) If ONRR determines that a lessee has improperly determined a washing allowance authorized by this section, then the lessee shall be liable for any additional royalties, plus interest determined in accordance with § 1218.202 of this subchapter, or shall be entitled to a credit, without interest.

(c) Lessees shall not disproportionately allocate washing costs to Indian leases.

(d) No cost normally associated with mining operations and which are necessary for placing coal in marketable condition shall be allowed as a cost of washing.

(e) Coal washing costs shall only be recognized as allowances when the washed coal is sold and royalties are reported and paid.

§ 1206.458 Determination of washing allowances.

(a) *Arm's-length contracts.* (1) For washing costs incurred by a lessee pursuant to an arm's-length contract, the washing allowance shall be the reasonable actual costs incurred by the lessee for washing the coal under that contract, subject to monitoring, review, audit, and possible future adjustment. ONRR's prior approval is not required before a lessee may deduct costs incurred under an arm's-length contract. However, before any deduction may be taken, the lessee must submit a completed page one of Form ONRR-4292, Coal Washing Allowance Report, in accordance with paragraph (c)(1) of this section. A washing allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form ONRR-4292 is filed with ONRR, unless ONRR approves a longer period upon a showing of good cause by the lessee.

(2) In conducting reviews and audits, ONRR will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from the lessee to the washer for the washing. If the contract reflects more than the total consideration paid, then ONRR may require that the washing allowance be determined in accordance with paragraph (b) of this section.

(3) If ONRR determines that the consideration paid pursuant to an arm's-length washing contract does not reflect the reasonable value of the washing because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then ONRR shall require that the washing allowance be determined in accordance with paragraph (b) of this section. When ONRR determines that the value of the washing may be unreasonable, ONRR will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's washing costs.

(4) Where the lessee's payments for washing under an arm's-length contract are not based on a dollar-per-unit basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent. Washing allowances shall be expressed as a cost per ton of coal washed.

(b) *Non-arm's-length or no contract.*

(1) If a lessee has a non-arm's-length contract or has no contract, including those situations where the lessee performs washing for itself, the washing allowance will be based upon the

lessee's reasonable actual costs. All washing allowances deducted under a non-arm's-length or no contract situation are subject to monitoring, review, audit, and possible future adjustment. Prior ONRR approval of washing allowances is not required for non-arm's-length or no contract situations. However, before any estimated or actual deduction may be taken, the lessee must submit a completed Form ONRR-4292 in accordance with paragraph (c)(2) of this section. A washing allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form ONRR-4292 is filed with ONRR, unless ONRR approves a longer period upon a showing of good cause by the lessee. ONRR will monitor the allowance deduction to ensure that deductions are reasonable and allowable. When necessary or appropriate, ONRR may direct a lessee to modify its actual washing allowance.

(2) The washing allowance for non-arm's-length or no contract situations shall be based upon the lessee's actual costs for washing during the reported period, including operating and maintenance expenses, overhead, and either depreciation and a return on undepreciated capital investment in accordance with paragraph (b)(2)(iv)(A) of this section, or a cost equal to the depreciable investment in the wash plant multiplied by the rate of return in accordance with paragraph (b)(2)(iv)(B) of this section. Allowable capital costs are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the wash plant.

(i) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes; rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(ii) Allowable maintenance expenses include: Maintenance of the wash plant; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(iii) Overhead attributable and allocable to the operation and maintenance of the wash plant is an allowable expense. State and Federal income taxes and severance taxes, including royalties, are not allowable expenses.

(iv) A lessee may use either paragraph (b)(2)(iv)(A) or (B) of this section. After a lessee has elected to use either method

for a wash plant, the lessee may not later elect to change to the other alternative without approval of ONRR.

(A) To compute depreciation, the lessee may elect to use either a straight-line depreciation method based on the life of equipment or on the life of the reserves which the wash plant services, whichever is appropriate, or a unit of production method. After an election is made, the lessee may not change methods without ONRR approval. A change in ownership of a wash plant shall not alter the depreciation schedule established by the original operator/lessee for purposes of the allowance calculation. With or without a change in ownership, a wash plant shall be depreciated only once. Equipment shall not be depreciated below a reasonable salvage value.

(B) ONRR shall allow as a cost an amount equal to the allowable capital investment in the wash plant multiplied by the rate of return determined pursuant to paragraph (b)(2)(v) of this section. No allowance shall be provided for depreciation. This alternative shall apply only to plants first placed in service or acquired after March 1, 1989.

(v) The rate of return shall be the industrial rate associated with Standard and Poor's BBB rating. The rate of return shall be the monthly average rate as published in Standard and Poor's Bond Guide for the first month of the reporting period for which the allowance is applicable and shall be effective during the reporting period. The rate shall be redetermined at the beginning of each subsequent washing allowance reporting period (which is determined pursuant to paragraph (c)(2) of this section).

(3) The washing allowance for coal shall be determined based on the lessee's reasonable and actual cost of washing the coal. The lessee may not take an allowance for the costs of washing lease production that is not royalty bearing.

(c) *Reporting requirements—*(1) *Arm's-length contracts.* (i) With the exception of those washing allowances specified in paragraphs (c)(1)(v) and (vi) of this section, the lessee shall submit page one of the initial Form ONRR-4292 prior to, or at the same time, as the washing allowance determined pursuant to an arm's-length contract is reported on Form ONRR-4430, Solid Minerals Production and Royalty Report. A Form ONRR-4292 received by the end of the month that the Form ONRR-4430 is due shall be considered to be received timely.

(ii) The initial Form ONRR-4292 shall be effective for a reporting period beginning the month that the lessee is

first authorized to deduct a washing allowance and shall continue until the end of the calendar year, or until the applicable contract or rate terminates or is modified or amended, whichever is earlier.

(iii) After the initial reporting period and for succeeding reporting periods, lessees must submit page one of Form ONRR-4292 within 3 months after the end of the calendar year, or after the applicable contract or rate terminates or is modified or amended, whichever is earlier, unless ONRR approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period).

(iv) ONRR may require that a lessee submit arm's-length washing contracts and related documents. Documents shall be submitted within a reasonable time, as determined by ONRR.

(v) Washing allowances which are based on arm's-length contracts and which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by ONRR in writing shall qualify as being in effect at the time these regulations become effective.

(vi) ONRR may establish, in appropriate circumstances, reporting requirements that are different from the requirements of this section.

(2) *Non-arm's-length or no contract.*

(i) With the exception of those washing allowances specified in paragraphs (c)(2)(v) and (vii) of this section, the lessee shall submit an initial Form ONRR-4292 prior to, or at the same time as, the washing allowance determined pursuant to a non-arm's-length contract or no contract situation is reported on Form ONRR-4430, Solid Minerals Production and Royalty Report. A Form ONRR-4292 received by the end of the month that the Form ONRR-4430 is due shall be considered to be timely received. The initial reporting may be based on estimated costs.

(ii) The initial Form ONRR-4292 shall be effective for a reporting period beginning the month that the lessee first is authorized to deduct a washing allowance and shall continue until the end of the calendar year, or until the washing under the non-arm's-length contract or the no contract situation terminates, whichever is earlier.

(iii) For calendar-year reporting periods succeeding the initial reporting period, the lessee shall submit a completed Form ONRR-4292 containing the actual costs for the previous reporting period. If coal washing is continuing, the lessee shall include on

Form ONRR-4292 its estimated costs for the next calendar year. The estimated coal washing allowance shall be based on the actual costs for the previous period plus or minus any adjustments which are based on the lessee's knowledge of decreases or increases which will affect the allowance. Form ONRR-4292 must be received by ONRR within 3 months after the end of the previous reporting period, unless ONRR approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period).

(iv) For new wash plants, the lessee's initial Form ONRR-4292 shall include estimates of the allowable coal washing costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the plant, or if such data are not available, the lessee shall use estimates based upon industry data for similar coal wash plants.

(v) Washing allowances based on non-arm's-length or no contract situations which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by ONRR in writing shall qualify as being in effect at the time these regulations become effective.

(vi) Upon request by ONRR, the lessee shall submit all data used by the lessee to prepare its Forms ONRR-4292. The data shall be provided within a reasonable period of time, as determined by ONRR.

(vii) ONRR may establish, in appropriate circumstances, reporting requirements which are different from the requirements of this section.

(3) ONRR may establish coal washing allowance reporting dates for individual leases different from those specified in this subpart in order to provide more effective administration. Lessees will be notified of any change in their reporting period.

(4) Washing allowances must be reported as a separate line on the Form ONRR-4430, unless ONRR approves a different reporting procedure.

(d) *Interest assessments for incorrect or late reports and failure to report.* (1) If a lessee deducts a washing allowance on its Form ONRR-4430 without complying with the requirements of this section, the lessee shall be liable for interest on the amount of such deduction until the requirements of this section are complied with. The lessee also shall repay the amount of any allowance which is disallowed by this section.

(2) If a lessee erroneously reports a washing allowance which results in an underpayment of royalties, interest shall be paid on the amount of that underpayment.

(3) Interest required to be paid by this section shall be determined in accordance with § 1218.202 of this subchapter.

(e) *Adjustments.* (1) If the actual coal washing allowance is less than the amount the lessee has taken on Form ONRR-4430 for each month during the allowance form reporting period, the lessee shall be required to pay additional royalties due plus interest computed pursuant to § 1218.202 of this subchapter, retroactive to the first month the lessee is authorized to deduct a washing allowance. If the actual washing allowance is greater than the amount the lessee has estimated and taken during the reporting period, the lessee shall be entitled to a credit, without interest.

(2) The lessee must submit a corrected Form ONRR-4430 to reflect actual costs, together with any payment, in accordance with instructions provided by ONRR.

(f) *Other washing cost determinations.* The provisions of this section shall apply to determine washing costs when establishing value using a net-back valuation procedure or any other procedure that requires deduction of washing costs.

§ 1206.459 Allocation of washed coal.

(a) When coal is subjected to washing, the washed coal must be allocated to the leases from which it was extracted.

(b) When the net output of coal from a washing plant is derived from coal obtained from only one lease, the quantity of washed coal allocable to the lease will be based on the net output of the washing plant.

(c) When the net output of coal from a washing plant is derived from coal obtained from more than one lease, unless determined otherwise by BLM, the quantity of net output of washed coal allocable to each lease will be based on the ratio of measured quantities of coal delivered to the washing plant and washed from each lease compared to the total measured quantities of coal delivered to the washing plant and washed.

§ 1206.460 Transportation allowances—general.

(a) For ad valorem leases subject to § 1206.456, where the value for royalty purposes has been determined at a point remote from the lease or mine, ONRR shall, as authorized by this section, allow a deduction in determining value

for royalty purposes for the reasonable, actual costs incurred to:

(1) Transport the coal from an Indian lease to a sales point which is remote from both the lease and mine; or

(2) Transport the coal from an Indian lease to a wash plant when that plant is remote from both the lease and mine and, if applicable, from the wash plant to a remote sales point. In-mine transportation costs shall not be included in the transportation allowance.

(b) Under no circumstances will the authorized washing allowance and the transportation allowance reduce the value for royalty purposes to zero.

(c)(1) When coal transported from a mine to a wash plant is eligible for a transportation allowance in accordance with this section, the lessee is not required to allocate transportation costs between the quantity of clean coal output and the rejected waste material. The transportation allowance shall be authorized for the total production which is transported. Transportation allowances shall be expressed as a cost per ton of cleaned coal transported.

(2) For coal that is not washed at a wash plant, the transportation allowance shall be authorized for the total production which is transported. Transportation allowances shall be expressed as a cost per ton of coal transported.

(3) Transportation costs shall only be recognized as allowances when the transported coal is sold and royalties are reported and paid.

(d) If, after a review and/or audit, ONRR determines that a lessee has improperly determined a transportation allowance authorized by this section, then the lessee shall pay any additional royalties, plus interest, determined in accordance with § 1218.202 of this subchapter, or shall be entitled to a credit, without interest.

(e) Lessees shall not disproportionately allocate transportation costs to Indian leases.

§ 1206.461 Determination of transportation allowances.

(a) *Arm's-length contracts.* (1) For transportation costs incurred by a lessee pursuant to an arm's-length contract, the transportation allowance shall be the reasonable, actual costs incurred by the lessee for transporting the coal under that contract, subject to monitoring, review, audit, and possible future adjustment. ONRR's prior approval is not required before a lessee may deduct costs incurred under an arm's-length contract. However, before any deduction may be taken, the lessee must submit a completed page one of Form ONRR–

4293, Coal Transportation Allowance Report, in accordance with paragraph (c)(1) of this section. A transportation allowance may be claimed retroactively for a period of not more than 3 months prior to the first day of the month that Form ONRR–4293 is filed with ONRR, unless ONRR approves a longer period upon a showing of good cause by the lessee.

(2) In conducting reviews and audits, ONRR will examine whether the contract reflects more than the consideration actually transferred either directly or indirectly from the lessee to the transporter for the transportation. If the contract reflects more than the total consideration paid, then ONRR may require that the transportation allowance be determined in accordance with paragraph (b) of this section.

(3) If ONRR determines that the consideration paid pursuant to an arm's-length transportation contract does not reflect the reasonable value of the transportation because of misconduct by or between the contracting parties, or because the lessee otherwise has breached its duty to the lessor to market the production for the mutual benefit of the lessee and the lessor, then ONRR shall require that the transportation allowance be determined in accordance with paragraph (b) of this section. When ONRR determines that the value of the transportation may be unreasonable, ONRR will notify the lessee and give the lessee an opportunity to provide written information justifying the lessee's transportation costs.

(4) Where the lessee's payments for transportation under an arm's-length contract are not based on a dollar-per-unit basis, the lessee shall convert whatever consideration is paid to a dollar value equivalent for the purposes of this section.

(b) *Non-arm's-length or no contract.*

(1) If a lessee has a non-arm's-length contract or has no contract, including those situations where the lessee performs transportation services for itself, the transportation allowance will be based upon the lessee's reasonable actual costs. All transportation allowances deducted under a non-arm's-length or no contract situation are subject to monitoring, review, audit, and possible future adjustment. Prior ONRR approval of transportation allowances is not required for non-arm's-length or no contract situations. However, before any estimated or actual deduction may be taken, the lessee must submit a completed Form ONRR–4293 in accordance with paragraph (c)(2) of this section. A transportation allowance may be claimed retroactively for a period of not more than 3 months prior to the first

day of the month that Form ONRR–4293 is filed with ONRR, unless ONRR approves a longer period upon a showing of good cause by the lessee. ONRR will monitor the allowance deductions to ensure that deductions are reasonable and allowable. When necessary or appropriate, ONRR may direct a lessee to modify its estimated or actual transportation allowance deduction.

(2) The transportation allowance for non-arm's-length or no contract situations shall be based upon the lessee's actual costs for transportation during the reporting period, including operating and maintenance expenses, overhead, and either depreciation and a return on undepreciated capital investment in accordance with paragraph (b)(2)(iv)(A) of this section, or a cost equal to the depreciable investment in the transportation system multiplied by the rate of return in accordance with paragraph (b)(2)(iv)(B) of this section. Allowable capital costs are generally those for depreciable fixed assets (including costs of delivery and installation of capital equipment) which are an integral part of the transportation system.

(i) Allowable operating expenses include: Operations supervision and engineering; operations labor; fuel; utilities; materials; ad valorem property taxes; rent; supplies; and any other directly allocable and attributable operating expense which the lessee can document.

(ii) Allowable maintenance expenses include: Maintenance of the transportation system; maintenance of equipment; maintenance labor; and other directly allocable and attributable maintenance expenses which the lessee can document.

(iii) Overhead attributable and allocable to the operation and maintenance of the transportation system is an allowable expense. State and Federal income taxes and severance taxes and other fees, including royalties, are not allowable expenses.

(iv) A lessee may use either paragraph (b)(2)(iv)(A) or (B) of this section. After a lessee has elected to use either method for a transportation system, the lessee may not later elect to change to the other alternative without approval of ONRR.

(A) To compute depreciation, the lessee may elect to use either a straight-line depreciation method based on the life of equipment or on the life of the reserves which the transportation system services, whichever is appropriate, or a unit of production method. After an election is made, the lessee may not change methods without

ONRR approval. A change in ownership of a transportation system shall not alter the depreciation schedule established by the original transporter/lessee for purposes of the allowance calculation. With or without a change in ownership, a transportation system shall be depreciated only once. Equipment shall not be depreciated below a reasonable salvage value.

(B) ONRR shall allow as a cost an amount equal to the allowable capital investment in the transportation system multiplied by the rate of return determined pursuant to paragraph (b)(2)(v) of this section. No allowance shall be provided for depreciation. This alternative shall apply only to transportation facilities first placed in service or acquired after March 1, 1989.

(v) The rate of return shall be the industrial rate associated with Standard and Poor's BBB rating. The rate of return shall be the monthly average as published in Standard and Poor's Bond Guide for the first month of the reporting period of which the allowance is applicable and shall be effective during the reporting period. The rate shall be redetermined at the beginning of each subsequent transportation allowance reporting period (which is determined pursuant to paragraph (c)(2) of this section).

(3) A lessee may apply to ONRR for exception from the requirement that it compute actual costs in accordance with paragraphs (b)(1) and (2) of this section. ONRR will grant the exception only if the lessee has a rate for the transportation approved by a Federal agency for Indian leases. ONRR shall deny the exception request if it determines that the rate is excessive as compared to arm's-length transportation charges by systems, owned by the lessee or others, providing similar transportation services in that area. If there are no arm's-length transportation charges, ONRR shall deny the exception request if:

(i) No Federal regulatory agency cost analysis exists and the Federal regulatory agency has declined to investigate pursuant to ONRR timely objections upon filing; and

(ii) The rate significantly exceeds the lessee's actual costs for transportation as determined under this section.

(c) *Reporting requirements*—(1) *Arm's-length contracts.* (i) With the exception of those transportation allowances specified in paragraphs (c)(1)(v) and (vi) of this section, the lessee shall submit page one of the initial Form ONRR-4293 prior to, or at the same time as, the transportation allowance determined pursuant to an arm's-length contract is reported on

Form ONRR-4430, Solid Minerals Production and Royalty Report.

(ii) The initial Form ONRR-4293 shall be effective for a reporting period beginning the month that the lessee is first authorized to deduct a transportation allowance and shall continue until the end of the calendar year, or until the applicable contract or rate terminates or is modified or amended, whichever is earlier.

(iii) After the initial reporting period and for succeeding reporting periods, lessees must submit page one of Form ONRR-4293 within 3 months after the end of the calendar year, or after the applicable contract or rate terminates or is modified or amended, whichever is earlier, unless ONRR approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period). Lessees may request special reporting procedures in unique allowance reporting situations, such as those related to spot sales.

(iv) ONRR may require that a lessee submit arm's-length transportation contracts, production agreements, operating agreements, and related documents. Documents shall be submitted within a reasonable time, as determined by ONRR.

(v) Transportation allowances that are based on arm's-length contracts and which are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For the purposes of this section, only those allowances that have been approved by ONRR in writing shall qualify as being in effect at the time these regulations become effective.

(vi) ONRR may establish, in appropriate circumstances, reporting requirements that are different from the requirements of this section.

(2) *Non-arm's-length or no contract.*

(i) With the exception of those transportation allowances specified in paragraphs (c)(2)(v) and (vii) of this section, the lessee shall submit an initial Form ONRR-4293 prior to, or at the same time as, the transportation allowance determined pursuant to a non-arm's-length contract or no contract situation is reported on Form ONRR-4430, Solid Minerals Production and Royalty Report. The initial report may be based on estimated costs.

(ii) The initial Form ONRR-4293 shall be effective for a reporting period beginning the month that the lessee first is authorized to deduct a transportation allowance and shall continue until the end of the calendar year, or until the transportation under the non-arm's-length contract or the no contract

situation terminates, whichever is earlier.

(iii) For calendar-year reporting periods succeeding the initial reporting period, the lessee shall submit a completed Form ONRR-4293 containing the actual costs for the previous reporting period. If the transportation is continuing, the lessee shall include on Form ONRR-4293 its estimated costs for the next calendar year. The estimated transportation allowance shall be based on the actual costs for the previous reporting period plus or minus any adjustments that are based on the lessee's knowledge of decreases or increases that will affect the allowance. Form ONRR-4293 must be received by ONRR within 3 months after the end of the previous reporting period, unless ONRR approves a longer period (during which period the lessee shall continue to use the allowance from the previous reporting period).

(iv) For new transportation facilities or arrangements, the lessee's initial Form ONRR-4293 shall include estimates of the allowable transportation costs for the applicable period. Cost estimates shall be based upon the most recently available operations data for the transportation system, or, if such data are not available, the lessee shall use estimates based upon industry data for similar transportation systems.

(v) Non-arm's-length contract or no contract-based transportation allowances that are in effect at the time these regulations become effective will be allowed to continue until such allowances terminate. For purposes of this section, only those allowances that have been approved by ONRR in writing shall qualify as being in effect at the time these regulations become effective.

(vi) Upon request by ONRR, the lessee shall submit all data used to prepare its Form ONRR-4293. The data shall be provided within a reasonable period of time, as determined by ONRR.

(vii) ONRR may establish, in appropriate circumstances, reporting requirements that are different from the requirements of this section.

(viii) If the lessee is authorized to use its Federal-agency-approved rate as its transportation cost in accordance with paragraph (b)(3) of this section, it shall follow the reporting requirements of paragraph (c)(1) of this section.

(3) ONRR may establish reporting dates for individual lessees different than those specified in this paragraph in order to provide more effective administration. Lessees will be notified as to any change in their reporting period.

(4) Transportation allowances must be reported as a separate line item on Form

ONRR-4430, unless ONRR approves a different reporting procedure.

(d) *Interest assessments for incorrect or late reports and failure to report.* (1) If a lessee deducts a transportation allowance on its Form ONRR-4430 without complying with the requirements of this section, the lessee shall be liable for interest on the amount of such deduction until the requirements of this section are complied with. The lessee also shall repay the amount of any allowance which is disallowed by this section.

(2) If a lessee erroneously reports a transportation allowance which results in an underpayment of royalties, interest shall be paid on the amount of that underpayment.

(3) Interest required to be paid by this section shall be determined in accordance with § 1218.202 of this subchapter.

(e) *Adjustments.* (1) If the actual transportation allowance is less than the amount the lessee has taken on Form ONRR-4430 for each month during the allowance form reporting period, the lessee shall be required to pay additional royalties due plus interest, computed pursuant to § 1218.202 of this subchapter, retroactive to the first month the lessee is authorized to deduct a transportation allowance. If the actual transportation allowance is greater than the amount the lessee has estimated and taken during the reporting period, the lessee shall be entitled to a credit, without interest.

(2) The lessee must submit a corrected Form ONRR-4430 to reflect actual costs, together with any payment, in accordance with instructions provided by ONRR.

(f) *Other transportation cost determinations.* The provisions of this section shall apply to determine transportation costs when establishing value using a net-back valuation procedure or any other procedure that requires deduction of transportation costs.

§ 1206.462 [Reserved]

§ 1206.463 In-situ and surface gasification and liquefaction operations.

If an ad valorem Federal coal lease is developed by in-situ or surface gasification or liquefaction technology, the lessee shall propose the value of coal for royalty purposes to ONRR. ONRR will review the lessee's proposal and issue a value determination. The lessee may use its proposed value until ONRR issues a value determination.

§ 1206.464 Value enhancement of marketable coal.

If, prior to use, sale, or other disposition, the lessee enhances the value of coal after the coal has been placed in marketable condition in accordance with § 1206.456(h), the lessee shall notify ONRR that such processing is occurring or will occur. The value of that production shall be determined as follows:

(a) A value established for the feedstock coal in marketable condition by application of the provisions of § 1206.456(c)(2)(i) through (iv); or,

(b) In the event that a value cannot be established in accordance with paragraph (a) of this section, then the value of production will be determined in accordance with § 1206.456(c)(2)(v) and the value shall be the lessee's gross proceeds accruing from the disposition of the enhanced product, reduced by ONRR-approved processing costs and procedures including a rate of return on investment equal to two times the Standard and Poor's BBB bond rate applicable under § 1206.458(b)(2)(v).

[FR Doc. 2023-15310 Filed 7-20-23; 8:45 am]

BILLING CODE 4335-30-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[USCG-USCG-2023-0564]

RIN 1625-AA00

Safety Zone, Upper Mississippi River MM 660.5-659.5, Lansing, IA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for all navigable waters in the Upper Mississippi River at Mile Marker (MM) 660.5 through 659.5. The safety zone is needed to protect personnel, vessels, and the marine environment from all potential hazards associated with the implosion of the Lansing Power Station. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port Sector Upper Mississippi River (COTP) or a designated representative.

DATES: This rule is effective from July 21, 2023, through August 15, 2023. This rule will be enforced July 22, 2023, and August 5, 2023, the planned dates of implosion. If circumstances require, this rule may be additionally enforced any day in which it is in effect.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2023-0564 in the search box and click "Search." Next, in the Document Type column, select "Supporting & Related Material."

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email MSTC Nathaniel Dibley, Sector Upper Mississippi River Waterways Management Division, U.S. Coast Guard; telephone 314-269-2560, email Nathaniel.D.Dibley@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because a temporary safety zone must be established immediately to protect personnel, vessels, and the marine environment from potential hazards created by the use of explosives for the implosion of the power plant and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule. It is impracticable to publish an NPRM because we must establish this safety zone by July 21, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated the use of explosives for the implosion of the Lansing Power Station.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The

Captain of the Port Sector Upper Mississippi River (COTP) has determined that potential hazards associated with the use of explosions for the implosion of the Lansing Power Plant will be a safety concern for anyone operating or transiting within the Upper Mississippi River from MM 660.5 through 659.5. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the implosion is being conducted.

IV. Discussion of the Rule

The Lansing Power Plant, located between MM 660.5 and 659.5, will be imploded using explosives. The planned dates of implosion are July 22, 2023, and August 5, 2023. The safety zone is designed to protect waterway users until work is complete.

No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. A designated representative is a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River. To seek permission to enter, contact the COTP or a designated representative via VHF-FM channel 16, or through USCG Sector Upper Mississippi River at 314-269-2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative. The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement, as well as reductions in the size of the safety zone through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB), as appropriate.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a “significant regulatory action,” under

section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on a safety zone located on the Upper Mississippi River at MM 660.5–659.5, near Lansing, IA. The Safety Zone is expected to be active only during the implosion events, until August 15, 2023.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator because the zone will be enforced only when work is being conducted.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone encompassing the width of the Upper Mississippi River at MM 660.5–659.5. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01,

Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0257 to read as follows:

§ 165.T08–0257 Safety Zone; Upper Mississippi River, Mile Markers 660.5–659.5, Lansing, IA.

(a) *Location.* The following area is a safety zone: all navigable waters within Upper Mississippi River, Mile Markers 660.5–659.5, Lansing, IA.

(b) *Definitions.* As used in this section, *designated representative* means a commissioned, warrant, or petty officer of the U.S. Coast Guard (USCG) assigned to units under the operational control of USCG Sector Upper Mississippi River.

(c) *Regulations.* (1) In accordance with the general safety zone regulations in § 165.23, entry of persons or vessels into this safety zone described in paragraph (a) of this section is prohibited unless authorized by the COTP or a designated representative.

(2) To seek permission to enter, contact the COTP or a designated representative via VHF–FM channel 16, or through USCG Sector Upper Mississippi River at 314–269–2332. Persons and vessels permitted to enter the safety zone must comply with all lawful orders or directions issued by the COTP or designated representative.

(d) *Enforcement period and informational broadcasts.* This section is subject to enforcement from July 21, 2023, through August 15, 2023. The COTP or a designated representative will inform the public of the effective period for the safety zone and all dates and times of enforcement, as well as reductions in size or scope of the safety zone through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Safety Marine Information Broadcast (SMIB) as appropriate. The COTP or a designated representative will inform the public through those same means of the termination of enforcement if enforcement of the zone is no longer required prior to the rule's termination.

Dated: July 18, 2023.

A.R. Bender,

Captain, U.S. Coast Guard, Captain of the Port Sector Upper Mississippi River.

[FR Doc. 2023–15559 Filed 7–20–23; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2023–0528]

RIN 1625–AA00

Safety Zone; Port of Los Angeles, San Pedro Bay, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary moving safety zone around the M/V ZHEN HUA 23 while it transits through the Port of Los Angeles to Fenix Marine Services (FMS), Pier LA 302. This safety zone is necessary to protect personnel, vessels, and the marine environment from potential hazards associated with oversized cargo transfer operations of two quay cranes and equipment, which will extend more than 200 feet out from the transiting vessel. Entry of persons or vessels into this safety zone is prohibited unless specifically authorized by the Captain of the Port (COTP) Los Angeles–Long Beach, or their designated representative.

DATES: This rule is effective from 7 a.m. July 20, 2023, to 12 p.m. on July 22, 2023.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG–2023–

0528 in the search box and click “Search.” Next, in the Document Type column, select “Supporting & Related Material.”

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email LCDR Kevin Kinsella, Waterways Management, U.S. Coast Guard Sector Los Angeles–Long Beach; telephone (310) 357–1603, email D11-SMB-SectorLALB-WWM@uscg.mil.

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because The COTP was notified of the impending arrival of the M/V ZHEN HUA 23 less than 30 days in advance and immediate action is needed to respond to the potential safety hazards associated with the transfer of large cranes within the Port of Los Angeles. It is impracticable to publish an NPRM because we must establish this safety zone by July 20, 2023.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because immediate action is needed to ensure the safety of persons, vessels, and the marine environment in the vicinity of the M/V ZHEN HUA 23 while conducting oversized cargo transfer operations at FMS, Pier LA 302, within the Port of Los Angeles.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The COTP Los Angeles–Long Beach has determined that potential hazards

associated with the movement of ship to shore crane transfer operations will be a safety concern for anyone within a 500-foot radius of the M/V ZHEN HUA 23 during its transit to FMS, Pier LA 302, while the vessel is within the Port of Los Angeles and the waters inside the Federal breakwaters bounding San Pedro Bay or on the waters within three nautical miles seaward of the Federal breakwaters, respectively. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the vessel offloads quay cranes in the Port of Los Angeles.

IV. Discussion of the Rule

This rule establishes a safety zone from 7 a.m. July 20, 2023 to 12 p.m. on July 22, 2023 during the transit of the M/V ZHEN HUA 23 to berth. While the M/V ZHEN HUA 23 is within the Port of Los Angeles and the waters inside the Federal breakwaters bounding San Pedro Bay or on the waters within three nautical miles seaward of the Federal breakwaters, respectively, the safety zone will encompass the navigable waters around and under the vessel, from surface to bottom, within a circle formed by connecting all points 500-feet out from the vessel. The safety zone is needed to protect personnel, mariners, and vessels from hazards associated with ship to shore gantry crane arms which will extend more than 200 feet out from the transiting vessel. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the transfer operations are active.

No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative. Sector Los Angeles–Long Beach may be contacted on VHF–FM Channel 16 or (310) 521–3801. The marine public will be notified of the safety zone via Broadcast Notice to Mariners.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits.

This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and time-of-year of the safety zone. This rule impacts an area of 500-feet surrounding a cargo vessel solely for its transit to FMS, Pier LA 302, during the month of July 2023. This safety zone impacts a 500-foot-radius area of the Port of Los Angeles and the waters inside the Federal breakwaters bounding San Pedro Bay or on the waters within three nautical miles seaward of the Federal breakwaters, respectively for a limited duration. While the safety zone encompasses a three-day period to account for uncertain transit delays of the M/V ZHEN HUA 23, the safety zone will only be enforced for the duration of the vessel’s inbound transit to FMS, Pier LA 302. The transit is expected to last less than 5 hours, and that period will be announced via Broadcast Notice to Mariners. Vessel traffic will be able to safely transit around this safety zone, which will impact a small, designated area of the San Pedro Bay, Los Angeles, CA.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V. A. above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the

person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone encompassing an area extending 500-feet out from a cargo vessel in vicinity of Fenix Marine Services and will last only for the inbound transit. It is categorically excluded from further review under paragraph L60 (a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T11–128 to read as follows:

§ 165.T11–128 Safety Zone; Port of Los Angeles, San Pedro Bay, CA.

(a) *Location.* The following area is a safety zone: all navigable waters of the port of Los Angeles, from surface to bottom, within a circle formed by connecting all points 500-feet out from the vessel, M/V ZHEN HUA 23, during

the vessel's transit within the Port of Los Angeles and the waters inside the Federal breakwaters bounding San Pedro Bay or on the waters within three nautical miles seaward of the Federal breakwaters, respectively.

(b) *Definitions.* As used in this section, *Designated representative* means a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel designated by or assisting the Captain of the Port Los Angeles–Long Beach (COTP) in the enforcement of the safety zone.

(c) Regulations.

(1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by hailing Coast Guard Sector Los Angeles–Long Beach on VHF–FM Channel 16 or calling at (310) 521–3801. Those in the safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This temporary safety zone will be enforced from 7 a.m. July 20, 2023, to 12 p.m. July 22, 2023, only during the M/V ZHEN HUA 23's inbound transit to Fenix Marine Services, Pier LA 302, or as announced via Broadcast Notice to Mariners.

(e) *Informational broadcasts.* The COTP or a designated representative will inform the public of the enforcement date and times for this safety zone via Local Notices to Mariners.

Dated: July 12, 2023.

R.D. Manning,

Captain, U.S. Coast Guard, Captain of the Port Sector Los Angeles–Long Beach.

[FR Doc. 2023–15535 Filed 7–20–23; 8:45 am]

BILLING CODE 9110–04–P

POSTAL SERVICE

39 CFR Part 233

Circulars and Rewards

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Inspection Service has the authority to issue monetary rewards for certain types of offenses against the United States Code. Changes in the relevant regulation will be made to reflect an increase in monetary reward amounts and a reclassification of

the types of offenses for which rewards can be issued.

DATES: *Effective* August 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Louis DiRienzo, Chief Counsel, U.S. Postal Inspection Service at 202 268–2705 or ljdirienzo@uspis.gov.

SUPPLEMENTARY INFORMATION: 39 CFR 233.2 gives Postal Inspection Service the authority to issue monetary rewards for certain types of offenses against the United States Code. 39 CFR 233.2 will be changed to reflect an increase in monetary reward amounts and a reclassification of the types of offenses for which rewards can be issued. Specifically, the rule change will reclassify offenses by categories which were previously classified by monetary amount. Reward amounts for the recategorized offenses will be increased to reflect current valuations and severity of such offenses.

These changes will be mirrored in the publication of the Postal Service's Poster 296, embedded in the footnote of 39 CFR 233.2, which in turn, will facilitate a better understanding of the Postal Service's reward system to the general public. Such changes will further enhance any investigation of the listed offenses and provide a deterrent incentive to the commission of crimes against the Postal Service. Additionally, the new rule adds a reward for mail fraud offenses. These changes will give the Chief Postal Inspector the discretion to authorize rewards exceeding Poster 296 amounts, and to offer rewards for other offenses not specifically listed in Poster 296.

The Postal Service is publishing a final rule to update Postal Service regulations regarding the 39 CFR part 233.2, Circulars and Rewards. The circumstances which created the need for the update were as follows: (1) 39 CFR 233.2 was published as a final rule on March 29, 2004; (2) since the publication of 39 CFR 233.2, no updates have been made; (3) changes to Poster 296 will be simultaneously made with this rule change to increase reward amounts and to recategorize the types of offenses for which rewards can be offered (4) an update to 39 CFR 233.2 is required to ensure its consistency to the current Poster 296 changes.

We will publish an appropriate amendment to 39 CFR part 223 to reflect these changes.

List of Subjects in 39 CFR Part 233

Administrative practice and procedure, Banks, Banking, Credit, Crime, Infants and children, Law enforcement, Penalties, Privacy, Seizures and forfeitures.

PART 233—[AMENDED]

■ 1. The authority citation for part 233 continues to read as follows:

Authority: 39 U.S.C. 101, 102, 202, 204, 401, 402, 403, 404, 406, 410, 411, 1003, 3005(e)(1), 3012, 3017, 3018; 12 U.S.C. 3401–3422; 18 U.S.C. 981, 983, 1956, 1957, 2254, 3061; 21 U.S.C. 881; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–208, 110 Stat. 3009; Secs. 106 and 108, Pub. L. 106–168, 113 Stat. 1806 (39 U.S.C. 3012, 3017); Pub. L. 114–74, 129 Stat. 584.

■ 2. In § 233.2, revise paragraphs (a) and (b)(1), the note following paragraph (b)(2), and paragraph (c) to read as follows:

§ 233.2 Circulars and rewards.

Circulars. The Inspection Service may issue wanted circulars or notices to assist in the apprehension of fugitives sought in the connection of postal offenses. The Inspection Service may issue circulars or notices seeking information and services leading to the arrest and conviction of any person for postal offenses. Circulars and notices may offer rewards as set forth in paragraph (b) of this section.

(b) * * *

(1) Rewards may be paid for any amount up to the maximum categorical amount stated in Poster 296, under the conditions stated in Poster 296, *Notice of Reward*, for information leading to the apprehension of fugitives sought in the connection of the following postal offenses, or for information and services leading to the arrest and conviction of any person for the following postal offenses:

- (i) Robbery or attempted robbery.
- (ii) Mailing or causing to be mailed bombs, explosives, poison, weapons of mass destruction.
- (iii) Post Office burglary.
- (iv) Stealing or unlawful possession of mail or money or property of the United States under the custody or control of the Postal Service, including property of the Postal Service.
- (v) Destroying, obstructing, or retarding the passage of mail.
- (vi) Altering, counterfeiting, forging, unlawful uttering or passing of postal money orders; or the unlawful use, counterfeiting or forgery of postage stamps or other postage; or the use, sale, or possession with intent to use or sell, any forged or counterfeited postage stamp or other postage.
- (vii) Assault on postal employee.
- (viii) Murder or manslaughter of a postal employee.
- (ix) Mailing or receiving through the mail any visual depiction involving the use of a minor engaging in sexually explicit conduct, or the use of the mail

to facilitate any crime relating to the sexual exploitation of children.

(x) The use of the mails or any Postal Service product or service to engage in money laundering, mailing, or causing to be mailed any money or other financial instrument which has been obtained illegally,

(xi) Using the mail to execute a scheme to defraud or obtain money or property from another by false pretenses or promises.

(xii) Illegally mailing or causing to be mailed controlled substances, narcotics, illegal drugs, or the proceeds from the sale of illegal drugs.

(xiii) Illegally mailing or causing to be mailed any firearm.

(xiv) Defrauding the USPS Workers' Compensation Program by any current or former postal employee.

* * * * *

Note 1 to paragraph (b): The text of Poster 296, referred to in paragraph (b)(1) of this section, reads as follows:

The United States Postal Inspection Service may pay rewards up to the listed amounts for the apprehension of fugitives sought in the connection of the below listed offenses or for information and services leading to the arrest and conviction of any person for the below listed offenses:

Offenses Against USPS Employees/Contractors

MURDER OR MANSLAUGHTER: \$250,000

The unlawful killing of any officer, employee, or contractor of the Postal Service™ while engaged in or on account of the performance of his or her official duties.

ROBBERY: \$150,000

Robbery or attempted robbery of any custodian of any mail, money, or other property of the United States under the control and jurisdiction of the Postal Service.

ASSAULT ON POSTAL EMPLOYEES: \$150,000

Forcibly assaulting any officer or employee of the Postal Service while engaged in or on account of the performance of his or her official duties.

Offenses Involving Mailings

BOMBS, EXPLOSIVES, WEAPONS OF MASS DESTRUCTION, POISONS: \$250,000

Mailing or causing to be mailed any bombs, explosives, actual or simulated weapons of mass destruction, dangerous chemicals or biological materials that may kill or harm another, or injure the mail or other property, or the placing of any bomb or explosive in a postal facility, vehicle, depository, or receptacle established, approved, or designated by the Postmaster General or their designee for the receipt of mail.

CONTROLLED SUBSTANCES, NARCOTICS: \$100,000

Illegally mailing or causing to be mailed any controlled substances, illegal drugs, or the proceeds from the sale of illegal drugs.

MONEY LAUNDERING: \$100,000

The use of the mails or any Postal Service product or service to engage in money laundering, mailing or causing to be mailed any money or other financial instrument which has been obtained illegally.

FIREARMS: \$100,000

Illegally mailing or causing to be mailed any firearm.

SEXUAL EXPLOITATION OF CHILDREN: \$150,000

The use of the mail to traffic in child pornography or facilitate any other crime relating to the sexual exploitation of children.

MAIL FRAUD: \$100,000

The use of the mail to execute a scheme to defraud or obtain money or property from another by false pretenses or promises.

Offenses Involving Theft of Mail or USPS Property

BURGLARY OF POST OFFICE: \$100,000

Breaking into, or attempting to break into, a Post Office™, station, branch, a building used wholly or partly as a Post Office, or any building or area in a building where the business of the Postal Service is conducted, with intent to commit a larceny or other depredation therein.

THEFT OF MAIL OR POSTAL SERVICE PROPERTY: \$100,000

Theft or attempted theft of any mail, or the contents thereof, or the theft of money or any other property of the Postal Service or the United States under the custody and control of the Postal Service from any custodian, postal vehicle, railroad depot, airport, or other transfer point, Post Office, or station, receptacle, or depository established, approved, or designated by the Postmaster General for the receipt of mail; possession of any item above which was stolen from Postal Service custody; or destroying, obstructing, or retarding the passage of mail, or any carrier or conveyance carrying the mail.

THEFT OF POSTAL MONEY ORDERS: \$100,000

Theft or possession of stolen postal money orders or any Postal Service equipment used to imprint money orders; or altering, counterfeiting, forging, unlawful uttering, or passing of Postal money orders.

POSTAGE OR METER TAMPERING: \$100,000

The unlawful use, reuse, or forgery of postage stamps, postage meter stamps, permit imprints, or other postage; or the use, sale, or possession with intent to use or sell any used, forged, or counterfeited postage stamp or other postage.

WORKERS COMPENSATION FRAUD: \$100,000

Defrauding the USPS Workers' Compensation Program by any current or former postal employee.

Related Offenses

The United States Postal Service also offers rewards as stated above for information and services leading to the arrest and conviction

of any person: (1) for being an accessory to any of the above crimes; (2) for receiving or having unlawful possession of any mail, money, or property secured through the above crimes; and (3) for conspiracy to commit any of the above crimes.

General Provisions

1. The Postal Inspection Service investigates the above-described crimes. Information concerning the violations, requests for applications for rewards, and written claims for rewards should be furnished to the nearest Postal Inspector. The written claim for reward payment must be submitted within 6 months from the date of conviction of the offender, the date of arrest of a previously convicted fugitive, the date of formally deferred prosecution, or the date of the offender's death if the offender was killed while committing a crime or resisting lawful arrest for one of the above offenses.

2. Reward amounts shown above are the maximum amounts that may be paid; however, the Chief Postal Inspector may authorize rewards in excess of the maximum amounts for specific matters. The maximum reward amount that may be paid for information leading to the apprehension of fugitives, or for information and services leading to the arrest and conviction of any person for specific matters, or incidents may be set forth in the specific circular or notices and may be less than the maximum amount listed above.

3. Overall, the actual amount paid on any reward will be based on the significance of information provided or services rendered, character of the offender, risks and hazards involved, time spent, and expenses incurred.

4. The term "custodian" as used herein includes any person having lawful charge, control, or custody of any mail matter, or any money or other property of the United States under the control and jurisdiction of the United States Postal Service.

5. The Postal Service reserves the right to reject a claim for reward where there has been collusion or criminal involvement, or improper methods have been used to effect an arrest or to secure a conviction. It has the right to allow only one reward when several persons were convicted of the same offense, or one person was convicted of several of the above offenses. Postal employees are not eligible to receive a reward.

6. Rewards for additional offenses not specifically listed in this notice may be offered upon approval of the Chief Postal Inspector [39 U.S.C. 404 (a) (7)].

(c) *Authorization.* The Chief Postal Inspector or his delegate is authorized to pay a reward to any person who provides information leading to the detection of persons or firms who obtain, or seek to obtain, funds, property, or services from the Postal Service based upon false or fraudulent activities, statements, or claims. The decision as to whether a reward shall be paid and the amount thereof shall be solely within the discretion of the Chief Postal Inspector or his delegate and the submission of information or a claim for

a reward shall not establish a contractual right to receive any reward. The reward shall not exceed one-half of the amount collected by the Postal Service as a result of civil or criminal proceedings to recover losses or penalties as a result of false or fraudulent claims or statements submitted to the Postal Service. Postal employees assigned to the Postal Inspection Service, the Law Department, or USPS Office of Inspector General are not eligible to receive a reward under this section for information obtained while so employed. The Chief Inspector may establish such procedures and forms as may be desirable to give effect to this section including procedures to protect the identity of persons claiming rewards under this section.

Tram T. Pham,

Attorney, Ethics and Legal Compliance.

[FR Doc. 2023-15449 Filed 7-20-23; 8:45 am]

BILLING CODE 7710-12-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R09-OAR-2023-0035; FRL-10594-02-R9]

Finding of Failure to Attain the 1987 24-Hour PM₁₀ Standards; Pinal County, Arizona

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action to determine that the West Pinal County, Arizona nonattainment area ("West Pinal County" or "area") did not attain the 1987 24-hour national ambient air quality standards (NAAQS or "standards") for particulate matter with a diameter of 10 micrometers or smaller (PM₁₀) by its December 31, 2022 "Serious" area attainment date. This action is based on the EPA's calculation of the PM₁₀ design value for the nonattainment area over the 2020-2022 period, using complete, quality-assured, and certified PM₁₀ monitoring data. With this final determination that West Pinal County has failed to attain the PM₁₀ NAAQS by its attainment date, the State of Arizona is required to submit a revision to the Arizona state implementation plan (SIP) that, among other elements, provides for expeditious attainment of the PM₁₀ standards and for a five percent annual reduction in

the emissions of direct PM₁₀ or a PM₁₀ plan precursor pollutant in the nonattainment area.

DATES: This rule is effective on August 21, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R09-OAR-2023-0035. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Ashley Graham, Geographic Strategies and Modeling Section (AIR-2-2), EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105. By phone: (415) 972-3877 or by email at graham.ashleyr@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" refer to the EPA.

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- I. Summary of the Proposed Action
- II. Public Comments and EPA Responses
- III. The EPA's Final Evaluation of Attainment
- IV. Final Action
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I. Summary of the Proposed Action

On February 15, 2023, the EPA proposed to determine that the West Pinal County nonattainment area failed to attain the 1987 24-hour PM₁₀ NAAQS by its December 31, 2022 "Serious" area attainment date.¹ For a PM₁₀ nonattainment area classified as Serious under the CAA, such as the West Pinal County area, section 188(c)(2) of the CAA states that the area's attainment date is "as expeditiously as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment."

¹ 88 FR 9812.

Consequently, the applicable attainment date for West Pinal County, designated nonattainment in 2012, was December 31, 2022.² CAA sections 179(c)(1) and 188(b)(2) require the EPA to determine whether a PM₁₀ nonattainment area attained the 1987 24-hour PM₁₀ NAAQS by the area's attainment date within six months after that date. Generally, this determination of whether an area's air quality meets the PM₁₀ standards is based upon the most recent three years of complete, certified data gathered at eligible monitoring sites in accordance with 40 CFR part 58.³

An area attains the 1987 24-hour PM₁₀ standards of 150 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) when the expected number of days per calendar year with a 24-hour concentration exceeding the standards, referred to as an "exceedance",⁴ averaged over a three-year period is equal to or less than one. The expected number of exceedances averaged over a three-year period at any given monitor is known as the PM₁₀ design value for that site.⁵ The PM₁₀ design value for the nonattainment area is the highest design value from a monitor within that area. Three consecutive years of air quality data are required to show attainment of the PM₁₀ standards.

Our proposed determination that the West Pinal County area failed to attain the PM₁₀ NAAQS was based on our review of preliminary monitoring data for 2020–2022.⁶ As discussed in our

proposal,⁷ while complete 2020 and 2021 data were available, the deadlines for submission of quarter 4 (October through December) 2022 data and certification of the 2022 data had not yet passed at the time our proposal was being developed and these data had not yet been submitted and certified. The 2022 data were therefore considered incomplete and preliminary. We reviewed such data for all regulatory monitoring sites measuring PM₁₀ within the West Pinal County nonattainment area, expressed as a single design value for each site representing the preliminary average expected exceedances over the three-year period, 2020–2022. The PM₁₀ data showed that the design values at multiple monitoring sites were greater than 1.0 estimated annual average exceedances of the 1987 24-hour PM₁₀ NAAQS. Moreover, the EPA explained that even if there were zero exceedances in 2022, the 2020–2022 design value would exceed 1.0 at multiple monitoring sites. Consequently, the EPA proposed to determine, based on complete and quality-assured 2020 and 2021 data and preliminary 2022 data, that the West Pinal County nonattainment area did not attain the 1987 24-hour PM₁₀ NAAQS by the applicable attainment date of December 31, 2022.

In our proposal to determine that the West Pinal County area did not attain the NAAQS by the relevant attainment date, the EPA noted that the consequence of a final determination is that the State of Arizona would be required under CAA sections 179(d) and 189(d) to submit, by December 31, 2023, a revision to the SIP for West Pinal County.⁸ The SIP revision must, among other elements, demonstrate expeditious attainment of the standards within the time period provided under CAA section 179(d), provide for an annual reduction in the emissions of direct PM₁₀ or a PM₁₀ plan precursor pollutant within the area of not less than five percent until attainment, demonstrate reasonable further progress, and include contingency measures. The requirement for a new attainment demonstration

under CAA section 189(d) also triggers the requirement for the SIP revision for quantitative milestones under section 189(c) that are to be achieved every three years until redesignation to attainment.

Our proposed rule also discussed that because the EPA has not yet approved a Moderate or Serious area attainment plan for West Pinal County, the Moderate and Serious area requirements also remain outstanding, though the EPA anticipates that Arizona's submission of an approvable Serious area and 189(d) nonattainment plan would also satisfy the State's Moderate area nonattainment plan obligations.⁹ The EPA explained that the new attainment date is the date by which attainment can be achieved as expeditiously as practicable, but no later than five years from the date of the final determination of failure to attain, except that the EPA may extend the attainment date for a period no greater than 10 years from the final determination, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

II. Public Comments and EPA Responses

The public comment period for the proposed rule opened on February 15, 2023, the date of its publication in the **Federal Register**, and closed on March 17, 2023. During this period, the EPA received comments from the Sierra Club and from a private citizen.¹⁰ The Sierra Club comment letter expressed support for our proposal and urged the EPA to finalize the determination. The comments from the private citizen pertain to the processes followed by the Arizona Agricultural Best Management Practices Committee and are not directly relevant to this finding of failure to attain the PM₁₀ NAAQS. Copies of the Sierra Club comment letter and comments from the private citizen are included in the docket for this final action.

III. The EPA's Final Evaluation of Attainment

As discussed in Section I of this document, our proposed determination that the West Pinal County area failed to attain the 1987 24-hour PM₁₀ NAAQS was based on the EPA's calculation of

² The EPA's proposed rule discusses that on May 31, 2022, the Arizona Department of Environmental Quality adopted and submitted the "2022 Serious Area Particulate Plan for PM-10 for the West Pinal County Nonattainment Area", which included a request for an extension of the December 31, 2022 attainment date pursuant to CAA section 188(e), but that the EPA has not approved the plan or attainment date extension. Therefore, the maximum Serious area attainment date for West Pinal County remains December 31, 2022.

³ 40 CFR part 50, Appendix K, section 2.3(a).

⁴ An exceedance is defined as a daily value that is above the level of the 24-hour standards, 150 $\mu\text{g}/\text{m}^3$, after rounding to the nearest 10 $\mu\text{g}/\text{m}^3$ (*i.e.*, values ending in five or greater are to be rounded up). Consequently, a recorded value of 154 $\mu\text{g}/\text{m}^3$ would not be an exceedance because it would be rounded to 150 $\mu\text{g}/\text{m}^3$; whereas, a recorded value of 155 $\mu\text{g}/\text{m}^3$ would be an exceedance because it would be rounded to 160 $\mu\text{g}/\text{m}^3$. See 40 CFR 50.6 and 40 CFR part 50, Appendix K, section 1.0.

⁵ A design value is calculated using a specific methodology from monitored air quality data and is used to compare an area's air quality to a NAAQS. The methodologies for calculating expected exceedances for the 1987 24-hour PM₁₀ NAAQS are found in 40 CFR part 50, Appendix K, Section 2.1(a).

⁶ The EPA also based the determination on the adequacy of the PM₁₀ monitoring network in the nonattainment area and the reliability of the data collected by that network (88 FR 9812, 9814). For purposes of our proposal, we reviewed findings from the EPA's 2019 technical systems audit (TSA), which was the most recent TSA available at that

time. For purposes of this final action, we also reviewed the findings from the EPA's 2022 TSA (see EPA Region IX, Technical Systems Audit of the Ambient Air Monitoring Program: Pinal County Air Quality Control District, September 13–15, 2022 (Final Report dated May 2023)). As with the 2019 TSA, none of the findings from the 2022 TSA were cause for invalidation of any data from the relevant monitors and thus the EPA continues to find that the data collected at the West Pinal monitoring sites are suitable for determining whether West Pinal County attained the PM₁₀ NAAQS by the applicable attainment date.

⁷ 88 FR 9812, 9814.

⁸ 88 FR 9812, 9815.

⁹ *Id.*

¹⁰ Comment submitted March 17, 2023, from Sierra Club to docket number EPA–R09–OAR–2023–0035, with attached letter dated March 17, 2023, from Sandy Bahr, Chapter Director, Sierra Club—Grand Canyon Chapter, to Ashley Graham, Air Planning Office (AIR–2), EPA Region IX; and comment submitted March 17, 2023, from Dan Blackson, to docket number EPA–R09–OAR–2023–0035.

the preliminary PM₁₀ design value for the nonattainment area over the 2020–2022 period. Since the time of the EPA’s proposal, the Pinal County Air Quality Control District has submitted the 2022 quarter 4 data to the EPA’s Air Quality System (AQS) database,¹¹ and has certified that the 2022 concentration data are accurate, taking into consideration the quality assurance findings.¹²

For purposes of this final action, we reviewed the final quality-assured and

certified PM₁₀ air quality monitoring data from the 2020–2022 calendar years. Table 1 of this document provides the estimated number of PM₁₀ exceedances in each of the years 2020–2022, and final certified 2022 PM₁₀ design values expressed as a single value representing the average expected exceedances over the three-year period, 2020–2022, for all regulatory monitoring sites measuring PM₁₀ within West Pinal County. These design values are identical to those

shown in our proposal and are greater than 1.0 estimated annual average exceedance of the 1987 24-hour PM₁₀ NAAQS at multiple monitoring sites. Consequently, the EPA is finalizing a determination that, based on complete and quality-assured 2020–2022 data, West Pinal County did not attain the 1987 24-hour PM₁₀ NAAQS by the applicable attainment date of December 31, 2022.

TABLE 1—2020–2022 PM₁₀ ESTIMATED EXCEEDANCES FOR THE WEST PINAL COUNTY NONATTAINMENT AREA

Monitoring site	AQS site ID No.	PM ₁₀ estimated exceedances			
		2020	2021	2022	2020–2022
Casa Grande Downtown	04–021–0001–3	1.2	2	0	1.1
Stanfield	04–021–3008–3	4	4	2	3.3
Combs	04–021–3009–3	0	1	0	0.3
Pinal County Housing (aka Eleven Mile Corner)	04–021–3011–3	1	3	0	1.3
Eloy	04–021–3014–3	2.2	3	0	1.7
Hidden Valley	04–021–3015–3	59.6	24	14.1	32.6
Maricopa 1405	04–021–3016–3	3	2	1	2

Source: EPA AQS Design Value Report, AMP 480, dated May 23, 2023. (User ID: JCARLSTAD, Report Request ID: 2107794).

IV. Final Action

In accordance with sections 179(c)(1) and 188(b)(2) of the CAA, the EPA is taking final action to determine that the West Pinal County Serious nonattainment area did not attain the 1987 24-hour PM₁₀ NAAQS by the Serious area attainment date of December 31, 2022. Our determination that West Pinal County failed to attain the PM₁₀ NAAQS is based on complete, quality-assured, and certified PM₁₀ monitoring data for the appropriate three-year period, 2020–2022.

As a result of our determination of failure to attain the 1987 24-hour PM₁₀ NAAQS by the Serious area attainment date, Arizona is required under CAA sections 179(d) and 189(d) to submit a revision to the SIP for West Pinal County that, among other elements, demonstrates expeditious attainment of the standards within the time period provided under CAA section 179(d), and that provides for an annual reduction in the emissions of direct PM₁₀ or a PM₁₀ precursor pollutant within the area of not less than five percent until attainment. The SIP revision required under CAA sections 179(d) and 189(d) will be due for submittal to the EPA no later than December 31, 2023.

¹¹ AQS is the EPA’s national repository of ambient air quality data.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the provisions of 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 does not impose any requirements on small entities. This action requires the State to adopt and submit SIP revisions to satisfy CAA requirements and does not itself directly regulate any small entities.

¹² Letter dated April 27, 2023, from Josh DeZeeuw, Air Quality Manager, Pinal County Air Quality Control District, to Dena Vallano, Manager,

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate of \$100 million or more, as described in UMRA (2 U.S.C. 1531–1538) and does not significantly or uniquely affect small governments. This action itself imposes no enforceable duty on any state, local, or tribal governments, or the private sector. This action determines that West Pinal County failed to attain the NAAQS by the applicable attainment date. As of the effective date, this determination triggers existing statutory timeframes for the state to submit a SIP revision. Such a determination in and of itself does not impose any federal intergovernmental mandate.

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: Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. As there are no federally recognized tribes within West Pinal

Monitoring and Analysis Section, U.S. EPA Region IX, Subject: “RE: AQS Data Certification—2022.”

County,¹³ the finding of failure to attain the PM₁₀ NAAQS does not apply to tribal areas, and the rule would not impose a burden on Indian reservation lands or other areas where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction within West Pinal County. Thus, this rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175.

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 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 the effect of this action is to trigger additional planning requirements under the CAA. This action does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This final rule is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

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 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color and/or Indigenous peoples) and low-income populations. There is no information in the record indicating that this action

would be inconsistent with the stated goals of Executive Order 12898 of achieving environmental justice for people of color, low-income populations, and indigenous peoples.

K. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability. This rule makes factual determinations for specific entities and does not directly regulate any entities. The determination of a failure to attain by the attainment date and reclassification does not in itself create any new requirements beyond what is mandated by the CAA.

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2023. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Particulate matter, Reporting and recordkeeping requirements.

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

Dated: July 13, 2023.

Martha Guzman Aceves,
Regional Administrator, Region IX.

Part 52, Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart D—Arizona

■ 2. Section 52.126 is amended by adding paragraph (e) to read as follows:

§ 52.126 Control strategy and regulations: Particulate matter.

* * * * *

(e) Effective August 21, 2023, the EPA has determined that the West Pinal Serious PM₁₀ nonattainment area failed

to attain the 1987 24-hour PM₁₀ NAAQS by the applicable attainment date of December 31, 2022. This determination triggers the requirements of CAA sections 179(d) and 189(d) for the State of Arizona to submit a revision to the Arizona SIP for West Pinal to the EPA by December 31, 2023. The SIP revision must, among other elements, demonstrate expeditious attainment of the 1987 PM₁₀ NAAQS within the time period provided under CAA section 179(d) and provide for an annual reduction in the emissions of direct PM₁₀ or a PM₁₀ plan precursor pollutant within the area of not less than five percent until attainment.

[FR Doc. 2023–15339 Filed 7–20–23; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 70 and 71

[EPA–HQ–OAR–2016–0186; FRL–8961–02–OAR]

RIN 2060–AV39

Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is removing the “emergency” affirmative defense provisions from the EPA’s title V operating permit program regulations. These provisions established an affirmative defense that sources could have asserted in enforcement cases brought for noncompliance with technology-based emission limitations in operating permits, provided that the exceedances occurred due to qualifying emergency circumstances. These provisions, which have never been required elements of state operating permit programs, are being removed because they are inconsistent with the EPA’s interpretation of the enforcement structure of the Clean Air Act (CAA or the Act) in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit. The removal of these provisions is also consistent with other recent EPA actions involving affirmative defenses and would harmonize the EPA’s treatment of affirmative defenses across different CAA programs. Through this document, the EPA is also providing guidance on the implementation process resulting from

¹³ A map of Federally-Recognized Tribes in the EPA’s Pacific Southwest (Region IX) is available at <https://www.epa.gov/tribal-pacific-sw/map-federally-recognized-tribes-epas-pacific-southwest-region-9>.

the removal of the emergency affirmative defense provisions from the EPA's regulations, including the need for some state, local, and tribal permitting authorities to submit program revisions to the EPA to remove similar title V affirmative defense provisions from their EPA-approved title V programs, and to remove similar provisions from individual operating permits.

DATES: This final rule is effective on August 21, 2023.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2016-0186. All documents in the docket are listed on the <http://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Corey Sugerik, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504-05), Environmental Protection Agency, Research Triangle Park, NC; telephone number: (919) 541-3223; email address: sugerik.corey@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How is this Federal Register document organized?

The information presented in this preamble is organized as follows:

I. General Information

- A. How is this **Federal Register** document organized?
- B. Does this action apply to me?
- C. Where can I get a copy of this document and other related information?

II. Background and Overview of the Final Action

III. Response to Significant Comments

- A. Affirmative Defenses and the NRDC Decision
- B. Exemptions and the Sierra Club Decision
- C. Other Legal and Policy Considerations
- D. Potential Impacts
- E. Response to Comments Outside the Scope of This Action

IV. Implementation Considerations

- A. Program Revisions
- B. Permit Revisions

V. Statutory and Executive Order Reviews

- A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

- B. Paperwork Reduction Act (PRA)
- C. Regulatory Flexibility Act (RFA)
- D. Unfunded Mandates Reform Act (UMRA)
- E. Executive Order 13132: Federalism
- F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
- G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
- H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
- I. National Technology Transfer and Advancement Act
- J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
- K. Congressional Review Act (CRA)
- VI. Statutory Authority
- VII. Judicial Review

B. Does this action apply to me?

Entities potentially directly affected by this rulemaking include federal, state, local, and tribal air pollution control agencies that administer title V operating permit programs.¹ Entities potentially indirectly affected by this rulemaking include owners and operators of emissions sources in all industry groups who hold or apply for title V operating permits.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this **Federal Register** document will be posted at <https://www.epa.gov/title-v-operating-permits/current-regulations-and-regulatory-actions>.

II. Background and Overview of the Final Action

The EPA has promulgated permitting regulations applicable to the operation of major and certain other sources of air pollutants under title V of the CAA. These regulations are codified in 40 CFR parts 70 and 71, which contain the requirements for state operating permit programs and the federal operating permit program, respectively. These regulations contained identical provisions establishing an affirmative defense that sources could assert in enforcement actions brought for noncompliance with technology-based emission limitations caused by specific emergency circumstances. These

¹ This preamble makes frequent use of the term "state," usually meaning the state air pollution control agency that serves as the permitting authority. The use of the term "state" also applies to local, tribal, and U.S. territorial air pollution control agencies, where applicable.

"emergency" provisions were located at 40 CFR 70.6(g) and 71.6(g).

In this action, the EPA is removing the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g) because they are inconsistent with the EPA's current interpretation of the enforcement structure of the CAA, in light of prior court decisions from the U.S. Court of Appeals for the D.C. Circuit—primarily the court's 2014 decision in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014). The removal of these provisions is also consistent with other recent EPA actions involving affirmative defenses² and will harmonize the EPA's treatment of affirmative defenses across different CAA programs. The EPA previously provided background on the title V emergency provisions and articulated its justification for this action in the preamble to the 2016 and 2022 proposed rules preceding this final rule.^{3,4} Section III. of this document responds to significant comments we received on those proposals and provides additional information in support of this final rule.

As a consequence of the EPA's action to remove these provisions from 40 CFR 70.6(g), it will be necessary for any states that have adopted similar affirmative defense provisions in their part 70 operating permit programs to revise their part 70 programs to remove these provisions. In addition, individual operating permits that contain title V affirmative defenses based on 40 CFR 70.6(g) or similar state regulations will eventually need to be revised. The EPA discussed its expectations concerning how states will implement this rule in section V. of the preamble to the 2016 proposed rule and also requested

² In newly issued and revised New Source Performance Standards (NSPS), emission guidelines for existing sources, and NESHAP regulations, the EPA has either omitted new affirmative defense provisions or removed existing affirmative defense provisions. See, e.g., National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants; Final Rule, 80 FR 44771 (July 27, 2015); National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Final Rule, 80 FR 72789 (November 20, 2015); Standards of Performance for New Stationary Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units; Final Rule, 81 FR 40956 (June 23, 2016).

³ See Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and Federal Operating Permit Program, Proposed Rule, 81 FR 38645 (June 14, 2016); Removal of Title V Emergency Affirmative Defense Provisions From State Operating Permit Programs and the Federal Operating Permit Program, Proposed Rule, 87 FR 19042 (April 1, 2022).

⁴ Docket No. EPA-HQ-OAR-2016-0186 comprises all supporting documents and public comments for both the 2016 and 2022 proposals.

comments on some of the aspects discussed. Additional information regarding these implementation considerations and the EPA's response to relevant comments received on these issues are included in section IV. of this document.

EPA expects that program revisions to remove the title V emergency defense provisions from state operating permit programs will include, at minimum: (1) a redline document identifying the state's proposed revision to its part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.

In general, any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business, such as during periodic permit renewals or revisions. At the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

III. Response to Significant Comments

This section contains the EPA's response to significant comments regarding the EPA's proposed action to remove 40 CFR 70.6(g) and 71.6(g) and provides the EPA's justification for this final action. Comments and the EPA's responses are divided into four general topic areas: section III.A. of this document discusses the legal basis for this action in light of the *NRDC* decision; section III.B. discusses issues related to exemptions from emission limitations and the D.C. Circuit's 2008 decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008); section III.C. discusses other legal and policy considerations; and section III.D. discusses various issues involving the consequences of removing the title V emergency affirmative defense provisions from operating permit programs, focusing primarily on the impact on sources.

A. Affirmative Defenses and the *NRDC* Decision

The following subsections address comments received concerning the *NRDC* decision and the EPA's legal basis for this action. Subsections III.A.1. and III.A.2. of this document address general comments either supporting or opposing the EPA's interpretation of the *NRDC* decision. Subsection III.A.3. addresses specific comments concerning the extent to which the *NRDC* decision should apply beyond the context of citizen-suit enforcement under CAA section 304, and how the decision should inform the EPA's treatment of affirmative defenses in the context of EPA-initiated judicial enforcement and administrative penalty actions under CAA sections 113(b) and (d). Specific comments that discuss the relationship between the *NRDC* decision and prior case law are presented in section III.C.2. of this document.

1. Support for the EPA's Interpretation of the CAA's Enforcement Structure in Light of the *NRDC* Decision

Comment: Multiple environmental and state commenters supported the EPA's view that, in light of *NRDC*, the title V emergency affirmative defense provisions should be removed because they impermissibly limit the authority of courts to decide appropriate penalties in private civil suits. Some commenters claimed that the EPA lacks the authority to create such provisions. Other state and industry commenters acknowledged that the *NRDC* decision limits the EPA's discretion to retain affirmative defense provisions, either altogether or in certain contexts. Commenters argued that when Congress wanted to limit the authority of courts, to allow an affirmative defense or to permit an extrajudicial entity to modify penalties, it did so expressly, citing CAA sections 113(e)(1), 113(c)(5)(C)–(D), and 113(d)(2)(B).

Some commenters asserted that the *NRDC* decision applies beyond the specific context of CAA section 112 standards because the court's rationale was based on CAA sections 113 and 304, not CAA section 112. Therefore, commenters concluded that the prohibition on affirmative defenses applies to any citizen-enforceable emission standards or limitations under the Act. Commenters claimed that *NRDC* is applicable to the title V emergency affirmative defense provisions because, like the hazardous air pollution standards at issue in *NRDC*, all other emission standards contained in title V operating permits are enforceable under CAA section 304.

Some commenters further asserted that the fundamental principles underlying the *NRDC* decision with respect to affirmative defenses were reinforced by the D.C. Circuit's 2016 decision in *U.S. Sugar v. EPA*.⁵

Response: The EPA generally agrees with commenters supporting the legal basis for this action to remove the emergency affirmative defense provisions from the EPA's title V regulations. The EPA previously explained its legal rationale for this action in the 2016 and 2022 proposed rules.⁶ Here, the EPA reiterates some of the primary legal principles guiding this current action.

The EPA's current interpretation of the CAA with respect to affirmative defenses is informed by the D.C. Circuit's *NRDC* decision. In *NRDC*, the D.C. Circuit vacated affirmative defense provisions contained in the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) for the portland cement industry, promulgated under CAA section 112. The D.C. Circuit concluded that the EPA lacked the authority to create these affirmative defense provisions because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Importantly, the court's decision did not turn upon any specific provisions of CAA section 112, but rather on the provisions of CAA sections 113 and 304. These provisions

⁵ *U.S. Sugar Corp. v. EPA*, 830 F.3d 579 (D.C. Cir. 2016), *amended on rehearing on unrelated grounds*, *U.S. Sugar Corp. v. EPA*, 844 F.3d 268 (D.C. Cir. 2016).

⁶ See 81 FR 38649. As noted in the 2016 and 2022 proposals, the EPA has also previously explained its interpretation of the CAA in light of the *NRDC* decision at great length in multiple other documents, including documents supporting the EPA's 2015 SSM SIP Action. See 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; Supplemental Proposal To Address Affirmative Defense Provisions in States Included in the Petition for Rulemaking and in Additional States, Supplemental Notice of Proposed Rulemaking, 79 FR 55919, 55929 (September 17, 2014) (SSM SIP Action Supplemental Proposal); State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction, Final Action, 80 FR 33839, 33851 (June 12, 2015) (SSM SIP Action); and Memorandum, Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy, 3–4 (September 30, 2021), available at <https://www.epa.gov/system/files/documents/2021-09/oar-21-000-6324.pdf> (September 2021 SSM SIP Memo).

pertain to enforcement of a wide variety of CAA requirements beyond section 112 standards, including enforcement of emission limits contained in title V permits. Thus, the mere fact that the court addressed the legality of an affirmative defense provision in the context of a section 112 NESHAP does not mean that the court's interpretation of sections 113 and 304 does not also apply more broadly. To the contrary, the EPA sees no reason why the logic of the court concerning sections 113 and 304 would not apply to the title V emergency affirmative defense provisions, as well.

Notably, in 2016, the D.C. Circuit reaffirmed its *NRDC* opinion concerning affirmative defenses. In *U.S. Sugar*, the D.C. Circuit addressed various challenges to rules promulgated in 2011, including challenges urging that—in the absence of affirmative defenses—the EPA was required to address periods of malfunction in setting the applicable standards. Discussing *NRDC*, the *U.S. Sugar* opinion stated that the affirmative defense provision at issue in the *NRDC* case was “an impermissible intrusion on the judiciary’s role.”⁷ The fact that the title V emergency affirmative defenses arguably apply more broadly (i.e., to potentially numerous technology-based emission limits developed under multiple CAA program areas) than the affirmative defense at issue in *NRDC* potentially makes it even more intrusive on the judiciary’s role.

In light of the *NRDC* decision and the EPA’s reevaluation of the CAA, the EPA interprets the enforcement provisions in sections 113 and 304 of the CAA to preclude affirmative defense provisions that would operate to limit a court’s authority or discretion to determine the appropriate remedy in an enforcement action. Section 304(a) grants the federal district courts jurisdiction to determine liability and to impose penalties in enforcement suits brought by citizens. Similarly, section 113(b) grants the federal district courts jurisdiction, in enforcement actions brought by the U.S. Department of Justice (DOJ) on behalf of the EPA, to determine liability and to impose remedies of various kinds, including injunctive relief and monetary penalties. These grants of jurisdiction come directly from Congress, and the EPA is not authorized to alter or eliminate this authority. With respect to monetary penalties, CAA section 113(e) lists various factors that courts and the EPA shall consider in the event of judicial or administrative enforcement for violations of CAA requirements, including title V permit conditions.

Because Congress has already given federal courts the authority to determine what penalties are appropriate in the event of judicial enforcement for a violation of a title V permit provision, neither the EPA nor states should be able to alter or eliminate that authority by superimposing restrictions on the authority and discretion granted by Congress to the courts. Affirmative defense provisions by their nature limit or eliminate the authority of federal courts to determine liability or to impose remedies through considerations that differ from the explicit grants of authority in section 113(b) and section 113(e). Therefore, these provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. The emergency affirmative defense provisions that the EPA is removing from 40 CFR 70.6(g) and 71.6(g) purported to interfere with the authority of the courts to determine whether and to what extent penalties or other remedies were appropriate in judicial enforcement actions, conflicted with the holding of *NRDC*, and were contrary to the enforcement structure of the CAA. Thus, the EPA has determined that these provisions should be removed from the EPA’s regulations.

Section IV.A. of this document contains additional information concerning the need for states to submit program revisions to remove similar title V affirmative defense provisions from EPA-approved state operating permit programs, and to remove similar provisions from individual operating permits.

2. Comments Suggesting That the *NRDC* Case Is a Narrow Decision That the EPA Is Incorrectly Extending or Misapplying

Comment: Some commenters stated that the D.C. Circuit’s decision in *NRDC v. EPA* was limited to the particular facts or circumstances of that case and that the EPA’s reliance on the decision to support removal of the title V emergency affirmative defense provisions is an incorrect extension or misapplication of the decision. Commenters generally claimed that the EPA should not apply the *NRDC* court’s ruling to every corner of the CAA, including to the title V affirmative defense provisions within the EPA’s regulations and state operating permit programs. Some commenters stated that the *NRDC* decision only invalidated an affirmative defense associated with a NESHAP issued in accordance with CAA section 112, and that the decision should be limited to those standards (or, even, to the specific standards for

portland cement plants subject to that litigation). Commenters alleged that the D.C. Circuit provided no language to broaden its ruling. Some commenters focused on the specific statutory mandates involved in establishing section 112 standards. One commenter alleged that the D.C. Circuit held that once a section 112 standard is promulgated and established for all operating modes, no “gap” remains for the EPA to create an affirmative defense.

Other commenters focused on the differences between title V permits and the section 112 standards that the *NRDC* court considered. These commenters explained that title V permits contain numerous different underlying standards applicable to a source (such as standards developed under a State Implementation Plan (SIP) or under New Source Review Programs), as well as additional procedural and monitoring, reporting, and recordkeeping requirements. Thus, one commenter asserted that enforcement of title V permit requirements differs from enforcement of specific section 112 emission limits, and that the D.C. Circuit’s logic prohibiting affirmative defenses does not apply to other types of applicable requirements in a title V permit, including substantive standards as well as administrative or procedural requirements.

Some commenters attempted to distinguish the title V emergency affirmative defense, which at least one commenter characterized as a defense to “liability” or “noncompliance,” from the affirmative defense to “civil penalties” at issue in the *NRDC* case. One commenter claimed that the *NRDC* decision was based on the assumption that excess emissions automatically result in a violation of a section 112 standard, and therefore that the D.C. Circuit only addressed how affirmative defense provisions affect a court’s authority to determine appropriate remedies *after* an actionable violation has been identified. Multiple commenters asserted that neither CAA section 113 nor the *NRDC* case speak to provisions that define when a violation has occurred. Some commenters also asserted that the *NRDC* decision involved an affirmative defense for malfunctions, not emergencies, and concluded that the EPA should not apply the decision to the title V emergency affirmative defense because malfunctions are not similar in nature to emergencies.

Some commenters also claimed more generally that the title V affirmative defense provisions do not impair a court’s ability to decide whether a source has met its burden of

⁷ See *U.S. Sugar*, 830 F.3d at 607.

demonstrating that an emergency has occurred and whether civil penalties are appropriate. Other commenters discussed the breadth of the *NRDC* case with respect to SIP provisions. Commenters asserted that the D.C. Circuit did not opine on the authority of the EPA or states to provide relief from noncompliance with technology-based SIP standards that are incorporated into title V operating permits. Commenters also claimed that the D.C. Circuit expressly reserved judgment concerning the validity of such defenses in SIPs,⁸ and that states have discretion under the CAA to include affirmative defense provisions in their SIPs. These commenters attempted to distinguish SIPs from the section 112 standards at issue in the *NRDC* case. Multiple commenters also incorporated in their comment submissions various attachments related to the Startup, Shutdown, and Malfunction (SSM) SIP Action,⁹ including comments submitted on the initial and supplemental SSM SIP Call proposals¹⁰ as well as briefs filed in the ongoing SSM SIP Action litigation.¹¹ Portions of these attachments addressed the EPA's interpretation of the *NRDC* case.

Response: The EPA disagrees with commenters' assertions that the logic of the *NRDC* case was restricted to the context of section 112 standards, or to a single NESHAP standard. Most of these comments do not address the fundamental legal principles upon which the D.C. Circuit based its decision, or the EPA's explanation of these principles. Contrary to what some commenters suggest, the *NRDC* decision was not based on any statutory mandates specific to promulgating CAA section 112 standards. Instead, the decision was based on CAA sections 113 and 304, which apply broadly to the enforcement of a wide range of CAA requirements, including SIP requirements. Thus, any differences between section 112 standards and other standards contained in title V permits (or, for example, the difference between malfunctions and emergencies) are irrelevant to the legal principles upon which the *NRDC* decision was based, and which apply equally well to the EPA's title V regulations in 40 CFR

70.6(g) and 71.6(g), as discussed in the preceding subsection.

The EPA also disagrees that *NRDC* is distinguishable from the current action due to any functional differences between the affirmative defense at issue in *NRDC*, which some commenters characterized as a defense to a claim for civil penalties for violations, and the title V emergency affirmative defense, which commenters characterized as a defense to an action brought for noncompliance. Both the title V affirmative defense and the portland cement NESHAP malfunction affirmative defense (originally located at 40 CFR 63.1344) established an affirmative defense that a source could assert in actions brought under CAA sections 113 and 304, after an enforcement action had been initiated for an alleged violation.¹² Both affirmative defense provisions functioned in the same manner. The fact that the portland cement defense was confined to enforcement actions for penalties, whereas the title V provisions do not on their face contain such an explicit restriction and could potentially be read more broadly, is irrelevant to the fact that both provisions purported to interfere with the authority of courts to determine whether and to what extent relief is appropriate in a given case, including relief from penalties. Moreover, CAA section 304(a), upon which the D.C. Circuit relied, is not restricted to monetary penalties. The EPA has previously explained its position that affirmative defenses are inappropriate regardless of what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. The EPA also notes that the title V emergency affirmative defense provisions were explicitly restricted to noncompliance with technology-based emission limits (such as emission limits derived from a NESHAP similar to the ones the D.C. Circuit invalidated) and were never available as a defense in an enforcement case for violations of other types of title V permit requirements, contrary to some commenters' assertions.

Finally, the EPA disagrees with commenters' claims that the title V affirmative defense provisions would not impair a court's ability to decide whether civil penalties are appropriate because a source attempting to invoke the title V emergency affirmative defense would have the burden to prove that an emergency occurred and other

demonstration requirements had been met. The affirmative defense provision formerly in the portland cement NESHAP was similarly structured, and the D.C. Circuit nonetheless found that those provisions impermissibly intruded into the judiciary's role to determine whether penalties are appropriate. Any comments challenging the holding of the D.C. Circuit in *NRDC* are beyond the scope of this rulemaking. To the extent that commenters suggested that a title V affirmative defense provision could be appropriate with respect to certain technology-based SIP requirements contained in a title V permit, the EPA disagrees. For the reasons previously discussed, affirmative defense provisions in title V permits are not appropriate with respect to any federally-enforceable requirements. To the extent that commenters discussed the relationship between the *NRDC* and *Sierra Club* cases and affirmative defense provisions contained within SIPs, and to the extent that commenters incorporated comments or briefs relevant to the SSM SIP Action but did not specifically explain how those comments were pertinent to the EPA's proposal to eliminate the title V emergency affirmative defense provisions, such comments are beyond the scope of this current rulemaking. Moreover, the EPA has previously responded to those comments and legal briefs in the appropriate venues.¹³ To the extent that comments addressed issues relevant to this action, the EPA is responding to these comments in this document.

3. The *NRDC* Case As It Applies Beyond Citizen-Suit Enforcement Under CAA Section 304(a)

Comment: Many commenters argued that the *NRDC* decision only invalidated affirmative defenses that could be asserted in citizen suits brought under CAA section 304 in federal court. These commenters asserted that the *NRDC* case does not require the EPA to remove affirmative defenses with respect to either: (1) EPA-initiated civil judicial enforcement actions under section 113(b); or (2) administrative penalty actions brought under section 113(d). Many of these commenters recommended that instead of entirely

⁸ Commenters cited *NRDC*, 749 F.3d at 1064 n.2.

⁹ SSM SIP Action, 80 FR 33840.

¹⁰ 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; Proposed Rule, 78 FR 12460 (February 22, 2013); SSM SIP Action Supplemental Proposal, 79 FR 55919.

¹¹ *Environmental Committee of the Florida Electric Power Coordinating Group, Inc. v. EPA*, No. 15–1239 (D.C. Cir.) (SSM SIP Action litigation).

¹² To the extent that commenters argue that the title V affirmative defenses function to define when a violation has occurred, these comments are addressed further in section III.B.1. of this document.

¹³ See SSM SIP Action, 80 FR 33840, 33852 (noting that “[s]tates have great discretion in how to devise SIP provisions, but they do not have discretion to create provisions that contradict fundamental legal requirements of the CAA” and that “[t]he jurisdiction of federal courts to determine liability and to impose statutory remedies for violations of SIP emission limitations is one such fundamental requirement”); Initial Brief of Respondent EPA, SSM SIP Action Litigation (filed July 26, 2016).

removing the title V emergency affirmative defense provisions, the EPA should amend the provisions to clarify that they do not apply to any enforcement actions based on section 304, but only to actions based on sections 113(b) and (d).

First, regarding EPA-initiated enforcement under section 113(b), some commenters acknowledged the EPA's position (as explained in the 2016 proposed rule) that, because both sections 304 and 113(b) vest federal district courts with the ability to determine liability and assess penalties, the EPA's hands are tied with respect to its own civil enforcement. One commenter noted that the *NRDC* case did not directly speak to enforcement actions brought by the EPA under section 113(b). Other commenters claimed that section 113(b) does nothing to impede the EPA's ability to define the circumstances under which it is "appropriate" to initiate an enforcement action, and that this would not interfere with the authority of a court to determine liability and assess penalties in an eventual enforcement action. Some commenters suggested that the EPA could use the affirmative defense to define by rule when it would be appropriate to commence an enforcement action, and others noted that the practical effect of the defense is to define when the EPA will exercise its enforcement discretion to initiate an enforcement action in the courts.

Second, regarding the EPA's authority to assess administrative penalties under section 113(d), commenters cited language from the *NRDC* decision, wherein the D.C. Circuit noted that, although the EPA did not have discretion to determine whether civil penalties should be imposed by a court, the agency had discretion to determine whether to assess administrative penalties under section 113(d).¹⁴ Various commenters similarly alleged that because CAA section 113(d) explicitly gives the EPA the authority to modify penalties, it therefore allows the EPA to establish an affirmative defense in the context of administrative enforcement. Some commenters claimed that retaining the title V affirmative defense for administrative enforcement is especially important because most penalties related to emission exceedances are imposed through administrative penalties sought by the agency, not as a result of citizen suits in federal court. Finally, some commenters suggested that the EPA could define

when it would be appropriate to assess administrative penalties.

Commenters also made similar arguments with respect to the ability of states to determine when it would be appropriate to pursue enforcement action, whether through the courts or with respect to administrative penalties.

Response: The EPA disagrees with the claim that it would be appropriate to retain the title V affirmative defense provisions for use in EPA-initiated judicial enforcement or administrative penalty actions. First, as explained previously and as acknowledged by commenters, the logic of the *NRDC* case applies not only to citizen-suit actions under section 304(a), but also to judicial enforcement actions initiated by DOJ on behalf of the EPA pursuant to section 113(b). Like section 304(a), section 113(b) involves enforcement actions that are ultimately brought before federal courts. Therefore, any affirmative defense that could be asserted in an enforcement proceeding brought under section 113(b) would similarly infringe on the authority of courts to determine appropriate penalties. Regarding suggestions that the EPA could treat the affirmative defense as establishing criteria defining whether the EPA considers it "appropriate" to commence an enforcement action under section 113(b), the EPA finds that this is not necessary or appropriate. For the reasons provided in section III.D.2. of this document, the EPA has decided not to explicitly codify such an "enforcement discretion" type provision.

Second, the EPA acknowledges that *NRDC* does not address the EPA's authority to establish an affirmative defense to CAA section 113(d) administrative actions. However, such an affirmative defense is not necessary. As discussed further in section III.D.2., if a source believes it is unable to comply with emissions standards as a result of an emergency, the EPA may use its case-by-case enforcement discretion to determine whether to initiate enforcement, as appropriate. Further, as the D.C. Circuit recognized, in an EPA or citizen enforcement action, the court has the discretion to consider any defense raised and determine whether penalties are appropriate.¹⁵ The same is true for EPA administrative actions. Moreover, assessment of

penalties for violations in administrative proceedings and judicial proceedings should generally be consistent. *Cf.* CAA section 113(e), 42 U.S.C. 7413(e) (requiring both the Administrator of the EPA and the court to take specified criteria into account when assessing penalties). The EPA has previously explained this approach in various rules developed under CAA sections 111, 112, and 129.¹⁶

Section IV.A.3. of this document discusses similar issues regarding how states may be able to implement this rule by retaining or developing similar provisions that apply in the limited context of state-initiated administrative enforcement actions or judicial enforcement in state courts.

B. Exemptions and the Sierra Club Decision

In the 2016 proposed rule, the EPA noted that the D.C. Circuit in *Sierra Club* vacated an EPA rule that exempted sources from otherwise applicable emissions standards during periods of SSM because the SSM exemption violated the CAA requirement that such standards apply continuously. The EPA stated that, although the title V emergency affirmative defenses were not exemptions, if they were to be construed or treated as exemptions, they would run afoul of *Sierra Club* and also should be removed for that reason. The EPA received various comments relating to these issues.

1. Comments Suggesting That the Title V Emergency Provisions Create an Exemption to Emission Limits or Define Whether a Violation Has Occurred

Comment: Commenters presented differing perspectives on how the title V emergency affirmative defense provisions function. The majority of commenters addressing this topic supported the EPA's position that the title V affirmative defense provisions, by their terms, clearly function as an affirmative defense, rather than as exemptions or provisions that define when a violation occurs. Commenters supporting this perspective explained that applicable emission limits would still apply during an emergency, and exceedances would still constitute a

¹⁵ See *NRDC*, 749 F.3d at 1064; see also *U.S. Sugar*, 830 F.3d at 609. ("[Sources] can argue that penalties should not be assessed because of an unavoidable malfunction" and courts "should not hesitate to exercise their judicial authority to craft appropriate civil remedies in the case of emissions exceedances caused by unavoidable malfunctions.")

¹⁶ See, e.g., National Emission Standards for Hazardous Air Pollutants Residual Risk and Technology Review for Flexible Polyurethane Foam Production; Final Rule, 79 FR 48073, 48082 n.3 (August 15, 2014); Oil and Natural Gas Sector: Reconsideration of Additional Provisions of New Source Performance Standards; Final Rule, 79 FR 79017, 79024 n.3 (December 31, 2014); National Emission Standards for Hazardous Air Pollutants: Polyvinyl Chloride and Copolymers Production Reconsideration; Proposed Rule, 85 FR 71490 n.16 (November 9, 2020).

¹⁴ See *NRDC*, 749 F.3d at 1063.

violation, but sources could later assert the affirmative defense in an effort to demonstrate to either the agency or a judge that, despite a violation of the applicable requirement, there are valid reasons to excuse the source from some or all penalties associated with the violation. Another commenter noted the very strict conditions that a source attempting to claim the affirmative defense for an emergency would have to comply with and document in order to be eligible for the affirmative defense. Similarly, commenters acknowledged that asserting this defense would not automatically mean it was granted.

However, other commenters suggested that the affirmative defense provisions functionally serve as exemptions to applicable emission limits or define when a violation of an emission limit has occurred. For example, one commenter claimed that the title V affirmative defense provisions operate as an exemption, whereby no restriction or emission limit would exist in specific emergency circumstances. One commenter suggested that the affirmative defenses found in 40 CFR 70.6(g) are an affirmative defense to liability rather than an affirmative defense for the reduction of penalties, which the commenter claims was considered in *NRDC*. Other commenters claimed that the title V affirmative defense essentially provides criteria for the EPA, the state, or a court to consider when deciding whether excess emissions trigger a violation in the first instance, and these commenters attempted to distinguish the title V affirmative defense from the section 112 affirmative defense at issue in the *NRDC* decision. Environmental commenters stated that the emergency provisions could be interpreted to mean that, when their terms are met, a source did not violate the relevant emission limitation, thereby effectively providing an exemption. Environmental commenters also argued that this type of functional exemption would be illegal.

Finally, one commenter suggested that the EPA convert the emergency affirmative defense provisions into a narrowly tailored exemption from technology-based standards. The commenter asserted that this approach would be within the EPA's authority, and that an exemption would provide more consistency than the use of enforcement discretion alone.

Response: The EPA agrees with the majority of commenters that acknowledged that the title V emergency affirmative defense provisions did not create exemptions or otherwise define whether a violation has occurred, as stated in the

proposal.¹⁷ The provisions being removed through this action, found at 40 CFR 70.6(g)(2) and 71.6(g)(3) state, in part, "An emergency constitutes an affirmative defense to an action brought for noncompliance with . . . technology-based emission limitations." By their terms, these provisions explicitly purported to establish an affirmative defense to an enforcement action, not an exemption. Moreover, these provisions purported to establish an affirmative defense to an action brought for noncompliance with certain emission limits. So, before the defense would apply, alleged noncompliance with an emissions limitation would have already occurred, and an enforcement action (administrative or judicial) would have been brought because of such noncompliance. The title V affirmative defenses, like the affirmative defense provisions at issue in the *NRDC* case, were thus based on the establishment of an alleged violation of permitted emission limits in the first instance. Moreover, it would not have been the burden of the party bringing an action for noncompliance to negate any claimed emergency "exemption" to an otherwise applicable emission limit. Rather, it would clearly have been the source's burden in defending against such an action to properly assert and prove all the elements of the emergency affirmative defense.¹⁸ The result of a successfully pled affirmative defense would be to provide the decision maker in an enforcement case with reasons why, despite violations of an emission limit, the source should not be held liable and assessed penalties (or potentially other forms of relief) for such noncompliance. Therefore, the EPA believes that the title V emergency affirmative defense provisions were not intended and should not be interpreted to function as an exemption or to otherwise define when a violation has occurred.

To the extent that the affirmative defense provisions could have been interpreted to provide an exemption or define whether a violation has occurred, the EPA reiterates that such an exemption would be impermissible under the EPA's interpretation of the CAA and in light of *Sierra Club*. Some commenters suggested that the EPA should interpret the affirmative defense to function as an affirmative defense to liability or to define whether the emission limitation applies and thus whether there is a "violation." But, if there is no "violation" when certain

criteria or conditions for an affirmative defense are met, then there is, in effect, no emission limitation that applies when the criteria or conditions are met, and the affirmative defense would operate to create an exemption from the emission limitation. As discussed in the following subsection, and based on the EPA's interpretation of the *Sierra Club* decision, this would violate the basic CAA principle that emission limitations must apply continuously and cannot contain exemptions, conditional or otherwise. For the same reasons, it is not appropriate to convert the title V emergency affirmative defense provisions into an exemption, as suggested by a commenter.

2. Comments Interpreting the Sierra Club Case With Respect to Exemptions From Emission Limitations

Comment: Commenters presented differing views on the EPA's interpretation of *Sierra Club*. Environmental commenters supported the EPA's conclusion that exemptions from emission limitations are unlawful, and that, to the extent that the title V emergency affirmative defense provisions could be interpreted as providing for an exemption, those provisions would be unlawful. Commenters noted that in the *Sierra Club* case, the D.C. Circuit held that sections 112 and 302(k), read together, require that there must be continuous section 112-compliant standards. Commenters claimed that the statutory terms "emission standard" and "emission limitation" mean the same thing, citing CAA section 302(k). Therefore, commenters asserted the court's holding in *Sierra Club* also applies to the emission limitations affected by the title V affirmative defenses. Environmental commenters further asserted that the fundamental principles underlying the *Sierra Club* decision with respect to exemptions were reinforced by the D.C. Circuit's *U.S. Sugar* decision.

However, a number of industry commenters challenged the EPA's interpretation of the *Sierra Club* case, arguing generally that the case has limited applicability beyond the context of section 112 standards. Some commenters asserted that *Sierra Club* is not relevant to the current rulemaking because the case was anchored to the unique language of CAA section 112 and only addressed exemptions under CAA section 112, rather than regulations in operating permit programs, SIP requirements, or New Source Performance Standards (NSPS) regulations. One commenter argued that because the *Sierra Club* decision was

¹⁷ See 81 FR 38645, 38651.

¹⁸ See 40 CFR 70.6(g)(4) (the "permittee . . . has the burden of proof").

limited to section 112 standards, the decision could at most be read to prohibit title V provisions excusing noncompliance with an underlying NESHAP provision.

Other commenters asserted that requirements that limit emissions on a continuous basis do not have to impose the same limitation at all times, and that the form of the limitation does not always have to be the same. For example, commenters noted that CAA section 302(k) includes design, equipment, work practice, and operational standards, which could apply during periods of operation not covered by a numerical emissions limitation. These commenters claim that the *Sierra Club* case did not approach the question of whether these different types of standards would be acceptable. One commenter also asserted that the emergency affirmative defense is not an exemption from continuously applicable emission limits.

Response: As discussed in the preceding subsection, the title V emergency affirmative defense provisions should not be interpreted to provide an exemption to emission limits or otherwise define when a violation of an emission limitation has occurred. However, as noted in the proposal, to the extent that the title V provisions could be interpreted as providing such an exemption, this would run afoul of the CAA requirement that emission limitations be continuous. See CAA section 302(k), 42 U.S.C. 7602(k). The EPA disagrees with commenters' assertions that the *Sierra Club* court's reasoning does not apply beyond section 112 standards. As the EPA has explained in depth in other documents, the same logic prohibiting exemptions from NESHAP emission limits applies to other emission limitations subject to the definition of "emission limitation" within section 302(k), including emission limits contained within a source's title V permit.¹⁹ Finally, comments on whether it is appropriate

to impose different types of emission limitations during different modes of operation may be relevant to standard-setting or other proceedings where such limitations are established, but these comments are not material to this rulemaking to remove the title V emergency affirmative defense provisions.

C. Other Legal and Policy Considerations

This section addresses comments involving other legal and policy considerations related to the EPA's removal of the title V emergency affirmative defense provisions.

1. Ongoing SSM SIP Action Litigation

Comment: Some state and industry commenters urged the EPA to delay finalizing this action until the ongoing SSM SIP Action litigation concludes. These commenters claimed that the EPA's rationale underlying this title V action depends on the same core legal issues involving the EPA's interpretation of the *NRDC* and *Sierra Club* cases, which the commenters claimed is currently under judicial review in the SSM SIP Action litigation. One commenter further asserted that an adverse ruling in the SSM SIP Action litigation would be dispositive of the issues involved here.

Response: The EPA disagrees with the commenters' suggestion to delay this final action. The EPA has no reason to delay moving forward with the removal of affirmative defense provisions from various CAA program areas, including title V, solely because litigants have challenged the SSM SIP Action. The EPA is confident of the strong legal and policy bases for this current action, as well as prior actions in the SSM SIP Action and numerous regulations promulgated under CAA sections 111, 112, and 129 that also address affirmative defense provisions. In fact, the EPA's interpretation of the CAA and its application of relevant court decisions was upheld by the D.C. Circuit.²⁰ The EPA also disagrees with commenters' assertions that an adverse decision with respect to the SSM SIP Action would necessarily undermine the legal justification for this rule, because the SSM SIP Action litigation could be decided on procedural or substantive grounds that would not be determinative for this action. For example, the ongoing SSM SIP Action

litigation involves many issues that are unrelated to this current rulemaking.²¹

2. Consideration of Prior Case Law

Comment: Multiple state and industry commenters discussed court decisions involving SSM issues and affirmative defenses predating the *NRDC* cases. These commenters generally asserted that the EPA relied too heavily on the *NRDC* case in justifying the current action, and that the EPA failed to address the importance of prior case law and the relationship between these prior cases and the *NRDC* case.

Many of these commenters cited to the Fifth Circuit's *Luminant*²² decision, where commenters asserted the court determined that affirmative defense provisions do not interfere with a court's jurisdiction to assess civil penalties or enforce the CAA, contrary to the D.C. Circuit's decision in *NRDC*. One commenter, acknowledging the differing outcomes of the *Luminant* and *NRDC* cases, asked the EPA to discuss this dissonance and claimed that the EPA should have sought *en banc* review of the *NRDC* decision before the full D.C. Circuit, or alternatively sought review by the Supreme Court. Another commenter suggested that the EPA should delay finalizing this rule because of the confusion in the courts resulting from the differing *NRDC* and *Luminant* decisions. Some commenters claimed that the *Luminant* case is more directly relevant to the current action than the *NRDC* case. One commenter asserted that the *Luminant* case would be controlling over the *NRDC* case in states within the Fifth Circuit's jurisdiction, including Texas. Some commenters noted that the *NRDC* case explicitly distinguished its holding from that of *Luminant* and avoided confronting the SIP issues discussed in *Luminant*. Similarly, some commenters cited the Eleventh Circuit's *Georgia Power*²³ case, which also involved affirmative defense provisions contained within a SIP. Some commenters also cited two cases where circuit courts upheld the EPA's ability to use affirmative defense provisions in Federal Implementation Plans (FIPs), including the Ninth Circuit's *Montana Sulphur*²⁴ decision and the Tenth Circuit's *Arizona Public*

¹⁹ See, e.g., SSM SIP Action, 80 FR 33892 ("Since the 2008 D.C. Circuit decision in *Sierra Club v. Johnson*, however, it has been clear that NSPS and NESHAP standards themselves cannot contain such exemptions. The reasoning of the court was that exemptions for SSM events are impermissible because they contradict the requirement that emission limitations be 'continuous' in accordance with the definition of that term in section 302(k). Although the court evaluated this issue in the context of EPA regulations under section 112, the EPA believes that this same logic extends to SIP provisions under section 110, which similarly must contain emission limitations as defined in the CAA. Section 110(a)(2)(A) requires states to have emission limitations in their SIPs to meet other CAA requirements, and any such emission limitations would similarly be subject to the definition of that term in section 302(k)."); see also *id.* at 33862.

²⁰ Specifically, the EPA's approach to addressing malfunction emissions in section 112 rules for major boilers and area boilers and section 111 and 129 rules for commercial and industrial solid waste incinerators was upheld by the D.C. Circuit in *U.S. Sugar*.

²¹ For example, briefs filed in the SSM SIP Action litigation allege, among other things, that the EPA failed to make the showing required to issue a SIP call, which is a procedure specific to CAA section 110. See Brief of Industry Petitioners, SSM SIP Action Litigation (filed March 16, 2016).

²² *Luminant Generation Co. v. EPA*, 714 F.3d 841 (5th Cir. 2013).

²³ *Sierra Club v. Georgia Power*, 443 F.3d 1346, 1357 (11th Cir. 2006).

²⁴ *Montana Sulphur & Chemical Co. v. EPA*, 666 F.3d 1174 (9th Cir. 2012).

*Service*²⁵ case. Other commenters cited to prior cases decided in the context of Clean Water Act regulations, including *Marathon Oil*²⁶ and *Essex Chemical*,²⁷ and claimed that these cases support the creation of mechanisms like affirmative defenses to account for the unforeseeable and uncontrollable failure of even the best technology.

Some commenters also addressed the D.C. Circuit's *U.S. Sugar* decision. One commenter claimed generally that the case did not undercut the EPA's basis for providing the title V emergency affirmative defense. Other commenters, however, claimed that *U.S. Sugar* reinforced the EPA's view that affirmative defense provisions that constrain or interfere with a court's authority under CAA sections 113 and 304 are inimical to the Act.

Response: The EPA acknowledges that various circuit court cases preceding the D.C. Circuit's *NRDC* decision, including the Fifth Circuit's *Luminant* decision, upheld the agency's prior interpretation of affirmative defense provisions in various contexts, including the authority of the EPA to approve affirmative defense provisions contained in SIPs and the authority of the EPA to create affirmative defense provisions in FIPs. In these decisions, the courts deferred to the EPA's prior interpretation of the CAA with respect to affirmative defense provisions.²⁸ While some courts found the EPA's former interpretation permissible, those courts did *not* determine that the EPA's former interpretation was the only or even the best permissible interpretation. As previously noted, it is well within the EPA's legal authority to now revise its interpretation to a different interpretation of the CAA.²⁹ Those prior decisions were based upon an interpretation of the CAA that the agency no longer holds, and therefore those prior decisions do not speak to the validity of the EPA's current policy with respect to affirmative defenses. The EPA further notes that the affirmative defense provisions at issue in the other court decisions cited by the commenters, including affirmative

defenses in SIPs and FIPs, are not affected by this action.

In *NRDC*, however, the D.C. Circuit conclusively determined that the EPA's former interpretation of the CAA concerning affirmative defenses was not permissible with respect to section 112 standards promulgated by the EPA. The *NRDC* court vacated the affirmative defense provisions in that case, finding them without legal basis because they contradicted fundamental requirements of the Act concerning the authority of courts to decide whether to assess civil penalties in CAA enforcement suits. Because the *NRDC* decision interprets CAA sections 113 and 304 and addresses the legal basis for affirmative defense provisions, the EPA has reevaluated its interpretation of the CAA with respect to affirmative defense provisions in title V programs as well. Based on this reevaluation and the reasoning of the *NRDC* decision, the EPA has determined that it is appropriate to remove the emergency affirmative defense provisions in 40 CFR 70.6(g) and 71.6(g), and to require removal of similar affirmative defense provisions from state operating permit programs and individual operating permits, because these provisions are not authorized by the CAA.

Finally, the EPA notes that the D.C. Circuit's *U.S. Sugar* decision further reinforced the principles underlying the *NRDC* decision. In *U.S. Sugar*, the D.C. Circuit, acknowledging that the EPA could not create an exemption or affirmative defense provision, deferred to the EPA's decision to rely on case-by-case enforcement discretion as the mechanism to handle excess emissions during malfunctions.³⁰ Arguments suggesting that prior cases, including *Marathon Oil* and *Essex Chemical*, require the EPA to provide affirmative defenses in such situations are contrary to the *U.S. Sugar* decision.

3. EPA's Historical Policies Concerning Affirmative Defense Provisions

Comment: A number of commenters addressed the EPA's historical policies concerning affirmative defenses,³¹ including the title V emergency provisions and the policy considerations underlying this type of mechanism to address emissions in unusual situations. Many commenters discussed the EPA's initial decision to create the title V affirmative defense in the 1992 part 70 rule and 1996 part 71 rule. One commenter claimed that the

EPA initially included the title V provisions to do what was right, even if the EPA did not concede that it was required. Commenters focused on the initial purpose of the emergency provisions, asserting that the affirmative defense provisions were a very limited, appropriate recognition that even properly designed and maintained technology is not infallible and can fail due to emergencies beyond the control of a source. Other commenters noted the EPA's prior approach that acknowledged that enforcement and the imposition of penalties might not be appropriate in certain situations beyond the control of the source. Commenters asserted that the *NRDC* decision does not undermine the policy reasons that initially informed the promulgation of affirmative defense provisions, and that these same policy reasons support the title V emergency affirmative defense provisions.

Commenters also claimed that the title V emergency provisions are consistent with decades of EPA policy, citing various rulemakings and guidance documents. Commenters also stated that these types of affirmative defense provisions were recognized by states long before the 1990 CAA Amendments and the title V operating permits program, and that the title V affirmative defense provisions have existed for over 25 years. Commenters also pointed to other EPA actions justifying affirmative defenses, including FIPs for Montana and New Mexico, EPA's briefs prepared for litigation in the *Luminant* case, and EPA's withdrawal of Texas' SIP Call. Commenters also noted that affirmative defense provisions are still contained in other regulations promulgated by the EPA, including NSPS and NESHAP standards.

Some commenters addressed the EPA's legal authority to change its policy on affirmative defenses. Commenters asserted that agencies are only permitted to change their existing interpretations when they offer a reasoned explanation for the change, citing various Supreme Court cases including *Encino Motorcars, LLC v. Navarro*³² and *FCC v. Fox Television Stations*.³³ These commenters alleged that the EPA's action is arbitrary and capricious because the EPA has failed to provide an adequate justification for the agency's revised policy with respect to the title V affirmative defenses. However, other commenters acknowledged that the EPA may change its interpretation so long as the agency provides a reasoned explanation, and

²⁵ *Arizona Public Service v. EPA*, 562 F.3d 1116 (10th Cir. 2009).

²⁶ *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977).

²⁷ *Essex Chemical Corp. v. Ruckelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

²⁸ For example, the Fifth Circuit in *Luminant* held that the EPA's interpretation of the CAA at that time was a "permissible interpretation of section [113], warranting deference." 714 F.3d at 853.

²⁹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

³⁰ *U.S. Sugar*, 830 F.3d at 607–09.

³¹ Some commenters also discussed the EPA's historical policy on exemptions prior to the *Sierra Club* case.

³² 136 S. Ct. 2117 (2016).

³³ 556 U.S. 502 (2009).

agreed that the justifications provided by the EPA in the 2016 and 2022 proposed rules are sufficient.

Finally, some commenters discussed the perceived inequity or unfairness of the EPA's change in policy and removal of affirmative defense provisions, based in part on the supposition that sources have come to rely on these provisions. Specific comments addressing how the removal of the title V affirmative defense provisions could impact sources are discussed further in section III.D.2. of this document.

Response: The EPA acknowledges the underlying considerations supporting the EPA's past policies—especially the agency's recognition that even well-designed and appropriately operated equipment may sometimes fail due to circumstances beyond the control of the source (such as during emergencies) and that, in certain situations, enforcement for violations of technology-based standards may not be appropriate. This rule does not change that general recognition. As discussed in section III.D.2. of this document, the EPA continues to believe that enforcement may not be warranted under certain specific circumstances, such as during an emergency, as determined on a case-by-case basis by enforcement authorities. The EPA, states, citizens, and the courts retain the discretion and authority to consider such circumstances in evaluating how to respond to exceedances or violations. However, an affirmative defense provision that interferes with the authority of courts to assess penalties is no longer an appropriate or legally sound mechanism to address these situations.

The EPA also acknowledges its past policies regarding different mechanisms to account for excess emissions during periods of SSM and emergencies. Based on these former policies, the EPA previously established affirmative defense provisions in various other CAA program areas, including within previously promulgated FIPs and various NSPS and NESHAP regulations. However, since that time, decisions from the D.C. Circuit, including *Sierra Club* and *NRDC*, have established parameters under the CAA regarding legally permissible approaches for addressing excess emissions during periods of SSM or emergency events. In light of these decisions—particularly the 2014 *NRDC* decision—the EPA has concluded that certain aspects of its prior interpretation of the CAA were not legally permissible under the CAA. Thus, the EPA has revised its interpretation of the CAA with respect to affirmative defense provisions, and

this revised interpretation provides the basis for the current action (and similar actions in other CAA program areas).

Following the 2016 proposal, the EPA continued to evaluate SSM provisions, including affirmative defenses, in SIPs. In October 2020, the EPA issued a guidance memorandum that, among other things, expressly superseded a portion of the EPA's interpretation of affirmative defenses presented in the 2015 SSM SIP Policy.³⁴ However, on September 30, 2021, the EPA issued a guidance memorandum that withdrew the October 2020 memorandum in its entirety and reinstated the legal and policy positions expressed in the 2015 SSM SIP Policy in their entirety.³⁵ Thus, the EPA's current interpretation of affirmative defenses in the context of SIPs is the interpretation set out in the 2015 SSM SIP Policy.

The EPA's revised interpretation following the *NRDC* decision was, and continues to be, well within the EPA's legal authority, and the EPA has properly exercised its authority to revise its interpretation of the CAA through the appropriate processes. The authority of an agency to change its interpretation of a statute is well-established, provided that it gives a reasoned explanation for the change.³⁶ The EPA disagrees with commenters that suggest that the EPA has not provided an adequate rationale for this shift in policy, either generally with respect to affirmative defenses or specifically with respect to the title V emergency affirmative defense

provisions. The EPA has clearly articulated its revised interpretation of the CAA with respect to affirmative defenses, here and in other documents, including the 2016 proposed rule (as referenced in the 2022 proposed rule), based on the EPA's analysis of the *NRDC* decision.³⁷ Commenters have not substantiated their claim that the EPA's rationale is inadequate.

4. Consistency With Other CAA Program Areas

Comment: A number of commenters acknowledged and addressed the EPA's desire to ensure consistent agency policy with respect to affirmative defense provisions across different CAA program areas. However, some commenters asserted that consistency between the EPA's title V regulations and other CAA programs is not a rationale for taking this action. Other commenters disagreed that the title V provisions should be removed for consistency with actions like the 2015 SSM SIP Action, arguing that the two actions are distinguishable. Finally, some commenters claimed that removal of the title V affirmative defense would actually undermine the goal of consistency across CAA program areas, because title V permits incorporate emission limits developed under numerous CAA regulatory authorities, and because various NSPS, NESHAP, and SIP regulations currently still contain affirmative defense provisions.

One commenter also suggested that the EPA could resolve any inconsistency between the title V affirmative defense provisions and underlying standards that do not allow an affirmative defense by clarifying through an interpretive rule or rule revision that nationwide standards outweigh affirmative defense provisions under title V.

Response: The EPA is not removing the title V emergency affirmative defense provisions solely for the sake of consistency. Rather, as discussed in the proposal and in section III.A. of this document, these provisions present legal issues substantially similar to those that called for the removal of affirmative defense provisions from other regulations. In addition to the legal considerations supporting the current action, and as previously explained in the preamble to the 2016 proposed rule (as referenced in the 2022 proposal), the EPA believes that it is important to apply, as much as

³⁴ Memorandum, Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans, 6 (October 9, 2020), available at <https://www.epa.gov/system/files/documents/2021-09/2020-ssm-in-sipguidance-memo.pdf>. In 2020, EPA also took action relating to an SSM-related affirmative defense in a SIP for Texas, withdrawing a SSM "SIP call" in part because the SIP-based affirmative defense was deemed to not be inconsistent with the CAA. See 85 FR 7232 (February 7, 2020); see also 85 FR 23700 (April 28, 2020) (SIP call withdrawal relating to North Carolina) and 85 FR 73218 (November 17, 2020) (SIP call withdrawal relating to Iowa). Petitions for review of these withdrawal actions were filed in the United States Court of Appeals for the D.C. Circuit. See *Sierra Club v. EPA*, No. 20–1115.

³⁵ September 2021 SSM SIP Memo, *supra* note 5. This memorandum also announced an intent to revisit, among other things, the 2020 action withdrawing the SSM affirmative defense-related SIP call for Texas. *Id.* at 5. On December 17, 2021, the United States Court of Appeals for the D.C. Circuit granted the EPA's request for a voluntary remand of that 2020 Texas SIP call withdrawal action, as well as the similar SIP call withdrawal actions relating to North Carolina and Iowa, in light of EPA's stated intent to reconsider those actions. *Sierra Club v. EPA*, No. 20–1115.

³⁶ See, e.g., *Encino Motorcars*, 136 S. Ct. at 2125–26; *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); see also *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (agency must adequately explain the reasons for a reversal of policy).

³⁷ The EPA has clearly explained its general shift in policy with respect to affirmative defense provisions in other documents. See, e.g., 81 FR 36849; SSM SIP Action Supplemental Proposal, 79 FR 55934; SSM SIP Action, 80 FR 33851.

reasonably possible, the EPA's policy concerning affirmative defense provisions consistently across CAA program areas. As previously explained, the EPA has removed affirmative defense provisions from numerous other CAA standards since the 2014 *NRDC* decision.³⁸ Based on the relationship between title V and these underlying standards, it is particularly important to remove the affirmative defense provisions from the title V program regulations. Title V permits include a wide range of substantive CAA requirements that apply to a source, including SIP provisions and standards developed under CAA sections 111, 112, and 129. Because the title V affirmative defense provisions applied independent of these underlying standards, the title V emergency affirmative defense might be asserted in civil actions or other proceedings involving noncompliance with title V permit terms reflecting standards from which the EPA has recently eliminated affirmative defenses. In this way, the continued presence of the title V affirmative defense provisions could effectively undermine the EPA's efforts to remove affirmative defenses from the underlying standards, as well as the efforts of states to revise SIPs to comply with the 2015 SSM SIP Action. The EPA acknowledges that not all affirmative defense provisions in the EPA's regulations have been removed as of the date of this rule. However, the fact that this is an ongoing process does not provide a basis for retaining or delaying removal of the title V affirmative defense provisions.

Moreover, the EPA does not believe that it would be appropriate to simply clarify in some manner—whether by revising the emergency affirmative defense rules or issuing guidance—that the title V affirmative defense would not apply where the underlying standards do not allow or provide for an affirmative defense. Although this approach could potentially reduce inconsistency between title V provisions and the underlying standards from which affirmative defenses have been removed, it would nonetheless fail to address the more fundamental problem that the title V affirmative defense provisions are, in and of themselves, inconsistent with the enforcement structure of the CAA and thus legally impermissible.

5. Relationship to Other CAA Standards

Comment: Commenters raised a number of concerns involving the relationship between the title V emergency affirmative defense and other CAA standards, including section 112 NESHAP, section 111 NSPS, and SIPs. Comments specifically relating to SIPs are discussed in the following subsection.

Commenters claimed generally that the EPA has failed to consider how the CAA requirements related to enforcement must be harmonized with the CAA requirements relating to standard setting and permitting. One commenter claimed that the title V affirmative defense provisions avoid the need to address emergencies in each individual underlying standard, which the commenter characterized as an impractical approach. Another commenter asserted that the title V affirmative defense provisions have effectively become part of the underlying applicable standards, and other commenters suggested that the title V affirmative defense provisions are necessary to ensure that underlying technology-based standards are achievable and adequately demonstrated, taking into account costs. These commenters asserted that removing the affirmative defense would have the effect of making the underlying standards in a permit more stringent than those authorized by the governing standards, in that sources would be subject to a level of control technology that is technologically and economically infeasible. Other commenters suggested that if affirmative defenses are removed, either title V permits or underlying standards would need to provide some other way to account for malfunctions, such as through alternative emission limitations, work practice standards, or malfunction abatement plans.

Some commenters also claimed that the overlap between the title V emergency provisions and various malfunction provisions in NSPS and NESHAP regulations could cause confusion. However, other commenters recognized that the removal of the title V affirmative defense provisions should not have any impact on independent malfunction or emergency provisions contained in underlying technology-based standards.

Lastly, several environmental commenters asserted that EPA must go further and quickly remove “SSM loopholes” from other CAA programs, including section 111 NSPS, section 112 NESHAP, and SIPs.

Response: Many of the comments relating to malfunction emissions and

the development of technology-based standards are either not directly related to the current rule to remove the title V emergency affirmative defense provisions or reflect a misunderstanding about the relationship between the title V affirmative defense provisions and underlying standards included within operating permits. As an initial matter, title V of the CAA does not generally impose new substantive requirements on a source. Rather, title V permits provide a vehicle to clarify in a single document the various CAA requirements applicable to a source. Although title V permits must contain conditions (such as monitoring, recordkeeping, and reporting provisions) necessary to assure compliance with all CAA requirements already applicable to a source, title V of the CAA does not provide the basis for making substantive changes to underlying applicable standards.³⁹ Therefore, title V permits are not an appropriate mechanism for addressing commenters' concerns related to the development of, for example, alternative emission limits, work practice standards, or malfunction abatement plans. These considerations may be more relevant in the context of developing specific SIP provisions or section 111, 112 or 129 standards.⁴⁰

Moreover, the underlying standards, not the title V affirmative defense provisions, establish the appropriate level of emission controls, accounting for technological, economic, and other considerations, as appropriate. The title V emergency affirmative defense provisions are not, as some commenters suggested, part of the underlying applicable requirements themselves. The title V affirmative defense provisions operated independently from the specific standards and/or emission limits, as well as any emergency, malfunction, or upset provisions contained within underlying applicable

³⁹ 40 CFR 70.1(b) (requiring all title V sources to have a permit to operate that “assures compliance by the source with all applicable requirements” and stating that “title V does not impose substantive new requirements,” although it does require imposition of fees and certain compliance measures).

⁴⁰ The D.C. Circuit's *U.S. Sugar* decision addressed arguments, raised in the context of challenges to NESHAPs issued under CAA section 112 that did not provide for an affirmative defense for unavoidable malfunctions, that such malfunctions must be accounted for either by an affirmative defense or by appropriate adjustments in the standard-setting itself. The D.C. Circuit upheld the EPA's decision to neither include an affirmative defense nor adjust the underlying standard, as requested by Petitioners, to account for malfunction periods. Instead, the court upheld the EPA's decision to use enforcement discretion to address exceedances that occur during malfunction periods.

³⁸ 87 FR 19042, 19044, n. 3 (citing recent EPA rulemakings removing affirmative defense provisions).

requirements. Although the title V provisions provided for an affirmative defense in emergencies, removal of the affirmative defenses would not make underlying technology-based standards more stringent or otherwise have any effect on standards applicable to a source. The title V provisions merely provided an affirmative defense that a source, after having allegedly violated a technology-based emission limitation contained in its title V permit, could assert in an enforcement proceeding brought for alleged violations of the title V permit term reflecting the requirements of the underlying standard. Because the title V affirmative defense did not provide an exemption to any standard or define when a violation of a standard has occurred, a source's compliance status with the underlying standard itself—as well as the source's compliance status with the title V permit term—would not be affected by the presence or absence of an affirmative defense.

Finally, comments discussing the purported need to provide for or address excess emissions associated with malfunctions are immaterial because this action addresses the title V affirmative defense provisions for emergencies, which—although there may be some similarities—are significantly different, and narrower, than malfunction events. For further discussion, see section III.D.3. of this document.

6. Relationship to the 2015 SSM SIP Action

Comment: Multiple commenters addressed the relationship between this action and the 2015 SSM SIP Action. Some commenters asserted that the EPA's current action is based on the 2015 SSM SIP Action, or claimed that the two actions are related for various reasons. Other commenters claimed that the 2015 SSM SIP Action is not at issue in this rulemaking, disagreed with the EPA's statements that certain aspects of the 2015 SSM SIP Action are especially relevant, and attempted to distinguish the types of provisions at issue in the 2015 SSM SIP Action from those at issue here.

Some commenters also specifically discussed the need for states to develop SIP provisions that account for SSM situations (including work practice standards) and claimed that states should not be prohibited from including approved state SSM plans in title V permits. One commenter suggested that removing the title V affirmative defense provisions before SIP issues are resolved could prevent states from incorporating all applicable requirements, including

SIP requirements, into title V permits, and another commenter asserted that this title V rule should be withdrawn while states modify their rules to address the 2015 SSM SIP Action. On the other hand, other commenters suggested that by promptly finalizing this title V rule, the EPA can better facilitate the coordination of SSM SIP revisions with title V program revisions and individual operating permit revisions.

Response: This current title V rule is related to the 2015 SSM SIP Action to the extent that each rule is based at least in part on the EPA's view that, in light of the *NRDC* decision, affirmative defense provisions are contrary to the enforcement structure of the CAA.⁴¹ However, this title V action is not “based on” the 2015 SSM SIP Action, and the two actions are functionally independent rulemakings, each operating within distinct areas of the CAA's regulatory structure. Therefore, and for the reasons discussed in the preceding subsection discussing the relationship between title V and other CAA standards, this current action involving the title V affirmative defense provisions will not have any effect on states' ability to develop appropriate SIP provisions in response to the 2015 SSM SIP Action, and it will not affect states' ability to ensure that title V permits appropriately reflect all requirements applicable to a source, including revised SIP provisions. In fact, as some commenters indicated, it may be convenient for states to coordinate implementation of any title V permit changes related to the 2015 SSM SIP Action with permit changes related to this rulemaking. Issues regarding implementation of this rule are discussed further in section IV. of this document.

7. Title V of the CAA

Comment: Some commenters noted that while title V of the CAA does not establish or mandate affirmative defense provisions, neither does title V of the CAA prohibit the EPA from establishing affirmative defenses.

Response: The EPA acknowledges that title V of the CAA is silent with respect to affirmative defense provisions; it neither provides for such provisions nor explicitly prohibits them. However, the EPA interprets other provisions of the CAA that apply to enforcement of the title V operating permits program—including sections

113 and 304—to effectively prohibit the creation of affirmative defense provisions, as discussed in section III.A.1. of this document.

8. Constitutional Issues

Comment: Some commenters raised constitutional issues with the removal of the title V emergency affirmative defense provisions. Commenters argued that the imposition of penalties for any conduct that is unavoidable violates basic constitutional protections guaranteed by the Eighth Amendment and due process requirements. Commenters further asserted that explicit affirmative defense provisions are necessary to satisfy minimum constitutional standards, and that alternative approaches, such as the exercise of enforcement discretion, are not sufficient.

Response: The EPA disagrees with commenters with respect to these constitutional arguments. The comments suggest that without the title V affirmative defense, any penalty assessed for violation of a title V permit term during an emergency would be *per se* “excessive” or “arbitrary” and that the existing CAA enforcement provisions would be facially unconstitutional. The EPA disagrees. It should be reiterated, first, that the title V emergency affirmative defense has never been a required permit term and it has not universally been adopted by all permitting authorities for all permits. Even where the defense may be available, it is, by its own terms, very limited and narrowly circumscribed. Commenters have provided no information indicating that the defense has been asserted with any frequency or, indeed, at all. It is difficult to see how the removal from the EPA's regulations of a narrowly circumscribed, discretionary defense that apparently is infrequently asserted could render the CAA unconstitutional.

Moreover, the CAA does not mandate that EPA automatically initiate an enforcement action, let alone automatically assess a penalty, for a violation of a CAA requirement. EPA has absolute discretion on whether to initiate an enforcement action in any circumstance, including during an emergency.⁴² If EPA chooses to initiate an enforcement action in a circumstance involving a violation during an emergency, and chooses to seek a penalty for that violation, the CAA establishes a maximum civil penalty in

⁴¹ This legal rationale is not affected by any differences between affirmative defense provisions implicated by the 2015 SSM SIP Action and those implicated by this action.

⁴² *Heckler v. Chaney*, 470 U.S. 821 (1985) (holding that decisions of agency not to undertake enforcement action are presumed unreviewable).

section 113(b)⁴³ but then expressly provides in section 113(e) that the EPA or the courts “shall take into consideration various criteria—including specifically, “good faith efforts to comply,” and, more generally, “other factors as justice may require.” Thus, the CAA on its face does not mandate the imposition of any penalty *automatically*, much less one that is *per se* excessive. The commenters fail to provide any specific support for their claim that the statutory penalty provisions of the CAA are facially unconstitutional, instead making only generalized claims.

In addition, *State Farm Mutual Auto Insurance Co. v. Campbell*,⁴⁴ a case cited by some commenters, provides no support for any claim that removal of the title V affirmative defense would somehow be unconstitutional. *State Farm* involved a claim that a jury award of \$145 million in punitive damages was excessive and, accordingly, contrary to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Reaffirming that the Fourteenth Amendment “prohibits the imposition of grossly excessive or arbitrary punishments,” the Supreme Court held that, under the particular circumstances of the case, the punitive damages award was excessive and “an irrational and arbitrary deprivation of property.”⁴⁵ Here, no penalties have been assessed at all, and *State Farm* provides no support for the conclusion that—absent the title V emergency affirmative defenses—the CAA’s authorization, in accordance with various identified criteria, of possible penalties is necessarily unconstitutional.⁴⁶

The EPA also disagrees with the claims that—absent the title V affirmative defenses—the penalty provisions of the CAA would be facially contrary to the Eighth Amendment. Again, if a party believes that the penalties assessed in a particular enforcement action violate the Eighth Amendment, it can raise that claim at the appropriate time. As with the commenters’ due process arguments, Congress has addressed the potential for unfair—or unconstitutional—penalties by setting out various criteria to be

considered in determining civil penalties. The penalty criteria in section 113(e) provide an opportunity to raise concerns about imposition of penalties in the event of an emergency similar to that afforded by the title V affirmative defenses, albeit directed at the courts’ discretion. The commenters do not explain why they believe these explicit statutory factors do not provide sufficient protection against the imposition of an allegedly unconstitutionally excessive penalty.

D. Potential Impacts

This section discusses various issues involving the effects of removing the title V emergency affirmative defense provisions, focusing primarily on the impact on sources. Overall, the EPA does not believe that removing the emergency affirmative defense provisions will substantially affect the legal rights of title V sources or the decisions sources make when confronted with emergency situations. It is also important to reiterate that the EPA is basing the current action on its interpretation of the CAA in light of relevant caselaw indicating that these affirmative defense provisions must be removed because they are inconsistent with the enforcement structure of the CAA.

1. Scope and Use of Title V Affirmative Defense Provisions

Comment: Multiple state and industry commenters acknowledged the limited scope of the title V affirmative defense provisions, which apply only to emergency situations. Commenters also addressed the relationship between emergencies and malfunctions. While some commenters provided examples of situations that would constitute an emergency but not a malfunction, other commenters asserted that the terms “emergency” and “malfunction” are closely related in that they both relate to unexpected and unforeseen events.

A number of commenters further acknowledged the limited historical and potential use of the title V emergency affirmative defense provisions. However, commenters suggested that the rule could have greater impacts than might be apparent.

Environmental commenters, on the other hand, characterized large SSM exceedances as routine and claimed that large polluters have used affirmative defense provisions in many citizen enforcement actions. Additionally, these commenters asserted that excess emissions are often the result of operator errors, poor plant design, and a lack of preventive maintenance. Thus, commenters claimed that sources using

SSM affirmative defense provisions have lacked an incentive to make investments in accident prevention. Finally, these commenters claimed that emissions during SSM and emergency events can be controlled.

Response: The EPA agrees with commenters that emphasized the limited scope of the title V emergency affirmative defense provisions. Unlike more general affirmative defense provisions addressing excess emissions during equipment malfunctions (which some commenters appear to address), the title V provisions being removed were specific to situations that qualify as an “emergency,” defined as “any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency.” 40 CFR 70.6(g)(1). Thus, while the title V emergency affirmative defenses, like affirmative defenses for malfunctions, relate to events that are beyond the control of a source, the title V defenses would only have been available in a more extreme, limited set of circumstances. While it is possible for some overlap in malfunction and emergency situations to exist (e.g., certain emergency events could potentially cause equipment malfunctions), the EPA believes that the majority of exceedances during malfunction events would not be attributable to “emergencies” as defined in the title V affirmative defense provisions. In addition, the title V affirmative defense provisions being removed contain various procedural requirements that must be met to assert the defense. See 40 CFR 70.6(g)(3). Moreover, as some commenters acknowledged and based on the best information available to the EPA, the title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings. Comments contending that sources frequently or routinely have asserted affirmative defenses appear to relate to SSM affirmative defenses, rather than the narrower title V affirmative defense for emergencies. It is unlikely that the criteria for the title V emergency affirmative defense would have been met in such circumstances, as the title V provisions could not be asserted for (among other things) noncompliance caused by improperly designed equipment, lack of preventative

⁴³ The maximum statutory civil monetary penalty amounts are adjusted annually for inflation in 40 CFR part 19.

⁴⁴ 538 U.S. 408 (2003).

⁴⁵ *Id.* at 429.

⁴⁶ Additionally, *State Farm* involved a claim under the Fourteenth Amendment, which imposes limitations on the states, not the federal government. This discussion assumes, for the sake of argument, that the principles expressed in *State Farm* would also apply to claims under the Due Process Clause of the Fifth Amendment.

maintenance, careless or improper operation, or operator error.

For these reasons, the EPA does not believe that the removal of the narrowly drawn and apparently infrequently used title V emergency affirmative defense provisions will have a significant impact on sources. Further, as discussed in the following subsection, the EPA, state authorities, and other entities likely would consider the relevant circumstances—especially the relatively unusual, extreme, and unavoidable circumstances that would have qualified under the narrow definition of “emergency”—in deciding whether to pursue enforcement action or seek penalties, and sources remain free to argue to the court, in the event of an enforcement action, that penalties should not be assessed for these same reasons.

2. Alternatives to an Affirmative Defense: Discretion To Initiate Enforcement and the Discretion of Decision Makers To Determine Appropriate Remedies

Comment: Many commenters expressed concerns that removing the title V emergency affirmative defense provisions would result in less certainty or greater risk of liability to sources confronted with emergency situations. One commenter asserted that even if the EPA is not legally required to provide an affirmative defense in title V permits, the EPA should, to the maximum extent consistent with law, continue to provide and allow states to provide sources relief from the threat of enforcement for exceedances caused by emergencies. Another commenter claimed more generally that the EPA must find other ways to assure sources that they will not be subject to penalties if they operate to provide vital services in an emergency. Commenters generally requested additional guidance from the EPA to provide more certainty to sources in the absence of an explicitly codified affirmative defense.

Most commenters acknowledged the fact that even in the absence of an affirmative defense, the EPA, state, and citizens all retain the discretion to determine whether to bring an enforcement action, based on the unique circumstances of each case. Thus, most commenters acknowledged that not all exceedances of emission limits will automatically result in enforcement actions. One commenter asserted that the EPA routinely uses enforcement discretion to decide which alleged violations to pursue, and that such decisions are often made on the same principles codified in an affirmative defense. Other commenters asserted that

the EPA does not intend for true emergencies to result in increased enforcement, and that the EPA’s suggested enforcement discretion approach avoids forcing every violation to judicial resolution. Finally, one commenter asserted that the exercise of enforcement discretion by state permitting authorities is appropriate and consistent with CAA sections 113 and 304 and separation of power principles.

However, a number of commenters challenged the sufficiency of relying on enforcement discretion alone to handle excess emissions caused by emergencies. Commenters noted that explicitly codified affirmative defense provisions have the benefit of providing certainty to permittees, promoting consistency to agency actions, and promoting the creation and retention of records necessary to justify agency actions. Commenters claimed that relying on enforcement discretion alone would result in more uncertainty and jeopardy and less harmony among different CAA programs, because enforcement discretion policies may be unwritten and unavailable to the public. Other commenters noted, citing the *U.S. Sugar* decision, that federal and state policies regarding enforcement discretion do nothing to prevent citizens from pursuing enforcement. Some commenters also asserted that an enforcement discretion approach still leaves sources in the difficult position of choosing between proper emergency response and compliance with emission limits. Other commenters claimed that relying on enforcement discretion puts all power in the hands of the EPA, without any checks and balances, and asserted that this contradicts principles of cooperative federalism and exceeds the authority intended in the passage of the CAA.

Some commenters discussed how prior court decisions have treated enforcement discretion. One commenter claimed that the D.C. Circuit in *U.S. Sugar* acknowledged, but did not evaluate, the EPA’s reliance on enforcement discretion, and the commenter alleged that the court appeared to have doubts that enforcement discretion alone is sufficient. Another commenter claimed that the *U.S. Sugar* decision did not validate the enforcement discretion approach beyond the context of section 112 standards. Other commenters cited to the 1973 D.C. Circuit opinion in *Portland Cement Assn. v. Ruckelshaus*⁴⁷ in support of their position that reliance on enforcement

discretion is not a sufficient response to addressing excess emissions from malfunctions, and another commenter claimed that the 9th Circuit rejected the EPA’s use of enforcement discretion in the 1977 *Marathon Oil*⁴⁸ Clean Water Act case.

Some commenters requested that the EPA provide additional guidance to clarify the circumstances under which permitting authorities (including the EPA) should exercise their discretion not to bring enforcement actions. Many commenters encouraged the use of the criteria contained in 40 CFR 70.6(g) in guiding permitting authorities’ exercise of enforcement discretion. Some commenters asserted that states should be able to rely on those criteria when exercising their enforcement discretion. Other commenters urged the EPA: to make clear that the EPA would not expect to bring an enforcement action under circumstances meeting those criteria; to make clear that the EPA would continue to use its enforcement discretion in the case of emergency situations; and to create a strong policy statement that the EPA does not support civil penalties in situations meeting those criteria. Commenters, with one quoting a passage from the EPA’s brief in the *U.S. Sugar* case, urged the EPA to more fully articulate certain standards for determining whether the EPA would pursue enforcement in a given situation, including consideration of the good faith efforts of a source to minimize emissions, which types of preventative and corrective actions would be considered, and the nature and extent of the root cause analysis that should be employed by sources to ascertain and rectify excess emissions. Another commenter claimed that it is appropriate for permitting authorities to take into account circumstances involving how a source mitigated damage to people and the environment in responding to an emergency.

Relatedly, one commenter suggested that instead of removing the affirmative defense provisions, the EPA should amend them to provide that the affirmative defense may be allowed, if specified conditions are met, at the discretion of the enforcement entity.

Commenters also acknowledged that even when an enforcement action is commenced, the ultimate decision makers also have the discretion to determine whether and to what extent penalties are appropriate in a given situation. Environmental commenters asserted that both the EPA and the NRDC court recognized that even

⁴⁷ 486 F.2d 375, 399 n.91 (D.C. Cir. 1973).

⁴⁸ *Marathon Oil Co v. EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977).

without an affirmative defense, sources are still free to argue to a court that they should be subject to lesser (or no) civil penalties for any number of reasons, including practical considerations or emergencies. Another commenter noted that the D.C. Circuit in *U.S. Sugar* confirmed that sources may still argue to a court that penalties should not be assessed in a given situation, and that sources may support these arguments with relevant facts, such as the source's compliance history and good faith efforts to comply with emission limits.

However, while some commenters acknowledged that the absence of an affirmative defense would not automatically result in the imposition of particular remedies, other commenters asserted that without an affirmative defense, sources would lack a legal defense in enforcement actions and would be liable for unforeseeable events outside of their control. One commenter claimed that this would be unjust, and that imposing an unjust system would foster disrespect for the law.

Finally, some commenters requested further guidance on how sources could make similar defenses in enforcement proceedings. Commenters requested that the EPA retain or narrow the definition of "emergency" in its regulations, as this definition could help guide a court's review of circumstances that are unlikely to warrant punishment, and could provide more certainty to sources.

Response: As discussed in detail in the 2016 proposal,⁴⁹ the EPA reiterates that the legal rights and obligations of individual sources potentially subject to enforcement proceedings will not be significantly affected by the removal of emergency affirmative defense provisions from their title V permits. The absence of an affirmative defense provision in a source's title V permit does not mean that all exceedances of emission limitations in a title V permit, including those resulting from an emergency, will automatically be subject to enforcement or automatically be subject to imposition of penalties or other remedies.

First, any entity that may bring an action to enforce title V permit provisions has enforcement discretion that they may exercise as they deem appropriate in any given circumstance. For example, if the excess emissions caused by an emergency occurred despite proper operation of the facility, and despite the permittee taking all reasonable steps to minimize such emissions, EPA or other relevant entities may well decide that no enforcement action is warranted in a specific case. In

the event that an entity decides to bring an enforcement action, it may, nonetheless, take into account the emergency circumstances in deciding what remedies to seek.

The EPA appreciates that relying on enforcement discretion might afford less certainty to sources than an affirmative defense provision. However, as the EPA has explained, the latter approach is not legally consistent with the enforcement structure of the CAA, which among other things imposes a duty on the source to continually comply with emission limits and standards. Moreover, the EPA believes the exercise of enforcement discretion in lieu of a codified affirmative defense provision is both appropriate and sufficient to carry out the mandates established by Congress in the CAA in a fair and equitable fashion, a position that the D.C. Circuit upheld in its *U.S. Sugar* decision.⁵⁰ The EPA believes that it is unlikely that entities would initiate an enforcement action for emissions exceedances resulting solely from a true emergency situation that would have qualified under the narrow definition and particular requirements of the title V emergency affirmative defense provisions. The EPA also generally agrees with commenters that the conditions contained in the title V emergency provisions, including but not limited to the nature of the emergency event and the source's efforts to take all reasonable steps to minimize emissions during an emergency, would likely be important considerations to take into account when deciding whether to pursue enforcement, among all other relevant factors. Enforcement discretion decisions necessarily involve case-specific considerations, which should not be confined to the specific conditions contained in the title V emergency affirmative defense provisions.⁵¹ Thus, the EPA will not, in the course of this rulemaking, provide

⁵⁰ In its *U.S. Sugar* decision, the D.C. Circuit upheld the EPA's reliance on case-by-case enforcement discretion as a permissible and reasonable substitute for affirmative defense provisions in accounting for malfunctions within section 112 standards. *U.S. Sugar*, 830 F.3d at 607–09. The EPA believes that the D.C. Circuit's statements in *NRDC* and *U.S. Sugar* are more reflective of the court's current views concerning affirmative defenses and enforcement discretion than the much earlier decisions cited by commenters, including *Portland Cement Assn. v. Ruckelshaus*. Arguments suggesting that prior cases, including *Marathon Oil and Essex Chemical*, require the EPA to provide affirmative defenses in such situations are contrary to the D.C. Circuit's holdings.

⁵¹ These considerations could potentially be much broader than the title V emergency affirmative defense provisions, and encompass situations where a source would never have been eligible for the emergency affirmative defense.

explicit criteria that the EPA, states, or other entities should apply in determining whether to commence an enforcement action. Nothing in this action precludes the EPA from issuing such guidance in other appropriate proceedings or formats if the agency should subsequently determine that to be appropriate.

Second, even if an enforcement action is commenced for exceedances caused by an emergency, the absence of an explicitly defined affirmative defense provision does not affect a source's ability to demonstrate to the court (or to the EPA in an administrative enforcement action) that penalties or other kinds of relief are not warranted. Under section 113(e), courts (and the EPA in an administrative enforcement action) must consider various factors when assessing monetary penalties, including the source's compliance history, good faith efforts to comply for the duration of the violation, and "such other factors as justice may require." Thus, with or without an explicit affirmative defense, a source retains the ability to defend itself in an enforcement action and to oppose the imposition of particular remedies or to seek the reduction or elimination of monetary penalties, based on the specific facts and circumstances of the emergency event. The D.C. Circuit has noted that such justifications would be a "good argument . . . to make to the courts."⁵² Thus, overall, elimination of the title V emergency affirmative defense provisions will not deprive sources of these defenses in potential enforcement actions. Sources retain all of the arguments they previously could have made. Congress vested the courts with the authority to judge how best to weigh the evidence in an enforcement action and to determine appropriate remedies. The EPA may not, through the title V affirmative defenses, restrict a court's ability to do so, and the EPA does not believe that it would be appropriate, in this action, to provide guidance to the courts with respect to what factors a court should or must consider.

For similar reasons, the EPA does not believe it would be appropriate or necessary to retain the definition of "emergency" or any of the other provisions formerly contained in 40 CFR 70.6(g) and 71.6(g) that were associated with the title V affirmative defense. These additional provisions, which were created solely for the purpose of supporting the title V affirmative defense and ensuring that it was narrowly tailored, no longer serve

⁴⁹ See 81 FR 38653.

⁵² *NRDC*, 749 F.3d at 1064.

a purpose in the EPA's part 70 and part 71 regulations. For example, the EPA does not believe that retaining a standalone definition of "emergency" without any context or application would be helpful to relevant entities determining whether to initiate enforcement or to the courts or an agency determining the appropriate remedies.

As explained in section III.A., affirmative defense provisions by their nature limit or eliminate the authority of federal courts to determine liability or to impose remedies through considerations that differ from the explicit grants of authority in section 113(b) and section 113(e). Therefore, these provisions are not appropriate under the CAA, no matter what type of event they apply to, what criteria they contain, or what forms of remedy they purport to limit or eliminate. Thus, it would not be appropriate to amend the title V affirmative defense provisions to provide that the affirmative defense may be allowed if specified conditions are met, at the discretion of the enforcement entity.

3. Impacts on the Decision Making and Planning of Sources Confronted With Emergency Situations

Comment: Industry commenters raised concerns involving how the removal of the title V affirmative defense provisions will affect how sources plan for and react to emergency situations. Many of these comments asserted that without an affirmative defense provision in their title V permits, sources confronted with an emergency situation would be forced to decide whether to (1) comply with operating permit requirements or (2) deal with the emergency situation in a manner protective of human safety or other public interests, at the risk of being held liable for violating permit terms. Specifically, some commenters asserted that facilities faced with the threat of liability may be less willing to shut down systems in an emergency, creating the risk of more catastrophic accidents. Other commenters suggested that sources might shut down earlier than would normally be the case, which could result in resource shortages that could impede emergency response efforts or area recovery. Commenters asserted that the affirmative defense provisions serve the important purpose of allowing sources the flexibility to continue or resume operations to provide vital services in times of emergency.

One industry commenter, citing discussion in the EPA's 2014 SSM SIP Action Supplemental Proposal, asserted

that removing the affirmative defense provisions could result in an additional resource burden for sources, who could be forced to invest in facility improvements in order to protect the source from emergency situations.

Other commenters asserted similar arguments specifically concerning electric grid reliability, asserting that sources would have to weigh compliance obligations against the need to continue generating electricity to avert grid reliability problems. Some commenters generally claimed, without describing specific instances, that the title V emergency affirmative defense provisions, in addition to other available mechanisms for relief from penalties, have helped ensure reliable electric grid operation in emergency situations. Several commenters provided specific examples of these situations.

Commenters presented differing views of whether the definition of "emergency" in the title V affirmative defense provisions would encompass reliability or electric system emergencies. One commenter asserted that the definition of "emergency" should cover an extreme situation involving critical reliability concerns because the EPA has recognized that CAA rules need to account for the unique interconnected and interdependent operations of power plants. However, another commenter acknowledged that the definition may not be broad enough to cover this situation, but suggested that the EPA recognize that enforcement may be unwarranted not only for unit-specific emergencies, but also for situations where facilities are called upon to support reliability in the context of a larger electric system emergency.

Some commenters claimed that certain electric system operators cannot force a source to continue generating electricity in order to ensure system reliability if doing so would cause the source to violate an environmental requirement, such as a permit condition. Thus, these commenters expressed concern that without the title V affirmative defense—characterized by the commenters as an "exemption"—electric system operators would not be able to force a source to generate electricity in order to ensure system reliability. Other commenters discussed emergency generation orders issued by the Department of Energy (DOE) under section 202(c) of the Federal Power Act (FPA), 16 U.S.C. 824a(c), by which the DOE may require power plant owners to operate and generate electricity in certain emergency situations. While some commenters expressed concern

that a source could face the risk of significant penalties for emissions exceedances resulting from complying with such an order, other commenters discussed an amendment to the FPA that excuses sources from compliance with environmental regulations when necessary to comply with DOE emergency orders. One commenter concluded that this FPA provision should be viewed as complementary to, rather than a substitute for, the title V emergency defense, and another asserted that this legislation indicates congressional support for an emergency defense when electric system reliability is at issue.

Commenters urged the EPA to consult with other agencies with expertise in reliability. Commenters also suggested that the EPA direct federal and state enforcement offices to engage in close consultation with relevant grid operators or reliability authorities prior to initiating enforcement actions where exceedances were caused by a demonstrated reliability need. Commenters also proposed that system operators should be able to submit a reliability analysis in the record of any enforcement proceeding and suggested that courts should not independently assess previously established reliability-related determinations.

Response: The EPA does not believe that the removal of the title V emergency affirmative defense provisions will significantly affect the decision making of sources confronted with emergency situations. Sources confronted with an emergency situation will always have to assess the risk of liability involved with courses of action that would result in exceedances of emission limits contained in title V permits as well as the underlying standards. The EPA does not believe that removing the title V affirmative defense provisions will affect this risk assessment. First, the title V emergency provisions did not provide guaranteed protection from liability. They simply created an affirmative defense that a source, having allegedly violated a technology-based emissions limit, could assert in narrowly defined circumstances after an enforcement action was initiated. Moreover, permittees seeking to assert the defense bore the burden of establishing that a number of required conditions were met.

Second, the incentives that exist for sources to behave in a prudent manner during emergencies remain largely unchanged, even without an explicit affirmative defense. As discussed in section III.D.2. of this document, sources can still argue all available

defenses to an alleged violation and/or assert that penalties should not be imposed, based on the particular circumstances. The ability to assert relevant considerations in this manner is not limited to the particular conditions associated with the title V emergency affirmative defense provisions. The EPA agrees that the need to avert catastrophic accidents, or to avert an electric reliability crisis, or any number of other public interest-related considerations, could be especially relevant to the decision whether to pursue enforcement or impose penalties. The EPA cannot, however, restrict or define—through the operation of an affirmative defense or otherwise—the evidence or considerations that a court may take into account when determining whether penalties should be assessed in a given situation.

Additionally, the EPA does not believe that removing the title V emergency affirmative defense provisions will have a significant effect on how sources plan for emergencies or invest in facility improvements in order to prepare for emergencies. The EPA notes that the comments received on this point, and the EPA's statements in the 2014 SSM Supplemental Proposal cited by commenters, are more relevant to preparing for excess emissions from equipment malfunctions than to preparing for emergencies. Moreover, as discussed previously, removing the affirmative defense provisions should not change the incentives that sources have to prepare for emergencies. Prudent behavior with respect to planning for emergency situations and minimizing emissions during an emergency to the maximum extent possible would be just as advantageous to a source seeking to reduce the possibility that enforcement will be initiated (or seeking to establish that penalties are not appropriate) as it would be to a source attempting to meet the criteria of a codified affirmative defense provision. The EPA believes that such prudent behavior is a matter of good business practice that most, if not all, sources would normally pursue irrespective of an affirmative defense.⁵³

Regarding specific comments concerning electric grid reliability, the EPA does not believe that the current action will have a measurable impact on

electric grid reliability, and the EPA does not believe that it is necessary to consult with other agencies with expertise in reliability with respect to the limited actions being taken in this rule. As an initial matter, even if the EPA were to retain the existing title V emergency affirmative defense, the availability of that defense in different types of situations involving issues of grid reliability is uncertain. The EPA generally agrees with the commenters suggesting that most electric grid reliability situations would not have qualified as emergencies eligible for the title V affirmative defense, based on the narrow definition of “emergency” in the title V regulations being removed through this action.⁵⁴ However, again, nothing would prevent the consideration of reliability-related circumstances in determining whether to initiate enforcement or in deciding whether penalties are appropriate.

Additionally, contrary to the assertion of commenters, the removal of the affirmative defense provisions should not affect the ability of electric grid operators to request that sources generate electricity in order to avert grid reliability problems. Some of these comments were based on the mistaken premise that the title V affirmative defense provisions functioned as an exemption to emission limits.⁵⁵ Moreover, as other commenters note, Congress has provided various forms of relief in these situations, including the amendment to FPA section 202(c) (exempting sources from compliance with environmental regulations when necessary to comply with a DOE emergency order), as well as provisions such as CAA section 110(f) (authorizing state governors to temporarily suspend certain requirements where the

President determines a national or regional energy emergency exists). The EPA cannot here provide any further guarantees in this regard in the form of an affirmative defense, exemption, or other mechanism that would run contrary to the CAA.

4. Perceived Benefits of the Requirements Associated With the Title V Affirmative Defense Provisions

Comment: Some commenters discussed perceived benefits of retaining affirmative defense provisions as written, in addition to the increased certainty and consistency that commenters believe the provisions provided. One commenter claimed that the various demonstration and reporting requirements in the title V emergency affirmative defense provisions serve as incentives for sources to prevent and minimize excess emissions during emergencies, an incentive that the commenter claimed would be lost if the affirmative defense was removed.

Response: The components of the title V emergency affirmative defense involving recordkeeping and reporting requirements and the obligation for a source to properly operate its facility and take all reasonable steps to minimize excess emissions (40 CFR 70.6(g)(3) and 71.6(g)(3)) were important to limit the scope of the defense and any potential for abuse. However, the EPA does not agree that removing the affirmative defense will eliminate the incentives for sources to appropriately prepare for and respond to emergency situations, to minimize excess emissions, to maintain proper records of such events, or to notify relevant authorities in a timely manner. Because the CAA requires continuous compliance with applicable emission limitations and emission standards, sources should properly operate and take steps to minimize excess emissions at all times. Sources still have an incentive to do all of these things in the event of an emergency, because doing so would continue to be in their best interests both for compliance purposes and for purposes of defending against an enforcement action. Again, the EPA believes that such prudent behavior is a matter of good business practice that most, if not all, sources would normally pursue irrespective of an affirmative defense.

5. Environmental and Public Health Impacts

Comment: A number of commenters discussed the potential air quality and public health impacts of removing the title V affirmative defense provision. Industry commenters asserted that

⁵³ Additionally, as discussed in section III.D.3., the title V emergency affirmative defense provisions have rarely, if ever, been asserted in enforcement proceedings. Thus, the EPA does not believe that the removal of the narrowly drawn and apparently infrequently used title V emergency affirmative defense provisions will have a significant impact on sources.

⁵⁴ Again, the title V emergency provisions were only available for “sudden and reasonably unforeseeable events beyond the control of the source” requiring “immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency.” 40 CFR 70.6(g)(1). This definition of “emergency” generally contemplated emergencies directly affecting the operations of a single source. In contrast, the need for one source to continue operating in response to reliability concerns would generally not involve any sort of emergency at that particular source, but rather would likely be motivated by circumstances occurring at a different source. For example, one source might be required to generate electricity to make up for power that another source was unable to generate due to an emergency at the other source.

⁵⁵ A source faced with demands to continue generating electricity would always have to decide whether doing so could cause it to exceed emission limits in its title V operating permit; the presence or absence of an affirmative defense that could later be asserted in an enforcement proceeding does not change this fact. For further discussion, see section III.B.1. of this document.

removing the affirmative defense provisions would not reduce emissions or provide any air quality benefits. Moreover, industry and state commenters claimed that the EPA has not made any demonstration that emissions during emergencies endanger public health or safety or have resulted in problems with attainment of the NAAQS. One commenter claimed that EPA action to remove the title V affirmative defense provisions would be arbitrary and capricious because the action would impose regulatory burdens without any significant benefit, and because the EPA failed to consider the costs and benefits of its proposed action.

On the other hand, environmental commenters claimed that affirmative defense provisions impermissibly allow large facilities to emit massive amounts of pollution in violation of applicable emission limits without consequence. These commenters provided extensive discussion of the health impacts of different pollutants and cited to numerical data and case studies involving the emissions of a number of large industrial facilities. The commenters asserted that this is an environmental justice issue, as these emissions impact surrounding communities, which the commenters claimed are often low-income communities or communities of color. Environmental commenters asserted that the impacts of climate change may increase the incidence of malfunctions due to extreme weather events.

Response: As previously explained, the EPA is removing the affirmative defense provisions from the title V program regulations because these provisions are inconsistent with the EPA's interpretation of the enforcement structure of the CAA. The EPA is not basing this current action on potential air quality benefits, or a weighing of costs and benefits, associated with the removal of these provisions. While the EPA acknowledges that there are benefits to reducing emissions, including reducing impacts to communities with environmental justice concerns, as previously explained, the purpose of this rulemaking is to eliminate the affirmative defense provisions that EPA finds to be inconsistent with the enforcement structure of the Clean Air Act. This action also does not take into account the impact of climate change on the incidence of malfunctions and, as previously explained, emergencies, which—although there may be some similarities—are significantly different, and narrower, than malfunction events.

E. Response to Comments Outside the Scope of This Action

Comment: Several industry commenters requested that EPA should consider removing hospital, medical, and infectious waste incinerators (HMIWI) as a title V source category or consider reducing program requirements applicable to HMIWIs. Separately, one commenter expressed disagreement with the EPA's return to its 2015 SSM SIP Policy.

Response: These comments are not relevant to the current rulemaking action and are outside the scope of this final rule.

IV. Implementation Considerations

This section provides guidance and addresses comments on various aspects related to implementing this final rule. First, as indicated in the 2016 and 2022 proposed rules, as a result of the EPA's removal of 40 CFR 70.6(g), state, local and tribal permitting authorities⁵⁶ whose part 70 programs contain impermissible affirmative defense provisions⁵⁷ must submit program revisions to the EPA to remove such impermissible provisions from their EPA-approved part 70 programs. The part 70 program revision process should follow the procedures in 40 CFR 70.4(a) and (i), as specified in the guidance provided in the following subsections. In summary, the EPA expects that states with part 70 programs containing impermissible affirmative defense provisions will submit to the EPA either a program revision, or a request for an extension of time, within 12 months of the effective date of this final rule—*i.e.*, by August 21, 2024. Other considerations associated with program revisions are discussed further in section IV.A. of this document.

States must also remove title V-based affirmative defense provisions contained in individual operating permits. The EPA encourages states to remove these provisions at their earliest convenience. The EPA expects that any necessary permit changes should occur in the ordinary course of business as states process periodic permit renewals or other unrelated permit modifications. At the latest, states must remove affirmative defense provisions from

individual permits during the next permit revision or periodic permit renewal for the source that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on an affirmative defense provision in an EPA-approved title V program). Additional considerations associated with permit revisions are discussed further in section IV.B. of this document.

A. Program Revisions

This section clarifies the EPA's expectations for how the final action to remove 40 CFR 70.6(g) will affect state programs and responds to comments involving these considerations. Specifically, this section describes the actions that some states will need to take in order to submit program revisions to remove impermissible affirmative defense provisions.

1. Necessity for State Program Revisions

As indicated in the 2016 and 2022 proposed rules, as a result of the removal of 40 CFR 70.6(g), the EPA has determined that it is necessary for states whose part 70 programs contain impermissible affirmative defense provisions to submit program revisions to the EPA to remove such provisions from their EPA-approved part 70 programs.⁵⁸ This determination is based on the EPA's interpretation of the enforcement structure of the CAA, as informed by the *NRDC* decision. The EPA's rationale concerning affirmative defenses, presented in section III.A. of this document, applies equally to affirmative defense provisions within state part 70 operating permit programs, which the EPA now considers to be impermissible. The term “impermissible affirmative defense provisions” as used throughout this section is intended to refer to all affirmative defense provisions that, for the same reasons necessitating the EPA's removal of CFR 70.6(g) and 71.6(g), are inconsistent with the CAA. This includes, but is not limited to, any provisions within EPA-approved part 70 programs that are similar to, based on, or function in similar ways to the provisions being removed from 40 CFR 70.6(g). For example, any title V provisions that establish an affirmative defense that could be asserted in a civil enforcement

⁵⁶ As noted previously, the term “state” is used generically throughout this section to refer to all state, local, U.S. territorial, and tribal permitting authorities that administer EPA-approved part 70 (title V) programs. See 40 CFR 70.2 and 71.2.

⁵⁷ As specified further in section IV.A.1. of this document, the term “impermissible affirmative defense provisions” is intended to refer to all affirmative defense provisions that, for the same reasons necessitating the EPA's removal of CFR 70.6(g) and 71.6(g), are inconsistent with the enforcement structure of the CAA.

⁵⁸ To the extent that this document refers to the need to remove affirmative defense provisions from part 70 programs, the EPA is referring to the need for states to submit program revisions to the EPA to remove such provisions from states' EPA-approved part 70 (title V) operating permit programs.

action involving alleged noncompliance with any federally-enforceable standards would be inconsistent with the enforcement structure of the CAA. Such provisions are impermissible regardless of whether the affirmative defense provisions are specific to emergency situations, and regardless of other criteria contained within such provisions. Any provisions in an EPA-approved part 70 program that establish an exemption to emission limitations as described in this document will similarly need to be removed. This action will not have any direct effect on affirmative defense provisions established under other CAA programs, such as the SIP or section 111, 112, or 129 programs.

2. EPA's Authority To Require State Program Revisions

Comment: Multiple commenters objected to the EPA's indication that, if the EPA finalized the removal of 70.6(g), it may be necessary for states with similar affirmative defense provisions to remove those provisions and submit program revisions.

A number of commenters discussed the legal authority by which the EPA could require state program revisions. Environmental commenters suggested that CAA section 502(b), read together with sections 502(d) and (i) and with 40 CFR 70.4, plainly authorizes the EPA to revise the minimum elements of operating permit program regulations when the Administrator determines that revisions are necessary to meet the requirements of the CAA. Other commenters argued that the EPA has no legal basis for imposing its policy preference on states, and some industry commenters claimed that nothing in the CAA authorizes the EPA to withdraw its final approval of a state title V permit program because the EPA prefers a particular improvement to what was already approved, claiming that this would be contrary to Congressional intent and the purpose of title V. One state commenter similarly claimed that requiring program revisions would fundamentally shift the careful balance between the state and the federal governments' regulatory partnership. Some commenters also claimed that requiring states to make title V program changes would constitute a challenge to the legality of state programs and would require a finding that there is no situation where the state program provisions can be applied in a way that is consistent with the Act. One commenter characterized state program revisions as an unfunded mandate, which the commenter asserted should not be imposed on states without a clear

and compelling need. One commenter claimed that the EPA has impermissibly extended its interpretation of the *NRDC* case to state operating permit programs.

State commenters discussed the authority of states to tailor the details of their own title V program regulations and potential limits on the EPA's authority to dictate the fine particulars of state programs. One state commenter claimed that by removing the title V emergency affirmative defense provisions, the EPA would substantially raise the minimum elements required by the Act for state operating permit programs, citing 40 CFR 70.1(a). Other state commenters claimed that under title V, similar to CAA section 110 for SIPs, after the EPA sets minimum program requirements, states must meet these minimum requirements but have the authority and discretion to otherwise tailor their program to their specific state requirements, such as by providing for affirmative defenses. State commenters further asserted that the EPA's implementing regulations do not require a state's enforcement program to be set out in any particular manner, while acknowledging that states must have adequate authority to carry out all aspects of the program and submit a description of their enforcement program to the EPA, citing 40 CFR 70.4(b)(3) and (5). One state commenter noted that an acceptable enforcement program should include the ability to account for emissions during distinct periods of operation, including SSM.

Both state and industry commenters also highlighted the fact that the title V emergency provisions have always been discretionary, not required, elements of state programs. One commenter argued that because the affirmative defense provisions were initially discretionary, it should now be up to states to decide whether to retain them. The commenter claimed that this is a logical extension of a state's constitutional authority and that the EPA should not disturb state authorities by disapproving existing state permit programs that contain these provisions.

Response: The EPA agrees with those commenters who asserted that the CAA authorizes the EPA to revise its part 70 implementing regulations when necessary to conform to the CAA, including provisions of the CAA that apply to the enforcement of title V permit requirements. As the CAA and the EPA's implementing regulations are periodically updated to address evolving legal, policy, technical, and scientific information, so must state operating programs be updated. State part 70 program revisions, while infrequent, are a natural and necessary

part of a complex regulatory program, and this process is entirely consistent with the principles of cooperative federalism established in title V of the CAA. As various commenters acknowledged, the EPA has the authority to establish the minimum elements for state title V programs. See CAA section 502. The EPA's part 70 regulations implement this authority. When the EPA must remove an element from its implementing regulations in order to maintain consistency with CAA requirements, it follows that it would also generally be necessary to revise EPA-approved state part 70 programs to meet the same minimum legal requirements required by the CAA. The EPA acknowledges that states may establish additional permitting requirements, but only to the extent they are not inconsistent with the CAA. See CAA section 506(a). States do not have discretion to implement provisions that are inconsistent with the enforcement structure of the CAA or the EPA's part 70 regulations.

As some commenters acknowledged, the EPA's existing part 70 implementing regulations clearly establish a framework by which state part 70 programs may need to occasionally be revised, including when the part 70 regulations are revised or modified. See, e.g., 40 CFR 70.4(a) (if part 70 is revised and the Administrator determines that changes to approved state programs are necessary, states must submit program revisions); 70.4(i) (program revisions may be necessary when relevant federal or state statutes or regulations are modified). The EPA has the authority to approve or disapprove program revisions based on the requirements of the part 70 regulations and the CAA. See 40 CFR 70.4(i)(1), (2). Thus, the EPA has authority to require state title V program revisions.

To be clear, the final action being taken in this rule is the removal of the affirmative defense provisions from the EPA's regulations at 40 CFR 70.6(g) and 71.6(g). As a consequence of this regulatory action, it will be necessary for states with part 70 programs containing impermissible affirmative defense provisions to make conforming revisions to their part 70 programs. However, contrary to the assertions of some commenters, the EPA is not, at this time, disapproving or making any finding of deficiency or inadequacy with respect to any particular state program (such as a finding under 40 CFR 70.10), although this type of determination may be appropriate at a later time. This document clarifies the EPA's expectations for how the program revision process will unfold, based on

the EPA's existing implementing regulations and the EPA's longstanding experience in overseeing title V operating permit programs. The EPA intends that this guidance will be useful to permitting authorities and permit holders interested in understanding how removal of the affirmative defense provisions from the EPA's regulations will affect their programs and individual permits, respectively.

The EPA also reiterates, as multiple commenters acknowledged, that the title V affirmative defense provisions have always been discretionary elements of state permitting programs, and the EPA has never required states to adopt these provisions. In fact, a number of state part 70 programs do not appear to contain any such title V affirmative defense provisions. However, contrary to one commenter's assertion, the fact that these provisions were never required elements of state programs does not mean that they now must be deemed appropriate program elements or that states must be allowed to continue implementing them.

Finally, as explained in section V.D. below, this action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. As a result of this rule, some states with EPA-approved part 70 programs that contain impermissible affirmative defense provisions will be required to submit program revisions to the EPA, according to the framework established by the EPA's existing regulations. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

3. Scope of Necessary Program Revisions

Comment: Commenters addressed various aspects of the scope of state program revisions that would be necessary following the removal of 40 CFR 70.6(g). First, some commenters claimed that part 70 program regulations that incorporate by reference 40 CFR 70.6(g) or any state affirmative defense provisions effectively function the same as regulations that expressly include an affirmative defense. Commenters claimed that if these provisions were not removed from state

programs, they would create ambiguity and would undermine CAA enforcement. Therefore, these commenters asserted that part 70 program regulations that incorporate by reference any other affirmative defense provisions must also be removed from state programs.

Next, multiple commenters expressed support for the view that states may retain affirmative defense provisions that could be used for alleged noncompliance with permit requirements arising solely from state law. Some commenters asserted that the EPA has no authority to limit the ability of states to provide this type of state-only affirmative defense provision. Another commenter suggested that state-only affirmative defense provisions should be available not only for enforcement actions brought by state agencies, but also for enforcement actions brought by citizens or the EPA. However, other commenters indicated concern that sources could attempt to invoke state-only affirmative defense provisions in enforcement proceedings involving noncompliance with federal requirements, thereby undermining the enforcement of the CAA. These commenters suggested that the EPA provide guidance to clarify that if a state wishes to retain an affirmative defense for noncompliance with state-only requirements, the state must also include clarifying language in their regulations expressly limiting the applicability of such remaining affirmative defense provisions. Commenters also suggested that states identify these state-only program provisions in their title V program revisions.

Additionally, some commenters asserted that states should be able to circumscribe their own authority to enforce even federally enforceable requirements. Commenters suggested that states should be able to provide an affirmative defense to state-initiated enforcement (such as for administrative penalty proceedings) or otherwise restrict their ability to enforce alleged violations of federally-enforceable applicable requirements.

Finally, some commenters disagreed with the EPA's suggestion that states may retain portions of the emergency provisions, such as the definition of "emergency" or certain reporting requirements, for purposes of supporting other regulations that do not involve an affirmative defense. The commenters expressed concern that the presence of a definition of "emergency" or other recordkeeping, reporting, or work practice requirements could be interpreted as providing for an

affirmative defense or otherwise excusing a source from compliance during these periods. However, these commenters also asserted that the EPA should encourage more readily accessible information about excess emission events, in order to better inform surrounding communities of air quality issues.

Response: As previously noted, all impermissible affirmative defense provisions, as specified in section IV.A.1. of this document, will need to be removed from EPA-approved part 70 programs. To reiterate, this encompasses provisions that are similar to, based on, or function in similar ways to the provisions in 40 CFR 70.6(g) that the EPA is removing in this action, including all provisions that effectively establish an affirmative defense that could be asserted in an enforcement action involving alleged noncompliance with any federally-enforceable standards. In light of comments received, the EPA is also providing clarification on various other topics related to the scope of necessary program revisions.

Regarding state part 70 provisions that incorporate other affirmative defense provisions by reference, as a general matter, the EPA agrees with commenters' assertions that incorporating a provision by reference may have the same legal effect as explicitly including the provision within a regulation. Thus, where a state part 70 program incorporates by reference another independently applicable affirmative defense that suffers the same infirmities as those provisions being removed from 40 CFR 70.6(g) and 71.6(g), the state provision incorporating the affirmative defense provision would generally need to be removed.⁵⁹

Concerning the comments supporting the option for states to retain an affirmative defense as a "state-only" provision—which would apply solely to rights and responsibilities created by state law and would not apply to, interfere with, or otherwise affect any requirements or remedies under the CAA or federally-enforceable regulations—the EPA agrees that states have the discretion to develop such state-only provisions, as allowed under

⁵⁹ It may be possible that some state programs could incorporate 40 CFR 70.6(g) (or a similar state provision) by reference in such a manner as to leave it free from doubt that the incorporating provision would have no legal effect following the removal of 40 CFR 70.6(g) from the EPA's regulations (or following the removal of the state affirmative defense). However, the EPA believes that removal of the incorporating provision would nonetheless be the best practice to avoid the potential for confusion.

state law. However, any such provisions would only be available in enforcement actions brought solely under state law, and they would not be available in enforcement actions brought for alleged violations of any federally-enforceable requirements in a source's title V permit. This rulemaking would have no effect on, and does not preclude states from retaining or creating, such regulations unrelated to the state's EPA-approved part 70 program. State-only affirmative defense provisions that are included within individual operating permits would need to be clearly labeled to indicate their limited applicability. 40 CFR 70.6(b)(2).

However, notwithstanding the ability of states to create state-only affirmative defense provisions within their state regulations, any impermissible affirmative defense provisions contained *within* any EPA-approved part 70 programs will nonetheless need to be removed from the state's EPA-approved part 70 program. In such instances, the state would need to transmit to the EPA a program revision submittal to remove the affirmative defense provision from the body of regulations that comprise the state's official EPA-approved part 70 program. The EPA believes that the best practice for states would be to conduct a rulemaking to remove the affirmative defense provision from the state's current regulations (or to revise the state regulations to clarify the limited applicability of a state-only affirmative defense) and/or a legislative process to remove such provisions from a state statute, in addition to submitting the part 70 program revision to the EPA to formally remove the provision from the state's EPA-approved part 70 program. This would provide clarity for sources and the public and avoid any inconsistency between the state's EPA-approved part 70 program and the state's current regulations and/or statutes.

Regarding comments suggesting that states should be able to limit their own authority to enforce even federally enforceable requirements, as noted in section III.D.2. of this document, permitting authorities always retain the discretion to determine whether to initiate an enforcement action based on the circumstances of a given case. To the extent that a state develops an "enforcement discretion"-type provision that applied only in its own administrative enforcement actions or only with respect to enforcement actions brought by the state in state courts, such a provision may be

appropriate under state rules.⁶⁰ However, among the minimum required elements of a title V permit program is the requirement that, consistent with EPA regulations, the permitting authority have adequate authority to assure compliance with applicable standards, requirements, and regulations, and to enforce permits, including the ability to recover civil penalties for each violation. *See* CAA section 502(b)(5), 42 U.S.C. 7661a(b)(5). EPA regulations further provide that approved title V programs must have appropriate enforcement authority, including the authority to seek injunctive relief and to assess or recover civil penalties for violations of any applicable requirement or permit condition. *See* 40 CFR 70.11. Thus, to the extent that states wish to describe certain aspects of their enforcement discretion policy within their part 70 program regulations, this could only be permissible provided that the provision does not effectively undermine or eliminate the state's ability to enforce its title V program, even under the circumstances previously covered by the affirmative defense. For example, it would likely not be permissible for a state to establish criteria that, when met, would effectively preclude the state from enforcing, even in part, a federally-enforceable standard. Nor would it be permissible for any such provision to limit the ability of the EPA or citizens to enforce any federally-enforceable permit terms or to interfere with the authority of the federal courts to determine whether and to what extent certain remedies are appropriate in a given case.

Finally, although states may not retain title V provisions establishing an affirmative defense to noncompliance with federal requirements, the EPA reiterates its position that states may choose to retain certain aspects of their existing program regulations—such as the definition of "emergency" and associated reporting and recordkeeping requirements—to support functions unrelated to an affirmative defense, such as prompt reporting requirements. The EPA disagrees with commenters' assertions that the presence of definitions or reporting and recordkeeping requirements associated with emergencies would necessarily imply that an affirmative defense exists or that exceedances of emission limits during emergencies are excused. To the contrary, and although the EPA is not retaining such provisions within its own

regulations, states may decide that some of these provisions could potentially serve a useful function for state permitting authorities considering whether to pursue enforcement, for sources faced with the possibility of a state enforcement action, and for the public.

4. Timing Associated With Program Revisions

Comment: Multiple state and industry commenters requested that the EPA allow states additional time to submit any required part 70 program revisions. These commenters all asserted that 12 months is not sufficient time to conduct the administrative processes required to change part 70 program regulations, and suggested that anywhere between 18 and 36 months should be allowed, for various reasons. Some state commenters provided specific examples of the administrative actions associated with rulemakings that would necessitate additional time, including outreach, public hearings and comment periods, rule development, gubernatorial approval, legislative committee review, and legislative approval. One state commenter noted that many states face program and staff resource constraints based on other rulemaking obligations. Another state commenter predicted that necessary rule changes may take longer to promulgate because they will be controversial. Some commenters recommended providing additional time for state program revisions because these affirmative defense provisions are not currently causing any pressing problems with enforcement and there is no urgent need to change the provisions. Finally, one commenter suggested that additional time for state program revisions would be necessary to allow time for sources to implement measures to address the loss of the affirmative defense.

Other commenters, on the other hand, recommended a more limited time frame, while acknowledging the discretion that the EPA has under 40 CFR 70.4(a) to extend program revision deadlines. These commenters supported the EPA's default 12-month submission deadline with the possibility of an extended deadline of up to 24 months, on the grounds that states should be able to easily amend their operating permit rules within months, and that prompt action would facilitate the coordination of SIP revisions and title V revisions (and associated permit revisions). Environmental commenters urged the EPA to require states seeking an extension to specifically request additional time and to demonstrate good cause for the extension, and urged that

⁶⁰ The EPA has previously discussed an analogous issue in the context of SIPs. *See* SSM SIP Action, 80 FR 33855.

such requests be granted only under compelling circumstances. These commenters also suggested additional details concerning the required form, content, and timing of such an extension request.

Response: As discussed in the proposal, the necessary changes to part 70 programs arising from this rule should generally be relatively minor and straightforward, involving the removal of affirmative defense provisions from the state's part 70 program.⁶¹ Because of the nature of the required revisions, the EPA continues to believe that most or many states should be able to complete the necessary program revisions within 12 months. However, the EPA again appreciates that some states may require more time to complete program revisions, based on a number of different factors associated with their administrative process, including the potential need for legislative approval. Therefore, the EPA is allowing states to submit a request to the appropriate EPA Regional office requesting an extension to this 12-month deadline and demonstrating why such an extension is necessary. Such extension requests should include detailed information concerning the steps that the state will take to revise its part 70 program, as well as the specific timing associated with each of these steps. The EPA understands that many states have lengthy rulemaking processes and expects that requests for extension that include the information identified here in sufficient detail would generally be approved. Nonetheless, the EPA will consider each program revision submission and extension request on a case-by-case basis. The EPA expects that each state with a part 70 program containing impermissible affirmative defense provisions will submit a program revision or request for an extension of time to the EPA by August 21, 2024.

5. Program Revision Submittal Details

Comment: Two state commenters discussed the details of any required program revision submittals. One state suggested requiring the following four components: (1) legal authorization to revise the state rules and part 70 program; (2) redlined changes to state rules; (3) timeline for planned removal of affirmative defense from each permit;

and (4) a plan to make these changes to individual permits. Another state commenter requested additional clarity on what form of legal authority demonstration would be required for program revision submittals, and suggested that a rulemaking certification (certifying that the rules have been reviewed by legal counsel and have been found to be within the legal authority of the agency) would be sufficient and less burdensome than a formal opinion by the state Attorney General. One state commenter further expressed concern with the additional burden that would be associated with preparing and submitting a revised program plan. Finally, one commenter requested clarification of the EPA's intention to publish proposed program revisions in the **Federal Register** and provide a 30-day public comment period. They requested further clarification on whether the EPA intended to publish notice of approval in the **Federal Register** or issue a letter to state governors or their designees.

Response: As stated in the introduction to this section regarding program revisions, the part 70 program revision process should follow the procedures in 40 CFR 70.4(a) and (i). The EPA's part 70 regulations provide that for state program revisions, the state should submit such documents as the EPA determines to be necessary. See 40 CFR 70.4(i)(2)(i). As noted in the 2016 proposal, the EPA expects that program revisions to remove the title V emergency defense provisions will include, at minimum: (1) a redline document identifying the state's proposed revision to its part 70 program rules; (2) a brief statement of the legal authority authorizing the revision; and (3) a schedule and description of the state's plans to remove affirmative defense provisions from individual operating permits. The EPA encourages states to consult with their respective EPA regional offices on the specific contents of their revision submittal packages.

Regarding one commenter's statements concerning the legal authority demonstration component, the EPA reiterates that this component could take various forms depending on the specific circumstances of each state, and a formal opinion by an Attorney General should not be required for the narrow program revisions implicated by this particular rule. For a revision involving only the removal of affirmative defense provisions, a certification indicating that the revisions are within the legal authority of the agency and followed all required administrative (including public

participation) requirements should be sufficient. For other program revisions related to the removal of affirmative defense provisions, such as the inclusion of a narrowly tailored enforcement discretion provision, as discussed in section IV.A.3. of this document, the legal authority demonstration should also contain assurances that the state has adequate authority to enforce its part 70 program.⁶²

It is unclear what the comments discussing a "revised program plan" refer to. The EPA believes that the plan described in this document, involving narrow program revision submittals to remove affirmative defense provisions, is appropriate. As noted in the 2016 proposal, states may, but need not, also include as part of their program revision submittals any other unrelated revisions to state program regulations.

6. Consequences of Failure To Submit Program Revisions

Comment: Some commenters requested that the EPA clarify the consequences for states that refuse to revise their operating permit regulations. Specifically, commenters cited to CAA sections 502(d) and (i) and discussed the possibility of notices of deficiency (NOD), sanctions, and the eventual withdrawal of permitting authority.

Response: Commenters are correct that the EPA has the authority under CAA sections 502(d) and (i), and as specified in the EPA's implementing regulations at 40 CFR 70.10, to issue NODs, issue sanctions, and potentially withdraw approval of part 70 programs under appropriate circumstances, potentially including the failure of a permitting authority to submit required program revisions to the EPA. The EPA would exercise this authority on a case-by-case basis for this element of the program, as it would with any other.

7. Discussion of State-Specific Program Provisions

Comment: In response to requests from the EPA for information about part 70 programs that contain affirmative defense provisions, various commenters discussed certain provisions in specifically identified state part 70

⁶¹ As discussed in section IV.A.3. of this document, this particular revision to remove affirmative defense provisions from a state's EPA-approved part 70 program might not necessarily also involve a notice-and-comment rulemaking to revise the state's current administrative code, although the EPA believes this would be a best practice to ensure clarity.

⁶² For example, the state should demonstrate that any such alternative provisions: do not interfere with the authority of courts to determine whether and to what extent certain remedies are appropriate in a given case; do not limit the ability of citizens or the EPA to pursue enforcement; and do not limit the state's ability to enforce its part 70 program, for example by establishing criteria that, when met, would effectively preclude the state from assessing or recovering penalties consistent with 40 CFR 70.11(a)(3).

programs that could be impacted by the final rule.⁶³ Several commenters also requested an update to the document titled “Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs” that was included in the docket during the 2016 rulemaking process.

Response: The EPA appreciates this additional information. As noted previously, the EPA is not taking any action in this final rule with respect to the adequacy or inadequacy of individual state programs, including specific programs identified in the 2016 document referenced by commenters. The EPA expects that permitting authorities with part 70 programs that have impermissible affirmative defense provisions will follow the process provided in section IV. of this document. EPA Regional offices will work closely with permitting authorities to provide support during this process. States with additional questions about the impact of this rule on their operating permit programs should contact the appropriate EPA Regional office for further assistance.

B. Permit Revisions

This section clarifies the EPA’s expectations for the eventual removal of impermissible affirmative defense provisions from individual title V operating permits.

1. Scope of Permit Revisions

Comment: One commenter claimed that title V permits containing affirmative defenses derived from sources of authority other than 40 CFR 70.6(g) would not need to be revised.

Response: In general, any impermissible affirmative defense provisions within individual operating permits that are based on a title V authority and that apply to federally-enforceable requirements will need to be removed. For example, permit conditions that directly rely on 40 CFR 70.6(g) or 71.6(g) would need to be removed following the removal of these provisions from the EPA’s regulations. Importantly, however, permit revisions

would not be limited to permit conditions based on 40 CFR 70.6(g) and 71.6(g); any permit conditions that rely on a similarly impermissible title V affirmative defense provision contained in (or incorporated by reference into) a state’s part 70 program would also have to be removed following state program revisions. On the other hand, and as the EPA explained in the 2016 proposal, this rule will not directly affect affirmative defense provisions contained in title V permits that are derived from independent applicable requirements, such as SIP, NSPS or NESHAP provisions. Finally, should a state decide to retain a “state-only” affirmative defense or enforcement discretion-type provision, it may need to eventually amend title V operating permits to explicitly state the limited applicability of the state-only provision. See 40 CFR 70.6(b)(2). The discussion provided in the following subsections applies to both the removal of affirmative defense provisions from permits and to the amendment or modification of such permit terms.

2. Burden, Mechanism, and Timing of Permit Revisions

Comment: State commenters and one tribal commenter claimed that the EPA underestimates the burden of removing affirmative defense provisions from individual permits, and challenged the EPA’s statement in the proposal that “removal of affirmative defense provisions from permits should generally occur in the ordinary course of business and should require essentially no additional burden on states and sources.” State commenters explained that thousands of existing operating permits would require some form of revision action to be processed by the state, and that revising certain general permits that apply to multiple sources would require an administrative process similar to a rulemaking.

Numerous state and industry commenters supported the EPA’s suggestion that states may utilize a number of existing permit mechanisms to remove affirmative defense provisions from title V permits in the ordinary course of business, such as when the permitting authority next processes a permit renewal or significant permit modification for a source. One state commenter noted that this would be the most sensible and least disruptive and burdensome mechanism to complete permit revisions.

Commenters agreed with the EPA’s initial suggestion that the removal of affirmative defense provisions from operating permits could be

accomplished through the minor permit revision process and would not constitute a significant permit modification. Further, one state suggested that the EPA adopt a policy interpretation that removal of affirmative defense provisions could be accomplished through the administrative amendment process.

Some commenters also asserted that permit revisions should not be based on any other independent deadline or timeline, and that there is no urgency to remove the provisions. Other commenters, though, urged the EPA to encourage permitting authorities to exercise their discretion to remove the provisions as expeditiously as possible, on the earliest possible occasion.

Commenters also addressed the sequence of program revisions and permit revisions. One commenter expressed concern that potential ambiguity may arise if a source invokes an affirmative defense provision found in the permit, after the program revisions have been approved but the permit has not been amended. Lastly, one tribal commenter expressed its concern that making conforming revisions to permits before programmatic revisions would create inconsistencies that could undermine enforcement.

Response: The EPA acknowledges commenters’ general assertions that a large number of existing title V permits across the nation will eventually need to be revised to remove title V affirmative defense provisions. However, the EPA disagrees that this will involve any extraordinary burden on states or sources. The need to occasionally revise individual title V permits is a natural, common, and required feature of the title V operating permits program. Title V operating permits, by their nature, include a wide variety of requirements applicable to a source, and permit changes are periodically necessary to incorporate new or modified applicable requirements, and to reflect physical or operational changes that occur at a source. The EPA’s regulations, and all EPA-approved state part 70 programs, contain well-established mechanisms to account for various types of necessary revisions to title V permits. See, e.g., 40 CFR 70.7(d)–(h). The permit revisions that will need to occur as a result of this rulemaking fit well within this existing regulatory framework for occasional permit revisions.

Moreover, the EPA expects permit changes to remove discretionary title V affirmative defense provisions to be a potentially less burdensome process than, for example, the process required to incorporate new applicable

⁶³ In the proposed rule, the EPA solicited comment on a document titled, “Title V Affirmative Defense Provisions in State, Local, and Tribal Part 70 Programs” that was included in the docket associated with this rulemaking (Docket ID No. EPA–HQ–OAR–2016–0186). This document contains a tentative list of part 70 programs that appear to contain affirmative defense provisions that could be affected by this action. The document was intended for informational purposes only and does not reflect any type of determination as to the adequacy or inadequacy of any specific program provisions. The EPA received comments involving provisions within the Texas and Georgia part 70 programs that purportedly incorporate by reference affirmative defense provisions.

requirements in a permit via permit reopening. *See, e.g.*, 40 CFR 70.7(f)(1)(i). As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business. For example, these revisions could be made when a state processes periodic permit renewals or other permit revisions. Additionally, states may utilize other existing mechanisms to effectuate these permit changes, consistent with each state's approved part 70 program regulations. For example, the EPA does not believe that a permit revision to simply remove a discretionary affirmative defense provision would require significant modification procedures, and permitting authorities may be able to process these changes as minor modifications. Also, in certain circumstances, it may be possible for some permit changes to be made using administrative permit amendment procedures, provided that the removal of the title V emergency provisions would satisfy one of the specific circumstances contemplated within each state's approved part 70 program regulations governing administrative amendments.⁶⁴ States may also be able to utilize other streamlined mechanisms for processing multiple permit revisions at once.

Regarding the timing of such permit changes, for state or tribal permitting agencies implementing the federal title V program or part 70 programs that directly rely on 40 CFR 70.6(g), any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should occur promptly after the effective date of this final rule. For states implementing part 70 programs that contain state affirmative defense provisions, any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should similarly occur promptly after the EPA's approval of the necessary part 70 program revisions.⁶⁵ Generally, states would be expected to remove title V affirmative defense provisions from permits (or clearly label remaining provisions as state-only) at the earliest possible occasion when each permit is next

reviewed by the permitting authority, such as the next permit renewal or unrelated permit revision. Thus, at the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

It is important to note that while the EPA is not currently establishing any independent timeline for states to remove these provisions from individual permits, the EPA encourages states to begin removing these provisions from permits prior to the completion of any necessary part 70 program revisions. States may also find it convenient to remove these provisions in the course of completing revisions to permits related to the implementation of the 2015 SSM SIP Action.

3. EPA Objections to Permits

Comment: Some commenters urged the EPA to make clear that the agency will object to title V permits issued after the effective date of the final rule that incorporate or refer to title V affirmative defense provisions.

Response: As previously noted, the EPA expects that any necessary permit revisions will generally occur following program revisions to remove the underlying affirmative defense provisions from each permitting authority's part 70 program regulations. Therefore, although the EPA encourages states to remove title V emergency affirmative defense provisions from operating permits at the earliest possible opportunity (including during permit renewals that occur before program revisions take place), the EPA generally does not anticipate objecting to title V permits that contain emergency affirmative defense provisions during the Agency's 45-day review period until after the relevant permitting authority has made necessary corrections to its approved part 70 program. The Administrator will evaluate any petitions to object to proposed title V operating permits on a case-by-case basis. Statements in this document are not intended to prejudice such petition responses.

As noted in section IV.B.2. of this document, in those state or tribal areas that implement the federal title V program (in 40 CFR part 71) or where the operating permit program directly relies on or incorporates by reference 40 CFR 70.6(g), the EPA expects states to begin the process of removing

impermissible affirmative defense provisions from operating permits promptly after the effective date of this final rule, as such permit revisions would not need to await state program revisions.

V. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0243 (for part 70 state operating permit programs) and 2060–0336 (for part 71 federal operating permit program). In this action, the EPA is removing certain provisions from the EPA's regulations, which should ultimately result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, some states will be required to submit program revisions to the EPA in order to remove affirmative defense provisions from their EPA-approved part 70 programs, and will eventually be required to remove provisions from individual permits. However, this action does not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA.

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 will not impose any requirements on small entities. Entities potentially affected directly by this proposal include state, local, and tribal governments, and none of these governments would qualify as a small entity. Other types of small entities, including stationary sources of air pollution, are not directly subject to the requirements of this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or

⁶⁴ In addition to specifying various types of permit changes for which the administrative amendment process would be appropriate, the EPA's regulations in 40 CFR 70.7(d) also provide states with the opportunity to specify additional criteria as part of their part 70 programs, if the EPA Administrator determines that those situations are similar to those specified in 40 CFR 70.7(d).

⁶⁵ 81 FR 38645, 38653, n. 35 (June 14, 2016) (acknowledging limits on state discretion where currently-approved state program regulations require inclusion of emergency affirmative defense provisions in state-issued title V permits).

uniquely affect small governments. The action imposes no new enforceable duty on any state, local or tribal governments or the private sector. As a result of this rule, some states with EPA-approved part 70 programs that contain impermissible affirmative defense provisions will be required to submit program revisions to the EPA, according to the framework established by the EPA's existing regulations. To the extent that such affected states allow local air districts or planning organizations to implement portions of the state's obligation under the CAA, the regulatory requirements of this action do not significantly or uniquely affect small governments because those governments have already undertaken the obligation to comply with the CAA.

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 has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. One tribal government (the Southern Ute Indian Tribe) currently administers an approved part 70 operating permit program, and one tribal government (the Navajo Nation) currently administers a part 71 operating permit program pursuant to a delegation agreement with the EPA. These tribal governments may be required to take certain actions, including a program revision (for the part 70 program) and eventual permit revisions, but these actions will not require substantial compliance costs. The EPA conducted outreach with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that outreach is provided in the rulemaking docket, Docket ID No. EPA-HQ-OAR-2016-0186, available at <http://www.regulations.gov>.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The EPA interprets Executive Order 13045 as applying to those 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 does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

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 (59 FR 7629, February 16, 1994) directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations (people of color) and low-income populations.

The EPA believes that it is not practicable to assess whether the human health or environmental conditions that exist prior to this action result in disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. This action simply removes the emergency affirmative defense provisions from the EPA's operating permit program regulations. As a result of this action, it will also be necessary for some state, local, and tribal permitting authorities to remove similar affirmative defense provisions from their EPA-approved part 70 programs and from individual title V operating permits. These title V provisions existed independently from any specific environmental health standards, and their removal should not affect the establishment of, or compliance with, environmental health or safety standards. It is not practicable to predict whether the removal of these affirmative defense provisions will result in any significant difference in emissions and subsequently whether this action will have any positive or negative effect on people of color, low-income populations and/or Indigenous

peoples. Information supporting this Executive Order review is contained in section III.D.5. of this document.

The EPA provided meaningful participation opportunities for people of color, low-income populations and/or Indigenous peoples or tribes in the development of the action through tribal outreach outlined in section V.F. of this document and summarized in the rulemaking docket, Docket ID No. EPA-HQ-OAR-2016-0186, as well as the standard opportunity to provide public comment on each proposal (2016 and 2022).

K. Congressional Review Act (CRA)

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

VI. Statutory Authority

The statutory authority for this action is provided in CAA sections 502(b) and 502(d)(3), 42 U.S.C. 7661a(b) & (d)(3), which direct the Administrator of the EPA to promulgate regulations establishing state operating permit programs and give the Administrator the authority to establish a federal operating permit program. Additionally, the Administrator determines that this action is subject to the provisions of CAA section 307(d), which establish procedural requirements specific to rulemaking under the CAA. CAA section 307(d)(1)(V) provides that the provisions of CAA section 307(d) apply to "such other actions as the Administrator may determine." 42 U.S.C. 7607(d)(1)(V).

VII. Judicial Review

Section 307(b)(1) of the CAA governs judicial review of final actions by the EPA. This section provides, in part, that petitions for review must be filed in the United States Court of Appeals for the District of Columbia Circuit: (i) when the agency action consists of "nationally applicable regulations promulgated, or final actions taken, by the Administrator," or (ii) when such action is locally or regionally applicable, but "such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." For locally or regionally applicable final actions, the CAA reserves to the EPA complete discretion whether to invoke the exception in (ii).

This final action is "nationally applicable" within the meaning of CAA section 307(b)(1). In the alternative, to

the extent a court finds this final action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that this action is based on a determination of “nationwide scope or effect” within the meaning of CAA section 307(b)(1).⁶⁶ This final action revises both the regulatory requirements in 40 CFR part 70 that govern state, local, tribal, and U.S. territorial operating permit programs nationwide and the regulatory requirements in 40 CFR part 71 that govern federal operating permits nationwide.⁶⁷ Accordingly, this final action is a nationally applicable regulation or, alternatively, the Administrator is exercising the complete discretion afforded to him by the CAA and hereby finds that this final action is based on a determination of nationwide scope or effect for purposes of CAA section 307(b)(1) and is hereby publishing that finding in the **Federal Register**.

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the District of Columbia Circuit within 60 days from the date this final action is published in the **Federal Register**. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of the action for the purposes of judicial review, nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of such rule or action.

List of Subjects

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

40 CFR Part 71

Environmental protection, Administrative practice and procedure,

⁶⁶ In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources.

⁶⁷ In the report on the 1977 Amendments that revised section 307(b)(1) of the CAA, Congress noted that the Administrator's determination that the “nationwide scope or effect” exception applies would be appropriate for any action that has a scope or effect beyond a single judicial circuit. See H.R. Rep. No. 95–294 at 323, 324, reprinted in 1977 U.S.C.A.N. 1402–03.

Air pollution control, Reporting and recordkeeping requirements.

Michael S. Regan,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 70—STATE OPERATING PERMIT PROGRAMS

- 1. The authority citation for part 70 continues to read as follows:

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

§ 70.6 [Amended]

- 2. In § 70.6, remove paragraph (g).

PART 71—FEDERAL OPERATING PERMIT PROGRAMS

- 3. The authority citation for part 71 continues to read as follows:

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

§ 71.6 [Amended]

- 4. In § 71.6, remove paragraph (g).

[FR Doc. 2023–15067 Filed 7–20–23; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

48 CFR Part 3052

[HSAR Case 2015–001; DHS Docket No. DHS–2017–0006]

RIN 1601–AA76

Homeland Security Acquisition Regulation; Safeguarding of Controlled Unclassified Information; Correction

AGENCY: Office of the Chief Procurement Officer, Department of Homeland Security (DHS).

ACTION: Final rule; correction.

SUMMARY: The Office of Chief Procurement is correcting a final rule published in the **Federal Register** on June 21, 2023, titled *Safeguarding of Controlled Unclassified Information*. The final rule amended the Homeland Security Acquisition Regulation (HSAR) to address requirements for the safeguarding of Controlled Unclassified Information (CUI).

DATES: 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: This correction fixes the amendatory instruction for 3052.204–71, Contractor employee access, to clarify that the text in Alternate II should not be removed, and adds in 3052.212–70, Contract terms and conditions applicable to DHS acquisition of commercial items, two alternative clauses that were inadvertently not included in the final rule.

Correction

In FR Doc. 2023–11270 appearing on page 40560 in the **Federal Register** of Wednesday, June 21, 2023, the following corrections are made:

3052.204–71 [Corrected]

- 1. On page 40598, in the second column, in part 3052, in amendment 6, the instruction “Revise clause 3052.204–71 to read as follows:” is corrected to read: “Revise section 3052.204–71 to read as follows:”.
- 2. On page 40599, in the third column, in section 3052.24–71, the regulatory text following Alternate I, starting with “Alternate II (June 2006)” to the end of the section, is corrected to read:

3052.24–71 [Corrected]

Alternate II (July 2023)

When the Department has determined contract employee access to controlled unclassified information or Government facilities must be limited to U.S. citizens and lawful permanent residents, but the contract will not require access to information resources, add the following paragraphs:

(g) Each individual employed under the contract shall be a citizen of the United States of America, or an alien who has been lawfully admitted for permanent residence as evidenced by a Permanent Resident Card (USCIS I–551). Any exceptions must be approved by the Department's Chief Security Officer or designee.

(h) 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)

- 3. On page 40603, in the third column, in part 3052, amendatory instruction 9 for section 3052.212–70 is corrected to read:
- 9. In section 3052.212–70:
 - a. Revise the date of the clause; and
 - b. Amend paragraph (b) of the clause by:
 - i. Removing the entry for “3052.204–70”;
 - ii. In the entry for “3052.204–71”, adding the entry “Alternate II” following the entry “Alternate I”; and
 - iii. Adding in numerical order the entry “3052.204–72” followed by the

entries “Alternate I” and “3052.204–73”.

The revision and additions read as follows:

■ 4. On page 40603, in the third column, in section 3052.212–70, the text of paragraph (b) is corrected to read:

3052.212–70 [Corrected]

(b) * * *

3052.204–71 * * *

Alternate II

3052.204–72 Safeguarding of Controlled Unclassified Information.

Alternate I

3052.204–73 Notification and Credit Monitoring Requirements for Personally Identifiable Information Incidents.

Paul Courtney,

Chief Procurement Officer, Department of Homeland Security.

[FR Doc. 2023–15579 Filed 7–20–23; 8:45 am]

BILLING CODE 9110–9B–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 230331–0089; RTID 0648–XD129]

Pacific Halibut Fisheries of the West Coast; Catch Sharing Plan; Inseason Action

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

ACTION: Temporary rule; inseason adjustment; request for comments.

SUMMARY: NMFS announces inseason actions for certain subareas in the Pacific halibut recreational fishery in the International Pacific Halibut Commission’s regulatory Area 2A off Washington, Oregon, and California. Specifically, this action adds the following fishing dates: the Washington Puget Sound subarea to open 7 days per week from August 17 through September 30; the Washington North Coast subarea to open 7 days per week from August 17 through September 30; the Columbia River and Washington South Coast subareas to open August 26 and 27, September 8, 9, and 22; and Oregon Central Coast subarea to open 7 days per week from August 3 through October 31. This action is intended to conserve Pacific halibut and provide angler opportunity where available.

DATES:

Effective date: July 19, 2023, through October 31, 2023.

Comment Date: Comments due on or before August 7, 2023.

ADDRESSES: Submit your comments, identified by NOAA–NMFS–2023–0128, by either of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA–NMFS–2023–0128 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Submit written comments to Jennifer Quan, Regional Administrator, c/o Katie Davis, West Coast Region, NMFS, 501 W Ocean Blvd., Long Beach, CA 90802.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post them for public viewing on <https://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender is publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Docket: This rule is accessible via the internet at the Office of the Federal Register website at <https://www.federalregister.gov/>. Background information and documents are available at the NOAA Fisheries website at <https://www.fisheries.noaa.gov/action/2023-pacific-halibut-recreational-fishery> and at the Council’s website at <https://www.pcouncil.org>. Other comments received may be accessed through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

Katie Davis, 323–372–2126, katie.davis@noaa.gov.

SUPPLEMENTARY INFORMATION: On April 11, 2023, NMFS published a final rule approving changes to the Pacific halibut Area 2A Catch Sharing Plan and implementing recreational (sport) management measures for the 2023 Area 2A recreational fisheries (88 FR 21503), as authorized by the Northern Pacific Halibut Act of 1982 (16 U.S.C. 773–773(k)). The Pacific Fishery Management Council (Council) 2023 Catch Sharing Plan provides a recommended framework for NMFS’ annual management measures and subarea allocations based on the 2023

Area 2A Pacific halibut catch limit of 1,520,000 pounds (lb) (689 metric tons (mt)) set by the International Pacific Halibut Commission (IPHC). The Area 2A catch limit and recreational fishery allocations were adopted by the IPHC and were published in the **Federal Register** on March 7, 2023 (88 FR 14066) after acceptance by the Secretary of State, with concurrence from the Secretary of Commerce, in accordance with 50 CFR 300.62. The Area 2A Pacific halibut management measures include recreational fishery season dates, bag limits, and subarea allocations.

Federal regulations at 50 CFR 300.63(c)(6), “Inseason Management for Recreational (Sport) Halibut Fisheries in Area 2A,” allow the NMFS Regional Administrator to modify annual regulations during the season. These inseason provisions allow the Regional Administrator to modify recreational (sport) fishing periods, bag limits, size limits, days per calendar week, and subarea allocations, if it is determined it is necessary to meet the allocation objectives and the action will not result in exceeding the catch limit.

NMFS has determined that, due to lower than expected landings in the Washington Puget Sound, North Coast, and South Coast subareas; the Columbia River subarea; and the Oregon Central Coast subarea; inseason action to modify the 2023 annual regulations for the recreational fishery is warranted at this time to provide additional opportunity for fishery participants to achieve the Area 2A subarea allocations. As stated above, inseason modification of fishing season dates is authorized by Federal regulations at 50 CFR 300.63(c)(6). After consulting with the IPHC, the Council, the Washington Department of Fish and Wildlife (WDFW), and the Oregon Department of Fish and Wildlife (ODFW), NMFS determined the following inseason actions are necessary to meet the management objective of attaining subarea allocations, will not result in exceeding any subarea allocations, and are consistent with the inseason management provisions allowing for the modification of recreational fishing periods and recreational fishing days per calendar week. Notice of these additional dates and increased bag limits will also be announced on the NMFS hotline at 206–526–6667 or 800–662–9825.

Weekly catch monitoring reports for the recreational fisheries in Washington, Oregon, and California are available on their respective state Fish and Wildlife agency websites. NMFS and the IPHC will continue to monitor recreational catch obtained via state sampling

procedures until NMFS has determined there is not sufficient allocation for another full day of fishing, and the area is closed by the IPHC, or the season closes on September 30 in Washington and the Columbia River subarea or October 31 in Oregon, whichever is earlier.

Inseason Action

Washington Puget Sound, North Coast, and South Coast Subareas

Description of the action: This inseason action implements additional fishing dates for the Washington Puget Sound, North Coast, and South Coast subareas during the 2023 recreational fishery. The Puget Sound subarea will open 7 days per week beginning on August 16 and will close when the subarea allocation is projected to be attained, or on September 30, whichever comes first. The North Coast subarea will open 7 days per week beginning on August 16 and close when the subarea allocation is projected to be attained, or on September 30, whichever comes first. The South Coast subarea will open on August 26 and 27, and September 8, 9, and 22, or until there is not sufficient allocation for another full day of fishing and the area is therefore closed.

Reason for the action: The purpose of this inseason action is to provide additional opportunity for anglers in the Washington Puget Sound, North Coast, and South Coast subareas to achieve the subarea allocations. NMFS has determined that these additional dates are warranted due to lower than expected landings through June 18, and the expectation that a substantial amount of the Washington allocation will go unharvested without additional fishing dates.

The Washington Puget Sound subarea will open 7 days per week beginning August 16 and will remain open until September 30 or the allocation is projected to be attained and the area is therefore closed. The recreational fishery in this subarea opened on April 6, 2023. As of June 18, anglers in the Puget Sound subarea have harvested 34,606 lb (15.70 mt) of the 79,031 lb (35.85 mt) allocation (44 percent), leaving 44,425 lb (20.15 mt) remaining (66 percent of the subarea allocation).

The Washington North Coast subarea will open 7 days per week beginning August 16 and will remain open until September 30 or the allocation is projected to be attained and the area is therefore closed. The recreational fishery in this subarea opened on May 4, 2023. As of June 18, anglers in the North Coast subarea have harvested 54,702 lb (24.81 mt) of the 129,668 lb

(58.82 mt) allocation (42 percent), leaving 74,966 lb (34.00 mt) remaining (68 percent of the subarea allocation).

The Washington South Coast subarea will open August 26 and 27, and September 8, 9, and 22 or the allocation is projected to be attained and the area is therefore closed. The recreational fishery in this subarea opened on May 4, 2023. As of June 18, anglers in the South Coast subarea have harvested 43,159 lb (19.58 mt) of the 64,376 lb (29.20 mt) allocation (67 percent), leaving 21,217 lb (9.62 mt) remaining (33 percent of the subarea allocation).

After consulting with WDFW, it was determined that in order for anglers to have the opportunity to achieve the Washington subarea allocations, with little risk of the subareas or coastwide allocation being exceeded, additional fishing dates are warranted. Therefore, through this action, NMFS is announcing fishing dates in August and September that were not previously implemented in the final rule on April 11, 2023 (88 FR 21503) or through inseason action implemented on June 2, 2023 (88 FR 36973).

Specifically, the additional season dates for the Puget Sound subarea are August 16 through September 30 or until there is not sufficient allocation for another full day of fishing and the area is therefore closed. The additional dates for the North Coast subarea as August 16 through September 30 or until there is not sufficient allocation for another full day of fishing and the area is therefore closed. The additional dates for the South Coast subarea are August 26 and 27, and September 8, 9, and 22, or until there is not sufficient allocation for another full day of fishing and the area is therefore closed.

Notice of these additional dates will also be announced on the NMFS hotline at 206-526-6667 or 800-662-9825.

Columbia River Subarea

Description of the action: This inseason action implements additional fishing dates for the Columbia River subarea during the 2023 recreational fishery, opening the fishery on August 26 and 27, and September 8, 9, and 22. The subarea may close sooner if there is projected to be insufficient allocation for another full day of fishing and the subarea is therefore closed.

Reason for the action: The purpose of this inseason action is to provide additional opportunity for anglers in the Columbia River subarea to achieve the subarea allocation. NMFS has determined that these additional dates are warranted due to lower than expected landings through June 18, and the expectation that a substantial

amount of the Columbia River subarea allocation will go unharvested without additional fishing dates. The recreational fishery in this subarea opened on May 4, 2023. As of June 18, anglers in the Columbia River subarea have harvested 12,213 lb (5.54 mt) of the 18,875 lb (8.56 mt) allocation (65 percent), leaving 6,661 lb (3.02 mt) remaining (35 percent of the subarea allocation).

After consulting with WDFW and ODFW, it was determined that in order for anglers to have the opportunity to achieve the Columbia River subarea allocation, with little risk of the subarea or coastwide allocation being exceeded, additional fishing dates are warranted. Therefore, through this action, NMFS is announcing fishing dates in August and September that were not previously implemented in the final rule on April 11, 2023 (88 FR 21503, April 11, 2023) or through inseason action implemented on June 2, 2023 (88 FR 36973).

Specifically, the additional season dates for the Columbia River subarea are August 26 and 27, and September 8, 9, and 22. The subarea may close sooner if there is projected to be insufficient allocation for another full day of fishing and the subarea is therefore closed.

Notice of these additional dates will also be announced on the NMFS hotline at 206-526-6667 or 800-662-9825.

Oregon Central Coast Subarea

Description of the action: This inseason action implements additional fishing dates for the Oregon Central Coast subarea during the 2023 recreational fishery, opening the fishery 7 days per week beginning on August 3 and closing when the entire Oregon Central Coast allocation (including the nearshore allocation) is projected to be reached, or on October 31, whichever comes first.

Reason for the action: The purpose of this inseason action is to provide additional opportunity for anglers in the Oregon Central Coast subarea to achieve the subarea allocation. NMFS has determined that additional fishing days are warranted due to lower than expected landings through June 18, 2023, and the expectation that a substantial amount of the Oregon combined allocation will go unharvested without additional fishing days. The recreational fishery in this subarea opened on May 1, 2023. As of June 18, anglers in the Oregon Central Coast subarea have harvested 98,342 lb (44.61 mt) of the 275,214 lb (124.84 mt) allocation (36 percent), leaving 176,872 lb (80.23 mt) remaining (64 percent of the overall subarea allocation).

After consulting with ODFW, it was determined that in order for anglers to have the opportunity to achieve the overall Central Coast subarea allocation, with little risk of the subarea or coastwide allocation being exceeded, additional fishing dates are warranted. Therefore, through this action, NMFS is announcing fishing dates in August, September, and October that were not previously implemented in the final rule on April 11, 2023 (88 FR 21503) or through inseason action implemented on June 2, 2023 (88 FR 36973).

Notice of these additional fishing dates will also be announced on the NMFS hotline at 206–526–6667 or 800–662–9825.

Classification

NMFS issues this action pursuant to the Northern Pacific Halibut Act of 1982. This action is taken under the regulatory authority at 50 CFR 300.63(c)(6), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(3)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. WDFW and ODFW provided updated landings data to NMFS on June 23, 2023, showing that through June 18, fishery participants in the recreational fishery off of Washington had caught only 44 percent of the Puget Sound subarea allocation, 42 percent of the North Coast subarea allocation, and 67 percent of the South Coast subarea allocation; fishery participants in the Columbia River subarea had caught only 65 percent of the subarea allocation; and fishery participants in the recreational fishery off of Oregon had caught only 36 percent of Central Coast subarea allocation. NMFS uses fishing rates from previous years to determine the number of recreational fishing dates needed to attain subarea allocations. Given the lower than expected catch rates in the Washington Puget Sound, North Coast, and South Coast subareas; the Columbia River subarea; and the Oregon Central Coast subarea, additional dates are considered necessary to increase angler opportunity to reach the overall Washington and Oregon subarea allocations. This action should be implemented as soon as possible to allow fishery participants to take advantage of the additional season dates. As the fisheries close on September 30, 2023 in Washington and the Columbia River subareas and on October 31, 2023 in Oregon, implementing this action through proposed and final rulemaking would

limit the benefit this action would provide to fishery participants. Without implementation of additional season dates in the Washington Puget Sound, North Coast, and South Coast subareas, the Columbia River subarea, and the Oregon Central Coast, the overall Washington and Oregon allocations are unlikely to be harvested, limiting economic benefits to the participants and not meeting the goals of the Catch Sharing Plan. It is necessary that this rulemaking be implemented in a timely manner so that planning for additional season dates can take place, and for business and personal decision making by the regulated public impacted by this action, which includes recreational charter fishing operations, associated port businesses, and private anglers who do not live near the coastal access points for this fishery, among others. To ensure the regulated public is fully aware of this action, notice of this regulatory action will also be provided to anglers through a telephone hotline, news release, and by the relevant state fish and wildlife agencies. NMFS will receive public comments for 15 days after publication of this action, in accordance with 50 CFR 300.63(c)(6)(iv). No aspect of this action is controversial, and changes of this nature were anticipated in the process described in regulations at 50 CFR 300.63(c).

For the reasons discussed above, there is also good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date and make this action effective immediately upon filing for public inspection, as a delay in effectiveness of this action would constrain fishing opportunity and be inconsistent with the goals of the Catch Sharing Plan, as well as potentially limit the economic opportunity intended by this rule to the associated fishing communities. This inseason action is not expected to result in exceeding the allocation for these subareas. NMFS regulations allow the Regional Administrator to modify sport fishing periods, bag limits, size limits, days per calendar week, and subarea allocations, provided that the action allows allocation objectives to be met and will not result in exceeding the catch limit for the subarea. NMFS recently received information on the progress of landings in the recreational fisheries in Washington and Oregon subareas, indicating additional season dates for Washington and Oregon should be implemented in the fishery to ensure optimal harvest of the subarea allocations. As stated above, it is in the public interest that this action is not

delayed, because a delay in the effectiveness of these new dates would not allow the allocation objectives of the recreational Pacific halibut fishery to be met.

Authority: 16 U.S.C. 773–773k.

Dated: July 17, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–15414 Filed 7–19–23; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230224–0053; RTID 0648–XD154]

Fisheries of the Exclusive Economic Zone off Alaska; Pacific Cod By Catcher/Processors Using Trawl Gear in the Central Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting retention of Pacific cod by catcher/processors using trawl gear in the Central Regulatory Area of the Gulf of Alaska (GOA). This action is necessary because the 2023 total allowable catch of Pacific cod allocated to catcher/processors using trawl gear in the Central Regulatory Area of the GOA has been reached.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), July 18, 2023, through 2400 hours, A.l.t., December 31, 2023.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2023 total allowable catch (TAC) of Pacific cod allocated to catcher/processors using trawl gear in the Central Regulatory Area of the GOA is

462 metric tons as established by the final 2023 and 2024 harvest specifications for groundfish of the GOA (88 FR 13238, March 2, 2023).

In accordance with § 679.20(d)(2), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2023 TAC of Pacific cod allocated to catcher/processors using trawl gear in the Central Regulatory Area of the GOA has been reached. Therefore, NMFS is requiring that Pacific cod caught by catcher/processors using trawl gear in the Central Regulatory Area of the GOA be treated as prohibited species in accordance with § 679.21(a)(2).

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay prohibiting the retention of Pacific cod by catcher/processors using trawl gear in the Central Regulatory Area of the GOA. NMFS was unable to publish a notice

providing time for public comment because the most recent, relevant data only became available as of July 17, 2023.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

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

Dated: July 18, 2023.

Jennifer M. Wallace,

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

[FR Doc. 2023–15515 Filed 7–18–23; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register

Vol. 88, No. 139

Friday, July 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.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 302, 332, and 337

[Docket ID: OPM-2023-0015]

RIN 3206-AN80

Recruitment and Selection Through Competitive Examination, and Employment in the Excepted Service (Rule of Many)

AGENCY: Office of Personnel Management.

ACTION: Proposed rule; request for comments.

SUMMARY: The Office of Personnel Management (OPM) is proposing regulations to implement changes authorized by the National Defense Authorization Act (NDAA) for Fiscal Year 2019 governing the selection of candidates from competitive lists of those who are eligible. These changes will provide expanded flexibility to agencies in the selection of candidates under delegated examining procedures. These changes also affect how agencies select candidates for excepted service appointments.

DATES: Comments must be received on or before September 19, 2023.

ADDRESSES: You may submit comments, identified by Regulation Identification Number (RIN) “3206-AN80” using any of the following methods:

Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments. All submissions received through the Portal must include the agency name and docket number or Regulation Identification Number (RIN) for this rulemaking.

Email: employ@opm.gov. Include “RIN 3206-AN80, Recruitment and Selection” in the subject line of the message.

Fax: (202) 606-4430.

Mail: Kimberly A. Holden, Deputy Associate Director for Talent Acquisition, Classification, and

Veterans Programs, U.S. Office of Personnel Management, Room 6551, 1900 E Street NW, Washington, DC 20415-9700.

FOR FURTHER INFORMATION CONTACT: Roseanna Ciarlante by telephone at (202) 936-3282 or Katika Floyd by telephone at (202) 606-0960; by email at employ@opm.gov; by fax at (202) 606-4430; or by TTY at (202) 418-3134.

SUPPLEMENTARY INFORMATION:

Background

The proposed rule is written for the immediate audience of Federal agency human resources practitioners and Federal agency hiring officials, who will implement the rules. For reference, many of the terms and concepts used and referenced below are defined in OPM’s *Delegated Examining Operations Handbook* (DEOH), and its appendices, available at <https://www.opm.gov/policy-data-oversight/hiring-information/competitive-hiring/deo-handbook.pdf>. The DEOH handbook also provides additional context.

The Federal civilian workforce consists of three categories of service: the competitive service, the excepted service, and the Senior Executive Service. The main differences between the three classes of service are: the manner in which candidates apply and are selected for jobs, the qualifications of the position being filled, the opportunity for appointees to move within or between the three classes of Federal service, and the rights governing appeal and redress options for incumbents of these positions. Each class of service (and its particular employment system(s)) is governed by different laws and regulations.

The competitive service consists of all civil service positions in the executive branch of the Federal Government with some exceptions, which are defined in section 2102 of title 5, United States Code (U.S.C.). Four categories of appointments comprise the competitive service: those subject to delegated examining procedures; those filled through promotion and internal placement (*i.e.*, merit promotion) procedures in accordance with 5 Code of Federal Regulations (CFR) part 335; those filled on a non-competitive basis in accordance with 5 CFR part 315 subparts F and G; and those filled under direct hire authority in accordance with 5 CFR part 337 subpart B. These

proposed regulations impact positions filled in the competitive service using delegated examining procedures.

The Director of OPM has delegated to agency heads the authority delegated to the Director by the President to conduct competitive examinations for positions in the competitive service. [5 U.S.C. 1104]. Each agency with this delegated authority is required to enter into a written agreement with OPM. Agencies with delegated examining authority may fill competitive civil service jobs with applicants from outside the Federal workforce; Federal employees who do not have competitive service status (*i.e.*, temporary or term employees, and individuals who hold or held an excepted service position which did not provide for conversion to the competitive service); or Federal employees with competitive service status (*i.e.*, career or career-conditional employees).

Agencies use delegated examining (also called “competitive examining”) procedures to fill positions in the competitive service for which any U.S. citizen may apply. Competitive examining supports Federal merit system principles by promoting recruitment from all segments of society, fair and open competition among job-seekers, and selection based on an applicant’s competencies or knowledge, skills, and abilities. OPM maintains oversight of its delegated examining authority to ensure agencies apply their delegated authority in accordance with the merit system principles in 5 U.S.C. 2301.

There are three stages to the competitive service Federal hiring process: the assessment process (*i.e.*, the rating and ranking of applicants and application of veterans’ preference); the certification process (*i.e.*, the process through which applicants are listed on a certificate of eligible candidates (“certificate of eligibles”) in order of their assessed scores, adjusted for veterans’ preference); and the selection process (*i.e.*, the process for choosing among applicants based on their numerical rankings in accordance with veterans’ preference requirements).

Filling Jobs in the Competitive Service

Rule of Three

For readers not familiar with delegated examining, traditionally, applicants for Federal jobs in the

competitive service are assigned numerical scores (including veterans' preference points, if applicable, for preference eligible veterans), listed in rank-order, and considered for selection based on the "rule of three." The rule of three requires that each selection must be made from among the highest three candidates on the certificate with the condition that a hiring official cannot select a non-preference eligible candidate over a preference eligible veteran (*i.e.*, an individual who served in the U.S. Armed Forces, or a relative of the individual, and meets certain statutory criteria, making the individual eligible for an advantage in Federal hiring over those who did not serve or do not meet the statutory criteria) with an equal or higher ranking, unless the agency follows the procedures for formally passing over or objecting to the preference eligible veteran. Under the rule of three, preference eligible candidates (or "eligibles") are given 0, 5, or 10 points, which are added to their passing score on an assessment. Individuals with 0 points added still have an advantage over non-preference eligible candidates with an equal or lower score. [5 U.S.C. 3318(a); 5 CFR part 332]. Numerical ranking is appropriate when a hiring agency needs to make granular distinctions between applicants; *i.e.*, an individual with a score of 97 (out of a 100 possible points) is deemed more qualified than an applicant with a score of 96 or lower.

Category Rating

On June 15, 2004, OPM issued final regulations which provided agencies with increased flexibility in assessing applicants using alternative (category-based) rating and selection procedures rather than individual numerical ratings. This flexibility is known as "category rating" (see 5 CFR part 337, subpart C). Under category rating procedures, in lieu of numerical ranking, applicants are assessed and placed into two or more pre-defined quality categories, with preference eligible veterans listed above non-preference eligible veterans in each category to which the applicants are assessed. Veterans who have a compensable service-connected disability of at least 10 percent must be listed in the highest quality category, except when the position being filled is scientific or professional at the GS-9 grade level or higher. Hiring officials may select from applicants in the highest quality category provided that any preference eligible veteran must be considered before a non-preference eligible applicant. A hiring official cannot select a non-preference eligible

veteran over a preference eligible veteran without going through the formal procedures for passing over or objecting to the preference eligible veteran. [5 U.S.C. 3319; 5 CFR part 337, subpart C.] Category rating is appropriate when the hiring agency does not need to make such fine distinctions among applicants as is made using numerical ranking procedures (*i.e.*, all applicants placed in a particular category are deemed equally qualified). Category rating gives selecting officials potentially more applicants to choose from because all applicants in a given category are equally qualified: hiring officials are not limited to selecting from only the three highest rated applicants.

Filling Jobs in the Excepted Service

By definition, the excepted service consists of those civil service positions which have been excepted from certain requirements of the competitive service or the Senior Executive Service. [5 U.S.C. 2103]. Positions may be excepted from title 5 U.S.C. entirely, or from limited portions of title 5 U.S.C., *e.g.*, excepted from public notice or selection requirements, or from classification and pay otherwise required in accordance with 5 U.S.C. chapter 51. The reasons for and scope of the exceptions vary, depending on the circumstances surrounding the exception and the authority for the exception.

When filling a position in the excepted service, the hiring agency must follow the procedures in 5 CFR parts 213 and 302. Under these provisions, agencies have more flexibility when assessing, rating and ranking, and selecting eligible applicants than they do under competitive examining. Agencies can:

- Use a numerical ranking procedure similar to the rule of three,
- Place eligible applicants into preference categories based on their veterans' preference status (*i.e.*, in descending order from 30 percent or more disabled veterans (CPS); disabled veterans with at least a 10 percent but less than 30 percent disability (CP); less than 10 percent disabled veterans (XP); eligible parents and widows and widowers of a disabled veteran or a veteran killed on active duty (XP-derived); veterans who served during certain periods specified in statute or by the President or who received an armed forces expeditionary medal (TP); and sole survivor veterans pursuant to the Hubbard Act (SSP));¹ or

- Use an agency-developed method that provides preference-eligible veterans with at least as much preference as they would receive under the other two methods. Agencies oftentimes use their competitive service category rating process in conjunction with this last option.

Introduction

The NDAA for Fiscal Year 2019 (or "the Act") authorizes changes governing the selection of candidates from competitive lists of those who are eligible. Such lists are also known as delegated examining certificates. The Act eliminates the "rule of three" in numerical rating and ranking, which required that, for each selection, consideration was limited to the top three candidates on the certificate. Instead, the Act authorizes agencies to certify a "sufficient number" of names, not less than three, from the top of the appropriate register or list of eligible candidates, to be considered for selection, using a cut-off score² or other mechanism established by OPM (described below), known as the "rule of many." The Act also affects how agencies may make selections under 5 CFR part 302, Employment in the Excepted Service.

The proposed rule, called the "rule of many," encompasses the advantages of both "rule of three" and category rating procedures, allowing the hiring agency to make finer distinctions among applicants based on their relative qualifications for the position being filled, while at the same time expanding the range of candidates from which a hiring manager may make a selection. Under the rule of many, a hiring manager is not limited to choosing from among only the three highest applicants to fill each vacancy.

The Act does not change other requirements of delegated examining including public notice and the application of veterans' preference in competitive examining—veterans are still granted preference points under "rule of many" numerical rating procedures and continue to be entitled to selection preference over non-

adding points to the veteran's numerical score. CPS-10 point 30 percent or more disabled veteran; CP-10 point at least 10 percent disabled, but less than 30 percent, disabled veteran; XP-10 point other disabled veteran and those with derived preference; TP-5 point preference; SSP-0-point sole survivorship preference; and NV-non-veteran/non-preference.

² A cut-off score is an established score used to filter out unqualified candidates on any particular test or assessment. For purposes of this proposed rule, a cut-off score is used to reflect a sub-group of qualified applicants who demonstrated, through the assessment, they are highly qualified and can be successful in the position.

¹ Veterans' preference codes, *e.g.*, "TP," are a shorthand reference used in competitive examinations. Veteran's preference is recognized by

preference eligible candidates with the same or a lower numerical score unless the requirements for passing over a preference eligible are satisfied.

Certification Procedures Using Numerical Rating

The Act requires OPM to prescribe regulations for the administration of the “rule of many” numerical rating procedure, which may include cut-off scores. In considering the types of mechanisms that may be appropriate for this use, OPM reviewed candidate assessment and referral procedures when using rank-ordered selection³ under competitive examining. OPM identified four approaches that can be reasonably and practically incorporated into existing processes. OPM proposes that agencies use one of the following ways for determining the number of applicants referred for selection:

1. A cut-off score based on the assessment(s)⁴ used, supported by job analysis data. This referral mechanism involves establishing a cut-off, or minimum, score using test measurement experts knowledgeable about the assessment(s) used. This score should reflect a sub-group of qualified applicants who demonstrated, through the assessment, that they are highly qualified and can be successful in the position.

2. A cut-off score based on business necessity; for example, to keep the number of applicants manageable for costly or labor-intensive assessments such as structured interviews. This way of referring applicants involves establishing a cut-off, or minimum, score that results in identifying an appropriate number of applicants to move forward in the hiring process based on the business needs of the agency, taking into consideration the resources available. This mechanism is also useful when test measurement expertise is not available.

3. A set number of the highest ranked eligible applicants, for example, the top 10 names. This referral mechanism involves establishing a number of applicants to refer from the top of the ranked list of applicants.

4. A percentage of the highest ranked eligible applicants; for example, the top 10 percent will be referred for selection. This referral mechanism involves establishing a percentage of applicants

to refer from the top of the ranked list of applicants.

When using a set number of applicants or top percentage of eligible applicants, all applicants with the same score as the last applicant in the cut will also be referred. For example, if using the top 10 eligible applicants and the 10th applicant has a score of 96.0, then all applicants scoring 96.0 will be referred.

In selecting an appropriate mechanism, agencies should consider the number of positions to be filled, the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action. Agencies should document their decision-making in the case files sufficient to allow for reconstruction or third-party review of the decision. This should include the data and factors used in making the decision.

Each agency may choose which methodology it will use to certify a sufficient number of candidates to allow them to consider at least three candidates for each vacancy. The hiring agency must decide the approach, or mechanism, it will use before announcing the vacancy and must identify the methodology in the job opportunity announcement. Additionally, the approach used must be clearly documented in the examining case file and available for reconstruction or third-party review. OPM is proposing to amend 5 CFR 332.402 to include these requirements.

Under this proposal, eligible applicants are ranked in score order, including veterans’ preference points, with veterans’ preference breaking ties in scores, and then the previously-chosen mechanism is applied to create the certificate of eligibles. For example, a preference eligible with a rating of 98XP (10-point veteran)⁵ is listed ahead of a preference eligible with 98TP (5-point veteran). Similarly, a preference eligible with a rating of 98TP is listed ahead of a non-preference eligible with a score of 98NV (non-veteran/non-preference veteran). Compensably disabled preference eligibles (CPS and CP veterans)⁶ go to the top of the certificate of eligibles, regardless of numerical rating and ahead of all other eligibles, except when certifying for scientific and professional positions⁷ at

the GS–9 grade level and above in accordance with 5 U.S.C. 3313.

Using the rule of many procedures will occur as the final step before certification. Applicants will have already applied, been reviewed and assessed for qualifications, assessed for rating and ranking purposes and have a final rating. If a pass/fail assessment(s) is used, any applicant who fails to meet the passing grade of an assessment is no longer eligible, including those with priority or preference, and, therefore, will not be certified or referred for selection consideration.

It should be noted that delegated examining certificates issued under rule of many procedures may be shared with other agencies consistent with the Competitive Service Act requirements. See 83 FR 5335.

Selection Procedures Using Numerical Rating

As provided in 5 U.S.C. 3318(a), OPM is proposing to revise 5 CFR 332.404 to change selection procedures from requiring that each selection must be made from the top three candidates (the “rule of three”) to state that a selecting official may select any eligible candidate on the certificate of eligibles. However, under delegated examining rules, a selecting official may not pass over a preference eligible veteran to select a lower ranked non-preference eligible on the certificate unless there are reasons for passing over the preference eligible and the agency has complied with the pass-over procedures at 5 U.S.C. 3318(c). OPM notes that the “three consideration rule” at 5 CFR 332.405 may be used to remove an eligible candidate (to include preference eligibles) from the certificate who has received three bona fide considerations, as described in the next section.

The following is an example of a certificate of eligibles ranked by numerical ratings and veterans’ preference under the proposed rule of many. In this example, the agency established a cut-off score of 95.0 based on the assessment used for the position. Candidates with the same score are ranked in veterans’ preference order.⁸

K of the *Delegated Examining Operations Handbook*.

⁸ CPS–10 point 30 percent or more disabled veteran and CP–10 point at least 10 percent disabled, but less than 30 percent, disabled veteran; XP–10 point other disabled veteran and those with derived preference; TP–5 point preference; SSP–0 point sole survivorship preference; and NV–non-veteran/non-preference.

³ Rank-order selection ranks applicants from highest score to lowest score based on their assessment results including veterans’ preference points, and selections occur on a top-down basis.

⁴ A sample of the most common assessment tools used in the Federal Government may be found in chapter 2 of the *Delegated Examining Operations Handbook*.

⁵ See note 1, above, for an explanation of veterans preference codes.

⁶ See note 1, above, for an explanation of veterans preference codes.

⁷ Professional and scientific positions are identified in the OPM publication *Handbook of Occupational Groups and Families*. For a list of professional and scientific positions, see Appendix

CERTIFICATE OF ELIGIBLES

Candidate	Score/ veterans' preference (VP)	Action
1	98.0 TP.	
2	96.0 XP.	
3	96.0 NV.	
4	95.0 TP.	
5	95.0 TP.	
6	95.0 NV.	

In this example, 6 candidates are eligible for consideration on the certificate of eligibles. Any of the 4 preference eligible candidates (candidates 1, 2, 4, or 5) may be selected. Under the rule of many procedures, the agency is not limited to considering the top three candidates, nor does the agency have to consider candidates in groups of three. The two non-preference eligibles may not be selected without satisfying pass-over requirements while there are higher ranked veterans' preference candidates available on the certificate. If the agency is filling multiple positions, a possible scenario may look like the below certificate where the first preference eligible declined and the second was selected:

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 TP	Declined.
2	96.0 XP	Selected.
3	96.0 NV.	
4	95.0 TP.	
5	95.0 TP.	
6	95.0 NV.	

For the next vacancy, using the example above, the agency may select candidate 3, 4, or 5. The first non-preference candidate, number 3, may be selected now that there are no available veterans' preference candidates ranked above them on the list. Candidate 6 may not be selected because there are available veterans' preference candidates ranked above candidate 6.

It should be noted that a certificate does not have to be worked from the top down. In this example, any of the preference eligible candidates may be selected. The fifth candidate, a 5-point preference eligible, may have been selected first.

In another example, below, based on the ranked certificate, an agency may select from among any of the top 5 candidates. The top three non-preference eligibles are within reach, or legally eligible, for selection because there are no higher ranked veterans' preference candidates.

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 NV.	
2	96.0 NV.	
3	96.0 NV.	
4	95.0 TP.	
5	95.0 TP.	
6	95.0 NV.	

Three Bona Fide Considerations

The Act codifies at 5 U.S.C. 3318(e) the long-standing practice under 5 CFR 332.405 of applying the "three consideration rule" under numerical rating and ranking selection procedures, whereby, if an appointing officer considers a candidate three times for three separate appointments from the same or different certificates for the same position⁹ and makes a valid (legal) selection of another candidate each time, the appointing officer may remove that candidate from further consideration. As stated above, the Act also retains the pass-over rule, which imposes certain requirements when an appointing authority proposes to pass over a preference eligible in favor of a lower ranked non-preference eligible.

A pass-over must be based on proper and adequate reasons. The *Delegated Examining Operations Handbook* provides information on proper and adequate reasons. When substantiated by documentation supporting the conclusion that one of the adequate and proper reasons has been demonstrated, the eligible is either not qualified or not suitable for the job and may be removed from consideration. Agencies with delegated examining authority have the authority to make a determination on most types of pass-overs. However, it should be noted that OPM retains exclusive authority to:

- Make medical determinations pertaining to preference eligibles (5 CFR part 339);
- Grant or deny an agency's pass-over request of a preference eligible with a compensable service connected disability of 30 percent or more (5 U.S.C. 3318); and
- Make suitability determinations involving material, intentional false statement or deception or fraud in examination or appointment, or refusal to furnish testimony as required by 5 CFR 731.103(a).

This proposed rule is not intended to affect an agency's obligation under 5 U.S.C. 3317 to notify a preference eligible of the eligible's removal from a standing register based on being

considered and passed over for appointment three times.

Additionally, OPM proposes that the three consideration rule does not always apply in cases of filling positions restricted to preference eligibles. Such positions include guards, elevator operators, messengers, and custodians (including housekeeping aides). [5 U.S.C. 3310]. The statute requires that in examining for such positions, "competition is restricted to preference eligibles as long as preference eligibles are available." [5 U.S.C. 3310.] If applications from both preference and non-preference eligibles are accepted, OPM proposes that agencies cannot eliminate preference eligibles from further consideration once they have been certified and received three bona fide considerations if doing so would result in the selection of a non-preference eligible. In such a case, an approved pass-over would be needed to remove the preference eligible from consideration prior to selecting a non-preference eligible candidate.

OPM is proposing the following process to reconcile the use of the three consideration rule in § 3318(e) and the pass-over rule in § 3318(c) to preserve veterans' preference. OPM cautions agencies to take a judicious approach when using the three consideration rule. An agency may not use the three consideration rule to remove large numbers of applicants in lieu of formal pass-over procedures. Agencies should continue to pursue pass-over procedures when warranted and consider using the three consideration provisions when pass-over procedures are not justified. An agency should limit use of the three consideration rule to situations in which an agency has made an individualized determination that a specific applicant does not possess the specific skills or attributes needed for the position being filled. Therefore, in order to remove a candidate from consideration, one or more hiring managers must have made three valid selections and given bona fide consideration to the candidate during this process. OPM has determined that a bona fide consideration under the three consideration rule requires, at a minimum, that the hiring manager(s) has considered the candidate's application material *and* interviewed the candidate for the position. OPM proposes the requirement of an interview to ensure that a candidate is treated as fairly and equitably as other candidates being considered. The interview must have been of the same rigor and thoroughness as that provided to other candidates. Such consideration may have been given by one or more

⁹ In this context, the same position means the same title, series, and grade level or equivalent.

hiring managers from the same or different certificates under the same appointing officer. When more than one hiring manager is involved, each hiring manager must have interviewed the candidate.

To use the three consideration provision, an agency must document in the case file the bona fide consideration a candidate received (including a copy of the interview and the interviewer's notes and rating) and its reason(s) for removing the candidate from consideration, including a description of why the applicant is not receiving additional consideration, such as the applicant's lack of a specific skill(s) or attribute(s).

When making multiple selections from a certificate, starting with the fourth selection, one individual may be removed per selection using the three consideration rule. OPM is proposing to amend 5 CFR 332.405 to include the requirements for this provision.

Example of Using the Three Consideration Rule

The following example goes through the steps an agency may take when making multiple selections under the proposed rule of many. In this example, the agency issued the following certificate of eligibles based on a cut-score of 95. The agency expects to make 9 selections from this certificate and conducts interviews with all 18 candidates.

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Selected.
8	96.0 NV	Selected.
9	95.0 TP	Removed—3 considerations.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Selected.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	Selected.
15	95.0 NV	Selected.
16	95.0 NV	Selected.
17	95.0 NV	Selected.
18	95.0 NV	Selected.

Any of the veterans' preference candidates referred on the certificate may be selected. In this example, candidates 2 and 6 decline the position. For the first three selections, the agency selects candidates 1, 4, and 5. (For purposes of this illustration, the agency is selecting from the top of the certificate. However, the agency could have selected any preference eligible on the certificate including those further

down on the list, such as candidates 12 or 13.)

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Selected.
8	96.0 NV	Selected.
9	95.0 TP	Removed—3 considerations.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Selected.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	Selected.
15	95.0 NV	Selected.
16	95.0 NV	Selected.
17	95.0 NV	Selected.
18	95.0 NV	Selected.

The agency has now considered candidate 3 in each of its earlier selection decisions, that is, three times. The agency documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 3 is removed from consideration. At this point, the agency may consider candidates 7, 8, or any of the veterans' preference candidates. The agency selects candidate 8 for the fourth selection.

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Selected.
8	96.0 NV	Selected.
9	95.0 TP	Removed—3 considerations.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Selected.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	Selected.
15	95.0 NV	Selected.
16	95.0 NV	Selected.
17	95.0 NV	Selected.
18	95.0 NV	Selected.

For the fifth selection, the agency may select candidate 7 or any of the veterans' preference candidates. The agency selects candidate 12. The agency has also determined to eliminate candidate 10 on the basis of the three consideration rule because three selections have been made and candidate 10 was not chosen. The agency documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 10 is removed from consideration.

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Selected.
8	96.0 NV	Selected.
9	95.0 TP	Removed—3 considerations.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Selected.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	Selected.
15	95.0 NV	Selected.
16	95.0 NV	Selected.
17	95.0 NV	Selected.
18	95.0 NV	Selected.

For the sixth selection, the agency may select candidate 7 or any of the veterans' preference candidates. The agency selects candidate 13. The agency has determined that candidate 11 has been considered 3 times and documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 11 is removed from consideration.

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Selected.
8	96.0 NV	Selected.
9	95.0 TP	Removed—3 considerations.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Selected.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	Selected.
15	95.0 NV	Selected.
16	95.0 NV	Selected.
17	95.0 NV	Selected.
18	95.0 NV	Selected.

For the seventh selection, the agency may select candidate 7 or 9. Candidates 14 to 18 are still not within reach as there is a higher ranked veterans' preference candidate available. The agency selects candidate 9. The agency has determined that candidate 7 has been considered 3 times and documents the interview and the hiring manager's reason(s) to remove the candidate. Candidate 7 is removed from consideration. (It should be noted that non-preference candidates may be non-selected at any time.)

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Removed—3 considerations.
8	96.0 NV	Selected.
9	95.0 TP	Selected.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Removed—3 considerations.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	
15	95.0 NV	
16	95.0 NV	
17	95.0 NV	
18		

For selections eight and nine, the agency may select any of the remaining candidates and selects candidate 15 and 17. Below is the complete certificate of eligibles.

CERTIFICATE OF ELIGIBLES

Candidate	Score/VP	Action
1	98.0 CP	Selected.
2	98.0 CPS	Declined.
3	98.0 TP	Removed—3 considerations.
4	98.0 TP	Selected.
5	98.0 TP	Selected.
6	96.0 TP	Declined.
7	96.0 NV	Removed—3 considerations.
8	96.0 NV	Selected.
9	95.0 TP	Selected.
10	95.0 TP	Removed—3 considerations.
11	95.0 TP	Removed—3 considerations.
12	95.0 TP	Selected.
13	95.0 TP	Selected.
14	95.0 NV	Non-selected.
15	95.0 NV	Selected.
16	95.0 NV	Non-selected.
17	95.0 NV	Selected.
18	95.0 NV	Non-selected.

OPM welcomes the public's views on the impact this application of the three consideration rule would have on agency hiring outcomes.

Supplemental Certification

Under competitive examining procedures, a supplemental certificate may be issued when the original certificate results in fewer than three eligible and available candidates per vacancy. Reasons why supplemental certificates are needed often include: (1) the declination and failure to respond rates are higher than anticipated; (2) additional vacancies materialize in the office where the original certificate was sent; or (3) a supervisor in another office

(but still under the same appointing officer) has an identical vacancy.

OPM proposes that, to allow for instances when a certificate of eligibles issued under rule of many procedures results in fewer than three eligible and available candidates per vacancy and the agency needs to issue a supplemental certification, the agency must have already decided how to expand the group of candidates for whichever of the referral mechanisms used. This decision must be made before announcing the vacancy and must be clearly documented in the examining case file and available for reconstruction or third-party review. In making this decision an agency may, for example, establish a standard policy that the cut-off score used to establish the original certificate of eligibles may be augmented by dropping down 10 points, for example, from 95 to 85 points, as determined on a case-by-case basis based on business necessity. Following are illustrations of how this process might work.

1. A cut-off score based on the assessment(s) used, supported by job analysis data. A supplemental cut-off score may be established for instances when the original certificate is exhausted. For example, the original cut-off score may be set at 95 and, if additional applicants are needed after exhausting the certificate of eligibles, a cut-off score of 90 will be used.

2. A cut-off score based on business necessity. A supplemental cut-off score may be established for instances when the original certificate is exhausted. For example, the original cut-off score may be set at 98 and, if additional applicants are needed after exhausting the certificate of eligibles, a cut-off score of 94 will be used.

3. A set number of the highest ranked eligible applicants. For example, if the top 10 applicants are referred and then exhausted, the next ranked 10 applicants may be referred.

4. A percentage of the highest ranked eligible applicants. For example, if the top 10 percent are referred and then exhausted, then the next 5 percent of top applicants may be referred.

The eligible candidates remaining on the original certificate retain their higher order of placement on the expanded certificate and candidates on the supplemental certificate are ranked below them. In working the expanded certificate, *i.e.*, the original and supplemental certificates together, any preference eligible may be selected. A non-preference eligibles may be selected only if there is no preference eligible above them on the list. That is, a hiring manager may not select a non-

preference eligible when there is an equal or higher-ranked preference eligible veteran(s) unless there are reasons for passing over the preference eligible and the agency has complied with the pass-over procedures at 5 U.S.C. 3318(c). Alternatively, as previously described, the three consideration rule may be used to remove an eligible candidate (to include preference eligibles) from the certificate who has received three bona fide considerations.

OPM is proposing to amend 5 CFR 332.402 to include the provision for issuing supplemental certification. Additionally, OPM will provide these and other examples in the guidance it issues when this proposed rule is implemented.

Category Rating

OPM notes that the NDAA added a provision at 5 U.S.C. 3319(c)(6) (renumbered from (c)(7) and amended by the Act) to allow an agency to use category rating procedures when issuing certificates from a standing register. When an appointing officer has three times considered and removed a preference eligible certified from a standing register through pass-over procedures, certification of the preference eligible may be discontinued. OPM will include this change in its category rating guidance in the *Delegated Examining Operations Handbook (DEOH)*; however, no modifications to the regulations are needed as § 337.304 already directs that veterans' preference be applied as prescribed in 5 U.S.C. 3319, which incorporates the recent amendment. OPM is proposing to amend 5 CFR 337.304 to reflect the new numbering of 5 U.S.C. 3319(c)(6). Additionally, OPM is proposing to retitle part 337, subpart C—Category Rating to conform to the statute.

Excepted Service Selections

Appointments in the excepted service are made in the same manner and under the same conditions required for the competitive service, as required by 5 U.S.C. 3320. With the proposed elimination of the rule of three, OPM is proposing to revise the procedures in 5 CFR part 302 to remove the requirement to make selection from among the highest three names available when using numerical scores and to add that agencies may apply the methods identified by OPM for identifying the number of applicants referred for selection. These methods (which are the same as described above for filling positions in the competitive service) are:

1. The use of a cut-off score based on the assessment(s) used, supported by job analysis data.

2. The use of a cut-off score based on business necessity; for example, to keep the number of applicants manageable for costly or labor-intensive assessments such as structured interviews.

3. A set number of candidates, for example, the top 10 applicants.

4. A percentage of the highest rated applicants; for example, the top 10 percent will be referred for selection.

In selecting an appropriate mechanism, agencies should consider the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

The NDAA also amended 5 U.S.C. 3320 to allow agencies to apply the provisions of 5 U.S.C. 3319, category rating, when making excepted service appointments in the same or similar manner as in the competitive service. OPM is proposing to revise the procedures for accepting, rating, and arranging applications in 5 CFR part 302 to include the option of using the category rating procedures as outlined in 5 U.S.C. 3319. Agencies are reminded that instructions for creating quality categories and procedures for certification and selection under category rating are provided in the DEOH available at www.opm.gov/deu.

Proposed § 302.201(c) provides information on granting veterans' preference when quality categories are used. When an agency chooses to use quality categories, it must list qualified preference eligibles ahead of non-preference eligibles within the same quality category.

OPM is proposing to modify § 302.302(a) to allow the use of either numerical rating or category rating when evaluating candidates.

OPM is proposing to modify § 302.302(b) to include procedures for using category rating. For the convenience of the reader, the existing process for numerical rating is listed as § 302.302(b)(1) and the procedures for using category rating are added as § 302.302(b)(2). An agency will be required to predefine at least two quality categories when using category rating.

OPM is proposing to modify the procedures for the maintenance of employment lists in § 302.303(d) by adding a new subparagraph § 302.303(d)(3) to explain the order used to list preference eligibles within each quality category. Within each quality category, preference eligibles must be listed ahead of non-preference eligibles

and may be listed in preference or alphabetical order.

Proposed § 302.304(b) includes procedures on the order of consideration when quality categories are used. These procedures are added as § 302.304(b)(6). The procedures require an agency to first consider candidates on the reemployment list, followed by candidates in the highest quality category, with preference eligibles listed ahead of non-preference eligibles, and then candidates in the next lower quality category, with preference eligibles listed ahead of non-preference eligibles.

Proposed § 302.401 modifies the current provisions to include procedures for the use of quality categories when making selections. For the convenience of the reader, the procedures for making selections from unranked lists are listed in § 302.401(a)(1) and have been revised to match processes used in the competitive service when unranked lists are used. The procedures for using numerical lists are in § 302.401(a)(2) and OPM is proposing to modify them to allow the agency to use an objective mechanism to define a sufficient number of candidates to refer for selection. The procedures for making selections using category rating are in § 302.401(a)(3) and allow an agency to select a candidate from the highest quality category as long as a non-preference eligible is not selected ahead of a preference eligible (an agency can select any preference eligible veteran in the highest quality category).

Expected Impact of This Proposed Rule

OPM is proposing regulations to implement changes authorized by the NDAA governing the selection of candidates from competitive lists of eligibles. The NDAA eliminated the "rule of three" in numerical rating and ranking, which required that, for each selection, consideration was limited to the top three candidates on the ranked certificate of eligibles. The NDAA, instead, authorizes agencies to certify a "sufficient number" of names, not less than three, from the top of the appropriate register, or list of eligibles, to be considered for selection, using a cut-off score or other mechanism established by OPM. The NDAA also affects how agencies make selections under 5 CFR part 302 procedures for excepted service appointments.

This proposal is part of a larger OPM effort to improve the hiring process by helping agencies make meaningful distinctions among applicants in terms of their relative qualifications for the position being filled, while at the same time expanding the range of candidates

from which a hiring manager may make a selection as compared to the more restrictive rule of three (*i.e.*, a hiring manager is not limited to choosing from among only the three highest applicants).

OPM is proposing four mechanisms for agencies to use to determine a "sufficient number" of names to certify for consideration, and the proposal includes provisions for using the three consideration rule in numerical rating and ranking. The proposed rule does not change the application of veteran's preference in competitive examining—veterans are still granted preference points under numerical rating procedures and continue to be entitled to selection preference over non-preference eligibles with the same or lower numerical score unless the requirements for passing over a preference eligible are satisfied.

The proposed rule also replaces "rule of three" procedures in excepted service hiring and allows agencies instead to use one of the same mechanisms described under competitive examining procedures to determine a "sufficient number" of names to certify for consideration. The NDAA also amended 5 U.S.C. 3320 to allow agencies to apply 5 U.S.C. 3319, category rating, when making excepted service appointments in the same or similar manner as in the competitive service. OPM's proposal revises the procedures for accepting, rating, and arranging applications in 5 CFR part 302 to include the option of using the category rating procedures as outlined in 5 U.S.C. 3319.

Costs

This proposed rule, once finalized and in effect, will affect the operations of over 80 Federal agencies—ranging from cabinet-level departments to small independent agencies. OPM will provide guidance on implementing this rulemaking in the form of frequently asked questions and updates to the *Delegated Examining Operations Handbook* and *Delegated Examining Training*. OPM estimates that this rulemaking will require individuals employed by these agencies to modify policies and procedures to implement the rulemaking and train human resources (HR) practitioners and hiring managers on its use. For the purpose of this cost analysis, the assumed average salary rate of Federal employees performing this work will be the rate in 2023 for GS–14, step 5, from the Washington, DC, locality pay table (\$150,016 annual locality rate and \$71.88 hourly locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and

overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$143.76 per hour.

In order to comply with the regulatory changes in this Notice of Proposed Rulemaking, affected agencies will need to review the rule and update their policies and procedures. We estimate that, in the first year following publication of the final rule, doing so will require an average of 300 hours of work by employees with an average hourly cost of \$143.76. This work would result in estimated costs in that first year of implementation of about \$43,128 per agency, and about \$3,450,240 in total Governmentwide. Some agencies may incur additional costs to ensure they have staff with the necessary assessment measurement expertise to use these proposed procedures. Numerical ranking is appropriate when a hiring agency needs to make finer, more granular distinctions between applicants, *i.e.*, an individual with a score of 97 (out of a 100 possible points) is deemed more qualified than an applicant with a score of 96 or lower. Therefore, using these procedures will require assessment tools that make those meaningful distinctions and measurement experts to understand their use to establish appropriate cut-off scores. For the purpose of this cost estimate, the assumed average salary rate of Federal employees performing this work will be the rate in 2023 for GS-14, step 5, from the Washington, DC, locality pay table (\$150,016 annual locality rate). We assume that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200 percent of the wage rate, resulting in an assumed labor cost of \$300,032 annually for those agencies in this situation.

We do not believe this rulemaking will substantially increase the ongoing administrative costs to agencies (including the administrative costs of using these new procedures and training new staff) because the rulemaking is replacing existing procedures and processes. OPM notes that agencies may incur higher costs to develop or purchase more rigorous assessments to use in determining cut-off scores under rule of many procedures. Alternatively, agencies may experience cost savings by identifying and selecting highly-qualified candidates more quickly through expanded choices and may recognize cost savings by eliminating the need to re-advertise and re-work hiring actions when selections were not made.

Finally, we intend and expect that the provisions of this proposed rule will operate independently and be treated as

severable. If any part or section of this proposed rule as finalized were invalidated by a reviewing court, the remaining provisions of the rule will continue to concern and effectuate the purpose of the rule, which is to implement changes in the various procedures for selecting candidates under delegated examining authorized by the NDAA for FY 2019.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). In accordance with the provisions of Executive Order 12866, this rulemaking was reviewed by the Office of Management and Budget as a significant rule.

Regulatory Flexibility Act

The Director of the Office of Personnel Management certifies that this regulation will not have a significant impact on a substantial number of small entities because it applies only to Federal agencies and employees.

Federalism

We have examined this rulemaking in accordance with Executive Order 13132, Federalism, and have determined that this rulemaking will not have any negative impact on the rights, roles and responsibilities of State, local, or tribal governments.

Civil Justice Reform

This regulation meets the applicable standard set forth in Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rulemaking will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521)

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 5 CFR Parts 302, 332, and 337

Government employees.

U.S. Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

Accordingly, the Office of Personnel Management proposes to amend title 5, Code of Federal Regulations, as follows:

PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE

■ 1. The authority citation for part 302 continues to read as follows:

Authority: 5 U.S.C. 1302, 3301, 3302, 8151, E.O. 10577 (3 CFR 1954–1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95–454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*

■ 2. In § 302.201, add paragraph (c) to read as follows:

§ 302.201 Persons entitled to veteran preference.

* * * * *

(c) When quality categories are used in the evaluation and referral, the agency shall list preference eligibles under section 2108(3) of title 5, United States Code, ahead of non-preference eligibles in accord with § 302.304(b)(6).

■ 3. In § 302.302, revise paragraphs (a) and (b) to read as follows:

§ 302.302 Examination of applicants.

(a) *Eligibility.* An evaluation of the qualifications of applicants for positions covered by this part may be conducted at any time before an appointment is made. The evaluation may involve only determination of eligibility or ineligibility or may include qualitative rating of candidates. If the evaluation involves only basic eligibility, candidates will not receive numerical scores or be placed in quality categories and will be referred in accordance with the procedures described in § 302.304(b)(5). If qualitative ranking is desired, numerical scores or placement in quality categories may be assigned in accordance with paragraph (b) of this section. Each agency shall make a part of the records the reasons for its decision to use ranked or unranked referral and, for ranked actions, the rating factors used. This information shall be made available to an applicant on his/her request.

(b) *Rating—(1) Numerical rating.* Numerical scores will be assigned on a scale of 100. Each applicant who meets the qualification requirements for the position established under § 302.202 will be assigned a rating of 70 or more and will be eligible for appointment. Candidates scoring 70 or more will

receive additional points for veteran preference as provided in § 302.201. Numerical ratings are not required when all qualified applicants will be offered immediate appointment. When there are an excessive number of applicants, numerical ratings are required only for a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable period of time. The agency must, however, adopt procedures to ensure the consideration of preference eligibles in the order in which they would have been considered if all applicants had been assigned numerical ratings. An agency shall furnish a notice of the rating assigned to an applicant on his/her request.

(2) *Category rating.* In accordance with 5 CFR part 337, subpart C, an agency must predefine at least two quality categories that reflect the requirements to perform the job successfully and to distinguish differences in the quality of candidates' job-related competencies/knowledge, skills and abilities. An agency may not establish a "not qualified" category. Only those found qualified will be placed in a category. Quality categories must be established and defined by the employing agency prior to accepting applications. Quality categories are not required when all qualified applicants will be offered immediate appointment.

* * * * *

■ 4. In § 302.303, add paragraph (d)(3) to read as follows:

§ 302.303 Maintenance of employment lists.

* * * * *

(d) * * *

(3) *When candidates have been placed in quality categories under § 302.302(b).* Within each quality category, preference eligibles must be listed ahead of non-preference eligibles and may be listed in preference or alphabetical order. Preference eligibles having a compensable, service-connected disability of 10 percent or more (designated as CPS or CP) are placed in the highest quality category unless the list will be used to fill scientific or professional positions at the GS-9 level or above, or equivalent.

■ 5. In § 302.304, revise paragraph (b) introductory text and add paragraph (b)(6) as follows:

§ 302.304 Order of consideration.

* * * * *

(b) *Consideration of other candidates.* Except as provided in paragraphs (b)(4), (b)(5) and (b)(6) of this section, an agency shall consider applicants on the reemployment and regular employment

list who have been assigned eligible ratings for a given position in Order A, Order B, or Order C, as described in paragraphs (b)(1) through (b)(3) of this section. Order A must be used when the agency has not established a reemployment list.

* * * * *

(6) *Category rating.* In accordance with 5 CFR part 337, subpart C, qualified preference eligibles will be listed ahead of non-preference eligibles within the same quality category in which they were assigned. Qualified preference eligibles with a compensable service-connected disability of 30-percent or more (CPS) and those with a compensable service-connected disability of at least 10-percent but less than 30-percent (CP) move from the category in which they would otherwise be placed to the highest quality category (except for scientific or professional positions at the GS-9 level or higher). Eligible candidates are considered in the following order:

(i) Candidates on the reemployment list;

(ii) Candidates in the highest quality category with preference eligibles listed ahead of non-preference eligibles; and

(iii) Candidates in each subsequent lower quality category with preference eligibles listed ahead of non-preference eligibles.

■ 6. In § 302.401, revise paragraph (a) to read as follows:

§ 302.401 Selection and appointment.

(a) *Selection—(1) Unranked lists.*

When making an appointment from a priority reemployment, reemployment, or regular list on which candidates have not received numerical scores, an agency must make its selection from among the qualified preference eligibles, as long as at least three candidates remain in that group. When fewer than three preference eligibles remain, consideration may be expanded to include the non-preference eligibles in accordance with paragraph (b) of this section, passing over a preference applicant.

(2) *Numerical lists.* When making an appointment from a list on which candidates have received numerical scores, an agency must use one of the methodologies identified below to determine the number of applicants referred for selection. A selecting official may select any eligible candidate referred for selection.

However, a selecting official may not pass over a preference eligible to select a lower standing non-preference eligible unless the agency has complied with the pass-over procedures in paragraph (b) of this section. The mechanism, or

approach, used must be determined before soliciting for applications and be made available to applicants upon their request. The approach used must be clearly documented in the recruitment file and available for reconstruction or third-party review. The agency may determine, based on the position to be filled, which of the following mechanisms will best meet the hiring needs of the agency and result in at least three names for consideration for appointment in the order provided in § 302.304.

(i) The agency may establish a cut-off score based on the assessment(s) used, supported by job analysis data;

(ii) The agency may use of a cut-off score based on business necessity;

(iii) The agency may use a set number of the highest ranked eligible applicants; or

(iv) The agency may use a set percentage of the highest ranked eligible applicants.

In selecting an appropriate mechanism, agencies should consider the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

(3) *Category rating.* When making appointments from a list on which candidates have been placed in quality categories, in accordance with 5 CFR part 337, subpart C, an agency may select any eligible candidate(s) in the highest quality category; except the selecting official may not select a non-preference eligible over a preference eligible unless the agency has complied with the pass-over procedures in paragraph (b) of this section. If there are fewer than three candidates in the highest quality category, the agency may combine (merge) the top two quality categories and make selections from the newly merged category. The newly merged category is the new highest quality category. Preference eligibles must be listed ahead of non-preference eligibles in the newly merged category.

(4) *Conditions.* Under any of the above selection methods, an agency is not required to—

(i) Accord an applicant on its priority reemployment or reemployment list the preference consideration required by § 302.304 if the list on which the applicant's name appears does not contain the names of at least three preference eligibles; or

(ii) Consider an applicant who has previously been considered three times or a preference eligible if consideration of his/her name has been discontinued for the position as provided in paragraph (b) of this section.

PART 332—RECRUITMENT AND SELECTION THROUGH COMPETITIVE EXAMINATION

■ 7. The authority citation for part 332 continues to read as follows:

Authority: 5 U.S.C. 1103, 1104, 1302, 2108, 3301, 3302, 3304, 3312, 3317, 3318, 3319; sec. 2(d), Pub. L. 114–137, 130 Stat. 310; E.O. 10577, 19 FR 7521, 3 CFR, 1954–1958 Comp., p. 218.

■ 8. Revise § 332.402 to read as follows:

§ 332.402 Referring candidates for appointment.

OPM or a delegated examining unit (DEU) will use one of the mechanisms identified below to refer a sufficient number of candidates for consideration, in accordance with this section and the agency's delegated examining policies.

(a) Agencies must establish a policy on the use of these procedures.

(b) OPM or a DEU may determine, based on the position to be filled, which of the following mechanisms will best meet the hiring needs of the agency and result in at least three names for consideration.

(1) OPM or a DEU may establish a cut-off score based on the assessment(s) used, supported by job analysis data;

(2) OPM or a DEU may establish a cut-off score based on business necessity;

(3) OPM or a DEU may use a set number of the highest ranked eligible applicants to certify; or

(4) OPM or a DEU may use a set percentage of the highest ranked eligible applicants to certify.

(5) When using a set number of candidates or top percentage of eligible applicants, all applicants with the same score and veterans' preference category as the last candidate in the cut, will also be referred.

(6) In selecting an appropriate mechanism, agencies should consider the number of positions to be filled, the assessment(s) used, historical applicant data, current labor market conditions, and other factors appropriate for the hiring action.

(c) The mechanism, or approach, used must be determined before announcing the vacancy and must be stated in the job opportunity announcement.

(d) The approach used must be clearly documented in the examining case file and available for reconstruction or third-party review.

(e) Hiring managers will receive sufficient names, when available, to allow them to consider at least three candidates for each vacancy.

(f) In instances when a certificate of eligibles results in fewer than three eligible and available candidates per vacancy and an agency needs to issue a

supplemental certification, OPM or a DEU must have decided, before announcing the vacancy, how to expand the group of candidates for whichever of the referral mechanisms used in accordance with the guidance in the *Delegated Examining Operations Handbook*.

(g) OPM or a DEU will refer candidates for consideration by simultaneously listing a candidate on all certificates for which the candidate is interested, eligible, and within reach, except that, when it is deemed in the interest of good administration and candidates have been so notified, OPM or a DEU may choose to refer candidates for only one vacancy at a time.

■ 9. Revise § 332.404 to read as follows:

§ 332.404 Order of selection from certificates.

A hiring manager, with sole regard to merit and fitness, shall select any eligible candidate certified for appointment on a certificate of eligibles, except the hiring manager may not pass over a preference eligible to select a lower standing non-preference eligible on the certificate unless the agency complies with pass over procedures in accordance with § 332.406.

■ 10. Revise § 332.405 to read as follows:

§ 332.405 Three considerations for appointment.

An appointing officer is not required to consider an eligible who has been considered by one or more hiring managers for three separate appointments from the same or different certificates for the same position (*i.e.*, the same title, series, and grade). In order to remove a candidate from consideration, one or more hiring managers must have made three valid selections and given bona fide consideration to the candidate during this process.

(a) *Bona fide consideration.* To use this provision, a hiring manager must consider the candidate's application material and interview the candidate for the position. The interview must have been of the same rigor and thoroughness as those conducted with other candidates interviewed for the position.

(b) *Documentation.* The agency must document in the case file the bona fide consideration a candidate received and its reason(s) for removing the candidate from consideration, including a description of why the candidate is not receiving additional consideration, such as the candidate's lack of a specific skill(s) or attribute(s).

(c) *Selection consideration.* An agency may use the three consideration

provision to remove one candidate from further consideration starting with the fourth selection, *i.e.*, after three valid selections have been made, and may remove one candidate for each subsequent selection made from a certificate of eligibles as long as bona fide consideration has been given and documented as required by this section.

PART 337—EXAMINING SYSTEM

■ 11. The authority citation for part 337 continues to read as follows:

Authority: 5 U.S.C. 1104(a), 1302, 2302, 3301, 3302, 3304, 3319, 5364; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; 33 FR 12423, Sept. 4, 1968; and 45 FR 18365, Mar. 21, 1980; 116 Stat. 2135, 2290; 117 Stat. 1392, 1665; and E.O. 13833.

■ 12. Revise the heading to subpart C to read as follows:

Subpart C—Category Rating

■ 13. Revise § 337.304 to read as follows:

§ 337.304 Veterans' preference.

In this subpart:

(a) Veterans' preference must be applied as prescribed in 5 U.S.C. 3319(b) and (c)(6);

(b) Veterans' preference points as prescribed in § 337.101 are not applied in category rating; and

(c) Sections 3319(b) and 3319(c)(6) of title 5 U.S.C. constitute veterans' preference requirements for purposes of 5 U.S.C. 2302(b)(11)(A) and (B).

[FR Doc. 2023–15374 Filed 7–20–23; 8:45 am]

BILLING CODE 6325–39–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 11

[Docket No. APHIS–2011–0009]

RIN 0579–AE76

Horse Protection; Licensing of Designated Qualified Persons and Other Amendments

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of proposed rulemaking and request for comments.

SUMMARY: The Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture is proposing to withdraw a final rule that was filed for public inspection by the Office of the Federal Register on January 19, 2017, in advance of

publication, and that amends the Agency's Horse Protection Act regulations (the 2017 HPA final rule). On January 23, 2017, APHIS withdrew the 2017 HPA final rule from publication without undertaking notice and comment procedures, in accordance with a memorandum that was issued by the Executive Office of the President on January 20, 2017. However, following a lawsuit, the U.S. Court of Appeals for the District of Columbia Circuit found this withdrawal to be deficient. The District Court has indicated that one way to remedy this deficiency is to undertake notice and comment procedures on the proposed withdrawal. APHIS is therefore proposing to withdraw the 2017 HPA final rule, and take public comment on this matter.

DATES: We will consider all comments that we receive on or before August 21, 2023.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov. Enter APHIS–2011–0009 in the Search field. Select the Documents tab, then select the Comment button in the list of documents.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0009, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at www.regulations.gov or in our reading room, which is located in Room 1620 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: Dr. Aaron Rhyner, DVM, Assistant Director, USDA–APHIS–Animal Care, 2150 Centre Ave., Building B, Mailstop 3W11, Fort Collins, CO 80526–8117; aaron.a.rhyner@usda.gov; (970) 494–7484.

SUPPLEMENTARY INFORMATION: Under the Horse Protection Act (HPA, or the Act, 15 U.S.C. 1821 *et seq.*), the Secretary of Agriculture is authorized to promulgate regulations to prohibit the movement, showing, exhibition, or sale of sore horses.

The Secretary has delegated responsibility for administering the Act to the Administrator of the U.S. Department of Agriculture's (USDA) Animal and Plant Health Inspection

Service (APHIS). Within APHIS, the responsibility for administering the Act has been delegated to the Deputy Administrator for Animal Care. Regulations and standards established under the Act are contained in 9 CFR part 11 (referred to below as the regulations), and 9 CFR part 12 lists the rules of practice governing administrative proceedings.¹

On July 26, 2016, APHIS published in the **Federal Register** (81 FR 49112–49137, Docket No. APHIS–2011–0009) a proposal² to amend the regulations. Primarily, APHIS proposed to discontinue third-party training and oversight of Designated Qualified Persons, or DQPs, who inspect regulated horses for evidence of soring. Instead, we proposed all inspectors would have to be trained and licensed by APHIS. The rule also proposed several changes to the requirements that pertain to the management of horse shows, exhibitions, sales, and auctions, as well as changes to the list of devices, equipment, substances, and practices that are prohibited to prevent the soring of horses. Finally, we proposed to revise the inspection procedures that inspectors are required to perform.

We solicited public comments on the proposal and received 130,975 submissions, as well as comments provided at 5 listening sessions. After APHIS reviewed the comments, on January 11, 2017, we submitted a final rule to the Office of the Federal Register (OFR) for publication (the 2017 HPA final rule).³ That rule was filed for public inspection, in advance of publication, on January 19, 2017. However, on January 20, 2017, the Chief of Staff of the President issued a memorandum instructing Federal agencies to immediately withdraw all regulations awaiting publication at the OFR.⁴ In response to the memorandum, the 2017 HPA final rule, which was on public inspection (and available on the **Federal Register** website, www.federalregister.gov), was withdrawn from publication by USDA

on January 23, 2017, the first business day following January 20, 2017.

In August 2019, the Humane Society of the United States (HSUS) and other non-governmental organizations sued USDA. HSUS argued that the 2017 HPA final rule had been duly promulgated and could not be withdrawn without first providing public notice in the **Federal Register** and an opportunity for public comment.

On July 22, 2022, the Court of Appeals for the D.C. Circuit reversed and remanded a lower court decision granting USDA's motion to dismiss, holding that “an agency must provide notice and an opportunity for comment when withdrawing a rule that has been filed for public inspection but not yet published in the **Federal Register**.” *Humane Soc’y of the U.S. v. U.S. Dep’t of Agric.*, 41 F.4th 564, 565 (D.C. Cir. 2022). In remanding the case to the lower court, the Court of Appeals clarified that “[o]n remand, the district court may consider all remedial issues, including the question of whether remand to the agency without vacatur is appropriate under the criteria established by Circuit precedent.” 54 F.4th 733, 734.

On May 12, 2023, the District Court issued its decision on remand. *Humane Soc’y of the U.S. v. U.S. Dep’t of Agric.*, No. 19–cv–2458 BAH, 2023 WL 3433970 (D.D.C. May 12, 2023). The Court remanded the withdrawal of the 2017 HPA final rule to APHIS without vacatur, but ordered that the withdrawal of the 2017 HPA final rule would be vacated in 120 days if the agency failed to take appropriate remedial action before then. The Court indicated that USDA could attempt to promulgate a new HPA rule or “remedy the deficiency in the withdrawal of [the 2017 HPA final rule] by conducting notice and comment on the withdrawal.” 2023 WL 3433970, at *14. On May 23, 2023, APHIS requested that the Court extend the deadline for action from 120 days to 180 days and the court granted that request on June 1, 2023.

APHIS will not be able to promulgate a new HPA rule within 6 months. Executive orders and USDA Departmental guidance regarding the regulatory process impose procedural steps for that new rule, including the preparation of supporting documentation, that USDA estimates will take materially longer to complete. Moreover, for the other reasons described below, APHIS has opted to engage in notice and comment rulemaking on the withdrawal.

¹ To view the regulations, go to <https://www.ecfr.gov/current/title-9/chapter-I/subchapter-A/part-11>.

² To view the 2016 proposed rule, its supporting documents, and the comments that we received, go to <https://www.regulations.gov/docket/APHIS-2011-0009>.

³ We are making a copy of the 2017 HPA final rule available as a supporting document for this proposed withdrawal. To obtain a copy, go to www.regulations.gov, and enter APHIS–2011–0009 in the Search field, or contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

⁴ To view the memorandum, go to <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-heads-executive-departments-agencies/>.

In a document⁵ published in the **Federal Register** on December 13, 2021 (86 FR 70755; Docket No. APHIS–2011–0009) (the 2021 withdrawal), APHIS withdrew the July 26, 2016 proposed rule on which the 2017 HPA final rule was based. In that 2021 withdrawal, we articulated our reasons for withdrawing the proposed rule. Those reasons remain relevant for our now proposing to withdraw the 2017 HPA final rule.

In the 2021 withdrawal, we stated that the National Academy of Sciences (NAS) reviewed methods for detecting soreness in horses and published a report of their findings in 2021.⁶ The report examined the inspection methods that DQPs use for identifying soreness in walking horses, new and emerging approaches for detecting pain, and use of the scar rule in determining compliance with the HPA, and made a number of science-based recommendations regarding revisions to APHIS' HPA program and associated regulations. We stated that we had reviewed the July 26, 2016 proposed rule in light of the NAS report, and determined that the proposed rule did not sufficiently address the report's findings.

We also stated that, because 5 years had elapsed since the issuance of the proposed rule, the underlying data and analyses that supported the proposed rule likely need to be updated.

Additionally, we stated that it was our intent to issue a new proposed rule that would incorporate more recent findings and recommendations, including the NAS report.

The above reasons are relevant in 2023 and, indeed, have become even more pronounced. A draft of the new proposed HPA rule was accepted by the Office of Management and Budget on September 2, 2022, and is currently under review. The 2017 HPA final rule did not provide for inspection of horses by APHIS employees as an alternative to inspection by third-party inspectors who have to be trained and licensed by APHIS, despite concerns from commenters that inspectors that meet APHIS' criteria could be prohibitively expensive for small shows. It is APHIS' intent, as stated in the Spring 2023 Unified Regulatory Agenda, to make such allowance in the new proposed rule.

Therefore, consistent with the 2021 withdrawal of the July 2016 proposed rule, we are proposing also to withdraw

the 2017 HPA final rule to avoid regulatory whiplash—*i.e.*, allowing a new (yet outdated) regulation to go into effect that would be subject to change, within a short period of time, by yet another rulemaking. Maintaining the status quo while going forward with the new proposed HPA rule will avoid regulatory confusion for both the industry and the public. Additionally, allocating resources towards implementing regulations that were developed without the benefit of consideration of the recent NAS report's findings, as well as recent inspection data, would hamper APHIS' current efforts to modernize the horse protection regulations.

Accordingly, we are proposing to withdraw the 2017 HPA final rule, and are requesting public comment on our proposed withdrawal. Comments shall be considered relevant to the proposed withdrawal to the extent that they articulate reasons for or against the withdrawal. To that end, we are making a copy of the 2017 HPA final rule available as a supporting document for this proposed withdrawal (see footnote 3).

Following the comment period, APHIS will publish a subsequent action in the **Federal Register** announcing the Agency's determination whether or not to withdraw the 2017 HPA final rule based on the comments received.

Executive Orders 12866, 13563, and 14094, and the Regulatory Flexibility Act

This proposed withdrawal has been determined to be significant for the purposes of Executive Order 12866, as amended by Executive Order 14094, and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rulemaking. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also examines the potential economic effects of this rulemaking on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below.

APHIS is proposing to withdraw a final rule that was filed for public inspection, in advance of publication, by the Office of the Federal Register on January 19, 2017, and that amends the Agency's Horse Protection Act regulations (the 2017 HPA final rule). APHIS withdrew the 2017 HPA final rule from publication without undertaking notice and comment procedures on January 23, 2017, in accordance with a memorandum that was issued by the Executive Office of the President on January 20, 2017. However, following a lawsuit, the U.S. Court of Appeals for the District of Columbia Circuit found this withdrawal to be deficient. The District Court has indicated that one way to remedy this deficiency is to undertake notice and comment procedures on the proposed withdrawal. APHIS is therefore proposing to withdraw the 2017 HPA final rule, and take public comment on this matter.

This proposed withdrawal is an administrative action and is intended to support the withdrawal of the 2017 HPA final rule. This action would not have a significant impact on the affected entities. In the absence of apparent significant economic impacts, we have not identified alternatives that would minimize such impacts. In addition, APHIS is in the process of developing new regulations that would provide protections to the regulated horses. In addition, this new amendments to the Horse Protection regulations would incorporate the findings of a 2021 National Academy of Sciences (NAS) study that examined methods used to inspect horses for soreness. This NAS study was published after the 2017 HPA rule.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

Executive Order 13175

This proposed withdrawal has been reviewed in accordance with the requirements of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or

⁵ To view the withdrawal, go to <https://www.regulations.gov/document/APHIS-2011-0009-11188>.

⁶ *A Review of Methods for Detecting Soreness in Horses*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/25949>.

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.

We have determined that this action does not have tribal implications, insofar as it would withdraw a final rule that the Agency never implemented or enforced.

Paperwork Reduction Act

This proposed withdrawal contains no reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Done in Washington, DC, this 17th day of July 2023.

Jennifer Moffitt,

Undersecretary, Marketing and Regulatory Programs, USDA.

[FR Doc. 2023–15462 Filed 7–20–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 34

[Docket ID OCC–2023–0007]

FEDERAL RESERVE SYSTEM

12 CFR Chapter II

[Docket No. OP–1809]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 323

RIN 3064–ZA36

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 722

[Docket ID NCUA–2023–0061]

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Chapter X

[Docket No. CFPB–2023–0033]

Interagency Guidance on Reconsiderations of Value of Residential Real Estate Valuations

AGENCY: Board of Governors of the Federal Reserve System (Board); Consumer Financial Protection Bureau (CFPB); Federal Deposit Insurance Corporation (FDIC); National Credit Union Administration (NCUA); and

Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Proposed interagency guidance with request for comment.

SUMMARY: The Board, CFPB, FDIC, NCUA, and OCC (together, the agencies) are issuing proposed guidance that would highlight risks associated with deficient residential real estate valuations and describe how financial institutions may incorporate reconsiderations of value (ROV) processes and controls into established risk management functions. The proposed guidance would also highlight examples of policies and procedures that a financial institution may choose to establish to help identify, address, and mitigate the risk of discrimination impacting residential real estate valuations.

DATES: Comments must be submitted on or before September 19, 2023.

ADDRESSES: Interested parties are encouraged to submit written comments to any and all agencies listed below. Comments submitted to the Federal eRulemaking Portal will be shared with all agencies for consideration. Comments should be directed to:

OCC: Commenters are encouraged to submit comments through the Federal eRulemaking Portal. Please use the title “Joint Guidance on Reconsiderations of Value of Residential Real Estate Valuations” 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–2023–0007” 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–2023–0007” 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–2023–0007” in the Search Box and click “Search.” Click on the “Documents” tab and then the document’s title. After clicking the document’s title, click the “Browse 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 Results” options on the left side of the screen. Supporting materials can be viewed by clicking on the “Documents” tab and filtered by clicking on the “Sort By” drop-down on the right side of the screen or the “Refine Documents Results” options on the left side of the screen. 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. OP–1809, 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 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 a.m. and 5 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-ZA36, 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-ZA36), 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-ZA36" 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 "Docket No.

NCUA-2023-0061" by any of the following methods (please send comments by one method only):

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments for "Docket No. NCUA-2023-0061."
- **Email:** PRAComments@ncua.gov.
- **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 <https://www.regulations.gov> as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. If you are unable to access public comments on the internet, you may contact NCUA for alternative access by calling (703) 518-6540 or emailing OGCMail@ncua.gov.

CFPB: You may submit comments, identified by Docket No. CFPB-2023-0033, by any of the following methods:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments.
- **Email:** 2023-IAA-ResidentialROV@cfpb.gov.
- **Mail/Hand Delivery/Courier:** Comment Intake—Interagency ROV, 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 document. 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.

FOR FURTHER INFORMATION CONTACT:

OCC: Siddarth Rao, Fair Lending Compliance Policy Specialist, (732) 635-2070; Joanne Phillips, Counsel, or Marta Stewart-Bates, Counsel, Chief Counsel's Office, (202) 649-5490; 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: Carmen Holly, Lead Financial Institutions Policy Analyst, Division of Supervision and Regulation, (202) 973-6122; Keshia King, Lead Supervisory Policy Analyst, Division of Consumer and Community Affairs, (202) 452-2496; Trevor Feigleson, Senior Counsel, (202) 452-3274, or Derald Seid, Senior Counsel, (202) 452-2246, Legal Division. 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; Board of Governors of the Federal Reserve System, 20th and C Streets NW, Washington, DC 20551.

FDIC: Patrick J. Mancoske, Senior Examination Specialist, Division of Risk Management Supervision, (202) 898-7032; Stuart Hoff, Senior Policy Analyst, Division of Depositor and Consumer Protection, (202) 898-3852; Legal Division: Navid Choudhury, Counsel, (202) 898-6526, nchoudhury@fdic.gov, or Mark Mellon, Counsel, (202) 898-3884, mmellon@fdic.gov. Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

NCUA: Naghi Khaled, Director of Credit Markets, or Walonda Hollins, Senior Credit Specialist, Office of Examination and Insurance, (703) 216-5136; Ernestine Ward, Director, Division of Consumer Compliance Policy & Outreach, Office of Consumer Financial Protection (703) 518-6524; National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314.

CFPB: Makalia Griffith, Counsel; Woody Anglade, Senior Counsel; Tim Lambert, Fair Lending Programs Lead and Senior Counsel, Office of Fair Lending and Equal Opportunity, at 202-435-7000. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Board, the CFPB, the FDIC, the NCUA, and the OCC are proposing interagency guidance (proposed guidance) on ROVs of residential real estate valuations.¹ Collateral valuations,

¹ If finalized, this guidance would be supervisory guidance that does not have the force and effect of law and does not impose any new requirements on supervised institutions. See 12 CFR 4, subpart F, appendix A (OCC); 12 CFR 262, appendix A (Board); 12 CFR 302, appendix A (FDIC); 12 CFR 1074, appendix A (CFPB); 12 CFR 791, subpart D, appendix A (NCUA). The agencies understand that

including appraisals,² are important to the integrity of the residential real estate lending process. Deficient collateral valuations can contain inaccuracies due to errors, omissions, or discrimination that affect the value conclusion and can result in either overvaluing or undervaluing real estate collateral. The Board, FDIC, NCUA, and the OCC have previously issued guidance that describes actions a financial institution may take to correct deficiencies identified in collateral valuations.³ These actions include ordering a second appraisal or evaluation or resolving the deficiency through the original appraiser or preparer of the evaluation.⁴

The agencies, collectively, do not have existing guidance specific to ROV processes. For purposes of the proposed guidance, an ROV is a request from the financial institution to the appraiser or other preparer of the valuation report to re-assess the report based upon potential deficiencies or other information that may affect the value conclusion.⁵ The agencies have received questions and comments from financial institutions and other industry stakeholders on ROVs, highlighting the uncertainty in the industry on how ROVs intersect with appraisal independence requirements and compliance with Federal consumer protection laws, including those related to nondiscrimination.

the Office of the Federal Register nevertheless has placed this proposed guidance document in the "Proposed Rules" category pursuant to the Office of the Federal Register regulation at 1 CFR 5.9(c).

² Appraisal means "a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information." 12 CFR 34.42(a) (OCC); 12 CFR 323.2(a) (FDIC); 12 CFR 225.62(a) (Board); 12 CFR 722.2 (NCUA).

³ See Interagency Appraisal and Evaluation Guidelines, 75 FR 77450 (Dec. 10, 2010).

⁴ The NCUA uses the term "written estimate of market value" in place of the term "evaluation." See 12 CFR 722.3.

⁵ ROVs may arise from a consumer requesting a financial institution to reexamine a valuation.

II. Description of Proposed Joint ROV Guidance

The proposed guidance describes how financial institutions may create or enhance ROV processes that are consistent with safety and soundness standards, comply with applicable laws and regulations, preserve appraiser independence, and remain responsive to consumers. The proposed guidance (1) describes the risks of deficient collateral valuations, (2) outlines applicable statutes, regulations, and existing guidance that govern ROVs and collateral valuations, (3) explains how ROV processes and controls can be incorporated into existing risk management functions such as appraisal review and complaint management, and (4) provides examples of ROV policies, procedures, and controls that financial institutions may choose to adopt.

III. Request for Comment

The agencies seek comment, from all interested parties, on all aspects of the proposed guidance, and in particular request comment on the following:

(1) *To what extent does the proposed guidance describe suitable considerations for a financial institution to take into account in assessing and potentially modifying its current policies and procedures for addressing ROVs?*

(a) *What, if any, additional examples of policies and procedures related to ROVs should be included in the guidance?*

(b) *Which, if any, of the policies and procedures described in the proposed guidance could present challenges?*

(2) *What model forms, or model policies and procedures, if any, related to ROVs would be helpful for the agencies to recommend?*

(3) *What other guidance may be helpful to financial institutions regarding the development of ROV processes?*

(4) *To what extent, if any, does the proposed ROV guidance conflict, duplicate, or complement the existing Interagency Appraisal and Evaluation Guidelines or a financial institution's policies and procedures to implement those Guidelines?*

IV. Paperwork Reduction Act Analysis

In accordance with the Paperwork Reduction Act (PRA) of 1995,⁶ the OCC, Board, FDIC, and NCUA reviewed the proposed guidance. The agencies may not conduct or sponsor, and an organization is not required to respond to, an information collection unless the information collection displays a currently valid OMB control number. The agencies have determined that certain aspects of the proposed guidance constitute a collection of information and are revising their information collections related to real estate appraisals and evaluations. The OMB control number for each agency is: OCC, 1557-0190; Board, 7100-0250; FDIC, 3064-0103; and NCUA, 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 guidance, the OCC, Board, FDIC, and NCUA are also updating and aligning their information collections with respect to the hourly burden associated with the Interagency Appraisal and Evaluation Guidelines.

Abstract: The proposed guidance encourages financial institutions to implement ROV policies, procedures, and control systems to allow consumers to provide the financial institution with relevant information that may not have been considered during an appraisal or evaluation. Such policies and procedures create a recordkeeping requirement.

Frequency of Response: Annual.

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) and nonbank subsidiaries of BHCs.

FDIC: Insured state nonmember banks and state savings associations, insured state branches of foreign banks.

NCUA: Private Sector: Not-for-profit institutions.

⁶ 44 U.S.C. 3506.

Burden

OCC

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
<i>Recordkeeping</i> : Resolution stating plans for use of property.	§ 7.1024(d)	6	5	30
<i>Recordkeeping</i> : 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
<i>Recordkeeping</i> : 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
<i>Recordkeeping</i> : 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
<i>Recordkeeping</i> : Real estate evaluation policy to monitor OREO.	§ 34.85	9	5	45
<i>Recordkeeping</i> : New IC 1—ROV Guidance—Policies and Procedures (Implementation: Applies to first year only).	N/A	930	40	37,200
<i>Recordkeeping</i> : New IC 2—ROV Guidance—Policies and Procedures (Ongoing).	N/A	930	2	1,860
<i>Recordkeeping</i> : New IC 3—Interagency Appraisal and Evaluation Guidelines—Policies and Procedures.	N/A	976	10	9,760
<i>Reporting</i> : Procedure to be followed when seeking to use an alternative index.	§ 34.22(b); § 160.35(d)(3)	249	6	1,494
<i>Reporting</i> : Prior notification of making advances under development or improvement plan for OREO.	§ 34.86	6	5	30
<i>Disclosure</i> : Default notice to debtor at least 30 days before repossession, foreclosure, or acceleration of payments.	§ 190.4(h)	42	2	84
<i>Disclosure</i> : New IC 4—Interagency Appraisal and Evaluation Guidelines.	N/A	976	5	4,880
Total Annual Burden Hours .....	.....	.....	.....	217,829

Board

TABLE 2—SUMMARY OF ESTIMATED ANNUAL BURDEN
[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 ROV guidance (Initial setup)	5,799	1	13.3	77,127
Policies and Procedures ROV guidance (Ongoing)	5,799	1	2	11,598
Disclosure				
Guidelines	5,415	1	5	27,075
Total .....	.....	.....	.....	210,089

FDIC

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—ROV Guidance—Policies and Procedures—Implementation (Voluntary).	Recordkeeping (Annual)	2,976	1	5 hours (15 hours divided by 3 years).	14,880

TABLE 3—SUMMARY OF ESTIMATED ANNUAL BURDEN—Continued
[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)
New IC 2—ROV Guidance—Policies and Procedures—Ongoing (Voluntary).	Recordkeeping (Annual)	2,976	1	1 hours	2,976
New IC 3—2010 Guidelines—Policies and Procedures—Ongoing (Voluntary).	Recordkeeping (Annual)	3,038	1	10 hours	30,380
New IC 4—2010 Guidelines—Disclosure—Ongoing (Voluntary).	Disclosure (Annual)	3,038	1	5 hours	15,190
Total Annual Burden (Hours) .....	.....	.....	.....	.....	126,465

NCUA

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).	3,648	618	0.0825	185,993
New IC 1—ROV Guidance—Policies and Procedures—Implementation.	Recordkeeping (Annual)	3,237	1	5	16,185
New IC 2—ROV Guidance—Policies and Procedures—Ongoing	Recordkeeping (Annual)	3,237	1	1	3,237
New IC 3—2010 Guidelines—Policies and Procedures—Ongoing	Recordkeeping (Annual)	3,648	1	10	36,480
New IC 4—2010 Guidelines—Disclosure—Ongoing	Disclosure (Annual)	3,648	1	5	18,240
Total Annual Burden Hours .....	.....	.....	.....	.....	260,135

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 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 for each agency in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to OMB: by mail, to U.S. Office of Management and Budget, 725 17th Street NW, #10235, Washington, DC 20503; by facsimile, to 202–395–6974; or by email, to oira_submission@omb.eop.gov, Attention: Federal Banking Agency Desk Officer.

V. Text of Proposed Interagency ROV Guidance*Background*

Credible collateral valuations, including appraisals, are essential to the integrity of the residential real estate lending process. Deficiencies identified in valuations, either through an institution's valuation review processes or through consumer provided information may be a basis for financial institutions to question the credibility of the appraisal or valuation report. Collateral valuations may be deficient due to prohibited discrimination;⁷ errors or omissions; or valuation methods, assumptions, data sources, or conclusions that are otherwise unreasonable, unsupported, unrealistic, or inappropriate. Deficient collateral valuations can keep individuals, families, and neighborhoods from building wealth through homeownership by potentially preventing homeowners from accessing accumulated equity, preventing prospective buyers from purchasing homes, making it harder for

⁷ For the purposes of this guidance, "discrimination" is prohibited discrimination based on protected characteristics in the residential property valuation process. For these purposes, "valuation" includes appraisals, evaluations, and other means to determine the value of residential property.

homeowners to sell or refinance their homes, and increasing the risk of default. Valuations that are not credible may pose risks to the financial condition and operations of a financial institution. Such risks may include loan losses, violations of law, fines, civil money penalties, payment of damages, and civil litigation.

Applicable Statutes, Regulations, and Guidance

The Equal Credit Opportunity Act (ECOA), and its implementing regulation, Regulation B, prohibit discrimination in any aspect of a credit transaction.⁸ The Fair Housing Act (FH Act) and its implementing regulation prohibit discrimination in all aspects of residential real estate-related transactions.⁹ ECOA and the FH Act prohibit discrimination on the basis of race and certain other characteristics in all aspects of residential real estate-related transactions, including in

⁸ See 15 U.S.C. 1691 *et seq.* and 12 CFR part 1002. Regulation B requires creditors to (1) provide an applicant a copy of all appraisals and other written evaluations developed in connection with an application for credit that is to be secured by a first lien on a dwelling; and (2) provide a copy of each such appraisal or other written valuation promptly upon completion, or three business days prior to consummation of the transaction (for closed-end credit) or account opening (for open-end credit), whichever is earlier. See 12 CFR 1002.14(a)(1).

⁹ See 42 U.S.C. 3601 *et seq.* and 24 CFR part 100.

residential real estate valuations. In addition, section 5 of the Federal Trade Commission Act prohibits unfair or deceptive acts or practices¹⁰ and the Consumer Financial Protection Act prohibits any covered person or service provider of a covered person from engaging in any unfair, deceptive, or abusive act or practice.¹¹

The Truth in Lending Act (TILA) and its implementing regulation, Regulation Z, establish certain federal appraisal independence requirements.¹² Specifically, TILA and Regulation Z prohibit compensation, coercion, extortion, bribery, or other efforts that may impede upon the appraiser's independent valuation in connection with any covered transaction.¹³ However, Regulation Z also explicitly clarifies that it is permissible for covered persons¹⁴ to, among other things, request the preparer of the valuation to consider additional, appropriate property information, including information about comparable properties, or to correct errors in the valuation.¹⁵

The Board's, FDIC's, NCUA's, and OCC's appraisal regulations¹⁶ implementing Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989¹⁷ require all appraisals conducted in connection with federally related transactions to conform with the Uniform Standards of Professional Appraisal Practice (USPAP), which requires compliance with all applicable laws and regulations including nondiscrimination requirements.

The Board's, FDIC's, NCUA's, and OCC's appraisal regulations also require appraisals to be subject to appropriate review for compliance with USPAP.¹⁸ Financial institutions generally conduct an independent review prior to providing the consumer a copy of the appraisal or evaluation; however,

additional review may be warranted if the consumer provides information that could affect the value conclusion or if deficiencies are identified in the original appraisal. An appraisal does not comply with USPAP if it relies on a prohibited basis set forth in either the ECOA or the FH Act or contains material errors including errors¹⁹ of omission or commission. If a financial institution determines through the appraisal review process, or after consideration of information later provided by the consumer, that the appraisal does not meet the minimum standards outlined in the agencies' appraisal regulations and if the deficiencies remain uncorrected, the appraisal cannot be used as part of the credit decision.²⁰

The Board, FDIC, NCUA, and OCC have issued interagency guidance describing actions that financial institutions may take to resolve valuation deficiencies.²¹ These actions include resolving the deficiencies with the appraiser or preparer of the valuation report; requesting a review of the valuation by an independent, qualified, and competent state certified or licensed appraiser; or obtaining a second appraisal or evaluation. Deficiencies may be identified through the financial institution's valuation review or through consumer provided information. The regulatory framework permits financial institutions to implement ROV policies, procedures, and control systems that allow consumers to provide, and the financial institution to review, relevant information that may not have been considered during the appraisal or evaluation process.

Use of Third Parties

A financial institution's use of third parties in the valuation review process does not diminish its responsibility to comply with applicable laws and

regulations.²² Moreover, whether valuation review activities and resolving deficiencies are performed internally or via a third party, financial institutions supervised by the Board, FDIC, NCUA, and the OCC are required to operate in a safe and sound manner and in compliance with applicable laws and regulations, including those designed to protect consumers.²³ In addition, the CFPB expects financial institutions to oversee their business relationships with service providers in a manner that ensures compliance with Federal consumer protection laws, which are designed to protect the interests of consumers and avoid consumer harm.²⁴ A financial institution's risk management practices include managing the risks arising from its third-party valuations and valuation review functions.

Reconsiderations of Value

An ROV request made by the financial institution to the appraiser or other preparer of the valuation report encompasses a request to reassess the report based upon deficiencies or information that may affect the value conclusion. A financial institution may initiate a request for an ROV because of the financial institution's valuation review activities or after consideration of information received from a consumer through a complaint, or request to the loan officer or other lender representative.²⁵

²² See OCC Bulletin 2013–29, “Third-Party Relationships: Risk Management Guidance;” CFPB Compliance Bulletin and Policy Guidance; 2016–02, Service Providers (Oct. 2016); FDIC FIL–44–2008, “Guidance for Managing Third-Party Risk” (June 6, 2008); SR Letter 13–19/CA Letter 13–21, “Guidance on Managing Outsourcing Risk” (December 5, 2013, updated February 26, 2021). The NCUA does not currently have supervisory or enforcement authority over third-party credit union vendors and service providers. The NCUA issued LTR 07–CU–13 “Evaluating Third Party Relationships.” to communicate guidance to examiners on a standard framework for reviewing third party relationships.

²³ See Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p–1) (which requires each appropriate Federal banking agency to prescribe safety and soundness standards for insured depository institutions). The Federal banking agencies implemented section 1831p–1 by rule through the “Interagency Guidelines Establishing Standards for Safety and Soundness.” See 12 CFR part 30, appendix A (OCC); 12 CFR part 208, appendix D–1 (Board); and 12 CFR part 364, appendix A (FDIC). See also 12 U.S.C. 1786(b); 12 U.S.C. 1789; and 12 CFR 741.3 (NCUA).

²⁴ CFPB Compliance Bulletin and Policy Guidance; 2016–02, Service Providers (Oct. 2016).

²⁵ See Interagency Appraisal and Evaluation Guidelines, 75 FR 77450, 77463 (Dec. 10, 2010). “An institution should establish policies and procedures for resolving any inaccuracies or weaknesses in an appraisal or evaluation identified through the review process, including procedures for: Communicating the noted deficiencies to and requesting correction of such deficiencies by the

¹⁰ See 15 U.S.C. 45(a)(1).

¹¹ See 12 U.S.C. 5531, 5536.

¹² See 15 U.S.C. 1601 *et seq.* and 12 CFR part 1026.

¹³ See 12 CFR 1026.42(c)(1).

¹⁴ “Covered persons” include creditors, mortgage brokers, appraisers, appraisal management companies, real estate agents, and other persons that provide “settlement services” as defined in section 3(3) of the Real Estate Settlement Procedures Act (12 U.S.C. 2602(3)) and the implementing regulation. See 12 CFR 1026.42(b)(1).

¹⁵ See 12 CFR 1026.42(c)(3)(iii).

¹⁶ 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); 12 CFR part 722 and 12 CFR part 701.31 (NCUA).

¹⁷ Public Law 101–73, title XI, 103 Stat. 511 (1989), codified at 12 U.S.C. 3331 *et seq.*

¹⁸ See 12 CFR 34.44(a) (OCC); 12 CFR 225.64(c) (Board); 12 CFR 722.4(c) (NCUA); and 12 CFR 323.4(c) (FDIC).

¹⁹ An error of omission is neglecting to do something that is necessary, *e.g.*, failing to identify the subject property's relevant characteristics. An error of commission is doing something incorrectly, *e.g.*, incorrectly identifying the subject property's relevant characteristics.

²⁰ See 12 CFR 34.44 (OCC); 12 CFR 225.64 (Board); 12 CFR 323.4 (FDIC); and 12 CFR 722.4 (NCUA). In addition, under TILA, if at any point during the lending process the financial institution reasonably believes, through appraisal review or consumer-provided information, that an appraiser has not complied with USPAP or ethical or professional requirements for appraisers under applicable State or Federal statutes or regulations, the financial institution is required to refer the matter to the appropriate State appraisal regulatory agency if the failure to comply is material. See 12 CFR 1026.42(g).

²¹ See Interagency Appraisal and Evaluation Guidelines, 75 FR 77450 (Dec. 10, 2010).

A consumer inquiry or complaint regarding a valuation would generally occur after the financial institution has conducted its initial appraisal or evaluation review and resolved any issues identified. Given this timing, a consumer may provide specific and verifiable information that may not have been available or considered when the initial valuation and review were performed. Regardless of how the request for an ROV is initiated, a request could be resolved through a financial institution's independent valuation review or other processes to ensure credible appraisals and evaluations.

An ROV request may include consideration of comparable properties not previously identified, property characteristics, or other information about the property that may have been incorrectly reported or not previously considered, which may affect the value conclusion. To resolve deficiencies, including those related to potential discrimination, financial institutions can communicate relevant information to the original preparer of the valuation and, when appropriate, request an ROV.

Complaint Resolution Process

Financial institutions can capture consumer feedback regarding potential valuation deficiencies through existing complaint resolution processes. The complaint resolution process may capture complaints and inquiries about the financial institution's products and services offered across all lines of business, including those offered by third parties, as well as complaints from various channels (such as letters, phone calls, in person, transmittal from regulators, third-party valuation service providers, emails, and social media). Depending on the nature and volume, appraisal and other valuation-based complaints and inquiries can be an important indicator of potential risks and risk management weaknesses. Appropriate policies, procedures, and control systems can adequately address the monitoring, escalating, and resolving of complaints including a determination of the merits of the

appraiser or person who prepared the evaluation. An institution should implement adequate internal controls to ensure that such communications do not result in any coercion or undue influence on the appraiser or person who performed the evaluation. Addressing significant deficiencies in the appraisal that could not be resolved with the original appraiser by obtaining a second appraisal or relying on a review that complies with Standards Rule 3 of USPAP and is performed by an appropriately qualified and competent State certified or licensed appraiser prior to the final credit decision. Replacing evaluations prior to the credit decision that do not provide credible results or lack sufficient information to support the final credit decision."

complaint and whether a financial institution should initiate an ROV.

Examples of Policies, Procedures, and Control Systems

Financial institutions may consider developing risk-based ROV-related policies, procedures, control systems, and complaint processes that identify, address, and mitigate the risk of deficient valuations, including valuations that involve prohibited discrimination, and that:

- Consider ROVs as a possible resolution for consumer complaints related to residential property valuations.
- Consider whether any information or other process requirements related to a consumer's request for a financial institution to initiate an ROV create unreasonable barriers or discourage consumers from requesting an ROV.
- Establish a process that provides for the identification, management, analysis, escalation, and resolution of valuation related complaints across all relevant lines of business, from various channels and sources (such as letters, phone calls, in person, regulators, third-party service providers, emails, and social media).
- Establish a process to inform consumers how to raise concerns about the valuation sufficiently early enough in the underwriting process for any errors or issues to be resolved before a final credit decision is made. This may include suggesting to consumers the type of information they may provide when communicating with the financial institution about potential valuation deficiencies.

- Identify stakeholders and clearly outline each business unit's roles and responsibilities for processing an ROV request (e.g., loan origination, processing, underwriting, collateral valuation, compliance, customer experience or complaints).

- Establish risk-based ROV systems that route the request to the appropriate business unit (e.g., ROV requests that allege discrimination could be routed to the appropriate compliance, legal, and appraisal review staff that have the requisite skills and authority to research and resolve the request).

- Establish standardized processes to increase the consistency of consideration of requests for ROVs:
 - Use clear, plain language in notices to consumers of how they may request the ROV;
 - Use clear, plain language in ROV policies that provide a consistent process for the consumer, appraiser, and internal stakeholders;

- Establish guidelines for the information the financial institution may need to initiate the ROV process;
- Establish timelines in the complaint or ROV process for when milestones need to be achieved;
- Establish guidelines for when a second appraisal could be ordered and who assumes the cost; and
- Establish protocols for communicating the status of the complaint or ROV and results to consumers.
- Ensure relevant lending and valuation related staff, inclusive of third parties (e.g., appraisal management companies, fee-appraisers, mortgage brokers, and mortgage servicers) are trained to identify deficiencies (inclusive of prohibited discriminatory practices) through the valuation review process.

VI. CFPB Signing Authority

The Director of the Consumer Financial Protection Bureau, Rohit Chopra, having reviewed and approved this document, is delegating the authority to electronically sign this document to Laura Galban, CFPB Federal Register Liaison, for purposes of publication in the **Federal Register**.

Michael J. Hsu,

Acting Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System.

Ann E. Misback,

Secretary of the Board.

Dated at Washington, DC, on June 1, 2023.

James P. Sheesley,

Assistant Executive Secretary, Federal Deposit Insurance Corporation.

Melane Conyers-Ausbrooks,

Secretary of the Board, National Credit Union Administration.

Laura Galban,

Federal Register Liaison, Consumer Financial Protection Bureau.

[FR Doc. 2023-12609 Filed 7-20-23; 8:45 am]

BILLING CODE 4810-33-P; 6210-01-P; 6714-01-P; 7535-01-P; 4810-AM-P

FEDERAL HOUSING FINANCE AGENCY

12 CFR Part 1227

RIN 2590-AB23

Suspended Counterparty Program

AGENCY: Federal Housing Finance Agency.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Housing Finance Agency (FHFA) is proposing to amend the existing Suspended Counterparty

Program (SCP) regulation. FHFA proposes to expand the categories of covered misconduct on which a suspension could be based to include sanctions arising from certain forms of civil enforcement. The proposed rule would also eliminate the requirement that any final suspension order be preceded by a proposed suspension order, but only when the suspension is based on an administrative sanction.

DATES: Comments must be received on or before September 19, 2023.

ADDRESSES: You may submit your comments on the proposed rule, identified by regulatory information number (RIN) 2590–AB23, by any one of the following methods:

- *Agency Website:* www.fhfa.gov/open-for-comment-or-input.
- *Federal eRulemaking Portal:* <https://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 FHFA. Include the following information in the subject line of your submission: Comments/RIN 2590–AB23.

- *Hand Delivered/Courier:* The hand delivery address is: Clinton Jones, General Counsel, Attention: Comments/RIN 2590–AB23, Federal Housing Finance Agency, 400 Seventh Street SW, Washington, DC 20219. Deliver the package at the Seventh Street entrance Guard 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–AB23, Federal Housing Finance Agency, 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. For any time-sensitive correspondence, please plan accordingly.

FOR FURTHER INFORMATION CONTACT: Marshall Adam Pecsek, Assistant General Counsel, at (202) 649–3380 (not a toll-free number), marshall.pecsek@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

The SCP requires a regulated entity—the Federal Home Loan Mortgage Corporation and any affiliate thereof,

the Federal National Mortgage Association and any affiliate thereof (individually, an Enterprise and together, the Enterprises), and any Federal Home Loan Bank (Bank)—to submit a report to FHFA if it becomes aware that an individual or institution with which it does business has been found within the past three years to have committed certain forms of misconduct. FHFA may issue proposed and final suspension orders based on the reports it has received from the regulated entities or based on other information. FHFA offers the affected individual or institution and the regulated entities an opportunity to respond to any proposed suspension order. FHFA may issue a final suspension order if FHFA determines that the underlying misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity. Final suspension orders direct the regulated entities to cease or refrain from doing business with the suspended counterparties, subject to terms as provided in the orders.

The reporting that is required under the SCP is authorized by sections 1313 and 1314 of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (Safety and Soundness Act). Section 1314(a) of the Safety and Soundness Act authorizes FHFA to require the regulated entities to submit regular reports on their activities and operations, as the Director considers appropriate. *See* 12 U.S.C. 4514(a).

The orders issued under the SCP fall within FHFA's general supervisory authority over the regulated entities, and specifically its authority under sections 1313, 1313B, and 1319G of the Safety and Soundness Act. Section 1313B of the Safety and Soundness Act authorizes FHFA to establish standards, by regulation or guideline, for each regulated entity regarding prudential management of risks. *See* 12 U.S.C. 4513b. The Director may also require by order that the regulated entities take any action that will best carry out the purposes of that section. *See* 12 U.S.C. 4513(b)(2)(B)(iii). Section 1319G(a) of the Safety and Soundness Act authorizes FHFA to issue any regulations, guidelines, or orders necessary to ensure that the purposes of the Safety and Soundness Act and the Enterprise charter acts are accomplished. *See* 12 U.S.C. 4526(a). Finally, section 1313(a)(2) of the Safety and Soundness Act authorizes FHFA to exercise such incidental powers as may be necessary in the supervision and

regulation of each regulated entity. *See* 12 U.S.C. 4513(a)(2).

FHFA established the SCP in June 2012 by letter to the regulated entities. The requirements and procedures for the SCP were generally codified at 12 CFR part 1227 by the interim final rule published on October 23, 2013. 78 FR 63007. FHFA amended the SCP regulation via final rule published on December 23, 2015. 80 FR 79675.

II. Analysis of Proposed Rule

A. Civil Enforcement

The SCP regulation authorizes suspension only if the applicable counterparty has committed covered misconduct, as that term is defined at 12 CFR 1227.2.¹ “Covered misconduct” is defined to include “administrative sanctions” and “convictions,” each of which is also defined at 12 CFR 1227.2.² The definition of “conviction” is limited solely to judgments of guilt of criminal offense, or certain other dispositions that are the functional equivalent of such judgments. The standards reflected in these definitions have allowed FHFA to significantly reduce the risks to which the regulated entities are exposed, by prohibiting them from doing business with counterparties that have committed various offenses, including but not limited to mortgage fraud. However, in FHFA's experience of administering the SCP, it has determined that this standard is too narrow; specifically, it does not authorize suspension of counterparties that have been found to have committed various forms of

¹ “Covered misconduct” is defined, in relevant part, to mean “[a]ny conviction or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product.” 12 CFR 1227.2 (definition of “covered misconduct”).

² “Administrative sanction” is defined to mean “debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question.” *Id.* (definition of “administrative sanction”). “Conviction” is defined as follows: “(1) [a] judgment or any other determination of guilt of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or plea; or (2) [a]ny other resolution that is the functional equivalent of a judgment of guilt of a criminal offense, including probation before judgment and deferred prosecution. A disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.” *Id.* (definition of “conviction”).

misconduct in the context of civil enforcement actions. Counterparties determined to have committed certain forms of misconduct in the context of civil enforcement actions may pose a significant risk to the regulated entities, even though their conduct might not rise to the level of criminal sanction, or might rise to this level, but the relevant criminal enforcement authority has declined to prosecute or has yet to prosecute.

To address this limitation in the SCP regulation, the proposed rule would amend the definition of “conviction” at § 1227.2 to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the person committed one of the offenses enumerated in the definition of “covered misconduct”—*e.g.*, fraud, embezzlement, etc. FHFA intends the expansion of the SCP suspension authority to cover civil enforcement actions to be applied broadly, to all manner of civil enforcement proceedings, including civil enforcement actions before a court in the relevant judicial branch—*e.g.*, a court organized under Article III of the United States Constitution in the Federal system or state equivalent—those before an administrative body convened by the issuing agency (*e.g.*, agency enforcement action presided over by an administrative law judge), as well as actions properly undertaken by a private citizen on behalf of the Federal or a state government (*e.g.*, *qui tam* actions under the False Claims Act).

In addition, the proposed amendments would also include findings that a counterparty knowingly committed a material breach of contract. Certain, although possibly not all, of the enumerated offenses in the definition of “covered misconduct” have analogs in a non-criminal context (*e.g.*, fraud); hence, the proposed amendment to the definition of “conviction” would simply incorporate, via reference, those enumerated offenses. However, a counterparty’s breach of contract, which generally would not be criminally actionable, may pose a significant risk to the regulated entities, particularly knowing, material breaches. These two qualifiers—“knowing” and “material,” which generally relate to intent and significance, respectively—are appropriate insofar as FHFA’s authority should be limited to those types of breaches that are likely to evince a risk of significant financial or reputation harm to the regulated entities, or

otherwise threaten their safe and sound operation. Selection of this standard is prompted by the authority provided at 42 U.S.C. 1437z–1, under which the United States Department of Housing and Urban Development (HUD) may impose monetary penalties under the Section 8 program for certain knowing, material contractual violations, including the failure under a Section 8 contract “to provide decent, safe, and sanitary housing.” 42 U.S.C. 1437z–1(b)(2)(A). However, the proposed rule would not merely authorize FHFA to suspend business where the counterparty has been found by HUD or, pursuant to judicial review of HUD final agency action, a federal court, to have knowingly committed a material breach under a Section 8 contract, but any finding by relevant authority in the context of civil enforcement actions where a counterparty has been found to have committed such a breach under any contract. Given the otherwise applicable restrictions under the SCP—most notably the requirement that covered misconduct occur in connection with a mortgage, mortgage business, *etc.* or in connection with the management or ownership of real property (a proposed revision separately addressed in section II.C.1 below)—the risk of any such breach to the regulated entities is apparent and it would be appropriate to authorize suspension in event of such a breach, not only those for which penalties are authorized under 42 U.S.C. 1437z–1.

This amendment would also include resolutions that are the equivalent of the above-referenced judgments or orders—*e.g.*, consent orders—regardless of whether the resolution includes an admission of misconduct by the subject counterparty. The current SCP regulation authorizes suspension where the covered misconduct is the disposition of a criminal offense that is the functional equivalent of a judgment of guilt (*e.g.*, deferred prosecution agreement). However, it also provides that “[a] disposition without the participation of the court is the functional equivalent of a judgment only if it includes an admission of guilt.” 12 CFR 1227.2 (par. (2) of definition of “covered misconduct”). The proposed rule would not establish such a restriction with respect to civil enforcement. In FHFA’s experience, admissions of misconduct in the context of civil enforcement are uncommon. Imposing such a restriction on suspensions based on settled civil enforcement actions would significantly hinder the SCP’s purpose. FHFA is not proposing to eliminate the

corresponding restriction in the context of criminal enforcement, because FHFA does not wish the SCP to have chilling effect on such dispositions. However, in the civil context, where the stakes for the applicable counterparties may be lower and where the costs of any such chilling effects would therefore be more limited, FHFA has determined that it is appropriate to permit suspension where enforcement claims are resolved without admission of misconduct.

Accordingly, for the aforementioned reasons, the proposed rule would amend the definition of “conviction” in § 1227.2 to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of “covered misconduct” or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.

B. Administrative Sanctions

1. Immediate Suspension Orders

The SCP regulation establishes a series of procedures governing the issuance of a final order of suspension. FHFA must first issue a proposed order of suspension and provide the relevant counterparty and each regulated entity an opportunity to respond. Only then does the regulation authorize issuance of a final suspension order, and any such suspension order may not be effective sooner than 45 days after signature by the suspending official. Although these procedures are appropriate under most circumstances, ensuring that affected counterparties and the regulated entities are given the opportunity to provide FHFA with relevant information prior to issuance of a final suspension order, and that the regulated entities are provided adequate time to cease transactions with the relevant counterparties, there are circumstances under which these procedures excessively constrain FHFA.

Specifically, FHFA has determined that these procedures should be modified where the covered misconduct is an administrative sanction, which is defined to mean “debarment or suspension imposed by any Federal agency, or any similar administrative action that has the effect of limiting the ability of a person to do business with a Federal agency, including Limited

Denials of Participation, Temporary Denials of Participation, or settlements of proposed administrative sanctions if the terms of the settlement restrict the person's ability to do business with the Federal agency in question." 12 CFR 1227.2 (definition of "administrative sanction"). Accordingly, where the covered misconduct is an administrative sanction, the proposed rule would add new § 1227.11 allowing FHFA to issue a suspension order—designated as an "immediate suspension order"—that is effective as early as the date signed by the suspending official and without first issuing a proposed suspension order.

Because FHFA does not conduct independent fact-finding investigations or adjudications in response to discovery of covered misconduct, it must defer to the judgment of third-party authorities (*e.g.*, a criminal court). A proposed suspension order provides an important opportunity for subject counterparties and regulated entities to provide information that FHFA might find relevant in determining whether to issue a final suspension order, including but not limited to information that the subject counterparty believes would undermine one or more of the factual determinations on which the order is based. FHFA believes, however, that where another Federal agency has concluded that a counterparty's right to do business with the government should be limited, particular deference to that conclusion is warranted. In addition, whereas a conviction represents a judgment by a court of competent jurisdiction that a counterparty has engaged in certain forms of misconduct—or the functional equivalent of such a judgment—an administrative sanction reflects a specific determination by a Federal agency that the subject counterparty's right to do business with the Federal government should be limited or prohibited. Given FHFA's obligation to protect the safe and sound operation of the regulated entities and the authority under the SCP to restrict the entities' rights to conduct business with third parties, such determinations by Federal agencies are of unique significance. Accordingly, FHFA has determined that where the covered misconduct is based on an administrative sanction, it should be authorized to restrict the relevant counterparty's business with the regulated entities without excessive delay.

This amendment would, of course, not preclude FHFA from adhering to the current procedures and issuing a proposed suspension order where an immediate suspension order is authorized, but would merely provide

the Agency with additional flexibility to timely respond to the discovery of covered misconduct as appropriate. Similarly, the amendments would not require that immediate suspension orders be effective upon signature by the suspending official. FHFA expects that there would be circumstances under which such an effective date would be unduly disruptive to the regulated entities, who may require additional time to wind down business with the relevant counterparties. The proposed amendment would simply permit FHFA to issue an immediate suspension order that is effective upon signature by the suspending official where necessary and appropriate to protect the safe and sound operation of the regulated entities, without the burden of the 45-day requirement, but would also permit issuance of an immediate suspension order effective at some future date specified in the order. In addition, subject counterparties and the regulated entities would have the opportunity to provide a response for FHFA's consideration. However, whereas this response period precedes the effective date of a final suspension order under the current procedures, the proposed rule would allow for issuance of an immediate suspension order with an effective date preceding the deadline by which a response must be provided. The procedures governing issuance of an immediate suspension order, including but not limited to those governing the content of the order and notice, are described in more detail in section II C below.

2. Request To Vacate

The proposed rule would add new § 1227.12, establishing procedures allowing for the vacation of a final suspension order where the administrative sanction was imposed under authority that does not guarantee advance notice or an opportunity to present an opposition before the sanction is imposed. As noted above, FHFA does not conduct investigations or adjudicate facts regarding subject counterparties' conduct. Rather, FHFA relies on findings made by other authorities. Accordingly, FHFA's suspension authority is generally limited to judgments by authorities issued with certain procedural protections in place—*e.g.*, notice and hearing opportunity in criminal proceedings. Under certain circumstances, however, a Federal agency may issue an administrative sanction without such protections. Specifically, the Office of Management and Budget (OMB) Guidelines to Agencies on Government-wide

Debarment and Suspension (Nonprocurement) in 2 CFR part 180, subpart G provides agencies with the authority, pursuant to implementing regulations promulgated by those agencies, to issue immediately effective orders of suspension without advance notice or an opportunity for hearing, pending resolution of a related proceeding (*e.g.*, debarment proceeding). This suspension is generally meant to be temporary, pending outcome of the related proceeding, although it may be superseded by a more permanent sanction (*e.g.*, debarment). *See* 2 CFR 180.760.

Due to the comparatively limited procedural protections afforded to counterparties subject to such suspensions, FHFA has determined that it would be appropriate to vacate suspension orders based on an administrative sanction imposed without prior notice and opportunity to present an opposition, once those orders are no longer in effect. The proposed rule would allow for a request to vacate, which FHFA would grant upon a finding that these conditions have been satisfied. The rule would require that the request be initiated by the subject counterparty and include such information as is necessary for FHFA to determine that the conditions are satisfied. The procedures governing vacation of such suspension orders are described in more detail in the section-by-section passage immediately below.

C. Section-by-Section Analysis

1. § 1227.2 Definitions

As discussed above in section II.A, the proposed rule would amend the definition of "conviction" to include an order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of "covered misconduct" or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.

In addition, the proposed rule would amend the definition of "covered misconduct" to include misconduct in connection with the management or ownership of real property. Real property management is a significant function performed by certain regulated entity counterparties, particularly

participants in Enterprise multifamily loan transactions. Misconduct in connection with real property management or ownership—*e.g.*, submission of fraudulent reports in connection with real property management service contracts, failure to maintain safe housing in accordance with assisted housing contracts, etc.—demonstrates a potential risk to the regulated entities, even in the absence of a close nexus between the misconduct and financing (*e.g.*, mortgage origination fraud).

Accordingly, the proposed rule would amend paragraph (1) of the definition of “covered misconduct” to read “[a]ny conviction or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product, or in connection with the management or ownership of real property.”

2. § 1227.11 Immediate Suspension Order

For the reasons provided above in section II B, the proposed rule would establish a new § 1227.11 governing the issuance of immediate suspension orders. Paragraph (a) would establish the grounds under which such an order could be issued; specifically, such an order would be issued where the subject counterparty committed covered misconduct, the basis of which is an administrative sanction, and where the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. This second requirement mirrors the corresponding standard, found in §§ 1227.5(b)(2) and 1227.6(a)(2), authorizing issuance of proposed and final suspension orders, respectively.

Paragraph (b) would establish the factors that FHFA may consider when determining whether to issue an immediate suspension order. It incorporates, by reference, the factors that FHFA may consider when determining whether to issue a final suspension order enumerated at § 1227.6(c).

Paragraph (c) would establish procedures governing issuance of an immediate suspension order, which generally correspond to those currently governing issuance of proposed and final suspension orders. It would

provide that, where the suspending official makes a determination to suspend a person under § 1227.11, the suspending official must issue an immediate suspension order to each regulated entity, mirroring similar requirements provided with respect to final suspension orders at § 1227.6(f)(1). It would establish requirements for the content of the required order, incorporating by reference the content requirements for a final suspension order at § 1227.6(f)(2); however, whereas a final suspension order must include a discussion of any relevant information submitted by the respondent or regulated entities, because an immediate suspension order is not preceded by a notice of proposed suspension that would provide the respondent or regulated entities with the opportunity to provide such information prior to issuance, reference to this information would be omitted in § 1227.11(c).

Paragraph (c) would also require that FHFA provide each respondent and regulated entity with a notice of the immediate suspension order and establish requirements for the content of the notice, incorporating by reference analogous requirements governing issuance of proposed suspension orders at § 1227.5(d) and (e). These elements include, but are not limited to, information instructing the subject counterparty on how to provide a response.

Paragraph (d) would provide that the effective date of the immediate suspension order be included in the order, as is the case with respect to final suspension orders. However, whereas final suspension orders may be effective no sooner than 45 days after signature by the suspending official, immediate suspension orders may be effective immediately upon signature.

Paragraph (e) would establish requirements for the written record and would provide for FHFA’s evaluation of information provided by respondents and regulated entities following issuance of an immediate suspension order. The proposed rule would require that the written record include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in making the determination, including any information related to the factors in paragraph (b) of this section. It would specify that FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record.

As discussed above in section II.B, in contrast to a proposed suspension order,

which is issued in anticipation of the issuance of a final suspension order and which will not be effective until after the deadline for response has passed, an immediate suspension order may be effective before such a deadline, and is not issued in anticipation of a subsequent order. Nevertheless, FHFA welcomes input from respondent and regulated entities in response to an immediate suspension order.

Accordingly, paragraph (e) would provide that FHFA will consider any material submitted by the respondent and regulated entities by the deadline provided in the notice and document its determination whether or not to vacate or modify the terms of the immediate suspension order. The rule would provide that if FHFA elects to vacate or modify the terms of an immediate suspension order, notice will be provided to the respondent and regulated entities, and a modified order, as applicable, will replace the immediate suspension order on FHFA’s website. However, if FHFA declines to vacate or modify the terms of the immediate suspension order, no notice of this determination would be provided, and the immediate suspension order would persist until it is later modified or vacated, or expires per the terms of the order.

Finally, paragraph (f) would specify, as is noted above, that an immediate suspension order has the full force and effect of a final suspension order. FHFA acknowledges that the addition of a new category of order might create confusion among certain members of the public, but expects that this can be addressed through the text of the immediate suspension order itself and accompanying notice—*e.g.*, in contrast to a notice of proposed suspension, which by historical practice notes that the referenced proposed order is only proposed and will not go into effect unless finalized, a notice of immediate suspension would read that the referenced order will go into effect on the identified effective date. Nevertheless, to more explicitly clarify what might otherwise be unclear, paragraph (f) distinguishes immediate from proposed suspension orders, providing that the former has the full force and effect of a final suspension order.

3. § 1227.12 Request To Vacate

The proposed rule would add new § 1227.12 to provide respondents subject to an immediate suspension order with the opportunity to request that FHFA vacate the order under certain circumstances. Paragraph (a) would provide the general grounds that

must be satisfied in order for FHFA to grant the request. These include that: (i) the covered misconduct on which the suspension order was based does not include a conviction; (ii) each administrative sanction on which the order was based was imposed pursuant to authority that does not guarantee prior notice and a prior opportunity to present an opposition; and (iii) each administrative sanction on which the order was based is no longer in effect.

Paragraph (b) would establish requirements for the content of a request to vacate. A request must include: (i) a copy of the final order of suspension for which the request to vacate applies; (ii) documentation from the agency imposing the administrative sanction citing the authority under which the sanction was imposed; (iii) documentation from the agency imposing the administrative sanction demonstrating that the sanction is no longer in effect; and (iv) all existing, proposed, or prior exclusions under regulations implementing Executive Order 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies. This information would allow FHFA to determine whether the preconditions that would be established in paragraph (a) are satisfied.

Paragraph (c) would establish requirements for FHFA's review of the request and any response. It would provide that FHFA must approve a request to vacate if it has been presented with evidence sufficient to demonstrate that the preconditions in paragraph (a) have been satisfied, unless FHFA discovers covered misconduct that has not formed the basis for a previously issued order of suspension, provided that the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. Discovery of this additional covered misconduct may justify denial of the request, and any denial of a request to vacate would be regarded as final agency action and would not be appealable to the Director. Under these circumstances—*i.e.*, where the administrative sanction initially justifying the suspension is no longer in effect but where continuation of the suspension is justified by discovery of additional covered misconduct—the public suspension order would not reflect all of the grounds on which the suspension's continuation is based. FHFA regards this as a negligible concern, however. By necessity, the immediate suspension order would

have satisfied the appropriate regulatory requirements upon issuance, and both the respondent and regulated entities would have had an opportunity to respond to the order. In addition, the proposed rule would require that FHFA timely notify the respondent of its decision and that a denial of the vacation request specify the reasons for the denial, which would include identification of the additional covered misconduct.

Paragraph (d) would specify that a request to vacate under § 1227.12 is distinct from a request for reconsideration under § 1227.9. A respondent may, for example, submit a request to vacate an immediate suspension order concurrently with a request for consideration, in which case FHFA would evaluate each independently. If FHFA were to determine that the request to vacate should be granted, then the request for reconsideration would be rendered moot. If, however, FHFA were to determine that the request to vacate should be denied, because the necessary preconditions have not been satisfied, it may still grant a request for reconsideration based on the standard provided in § 1227.9(c). The time constraints governing requests for reconsideration would not apply to requests to vacate.

4. Miscellaneous Provisions

The proposed rule would amend § 1227.6(a) to specify that a final suspension order may be issued only if preceded by a proposed suspension order, pursuant to the requirements of § 1227.5. Although this is implicitly apparent under the current regulation, it would be appropriate, in light of the proposed addition of immediate suspension order authority, to explicitly provide the circumstances under which a final suspension order may be issued. Finally, the proposed rule would make a series of conforming revisions throughout part 1227 to include a reference to immediate suspension orders, where the SCP regulation currently only references final suspension orders—*e.g.*, the requirement, found at § 1227.8(a), that FHFA publish final suspension orders on its website. These amended provisions are: §§ 1227.1(c); 1227.2 (definitions of “respondent,” “suspending official” and “suspension”); 1227.3(a); and 1227.8 section heading, paragraphs (a) and (b)(3).

D. Solicitation of Comments

FHFA solicits comments on every aspect of this proposed rule. However,

FHFA solicits input in particular with respect to the following questions:

1. Should the scope of misconduct included in the definition of “covered misconduct” be expanded beyond what is being proposed? If so, what additional forms of misconduct should be included?

2. Should the illustrative list of forms of misconduct—*e.g.*, fraud, embezzlement, etc.—provided in the definition of “covered misconduct” be otherwise changed? If so, what should be added or removed?

3. Should the regulation be amended to allow for suspension based on specific additional sanctions imposed by other Federal agencies, including but not limited to sanctions that restrict a counterparty's rights to participate in federally insured mortgage programs—*e.g.*, the Federal Housing Administration's revocation of a mortgagee's right to participate in mortgage insurance programs under Title I or Title II of the National Housing Act—regardless of whether the underlying misconduct was related to fraud, embezzlement, etc.?

4. Should FHFA be authorized to issue immediate suspension orders only with a prospective effective date (*e.g.*, ten days after signature by the suspending official)? If so, how long after signature by the suspending official?

III. Consideration of Differences Between the Banks and the Enterprises

Section 1313(f) of the Safety and Soundness Act requires FHFA, when promulgating regulations relating to the Banks, to consider the differences between the Enterprises and the Banks with respect to the Banks': cooperative ownership structure; mission of providing liquidity to members; affordable housing and community development mission; capital structure; joint and several liability; and any other differences FHFA considers appropriate. *See* 12 U.S.C. 4513(f). In preparing this proposed rule, FHFA considered the differences between the Banks and the Enterprises as they relate to the above factors and determined that the Banks should not be treated differently from the Enterprises for purposes of the proposed rule.

IV. Paperwork Reduction Act

The proposed rule does not contain any information collection requirement that requires the approval of OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Therefore, FHFA has not submitted any information to OMB for review.

V. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) 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 Regulatory Flexibility Act. FHFA certifies that the proposed rule, if adopted as a final rule, would not have a significant economic impact on a substantial number of small entities because the proposed rule is applicable only to the regulated entities, which are not small entities for purposes of the Regulatory Flexibility Act.

List of Subjects in 12 CFR Part 1227

Administrative practice and procedure, Federal home loan banks, Government-sponsored enterprises, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the Preamble, FHFA proposes to amend part 1227 of chapter XII of title 12 of the Code of Federal Regulations as follows:

PART 1227—SUSPENDED COUNTERPARTY PROGRAM

- 1. The authority citation for part 1227 continues to read as follows:

Authority: 12 U.S.C. 4513, 4513b, 4514, 4526.

§ 1227.1 [Amended]

- 2. Amend § 1227.1(c) by adding the words “or immediate” after “Request for an exception to a final”.
- 3. Amend § 1227.2 as follows:
- a. In the definition of “Conviction”:
- i. In paragraph (1), by removing the word “or” after the “;”;
- ii. In paragraph (2), by removing the “.” and adding the word “; or” after the words “admission of guilt”; and
- iii. by adding paragraph (3).
- b. In the definition of “Covered misconduct” by revising paragraph (1).
- c. In the definition of “Respondent” by adding “, immediate,” after the words “subject of a proposed”;
- d. In the definition of “Suspending official” by adding “, immediate” after the words “sign proposed”;
- e. In the definition of “Suspension” by removing the word “a” after the term “pursuant to” and adding in its place the words “an immediate or”.

The addition and revision read as follows:

§ 1227.2 Definitions.

* * * * *

Conviction * * *

(3) An order or judgment by a Federal or state agency or court in a civil matter to which a Federal or state agency or government, or private citizen asserting claims on behalf of the government, is a party, constituting or including a finding that the respondent committed one of the offenses enumerated in the definition of “covered misconduct” or knowingly committed a material breach of contract, or any other resolution that is the functional equivalent of such a judgment or order, such as a consent order, regardless of whether it includes any admission of misconduct.

Covered misconduct * * *

(1) Any conviction or administrative sanction within the past three (3) years if the basis of such action involved fraud, embezzlement, theft, conversion, forgery, bribery, perjury, making false statements or claims, tax evasion, obstruction of justice, or any similar offense, in each case in connection with a mortgage, mortgage business, mortgage securities or other lending product, or in connection with the management or ownership of real property.

* * * * *

§ 1227.3 [Amended]

- 3. Amend § 1227.3(a) by removing the word “a” after the word “issue” and adding, in its place, the words “an immediate or”.
- 4. Amend § 1227.6(a) by adding a new first sentence in the introductory text to read as follows:

§ 1227.6 Final suspension order.

(a) *Grounds for issuance.* A final suspension order may be issued only if preceded by a proposed suspension order, pursuant to the requirements of § 1227.5. * * *

* * * * *

§ 1227.8 [Amended]

- 5. Amend § 1227.8 by:
- a. Adding the words “and immediate” after the word “final” in the section heading and paragraph (a);
- b. Adding the words “or immediate” after the word “final” in paragraph (b)(3).
- 6. Add § 1227.11 to read as follows:

§ 1227.11 Immediate suspension order.

(a) *Grounds for issuance.* A suspending official may issue an immediate suspension order with respect to a person if, based solely on the written record, the suspending

official determines that there is adequate evidence that:

(1) The person engaged in covered misconduct, the basis for which is an administrative sanction; and

(2) The covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity.

(b) *Factors that may be considered by the suspending official.* In determining whether or not to issue an immediate suspension order with respect to a person where the grounds for suspension are satisfied, the suspending official may also consider any factors that the suspending official determines may be relevant in light of the circumstances of the particular case, including but not limited to any of the applicable factors enumerated in § 1227.6(c).

(c) *Issuance of an immediate suspension order—(1) General.* If the suspending official makes a determination to suspend a person under this section, the suspending official shall issue an immediate suspension order to each regulated entity regarding the respondent.

(2) *Content of immediate suspension order.* The immediate suspension order must include a statement of the suspension determination and supporting grounds and each of the elements described in § 1227.6(f)(2)(ii) through (iv).

(3) *Notice to respondent required.* The suspending official shall provide prompt written notice to the respondent of the immediate suspension order issued to the regulated entities with respect to such respondent. It must be delivered pursuant to the requirements provided in § 1227.5(e).

(4) *Content of notice.* The notice of an immediate suspension order shall include the elements prescribed for notice of a proposed suspension order established in § 1227.5(d), except that wherever the term “proposed” appears in § 1227.5(d), it shall be construed to mean “immediate.”

(d) *Effective date.* An immediate suspension order shall take effect on the date specified in the order, which may be as early as the date that the order is signed.

(e) *Written record and post-issuance evaluation.* The written record shall include any material submitted by the respondent and any material submitted by the regulated entities, as well as any other material that was considered by the suspending official in making the determination, including any information related to the factors in

paragraph (b) of this section. FHFA may independently obtain information relevant to the suspension determination for inclusion in the written record. FHFA will consider any material submitted by the respondent and regulated entities by the deadline provided in the notice and document its determination whether or not to vacate or modify the terms of the immediate suspension order. If FHFA elects to vacate or modify the terms of an immediate suspension order, notice will be provided to the respondent and regulated entities, and a modified order, as applicable, will replace the immediate suspension order on FHFA's website. If FHFA declines to vacate or modify the terms of the immediate suspension order, no notice of this determination will be provided, and the immediate suspension order will persist until it is later modified or vacated, or expires per the terms of the order.

(f) *Relationship to final suspension order.* An immediate suspension order has the same force and effect of a final suspension order, subject to the terms and conditions presented in the order.

■ 7. Add § 1227.12 to read as follows:

§ 1227.12 Request to vacate.

(a) *Grounds.* A respondent subject to an immediate suspension order may petition FHFA for a request to vacate the order if each of the following conditions is met:

(1) The covered misconduct on which the order was based does not include a conviction;

(2) Each administrative sanction on which the order was based was imposed pursuant to authority that does not guarantee prior notice and a prior opportunity to present an opposition; and

(3) Each administrative sanction on which the order was based is no longer in effect.

(b) *Content of request.* A request to vacate a final suspension order that satisfies each of the conditions provided in this paragraph (b) does not preclude FHFA from requesting additional information from the respondent. The request must include:

(1) A copy of the final order of suspension for which the request to vacate applies;

(2) Documentation from the agency imposing the administrative sanction citing the authority under which the sanction was imposed;

(3) Documentation from the agency imposing the administrative sanction demonstrating that the sanction is no longer in effect; and

(4) All existing, proposed, or prior exclusions under regulations

implementing Executive Order 12549 and all similar actions taken by Federal, state, or local agencies, including administrative agreements that affect only those agencies.

(c) *Decision and response.* FHFA will vacate the final order of suspension if it has been presented with documentation demonstrating that each of the conditions in paragraph (a) of this section has been satisfied, unless FHFA is aware of any other covered misconduct that has not formed the basis for a previously issued order of suspension, which may justify denying the request to vacate if the covered misconduct is of a type that would be likely to cause significant financial or reputational harm to a regulated entity or otherwise threaten the safe and sound operation of a regulated entity. FHFA will notify the respondent of its decision in a timely manner. If FHFA denies the request, its response will specify the reasons for the denial. Any such rejection shall not be appealable to the Director and shall constitute final agency action.

(d) *Relationship to requests for reconsideration.* A request to vacate a final suspension order issued under this section is distinct from a request for reconsideration issued under § 1227.9.

Sandra L. Thompson,

Director, Federal Housing Finance Agency.

[FR Doc. 2023-14723 Filed 7-20-23; 8:45 am]

BILLING CODE 8070-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-1503; Project Identifier AD-2023-00197-A]

RIN 2120-AA64

Airworthiness Directives; Epic Aircraft, LLC Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Epic Aircraft, LLC Model E1000 airplanes. This proposed AD was prompted by improperly rigged flap position switches. This proposed AD would require installing a secondary full position limit switch to the flap system, installing a switch ramp on the flap actuator, and modifying the take-off position switch rigging. The FAA is

proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by September 5, 2023.

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

- *Federal eRulemaking Portal:* Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.

- *Fax:* (202) 493-2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590.

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

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) by searching for and locating Docket No. FAA-2023-1503; 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 NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For service information identified in this NPRM, contact Epic Aircraft, LLC, 22590 Nelson Road, Bend, OR 97701; phone: (541) 639-4603; email: info@epicaircraft.com; website: [epicaircraft.com](https://www.epicaircraft.com).

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222-5110.

FOR FURTHER INFORMATION CONTACT:

Anthony Caldejon, Aviation Safety Engineer, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712; phone: (206) 231-3534; email: Anthony.V.Caldejon@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include "Docket No. FAA-2023-1503; Project Identifier AD-2023-00197-A" at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing

date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as "PROPIN." The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Anthony Caldejon, Aviation Safety Engineer, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712. Any commentary that the FAA

receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA received a report that during a production ground test, the flap position switches were not properly rigged and allowed the actuator to travel beyond the commanded flaps' full (fully extended) position. The flap actuator could overrun the flaps' fully extended position if the full position microswitch is either missing or not rigged properly, resulting in an uncertified flap configuration. This condition, if not addressed, could result in loss of control of the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 1 CFR Part 51

The FAA reviewed Epic Aircraft Service Bulletin SB-0034, Revision B, issued December 22, 2022. This service information specifies procedures for installing a secondary full position limit switch to the flap system to prevent over-travel. This service information also specifies procedures for installing a switch ramp on the flap actuator to improve reliability and modifying the take-off position switch rigging. In

addition, this service information specifies procedures for checking the flap-to-wing clearances, adjusting clearances as needed, and contacting Epic Aircraft if clearance and travel limits cannot be met. This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in ADDRESSES.

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described, except as discussed under "Differences Between this Proposed AD and the Service Information."

Differences Between This Proposed AD and the Service Information

The service information specifies contacting the manufacturer if the clearance and travel limits are exceeded during the check of the flap-to-wing clearances, but this proposed AD would not require that action. This proposed AD would require adjusting the flap-to-wing clearances until they do not exceed the specified travel limits.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 29 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Install a secondary full position limit switch to the flap system.	1 work-hour × \$85 per hour = \$85 ..	\$587	\$672	\$19,488
Install a switch ramp on the flap actuator	1 work-hour × \$85 per hour = \$85 ..	54	139	4,031
Modify rigging	4 work-hours × \$85 per hour = \$340	0	340	9,860

The FAA has no data to determine the costs to accomplish the corrective action of adjusting the flap-to-wing clearances or the number of airplanes that may require this corrective action.

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

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of

the FAA Administrator. Subtitle VII: Aviation Programs, describes in more detail the scope of the Agency's authority.

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

develop on products identified in this rulemaking action.

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

(3) Would 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 Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Epic Aircraft, LLC: Docket No. FAA–2023–1503; Project Identifier AD–2023–00197–A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by September 5, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Epic Aircraft, LLC Model E1000 airplanes, serial numbers K003 through K032 inclusive, certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2750, TE Flap Control System.

(e) Unsafe Condition

This AD was prompted by a report that during a production ground test, the flap position switches were not properly rigged and allowed the actuator to travel beyond the commanded flaps' full (fully extended) position. The FAA is issuing this AD to prevent the flap actuator from overrunning the flaps' fully extended position if the full position microswitch is either missing or not rigged properly, resulting in an uncertified flap configuration. The unsafe condition, if not addressed, could result in loss of control of the airplane.

(f) Compliance

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

(g) Required Actions

Within 12 months after the effective date of this AD, install a secondary full position limit switch to the flap system, install a switch ramp on the flap actuator, and modify the take-off position switch rigging in accordance with steps 5 through 13 of the Instructions section in Epic Aircraft Service Bulletin SB–0034, Revision B, issued December 22, 2022 (Epic SB–0034, Revision B). Where Epic SB–0034, Revision B, specifies to discard a switch block, this AD requires removing that part from service. If, during the accomplishment of step 12, the flap-to-wing clearances exceed the specified travel limits, before further flight, adjust the flap-to-wing clearances until they do not exceed the specified travel limits. Where Epic SB–0034, Revision B, specifies to contact Epic Aircraft if clearance and travel limits cannot be met, this AD does not require that action.

Note 1 to paragraph (g): Information regarding the flap-to-wing travel limits may be found in Epic E1000 Maintenance Manual SK05000000, Revision A, dated April 13, 2020.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, West Certification Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification branch, send it to the attention of the person identified in paragraph (i)(1) of this AD. Information may be emailed to: 9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.

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

(i) Related Information

(1) For more information about this AD, contact Anthony Caldejon, Aviation Safety Engineer, FAA, 3960 Paramount Boulevard, Lakewood, CA 90712; phone: (206) 231–3534; email: Anthony.V.Caldejon@faa.gov.

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

(j) Material Incorporated by Reference

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

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

(i) Epic Aircraft Service Bulletin SB–0034, Revision B, issued December 22, 2022.

(ii) [Reserved]

(3) For service information identified in this AD, contact Epic Aircraft, LLC, 22590 Nelson Road, Bend, OR 97701; phone: (541)

639–4603; email: info@epicaircraft.com; website: epicaircraft.com.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on July 17, 2023.

Victor Wicklund,

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

[FR Doc. 2023–15488 Filed 7–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2023–1501; Project Identifier MCAI–2023–00380–T]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede Airworthiness Directive (AD) 2023–04–10, which applies to all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. AD 2023–04–10 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. Since the FAA issued AD 2023–04–10, the FAA has determined that new or more restrictive airworthiness limitations are necessary. This proposed AD would continue to require the actions in AD 2023–04–10 and would require revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations, as specified in a European Union Aviation Safety Agency (EASA) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by September 5, 2023.

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

- *Federal eRulemaking Portal:* Go to *regulations.gov*. Follow the instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

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

AD Docket: You may examine the AD docket at *regulations.gov* under Docket No. FAA–2023–1501; 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 NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For material that is proposed for IBR in this NPRM, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email *ADs@easa.europa.eu*; website *easa.europa.eu*. You may find this material on the EASA website at *ad.easa.europa.eu*. It is also available at *regulations.gov*, under Docket No. FAA–2023–1501.

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

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email *tom.rodriguez@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–1501; Project Identifier MCAI–2023–00380–T” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email *tom.rodriguez@faa.gov*. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA issued AD 2023–04–10, Amendment 39–22357 (88 FR 20743, April 7, 2023) (AD 2023–04–10), for all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. AD 2023–04–10 was prompted by an MCAI originated by EASA, which is the Technical Agent for the Member States of the European Union. EASA issued AD 2022–0137, dated July 6, 2022 (EASA AD 2022–0137) (which corresponds to FAA AD 2023–04–10), to correct an unsafe condition.

AD 2023–04–10 requires revising the existing maintenance or inspection program, as applicable, to incorporate new or more restrictive airworthiness limitations. The FAA issued AD 2023–04–10 to address reduced structural integrity of the airplane. AD 2023–04–10 specifies that accomplishing the revision required by that AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD

2010–26–05) for Dassault Aviation Model MYSTERE–FALCON 900 airplanes only. This proposed AD would therefore continue to allow that terminating action.

Actions Since AD 2023–04–10 Was Issued

Since the FAA issued AD 2023–04–10, EASA superseded AD 2022–0137 and issued EASA AD 2023–0046, dated March 2, 2023 (EASA AD 2023–0046) (also referred to as the MCAI), for all Dassault Aviation Model MYSTERE–FALCON 900 airplanes. The MCAI states that new or more restrictive airworthiness limitations have been developed.

The FAA is proposing this AD to address reduced structural integrity of the airplane. You may examine the MCAI in the AD docket at *regulations.gov*, under Docket No. FAA–2023–1501.

Related Service Information Under 1 CFR Part 51

The FAA reviewed EASA AD 2023–0046. This service information specifies new or more restrictive airworthiness limitations for airplane structures and safe life limits.

This proposed AD would also require EASA AD 2022–0137, which the Director of the Federal Register approved for incorporation by reference as of May 12, 2023 (88 FR 20743, April 7, 2023).

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

FAA’s Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would retain all requirements of AD 2023–04–10. This proposed AD would also require revising the existing maintenance or inspection program, as applicable, to incorporate additional new or more restrictive airworthiness limitations, which are specified in EASA AD 2023–

0046 already described, as proposed for incorporation by reference. Any differences with EASA AD 2023–0046 are identified as exceptions in the regulatory text of this AD.

This proposed AD would require revisions to certain operator maintenance documents to include new actions (e.g., inspections). Compliance with these actions is required by 14 CFR 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by this proposed AD, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 91.403(c), the operator must request approval for an alternative method of compliance (AMOC) according to paragraph (n)(1) of this proposed AD.

Explanation of Required Compliance Information

In the FAA's ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to retain the IBR of EASA AD 2022–0137 and incorporate EASA AD 2023–0046 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with EASA AD 2023–0046 and EASA AD 2022–0137 through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Using common terms that are the same as the heading of a particular section in EASA AD 2023–0046 or EASA AD 2022–0137 does not mean that operators need comply only with that section. For example, where the AD requirement refers to “all required actions and compliance times,” compliance with this AD requirement is not limited to the section titled “Required Action(s) and Compliance Time(s)” in EASA AD 2023–0046 or EASA AD 2022–0137. Service information required by EASA AD 2023–0046 and EASA AD 2022–0137 for compliance will be available at *regulations.gov* by searching for and locating Docket No. FAA–2023–1501 after the FAA final rule is published.

Airworthiness Limitation ADs Using the New Process

The FAA's process of incorporating by reference MCAI ADs as the primary source of information for compliance with corresponding FAA ADs has been limited to certain MCAI ADs (primarily

those with service bulletins as the primary source of information for accomplishing the actions required by the FAA AD). However, the FAA is now expanding the process to include MCAI ADs that require a change to airworthiness limitation documents, such as airworthiness limitation sections.

For these ADs that incorporate by reference an MCAI AD that changes airworthiness limitations, the FAA requirements are unchanged. Operators must revise the existing maintenance or inspection program, as applicable, to incorporate the information specified in the new airworthiness limitation document. The airworthiness limitations must be followed according to 14 CFR 91.403(c) and 91.409(e).

The previous format of the airworthiness limitation ADs included a paragraph that specified that no alternative actions (e.g., inspections) or intervals may be used unless the actions and intervals are approved as an AMOC in accordance with the procedures specified in the AMOCs paragraph under “Additional AD Provisions.” This new format includes a “New Provisions for Alternative Actions and Intervals” paragraph that does not specifically refer to AMOCs, but operators may still request an AMOC to use an alternative action or interval.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 151 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

The FAA estimates the total cost per operator for the retained actions from AD 2023–04–10 to be \$7,650 (90 work-hours × \$85 per work-hour).

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

The FAA estimates the total cost per operator for the new proposed actions to be \$7,650 (90 work-hours × \$85 per work-hour).

Authority for This Rulemaking

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

Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

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

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

(3) Would 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 Proposed Amendment

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 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) 2023–04–10, Amendment 39–22357 (88 FR 20743, April 7, 2023); and
- b. Adding the following new AD:

Dassault Aviation: Docket No. FAA–2023–1501; Project Identifier MCAI–2023–00380–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by September 5, 2023.

(b) Affected ADs

(1) This AD replaces AD 2023–04–10, Amendment 39–22357 (88 FR 20743, April 7, 2023) (AD 2023–04–10).

(2) This AD affects AD 2010–26–05, Amendment 39–16544 (75 FR 79952, December 21, 2010) (AD 2010–26–05).

(c) Applicability

This AD applies to all Dassault Aviation Model MYSTERE–FALCON 900 airplanes, certificated in any category.

(d) Subject

Air Transport Association (ATA) of America Code 05, Time Limits/Maintenance Checks.

(e) Unsafe Condition

This AD was prompted by a determination that new or more restrictive airworthiness limitations are necessary. The FAA is issuing this AD to address reduced structural integrity of the airplane.

(f) Compliance

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

(g) Retained Revision of the Existing Maintenance or Inspection Program, With No Changes

This paragraph restates the requirements of paragraph (j) of AD 2023–04–10, with no changes. Except as specified in paragraph (h) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, European Union Aviation Safety Agency (EASA) AD 2022–0137, dated July 6, 2022 (EASA AD 2022–0137). Accomplishing the revision of the existing maintenance or inspection program required by paragraph (j) of this AD terminates the requirements of this paragraph.

(h) Retained Exceptions to EASA AD 2022–0137, With No Changes

This paragraph restates the exceptions specified in paragraph (k) of AD 2023–04–10, with no changes.

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2022–0137.

(2) Paragraph (3) of EASA AD 2022–0137 specifies revising “the approved AMP” within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after May 12, 2023 (the effective date of AD 2023–04–10).

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2022–0137 is at the applicable “limitations” and “associated thresholds” as incorporated by the requirements of paragraph (3) of EASA AD 2022–0137, or within 90 days after May 12, 2023 (the effective date of AD 2023–04–10), whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2022–0137.

(5) This AD does not adopt the “Remarks” section of EASA AD 2022–0137.

(i) Retained Restrictions on Alternative Actions or Intervals, With a New Exception

This paragraph restates the requirements of paragraph (l) of AD 2023–04–10, with a new exception. Except as required by paragraph (j) of this AD, after the maintenance or inspection program has been revised as required by paragraph (g) of this AD, no alternative actions (e.g., inspections) or intervals are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2022–0137.

(j) New Revision of the Existing Maintenance or Inspection Program

Except as specified in paragraph (k) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, EASA AD 2023–0046, dated March 2, 2023 (EASA AD 2023–0046). Accomplishing the revision of the existing maintenance or inspection program required by this paragraph terminates the requirements of paragraph (g) of this AD.

(k) Exceptions to EASA AD 2023–0046

(1) This AD does not adopt the requirements specified in paragraphs (1) and (2) of EASA AD 2023–0046.

(2) Paragraph (3) of EASA AD 2023–0046 specifies revising “the approved AMP” within 12 months after its effective date, but this AD requires revising the existing maintenance or inspection program, as applicable, within 90 days after the effective date of this AD.

(3) The initial compliance time for doing the tasks specified in paragraph (3) of EASA AD 2023–0046 is at the applicable “limitations” and “associated thresholds” as incorporated by the requirements of paragraph (3) of EASA AD 2023–0046, or within 90 days after the effective date of this AD, whichever occurs later.

(4) This AD does not adopt the provisions specified in paragraphs (4) and (5) of EASA AD 2023–0046.

(5) This AD does not adopt the “Remarks” section of EASA AD 2023–0046.

(l) New Provisions for Alternative Actions and Intervals

After the existing maintenance or inspection program has been revised as required by paragraph (j) of this AD, no alternative actions (e.g., inspections) and intervals are allowed unless they are approved as specified in the provisions of the “Ref. Publications” section of EASA AD 2023–0046.

(m) Terminating Action for AD 2010–26–05

Accomplishing the actions required by paragraph (g) or (j) of this AD terminates the requirements of paragraph (g)(1) of AD 2010–26–05, for Dassault Aviation Model MYSTERE–FALCON 900 airplanes only.

(n) Additional AD Provisions

The following provisions also apply to this AD:

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

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

(o) Additional Information

For more information about this AD, contact Tom Rodriguez, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone: 206–231–3226; email tom.rodriguez@faa.gov.

(p) Material Incorporated by Reference

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

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

(3) The following service information was approved for IBR on [DATE 35 DAYS AFTER PUBLICATION OF THE FINAL RULE].

(i) European Union Aviation Safety Agency (EASA) AD 2023–0046, dated March 2, 2023.

(ii) [Reserved]

(4) The following service information was approved for IBR on May 12, 2023 (88 FR 20743, April 7, 2023).

(i) European Union Aviation Safety Agency (EASA) AD 2022–0137, dated July 6, 2022.

(ii) [Reserved]

(5) For EASA ADs 2023–0046 and 2022–0137, contact EASA, Konrad-Adenauer-Ufer 3, 50668 Cologne, Germany; telephone +49 221 8999 000; email ADs@easa.europa.eu; website easa.europa.eu. You may find these EASA ADs on the EASA website at ad.easa.europa.eu.

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

(7) You may view this material that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability

of this material at NARA, email fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Issued on July 14, 2023.

Victor Wicklund,

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

[FR Doc. 2023-15299 Filed 7-20-23; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA-2023-1214; Project Identifier AD-2023-00181-T]

RIN 2120-AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 757-200, 757-200CB, and 757-300 airplanes. This proposed AD was prompted by cracks on both sides of the airplane at certain stringers. This proposed AD would require an inspection or a maintenance records check for existing liner holes at certain stringers, and applicable on-condition actions. The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this proposed AD by September 5, 2023.

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

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

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

AD Docket: You may examine the AD docket at regulations.gov under Docket No. FAA-2023-1214; 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 NPRM, any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

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

• You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206-231-3195. It is also available at regulations.gov by searching for and locating Docket No. FAA-2023-1214.

FOR FURTHER INFORMATION CONTACT:

Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562-627-5238; email: wayne.ha@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA-2023-1214; Project Identifier AD-2023-00181-T” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

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

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated

as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562-627-5238; email: wayne.ha@faa.gov. Any commentary that the FAA receives that is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The FAA has received a report indicating an operator of Model 757-200 airplanes found cracks on the left side and right side in the station (STA) 1640 frame web between stringer S-14 and S-15, during maintenance. One crack initiated at a corrosion pit in the open liner hole and propagated by fatigue. The crack was detected when the airplane had accumulated 30,181 total flight cycles and 89,042 total flight hours. Other cracks found initiated at an open liner hole on the inboard side and outboard side of the liner hole, and the airplane had attained 40,159 total flight cycles and 90,457 total flight hours at the time of detection. Boeing investigation determined that liner holes at the STA 1640 frame web between stringers S-14 and S-15 on some airplanes were not plugged, creating a stress concentration around the unplugged hole, which could lead to cracks. This condition, if not addressed, could result in the inability of a structural element to sustain limit load and reduced structural integrity of the airplane.

FAA's Determination

The FAA is issuing this NPRM after determining that the unsafe condition described previously is likely to exist or develop on other products of the same type design.

Related Service Information Under 14 CFR Part 51

The FAA reviewed Boeing Alert Requirements Bulletin 757-53A0120 RB, dated January 17, 2022. This service information specifies procedures for a general visual inspection (GVI) or maintenance records check of the STA 1640 fuselage frame web between S-14 and S-15, left and right sides, for an existing liner hole, and applicable on-condition actions. On-condition actions

include repetitive surface high frequency eddy current (HFEC) inspections for cracks of the web around the fastener (plug), zero-timing the liner hole, plugging the liner hole, depending on the airplane configuration, repetitive open-hole HFEC inspections of the web for cracks, and crack repair.

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in the service information already described, except as discussed under “Difference Between Proposed AD and Service Information,” and except for

any differences identified as exceptions in the regulatory text of this proposed AD. Zero-timing the liner hole and installing a fastener (plug) at the zero-time liner hole location would terminate the proposed repetitive inspections for that location. For information on the procedures and compliance times, see this service information at *regulations.gov* under Docket No. FAA–2023–1214.

Difference Between Proposed AD and Service Information

This proposed AD would require compliance at the times specified in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, except for airplanes with winglets installed in accordance with supplemental type certificate ST01518SE. For those airplanes, this

proposed AD would require that all specified compliance times and repetitive intervals be divided by a factor of 2.

Aviation Partners Boeing (APB), the Supplemental Type Certificate (STC) holder for ST01518SE has not completed an evaluation to provide an appropriate compliance time for the inspection of airplanes with the STC winglets installed. The factor of 2 is a conservative factor and would be applicable for airplanes with APB winglets.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 419 airplanes of U.S. registry. The FAA estimates the following costs to comply with this proposed AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
GVI	69 work-hours × \$85 per hour = \$5,865	\$0	\$5,865	\$2,457,435

The FAA estimates the following costs to do any necessary on-condition actions that would be required based on

the results of the proposed inspection. The agency has no way of determining

the number of aircraft that might need these on-condition actions:

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
HFEC inspections, plugging the liner hole, zero-timing of plugged liner hole (per side).	2 work-hours × \$85 per hour = \$340	\$5	\$345

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

Authority for This Rulemaking

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

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

unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

The FAA determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this proposed regulation:

- (1) Is not a “significant regulatory action” under Executive Order 12866,
- (2) Would not affect intrastate aviation in Alaska, and
- (3) Would 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 Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2023–1214; Project Identifier AD–2023–00181–T.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by September 5, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 757–200, 757–200CB, and 757–300 airplanes, certificated in any category, as identified in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

(d) Subject

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

(e) Unsafe Condition

This AD was prompted by cracks on the left side and right side of the airplane at station (STA) 1640 between stringer S–14 and S–15. The FAA is issuing this AD to address unplugged liner holes that could create a stress concentration around the unplugged hole and lead to cracks. The unsafe condition, if not addressed, could result in the inability of a structural element to sustain limit load and could adversely affect the structural integrity of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified by paragraph (h) of this AD: At the applicable times specified in the “Compliance” paragraph of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, do all applicable actions identified in, and in accordance with, the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022. Actions identified as terminating action in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, terminate the applicable required actions of this AD, provided the terminating action is done in accordance with the Accomplishment Instructions of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

Note 1 to paragraph (g): Guidance for accomplishing the actions required by this AD can be found in Boeing Alert Service Bulletin 757–53A0120, dated January 17, 2022, which is referred to in Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

(h) Exceptions to Service Information Specifications

(1) Where the Compliance Time columns of the tables in the “Compliance” paragraph of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, use the phrase “the original issue date of Requirements Bulletin 757–53A0120 RB,” this AD requires using “the effective date of this AD.”

(2) Where Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17,

2022, specifies contacting Boeing for repair instructions: This AD requires doing the repair before further flight using a method approved in accordance with the procedures specified in paragraph (i) of this AD.

(3) For airplanes with winglets installed in accordance with supplemental type certificate ST01518SE: This AD requires all compliance times and repetitive intervals required by this AD, as specified in the “Compliance” paragraph of Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022, to be divided by a factor of 2.

(i) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Continued 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 certification office, send it to the attention of the person identified in paragraph (j) of this AD. Information may be emailed to 9-ANM-Seattle-ACO-AMOC-Requests@FAA.gov.

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

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

(j) Related Information

For more information about this AD, contact Wayne Ha, Aviation Safety Engineer, FAA, 2200 South 216th Street, Des Moines, WA 98198; phone: 562–627–5238; email: wayne.ha@faa.gov.

(k) Material Incorporated by Reference

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

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

(i) Boeing Alert Requirements Bulletin 757–53A0120 RB, dated January 17, 2022.

(ii) [Reserved]

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

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 2200 South 216th St., Des Moines, WA. For information on the

availability of this material at the FAA, call 206–231–3195.

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

Issued on June 13, 2023.

Michael Linegang,

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

[FR Doc. 2023–15292 Filed 7–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. **FAA–2023–1504**; Project Identifier **MCAI–2023–00473–A**]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain Embraer S.A. (Embraer) Model EMB–505 airplanes. This proposed AD was prompted by an occurrence of corrosion on the clutch retaining bolt of the aileron autopilot servo mount. This proposed AD would require repetitively replacing the clutch retaining bolt and washer of the aileron autopilot servo mount, as specified in an Agência Nacional de Aviação Civil (ANAC) AD, which is proposed for incorporation by reference (IBR). The FAA is proposing this AD to address the unsafe condition on these products.

DATES: The FAA must receive comments on this NPRM by September 5, 2023.

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

- *Federal eRulemaking Portal:* Go to [regulations.gov](https://www.regulations.gov). Follow the instructions for submitting comments.

- *Fax:* (202) 493–2251.

- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5

p.m., Monday through Friday, except Federal holidays.

AD Docket: You may examine the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1504; 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 NPRM, the mandatory continuing airworthiness information (MCAI), any comments received, and other information. The street address for Docket Operations is listed above.

Material Incorporated by Reference:

- For ANAC service information that is proposed for IBR in this NPRM, contact ANAC, Continuing Airworthiness Technical Branch (GTAC), Rua Doutor Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; phone: 55 (12) 3203–6600; email: pac@anac.gov.br; website: anac.gov.br/en/. You may find this material on the ANAC website at sistemas.anac.gov.br/certificacao/DA/DAE.asp. It is also available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1504.

- You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

FOR FURTHER INFORMATION CONTACT: Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329–4165; email: jim.rutherford@faa.gov.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under **ADDRESSES**. Include “Docket No. FAA–2023–1504; Project Identifier MCAI–2023–00473–A” at the beginning of your comments. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. The FAA will consider all comments received by the closing date and may amend this proposal because of those comments.

Except for Confidential Business Information (CBI) as described in the following paragraph, and other information as described in 14 CFR

11.35, the FAA will post all comments received, without change, to [regulations.gov](https://www.regulations.gov), including any personal information you provide. The agency will also post a report summarizing each substantive verbal contact received about this NPRM.

Confidential Business Information

CBI is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this NPRM contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this NPRM, it is important that you clearly designate the submitted comments as CBI. Please mark each page of your submission containing CBI as “PROPIN.” The FAA will treat such marked submissions as confidential under the FOIA, and they will not be placed in the public docket of this NPRM. Submissions containing CBI should be sent to Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590. Any commentary that the FAA receives which is not specifically designated as CBI will be placed in the public docket for this rulemaking.

Background

The ANAC, which is the aviation authority for Brazil, has issued ANAC AD 2023–02–01R1, effective March 14, 2023 (referred to after this as “the MCAI”), to correct an unsafe condition on certain serial-numbered Embraer Model EMB–505 airplanes. The MCAI states that an occurrence of corrosion was found on the clutch retaining bolt of the aileron autopilot servo mount. This condition could result in failure of the clutch retaining bolt of the aileron autopilot servo mount, which could disengage the clutch from the drive pin and jam the aileron controls, resulting in reduced controllability of the airplane.

You may examine the MCAI in the AD docket at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1504.

Related Service Information Under 1 CFR Part 51

The FAA reviewed ANAC AD 2023–02–01R1, which specifies procedures for replacing the clutch retaining bolt and

washer of the aileron autopilot servo mount.

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

FAA’s Determination

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

Proposed AD Requirements in This NPRM

This proposed AD would require accomplishing the actions specified in ANAC AD 2023–02–01R1 described previously, except for any differences identified as exceptions in the regulatory text of this proposed AD.

Explanation of Required Compliance Information

In the FAA’s ongoing efforts to improve the efficiency of the AD process, the FAA developed a process to use some civil aviation authority (CAA) ADs as the primary source of information for compliance with requirements for corresponding FAA ADs. The FAA has been coordinating this process with manufacturers and CAAs. As a result, the FAA proposes to incorporate ANAC AD 2023–02–01R1 by reference in the FAA final rule. This proposed AD would, therefore, require compliance with ANAC AD 2023–02–01R1 in its entirety through that incorporation, except for any differences identified as exceptions in the regulatory text of this proposed AD. Service information required by ANAC AD 2023–02–01R1 for compliance will be available at [regulations.gov](https://www.regulations.gov) under Docket No. FAA–2023–1504 after the FAA final rule is published.

Costs of Compliance

The FAA estimates that this AD, if adopted as proposed, would affect 505 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replace bolt and washer	1 work-hour × \$85 per hour = \$85.	\$50	\$135 per replacement interval	\$68,175 per replacement interval.

The FAA has included all known costs in its cost estimate. According to the manufacturer, however, all of the costs associated with the initial bolt and washer replacement may be covered under warranty.

Authority for This Rulemaking

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

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

Regulatory Findings

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

For the reasons discussed above, I certify this proposed regulation:

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

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

(3) Would 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 Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Embraer S.A.: Docket No. FAA-2023-1504; Project Identifier MCAI-2023-00473-A.

(a) Comments Due Date

The FAA must receive comments on this airworthiness directive (AD) by September 5, 2023.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Embraer S.A. Model EMB-505 airplanes, as identified in Agência Nacional de Aviação Civil (ANAC) AD 2023-02-01R1, effective March 14, 2023 (ANAC AD 2023-02-01R1), certificated in any category.

(d) Subject

Joint Aircraft System Component (JASC) Code 2215, Autopilot Main Servo.

(e) Unsafe Condition

This AD was prompted by an occurrence of corrosion on the clutch retaining bolt of the aileron autopilot servo mount. The FAA is issuing this AD to address the corrosion in the clutch retaining bolt of the aileron autopilot servo mount. The unsafe condition, if not addressed, could result in failure of the clutch retaining bolt of the aileron autopilot servo mount, which could disengage the clutch from the drive pin and jam the aileron controls, resulting in reduced controllability of the airplane.

(f) Compliance

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

(g) Required Actions

Except as specified in paragraphs (h) and (i) of this AD: Comply with all required actions and compliance times specified in, and in accordance with, ANAC AD 2023-02-01R1.

(h) Exceptions to ANAC AD 2023-02-01R1

(1) Where ANAC AD 2023-02-01R1 refers to February 6, 2023, the effective date of ANAC AD 2023-02-01, this AD requires using the effective date of this AD.

(2) Where ANAC AD 2023-02-01R1 requires replacing a part with a new part, for the purposes of this AD, "new" means zero flight hours.

(3) Where the "NOTE" to Table 01 in ANAC AD 2023-02-01R1 specifies "If the airplane operation age and/or the flight hours criteria change before the SB accomplishment, the most restrictive criteria must be obeyed," this AD requires complying with the most restrictive criteria in Table 01 of ANAC AD 2023-02-01R1.

(4) This AD does not adopt paragraph (d) of ANAC AD 2023-02-01R1.

(i) No Reporting Requirement

Although the service information referenced in ANAC AD 2023-02-01R1 specifies to submit certain information to the manufacturer, this AD does not include that requirement.

(j) Alternative Methods of Compliance (AMOCs)

The Manager, International Validation Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the International Validation Branch, mail it to the address identified in paragraph (k) of this AD or email to: 9-AVS-AIR-730-AMOC@faa.gov. If mailing information, also submit information by email. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.

(k) Additional Information

For more information about this AD, contact Jim Rutherford, Aviation Safety Engineer, FAA, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: (816) 329-4165; email: jim.rutherford@faa.gov.

(l) Material Incorporated by Reference

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

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

(i) Agência Nacional de Aviação Civil AD 2023-02-01R1, effective March 14, 2023.

(ii) [Reserved]

(3) For ANAC AD 2023–02–01R1, contact ANAC, Continuing Airworthiness Technical Branch (GTAC), Rua Doutor Orlando Feirabend Filho, 230—Centro Empresarial Aquarius—Torre B—Andares 14 a 18, Parque Residencial Aquarius, CEP 12.246–190—São José dos Campos—SP, Brazil; phone: 55 (12) 3203–6600; email: pac@anac.gov.br; website: anac.gov.br/en/. You may find this material on the ANAC website at sistemas.anac.gov.br/certificacao/DA/DAE.asp.

(4) You may view this service information at the FAA, Airworthiness Products Section, Operational Safety Branch, 901 Locust, Kansas City, MO 64106. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued on July 17, 2023.

Victor Wicklund,

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

[FR Doc. 2023–15489 Filed 7–20–23; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2022–0605; FRL–11128–01–R6]

Air Approval Plan; Arkansas; Excess Emissions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Pursuant to the Federal Clean Air Act (CAA or Act), the Environmental Protection Agency (EPA) is proposing to approve two revisions to the Arkansas State Implementation Plan (SIP) submitted by the Governor of the State of Arkansas on May 12, 2022, and November 1, 2022. The revisions were submitted in response to a finding of substantial inadequacy and SIP call published by EPA on June 12, 2015, which included certain provisions in the Arkansas SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. The submittals request the removal of the provisions identified in the 2015 SIP call from the Arkansas SIP. EPA is proposing to determine that the removal of these substantially inadequate provisions from the SIP will correct the deficiencies in the Arkansas SIP identified in the June 12, 2015 SIP call.

DATES: Comments must be received on or before August 21, 2023.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2022–0605 at <https://www.regulations.gov> or via email to Shar.Alan@epa.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. 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. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). For additional submission methods, please contact Mr. Alan Shar, (214) 665–6691, Shar.Alan@epa.gov. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

Docket: The index to the docket for this action is available electronically at www.regulations.gov and in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.*, copyrighted material), and some may not be publicly available at either location (*e.g.*, CBI).

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Regional Haze and SO₂ Section, EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270, (214) 665–6691, Shar.Alan@epa.gov. We encourage the public to submit comments via <https://www.regulations.gov>. Please call or email the contact listed above if you need alternative access to material indexed but not provided in the docket.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means the EPA.

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I. Background

A. EPA’s 2015 SSM SIP Action

On February 22, 2013, EPA issued a **Federal Register** proposed rulemaking action 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 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 (79 FR 55920, September 17, 2014).

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,” (80 FR 33839, June 12, 2015), hereafter referred to as the “2015 SSM SIP Action.” 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, including Arkansas, were substantially inadequate to meet CAA requirements and issued a SIP call to those states to

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 (Feb. 22, 2013).

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. The detailed rationale for issuing the SIP call to Arkansas can be found in the 2015 SSM SIP Action and preceding proposed actions.

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.² Importantly, the 2020 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 Arkansas 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).³ 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 populations, including overburdened communities, impacted by air pollution receive the full health and environmental protections provided by the CAA.⁴ 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 the two Arkansas SIP submittals provided by the State in response to the 2015 SIP call.

B. Arkansas Regulation 19.1004(H) Malfunctions, Breakdowns, Upsets and Regulation 19.602 Emergency Conditions

Rules of the Arkansas Plan of Implementation for Air Pollution Control (Rule 19), Regulation 19.1004(H) Malfunctions, Breakdowns, Upsets (Reg. 19.1004(H)) and Regulation 19.602 Emergency Conditions (Reg. 19.602) were originally approved by EPA on October 16, 2000 (65 FR 61103), and became federally effective on November 15, 2000. The EPA found that Reg. 19.1004(H) provided an automatic exemption for excess emissions of Volatile Organic Compounds (VOC) for sources located in Pulaski County that occur due to malfunctions and that Reg. 19.602 provided an affirmative defense for excess emissions that occur during emergency conditions. As a part of EPA’s 2015 SSM SIP Action, EPA made a finding that these provisions (Regs. 19.1004(H) and 19.602) in the Arkansas SIP are substantially inadequate as they provide for an automatic exemption and an affirmative defense, respectively, from otherwise applicable SIP emissions limits, and thus issued a SIP call with respect to these two provisions. On January 12, 2022, EPA issued Findings of Failure to Submit (FFS) to 12 air agencies, including the State of Arkansas, that had not submitted SIPs responding to the 2015 SSM SIP call by the November 22, 2016, deadline per the requirements of section 110(k)(5) of the Act.⁵

II. Analysis of SIP Submission

Subsequent to EPA’s January 12, 2022 FFS, Arkansas submitted two SIP revisions on May 12, 2022, and November 1, 2022, requesting the removal of both SIP-called provisions—Reg. 19.1004(H) and Reg. 19.602 of Rule 19, respectively—from the EPA-approved Arkansas SIP.^{6,7} We note that

⁵ Findings of Failure To Submit State Implementation Plan Revisions in Response to the 2015 Findings of Substantial Inadequacy and SIP Calls To Amend Provisions Applying To Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 87 FR 1680 (Jan. 12, 2022), available at www.regulations.gov, Docket ID No. EPA-HQ-OAR-2021-0863.

⁶ The May 12, 2022 submittal included other revisions to Rule 19 which will be handled in a separate SIP rulemaking action(s); the only aspect of the May 12, 2022 submittal that is being addressed by this proposed rulemaking now is the removal of Reg. 1004(H) from the Arkansas SIP. The November 1, 2022 submittal requests EPA approval of the removal of Reg. 19.602 from the Arkansas

Arkansas has repealed and removed Reg. 19.1004(H) under State law; however, Reg. 19.602 remains as a state-only provision applicable only under the Arkansas law. The Reg. 19.602 provisions do not apply to actions brought by EPA or citizens to enforce excess emission violations.⁸

Removal of Reg. 19.1004(H) from the EPA-approved Arkansas SIP will eliminate the impermissible automatic exemption from applicable SIP emissions limits for VOC sources located in Pulaski County. Also, removal of Reg. 19.602 from the EPA-approved Arkansas SIP will eliminate an owner or operator’s ability to assert an affirmative defense to violations of applicable SIP emissions limits resulting from excess emissions during SSM events.

These revisions (removal of Reg. 19.1004(H) and Reg. 19.602) will not otherwise affect the adequacy of the remaining portions of the Arkansas SIP. EPA concurs with this State action and is proposing to approve removing these substantially inadequate SIP-called provisions (Reg. 19.1004(H) and Reg. 19.602) from the EPA-approved Arkansas SIP.

The Arkansas submittal includes an analysis to demonstrate compliance with Section 110(l) of the Act.⁹ Removal of Reg. 19.602 from the Arkansas SIP is not expected to lead to any emissions increase and, therefore, would not interfere with the State’s ability to attain or maintain state or federal standards or reasonable further progress. This approach is consistent with the analogy presented in EPA’s Example 1 at 80 FR 33975 of the 2015 SSM SIP Action. Likewise, removal of Reg. 19.1004(H) from the Arkansas SIP is not expected to lead to any emissions increase and, therefore, would not interfere with the State’s ability to attain or maintain state or federal standards or reasonable further progress. Consequently, EPA is proposing to approve the removal of Reg. 19.602 and Reg. 19.1004(H) from the EPA-approved Arkansas SIP.

III. Proposed Action

EPA is proposing to approve revisions to the Arkansas SIP submitted by the State of Arkansas on May 12, 2022, and November 1, 2022, following EPA’s FFS

SIP, and this proposed rulemaking is taking action on that request.

⁷ These SIP submittals were found to be administratively complete on May 1, 2023. See “AR SSM Completeness Letter” available in the docket for this rulemaking.

⁸ CAA sections 113 and 304; see 80 FR 33958 (June 12, 2015).

⁹ See pdf pages 36–37 of the November 1, 2022 submittal.

² October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

³ 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.

⁴ Section J, June 12, 2015 (80 FR 33985).

concerning excess emissions during periods of SSM. Specifically, we are proposing to approve the removal of Reg. 19.1004(H) Malfunctions, Breakdowns, Upsets and Reg. 19.602 Emergency Conditions of Rule 19 of the Arkansas SIP. We are proposing to approve these revisions in accordance with section 110 of the Act. EPA is further proposing to determine that such SIP revisions correct the substantial inadequacies in the Arkansas SIP as identified in the 2015 SSM SIP Action and in response to EPA's 2022 FFS Action. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether this proposed SIP revision is consistent with CAA requirements and whether it addresses the substantial inadequacy in the provisions of the Arkansas SIP identified in the 2015 SSM SIP Action.

IV. Environmental Justice Considerations

Although not a basis for this proposed action, EPA is providing additional information, for informational purposes only, regarding this proposed action and potentially impacted populations. EPA reviewed demographic data, which provides an assessment of individual demographic groups of the populations living within the affected Pulaski County area, as well as the State of Arkansas as a whole.¹⁰ EPA then compared this data to the national average for each of the demographic groups. The results of the demographic analysis indicate that, for populations within Arkansas, the percent people of color (persons who reported their race as a category other than white alone (not Hispanic or Latino)) is above the national average for Pulaski County; and below the national average for the State of Arkansas as a whole (49.3 and 29.7 percent, respectively versus 41.7 percent). The percent of the population that is Black or African American alone is significantly above the national average for Pulaski County and above the national average for the State as a whole (38.3 and 15.7 percent, respectively versus 13.6 percent), and the percent of the population that is American Indian/Alaska Native is below the national average for both Pulaski County and the State as a whole (0.5 and 1.1 percent, respectively versus 1.3 percent). The percent of people living below the poverty level in Pulaski County and the State as a whole is higher than the national average (17.6 and 16.3 percent, respectively versus 11.6 percent). The percent of people

over 25 with a high school diploma is above the national average for Pulaski County; and is similar to the national average for the State of Arkansas as a whole (91.5 percent and 87.7 percent, respectively versus 88.9 percent), while the percent with a Bachelor's degree or higher is above the national average for Pulaski County; and is lower than the national average for the State of Arkansas as a whole (36.3 percent and 24.3 percent, respectively versus 33.7 percent).

Communities in close proximity to and/or downwind of industrial sources may be subject to disproportionate environmental impacts of excess emissions. Short- and/or long-term exposure to air pollution has been associated with a wide range of human health effects including increased respiratory symptoms, hospitalization for heart or lung diseases, and even premature death. Excess emissions during SSM activities exceed applicable emission limitations and can be considerably higher than emissions under normal steady-state operations. As to all population groups within the State of Arkansas, as explained below, we believe that this proposed action will be beneficial and may reduce impacts. As discussed earlier in this document, this rulemaking, if finalized as proposed, would result in the removal of identified provisions in the Arkansas SIP that provide sources emitting pollutants in excess of otherwise allowable amounts to be automatically exempt or be allowed to assert an affirmative defense for violations involving excess emissions during SSM activities. Federal removal of such impermissible automatic exemptions or impermissible affirmative defense provisions from the SIP is necessary to preserve the enforcement structure of the CAA, to preserve the jurisdiction of courts to adjudicate questions of liability and remedies in judicial enforcement actions and to preserve the potential for enforcement by the EPA and other parties under the citizen suit provision as an effective deterrent to violations. If finalized as proposed, this action is intended to ensure that overburdened communities and affected populations across the State and downwind areas receive the full human health and environmental protection provided by the CAA. There is nothing in the record which indicates that this proposed action, if finalized, would have disproportionately high or adverse human health or environmental effects on communities with environmental justice concerns.

V. Incorporation by Reference

In this action, we are proposing to include in a final rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is proposing to remove the incorporation by reference of Reg. 19.1004(H) Malfunctions, Breakdowns, Upsets and Reg. 19.602 Emergency Conditions of Rule 19 of the Arkansas SIP, as described in the Proposed Action section above. The EPA has made, and will continue to make, these documents generally available electronically through www.regulations.gov and in hard copy at the EPA Region 6 office.

VI. Statutory and Executive Order Reviews

Under the Act, 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, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993), 13563 (76 FR 3821, January 21, 2011), and 14094 (88 FR 21879, April 11, 2023);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National

¹⁰ <https://www.census.gov/quickfacts/fact/table/pulaskicountyarkansas,AR,US/PS045222>.

Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and

- Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 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.” 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. The EPA performed an environmental justice analysis, as is described above in the section titled, “Environmental Justice Considerations.” The analysis was done for the purpose of providing additional context and information about this rulemaking to the public, not as a basis of the 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 by removal of an automatic exemption provision and an affirmative defense provision from the Arkansas SIP. In addition, there is no information in the record upon which this decision is based inconsistent with the stated goal of Executive Order (E.O.) 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

This proposed approval of a revision to the Arkansas SIP removing provisions providing an exemption and an affirmative defense to excess emission

violations has no tribal implications as specified in E.O. 13175 (65 FR 67249, November 9, 2000). This action will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. This action will not impose substantial direct compliance costs on federally recognized tribal governments because no actions will be required of tribal governments. This action will also not preempt tribal law as it does not have applicable or related tribal laws.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Particulate matter, Sulfur dioxide, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: July 13, 2023.

Earthea Nance,

Regional Administrator, Region 6.

[FR Doc. 2023–15344 Filed 7–20–23; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 88, No. 139

Friday, July 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Partnership for Peace Fund Advisory Board; Notice of Meeting

AGENCY: United States Agency for International Development.

ACTION: Request for public comment and notice of public meeting.

SUMMARY: The United States Agency for International Development (USAID) announces a public meeting, and requests public comment for the third meeting of the Partnership for Peace Fund (PPF) Advisory Board to receive further information on the DFC's Joint Investment for Peace Initiative under MEPPA; discuss feedback and insights from the recent Board trip to Israel and the West Bank; and provide recommendations for peacebuilding programming at USAID. A portion of this meeting will be closed to the public.

DATES:

1. Written comments and information are requested on or before August 21, 2023, at 5 p.m. EDT.

2. The public meeting will take place on Thursday, August 24, 2023, from 9 a.m. to 10:30 a.m. EDT via the Zoom platform (<https://usaid.zoomgov.com/j/1613820653>) followed by the closed portion.

3. The meeting does not require pre-registration.

ADDRESSES: You may submit comments regarding the work of the PPF Advisory Board by email to MEPPA@usaid.gov. Include "Public Comment, PPF Advisory Board Meeting, August 24" in the subject line. All public comments and questions will be included in the official record of the meeting and posted publicly on the USAID website.

Please email MEPPA@usaid.gov to request reasonable accommodations for the public meeting. Include "Request for Reasonable Accommodation, PPF

Advisory Board Meeting, August 24" in the subject line.

FOR FURTHER INFORMATION CONTACT: Dan McDonald, 202-712-4938, meppa@usaid.gov.

SUPPLEMENTARY INFORMATION: In December 2020, Congress passed the Nita M. Lowey Middle East Partnership for Peace Act, or MEPPA, with bipartisan support. The Act directs USAID and the U.S. International Development Finance Corporation (DFC), in coordination with the Department of State, to program \$250 million over five years to build the foundation for peaceful coexistence between Israelis and Palestinians through a new PPF, managed by USAID, and a Joint Investment Initiative, managed by the DFC.

MEPPA serves as a recognition that economic, social, and political connections between Israelis and Palestinians are the best way to foster mutual understanding and provide the strongest basis for a sustainable, two-state solution. USAID's Middle East Bureau has been working with Congress, interagency colleagues, and partners in Israel, the West Bank, and Gaza to implement the Act. MEPPA also calls for the establishment of a board to advise USAID on the strategic direction of the PPF.

Composed of up to 15 members, the PPF Advisory Board includes development experts, private sector leaders and faith-based leaders who are appointed by members of Congress and the USAID Administrator. As stated in its charter, the Board's role is to:

1. To consult with, provide information to and advise USAID, and other U.S. Government agencies, as appropriate, on matters and issues relating to the PPF, including on:

- the efficacy of United States and international support for grassroots, people-to-people efforts aimed at fostering tolerance, countering extremist propaganda and incitement in the State of Israel, the West Bank, and Gaza;

- strengthening engagement between Palestinians and Israelis, including through people-to-people peacebuilding programs to increase the bonds of friendship and understanding; and

- investing in cooperation that develops the Palestinian economy and results in joint economic ventures;

2. To make recommendations on the types of projects USAID should seek to

further the purposes of the People-to-People PPF;

3. To make recommendations on partnerships with foreign governments and international organizations to leverage the impact of the PPF; and

4. To inform USAID's required reporting to the appropriate Congressional committees.

The following are the current members of the Advisory Board:

- Chair: The Honorable George R. Salem
- The Honorable Elliott Abrams
- Farah Bdour
- Rabbi Angela Buchdahl
- Rabbi Michael M. Cohen
- Sander Gerber
- Ambassador Mark Green (ret.)
- Hiba Husseini
- Heather Johnston
- Harley Lippman
- The Honorable Nita M. Lowey
- Dina Powell McCormick
- Nickolay Mladenov
- Jen Stewart
- The Honorable Robert Wexler

PPF Advisory Board meetings are held twice a year and are public. More information about how USAID is implementing MEPPA to increase people-to-people partnerships between Israelis and Palestinians is available at: <https://www.usaid.gov/west-bank-and-gaza/meppa>.

The purpose of this meeting is for the Advisory Board to gain a better understanding of the progress so far to program funds under the PPF to bring Israelis and Palestinians together to increase understanding and advance the goal of a two-state solution.

During this meeting, the Board will (1) receive further information on the DFC's Joint Investment for Peace Initiative under MEPPA; (2) discuss feedback and insights from the recent Board trip to Israel and the West Bank; and (3) provide recommendations for peacebuilding programming at USAID. The close portion of the meeting will involve discussion of matters determined to be exempt from the open meeting and public participation requirements found in Sections 10(a)(1) and 10(a)(3) of the Federal Advisory Committee Act (FACA) (5 U.S.C. 1001-1014).

Closed Meeting Exemption and Determination

The exemption is authorized by section 10(d) of the FACA, which

permits the closure of advisory committee meetings, or portions thereof, if the head of the agency to which the advisory committee reports determines such meetings may be closed to the public in accordance with subsection (c) of the Government in the Sunshine Act (5 U.S.C. 552b(c)). In this case, the applicable provisions of 5 U.S.C. 552b(c) are subsection 552b(c)(9)(B), which permits closure to protect information that would be likely to significantly frustrate implementation of a proposed agency action were it to be disclosed prematurely, and 552b(c)(6), which permits closure to protect information disclosure of which would constitute an unwarranted invasion of privacy. The closed session of the meeting will involve committee discussions and guidance regarding USAID's strategies and policies that substantially impact the interests of third-parties. The Administrator, with the concurrence of the General Counsel, formally determined on June 13, 2023 pursuant to section 10 of the FACA, (5 U.S.C. 1009(d)), that the portion of the meeting dealing with the privacy interests of third-parties and pre-decisional changes to Agency source selection policies and evaluation criteria relating to awards under the Partnership for Peace Fund shall be exempt from the provisions relating to public meetings found in 5 U.S.C. 1009(a)(1) and 1009(a)(3).

The remaining portions of the meeting will be open to the public.

The open session will be accessible to the public. See details below.

Request for Public Comment

To inform the direction and advice of the Board, USAID invites written comments from the public on areas for focus and strategies for people-to-people peacebuilding under the PPF.

Written comments and information are requested on or before Monday, August 21, 2023, at 5 p.m. EDT. Include "Public Comment, PPF Advisory Board Meeting, August 24" in the subject line. Please submit comments and information as a Word or PDF attachment to your email. You are encouraged to submit written comments even if you plan to attend the public meeting. All public comments and questions will be included in the official record of the meeting and posted publicly on the USAID website.

Public Meeting

A public meeting will take place Thursday, August 24, 2023, from 9 a.m. to 10:30 a.m. EDT. [The closed portion of the meeting will take place from approximately 10:45 a.m. to 12:15 p.m.

The open portion of the meeting will take place from 9 a.m. to 10:30 a.m.]. This meeting is free and open to the public. Persons wishing to attend the meeting should use the following link: (<https://usaid.zoomgov.com/j/1613820653>).

American Sign Language interpretation will be provided during the public meeting. Requests for reasonable accommodations should be directed to Daniel McDonald at MEPPA@usaid.gov. Please include "Request for Reasonable Accommodation, PPF Advisory Board Meeting, August 24" in the subject line.

Megan Doherty,

USAID Designated Federal Officer for the PPF Advisory Board, Bureau for the Middle East, U.S. Agency for International Development.

[FR Doc. 2023-14981 Filed 7-20-23; 8:45 am]

BILLING CODE 6116-01-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding: whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by August 21, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information

unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Food Distribution Programs.

OMB Control Number: 0584-0293.

Summary of Collection: The Food Distribution Programs of the Department of Agriculture (USDA), Food and Nutrition Service (FNS) assist American farmers and needy people by purchasing USDA donated foods and delivering them to State agencies that, in turn, distribute them to organizations who provide food assistance to those in need. The USDA donated foods help to meet the nutritional needs of: (a) Children from preschool age through high school in FNS Child Nutrition Programs and in nonprofit summer camps; (b) needy persons in households on Indian reservations participating in the Food Distribution Program on Indian Reservations (FDPIR) or the Food Distribution Program for Indian Households in Oklahoma (FDPIHO); (c) needy persons served by charitable institutions; (d) elderly persons participating in the Commodity Supplemental Food Program (CSFP); (e) low-income, unemployed or homeless people provided foods through household distributions or meals through soup kitchens under the Emergency Food Assistance Program (TEFAP); (f) pre-school and school-age children, elderly, and functionally impaired adults enrolled in child and adult day care centers participating in the Child and Adult Care Food Program (CACFP); and (g) victims of Presidentially-declared disasters and other situations of distress. The following authorizing legislation allows the Secretary broad authority to establish regulatory provisions governing accountability in the use of USDA donated foods by Federal, State, and private agencies: (a) Section 4(b) of the Food and Nutrition Act of 2008, as amended (7 U.S.C. 2013(b)); (b) Sections 6, 14, and 17 of the National School Lunch Act, as amended (42 U.S.C. 1755, 1762(a), 1766); (c) Section 4 of the Child Nutrition Act of 1966, as amended (42 U.S.C. 1733); (d) The Emergency Food Assistance Act of 1983, as amended (7 U.S.C. 7501 *et seq.*); and (e) Sections 4(a) and 5 of the Agriculture and Consumer Protection Act of 1973, as amended (7 U.S.C. 612c *note*).

Need and Use of the Information: FNS collects information from state and local agencies, for-profit and non-profit businesses, and individuals and households. This collection is mandatory for the states, local agencies, and the businesses, but it is required to obtain or maintain benefits for the individuals and households. The information collected from the state and local agencies is used for a variety of program activities such as ordering USDA foods; arranging for their delivery to storage facilities; sharing information concerning inaccurate or incomplete orders; providing inventory data; applying to participate in the programs and preparing plans to initiate or continue program operations; recovering unused funds; responding to audits; conducting on-site reviews; reporting on financial status and administrative costs; and other program monitoring activities. The information collected from the individuals and households permits them to apply for benefits (including assistance during disasters or situations of distress) or to recertify their eligibility. FNS uses this information to manage the Food Distribution Programs and monitor the use of Federal funds.

Description of Respondents: State, Local, or Tribal Government; Business or other for-profit; Not-for-profit institutions; and Individuals or households.

Number of Respondents: 756,147.

Frequency of Responses:

Recordkeeping; Reporting: On occasion; Quarterly; Semi-annually; Monthly; and Annually.

Total Burden Hours: 1,218,438.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023-15484 Filed 7-20-23; 8:45 am]

BILLING CODE 3410-30-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request; Reinstatement

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and reinstatement under the Paperwork Reduction Act of 1995, Public Law 104-13 on or after the date of publication of this notice. Comments are requested regarding: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden including

the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding these information collections are best assured of having their full effect if received by August 21, 2023. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: Field Crops Production.

OMB Control Number: 0535-0002.

Summary of Collection: The primary functions of the National Agricultural Statistics Services' (NASS) are to prepare and issue State and national estimates of crop and livestock production, disposition, and prices and to collect information on related environmental and economic factors. The Field Crops Production Program consists of probability field crops surveys and supplemental panel surveys. These surveys are extremely valuable for commodities where acreage and yield are published at the county level. NASS will use surveys to collect information through a combination of the internet, mail, telephone, and personnel interviews. The general authority for these data collection activities is granted under U.S. Code title 7, section 2204.

Need and Use of the Information: NASS collects information on field crops to monitor agricultural developments across the country that may impact on the nation's food supply. The Secretary of Agriculture uses estimates of crop production to administer farm program legislation and

import and export programs. Collecting this information less frequently would eliminate the data needed to keep the Department abreast of changes at the State and national level.

Description of Respondents: Farms; Business or other for-profits.

Number of Respondents: 532,853.

Frequency of Responses: Reporting: Weekly, Monthly, Quarterly, Annually.

Total Burden Hours: 142,236.

Levi S. Harrell,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023-15505 Filed 7-20-23; 8:45 am]

BILLING CODE 3410-20-P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Comments are requested regarding whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by August 21, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it

displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Modernization of Poultry Slaughter Inspection

OMB CONTROL Number: 0583–0156

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*). These statutes mandate that FSIS protect the public by ensuring that meat and poultry products are safe, wholesome, and properly labeled and packaged.

Need and Use of the Information: FSIS requires that all poultry slaughter establishments develop, implement, and maintain, as part of their HACCP plans, or Sanitation SOPs, or other prerequisite programs, written procedures to prevent contamination of carcasses and parts by enteric pathogens, *e.g.*, *Salmonella* and *Campylobacter*, and fecal material throughout the entire slaughter and dressing operation. FSIS requires that these procedures include sampling for microbial organisms at the pre-chill and post-chill points in the process to monitor establishments' process control for enteric pathogens, except for low volume establishments that are required to test only at post-chill. If the information was not collected or collected less frequently it would reduce the effectiveness of the poultry products inspection program.

Description of Respondents: Business or other for-profit.

Number of Respondents: 289.

Frequency of Responses:

Recordkeeping; Reporting: On occasion.

Total Burden Hours: 191,204.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–15504 Filed 7–20–23; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have

practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Comments regarding this information collection received by August 21, 2023 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting "Currently under 30-day Review—Open for Public Comments" or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number, and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Sheep 2024 Study.

OMB Control Number: 0579-New.

Summary of Collection: The

Department of Agriculture is responsible for protecting the health of our Nation's livestock and poultry populations by preventing the introduction and interstate spread of contagious, infectious, or communicable diseases of livestock and poultry and for eradicating such diseases from the United States when feasible. In connection with this mission, the Animal and Plant Health Inspection Service (APHIS) operates the National Health Monitoring System (NAHMS), which collects, on a national basis, statistically valid and scientifically sound data on the prevalence and economic importance of livestock and poultry diseases. NAHMS will conduct a national data collection for sheep through a national study, Sheep 2024. Collection and dissemination of animal and poultry health information is mandated by 7 U.S.C. 8301, The Animal Health Protection Act of 2002.

Need and Use of the Information: APHIS will collect information using

several questionnaires and consent forms. It will use the data collected to: (1) describe management and biosecurity practices associated with, and producer-reported occurrence of, common economically important diseases in sheep; (2) describe antimicrobial stewardship on sheep operations and estimate the prevalence of enteric microbes and antimicrobial resistance patterns; (3) describe management practices producers use to control internal parasites and reduce anthelmintic resistance; (4) describe changes in animal health, nutrition, and management practices in the U.S. sheep industry from 1996–2024; and (5) provide a serologic and DNA bank for future research.

Without the aforementioned data, the U.S.' ability to detect trends sheep in management, production, and health status that increase or decrease farm economy, either directly or indirectly, would be reduced or nonexistent.

Description of Respondents: Business or other for-profit, State agricultural officials.

Number of Respondents: 4,970.

Frequency of Responses: Reporting: Other (one time).

Total Burden Hours: 8,000.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2023–15486 Filed 7–20–23; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

[Docket ID: FSA–2023–0013]

Information Collection Request; Online Loan Application for Direct Loan Making Program and Direct Loan Servicing

AGENCY: Farm Service Agency, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) requirements, the Farm Service Agency (FSA) is requesting comments from all interested individuals and organizations on a new collection associated with the new automated FSA Online Loan Application for Direct Loan Making Program and Direct Loan Servicing—Primary. For both Direct Loan Making and Direct Loan Servicing—Primary, the collected information is used in eligibility and feasibility determinations for loan making and loan servicing actions. Future releases of the FSA Online Loan Application will provide

additional functionality and components for Direct Loan Making & Direct Loan Servicing—Primary applications.

DATES: We will consider comments that we receive by September 19, 2023.

ADDRESSES: We invite you to submit comments in response to this notice. FSA prefers that the comments are submitted electronically through the Federal eRulemaking Portal, identified by docket ID No. FSA–2023–0013, go to <http://www.regulations.gov> and search for docket ID FSA–2023–0013. Follow the online instructions for submitting comments.

All comments received will be posted without change and made publicly available on www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: For specific questions related to the information collection activities or to obtain a copy of the information collection request: For the Direct Loan Making Program please contact Matthew Christian; telephone; (423) 788–2007; email: matthew.christian@usda.gov; for Direct Loan Servicing—Primary, please contact Lee Nault, (202) 720–6834; email: lee.nault@usda.gov. Individuals who require alternative means for communication should contact the USDA Target Center at (202) 720–2600 (voice).

SUPPLEMENTARY INFORMATION:

Title: Farm Loan Programs, Direct Loan Making.

OMB Control Number: 0560–NEW.

Type of Request: New.

Abstract: FSA's Farm Loan Programs provide loans to family farmers to purchase real estate and equipment, and to finance agricultural production. FSA simplified the Direct farm loan application as a part of the efforts to conform with the Executive Order 14058, "Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government." The use of the hard copy form is covered in the information collection request under the OMB control number of 0560–0237; FSA reduced the number of pages required for completion of the form FSA–2001, "Request for Direct Loan Assistance" from 29 pages to 13 pages.

To further improve the customer experience and service delivery for the Farm Loan Program loan applicants, FSA is currently developing an Online Loan Application for the applicants to submit requests for Direct Loan assistance electronically. Future releases and iterations of the online application software will include expansion of functionality for direct loan making and provide ability for primary loan servicing application submission.

FSA will expect to further decrease the burden hours under the OMB Control number 0560–0237 as the functionally and use of the online application software expands, and more applicants shift away from using the hard copy application form. Due to ease of application submission, the expected number of annual respondents for all FSA–2001 submissions for loan making purposes is expected to increase by 10 percent over a 5-year average.

For the following estimated total annual burden on respondents, the formula used to calculate the total burden hour is the estimated average time per response hours multiplied by the estimated total annual responses.

Estimate of Average Time to Respond: Public reporting burden for the information collection is estimated to average per response 1.2 hours.

Type of Respondents: Individuals or households, informal entities, legal entities, businesses or other for-profit farms.

Estimated Annual Number of Respondents: 21,610.

Estimated Number of Responses per Respondent: 1.82.

Estimated Total Annual Responses: 39,330.

Estimated Total Annual Burden on Respondents: 47,196 hours.

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of FSA, including whether the information will have practical utility;

(2) Evaluate the accuracy of FSA's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected;

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

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 (TTY) or dial 711 for Telecommunications Relay Service (both voice and text telephone users can initiate this call from any telephone). 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.

USDA is an equal opportunity provider, employer, and lender.

Zach Ducheneaux,

Administrator, Farm Service Agency.

[FR Doc. 2023–15536 Filed 7–20–23; 8:45 am]

BILLING CODE 3411–E2–P

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting Notice

AGENCY: Commission on the Social Status of Black Men and Boys (CSSBMB), U.S. Commission on Civil Rights.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Government in Sunshine Act (5 U.S.C. 552b), the Commission on Civil Rights

is holding an in-person summit focused on policy initiatives that address systemic issues affecting the Black community.

DATES: Monday, July 24, 2023, 11 a.m. EST.

ADDRESSES: Meeting is open to the public to take place in person at the National Press Club, 529 14th St NW, Washington, DC 20045; and virtually via livestream on the Commission's YouTube page: <https://www.youtube.com/user/USCCR/videos>.

FOR FURTHER INFORMATION CONTACT: Diamond Newman: dnewman@usccr.gov; 202–376–8371.

SUPPLEMENTARY INFORMATION: This business meeting is open to the public. Computer assisted real-time transcription (CART) will be provided. The web link to access CART (in English) on Monday, July 24, 2023, is <https://www.streamtext.net/player?event=USCCR>. Please note that CART is text-only translation that occurs in real time during the meeting and is not an exact transcript.

Meeting Agenda

- I. ACT NOW Summit
- II. Adjourn Meeting

Dated: July 19, 2023.

Angelia Rorison,

USCCR Media and Communications Director.

[FR Doc. 2023–15614 Filed 7–19–23; 4:15 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–125–2023]

Foreign-Trade Zone 37; Application for Subzone; Findlay's Tall Timbers Distribution Center LLC dba Southern Tier Logistics; Village of Horseheads, New York

An application has been submitted to the Foreign-Trade Zones (FTZ) Board by the County of Orange, grantee of FTZ 37, requesting subzone status for the facility of Findlay's Tall Timbers Distribution Center LLC dba Southern Tier Logistics (Southern Tier Logistics), located in the Village of Horseheads, New York. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the FTZ Board (15 CFR part 400). It was formally docketed on July 17, 2023.

The proposed subzone (10.58 acres) is located at 120 Wygant Road, Village of Horseheads, New York. No

authorization for production activity has been requested at this time. The proposed subzone would be subject to the existing activation limit of FTZ 37.

In accordance with the FTZ Board's regulations, Juanita Chen of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the FTZ Board's Executive Secretary and sent to: ftz@trade.gov. The closing period for their receipt is August 30, 2023. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to September 14, 2023.

A copy of the application will be available for public inspection in the "Online FTZ Information Section" section of the FTZ Board's website, which is accessible via www.trade.gov/ftz.

For further information, contact Juanita Chen at juanita.chen@trade.gov.

Dated: July 17, 2023.

Elizabeth Whiteman,
Executive Secretary.

[FR Doc. 2023–15470 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–900]

Diamond Sawblades and Parts Thereof, From the People's Republic of China: Notice of Court Decision Not in Harmony With the Final Results of Antidumping Administrative Review; Notice of Amended Final Results

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: On July 12, 2023, the U.S. Court of International Trade (CIT) issued its final judgment in *Danyang Weiwang Tools Manufacturing Co., Ltd. et al. v. United States*, Consol. Court No. 19–00006, sustaining the U.S. Department of Commerce's (Commerce) remand results pertaining to the antidumping duty administrative review on diamond sawblades and parts thereof from the People's Republic of China (China) covering the period of review, November 1, 2016, through October 31, 2017. Commerce is notifying the public that the CIT's final judgment is not in harmony with Commerce's final results of the administrative review, and that Commerce is amending the final results

with respect to the dumping margin assigned to Danyang Weiwang Tools Manufacturing Co., Ltd., Quanzhou Zhongzhi Diamond Tool Co., Ltd., and Chengdu Huifeng New Material Technology Co., Ltd. (collectively, the Separate Rate Respondents).

DATES: Applicable July 24, 2023.

FOR FURTHER INFORMATION CONTACT:

Allison Hollander, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2805.

SUPPLEMENTARY INFORMATION:

Background

On December 14, 2018, Commerce published its final results in the 2016–2017 antidumping duty administrative review of diamond sawblades and parts thereof from China.¹ Commerce applied to non-selected respondents the separate rate assigned to eligible respondents in the last completed administrative review prior to the instant review, which was 82.05 percent.

The Separate Rate Respondents appealed Commerce's *Final Results*. On January 13, 2023, the CIT remanded the *Final Results* to Commerce, granting Commerce's request to consider the effect of recently completed litigation of the prior administrative review² on the *Final Results*.³ In its final results of redetermination, issued on April 7, 2023, Commerce revised the rate (*i.e.*, from 82.05 percent to 41.03 percent) for the Separate Rate Respondents.⁴ The CIT sustained Commerce's *Final Remand*.⁵

¹ See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 83 FR 64331 (December 14, 2018) (*Final Results*), and accompanying Issues and Decision Memorandum.

² See *Bosun Tools Co., Ltd. v. United States*, 493 F. Supp. 3d 1351 (CIT 2021), *aff'd* *Bosun Tools Co., Ltd. et al. v. United States*, Court No. 2021–1930 (Fed. Cir. Jan. 10, 2022).

³ See *Danyang Weiwang Tools Manufacturing Co., Ltd. et al. v. United States*, Consol. Court No. 19–00006 (CIT January 13, 2023) (*Remand Order*).

⁴ See *Final Results of Redetermination Pursuant to Court Remand, Danyang Weiwang Tools Manufacturing Co., Ltd. et al.*, Consol. Court No. 19–00006 (CIT January 13, 2023), dated April 7, 2023 (*Final Remand*), available on Commerce's website at <https://access.trade.gov/resources/remands/19-00006.pdf>.

⁵ See *Danyang Weiwang Tools Manufacturing Co., Ltd. et al. v. United States*, Consol. Court No. 19–00006, Slip Op. 23–100 (CIT July 12, 2023).

Timken Notice

In its decision in *Timken*,⁶ as clarified by *Diamond Sawblades*,⁷ the U.S. Court of Appeals for the Federal Circuit held that, pursuant to section 516A(c) and (e) of the Tariff Act of 1930, as amended (the Act), Commerce must publish a notice of court decision that is not “in

harmony” with a Commerce determination and must suspend liquidation of entries pending a “conclusive” court decision. The CIT’s July 12, 2023, judgment constitutes a final decision of the CIT that is not in harmony with Commerce’s *Final Results*. Thus, this notice is published

in fulfillment of the publication requirements of *Timken*.

Amended Final Results

Because there is now a final court judgment, Commerce is amending its *Final Results* with respect to the Separate Rate Respondents as follows:

Company	Final results rate (percent)	Remand rate (percent)
Chengdu Huifeng New Material Technology Co., Ltd.	82.05	41.03
Danyang Weiwang Tools Manufacturing Co., Ltd.	82.05	41.03
Quanzhou Zhongzhi Diamond Tool Co., Ltd.	82.05	41.03

Cash Deposit Requirements

Because Chengdu Huifeng New Material Technology Co., Ltd., and Quanzhou Zhongzhi Diamond Tool Co., Ltd., have superseding cash deposit rates, *i.e.*, there have been final results published in a subsequent administrative review,⁸ we will not issue revised cash deposit instructions to U.S. Customs and Border Protection (CBP) with respect to these companies. This notice will not affect the current cash deposit rate for these exporters.

Commerce will issue revised cash deposit instructions to CBP for Danyang Weiwang Tools Manufacturing Co., Ltd., which does not have a superseding cash deposit rate.

Liquidation of Suspended Entries

At this time, Commerce remains enjoined by CIT order from liquidating entries that were exported by the Separate Rate Respondents, and were entered, or withdrawn from warehouse, for consumption during the period November 1, 2016, through October 31, 2017. These entries will remain enjoined pursuant to the terms of the injunctions during the pendency of any appeals process.

In the event the CIT’s ruling is not appealed, or, if appealed, upheld by a final and conclusive court decision, Commerce intends to instruct CBP to assess antidumping duties on unliquidated entries of subject merchandise exported by the Separate Rate Respondents in accordance with 19

CFR 351.212(b). We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review.

Notification to Interested Parties

This notice is issued and published in accordance with sections 516A(c) and (e) and 777(i)(1) of the Act.

Dated: July 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2023–15469 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE**International Trade Administration**

[A–533–840]

Certain Frozen Warmwater Shrimp From India: Notice of Initiation of Antidumping Duty Changed Circumstances Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is initiating a changed circumstances review (CCR) to determine if Elque Ventures Private Limited (Elque) is the successor-in-interest to Elque & Co. in the context of the antidumping duty (AD) order on certain frozen warmwater shrimp (shrimp) from India.

46832 (August 20, 2021); see also *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments*; 2019–2020, 86 FR 41446 (August 2, 2021), unchanged in *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*; 2019–2020, 86 FR 67905 (November 30, 2021).

¹ See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping

DATES: Applicable July 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Terre Keaton Stefanova or Christopher Viers, AD/CVD Operations, Office IX, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1280 or (202) 482–0519, respectively.

SUPPLEMENTARY INFORMATION:**Background**

On February 1, 2005, Commerce published in the **Federal Register** the AD order on shrimp from India.¹ On June 6, 2023, Elque requested that, pursuant to section 751(b)(1) of the Tariff Act of 1930, as amended (the Act), 19 CFR 351.216, and 19 CFR 351.221(c)(3), Commerce conduct an expedited CCR to determine that it is the successor-in-interest to Elque & Co. and assign it the cash deposit rate of the Elque Group.² In its submission, Elque stated that in 2022 it changed its name from Elque & Co. and also changed its corporate structure to become a limited liability company.³ In addition, Elque notes that, because Commerce determined in the 2017–2018 administrative review to treat Calcutta Seafoods Pvt. Ltd. (Calcutta), Bay Seafood Pvt. Ltd. (Bay Seafood), and Elque & Co. as a collective entity (*i.e.*, the Elque Group), Commerce should also determine that the Elque Group is

Duty Order: Certain Frozen Warmwater Shrimp from India, 70 FR 5147 (February 1, 2005) (Order).

² See *Certain Frozen Warmwater Shrimp from India: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018*, 78 FR 61843 (April 23, 2019), and accompanying Preliminary Decision Memorandum, unchanged in *Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2017–2018*, 84 FR 57847 (October 29, 2019).

³ See Elque’s Letter, “Request for an Expedited Changed Circumstances Review,” dated June 6, 2023.

⁶ See *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) (*Timken*).

⁷ See *Diamond Sawblades Manufacturers Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*).

⁸ See *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Rescission of Review in Part*; 2018–2019, 86 FR 14873 (March 19, 2021), unchanged in *Diamond Sawblades and Parts Thereof from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2018–2019*, 86 FR

now comprised of Calcutta, Bay Seafood, and Elque.

Scope of the Order

The scope of this *Order* includes certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,⁴ deveined or not deveined, cooked or raw, or otherwise processed in frozen form.

The frozen warmwater shrimp and prawn products included in the scope of this *Order*, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannamei*), banana prawn (*Penaeus merguensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope of this *Order*. In addition, food preparations, which are not “prepared meals,” that contain more than 20 percent by weight of shrimp or prawn are also included in the scope of this *Order*. Excluded from the scope are: (1) breaded shrimp and prawns (HTSUS subheading 1605.20.10.20); (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled (HTSUS subheadings 0306.23.00.20 and 0306.23.00.40); (4) shrimp and prawns in prepared meals (HTSUS subheading 1605.20.05.10); (5) dried shrimp and prawns; (6) canned warmwater shrimp

and prawns (HTSUS subheading 1605.20.10.40); (7) certain battered shrimp. Battered shrimp is a shrimp-based product: (1) that is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a “dusting” layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and ten percent of the product’s total weight after being dusted, but prior to being frozen; and (5) that is subjected to IQF freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried. The merchandise subject to the *Order* is certain frozen warmwater shrimp.

The products covered by this *Order* are currently classified under the following (HTSUS) subheadings: 0306.17.00.04, 0306.17.00.05, 07, 0306.17.00.08, 0306.17.00.10, 0306.17.00.11, 0306.17.00.13, 0306.17.00.14, 0306.17.00.16, 0306.17.00.17, 0306.17.00.19, 0306.17.00.20, 0306.17.00.22, 0306.17.00.23, 0306.17.00.25, 0306.17.00.26, 0306.17.00.28, 0306.17.00.29, 0306.17.00.41, 0306.17.00.42, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope of this *Order* is dispositive.⁵

Initiation of CCR

Pursuant to section 751(b)(1)(A) of the Act and 19 CFR 351.216(d), Commerce conducts a CCR upon receipt of information concerning, or a request from, an interested party for a review of an AD order which shows changed

circumstances sufficient to warrant a review of the order. The information submitted by Elque regarding its claim that it is the successor-in-interest to Elque & Co. demonstrates changed circumstances sufficient to warrant the initiation of such a review.⁶ Therefore, in accordance with section 751(b)(1)(A) of the Act and 19 CFR 351.216(d) and (e), we are initiating a CCR.

In making a successor-in-interest determination, Commerce examines several factors, including, but not limited to, changes in the following: (1) management; (2) production facilities; (3) supplier relationships; and (4) customer base.⁷ While no single factor or combination of factors will necessarily provide a dispositive indication of a successor-in-interest relationship, generally, Commerce will consider the new company to be the successor to the previous company if the new company’s resulting operation is not materially dissimilar to that of its predecessor.⁸ Thus, if the record evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as the predecessor company, Commerce may assign the new company the cash deposit rate of its predecessor.⁹

Pursuant to 19 CFR 351.221(c)(3)(ii), Commerce may combine the notices of initiation and preliminary results of a CCR into a single notice if it concludes that expedited action is warranted. However, we are not combining this notice of initiation with the preliminary results, because we require additional information from the other companies in the Elque Group regarding the effect

⁵ See 19 CFR 351.216(d).

⁷ See, e.g., *Certain Frozen Warmwater Shrimp from India: Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review*, 81 FR 75376 (October 31, 2016) (*Shrimp from India Preliminary CCR*), unchanged in *Certain Frozen Warmwater Shrimp from India: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 81 FR 90774 (December 15, 2016) (*Shrimp from India Final CCR*).

⁸ See, e.g., *Shrimp from India Preliminary CCR*, 81 FR at 75377, unchanged in *Shrimp from India Final CCR*, 81 FR at 90774.

⁹ *Id.*; see also *Notice of Final Results of Changed Circumstances Antidumping Duty Administrative Review: Polychloroprene Rubber from Japan*, 67 FR 58, 59 (January 2, 2002); *Ball Bearings and Parts Thereof from France: Final Results of Changed-Circumstances Review*, 75 FR 34688, 34689 (June 18, 2010); and *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Changed Circumstances Review*, 63 FR 14679 (March 26, 1998), unchanged in *Circular Welded Non-Alloy Steel Pipe from Korea: Final Results of Antidumping Duty Changed Circumstances Review*, 63 FR 20572 (April 27, 1998) (in which Commerce found that a company which only changed its name and did not change its operations is a successor-in-interest to the company before it changed its name).

⁴ “Tails” in this context means the tail fan, which includes the telson and the uropods.

⁵ On April 26, 2011, Commerce amended the antidumping duty order to include dusted shrimp, pursuant to the U.S. Court of International Trade decision in *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010) and the U.S. International Trade Commission determination, which found the domestic like product to include dusted shrimp. See *Certain Frozen Warmwater Shrimp from Brazil, India, the People’s Republic of China, Thailand, and the Socialist Republic of Vietnam: Amended Antidumping Duty Orders in Accordance with Final Court Decision*, 76 FR 23277 (April 26, 2011); see also *Ad Hoc Shrimp Trade Action Committee v. United States*, 703 F. Supp. 2d 1330 (CIT 2010); and *Frozen Warmwater Shrimp from Brazil, China, India, Thailand, and France* (Investigation Nos. 731-TA-1063, 1064, 1066-1068) (Review), USITC Publication 4221 (March 2011).

of Elque & Co.'s name change and change in corporate structure on the operation of the Elque Group. Commerce intends to publish in the **Federal Register** a notice of the preliminary results of this CCR, in accordance with 19 CFR 351.221(b)(4) and (c)(3)(i), which will set forth Commerce's preliminary factual and legal conclusions. Pursuant to 19 CFR 351.221(b)(4)(ii), interested parties will have an opportunity to comment on the preliminary results.

Unless extended, Commerce intends to issue the final results of this CCR within 270 days after the date of initiation, in accordance with 19 CFR 351.216(e).

Notification to Interested Parties

We are issuing this notice in accordance with section 751(b)(1) of the Act and 19 CFR 351.216(b) and 351.221(b)(1).

Dated: July 17, 2023.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2023–15511 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–552–829]

Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Preliminary Results of Countervailing Duty Administrative Review and Partial Rescission of Administrative Review; 2020–2021

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) preliminarily determines that the company subject to this countervailing duty administrative review of passenger vehicle and light truck tires (PVL T tires) from the Socialist Republic of Vietnam (Vietnam)

received countervailable subsidies during the period of review (POR), November 10, 2020, through December 31, 2021. Additionally, Commerce is rescinding the review with respect to three companies. Interested parties are invited to comment on these preliminary results.

DATES: Applicable July 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Thomas Schauer, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0410.

SUPPLEMENTARY INFORMATION:

Background

On July 19, 2021, Commerce published in the **Federal Register** the countervailing duty order on PVL T tires from Vietnam.¹ On July 1, 2022, Commerce published in the **Federal Register** a notice of opportunity to request an administrative review of the Order for the POR.² Between July 29 and August 1, 2022, we received timely requests from multiple parties to conduct an administrative review of the Order.³ On September 6, 2022, we published in the **Federal Register** a notice of initiation for this administrative review.⁴ On March 13, 2023, Commerce extended the deadline for the preliminary results of this review by 117 days to July 28, 2023.⁵

For a complete description of the events that followed the initiation of this review, see the Preliminary Decision Memorandum.⁶ A list of topics discussed in the Preliminary Decision Memorandum is provided in the appendix to this notice. 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 <https://access.trade.gov>. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly

at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Scope of the Order

The scope of the Order covers PVL T tires from Vietnam. For a complete description of the scope of the Order, see the Preliminary Decision Memorandum.

Methodology

We are conducting this administrative review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (the Act). For each of the subsidy programs found countervailable, we determine that there is a subsidy, i.e., a financial contribution by an "authority" that confers a benefit to the recipient, and that the subsidy is specific.⁷ For a full description of the methodology underlying our preliminary conclusions, see the Preliminary Decision Memorandum.

Partial Preliminary Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation. Commerce received withdrawal requests with respect to Sailun (Vietnam) Co., Ltd. (Sailun), Kumho Tire (Vietnam) Co., Ltd. (KTV), and Kumho Tire Co., Inc. (KTCL).⁸ Because the withdrawal requests were timely filed and no other parties requested reviews of these companies, in accordance with 19 CFR 351.213(d)(1), Commerce is rescinding this review of the Order for Sailun, KTV, and KTCL.⁹

Preliminary Results of Review

As a result of this administrative review, we preliminarily find that the following net countervailable subsidy rates exist for the period November 10, 2020, through December 31, 2021:

¹ See *Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam: Countervailing Duty Order*, 86 FR 38013 (July 19, 2021) (Order).

² See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity To Request Administrative Review and Join Annual Inquiry Service List*, 87 FR 39461 (July 1, 2022).

³ See Bridgestone's Letter, "Request for Administrative Review," dated July 29, 2022; Sailun's Letter, "Request for Administrative Review," August 1, 2022; and KTV and KTCL's Letter, "Request for Administrative Review," dated August 1, 2022.

⁴ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 87 FR 54463, 54474 (September 6, 2022).

⁵ See Memorandum, "Extension of Deadline for Preliminary Results of Countervailing Duty Administrative Review," dated March 13, 2023.

⁶ See Memorandum, "Decision Memorandum for the Preliminary Results and Partial Rescission of the Administrative Review of the Countervailing Duty Order on Passenger Vehicle and Light Truck Tires from the Socialist Republic of Vietnam; 2020–2021," dated concurrently with, and hereby adopted by, this notice (Preliminary Decision Memorandum).

⁷ See sections 771(5)(B) and (D) of the Act regarding financial contribution; section 771(5)(E)

of the Act regarding benefit; and section 771(5A) of the Act regarding specificity.

⁸ See Sailun's Letter, "Sailun Withdrawal of Review Request," dated September 29, 2022; and KTV/KTCL's Letter, "Withdrawal of Request for Administrative Review," dated October 25, 2022.

⁹ See, e.g., *Lightweight Thermal Paper from the People's Republic of China: Notice of Rescission of Countervailing Duty Administrative Review; 2015*, 82 FR 14349 (March 20, 2017); and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Rescission of Countervailing Duty Administrative Review; 2017*, 84 FR 14650 (April 11, 2019).

Company	Subsidy rate— 2020 (percent <i>ad valorem</i>)	Subsidy rate— 2021 (percent <i>ad valorem</i>)
Bridgestone Tire Manufacturing Vietnam, LLC	1.26	0.00

Cash Deposit Requirements

Pursuant to section 751(a)(2)(C) of the Act, Commerce intends, upon publication of the final results, to instruct U.S. Customs and Border Protection (CBP) to collect cash deposits of estimated countervailing duties in the amounts calculated in the final results of this review for the company listed above, on shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review. If the rate calculated in the final results for 2021 is zero or *de minimis*, no cash deposit will be required on shipments of the subject merchandise entered or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review. For all non-reviewed companies, CBP will continue to collect cash deposits of estimated countervailing duties at the all-others rate (*i.e.*, 6.46 percent)¹⁰ or the most recent company-specific rate applicable to the company, as appropriate. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Assessment Rates

Upon issuance of the final results of this administrative review, consistent with section 751(a)(1) of the Act and 19 CFR 351.212(b)(2), Commerce shall determine, and CBP shall assess, countervailing duties on all appropriate entries covered by this review. For Sailun and KTCI, Commerce will instruct CBP to assess countervailing duties on all appropriate entries at the rate equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, during the period November 10, 2020, through December 31, 2021, in accordance with 19 CFR 351.212(c)(1)(i). With respect to KTV, entries produced and/or exported by KTV during the period November 10, 2020, through December 31, 2021, are enjoined from liquidation;¹¹ as a result, we will issue the appropriate

liquidation instructions for KTV once the statutory injunction is lifted.

For Bridgestone Tire Manufacturing Vietnam, LLC (Bridgestone), the only company subject to 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 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).

Disclosure and Public Comment

We intend to disclose the calculations performed for these preliminary results to parties in this proceeding within five days after public announcement of the preliminary results in accordance with 19 CFR 351.224(b). Pursuant to 19 CFR 351.309(c), interested parties may submit case briefs no later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed no later than seven days after the date for filing case briefs.¹² Parties who submit case or rebuttal briefs in this proceeding 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.¹³ Note that Commerce has temporarily modified certain of its requirements for serving documents containing business proprietary information, until further notice.¹⁴

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, limited to issues raised in the case and rebuttal briefs, must submit a written request to the Assistant Secretary for Enforcement and Compliance, filed electronically via ACCESS. 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 within 30 days after the date of publication of this notice.¹⁵

¹² See 19 CFR 351.309(d).

¹³ See 19 CFR 351.309(c)(2) and (d)(2).

¹⁴ See *Temporary Rule Modifying AD/CVD Service Requirements Due to COVID-19*, 85 FR 41363 (July 10, 2020).

¹⁵ See 19 CFR 351.310(c).

Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. If a request for a hearing is made, we will inform parties of the scheduled date and time for the hearing.

Unless extended, we intend to issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their case briefs, no later than 120 days after the date of publication of this notice in the **Federal Register**, pursuant to section 751(a)(3)(A) of the Act.

Notification to Interested Parties

We are issuing and publishing these preliminary results in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4) and 351.221(b)(4).

Dated: July 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the Order
- IV. Application of the CVD Law to Imports from Vietnam
- V. Subsidies Valuation
- VI. Benchmarks and Discount Rates
- VII. Analysis of Programs
- VIII. Recommendation

[FR Doc. 2023-15530 Filed 7-20-23; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-129, C-570-130]

Certain Walk-Behind Lawn Mowers and Parts Thereof From the People's Republic of China: Notice of Rescission of Circumvention Inquiry on the Antidumping and Countervailing Duty Orders

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The U.S. Department of Commerce (Commerce) is rescinding a

¹⁰ See *Order*, 86 FR at 38014.

¹¹ See KTV Statutory Injunction Instructions dated November 2, 2022, CBP Message 2306402.

circumvention inquiry regarding whether certain lawn mowers assembled or completed in the United States by attaching Chinese cutting deck shells (attached to at least one significant non-engine component) to internal combustion engines are circumventing the antidumping duty (AD) and countervailing duty (CVD) orders on certain walk-behind lawn mowers and parts thereof (lawn mowers) from the People's Republic of China (China).

DATES: Applicable July 21, 2023.

FOR FURTHER INFORMATION CONTACT:

Yang Jin Chun or Natasia Harrison, AD/CVD Operations, Office VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482-5760 or (202) 482-1240, respectively.

SUPPLEMENTARY INFORMATION:

Background

On March 3, 2023, Commerce published the notice of intent to rescind a circumvention inquiry regarding whether certain lawn mowers assembled or completed in the United States by attaching Chinese cutting deck shells (attached to at least one significant non-engine component) to internal combustion engines are circumventing the AD and CVD orders on lawn mowers from China under section 781(a) of the Tariff Act of 1930, as amended (the Act).¹ We invited interested parties to submit comments and rebuttals on our intent to rescind.² On March 17, 2023, MTD Products Inc. and its parent company, Stanley Black & Decker, Inc. (collectively, the petitioner) submitted comments.³ On

March 24, 2023, Ningbo Daye Garden Machinery Co., Ltd., Ningbo Lingyue Intelligent Equipment Co., Ltd., and Daye North America, Inc. (collectively, Daye) submitted rebuttal comments.⁴

For a full discussion of the basis for our rescission of this circumvention inquiry, see the Decision Memorandum.⁵ A list of topics discussed in the Decision Memorandum is included as the appendix to this notice. The 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 <https://access.trade.gov>. In addition, a complete version of the Decision Memorandum can be accessed directly at <https://access.trade.gov/public/FRNoticesListLayout.aspx>.

Scope of the Orders

The products covered by these *Orders* are lawn mowers from China. A full description of the scope of the *Orders* is provided in the Decision Memorandum.

Merchandise Subject to the Circumvention Inquiry

The merchandise subject to this circumvention inquiry are lawn mower sub-assemblies imported from China and comprised of a cutting deck shell attached to at least one other significant non-engine component, such as, but not limited to, a handle, wheels, grass catcher bag, or an electronic starter. These sub-assemblies are assembled or completed in the United States by attaching internal combustion engines to produce rotary walk-behind lawn mowers of the type that would be subject to the *Orders*.⁶ The cutting deck shell is the portion of the lawn mower—typically of aluminum or steel—that houses and protects a user from a rotating blade. Cutting deck shells are typically entered under Harmonized Tariff Schedule of the United States

(HTSUS) subheading 8433.11 or 8433.90.

Rescission of Circumvention Inquiry

As explained above, this circumvention inquiry covers cutting deck shells attached to at least one other significant non-engine component, such as, but not limited to, a handle, wheels, grass catcher bag, or an electronic starter. We find that the inquiry merchandise is specifically excluded from the scope of the *Orders* because it is not imported as “at a minimum, a sub-assembly comprised of an engine and a cutting deck shell attached to one another.”⁷ We also find that it is not appropriate to conduct a circumvention inquiry on such specifically excluded merchandise. Therefore, Commerce is rescinding this circumvention inquiry, in accordance with 19 CFR 351.226(f)(6). For more explanation, see the Decision Memorandum.

Suspension of Liquidation

Pursuant to 19 CFR 351.226(l)(1), Commerce notified U.S. Customs and Border Protection (CBP) of the initiation of this circumvention inquiry and directed CBP to continue the suspension of liquidation of entries of products subject to the circumvention inquiry that were already subject to the suspension of liquidation under the *Orders* and to apply the cash deposit rate that would be applicable if the products were determined to be covered by the scope of the *Orders*.⁸ Because we are now rescinding this inquiry, Commerce will inform CBP accordingly and instruct CBP to continue to suspend entries of lawn mowers from China that are subject to the *Orders* at the applicable rate(s) in effect on the date of entry until specific liquidation instructions are issued.

Notification to Interested Parties

This notice is issued and published in accordance with 19 CFR 351.226(f)(6).

Dated: July 17, 2023.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Decision Memorandum

- I. Summary
- II. Background
- III. Scope of the *Orders*
- IV. Merchandise Subject to the Circumvention Inquiry
- V. Discussion of the Issue

⁷ See Decision Memorandum at 2.

⁸ See CBP Message No. 2305407, dated November 1, 2022.

¹ See *Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Notice of Intent To Rescind Circumvention Inquiry on the Antidumping and Countervailing Duty Orders*, 88 FR 13434 (March 3, 2023) (*Intent to Rescind*), and accompanying Memorandum of Intent to Rescind; see also *Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 86 FR 36703 (July 13, 2021); and *Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination*, 86 FR 36702 (July 13, 2021) (collectively, *Orders*).

² See *Intent to Rescind*, 88 FR at 13435.

³ See Petitioner's Letter, “Comments of MTD Products, Inc and Stanley Black & Decker, Inc. in Opposition to the Notice of Intent to Rescind the Anticircumvention Inquiry,” dated March 17, 2023. MTD Products, Inc. was the petitioner in the underlying investigations. See *Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China and the Socialist Republic of Vietnam: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 37417, n.1 (June 22, 2020).

⁴ See Daye's Letter, “Response to Petitioner's Comments in Opposition to the Notice of Intent to Rescind the Anticircumvention Inquiry,” dated March 24, 2023.

⁵ See Memorandum, “Certain Walk-Behind Lawn Mowers and Parts Thereof from the People's Republic of China: Rescission of Circumvention Inquiry on the Antidumping and Countervailing Duty Orders,” dated concurrently with, and hereby adopted by, this notice (Decision Memorandum).

⁶ This inquiry does not include lawn mowers assembled or completed in the United States using small vertical engines from China that are covered by the scope of the antidumping and countervailing duty orders on certain vertical shaft engines between 99cc and up to 225 cc, and parts thereof. See *Initiation Notice*, 87 FR at 65034, n.11.

Comment: Whether to Rescind this Circumvention Inquiry
 VI. Recommendation
 [FR Doc. 2023–15529 Filed 7–20–23; 8:45 am]
 BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Recipient Reporting Information Collection

AGENCY: National Institute of Standards and Technology (NIST), 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 September 19, 2023.

ADDRESSES: Interested persons are invited to submit written comments by mail to Liz Reinhart, Management Analyst, National Institute of Standards and Technology, PRAComments@doc.gov. Please reference Recipient Reporting Information Collection OMB Control Number 0693–xxxx 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 Cierra Bean, Business Operations Specialist, CHIPS Program Office, askchips@chips.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

The CHIPS Incentives Program is authorized by Title XCIX—Creating Helpful Incentives to Produce Semiconductors for America of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal

Year 2021 (Pub. L. 116–283, referred to as the CHIPS Act or Act), as amended by the CHIPS Act of 2022 (Division A of Pub. L. 117–167). The CHIPS Incentives Program is administered by the CHIPS Program Office (CPO) within the National Institute of Standards and Technology (NIST) of the United States Department of Commerce (Department).

The CPO is considering collecting key data and information from recipients of CHIPS funding for the purposes of monitoring progress and performance on selected projects; ensuring compliance with the terms of an award; general programmatic financial management activities; and executing long-term program evaluation initiatives. CPO intends to collect key data and information in three primary categories: metrics, milestones, and reports. Metrics are quantitative measures that describe project progress or impact, and milestones are discrete action steps that are tied to target dates. Examples of data or information collected in the metric category may include but are not limited to number of jobs created, wafer starts per month, cumulative obligations, number of new customers contracts, or percentage of total childcare seats filled. Examples of milestone data or information collected may include but are not limited to construction milestones (e.g., permit issuance, utilities installation, fab groundbreaking, fab completion, etc.) or production go-live. Reports describe progress or details of a given content area in a narrative fashion.

The frequency and granularity of data and information collection is still under development by CPO. CPO will aim for a balance of utility to the government and burden on the recipient when determining the data and information to collect.

II. Method of Collection

CPO intends to collect data from recipients electronically, although other methods, e.g., interviews, email, etc., may also be leveraged. The primary data collection tool will be Salesforce, which CPO leverages for the application process and will leverage for communication with recipients post award.

III. Data

OMB Control Number: 0693–XXXX.
Form Number(s): None.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 100.

Estimated Time per Response: 12 hours.

Estimated Total Annual Burden Hours: 1,200 hours.

Estimated Total Annual Cost to Public: \$56,784.

Respondent's Obligation: Mandatory to be eligible for CHIPS Act funding.

Legal Authority: CHIPS Act of 2022 (Division A of Pub. L. 117–167) (the Act).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2023–15537 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD164]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Highly Migratory Species Management Team (HMSMT) will hold an online meeting, which is open to the public.

DATES: The online meeting will be held Tuesday, August 8, 2023, and Wednesday, August 9, 2023, from 9 a.m. to 12 p.m. Pacific Time or until business for the day is completed.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see www.pcouncil.org). You may send an email to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov) or contact him at (503) 820-2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220-1384.

FOR FURTHER INFORMATION CONTACT: Dr. Kit Dahl, Staff Officer, Pacific Council; telephone: (503) 820-2422.

SUPPLEMENTARY INFORMATION: The purpose of this online HMSMT meeting is to plan for a joint meeting with the Pacific Council's HMS Advisory Subpanel concurrent with the September 2023 Pacific Council meeting. The Pacific Council directed its two HMS advisory bodies to meet jointly to develop a detailed proposal for a workshop involving stakeholders. The objective of such a workshop would be to consider the development of fisheries for swordfish and other economically important species caught in the California large-mesh gillnet (DGN) fishery. This discussion is in the context of the transition of the DGN fishery as mandated by the Drift Gillnet Modernization and Bycatch Reduction Act.

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

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (kris.kleinschmidt@noaa.gov); (503) 820-2412) at least 10 days prior to the meeting date.

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

Dated: July 17, 2023.

Key Israel Marquez,

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

[FR Doc. 2023-15446 Filed 7-20-23; 8:45 am]

BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD082]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Mole Pier South Berth Floating Dry Dock Project

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

ACTION: Notice; proposed incidental harassment authorization; request for comments on proposed authorization and possible renewal.

SUMMARY: NMFS has received a request from the United States Navy for authorization to take marine mammals incidental to the Mole Pier South Berth Floating Dry Dock Project in San Diego Bay. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-time, one-year renewal 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.

DATES: Comments and information must be received no later than August 21, 2023.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to ITP.Tucker@noaa.gov. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained

online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. In case of problems accessing these documents, please call the contact listed below.

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/national/marine-mammal-protection/incidental-take-authorizations-construction-activities> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Steven Tucker, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the "take" of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other "means of effecting the least practicable adverse impact" on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as "mitigation"); and requirements

pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

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 notice prior to concluding our NEPA process or making a final decision on the IHA request.

Summary of Request

On February 16, 2022, NMFS received a request from the U.S. Navy, Navy Base San Diego (or, the Navy) for an IHA to take marine mammals incidental to Mole Pier Floating Dry Dock project proposed to occur in south-central San Diego Bay. The application was deemed adequate and complete on May 1, 2023. The Navy's request is for authorization to incidentally take California sea lions, harbor seals, and bottlenose dolphins, by Level B harassment only. Neither the U.S. Navy nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued an IHA to the U.S. Navy for similar work (87 FR 65578, October 31, 2022). The U.S. Navy has complied with all the requirements

(*e.g.*, mitigation, monitoring, and reporting) of the previous IHA, and information regarding their monitoring results is publicly available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

Description of Proposed Activity

Overview

The U.S. Navy request is associated with demolition and construction activities related to partial demolition and construction of a floating dry dock and related facilities at Mole Pier, Navy Base San Diego. The purpose of the Mole Pier South Berth Floating Dry Dock (FDD) Project is to overcome current shortfall in dry dock availability for repair and maintenance of vessels at Navy Base San Diego. The specified activity remedies some of the constraints resulting from aging or obsolete facilities.

Activities that may result in Level B harassment include removal of existing piles and installation of new piles to support facilities that are necessary for repair and maintenance of vessels in furtherance of the U.S. Navy's Congressionally mandated responsibilities under 10 U.S.C. 5062. The specified activity also includes dredging and demolition of the existing deck at the mooring wharf, installation of mooring attachments, installation of a steel floating dry dock and construction of a ramp and pier. Demolition activities include vibratory removal of up to 52, 24 x 24-inch square concrete piles and 7, 24-inch octagonal concrete piles. These activities are proposed to take place during a 19-day work period at the Mole Pier mooring wharf and the Ramp Pier locations, with construction to follow occurring over a subsequent span of 40 days. Prior to installation of new and replacement piles, a Test Pile Program (TPP) will be undertaken. The TPP entails installation and removal of six 24-inch octagonal concrete piles. Permanent pile installations, expected to occur via impact hammer and/or jetting, consist of eighty 24-inch octagonal concrete piles at the mooring wharf and twenty-one 24-inch octagonal

piles for the Ramp Pier and access to the FDD.

Dates and Duration

The U.S. Navy requested that the IHA be effective for a period of 1 year, from January 15, 2024, to January 14, 2025. During this period, the Navy expects to complete the pile driving and removal portions of the project during 59 workdays that may be non-consecutive, with all in-water activities conducted during daylight hours. Pile driving and removal activities may occur at any time during the proposed 1-year period of effectiveness.

Specific Geographic Region

The activities would occur in the south-central portion of San Diego Bay. San Diego Bay is a narrow, crescent-shaped natural embayment-oriented northwest-southeast with an approximate length of 24 kilometers (km) and a total area of roughly 4 km² (11,000 acres; Port of San Diego, 2007). The width of the Bay ranges from 300 meters to 5,800 meters and depths range from 23 meters Mean Lower Low Water (MLLW) near the tip of Ballast Point to less than 1.2 meters at the southern end (Merkel and Associates, Inc., 2009). Approximately half of the Bay is less than 4.5 meters deep and much of it is less than 15 meters deep (Merkel and Associates, Inc., 2009). The northern and central portions of the Bay have been shaped by historical dredging and filling to support large ship navigation and shoreline development. The United States Army Corps of Engineers dredges the main navigation channel in the Bay to maintain a depth of 14 meters MLLW and is responsible for providing safe transit for private, commercial, and military vessels within the bay (NOAA 2012). Outside of the navigation channel, the bay floor consists of platforms at depths that vary slightly (Merkel and Associates, Inc., 2009). Within the Central Bay, typical depths range from 10.7–11.6 meters MLLW to support large ship turning and anchorage, and small vessel marinas are typically dredged to depths of 4.6 meters MLLW (Merkel and Associates, Inc., 2009).

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Figure 1 -- Project Location

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San Diego Bay is heavily used by commercial, recreational, and military vessels, with an average of 82,413 vessel movements (in or out of the Bay) per year (approximately 225 vessel transits per day), a majority of which are presumed to occur during daylight hours. This number of transits does not include recreational boaters that use San Diego Bay, estimated to number 200,000 annually (San Diego Harbor Safety

Committee, 2009). Background (ambient) noise in the south-central San Diego Bay averaged 126 decibels (dB) re: 1 micropascal (μPa) in 2019 (Dahl and Dall'Osto 2019). Therefore, noise from non-impulsive sources associated with the specified activities is assumed to become indistinguishable from background noise as it diminishes to 126 dB with distance from the source (Dahl and Dall'Osto, 2019).

Detailed Description of the Specified Activity

The proposed FDD installation and associated dredging activities would occur within San Diego Bay at the south berth of the Mole Pier, which is located approximately 1.6 kilometers (km; 1 mile) south of the main entrance gate to Navy Base San Diego (NBSD), immediately south of Pier 8 and the Paleta Creek Channel, and north of Pier 10.

The Mole Pier floating dry dock project includes the following phases:

(1) Relocation of the USS *Curtiss* and hoteling facilities that are currently moored along the south berth of the Mole Pier;

(2) Dredging at the Mole Pier FDD sump, approaches, and turning basin to

increase water-depths as well as subsequent sediment disposal activities;

(3) Partial demolition of the existing decking at the mooring wharf;

(4) Installation of mooring attachments and upgrades at the mooring wharf;

(5) Demolition of existing Ramp Pier;

(6) Utility modifications;

(7) Placement and operation of a steel FDD; and

(8) Construction of a new Ramp Pier with vehicle access bridge from the quay wall southeast of the 1 Mole Pier to the FDD.

TABLE 1—PROPOSED PILE EXTRACTION/INSTALLATION ACTIVITIES

Pile location	Pile size/type	Pile extraction/installation method	Piles/day	Number of piles	Total estimated days
Demolition (Pile Extraction) ¹					
Mooring Wharf	24-inch Square Concrete	—Vibratory Extraction	5	24	5
	24-inch Octagonal Concrete	—High-pressure Water Jetting		7	2
Ramp Pier.	24-inch Square Concrete	—Hydraulic Pile Clipper		28	6
TPP ²	24-inch Octagonal Concrete	—Wire Saw	1	6	6
		—Underwater Chain Saw			
		—Dead Pull			
Total Piles Removed				65	19
Construction (Pile Installation) ³					
TPP ²	24-inch Octagonal Concrete	—Impact Hammer	1	6	6
Mooring Wharf		—High-pressure Water Jetting	3	80	27
Ramp Pier & Intermediate Support Structure ...				21	7
Total Piles Installed				107	40
Total In-Water Pile Extraction/Installation Days					59

¹ While other methods of pile extraction are possible, vibratory extraction is the most likely method that will be used to extract piles and is the method analyzed by NMFS for purposes of take estimation;

² The TPP piles will be installed via an impact hammer prior to the production piles, re-struck for testing approximately one week later, and then extracted prior to the start of production pile installation. Piles will likely be extracted via a vibratory pile remover or dead-pulled;

³ Impact pile installation is the most likely method that will be used to install piles. High-pressure water jetting may be used either separately from, or at the same time as, impact pile installation.

Underwater demolition activities covered under this IHA application would occur over a period of 19 days at two primary locations: (1) the Mole Pier mooring wharf and (2) the Ramp Pier. Piles at the mooring wharf will only be removed if they obstruct installation of new piles. All of the piles that support the Ramp Pier are slated for removal and replacement in the course of constructing a new replacement pier. At both locations, the concrete pier deck would be saw cut longitudinally and transversely at mid-span of every bent, allowing for removal in large but manageable sections, with weights of less than 50 tons. While the section is rigged to the derrick crane, a hydraulic shearing tool attached to a barge-mounted excavator would be used to cut the piles just below pile cap. Once freed from the piles, the sections would be set onto a barge. Following the removal of the pier deck, the piles could be

removed via multiple methods, including vibratory extraction, high-pressure water jetting, hydraulic pile clipper, wire saw, underwater chain saw, dead pull or via a combination of methods. Up to fifty-two 24-by-24-inch square concrete piles and seven 24-inch octagonal concrete piles would be removed from within the mooring wharf and the Ramp Pier.

Any of the pile extraction activities cited above may occur as part of the Project-related activities. However, given that the methods other than vibratory pile extraction entail lower source levels, we assume that take will not result. Vibratory pile driving is the only demolition-related activity expected to potentially result in incidental Level B harassment and subsequent take of marine mammals.

Pile installation activities would require 40 days. Similar to pile extraction activities, pile installation

activities for the Project are broken up into separate phases: (1) installation and extraction of six 24-inch octagonal concrete piles for a TPP; (2) installation of eighty 24–29 inch octagonal concrete piles at the mooring wharf; and (3) installation of twenty-one 24-inch octagonal concrete piles associated with the Ramp Pier and Intermediate Support Structure for personnel and vehicle access to the FDD. The TPP piles would be installed using an impact hammer, re-struck using the same hammer approximately one week later to provide data for production piles, and then removed prior to production pile driving. Piles installed for the mooring wharf and the Ramp Pier/Intermediate Support Structure would occur via an impact pile driver, high-pressure water jetting, or a combination of both methods. Vibratory pile installation is not expected.

The relocation of assets, dredging and sediment disposal, utility modifications, above-water demolition activities, and placement and operation of the FDD does not have the potential to result in harassment under the MMPA. Underwater sound associated with pile extraction and installation would have the potential to harass marine mammals. The demolition and construction elements analyzed in the IHA are described below and would occur over 59 days of in-water work over the 1-year period of authorization.

Proposed mitigation, monitoring, and reporting measures are described in detail later in this document (please see Proposed Mitigation and Proposed Monitoring and Reporting).

Description of Marine Mammals in the Area of Specified Activities

The request provides information about marine mammals that are known to occur in the broader geographic region including near the mouth of San Diego Bay and North Bay. Based on monitoring of prior projects conducted at Navy Base San Diego and in the vicinity of the FDD project, three of the species discussed are most likely to occur in the project area: California sea

lions, Bottlenose dolphins and harbor seals.

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS' website (<https://www.fisheries.noaa.gov/find-species>).

Table 2 lists all species or stocks for which take is expected and proposed to be authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and Potential Biological Removal (PBR), where known. PBR is defined by the

MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks and other threats.

Marine mammal abundance estimates presented in the table represent the total number of individuals that make up a given stock. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. All managed stocks in this region are assessed in NMFS' U.S. Pacific SARs. All values presented in Table 2 are the most recent available at the time of publication (including from the 2022 Draft SARs) and are available online at: www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.

TABLE 2—SPECIES ⁴ LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Cetacea—Odontoceti (toothed whales, dolphins, and porpoises)						
<i>Family Delphinidae:</i> Bottlenose Dolphin	<i>Tursiops truncatus</i>	CA Coastal	-, -, N	453 (0.06, 346, 2011)	2.7	≥2.0
Order Carnivora—Pinnipedia						
<i>Family Otariidae (eared seals and sea lions):</i> CA Sea Lion	<i>Zalophus californianus</i>	U.S.	-, -, N	257,606 (N/A, 233, 515, 2014).	14,011	>321
<i>Family Phocidae (earless seals):</i> Harbor Seal	<i>Phoca vitulina</i>	CA	-, -, N	30,968 (N/A, 27,348, 2012).	1,641	43

¹ Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species listed under the ESA is automatically designated under the MMPA as depleted as a strategic stock.

² NMFS marine mammal stock assessment reports online at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region/>. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

³ These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

⁴ Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (<https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/>; Committee on Taxonomy (2022)).

As indicated above, the 3 species in Table 2 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. Based on many years of observations and numerous Navy-funded surveys in San Diego Bay (Merkel and Associates, Inc., 2008; Sorensen and Swope, 2010; Graham and Saunders, 2014; Tierra Data Inc., 2016), other marine mammals rarely occur south of the Coronado Bay Bridge, are not known to occur near Naval Base San Diego, and any occurrence in the project area would be very rare. Therefore, while common dolphins (*Delphinus delphis* and *Delphinus capensis*), and gray whales (*Eschrichtius robustus*) have been sighted in North Bay and reported near the mouth of San Diego Bay respectively (Naval Facilities Engineering Command, Southwest and Port of San Diego Bay,

2013), they are not anticipated to occur in the project area and no take of these species is anticipated or proposed to be authorized.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.*, 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured

(behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 3—MARINE MAMMAL HEARING GROUPS
[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, Cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i>).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.*, 2006; Kastelein *et al.*, 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

This section provides a discussion of the ways in which components of the specified activity may impact marine mammals and their habitat. The Estimated Take of Marine Mammals section later in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take of Marine Mammals section, and the Proposed Mitigation

section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and whether those impacts are reasonably expected to, or reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Effects on Marine Mammals

Marine mammals encountering pile-driving operations over a project's construction time frame would likely avoid affected areas where they could encounter noise sufficient to limiting their ability to forage or rest. Individual responses to pile-driving noise are expected to vary. Prior work both in the vicinity of the project and further afield has shown that different species and individual animals within species may exhibit variable response when encountering the sound from pile driving. Some individual animals may occupy a project area during pile driving without apparent discomfort, and others may be displaced with undetermined effects. Avoidance of the affected area during pile-driving

operations reduces the likelihood of injury impacts, but, to the extent that conditions would otherwise be suitable, could come at the cost of reduced foraging in the affected area. For the work proposed here, the estimated Level B harassment zone constitutes a small proportion of foraging habitat utilized in San Diego Bay in general.

Noise-related disturbance may inhibit some marine mammals from transiting the area. There is also some potential for displacement of marine mammals from the affected area as a result of behavioral disturbance while the in-water construction is under way. However, in some areas, habituation may occur, resulting in a decrease in the severity of the response. Since pile driving/ extracting activities will only occur during daylight hours, marine mammals swimming, foraging, or resting in the Project area at night will not be affected. While we expect that the foregoing effects of pile-driving activity will be experienced by some individual marine mammals they are not expected to cause population-level impacts or to affect the continued survival of the species.

Effects on Marine Mammal Habitat

The Navy's construction activities could have localized, temporary impacts on marine mammal habitat, including prey availability, by increasing in-water sound pressure levels and slightly decreasing water quality. Increased noise levels may affect acoustic characteristics of marine mammal habitat and adversely affect marine mammal prey in the vicinity of the project area. During impact and vibratory pile driving and pile removal, elevated levels of underwater noise would ensonify San Diego Bay where both fishes and mammals occur and could affect foraging success. Some marine mammals may avoid the area during construction, however, any such displacement attributable to project noise is expected to be temporary, and is not expected to result in long-term effects to the individuals or populations.

Prey Habitat Considerations

Given the short daily duration of sound associated with individual pile driving events and the small area being affected, pile driving and removal activity associated with the project is not likely to have a permanent, adverse effect on any fish habitat, or populations of marine mammal prey. Any behavioral avoidance of the project area by fish would likely be inconsequential given the significant extent of fish and marine mammal foraging habitat in the nearby vicinity. Thus, we conclude that impacts of the specified activity are not likely to have more than short-term adverse effects on any prey habitat or populations of prey species. Further, any impacts to marine mammal habitat are not expected to result in significant or long-term consequences for individual marine mammals, or to contribute to adverse impacts on their populations.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes proposed for authorization through this IHA, which will inform both NMFS' consideration of "small numbers," and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of 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).

Here, authorized takes would be by Level B harassment only, in the form behavioral response to noise, or short-term disruption of behavioral patterns resulting from exposure to sound generated during pile driving and extraction activities. Based on the nature of the activity, Level A harassment is neither anticipated nor proposed to be authorized. As described previously, no serious injury or mortality is anticipated or proposed to be authorized for this activity. Below we describe how the proposed take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (e.g., previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the proposed take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur auditory permanent threshold shift (PTS) of some degree (equated to Level A harassment).

Level B harassment is largely driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (e.g., frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (e.g., bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (e.g., Southall *et al.*, 2007, 2021, Ellison

et al., 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μ Pa)) for continuous (e.g., vibratory pile driving, drilling) sources, and above RMS SPL 160 dB re 1 μ Pa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources. Generally speaking, Level B harassment take estimates based on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (masking of vocalization/conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

During the proposed work, the animals most likely to be at risk for vocalization masking are resident California sea lions around local haulout areas. Behavioral reactions to vocalization masking could include changes to vocal behavior (including cessation of calling), habitat abandonment (short- or long-term), and modifications to the acoustic structure of vocalizations (which may help signalers compensate for masking) (Brumm and Slabbekoorn 2005; Brumm and Zollinger 2011). Given the relatively high source levels for most marine mammal vocalizations, we anticipate that masking events would occur concurrently within the zones of behavioral harassment estimated for vibratory and impact pile driving and it is taken into account in the exposure analysis.

The specified activity includes the use of continuous (vibratory pile extraction) and impulsive (impact pile driving) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μ Pa would typically be applicable. However, as discussed above, the Navy has established that the ambient noise in the project area is 126 dB re 1 mPa

(rms). Since this is louder than the 120 dB threshold for continuous sources, 126 dB becomes the effective threshold for Level B harassment for continuous sources.

Level A harassment is described in detail in NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018). The Technical Guidance identifies dual criteria to assess auditory injury (Level A harassment) to five

different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's specified activity includes the use of both impulsive (impact pile driving) and non-impulsive (vibratory extraction) sources.

The Level A harassment thresholds are provided in the table below. The references, analysis, and methodology used in the development of the

thresholds are described in NMFS' 2018 Technical Guidance, which may be accessed at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>.

No project activities are expected to approach levels that may induce permanent threshold shift or other injury, and no take by Level A harassment is expected or proposed for authorization.

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

PTS onset acoustic thresholds (received level)	Hearing group	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	<i>Cell 1:</i> $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	<i>Cell 2:</i> $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	<i>Cell 3:</i> $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	<i>Cell 4:</i> $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	<i>Cell 5:</i> $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	<i>Cell 6:</i> $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	<i>Cell 7:</i> $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	<i>Cell 8:</i> $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	<i>Cell 9:</i> $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	<i>Cell 10:</i> $L_{E,OW,24h}$: 219 dB.

Ensonified Area

Here, we describe the parameters of the specified activity used to estimate the ensonified area and application of related acoustic thresholds, including source levels and transmission loss coefficient.

The ensonified area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the

Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional

tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources (such as pile driving and removal), the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the optional User Spreadsheet tool, and the resulting estimated isopleths, are reported below.

TABLE 5—CALCULATED EXTENT OF LEVEL A AND LEVEL B HARASSMENT ZONES

Activity description	Pile size/type & source levels ¹	Level A harassment zones ² (meters)			Level B harassment zones ² (meters)
		California sea lions	Harbor seals	Coastal bottlenose dolphins	All species
Vibratory Extraction ³	24-inch octagonal/square concrete (Production) (162 RMS).	0.0	6.8	1.0	3,525 × 1,055. ⁵
	24-inch octagonal concrete (TPP) ⁴ (162 RMS).	0.0	2.3	0.3	
Impact Driving ⁶	24-inch octagonal concrete (TPP) ⁴ (188 Peak, 176 RMS, 166 SEL).	0.0	28.0	1.9	375.
	24-inch octagonal concrete (Production) (188 Peak, 176 RMS, 166 SEL).	0.0	58.2	3.9	

¹ Sound source levels at 10 meters (m) (33 ft.) distance. Units for Peak and RMS are dB re 1 μ Pa. The unit for sound exposure level (SEL) is dB 1 μ Pa²-sec.

² Level A distances are based on a site-specific model for California sea lions (Dall'Osto and Dahl 2019) and a generic Practical Spreading Loss model (NMFS 2018, 2020) for harbor seals and coastal bottlenose dolphins. The Level A harassment criteria are not exceeded for California sea lions based on the site-specific model (Dall'Osto and Dahl 2019). Level B harassment distances are based on the site-specific model (Dall'Osto and Dahl 2019). No take by Level A harassment is requested or proposed for authorization.

³ Assumes 20 minutes of vibratory pile extraction, Weighting Factor Adjustment of 2.5 kHz, with 5 piles/day for Production, and 1 pile/day for the TPP.

⁴ The TPP Piles will be installed via an impact hammer prior to the production piles, re-struck for testing approximately one week later, and then removed prior to the start of production pile driving.

⁵ The distances represent the maximum north/south and east/west distance from the pile being driven. These distances are represented by the green line in Figure 6–1 of the Navy's application.

⁶ Assumes 600 strikes per pile, 0.01 second single-strike duration, Weighting Factor Adjustment of 2.0 kHz, with 3 piles/day for Production, and 1 pile/day for the TPP.

Marine Mammal Occurrence

In this section we provide information about the occurrence of marine mammals, including density or other relevant information which will inform the take calculations. In the case of the Navy's FDD project, monitoring results from nearby projects provide the best available information about marine mammal presence and abundance in the project area. Accordingly, for purposes of estimating density of species that may occur in the project area, sightings collected in the course of monitoring projects for work at other locations within the bounds of NBSD are used.

Due to the dynamic nature and multitude of overlapping uses of the north and north-central San Diego Bay, a number of marine mammal surveys have been conducted (Merkel and Associates, Inc. 2008; Sorensen and Swope 2010; Graham and Saunders 2014; Naval Facilities Engineering Command, Southwest (NAVFAC SW) 2018b). Based on these surveys California sea lions are the predominant species observed. However, relative to the FDD project area, only one dedicated line transect survey (Sorensen and Swope 2010) surveyed an area south of the Coronado Bridge. During the Sorensen and Swope (2010) survey, two sightings of one California sea lion each were reported in the water adjacent to NBSD. As presented in the NBSD Pier 6 Replacement Project's first year's interim report (NAVFAC SW 2022) a clearer picture of marine mammal

activity south of the Coronado Bay Bridge was developed during 132 days of observations. This recent monitoring effort found that California sea lions were the most common species observed south of the Coronado Bridge (69.9 percent), but coastal bottlenose dolphins (29.5 percent), and to a lesser extent harbor seals (0.6 percent), were observed as well. The Pier 6 Replacement Project data represents the best available science for an area that is close to the project area described here. Accordingly, the application uses these prior observations from the immediate vicinity as a basis for assessing potential project impacts to California sea lions, coastal bottlenose dolphins, and harbor seals by leveraging the numbers provided in NAVFAC SW (2022).

Take Estimation

Here, we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and proposed for authorization.

The degree to which underwater noise propagates away from a noise source is dependent on a variety of factors, most notably by bathymetry and the presence or absence of reflective or absorptive conditions, including the sea surface and sediment type. The two models used to assess the potential distances to regulatory thresholds and to evaluate the potential for Level A/B harassment: (Dall'Osto and Dahl 2019; NMFS 2018,

2020), and a Practical Spreading Loss model (PSL). Dall'Osto and Dahl (2019) developed site-relevant acoustic models using point sources at three locations (Pier 1, Pier 6 and Pier 13) along the eastern extent of the south-central San Diego Bay on NBSD. Due to the similar bathymetry and location with respect to the channel, the Pier 13 modeling location, which is roughly 725 meters to the south of the Project location approximates the sound propagation profile from a notional source at the Mole Pier mooring wharf FFD location. Key to this profile is the dampening effect of sound due to the western slope of the dredged navigation channel, as well as channelization of sound to the north and south within the channel. While the Pier 13 point is not exactly in the project location, the model provides suitable representation of sound propagation in the project area with a higher degree of resolution than a generic PSL model would provide.

Harbor seals and coastal bottlenose dolphins were not included in the site-specific modeling effort for Level A harassment isopleth calculations. As a result, the NMFS user spreadsheet (NMFS 2020) was used to determine Level A harassment zones for these species. To determine zones for potential Level B harassment, the site-specific model was used for all species because the threshold criteria for Level B harassment are based solely on continuous or impulsive noise source and are not frequency-dependent.

TABLE 6—ESTIMATED TAKES FROM LEVEL B HARASSMENT

Species	Expected average individuals per day	Requested ¹ Level B take	Stock abundance	Instances of take as percent of stock
California sea lion	2	118	257,606	0.05
Harbor seal	1	59	30,968	0.19
Coastal bottlenose dolphin	1	59	453	13

¹ Based on 59 days of pile driving activity.

Proposed Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and

feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful

implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which

may consider such things as cost, impact on operations.

The following mitigation measures are proposed in order to avoid and minimize the potential for Level A harassment and to reduce, to the lowest extent practicable, exposure to noise exceeding Level B harassment criteria. The contractor is responsible for complying with all the mitigation measures listed below, whereas on-site Navy representatives will monitor the contractor's performance and require corrective action or stop work, if necessary, to ensure that requirements are met.

(1) *Time Restriction:* The Navy proposes that in-water pile extraction/installation activities will only be conducted when sufficient ambient light is available for visual observations (generally 30 minutes after sunrise and up to 45 minutes before sunset); however, the Lead Protected Species Observer will make a final determination as to when to start or stop activities based on ambient lighting conditions.

(2) *General Vessel and Machinery Stoppage:* For in-water activities, including heavy machinery activities other than pile extraction/installation (e.g., barge movements) or when using vessels, if a marine mammal comes within 10 m (33 ft.), the activity must cease operations and/or reduce vessel speed to the minimum level required to

maintain steerage and safe working conditions.

(3) *Pre-Construction Briefing:* Prior to the start of all in-water pile installation or extraction activities, briefings will be conducted for construction supervisors and crews, the monitoring team and when new personnel join the work. The briefing will explain responsibilities, communication procedures, the marine mammal protocols, and operational procedures for stopping/delaying in-water activities.

(4) *Protected Marine Species Visual Monitoring:* Marine Species Visual Monitoring will assess and document any effects on marine mammals. PSOs will visually observe the surrounding waters for marine mammal presence, assess any potential Level B harassment and ensure effective notification of any animals sighted in established shutdown zones.

- Monitoring will take place from 30 minutes prior to initiation through 30 minutes post-completion of pile extraction/installation activities;
- During all observation periods, the PSOs will use binoculars and/or the naked eye to search continuously for protected marine species;
- Shutdown zone(s) may only be declared clear, and pile extraction/installation started, when the entire shutdown zone is visible (i.e., when not obscured by a poor light, rain, fog, etc.). If the applicable shutdown zone is obscured by fog or poor lighting conditions, activity at the location will

not be initiated until the shutdown zone is visible.

(4) All observers shall have no other project-related tasks while recording data to address the following requirements:

- a. Date and time that pile extraction/installation begins or ends;
- b. Construction activities occurring during each observation period;
- c. Weather parameters (e.g., wind, temperature, percent cloud cover, and visibility);
- d. Tide stage and sea state (The Beaufort Sea State Scale will be used to determine sea-state);
- e. Species, numbers, and, if possible, sex and age class of marine mammals;
- f. Marine mammal behavior patterns observed, including bearing and direction of travel, and if possible, the correlation to Sound Pressure Levels;
- g. Distance from pile installation activities to marine mammals and distance of a sighted marine mammal from the observation point;
- h. Locations of all PSOs; and
- i. Other, relevant human activity in the area.

(5) *Soft Start:* The use of soft-start procedures for impact pile driving are believed to provide additional protection to marine mammals by providing a warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity.

(6) *Shutdown Zones:*

TABLE 7—SHUTDOWN ZONES

Activity description	Pile size/type & source levels	Shutdown zones (meters)		
		California sea lions	Harbor seals	Coastal bottlenose dolphins
Vibratory Extraction	24-inch octagonal/square concrete (Production) (162 RMS)	10	10	10
	24-inch octagonal concrete (TPP) (162 RMS)	10	10	10
Impact Driving	24-inch octagonal concrete (TPP) (188 Peak, 176 RMS, 166 SEL)	10	30	10
	24-inch octagonal concrete (Production) (188 Peak, 176 RMS, 166 SEL).	10	60	10

• Based on the activity and species observed shutdown zones will be established around in-water pile extraction/installation activities to avoid the potential for Level A harassment of marine mammals.

• One Pier-based PSO will be stationed with clear view of the shutdown zone(s) and will be responsible for initiating shutdowns/delays of project activities, monitoring for animals in close proximity to the project site, and the collection of project-related activity data (i.e., pile

extraction/installation start and stop times, shutdowns/delays);

- Visual surveys will occur for at least 30 minutes prior to the start of pile extraction/installation;
- If marine mammals covered under the IHA are present within the Level B harassment zone, in-water construction or demolition will be allowed to start without delay.
- If a marine mammal covered in the IHA enters an applicable shutdown zone, all pile extraction/installation activities at that location shall be

delayed. The animal(s) shall be allowed to remain in the shutdown zone (i.e., must leave of their own volition) and their behavior must be monitored and documented. Work will be allowed to start once the animal has been observed either leaving the shutdown area, or 15 minutes has elapsed since the last observation without re-detection of the animal;

• If a marine mammal covered in the IHA enters the applicable shutdown zone, the PSO shall direct a halt of all pile extraction/installation activities at

that location and initiate mitigation. The animal(s) must be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior must be monitored and documented. Work may restart once the animal has been observed either leaving the shutdown area, or 15 minutes has elapsed since the last observation without re-detection of a marine mammal;

- If a marine mammal not covered in the IHA enters the applicable Level B harassment zone, all pile extraction/installation activities shall be halted. The animal(s) must be allowed to remain in the Level B harassment zone (*i.e.*, must leave of their own volition) and their behavior must be monitored and documented. Work will be allowed to restart once the animal has been observed either leaving the Level B harassment zone, or 60 minutes has elapsed since the last observation without re-detection of the animal; and
- In the unlikely event that environmental conditions, such as heavy fog, prevent the visual detection of marine mammals within the shutdown zone (see Table 7), in-water demolition or construction activities will not be initiated. If in-water demolition or construction activities have been initiated, and conditions deteriorate so that the shutdown zone is not completely visible, then activities will be delayed until the zone is fully visible.

Based on our evaluation of the applicant's proposed measures NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

The Navy addresses the above requirements in depth in its NMFS-approved Marine Species Monitoring Plan and proposes the following procedures:

The Navy will retain independent PSOs to collect marine mammal sightings data, including behaviors, during site preparation in the pre-construction period, during all in-water workdays, through completion of in water construction and the demobilization of pile extraction/installation extraction equipment. To eliminate the potential for bias, all marine mammal observations will be logged, regardless of proximity to the Level A or Level B harassment zones. The efficacy of visual detection depends on several factors including the PSO's ability to detect the animal, the environmental conditions (visibility and sea state), and monitoring platforms. All observers shall be trained in marine mammal identification and behaviors, and satisfy the following criteria:

- Visual acuity in both eyes (correction is permissible) sufficient to discern moving targets at the water's

surface with ability to estimate target size and distance. Use of binoculars or spotting scope may be necessary to correctly identify the target.

- Advanced education in biological science, wildlife management, mammalogy or related field (Bachelor's degree or higher is preferred), or equivalent Alaska Native traditional knowledge.
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience).
- Experience or training in the field identification of marine mammals (cetaceans and pinnipeds).
- Sufficient training, orientation or experience with vessel operation and pile driving operations to provide for personal safety during observations.
- Writing skills sufficient to prepare a report of observations. Reports should include such information as the number, type, and location of marine mammals observed; the behavior of marine mammals in the area of potential sound effects during construction; dates and times when observations and in-water construction activities were conducted; dates and times when in-water construction activities were suspended because of marine mammals, etc.
- Ability to communicate orally, by radio or in person, with project personnel to provide real time information on marine mammals observed in the area and necessary actions, as needed.

General Visual Monitoring Protocols: Trained PSOs will be placed at the best vantage point(s) practicable (*e.g.*, the crane barge, on shore, or any other suitable location) to monitor for marine mammals and implement shutdown/delay procedures, when applicable, by notifying the construction operator of a need for a work stoppage.

Marine Mammal Monitoring Protocols:

- Observation data will be recorded for any marine mammals within visual range of the PSO, regardless of proximity to the monitoring zones;
- Up to three PSOs at up to three locations will conduct the marine mammal monitoring depending on the activity and size of monitoring zones (see Figure 1–2 of the Navy's application). All PSOs will communicate with each other to enhance tracking of marine mammals that may be moving through the area and to minimize duplicate observation records of the same animal by different PSOs (*i.e.*, a re-sighting);
- Results of all protected marine mammal observations will be recorded

on electronic tablet or hardcopy datasheets (see Appendix A for an example of a hard-copy datasheet).

- If an injured, sick, or dead marine mammal is observed, procedures outlined in Section 3.0 of the Navy's application will be followed:
 - In the event that personnel involved in the Project-related activities discover an injured or dead marine mammal, the Navy POC for the IHA shall report the incident to the Office of Protected Resources (OPR), NMFS, and the Regional Stranding Coordinator as soon as feasible.
 - If the death or injury was clearly caused by the specified activity, the IHA-holder must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the IHA. The IHA-holder must not resume their activities until notified by NMFS.
 - The report will include the following information:
 - Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
 - Species identification (if known) or description of the animal(s) involved;
 - Condition of the animal(s) (including carcass condition if the animal is dead);
 - Observed behavior of the animal(s), if alive;
 - If available, photographs or video footage of the animal(s); and,
 - General circumstances under which the animal was discovered.
 - In the event that an injured or dead marine mammal is discovered, and the Lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.*, in less than a moderate state of decomposition as described in the next paragraph), the PSO will report to the Navy POC.
 - Within 24 hours, the Navy POC will report the incident to the NBSD Base Biologist, the NMFS OPR, and the appropriate West Coast Region Marine Mammal Network Stranding Coordinators as noted above.
 - The report will include the same information identified above. Pursuant to NMFS instruction and approval, activities may continue while the circumstances of the incident are under review.
 - In the event that an injured or dead marine mammal is discovered, and the Lead PSO determines that the injury or death is not a result of activities authorized in the IHA (*i.e.*, previously wounded animal, carcass with moderate to advanced decomposition, or

scavenger damage), the Lead PSO will report the incident to the Navy POC, who will report the animal(s) to the NBSD base biologist.

- The appropriate West Coast Region Marine Mammal Network Stranding Coordinators, as noted above, will be notified within 24 hours of the discovery.
- The PSOs will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to the Navy POC under such a case.
- At no time should the PSO handle, or attempt to handle, a dead marine mammal.
- Pre-Construction Monitoring:*
 - Visual surveys will occur for at least 30 minutes prior to the start of pile extraction/installation and mitigation measures will be initiated as described above.
- Monitoring Concurrent with Construction:*
 - If a marine mammal approaches, or appears to be approaching, the shutdown zone(s), the PSO who first observed the animal will alert the "Command" PSO, who will notify the construction crew of the animal's current status. In-water activities addressed in the IHA will be allowed to continue while the animal remains outside the shutdown zone;
 - If shutdown and/or clearance procedures would result in an imminent concern for human safety, then the activity will be allowed to continue until the safety concern is addressed. During that timeframe, the animal(s) will be continuously monitored, and the Navy POC will be notified and consulted prior to re-initiation of Project-related activities; and
 - Regardless of location within the Level B harassment zone, an initial behavior and the location of the animal(s) will be logged. Behaviors will be continually logged until the animal is either passed off to another PSO, the animal is no longer visible, or it has left the Level B harassment zone.
- Post-Activity Monitoring:*
 - Monitoring of all zones will continue for 30 minutes following completion of pile extraction/installation and drilling activities. These surveys will record all marine mammal observations following the same procedures as identified for the pre-construction monitoring time-period, and will focus on observing and reporting unusual or abnormal behaviors.
 - A summary report of recorded observations, work stoppages (if any) and an assessment of 1) effectiveness of mitigation and 2) recommendations for

adjustment to future monitoring protocols will be required within 90 days of project completion or expiration of an IHA

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, this discussion of our analysis applies to all the species listed in Table 2, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity.

The takes from Level B harassment would be due to potential behavioral disturbance such as avoidance or temporary displacement or temporary shift in hearing threshold. No mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. The potential for harassment is minimized through the

construction method and the implementation of the planned mitigation measures (see Proposed Mitigation section).

The nature of the pile driving project precludes the likelihood of serious injury or mortality. Take would occur within a limited, confined area (south-central San Diego Bay) of the stock's range. The duration and intensity of Level B harassment events will be minimized through use of mitigation measures described herein. Further the amount of take proposed to be authorized is extremely small when compared to stock abundance.

Behavioral responses of marine mammals to pile driving at the project site, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day and that pile driving and removal would occur across 6 months, any harassment would be temporary. There are no other areas or times of known biological importance for any of the affected species.

In addition, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our preliminary determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- No important habitat areas have been identified within the project area;
- For all species, San Diego Bay is a peripheral part of their range;
- Among the suitable options for construction available, the Navy will select lower-impact techniques such as vibratory pile driving in lieu of impact driving, to the maximum extent practicable.
- The Navy will adhere to standards for soft-starts when impact driving and

shut downs for all in-water activities subject to work stoppage; and

- Monitoring reports from similar work in San Diego Bay have documented little to no effect on individuals of the same species resulting from the specified activities.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the specified activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS proposes to authorize is below one-third of the estimated stock abundance of the three species that may be subject to Level B harassment from the proposed pile driving and extraction activities.

This estimated takes are presumed to meet the "small numbers" criteria given that total requested instances of take equate to no more than 13 percent of any stock expected to be taken, less than benchmark of less than one-third of stock abundance often used to substantiate a small numbers finding. Comparing estimated instances of take against stock abundance for assessment of small numbers is a conservative approach and is likely to over-estimate the number of animals that may be affected by the activity.

Based on the analysis contained herein of the specified activity (including the proposed mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS preliminarily finds that small

numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

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 consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the U.S. Navy for conducting construction activities pursuant to the Mole Pier Floating Dry Dock project, 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/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

Request for Public Comments

We request comment on our analyses, the proposed authorization, and any other aspect of this notice of proposed IHA for the proposed Floating Dry Dock project. We also request comment on the potential 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 decisions on the request for this IHA or a subsequent renewal IHA.

On a case-by-case basis, NMFS may issue a one-time, one-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 Proposed Activity section of this notice is planned or (2) the activities as described in the Description of Proposed Activity 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.

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: July 18, 2023.

Kimberly Damon-Randall,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 2023–15516 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD177]

Gulf of Mexico Fishery Management Council; Public Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of hybrid meeting open to the public offering both in-person and virtual options for participation.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will hold a four-day meeting to consider actions affecting the Gulf of Mexico fisheries in the exclusive economic zone (EEZ).

DATES: The meeting will convene Monday, August 14 through Thursday, August 17, 2023. Times are: Monday, Tuesday and Wednesday, from 8 a.m. to 5 p.m.; and Thursday, from 8 a.m. to 4:30 p.m., CDT.

ADDRESSES:

Meeting address: The meeting will take place at The Driskill Hotel, located at 604 Brazos Street, Austin, TX 78701.

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

FOR FURTHER INFORMATION CONTACT: Dr. Carrie Simmons, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Monday, August 14, 2023; 8 a.m.–5 p.m., CDT

The meeting will begin in Full Council with the Induction of New Council Members. Committee Sessions will follow beginning with the Administrative/Budget Committee reviewing the 2021–22 Audit Report and Final 2023 Funded Budget and Activities Report. Information will be presented on the Inflation Reduction Act Funding for the Regional Management Councils.

The Migratory Species Committee will give an update on Atlantic Highly Migratory Species Management Measures; including, Proposed Rule: Amendment 15—Modifications of Four Commercial Longline Spatial Management Areas and Administrative Changes to Pelagic Longline Electronic Monitoring Program, Advanced Notice of Proposed Rulemaking on Electronic Reporting and Scoping; Amendment 16—Revised Catch Limit for *Shark* Stocks, Modifications to Commercial and Recreational *Shark* Fisheries Management. The Data Collection Committee will receive an update on the Southeast For-Hire Integrated Reporting (SEFHIER) Program and next steps.

Following lunch, the Sustainable Fisheries Committee will review Rice's *Whale* Critical Habitat Proposed Rule and Scientific and Statistical Committee (SSC) recommendations for Marine

Recreational Information Program (MRIP) Cumulative Estimate Reporting; Technical Guidance for National Standard 1 Reference Points and Status Determinations and Evaluation of Interim Analysis Process. The committee will receive presentations on Allocation Reviews and, review Draft Letter on NOAA Fisheries Request for Comments on the Advance Notice of Proposed Rulemaking for National Standard Guidelines 4, 8 and 9.

The Full Council will meet in a CLOSED SESSION to receive a Litigation update.

Tuesday, August 15, 2023; 8 a.m.–5 p.m., CDT

The *Reef Fish* Committee will hold a discussion on *Gag and Black Grouper* Management Alternatives and *Shallow-water Grouper* Complex Management. The Committee will review Draft Framework Action: Modifications to the Recreational and Commercial *Greater Amberjack* Management Measures, Draft: *Snapper Grouper* Amendment 44/*Reef Fish* Amendment 55: Catch Level Adjustments and Allocations for Southeast U.S. *Yellowtail Snapper*. The Committee will receive a status updates on Anticipated Endangered Species Act Proposed Rules and Section 7 Consultations, Status and Timeline Updates for Revised Individual Fishing Quota (IFQ) Goals and Objectives and on the Recreational Initiative.

Wednesday, August 16, 2023; 8 a.m.–5 p.m., CDT

The *Mackerel* Committee will review the SSC Recommendations for *Gulf King Mackerel* Interim Assessment and SEDAR 81: *Gulf Spanish Mackerel* Updated Stock Assessment. The Committee will review Proposed Engagement in *Mackerel* Port Meetings and Amendment to the 2015 Biological Opinion for Coastal Migratory Pelagic Resources in the Gulf of Mexico and Atlantic Region.

The *Shrimp* Committee will discuss the Re-initiation of Endangered Species Action Section 7 Consultation on the Authorization of the Southeast U.S. *Shrimp* Fisheries in Federal Waters, Giant *Manta Ray* and *Shrimp* Trawl Interactions, and next steps; and, receive a status update of Side-by-Side Testing of Cellular Vessel Monitoring Systems (cVMS) and Cellular Electronic Logbooks (cELBs) on *Gulf Shrimp* Vessels.

Approximately 11:20 a.m., CDT, the Council will convene with a Call to Order, Announcements and Introductions, Adoption of Agenda and Approval of Minutes. The Council will receive a presentation Update on the

Bureau of Ocean Energy Management (BOEM) on Wind Energy Development in the Gulf of Mexico.

The Council will hold public comment testimony from 1:30 p.m. to 5 p.m., CDT on fishery issues or concerns. Public comment may begin earlier than 1:30 p.m. CDT, but will not conclude before that time. Persons wishing to give public testimony in-person must register at the registration kiosk in the meeting room. Persons wishing to give public testimony virtually must sign up via the link on the Council website. Registration for virtual testimony is open at the start of the meeting, Monday, August 14th at 8 a.m., CDT and closes one hour before public testimony begins on Wednesday, August 16th at 12:30 p.m. CDT. Public testimony may end before the published agenda time if all registered in-person and virtual participants have completed their testimony.

Thursday, August 17, 2023; 8 a.m.–4:30 p.m., CDT

The Council will receive Committee reports from Administrative/Budget, *Migratory Species*, Data Collection, *Sustainable Fisheries*, *Reef Fish*, *Mackerel and Shrimp* Management Committees. The Council will receive updates from the following supporting agencies: Texas Law Enforcement Efforts; South Atlantic Fishery Management Council; NOAA Office of Law Enforcement (OLE); Gulf States Marine Fisheries Commission; U.S. Coast Guard; U.S. Fish and Wildlife Service; and Department of State.

The Council will discuss any Other Business items; any remaining updates on Litigation and hold an Election of Chair and Vice-Chair.

Meeting Adjourns

The meeting will be a hybrid meeting; both in-person and virtual participation available. You may register for the webinar to listen-in only by visiting www.gulfcouncil.org and click on the Council meeting on the calendar.

The timing and order in which agenda items are addressed may change as required to effectively address the issue, and the latest version along with other meeting materials will be posted on the website as they become available.

Although other non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions will be restricted to those issues specifically listed in this notice and any

issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided that the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid or accommodations should be directed to Kathy Pereira, (813) 348–1630, at least 15 days prior to the meeting date.

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

Dated: July 17, 2023.

Key Israel Marquez,

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

[FR Doc. 2023–15448 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD166]

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of seminar series presentation via webinar.

SUMMARY: The South Atlantic Fishery Management Council (Council) will host a presentation on the status of on-demand gear for the U.S. South Atlantic Black Sea Bass pot fishery via webinar August 8, 2023.

DATES: The webinar presentation will be held on Tuesday, August 8, 2023, from 1 p.m. until 2:30 p.m.

ADDRESSES: The presentation will be provided via webinar. The webinar is open to members of the public. Information, including a link to webinar registration will be posted on the Council's website at: <https://safmc.net/safmc-seminar-series/> as it becomes available.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; phone: (843) 302–8439 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: kim.iverson@safmc.net.

SUPPLEMENTARY INFORMATION: The Council will host a presentation from the National Marine Fisheries Service on the value and benefits of on-demand fishing gear for the U.S. South Atlantic Black Sea Bass pot fishery and North Atlantic Right Whales. The presentation will discuss the history of the current area closure for pot fishing during North Atlantic Right Whales calving season to reduce entanglement risk. Since 2020, experimental on-demand gear has been authorized and trialled by commercial fishermen in the black sea bass pot fishery. The researchers will discuss the potential benefits of the new gear for fishermen and discuss how the new gear presents minimal entanglement risk to endangered North Atlantic Right Whales. A question-and-answer session will follow the presentation. Members of the public will have the opportunity to participate in the discussion. The presentation is for informational purposes only and no management actions will be taken.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the Council office (see **ADDRESSES**) 5 days prior to the meeting.

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

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

Dated: July 17, 2023.

Key Israel Marquez,

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

[FR Doc. 2023–15447 Filed 7–20–23; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD173]

Request for Information; Advancing Equity and Environmental Justice in the Southeast Through the Conservation and Management of Living Marine Resources

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

ACTION: Notice; request for information.

SUMMARY: In May 2023, NMFS finalized its first-ever national Equity and Environmental Justice Strategy. The national strategy describes the path the agency will take to incorporate equity and environmental justice into the vital

services we provide to all communities. Through this Request for Information, we are seeking stakeholder input to inform the operationalization of the national strategy in the Southeast Region. The public input we receive in response to the questions listed in the **SUPPLEMENTARY INFORMATION** section of this document will inform the development of a Southeast Equity and Environmental Justice Implementation Plan that is specific and responsive to the needs of underserved communities in the U.S. Caribbean, South Atlantic, and Gulf of Mexico.

DATES: Interested persons are invited to provide input in response to this Request for Information through September 30, 2023. Late-filed input will be considered to the extent practicable.

Verbal input will be accepted during a webinar-based listening session to be conducted in English, Spanish, and Vietnamese on Tuesday, August 29, 2023, from 6 p.m. to 8 p.m. ET.

ADDRESSES: Interested persons are invited to provide input using one of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2023-0092 in the Search box. Click on the "Comment" icon, complete the required fields, and enter or attach your comments.

- *Verbal submission:* NMFS will accept verbal input during a webinar-based listening session from 6 p.m. to 8 p.m. ET on Tuesday, August 29, 2023. The webinar will be conducted in English, Spanish, and Vietnamese. Information about how to access the webinar will be available at <https://www.fisheries.noaa.gov/southeast/about-us/southeast-equity-and-environmental-justice-implementation-plan>. The transcript of the webinar will be posted to <https://www.fisheries.noaa.gov/southeast/about-us/southeast-equity-and-environmental-justice-implementation-plan> after the listening session has been completed.

Recorded presentations providing more information on this public comment opportunity will be made available at <https://www.fisheries.noaa.gov/southeast/about-us/southeast-equity-and-environmental-justice-implementation-plan> in English, Spanish, and Vietnamese for interested persons to listen at their convenience prior to submitting input via the Federal e-Rulemaking Portal or the webinar-based listening session. If you are unable to

provide electronic written comments or participate in the webinar-based listening session, please contact Brent Stoffle at brent.stoffle@noaa.gov or (305) 951-1212 for alternative submission methods.

FOR FURTHER INFORMATION CONTACT:

Heather Blough, heather.blough@noaa.gov, (727) 304-0131.

SUPPLEMENTARY INFORMATION:

I. Background

NMFS is responsible for managing the nation's living marine resources. We work to make fisheries sustainable and productive, provide safe seafood to consumers, conserve threatened and endangered species and other protected resources, and maintain healthy ecosystems. The work that we do affects people in underserved communities who depend on these resources for their environmental, economic, social, and cultural well-being. We recognize that these communities experience barriers to accessing our services and that the services they access may not effectively meet their needs.

On May 22, 2023, NMFS finalized a national Equity and Environmental Justice Strategy (<https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-releases-final-equity-and-environmental-justice-strategy>) designed to break down key barriers impeding the equitable delivery of services and opportunities derived from the work that we do. The national strategy describes the path we will take to incorporate equity and environmental justice into the vital services we provide to all communities.

Our goals under the strategy are to: (1) Prioritize identification, equitable treatment, and meaningful involvement of underserved communities; (2) Provide equitable delivery of services; and (3) Prioritize equity and environmental justice in our mandated and mission work with demonstrable progress.

The strategy outlines six objectives to accomplish those goals: (1) Provide an empowering environment within NMFS to support multiple approaches to equity and environmental justice; (2) Ensure that our policies promote equal opportunities for all and do not create unintended inequities or unequal burdens for underserved communities; (3) Identify underserved communities and their needs, conduct collaborative research, and assess impacts of management decisions; (4) Build relationships with underserved communities to better understand their engagement preferences, and improve information sharing with all

communities; (5) Distribute benefits equitably among communities by increasing the access to opportunities for underserved communities; and (6) Enable the meaningful involvement of underserved communities in decision-making processes.

Together, these goals and objectives are intended to create the capacity and accountability processes necessary to effectively embed equity and environmental justice within our agency and the work that we do.

Additional information on the national strategy, including our working definitions of equity, environmental justice, and underserved communities, is available on our website at: <https://www.fisheries.noaa.gov/southeast/about-us/southeast-equity-and-environmental-justice-implementation-plan>.

II. Purpose of This Request for Information

NMFS recognizes that we have much work to do to effectively embed equity and environmental justice into our day-to-day efforts, and we have incorporated input from communities into our national Equity and Environmental Justice Strategy (<https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-releases-final-equity-and-environmental-justice-strategy>) to guide that work. The purpose of this Request for Information is to solicit input on ways we can operationalize the national strategy in the Southeast Region by identifying specific actions and related performance metrics we will take to advance each of our six national equity and environmental justice objectives in the U.S. Caribbean, South Atlantic, and Gulf of Mexico. We will supplement the information we receive in response to this Request for Information with information we obtain through a series of focus group meetings we are conducting with underserved community members and liaisons throughout the region.

III. Specific Information Requested To Inform Development of the Southeast Region Equity and Environmental Justice Implementation Plan

Through this Request for Information, NMFS seeks written public input to inform the operationalization of our national Equity and Environmental Justice Strategy (<https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-releases-final-equity-and-environmental-justice-strategy>) in the Southeast Region. The input we receive in response to this request will help us to identify specific action items and related performance metrics to advance

each of the six national equity and environmental justice objectives in the U.S. Caribbean, South Atlantic, and Gulf of Mexico.

When providing input, please specify if you are providing general feedback on how we can eliminate barriers or better serve underserved communities in the region, or responding to one or more of the specific objective(s) and question number(s) below:

Objective 1. Provide an empowering environment within NMFS to support multiple equity and environmental justice approaches.

1. What data and resources does NMFS need to identify the underserved communities impacted by our work and evaluate the success of our equity and environmental justice efforts?

2. What accountability structures does NMFS need to stay focused on our equity and environmental justice goals and build trust with underserved communities?

Objective 2. Ensure that our policies promote equal opportunities for all and do not create unintended inequities or unequal burdens for underserved communities.

1. How can NMFS better include equity for underserved communities in policies and plans?

2. How can existing policies and procedures be refined or revised to achieve more equitable outcomes?

3. How can NMFS design or revise policies and procedures in a way that ensures they are helpful and clear to underserved communities?

4. How can NMFS further incorporate into its policies and procedures relevant language, customs, and indigenous knowledge, consistent with statutory requirements (e.g., best scientific information available standard under the Magnuson-Stevens Fishery Conservation and Management Act)?

Objective 3. Identify underserved communities and their needs, conduct collaborative research, and assess impacts of management decisions.

1. What research do we need to identify underserved communities and assess their needs?

2. How can NMFS better engage with underserved communities to identify, co-develop, and co-produce place-based research and monitoring priorities and promote opportunities for citizen science?

3. How can we reduce bias in the prioritization of NMFS' research to better serve underserved communities?

4. How can NMFS expand involvement of members of underserved communities in research and monitoring projects while ensuring protection of indigenous knowledge?

5. How can NMFS more equitably allocate research and monitoring resources to identify and characterize underserved communities, understand their needs, and use findings to effectively guide management decisions that affect them?

6. How can NMFS more equitably allocate research and monitoring resources to fisheries, habitat, and protected species science that directly impacts underserved communities?

7. How can NMFS improve our understanding of the impact of our regulatory actions on underserved communities?

8. What are best practices for working with communities to integrate indigenous knowledge into research structure, data collection, and data reporting?

9. How can NMFS better share research and monitoring results in plain language?

Objective 4. Build relationships with underserved communities to better understand their engagement preferences, and improve information sharing with all communities.

1. Are the various communication platforms and outreach activities used by NMFS effectively reaching underserved communities? Are there other preferred methods of communication?

2. How can NMFS build relationships with underserved communities that allow for two-way communication and trust?

3. What training and resources do staff need to expand NMFS' outreach and communication in underserved communities?

4. How can NMFS make its communications more accessible and understandable to a diverse audience, including underserved communities?

Objective 5. Distribute benefits equitably among communities by increasing the access to opportunities for underserved communities.

1. What barriers do underserved communities face in accessing benefits managed by NMFS?

2. Do NMFS' benefits (such as funding, fishery allocations, permits, opportunities, services, and environmental protection and restoration) equitably reach or benefit underserved communities? Consistent with applicable legal requirements, how can we expand the equity in our delivery of these benefits?

3. What accountability structures and processes are needed to ensure equitable delivery of benefits, such as data collection, on benefit recipients and analysis of that data?

4. How can we better serve underserved communities with data and tools NMFS provides to the public?

Objective 6. Enable the meaningful involvement of underserved communities in decision-making processes.

1. How can NMFS better account for the needs of underserved communities in decision-making?

2. What accountability processes and structures are needed for NMFS to assess if underserved community needs are adequately accounted for in decision-making?

3. Is the information NMFS uses to support decision-making accessible to underserved communities?

4. How can underserved communities have equitable access to participate in public meetings?

5. How can NMFS ensure that public meetings are inclusive, safe, and welcoming?

6. How can NMFS facilitate access and involvement of underserved communities during the decision-making process?

7. How can NMFS increase representation of underserved communities on Regional Fishery Management Councils and advisory bodies, including international advisory bodies?

Dated: July 18, 2023.

Kimberly Damon-Randall,

Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2023-15546 Filed 7-20-23; 8:45 am]

BILLING CODE 3510-22-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions and Deletions

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

ACTION: Additions to and deletions from the Procurement List.

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

DATES: *Date added to and deleted from the Procurement List:* August 20, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely

Disabled, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202-4149.

FOR FURTHER INFORMATION CONTACT:

Michael R. Jurkowski, Telephone: (703) 603-2117, Fax: (703) 603-0655, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION:

Additions

On 2/3/2023 and 5/12/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed additions to the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51-2.3.

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

Regulatory Flexibility Act Certification

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

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

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

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

End of Certification

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

Product(s)

NSN(s)—Product Name(s):

7195-00-NIB-2442—Seat Cushion, Ergonomic, Memory Foam, Coccyx Support, Black

750056001N—Power Strip Holder, Clamp-On, Black

750056501N—Monitor Stand, Wireless and USB Charging, 21.5" Wide, Black

750056301N—Monitor Stand, Height Adjustable, Storage Drawer, Black

620003501N—Desk Lamp, LED, Wireless and USB Charging, Black

750055901N—Keyboard Tray, Clamp-On, Height Adjustable, Black

750056401N—Laptop and Tablet Riser, Ergonomic, Height and Angle Adjustable, Aluminum

Mandatory Source of Supply: Chicago Lighthouse Industries, Chicago, IL

Mandatory For: Total Government Requirement

Contracting Activity: FEDERAL ACQUISITION SERVICE, GSA/FAS FURNITURE SYSTEMS MGT DIV

Distribution: A-List

Service(s)

Service Type: Document Destruction Service

Mandatory for: US Air Force, 82nd Medical Group, Sheppard AFB, TX

Designated Source of Supply: Work Services Corporation, Wichita Falls, TX

Contracting Activity: DEPT OF THE AIR FORCE, FA3020 82 CONS LGC

Deletions

On 6/16/2023, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice of proposed deletions from the Procurement List. This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51-2.3.

After consideration of the relevant matter presented, the Committee has determined that the product(s) listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 8501-8506 and 41 CFR 51-2.4.

Regulatory Flexibility Act Certification

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

1. The action will not result in additional reporting, recordkeeping or other compliance requirements for small entities.

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

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

End of Certification

Accordingly, the following product(s) are deleted from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

7510-01-664-8783—DAYMAX SYSTEM, 2022 Calendar Pad, Type I

7510-01-664-9513—DAYMAX System, 2022, Calendar Pad, Type II

Designated Source of Supply: Anthony Wayne Rehabilitation Ctr for Handicapped and Blind, Inc., Fort

Wayne, IN

Contracting Activity: GSA/FAS ADMIN SVCS ACQUISITION BR(2, NEW YORK, NY

NSN(s)—Product Name(s):

8415-01-518-4594—Jacket, Physical Training Uniform, USAF, Blue, X-Small/Short

8415-01-518-4599—Jacket, Physical Training Uniform, USAF, Blue, X-Small/Regular

8415-01-518-4600—Jacket, Physical Training Uniform, USAF, Blue, X-Small/Long

8415-01-518-4601—Jacket, Physical Training Uniform, USAF, Blue, Small/Short

8415-01-518-4603—Jacket, Physical Training Uniform, USAF, Blue, Small/Regular

8415-01-518-4604—Jacket, Physical Training Uniform, USAF, Blue, Small/Long

8415-01-518-4605—Jacket, Physical Training Uniform, USAF, Blue, Medium/Short

8415-01-518-4607—Jacket, Physical Training Uniform, USAF, Blue, Medium/Regular

8415-01-518-4608—Jacket, Physical Training Uniform, USAF, Blue, Medium/Long

8415-01-518-4609—Jacket, Physical Training Uniform, USAF, Blue, Large/Short

8415-01-518-4610—Jacket, Physical Training Uniform, USAF, Blue, Large/Regular

8415-01-518-4611—Jacket, Physical Training Uniform, USAF, Blue, Large/Long

8415-01-518-4612—Jacket, Physical Training Uniform, USAF, Blue, X-Large/Short

8415-01-518-4613—Jacket, Physical Training Uniform, USAF, Blue, X-Large/Regular

8415-01-518-4615—Jacket, Physical Training Uniform, USAF, Blue, X-Large/Long

8415-01-518-4616—Jacket, Physical Training Uniform, USAF, Blue, XX-Large/Short

8415-01-518-4617—Jacket, Physical Training Uniform, USAF, Blue, XX-Large/Regular

8415-01-518-4618—Jacket, Physical Training Uniform, USAF, Blue, XX-Large/Long

8415-01-518-4619—Jacket, Physical Training Uniform, USAF, Blue, XXX-Large/Short

8415-01-518-4620—Jacket, Physical Training Uniform, USAF, Blue, XXX-Large/Regular

8415-01-518-4621—Jacket, Physical Training Uniform, USAF, Blue, XXX-Large/Long

8415-01-518-4622—Jacket, Physical Training Uniform, USAF, Blue, XXXX-Large/Short

8415-01-518-4623—Jacket, Physical Training Uniform, USAF, Blue, XXXX-Large/Regular

8415-01-518-4647—Jacket, Physical Training Uniform, USAF, Blue, XXXX-Large/Long

8415-01-521-0841—Jacket, Physical Training Uniform, USAF, Blue, X Small/X Short

8415-01-521-0844—Jacket, Physical Training Uniform, USAF, Blue, Small/X Short

8415-01-521-0845—Jacket, Physical Training Uniform, USAF, Blue, Medium/X Short

8415-01-521-0846—Jacket, Physical Training Uniform, USAF, Blue, Large/X Short

8415-01-521-0847—Jacket, Physical Training Uniform, USAF, Blue, X Large/X Short

8415-01-521-0848—Jacket, Physical Training Uniform, USAF, Blue, XX Large/X Short

8415-01-521-0849—Jacket, Physical Training Uniform, USAF, Blue, XXX Large/X Short

8415-01-521-0851—Jacket, Physical Training Uniform, USAF, Blue, XXXX Large/X Short

Designated Source of Supply: Blind Industries & Services of Maryland, Baltimore, MD

Designated Source of Supply: Winston-Salem Industries for the Blind, Inc, Winston-Salem, NC

Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-15503 Filed 7-20-23; 8:45 am]

BILLING CODE 6353-01-P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

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

ACTION: Proposed additions to and deletions from the Procurement List.

SUMMARY: The Committee is proposing to add product(s) to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and deletes product(s) and service(s) previously furnished by such agencies.

DATES: Comments must be received on or before: August 20, 2023.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, 355 E Street SW, Suite 325, Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: For further information or to submit comments contact: Michael R. Jurkowski, Telephone: (703) 785-6404, or email CMTEFedReg@AbilityOne.gov.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41

U.S.C. 8503(a)(2) and 41 CFR 51-2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the product(s) listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following product(s) are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Product(s)

NSN(s)—Product Name(s):

7930-01-690-9999—Cleaner, Glass, Biobased, Concentrate

7930-01-691-0002—Cleaner, Glass, Biobased, Ready-To-Use

7930-01-687-2546—Detergent, General Purpose, Cleaner/Degreaser, Biodegradable, Concentrated

Designated Source of Supply: Lighthouse for the Blind and Visually Impaired, San Francisco, CA

Contracting Activity: FEDERAL ACQUISITION SERVICE, GSA/FSS GREATER SOUTHWEST ACQUISITI

Distribution: A-List

Mandatory for: Total Government Requirement

NSN(s)—Product Name(s):

6140-01-624-2917—Battery, Storage, 12V, Lead Acid, 15 Amp Hours

6140-01-619-9474—Battery, Storage, 12V, Lead Acid, 8.5 Amp Hours

6140-01-237-8005—Battery, Storage, 12V, Lead Acid, 1.2 Amp Hours

6135-01-370-2599—Battery, Nonchargeable, 3.6V, Lithium

Designated Source of Supply: Eastern Carolina Vocational Center, Inc., Greenville, NC

Contracting Activity: DEFENSE LOGISTICS AGENCY, DLA LAND AND MARITIME

Distribution: C-List

Mandatory for: 100% of the requirement of the Department of Defense

Deletions

The following product(s) and service(s) are proposed for deletion from the Procurement List:

Product(s)

NSN(s)—Product Name(s):

8415-00-245-2065—Jersey, Reversible, US Navy, Blue and Yellow, Large

8415-00-245-2054—Jersey, Reversible, US Navy, Blue and Yellow, Medium

8415-00-245-2052—Jersey, Reversible, US Navy, Blue and Yellow, Small

8415-00-245-2073—Jersey, Reversible, US Navy, Blue and Yellow, X- Large

8415-00-914-0313—Jersey, Flight Deck Crewman's, Blue, Medium

8415-00-914-0312—Jersey, Flight Deck Crewman's, Blue, Small

8415-00-914-0314—Jersey, Flight Deck Crewman's, USN, Blue, Large

8415-00-914-0315—Jersey, Flight Deck Crewman's, USN, Blue, X-Large

8415-00-914-0318—Jersey, Flight Deck Crewman's, USN, Brown, Large

8415-00-914-0317—Jersey, Flight Deck Crewman's, USN, Brown, Medium

8415-00-914-0316—Jersey, Flight Deck Crewman's, USN, Brown, Small

8415-00-914-0319—Jersey, Flight Deck Crewman's, USN, Brown, X-Large

8415-00-914-0323—Jersey, Flight Deck Crewman's, USN, Green, Large

8415-00-914-0322—Jersey, Flight Deck Crewman's, USN, Green, Medium

8415-00-914-0321—Jersey, Flight Deck Crewman's, USN, Green, Small

8415-00-914-0324—Jersey, Flight Deck Crewman's, USN, Green, X-Large

8415-00-914-0327—Jersey, Flight Deck Crewman's, USN, Purple, Large

8415-00-914-0326—Jersey, Flight Deck Crewman's, USN, Purple, Medium

8415-00-914-0325—Jersey, Flight Deck Crewman's, USN, Purple, Small

8415-00-914-0328—Jersey, Flight Deck Crewman's, USN, Purple, X-Large

8415-00-914-0331—Jersey, Flight Deck Crewman's, USN, Red, Large

8415-00-914-9481—Jersey, Flight Deck Crewman's, USN, Red, Medium

8415-00-914-0329—Jersey, Flight Deck Crewman's, USN, Red, Small

8415-00-914-4143—Jersey, Flight Deck Crewman's, USN, Red, X-Large

8415-00-914-0335—Jersey, Flight Deck Crewman's, USN, White, Large

8415-00-914-0334—Jersey, Flight Deck Crewman's, USN, White, Medium

8415-00-914-0333—Jersey, Flight Deck Crewman's, USN, White, Small

8415-00-914-0336—Jersey, Flight Deck Crewman's, USN, White, X-Large

8415-00-914-0339—Jersey, Flight Deck Crewman's, USN, Yellow, Large

8415-00-914-0338—Jersey, Flight Deck Crewman's, USN, Yellow, Medium

8415-00-914-0337—Jersey, Flight Deck Crewman's, USN, Yellow, Small

8415-00-914-0340—Jersey, Flight Deck Crewman's, USN, Yellow, X-Large

Designated Source of Supply: The Arkansas Lighthouse for the Blind, Little Rock, AR

Designated Source of Supply: Winston-Salem Industries for the Blind, Inc, Winston-Salem, NC

Designated Source of Supply: INDUSTRIES OF THE BLIND, INC, Greensboro, NC

Designated Source of Supply: Westmoreland County Association, Greensburg, PA

Contracting Activity: DLA TROOP SUPPORT, PHILADELPHIA, PA

NSN(s)—Product Name(s):

7530-00-985-7097—Folder, File, Reinforced, 1/3" Cut, 11 pt., Natural Kraft, 11 3/4" x 9 1/4"

7530-00-02R-1357—Label, Pressure Sensitive

Designated Source of Supply: CLOVERNOOK CENTER FOR THE BLIND AND VISUALLY IMPAIRED, Cincinnati, OH

Contracting Activity: STRATEGIC ACQUISITION CENTER, FREDERICKSBURG, VA

Service(s)

Service Type: Custodial and Related Services

Mandatory for: GSA PBS Region 5, Federal Building, 105 South Sixth Street, Mt. Vernon, IL

Designated Source of Supply: Jefferson County Comprehensive Services, Inc., Mt. Vernon, IL

Contracting Activity: PUBLIC BUILDINGS SERVICE, PBS R5

Michael R. Jurkowski,

Acting Director, Business Operations.

[FR Doc. 2023-15502 Filed 7-20-23; 8:45 am]

BILLING CODE 6353-01-P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

TIME AND DATE: 9:00 a.m. EDT, Friday, July 28, 2023.

PLACE: Virtual meeting.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Enforcement matters. In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at <https://www.cftc.gov/>.

CONTACT PERSON FOR MORE INFORMATION: Christopher Kirkpatrick, 202-418-5964.

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

Dated: July 19, 2023.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2023-15625 Filed 7-19-23; 4:15 pm]

BILLING CODE 6351-01-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Scoping Comment Period Extension for the Notice of Intent To Prepare an Environmental Impact Statement for an Enhanced Integrated Air and Missile Defense System on Guam

AGENCY: Missile Defense Agency (MDA), Department of Defense (DoD).

ACTION: Notice of intent; extension of comment period.

SUMMARY: The MDA is extending the scoping comment period for the notice of intent titled "Notice of Intent to Prepare an Environmental Impact Statement for an Enhanced Integrated Air and Missile Defense System on Guam," which published in the **Federal Register** on May 5, 2023. The MDA is extending the scoping period to August 18, 2023, in response to on-going Typhoon Mawar-related recovery efforts on Guam.

DATES: The scoping comment period for the notice of intent published in the **Federal Register** on May 5, 2023 (88 FR 29104) is extended. Comments must be postmarked or received on or before August 18, 2023, to ensure consideration in the Draft Environmental Impact Statement (EIS).

ADDRESSES: Written comments should be sent via email to info@EIAMD-EIS.com; via the website comment submission form on www.EIAMD-EIS.com; or by United States (U.S.) Postal Service to: ManTech International Corporation, Attention: EIAMD EIS Project Support, PMB 403, 1270 N. Marine Corps Drive, Suite 101, Tamuning, Guam 96913-4331. Written comments will also be accepted at the public scoping meetings. All comments, including names and addresses, will be included in the administrative record, but personal information will be kept confidential unless release is required by law.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Wright, MDA Public Affairs, at 571-231-8212 or by email to mda.info@mda.mil. Additional information on the Proposed Action can be found at the MDA website: <https://www.mda.mil/system/eiamd.html>.

SUPPLEMENTARY INFORMATION: On May 5, 2023, the MDA published a notice of intent titled "Notice of Intent to Prepare an Environmental Impact Statement for an Enhanced Integrated Air and Missile Defense System on Guam" (88 FR 29104). On June 9, 2023, the MDA published an extension of the comment period titled "Scoping Comment Period Extension for the Notice of Intent to Prepare an Environmental Impact Statement for an Enhanced Integrated Air and Missile Defense System on Guam" (88 FR 37870) in response to Typhoon Mawar-related damage and recovery efforts on Guam. The first extended scoping comment period was scheduled to close on August 11, 2023, with in-person open house scoping meetings planned on Guam in summer 2023.

With this notice, the MDA is extending the scoping comment period to August 18, 2023, in response to on-going Typhoon Mawar-related recovery efforts on Guam. The MDA will conduct in-person open house scoping meetings on Guam on August 2-4, 2023, from 4:00 p.m. to 7:00 p.m. Chamorro Standard Time (ChST). Notification for the meeting locations, dates, and times will be published and announced in local news media to encourage public participation. Access to meeting information can also be found on the

MDA website at <https://www.mda.mil/system/eiamd.html>.

Dated: July 13, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023-15238 Filed 7-20-23; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Office of the Secretary

Board of Regents, Uniformed Services University of the Health Sciences; Notice of Federal Advisory Committee Meeting

AGENCY: Under Secretary of Defense for Personnel and Readiness (USD(P&R)), Department of Defense (DoD).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Board of Regents, Uniformed Services University of the Health Sciences (BoR USUHS) will take place.

DATES: Monday, August 7, 2023, open to the public from 9:00 a.m. to 4:30 p.m. eastern time.

ADDRESSES: Uniformed Services University of the Health Sciences, 4301 Jones Bridge Road, Everett Alvarez Jr. Board of Regents Room (D3001), Bethesda, MD 20814. The meeting will be held both in-person and virtually. To participate in the meeting, see the Meeting Accessibility section for instructions.

FOR FURTHER INFORMATION CONTACT: Annette Askins-Roberts, Designated Federal Officer (DFO), at (301) 295-3066 or annette.asksins-roberts@usuhs.edu. Mailing address is 4301 Jones Bridge Road, Bethesda, MD 20814. Website: <https://www.usuhs.edu/ao/board-of-regents>.

SUPPLEMENTARY INFORMATION: This 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"), 5 U.S.C. 552b (commonly known as the "Government in the Sunshine Act"), and 41 CFR 102-3.140 and 102-3.150.

Purpose of the Meeting: The purpose of the meeting is to provide advice and recommendations to the Secretary of Defense, through the USD(P&R), on academic and administrative matters critical to the full accreditation and successful operation of Uniformed Services University (USU). These

actions are necessary for USU to pursue its mission, which is to educate, train, and comprehensively prepare uniformed services health professionals, officers, scientists, and leaders to support the Military and Public Health Systems, the National Security and National Defense Strategies of the United States, and the readiness of our Uniformed Services.

Agenda: The schedule includes opening comments from the Chair; a brief by the USU President; a report from the College of Allied Health Sciences; and a briefing, discussion, and deliberation on the Supreme Court decision on admissions for institutions of higher learning. Any updates to the agenda for the August 7, 2023, meeting will be available on the BoR USUHS website.

Meeting Accessibility: Pursuant to Federal statutes and regulations (5 U.S.C. Appendix, 5 U.S.C. 552b, and 41 CFR 102–3.140 through 102.3.165), the meeting will be held in-person and virtually and is open to the public from 9:00 a.m. to 4:30 p.m. Seating is on a first-come basis. Members of the public wishing to attend the meeting in-person or virtually should contact Dr. Clarice Waters via email at clarice.waters.ctr@usuhs.edu no later than five business days prior to the meeting.

Written Statements: Pursuant to section 10(a)(3) of the FACA and 41 CFR 102–3.140, the public or interested organizations may submit written comments to the BoR USUHS about its approved agenda pertaining to this meeting or at any time regarding the Board's mission. Individuals submitting a written statement must submit their statement to Ms. Askins-Roberts at the address noted in the **FOR FURTHER INFORMATION CONTACT** section. Written statements that do not pertain to a scheduled meeting of the BoR USUHS may be submitted at any time. If individual comments pertain to a specific topic being discussed at the planned meeting, then these statements must be received at least five calendar days prior to the meeting. Otherwise, the comments may not be provided to or considered by the Board until a later date. The DFO will compile all timely submissions with the BoR USUHS' Chair and ensure such submissions are provided to BoR USUHS members before the meeting.

Dated: July 18, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register, Liaison Officer, Department of Defense.

[FR Doc. 2023–15541 Filed 7–20–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Innovation Board; Notice of Federal Advisory Committee Meeting

AGENCY: Office of the Under Secretary of Defense for Research and Engineering, Department of Defense (DoD).

ACTION: Meeting of Federal Advisory Committee.

SUMMARY: The DoD is publishing this notice to announce that the following Federal Advisory Committee meeting of the Defense Innovation Board (DIB) will take place.

DATES: Open to the public July 18, 2023, from 2:00 p.m. to 3:15 p.m. Closed to the public July 18, 2023, from 8:45 a.m. to 1:00 p.m. and 3:30 p.m. to 5:45 p.m.

ADDRESSES: The Open Meeting of the DIB will take place virtually; the Closed Meeting of the DIB will be held in the Pentagon.

FOR FURTHER INFORMATION CONTACT: Ms. Colleen Laughlin, the Designated Federal Officer (DFO) at (571)-372–7344 (voice) or osd.innovation@mail.mil. Mailing address is Defense Innovation Board, 4800 Mark Center Drive, Suite 16F09–02, Alexandria, VA 22350–3600. Website: <https://innovation.defense.gov>. The most up-to-date changes to the meeting agenda and link to the virtual meeting can be found on the website.

SUPPLEMENTARY INFORMATION: This 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", 5 U.S.C. 552b (commonly known as the "Government in the Sunshine Act"), and 41 Code of Federal Regulations (CFR) 102–3.140 and 102–3.150.

Due to circumstances beyond the control of the Designated Federal Officer and the Department of Defense, the Defense Innovation Board was unable to provide public notification required by 41 CFR 102–3.150(a) concerning its July 18, 2023 meeting. Accordingly, the Advisory Committee Management Officer for the Department of Defense, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Purpose of Meeting: The mission of the DIB is to provide the Secretary of Defense, the Deputy Secretary of Defense, and the Under Secretary of Defense for Research and Engineering (USD(R&E)) independent advice and strategic insights on emerging and disruptive technologies and their impact on national security, adoption of commercial sector innovation best

practices, and ways to leverage the U.S. innovation ecosystem to align structures, processes, and human capital practices to accelerate and scale innovation adoption, foster a culture of innovation and an experimentation mindset, and enable the DoD to build enduring advantages. The DIB focuses on innovation-related issues and topics raised by the Secretary of Defense, the Deputy Secretary of Defense, or the USD(R&E). The objective of this DIB meeting is to obtain, review, and evaluate information related to the DIB's mission and studies.

Agenda: The DIB open meeting will take place on July 18, 2023, from 2:00 p.m. to 3:15 p.m. The DFO, Ms. Colleen Laughlin, will open the meeting and introduce the DIB Chair, Michael Bloomberg, for his welcome and opening remarks. The Task Force chairs will present their findings and recommendations to the DIB for its deliberation and vote on the studies. The DFO will then preview new study topics—related to lowering barriers to innovation and approaches data architectures—followed by a review of public comments. The open meeting will conclude with closing remarks by the DIB Chair and adjournment of the open portion of the meeting by the DFO.

The DIB closed meeting will take place July 18, 2023, from 8:45 a.m. to 1:00 p.m. and from 3:30 p.m. to 5:45 p.m. During this time, the DIB will meet with senior DoD leaders to receive classified briefs on the following: Defense Innovation Unit (Doug Beck, Director Defense Innovation Unit), Generative AI and Large Language Models (Dr. Craig Martell, Chief Data and AI Officer; Dr. Peter Highnam, Chief Strategy Officer, Office of the Secretary of Defense for Research & Engineering; Dr. Kim Sablon, Principal Director for Trusted AI and Autonomy, Office of the Secretary of Defense for Research & Engineering), Service Perspective on Innovation: Accelerate Change or Lose (General Charles Q. Brown, Chief of Staff of the Air Force), Defense Innovation Update (Secretary of Defense Lloyd Austin), and Security Clearance Enterprise (William Lietzau, Director Defense Counterintelligence Security Agency).

Meeting Accessibility: In accordance with section 1009(d) of the FACA and 41 CFR 102–3.155, the DoD has determined that parts of the DIB meeting will be closed to the public on July 18, 2023, from 8:45 a.m. to 1:00 p.m. and from 3:30 p.m. to 5:45 p.m. Specifically, the USD(R&E), as the DIB Sponsor, in consultation with the DoD Office of General Counsel, has determined in writing that these

portions of the meeting will be closed to the public because the DIB will consider matters covered by 5 U.S.C. 552b(c)(1). The determination is based on the classified nature of discussions related to national security. Such classified material is so intertwined with the unclassified material that it cannot reasonably be segregated into separate discussions without defeating the effectiveness and meaning of the overall meeting.

Pursuant to Federal statutes and regulations (the FACA and 41 CFR 102–3.140 and 102–3.150), the open meeting will be accessible to the public virtually from July 18, 2023, from 2:00 p.m. to 3:15 p.m. Members of the public wishing to attend the meeting virtually will be able to access a link published on the DIB website the morning of the meeting. Members of the media should RSVP to the Office of the Assistant to the Secretary of Defense (Public Affairs), at osd.pentagon.pa.list.dpo-atl@mail.mil.

Written Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 1009(a)(3) of the FACA, the public or interested organizations may submit written comments or statements to the DIB in response to the stated agenda of the meeting or regarding the DIB's mission in general. Written comments or statements should be submitted to Ms. Colleen Laughlin, the DFO, via email to osd.innovation@mail.mil. Comments or statements must include the author's name, title or affiliation, address, and daytime phone number. The DFO must receive written comments or statements being submitted in response to the agenda set forth in this notice by 12:00 p.m. on July 17, 2023, to be considered by the DIB. The DFO will review all timely submitted written comments or statements with the DIB Chair and ensure the comments are provided to all members before the meeting. Written comments or statements received after this date may not be provided to the DIB until its next scheduled meeting. Please note that all submitted comments and statements will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the DIB's website.

Dated: July 18, 2023.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2023–15542 Filed 7–20–23; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0137]

Agency Information Collection Activities; Comment Request; Report of Dispute Resolution Under Part C of the Individuals With Disabilities Education Act

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), 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 September 19, 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–0137. 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 www.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 Amy Bae, (202) 987–1557.

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: Report of Dispute Resolution Under Part C of the Individuals with Disabilities Education Act

OMB Control Number: 1820–0678

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

Respondents/Affected Public: State, local, and Tribal governments **Total Estimated Number of Annual Responses:** 56

Total Estimated Number of Annual Burden Hours: 2,240

Abstract: The Individuals with Disabilities Education Act (IDEA; Pub. L. 108–446) directs the Secretary of Education to obtain data on the dispute resolution process described in section 615 of the law. Specific legislative authority in section 618 of IDEA requires that:

“(a) In General—Each State that receives assistance under this part, and the Secretary of the Interior, shall provide data each year to the Secretary of Education and the public on the following:

(1)(F) The number of due process complaints filed under section 615 and the number of hearings conducted.

(H) The number of mediations held, and the number of settlement agreements reached through such mediations”.

In addition to the specific data requirements described in Section 618, Section 616(a)(3)(B) of IDEA identifies the dispute resolution process as a monitoring priority. The law states specifically that:

“(3) Monitoring Priorities—The Secretary shall monitor the States, and shall require each State to monitor the local educational agencies located in the

State (except the State exercise of general supervisory responsibility), using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in the following priority areas:

(B) State exercise of general supervisory authority, including child find, effective monitoring, the use of resolution sessions, mediation, voluntary binding arbitration, and a system of transition services as defined in sections 602(34) and 637(a)(9)".

The data collection form provides instructions and information for States when submitting their dispute resolution data. The form collects data on the number of written, signed complaints; mediation requests; and hearing requests and the status of these actions initiated during the reporting year with regards to children served under Part C of IDEA. The purposes of these data are to: (1) assess the progress, impact, and effectiveness of State and local efforts to implement the legislation and (2) provide Congress, the public, and Federal, State, and local educational agencies with relevant information. These data are used for monitoring activities, planning purposes, congressional reporting requirements, and dissemination to individuals and groups.

Dated: July 17, 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. 2023-15457 Filed 7-20-23; 8:45 am]

BILLING CODE 4000-01-P

ELECTION ASSISTANCE COMMISSION

Help America Vote College Program Application Kit; Request for Comment

AGENCY: Election Assistance Commission.

ACTION: Notice; request for public comment.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995 (PRA), the U.S. Election Assistance Commission (EAC) gives notice that it is requesting from the Office of Management and Budget

(OMB) approval for the information collection EAC Help America Vote College Program (HAVCP) Application Kit.

DATES: Comments must be received by 5 p.m. Eastern on Monday, September 18, 2023.

ADDRESSES: To view the proposed EAC HAVCP Application Kit format and instruments, see: <https://www.eac.gov/payments-and-grants/hava-grant-programs>. For information on the Application Kit, contact Tina Bateman, Office of Grants Management, Election Assistance Commission, Grants@eac.gov. All requests and submissions should be identified by the title of the information collection.

Written comments and recommendations for the proposed information collection should be sent 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.

SUPPLEMENTARY INFORMATION:

Purpose

The purpose of this notice is to allow 60 days for public comment from all interested individuals and organizations. In compliance with Section 3507(a)(1)(D) of the Paperwork Reduction Act (PRA) of 1995, EAC will submit to the Office of Management and Budget (OMB) a request for review and approval of the information collection listed below after the 60 days have passed. The EAC Office of Grants Management (EAC/OGM) is responsible for distributing, monitoring and providing technical assistance to states and grantees on the use of federal funds. EAC/OGM also reports on how the funds are spent to Congress, negotiates indirect cost rates with grantees, and resolves audit findings on the use of Help America Vote Act of 2002 (HAVA) funds. The U.S. Election Assistance Commission (EAC) anticipates the availability of \$1 million dollars in discretionary grant funding to support the Help America Vote College Program (HAVCP). The HAVCP grant competition includes funding for two separate grant programs: The HAVCP Poll Worker grant and the HAVCP Service Day mini-grant. Applicant organizations may apply for either or both grants but may not submit more than one application for each. The

purpose of the HAVCP Poll Worker grant is to encourage college students to assist state and local governments in the administration of elections by serving as nonpartisan poll workers or assistants, and to encourage jurisdictions to utilize these efforts. The purpose of the HAVCP Service Day mini-grant is to elevate civic participation on college campuses through a day of service and inspire college students to volunteer their time and talents to ensure safe, secure, accessible, and transparent elections.

The EAC Help America Vote College Program Application Kit Progress has been developed for discretionary grants issued under HAVA authority. This application package provides the instruments necessary to collect competitive applications with program-specific information necessary for the College Program. Supporting guidance and instructions are included as applicant resources and to reduce the administrative burden of applying for federal funds.

Public Comments

We are soliciting public comments to permit the EAC to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Office of Grants Management.
- Evaluate the accuracy of our estimate of burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted, including your personal information, will be available for public review. OMB approval is requested for 3 years.

Respondents: Eligible applicants and relevant stakeholders: Public and Private Institutions of Higher Education (including Community Colleges), State and Local Election Offices, Non-Profit Organizations, and College Students.

Annual Reporting Burden:

ANNUAL BURDEN ESTIMATES

EAC grant	Instrument	Total number of respondents	Total number of responses per year	Average burden hours per response	Annual burden hours
HAVCP	Application and Guidance	50	1	10	500
HAVCP	Budget Worksheet and Instructions	50	1	7	350
HAVCP	Progress Report	40	2	1	80
Total .....	.....	.....	.....	.....	930

The estimated cost of the annualized cost of this burden is: \$22,422.30, which is calculated by taking the annualized burden (930 hours) and multiplying by an hourly rate of \$24.11 (GS-8/Step 5 hourly basic rate).

Camden Kelliher,

Senior Associate Counsel, U.S. Election Assistance Commission.

[FR Doc. 2023-15506 Filed 7-20-23; 8:45 am]

BILLING CODE 4810-71-P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

AGENCY: Office of Environmental Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces an in-person/virtual hybrid meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act requires that public notice of this meeting be announced in the **Federal Register**.

DATES:

Wednesday, August 23, 2023; 9:00 a.m.–4:00 p.m. PDT.

Thursday, August 24, 2023; 9:00 a.m.–2:45 p.m. PDT.

ADDRESSES: This hybrid meeting will be in-person at the Holiday Inn Richland on the River (address below) and virtually. To receive the virtual access information and call-in number, please contact the Deputy Designated Federal Officer, Lindsay Somers, at the telephone number or email listed below at least five days prior to the meeting.

Holiday Inn Richland on the River, 802 George Washington Way, Richland, WA 99352.

FOR FURTHER INFORMATION CONTACT:

Lindsay Somers, Deputy Designated Federal Officer, U.S. Department of Energy, Hanford Office of Communications, Richland Operations Office, P.O. Box 550, Richland, WA 99354; Phone: (509) 376-0923; or Email: lindsay.somers@rl.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:

- Tri-Party Agreement Agencies' Updates
- Approval of Fiscal Year 2024 Workplan and Calendar
- Board Subcommittee Reports
- Discussion of Board Business

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Lindsay Somers at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or within five business days after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Lindsay Somers. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. 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 make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available at the following website: <http://www.hanford.gov/page.cfm/hab/FullBoardMeetingInformation>.

Signed in Washington, DC, on July 17, 2023.

LaTanya Butler,

Deputy Committee Management Officer.

[FR Doc. 2023-15483 Filed 7-20-23; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL23-76-000]

Newark Energy Center, LLC; Notice of Institution of Section 206 Proceeding and Refund Effective Date

On July 17, 2023, the Commission issued an order in Docket No. EL23-76-000, pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. 824e, instituting an investigation into whether Newark Energy Center, LLC's Rate Schedule remains just and reasonable. *Newark Energy Center, LLC*, 184 FERC ¶ 61,037 (2023).

The refund effective date in Docket No. EL23-76-000, established pursuant to section 206(b) of the FPA, will be the date of publication of this notice in the **Federal Register**.

Any interested person desiring to be heard in Docket No. EL23-76-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 CFR 385.214 (2022), within 21 days of the date of issuance of the order.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (<http://www.ferc.gov>) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room, due to the proclamation declaring a National

Emergency concerning the Novel Coronavirus Disease (COVID-19), issued by the President on March 13, 2020. For assistance, contact FERC at FERCOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY, (202) 502-8659.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the “eFile” link at <http://www.ferc.gov>. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

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: July 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023-15492 Filed 7-20-23; 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: EC23-107-000.

Applicants: Horus West Virginia I, LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Horus West Virginia 1, LLC.

Filed Date: 7/12/23.

Accession Number: 20230712-5228.

Comment Date: 5 p.m. ET 8/2/23.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG23-230-000.

Applicants: Misenheimer Solar LLC.
Description: Misenheimer Solar LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 7/14/23.

Accession Number: 20230714-5221.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: EG23-231-000.

Applicants: Downeast Wind, LLC.

Description: Downeast Wind, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 7/17/23.

Accession Number: 20230717-5080.

Comment Date: 5 p.m. ET 8/7/23.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10-2735-002.

Applicants: Anthracite Power and Light Company.

Description: Notice of Change in Status of Anthracite Power and Light Company.

Filed Date: 7/14/23.

Accession Number: 20230714-5186.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER11-2040-003.

Applicants: Schuylkill Energy Resources, Inc.

Description: Notice of Change in Status of Schuylkill Energy Resources, Inc.

Filed Date: 7/14/23.

Accession Number: 20230714-5173.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER12-726-009; ER18-2158-003; ER22-2703-002.

Applicants: Pattern Energy Management Services LLC, Stillwater Wind, LLC, Spring Valley Wind LLC.

Description: Triennial Market Power Analysis for Northwest Region of Spring Valley Wind LLC, et al.

Filed Date: 7/12/23.

Accession Number: 20230712-5225.

Comment Date: 5 p.m. ET 9/11/23.

Docket Numbers: ER15-1668-005.

Applicants: Phoenix Energy Group, LLC.

Description: Notice of Non-Material Change in Status of Phoenix Energy Group, LLC.

Filed Date: 7/14/23.

Accession Number: 20230714-5174.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-629-004.

Applicants: Public Service Company of Colorado.

Description: Compliance filing: 2023-07-14—Attach N Compliance Filing Amendments to be effective 6/3/2023.

Filed Date: 7/17/23.

Accession Number: 20230717-5000.

Comment Date: 5 p.m. ET 8/7/23.

Docket Numbers: ER23-2403-000.

Applicants: Victory Pass I, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 9/15/2023.

Filed Date: 7/14/23.

Accession Number: 20230714-5155.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-2404-000.

Applicants: Bronco Plains Wind II, LLC.

Description: Baseline eTariff Filing: Bronco Plains Wind II, LLC Application for Market-Based Rate Authorization to be effective 9/13/2023.

Filed Date: 7/14/23.

Accession Number: 20230714-5158.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-2405-000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: LGIA, Bellefield 3 Solar Farm (TOT966-Q1779/SA No. 305) to be effective 7/15/2023.

Filed Date: 7/14/23.

Accession Number: 20230714-5161.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-2406-000.

Applicants: Arica Solar, LLC.

Description: Baseline eTariff Filing: Market-Based Rate Application to be effective 9/15/2023.

Filed Date: 7/14/23.

Accession Number: 20230714-5164.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-2407-000.

Applicants: Strauss Wind, LLC.

Description: Baseline eTariff Filing: Baseline new to be effective 7/15/2023.

Filed Date: 7/14/23.

Accession Number: 20230714-5176.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-2408-000.

Applicants: 2015 ESA Project Company, LLC.

Description: Tariff Amendment: 2015 ESA Project Company, LLC Notice of Cancellation to be effective 7/17/2023.

Filed Date: 7/14/23.

Accession Number: 20230714-5182.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: ER23-2410-000.

Applicants: PJM Interconnection, L.L.C.

Description: Tariff Amendment: Notice of Cancellation of WMPA, Service Agreement No. 5932; Queue No. AE2-028 to be effective 9/15/2023.

Filed Date: 7/17/23.

Accession Number: 20230717-5046.

Comment Date: 5 p.m. ET 8/7/23.

Docket Numbers: ER23-2411-000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original IISA, SA No. 6993 and ICSA, SA No. 6994; Queue No. AF1-128 to be effective 6/16/2023.

Filed Date: 7/17/23.
Accession Number: 20230717–5057.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2412–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Original WMPA, Service Agreement No. 7007; Queue No. AF1–104 to be effective 9/15/2023.
Filed Date: 7/17/23.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2413–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–07–17 Attachment BB Compensation for Rescheduled Generator Outages to be effective 9/16/2023.
Filed Date: 7/17/23.
Accession Number: 20230717–5078.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2414–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 6708; Queue No. AF1–075 to be effective 9/16/2023.
Filed Date: 7/17/23.
Accession Number: 20230717–5090.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2415–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Designated Entity Agreement, SA No. 7000 between PJM and MAIT to be effective 7/17/2023.
Filed Date: 7/17/23.
Accession Number: 20230717–5100.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2416–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Designated Entity Agreement, SA No. 7001 between PJM and MAIT to be effective 7/17/2023.
Filed Date: 7/17/23.
Accession Number: 20230717–5103.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2417–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Designated Entity Agreement, SA No. 6999 between PJM and ComEd to be effective 6/16/2023.
Filed Date: 7/17/23.
Accession Number: 20230717–5108.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: ER23–2418–000.
Applicants: Midcontinent Independent System Operator, Inc.
Description: § 205(d) Rate Filing: 2023–07–17 SA 4125 UE-Kelso 2 Solar GIA (J1299) to be effective 9/16/2023.

Filed Date: 7/17/23.
Accession Number: 20230717–5117.
Comment Date: 5 p.m. ET 8/7/23.
 Take notice that the Commission received the following qualifying facility filings:
Docket Numbers: QF23–1111–000.
Applicants: 2015 ESA Project Company, LLC.
Description: Form 556 of 2015 ESA Project Company, LLC.
Filed Date: 7/17/23.
Accession Number: 20230717–5028.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: QF23–1112–000.
Applicants: 2015 ESA Project Company, LLC.
Description: Form 556 of 2015 ESA Project Company, LLC [USD Campus].
Filed Date: 7/17/23.
Accession Number: 20230717–5034.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: QF23–1113–000.
Applicants: 2015 ESA Project Company, LLC.
Description: Form 556 of 2015 ESA Project Company, LLC [Genentech B48 & B43].
Filed Date: 7/17/23.
Accession Number: 20230717–5039.
Comment Date: 5 p.m. ET 8/7/23.
Docket Numbers: QF23–1114–000.
Applicants: 2015 ESA Project Company, LLC.
Description: Form 556 of 2015 ESA Project Company, LLC [Kaiser—Downey MC—Upgrade].
Filed Date: 7/17/23.
Accession Number: 20230717–5041.
Comment Date: 5 p.m. ET 8/7/23.
 The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercensearch.asp>) by querying the docket number.
 Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) 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: July 17, 2023.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2023–15493 Filed 7–20–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–510–000]

Florida Gas Transmission Company, LLC; Notice of Request Under Blanket Authorization and Establishing Intervention and Protest Deadline

Take notice that on July 5, 2023, Florida Gas Transmission Company, LLC (Florida Gas), 1300 Main St., Houston, Texas 77002, filed in the above referenced docket, a prior notice requests pursuant to sections 157.205, 157.208, 157.210, 157.211 and 157.216 of the Commission's regulations under the Natural Gas Act (NGA), and Florida Gas' blanket certificate issued in Docket No. CP82–553–000, for authorization to rearrange part of its proposed Turnpike and Sand Lake Road Relocation Project. The proposed project will allow Florida Gas to: (i) abandon an approximate 0.94-mile segment of its existing 26-inch-diameter mainline pipeline and appurtenant facilities, and relocate and construct approximately 0.96 miles of replacement 26-inch-diameter natural gas pipeline; (ii) and abandon a mainline valve delivery takeoff and an approximate 0.14-mile segment of its existing 4-inch-diameter delivery lateral pipeline and appurtenant facilities, and relocate and construct a replacement takeoff valve and an approximate 0.30-mile segment of 4-inch-diameter delivery lateral pipeline and appurtenant facilities all in Orange County, Florida, to avoid conflicts with a Florida Turnpike Enterprise and Florida Department of Transportation design and construction of a new interchange at Sand Lake Road and Florida Turnpike in Orange County, Florida. Florida Gas states that there will be no change in the capacity of Florida Gas' mainline

system. The estimated, cost for the project is \$18,900,000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (www.ferc.gov) using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. At this time, the Commission has suspended access to the Commission's Public Reference Room. For assistance, contact the Federal Energy Regulatory Commission at FercOnlineSupport@ferc.gov or call toll-free, (886) 208-3676 or TTY (202) 502-8659.

Any questions concerning this request should be directed to Blair Lichtenwalter, Senior Director of Certificates, Florida Gas Transmission Company, LLC, 1300 Main St., Houston, Texas 77002, or by phone at (713) 989-2605 or via email at blair.lichtewalter@energytransfer.com.

Public Participation

There are three ways to become involved in the Commission's review of this project: you can file a protest to the project, you can file a motion to intervene in the proceeding, and you can file comments on the project. There is no fee or cost for filing protests, motions to intervene, or comments. The deadline for filing protests, motions to intervene, and comments is 5:00 p.m. Eastern Time on September 15, 2023. How to file protests, motions to intervene, and comments is explained below.

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.

Protests

Pursuant to section 157.205 of the Commission's regulations under the

NGA,¹ any person² or the Commission's staff may file a protest to the request. If no protest is filed within the time allowed or if a protest is filed and then withdrawn within 30 days after the allowed time for filing a protest, the proposed activity shall be deemed to be authorized effective the day after the time allowed for protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request for authorization will be considered by the Commission.

Protests must comply with the requirements specified in section 157.205(e) of the Commission's regulations,³ and must be submitted by the protest deadline, which is September 15, 2023. A protest may also serve as a motion to intervene so long as the protestor states it also seeks to be an intervenor.

Interventions

Any person has the option to file a motion to intervene in this proceeding. Only intervenors have the right to request rehearing of Commission orders issued in this proceeding and to subsequently challenge the Commission's orders in the U.S. Circuit Courts of Appeal.

To intervene, you must submit a motion to intervene to the Commission in accordance with Rule 214 of the Commission's Rules of Practice and Procedure⁴ and the regulations under the NGA⁵ by the intervention deadline for the project, which is September 15, 2023. As described further in Rule 214, your motion to intervene must state, to the extent known, your position regarding the proceeding, as well as your interest in the proceeding. For an individual, this could include your status as a landowner, ratepayer, resident of an impacted community, or recreationist. You do not need to have property directly impacted by the project in order to intervene. For more information about motions to intervene, refer to the FERC website at <https://www.ferc.gov/resources/guides/how-to-intervene.asp>.

All timely, unopposed motions to intervene are automatically granted by operation of Rule 214(c)(1). Motions to intervene that are filed after the intervention deadline are untimely and may be denied. Any late-filed motion to intervene must show good cause for

being late and must explain why the time limitation should be waived and provide justification by reference to factors set forth in Rule 214(d) of the Commission's Rules and Regulations. A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies (paper or electronic) of all documents filed by the applicant and by all other parties.

Comments

Any person wishing to comment on the project may do so. The Commission considers all comments received about the project in determining the appropriate action to be taken. To ensure that your comments are timely and properly recorded, please submit your comments on or before September 15, 2023. The filing of a comment alone will not serve to make the filer a party to the proceeding. To become a party, you must intervene in the proceeding.

How To File Protests, Interventions, and Comments

There are two ways to submit protests, motions to intervene, and comments. In both instances, please reference the Project docket number CP23-510-000 in your submission.

(1) You may file your protest, motion to intervene, and comments by using the Commission's eFiling feature, which is located on the Commission's website (www.ferc.gov) under the link to Documents and Filings. New eFiling users must first create an account by clicking on "eRegister." You will be asked to select the type of filing you are making; first select "General" and then select "Protest", "Intervention", or "Comment on a Filing"; or⁶

(2) You can file a paper copy of your submission by mailing it to the address below. Your submission must reference the Project docket number CP23-510-000.

To file via USPS: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other method: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission encourages electronic filing of submissions (option 1 above) and has eFiling staff available

¹ 18 CFR 157.205.

² Persons include individuals, organizations, businesses, municipalities, and other entities. 18 CFR 385.102(d).

³ 18 CFR 157.205(e).

⁴ 18 CFR 385.214.

⁵ 18 CFR 157.10.

⁶ Additionally, you may file your comments electronically by using the eComment feature, which is located on the Commission's website at www.ferc.gov under the link to Documents and Filings. Using eComment is an easy method for interested persons to submit brief, text-only comments on a project.

to assist you at (202) 502–8258 or FercOnlineSupport@ferc.gov.

Protests and motions to intervene must be served on the applicant either by mail or email (with a link to the document) at: Blair Lichtenwalter, Senior Director of Certificates, Florida Gas Transmission Company, LLC, 1300 Main St., Houston, Texas 77002, or at blair.lichtewalter@energytransfer.com. Any subsequent submissions by an intervenor must be served on the applicant and all other parties to the proceeding. Contact information for parties can be downloaded from the service list at the eService link on FERC Online.

Tracking the Proceeding

Throughout the proceeding, additional information about the project will be available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC website at www.ferc.gov using the “eLibrary” link as described above. The eLibrary link also provides access to the texts of all formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. For more information and to register, go to www.ferc.gov/docs-filing/esubscription.asp.

Dated: July 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–15495 Filed 7–20–23; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas and Oil Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: CP23–514–000.

Applicants: Texas Eastern Transmission, LP, NEXUS Gas Transmission, LLC.

Description: Application for Authorization to Amend Certificate of Public Convenience and Necessity and

Authorization to Abandon by Leas NEXUS Gas Transmission, LLC and Texas Eastern Transmission, LP.

Filed Date: 7/14/23.

Accession Number: 20230714–5216.

Comment Date: 5 p.m. ET 8/4/23.

Docket Numbers: PR23–60–000.

Applicants: Red Bluff Express Pipeline, LLC.

Description: Red Bluff Express Pipeline, LLC Certification of Unchg Rates to be effective N/A.

Filed Date: 7/17/23.

Accession Number: 20230717–5076.

Comment Date: 5 p.m. ET 8/7/23.

Docket Numbers: RP23–899–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Negotiated Rates—July 2023 Cleanup Filing eff 8–17–23 to be effective 8/17/2023.

Filed Date: 7/17/23.

Accession Number: 20230717–5036.

Comment Date: 5 p.m. ET 7/31/23.

Docket Numbers: RP23–900–000.

Applicants: Algonquin Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rates—July 2023 Clean Up Filing to be effective 8/17/2023.

Filed Date: 7/17/23.

Accession Number: 20230717–5044.

Comment Date: 5 p.m. ET 7/31/23.

Docket Numbers: RP23–901–000.

Applicants: NEXUS Gas Transmission, LLC.

Description: § 4(d) Rate Filing: Negotiated Rates—July 2023 Cleanup Filing eff 8–17–23 to be effective 8/17/2023.

Filed Date: 7/17/23.

Accession Number: 20230717–5045.

Comment Date: 5 p.m. ET 7/31/23.

Docket Numbers: RP23–902–000.

Applicants: Texas Eastern Transmission, LP.

Description: § 4(d) Rate Filing: Negotiated Rates—UGI to Colonial 8984409 eff 7–18–23 to be effective 7/18/2023.

Filed Date: 7/17/23.

Accession Number: 20230717–5067.

Comment Date: 5 p.m. ET 7/31/23.

Docket Numbers: RP23–903–000.

Applicants: White River Hub, LLC.

Description: § 4(d) Rate Filing: Capacity Reserved for a Future Project to be effective 8/1/2023.

Filed Date: 7/17/23.

Accession Number: 20230717–5082.

Comment Date: 5 p.m. ET 7/31/23.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18

CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (<https://elibrary.ferc.gov/idmws/search/fercgensearch.asp>) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: <http://www.ferc.gov/docs-filing/efiling/filing-req.pdf>. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

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: July 17, 2023.

Debbie-Anne A. Reese,
Deputy Secretary.

[FR Doc. 2023–15494 Filed 7–20–23; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL OP–OFA–078]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information 202–564–5632 or <https://www.epa.gov/nepa>. Weekly receipt of Environmental Impact Statements (EIS) Filed July 10, 2023 10 a.m. EST Through July 17, 2023 10 a.m. EST Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: <https://cdxapps.epa.gov/cdx-enepa-II/public/action/eis/search>.

EIS No. 20230086, Revised Draft, USACE, LA, St. Tammany Parish, Louisiana Feasibility Study, Comment Period Ends: 09/06/2023, Contact: Sandra Stiles 504-862-1193.

EIS No. 20230087, Final, BOEM, RI, Revolution Wind Farm and Revolution Wind Export Cable Final Environmental Impact Statement, Review Period Ends: 08/21/2023, Contact: Jessica Stromberg 703-787-1730.

EIS No. 20230088, Final, BIA, ID, Nez Perce Tribe Integrated Resource Management Plan, Review Period Ends: 08/21/2023, Contact: Tobiah Mogavero 435-210-0509.

Dated: July 17, 2023.

Cindy S. Barger,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2023-15500 Filed 7-20-23; 8:45 am]

BILLING CODE 6560-50-P

GENERAL SERVICES ADMINISTRATION

[Notice-ID-2023-09; Docket No. 2023-0002; Sequence No. 16]

Privacy Act of 1974; System of Records

AGENCY: Office of the Chief Privacy Officer, General Services Administration (GSA).

ACTION: Notice of a modified system of records.

SUMMARY: GSA proposes to modify a system of records subject to the Privacy Act of 1974, as amended. GSA is updating the outdated following systems: Policies and Practices for Storage of Records, Policies and Practices for Retrieval of records, and documented the Policies and Practice for Retention and Disposal of records.

DATES: Submit comments on or before August 21, 2023. The new and/or significantly modified routine uses will be applicable on August 21, 2023.

ADDRESSES: Submit comments identified by "Notice-ID-2023-09, Modify System of Records" via <http://www.regulations.gov>. Search [regulations.gov](http://www.regulations.gov) for Notice-ID-2023-09, Modified System of Records Notice. Select the link "Comment" that corresponds with "Notice-ID-2023-09, Modified System of Records Notice." Follow the instructions provided on the screen. Please include your name, company name (if any), and "Notice-ID-2023-09, Modified System of Records Notice" on your attached document. If your comment cannot be submitted using [regulations.gov](http://www.regulations.gov), call or email the

points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Call or email Richard Speidel, the GSA Chief Privacy Officer (Office of the Deputy Chief Information Officer); telephone 202-969-5830; email gsa.privacyact@gsa.gov.

SUPPLEMENTARY INFORMATION: GSA proposes to modify a system of records subject to the Privacy Act of 1974, 5 U.S.C. 552a. This notice is regarding the Agency's update to Policies and Practices for Storage of Records, Policies and Practices for Retrieval of records, and documented the Policies and Practice for Retention and Disposal of records because they are outdated.

SYSTEM NAME AND NUMBER:

Employee-related files, GSA/Agency-1.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

GSA owns the system. The system of records may be located at the supervisory or administrative office level at all GSA facilities and at commissions, committees, and small agencies serviced by GSA.

SYSTEM MANAGER(S):

Director, Office of Human Resources Management (OHRM), GSA, 1800 F Street NW, Washington, DC 20405. Email at cxo@gsa.gov.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Authority for the system comes from the Federal Property and Administrative Services Act of 1949 (63 Stat. 377); title 5 U.S.C. and title 31 U.S.C., generally; and Executive Order (E.O.) 12953, February 27, 1995.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to maintain personnel record system covering employees and uncompensated workers. The system is used to initiate personnel actions, schedule training, counsel employees on their performance, propose disciplinary action, and manage personnel in general.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The individuals covered are as follows;

- Present and Former Employees of GSA and of Commissions
- Committees
- Small Agencies Serviced by GSA
- Applicants or Potential Applicants for Positions in GSA, Persons Employed

by Other Agencies for Employee Relief Bills

- Volunteer Workers
- Uncompensated Workers

CATEGORIES OF RECORDS IN THE SYSTEM:

The system records contain the following;

- Individual's Name
 - Social Security Number
 - Birth Date
 - Home and Emergency Addresses and Telephone Numbers
 - Employee ID number
 - Personnel Actions
 - Professional Registration
 - Qualifications
 - Training
 - Employment History
 - Awards
 - Counseling
 - Reprimands
 - Grievances
 - Appeals
 - Leave
 - Pay Attendance
 - Work Assignments
 - Performance Ratings
 - Injuries
 - Parking Permit and Pass Applications
 - Unpaid Debt Complaints (including nonpayment of child support)
 - Travel
 - Outside Employment
 - Congressional Employee Relief Bills
 - Telephone Call Details.
- The system does not include official personnel files covered by OPM/GOVT-1.

RECORD SOURCE CATEGORIES:

The sources for the information are individuals themselves, other employees, personnel records, and persons who have complained of unpaid debts, including nonpayment of child support.

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

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed to authorized entities, as is determined to be relevant and necessary, outside GSA as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

- a. To disclose information to a Federal, State, local, or foreign agency responsible for investigating, prosecuting, enforcing or carrying out a statute, rule, regulation, or order where GSA becomes aware of a violation or potential violation of civil or criminal law or regulation.

b. To disclose information to another Federal agency or a court when the Government is a party to a judicial proceeding.

c. To disclose requested information to a Federal agency in connection with hiring or retaining an employee; issuing a security clearance; reporting an employee investigation; clarifying a job; letting a contract; or issuing a license, grant, or other benefit by the requesting agency when the information is needed for a decision.

d. To disclose information to the Merit Systems Protection Board, including its Office of Special Counsel; the Federal Labor Relations Authority and its general counsel; or the Equal Employment Opportunity Commission in performing their duties.

e. To disclose information to the Federal Parent Locator Service to assist in locating an absent parent and enforce child support obligations against a delinquent parent. This includes routinely cross-matching Federal personnel records with State records of persons who owe child support to learn if there are any Federal employees delinquent in supporting a dependent child.

f. To disclose information to an appeal, grievance, or formal complaints examiner; equal employment opportunity investigator; arbitrator; union representative; or other official engaged in investigating or settling a grievance, complaint, or appeal filed by an employee.

g. To disclose information to the Office of Personnel Management (OPM) under the agency's responsibility for evaluating Federal personnel management. When personnel records in the custody of GSA are covered in a record system published by OPM as a Governmentwide record system, they are considered part of that system. Other personnel record systems covered by notices published by GSA as separate systems may also be transferred to OPM as a routine use.

h. To disclose information to a Member of Congress or to a congressional staff member in response to a request from the person who is the subject of the records.

i. To disclose information to an expert, consultant, or contractor of GSA in performing a Federal duty.

j. To appropriate agencies, entities, and persons when (1) the Agency suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (2) the Agency has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or

property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by GSA or another agency or entity) that rely upon the compromised information; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with GSA's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system of records are stored electronically in secure facilities. Electronic records are stored on GSA's secure network which is managed by the Office of GSA IT.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by an individual's name, employee ID number, or social security number.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Record disposal is controlled by the GSA directive, "Records Management Program", CIO 1820.2. Applicable records series include the following and contain associated records disposition authorities key to employee-related records:

GRS 2.1—Employee Acquisition Records

GRS 2.2—Employee Management Records

GRS 2.3—Employee Relations Records

GRS 2.4—Employee Compensation and Benefits Records

GRS 2.5—Employee Separation Records

GRS 2.6—Employee Training Records

GRS 2.7—Employee Health and Safety Records

GRS 2.8—Employee Ethics Records

GSA 269.16—Human Resource

Records

The records are reviewed and updated yearly, and records past their disposition date are destroyed. Once paper originals and copies are purged from the official personnel folder, no other paper copies are kept. When the employee transfers or separates from the agency, records are promptly sent to the office that is to maintain the official personnel folder. The records are screened to ensure that nothing is missing.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Records in the system are protected from unauthorized access and misuse

through a combination of administrative, technical and physical security measures. Administrative measures include but are not limited to policies that limit system access to individuals within an agency with a legitimate business need, and regular review of security procedures and best practices to enhance security. Technical measures include but are not limited to system design that allows authorized system users access only to data for which they are responsible; required use of strong passwords that are frequently changed; and use of encryption for certain data transfers. Physical security measures include but are not limited to the use of data centers which meet government requirements for storage of sensitive data.

RECORD ACCESS PROCEDURES:

An individual request to review a record can be addressed to the supervisor, team leader, or official at the address where the employee worked. If that is unknown, a general request can be addressed to the head of the service or staff office for Central Office employees, or to the regional administrator at the address given in the appendix to this notice. For the identification required, see 41 CFR part 105-64 published in the **Federal Register** (<https://www.ecfr.gov/current/title-41/subtitle-C/chapter-105/part-105-64>).

CONTESTING RECORD PROCEDURES:

The GSA procedures for contesting the content of a record and appealing an initial denial of a request to access or amend a record may be found in 41 CFR part 105-64. If an individual wishes to contest the content of any record pertaining to him or her in the system after it has been submitted, that individual should consult the GSA's Privacy Act implementation rules available at 41 CFR part 105-64.4.

NOTIFICATION PROCEDURES:

An individual who wishes to be notified whether the system contains a record related to him- or herself should address an inquiry to the supervisor or team leader where the employee worked. If that is unknown, general requests can be addressed to the head of the service or staff office for Central Office employees, or to the regional administrator for regional office employees at the address listed in the appendix (<https://www.ecfr.gov/current/title-41/subtitle-C/chapter-105/part-105-64>).

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

61 FR 60103.

Richard Speidel,*Chief Privacy Officer, Office of the Deputy Chief Information Officer, General Services Administration.*

[FR Doc. 2023-15460 Filed 7-20-23; 8:45 am]

BILLING CODE 6820-34-P**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Centers for Disease Control and Prevention****[30Day-23-23CV]****Agency Forms Undergoing Paperwork Reduction Act Review**

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Reducing Fatigue Among Taxi/Rideshare Drivers” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on March 10, 2023 to obtain comments from the public and affected agencies. CDC received four non-substantive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) 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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639-7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395-5806. Provide written comments within 30 days of notice publication.

Proposed Project

Reducing Fatigue Among Taxi/Rideshare Drivers—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Taxi drivers routinely work long hours and late night or early morning shifts. Shift work and long work hours are linked to many health and safety risks due to disturbances to sleep and circadian rhythms. Fatigue is a significant contributor to transportation-related injuries, most notably among shift workers. Such work schedules and inadequate sleep likely contribute to health issues and injuries among taxi drivers who experience a roadway fatality rate of 3.5 times higher than all civilian workers and had the highest rate of nonfatal work-related motor vehicle injuries treated in emergency departments. The urban and interurban transportation industry ranks the third highest in costs per employee for motor vehicle crashes. Tired drivers endanger others on the road (e.g., other drivers, passengers, bicyclists, pedestrians) in addition to themselves and their passengers. An important approach to reducing fatigue-related risks is to inform employers and taxi drivers about the risks and strategies to reduce their risks.

The purpose of this project is to evaluate a training program to inform taxi drivers and other drivers for hire who transport passengers (“rideshare” services) of the risks linked to shift work and long work hours and to evaluate strategies for taxi drivers to reduce these risks. The proposed study site will be the Flywheel Taxi Company in San Francisco, with approximately 500 drivers, who have agreed to share data

collected on the study participants. The recruitment of 180 study participants and data collection onsite will be performed by a NIOSH contractor trained by the NIOSH project personnel. This research study involves two parts: development of a fatigue management eLearning training tool designed for drivers-for-hire (e.g., taxi drivers; ride sourcing drivers); and an evaluation of the use of this tool as an intervention. The training tool will educate drivers about fatigue as a risk factor for motor vehicle crashes, the negative health and safety effects of fatigue, and how to reduce fatigue by improving sleep, health, nutrition, and work schedules. There will be pre- and post-module knowledge tests to evaluate the training. The training will be offered online, free of charge, and will be viewable on multiple platforms (e.g., smartphone, tablet, laptop). All participants will also wear a wristband actigraph used to measure sleep/wake cycles, which will serve as a second intervention. The actigraph data will provide a personalized, objective daily measure of fatigue for each participant. One group of participants will receive feedback (an external prompt) from the actigraph which may be used to assess individual fatigue level and trigger self-reflection on fitness to drive and act accordingly.

A randomized pre-post with control group longitudinal study design will evaluate the training and the driver’s response to feedback from the actigraph. Specifically, there are two intervention groups: (1) training plus actigraph fatigue level feedback (N=60); and (2) training only but no fatigue level feedback from the actigraph (N=60). The control group (N=60) will receive neither training nor feedback on fatigue level from their actigraph. Participants will complete a baseline and follow-up Work and Health survey, sleep and activities diaries, and sleep health knowledge questions during each of five observation periods. The Work and Health survey administered in the first observation period will be more comprehensive and the abbreviated follow up Work and Health surveys administered for the remaining observation periods will serve to capture only responses to questions that can change from one observation period to the next. Only participants randomly selected to take the training will complete a training evaluation survey used to strengthen the training’s effectiveness. As part of their daily sleep and health diaries drivers will be asked to complete three-minute psychomotor vigilance tests (PVTs) five times throughout the day to directly measure

alertness using an app installed on an electronic device. At the end of the data collection period the training will be offered to the remaining study participants who will be provided an opportunity to complete the training and training evaluation survey.

Study staff will use the findings from this evaluation to improve the training program, including content and delivery, as well as compare fatigue between intervention groups. Potential impacts of this project include improvements in work behaviors for coping with shift work and long work hours and an objective reduction in fatigue compared to the control groups. This project is poised to have considerable impact in the contribution

of an evidence base for effective interventions that could be used by other taxi companies and drivers for ride sourcing companies to promote strategies in road safety.

All study participants (N=180) will be fitted with a wrist actigraph. All study participants will complete the Work and Health survey, and the knowledge survey during each study observation period (five times each per participant). All participants will complete the sleep and activity diary five times a day, each day for 35 days (175 times total) which will require approximately five minutes for each response which includes both survey questions and the Psychomotor Vigilance Test. Participants in the intervention groups (N=120) will

complete the online training and evaluation. For purposes of burden estimation, the total number of annualized participants is 90, the annualized number of participants in the control group is 30, and the total annualized number of participants in the intervention groups is 60. Information collection is the same for all participants, except for the Fatigue Training Evaluation Survey which will only be completed by participants in the intervention groups.

CDC requests OMB approval for two years. Participation is voluntary and there are no costs to participants other than their time. The total estimated annualized burden is 1,794 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Taxi and Rideshare Drivers	Fatigue Training Evaluation Survey	60	1	15/60
	Actigraph Training and Fitting	90	1	10/60
	Sleep & Activities Diary (including Psychomotor Vigilance Test).	90	175	5/60
	Work & Health Survey	90	5	45/60
	Knowledge Survey	90	5	15/60

Jeffrey M. Zirger,
*Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.*
[FR Doc. 2023–15543 Filed 7–20–23; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND
HUMAN SERVICES

Centers for Disease Control and
Prevention

[30Day–23–0841]

Agency Forms Undergoing Paperwork
Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Management Information System for Comprehensive Cancer Control Programs” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on May 19, 2023 to obtain comments from the public and affected agencies. CDC received one comment related to the previous notice. This notice serves to

allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

- (a) 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;
- (b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- (c) Enhance the quality, utility, and clarity of the information to be collected;
- (d) 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; and
- (e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Management Information System for Comprehensive Cancer Control Programs (OMB Control No. 0920–0841, Exp. 7/31/2023)—Revision—National Center of Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

This statement supports the request for clearance of a Revision to National Comprehensive Cancer Control Program (NCCCP) (Management Information System for Comprehensive Cancer

Control Programs, OMB Control No. 0920–0841, Exp. 7/31/2023) to continue electronic data collection of information about the NCCCP, funded by the Comprehensive Cancer Control Branch of the Centers for Disease Control and Prevention (CDC). OMB approval is requested for three years. This information collection is authorized by the Public Health Service Act, section 301, 241(a)

The Comprehensive Cancer Control Branch administers the NCCCP, which provides funding to 66 state health departments and the District of Columbia, US Territories and Freely Associated States, Federally Recognized American Indian Tribes, Tribal Organizations, Alaska Native Organizations, and Urban Indian Organization; or their Bona Fide Agents, to design, implement, and evaluate comprehensive cancer control plans to reduce the burden of cancer locally.

Support for these programs is a cornerstone of CDC efforts to reduce the burden of cancer throughout the nation. Awards to individual applicants are made for a five-year program period. Continuation awards for subsequent budget periods are made on the basis of satisfactory progress in achieving both national and program-specific goals and objectives, as well as the availability of funds.

In 2022, 66 recipients were selected for funding for DP22–2202 (“Cancer Prevention and Control Programs for State, Territorial, and Tribal Organizations”) to implement a program to support cancer coalition efforts that leverage resources to plan and implement evidence-based strategies to promote the primary prevention of cancer; support cancer early detection efforts, address the needs of cancer survivors; and promote health equity. Consistent with programmatic changes,

the proposed data collection plan for DP22–2202 has been redesigned to increase efficiency by updating existing and adding new data collection instruments, which were previously approved under the current OMB package (OMB Control No. 0920–0841) and Generic package (OMB Control No. 0920–0879). This revised data collection will allow CDC to continue providing routine feedback to recipients based on their data submissions, tailor technical assistance as needed, support program planning, and assess program outcomes. Specifically, in this Revision request, CDC seeks OMB approval to use an interview and web-based survey to collect, store, retrieve, share, and report accurate and timely information to monitor and evaluate recipient performance. CDC requests OMB approval for an estimated 342 annual burden hours. There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Program Director for State-, Tribal- or Territorial-based Cancer Prevention and Control Program.	NCCCP Annual Key Informant Interview.	54	3	90/60
Program Director for State-, Tribal- or Territorial-based Cancer Prevention and Control Program.	NCCCP Survey	132	1	45/60

Jeffrey M. Zirger,

Lead, Information Collection Review Office, Office of Scientific Integrity, Office of Science, Centers for Disease Control and Prevention.

[FR Doc. 2023–15544 Filed 7–20–23; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–23–0910]

Agency Forms Undergoing Paperwork Reduction Act Review

In accordance with the Paperwork Reduction Act of 1995, the Centers for Disease Control and Prevention (CDC) has submitted the information collection request titled “Message Testing for Tobacco Communication Activities (MTTCA)” to the Office of Management and Budget (OMB) for review and approval. CDC previously published a “Proposed Data Collection Submitted for Public Comment and Recommendations” notice on January 23, 2023 to obtain comments from the public and affected agencies. CDC did

not receive comments related to the previous notice. This notice serves to allow an additional 30 days for public and affected agency comments.

CDC will accept all comments for this proposed information collection project. The Office of Management and Budget is particularly interested in comments that:

(a) 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;

(b) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Enhance the quality, utility, and clarity of the information to be collected;

(d) 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; and

(e) Assess information collection costs.

To request additional information on the proposed project or to obtain a copy of the information collection plan and instruments, call (404) 639–7570. 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. Direct written comments and/or suggestions regarding the items contained in this notice to the Attention: CDC Desk Officer, Office of Management and Budget, 725 17th Street, NW, Washington, DC 20503 or by fax to (202) 395–5806. Provide written comments within 30 days of notice publication.

Proposed Project

Message Testing for Tobacco Communication Activities (MTTCA) (OMB Control No. 0920–0910, Exp. 01/31/2024)—Revision—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers

for Disease Control and Prevention (CDC).

Background and Brief Description

Since 2012, OMB approval of a Generic Clearance of Message Testing for Tobacco Communication Activities (MTTCA, OMB Control No. 0920–0910), has been continuously maintained. CDC’s authority to collect information for public health purposes is provided by the Public Health Service Act (41 U.S.C. 241) section 301. CDC has employed the MTTCA clearance to collect information about the attitudes and perceptions of adults who smoke and adults who do not smoke, and to pretest draft messages and materials for clarity, salience, appeal, and persuasiveness. The MTTCA clearance has been used to obtain OMB approval for a variety of message testing activities, with particular emphasis on communications supporting CDC’s National Tobacco Education Campaign (NTEC) called the *Tips from Former Smokers*® campaign. This national campaign is designed to increase public awareness of the health consequences of tobacco use and exposure to secondhand smoke. The MTTCA clearance has also supported formative research relating to the development of health messages for a campaign to encourage educators to speak with middle and high school students about

the risks of e-cigarette use and empower them to avoid or quit e-cigarettes.

Information collection modes under the MTTCA clearance that are supported include in-depth interviews, in-person and online focus groups, and online surveys. Each project approved under the MTTCA framework is outlined in a project-specific Information Collection Request that describes its purpose and methodology. Messages developed from MTTCA data collection have been disseminated via multiple media channels including television, radio, print, out-of-home, and digital formats.

CDC requests OMB approval to extend the MTTCA clearance, with changes, for three years. Requested changes are to increase the number of respondents and burden hours and remove the upper age limit previously 54 years of age, to include all adults aged 18 years and older. These changes are needed to support CDC’s planned information collections and to accommodate additional needs that CDC may identify during the next three years. No modification is requested for information collection activities, methodology, or populations of interest from the existing Generic Clearance. The MTTCA Generic Clearance may be used to facilitate the development of tobacco-related health communications of interest for CDC’s collaborative efforts

with other federal partners including, but not limited to, the Food and Drug Administration’s Center for Tobacco Products. The MTTCA clearance does not replace the need for additional generic clearance mechanisms of HHS and other federal partners that may need to test tobacco messages related to their campaigns and initiatives.

CDC is requesting increases to accommodate planned message testing needs for the NTEC, the campaign to encourage educators to speak with middle and high school students about the risks of e-cigarettes use, as well as ad hoc testing activities that may involve other CDC/ATSDR programs. CDC will continue to use the MTTCA clearance to develop and test messages and materials using data collection methodologies including online surveys, in-person or online focus groups, in-depth interviews, etc. Electronic data collection methods will be employed where possible to minimize COVID–19 and/or other exposure risk. Any in-person data collection will be conducted consistent with current guidance for mitigating the risk of transmitting COVID–19 and/or other exposures. Participation is voluntary and there are no costs to respondents, other than their time. The total estimated annualized burden hours are 20,039.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
General Public and Special Populations	Screening	74,386	1	2/60
	In-Depth Interviews (In Person)	25	1	1
	Focus Groups (In Person)	628	1	90/60
	Surveys (Online, Short)	71,000	1	20/60
	Surveys (Online, Medium)	2,733	1	13/60
				25/60

Jeffrey M. Zirger,
Lead, Information Collection Review Office,
Office of Public Health Ethics and
Regulations, Office of Science, Centers for
Disease Control and Prevention.
[FR Doc. 2023–15545 Filed 7–20–23; 8:45 am]
BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–1728–20]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing

an opportunity for the public to comment on CMS’ intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of

the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by August 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.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: <https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing>.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786-4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term "collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Reinstatement without change of a previously approved collection; *Title of Information Collection:* Home Health Agency Cost Report; *Use:* The Form CMS-1728-20 cost report is used to determine a provider's reasonable cost incurred in furnishing medical

services to Medicare beneficiaries and reimbursement due to or from a provider. The Form CMS-1728-20 cost report is also used for annual rate setting and payment refinement activities, including developing a home health market basket. Additionally, the Medicare Payment Advisory Commission (MedPAC) uses the home health cost report data to calculate Medicare margins, to formulate recommendations to Congress regarding the HHA PPS, and to conduct additional analysis of the HHA PPS.

The primary function of the cost report is to implement the principles of cost reimbursement which require that HHAs maintain sufficient financial records and statistical data for proper determination of costs payable under the program. The S series of worksheets collects the provider's location, CBSA, date of certification, operations, and unduplicated census days. The A series of worksheets collects the provider's trial balance of expenses for overhead costs, direct patient care services by level of care, and non-revenue generating cost centers. The B series of worksheets allocates the overhead costs to the revenue and non-revenue generating cost centers using functional statistical bases. The C series of worksheets computes the average cost per visit for HHA services. The D series of worksheets are Medicare specific and are used to determine reimbursement due to the provider or program. The F series of worksheets collect data from a provider's balance sheet and income statement. *Form Number:* CMS-1728-20 (OMB control number: 0938-0022); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits, Not-for-profit institutions; *Number of Respondents:* 10,944; *Total Annual Responses:* 10,944; *Total Annual Hours:* 2,134,080. (For policy questions regarding this collection contact LuAnn Piccione at (410) 786-5423.)

Dated: July 17, 2023.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2023-15461 Filed 7-20-23; 8:45 am]

BILLING CODE 4120-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA-2014-N-0086]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Potential Tobacco Product Violations Reporting Form

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995 (PRA).

DATES: Submit written comments (including recommendations) on the collection of information by August 21, 2023.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function. The OMB control number for this information collection is 0910-0716. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-8867, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Potential Tobacco Product Violations Reporting Form

OMB Control Number 0910-0716—Extension

This information collection supports the opportunity to accept consumer and other stakeholder feedback and notification of potential violations of the Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Tobacco Control Act. Tobacco products are generally governed by chapter IX of the

FD&C Act (sections 900 through 920) (21 U.S.C. 387 through 21 U.S.C. 387t). The FD&C Act provides FDA authority to monitor compliance with Federal tobacco laws and regulations and take corrective action when violations occur.

As part of its enforcement strategy, FDA accepts information from the public regarding potential tobacco product violations of the FD&C Act. Potential tobacco product violations include (but are not limited to): (1) sales to underage purchasers (persons under 21); (2) flavored cigarette sales; (3) illegal marketing and advertising; (4) distribution of free samples of tobacco products except in limited circumstances; (5) placement of cigarette or smokeless tobacco product vending machines in prohibited areas (or providing access to self-service or direct access of tobacco products in prohibited areas); and (6) sale of cigarettes in packages of less than 20.

FDA currently provides a form that may be used to collect this information from the public (Form FDA 3779, Potential Tobacco Product Violations Report). The Potential Tobacco Product Violations Report, Form FDA 3779, asks for the following information: (1) date potential violation occurred; (2) product type (e.g., cigarette, smokeless, roll-your-own, cigar, e-cigarette, hookah, pipe tobacco); (3) tobacco brand; (4) potential violation type; (5) type of potentially violative promotional materials; (6) who potentially violated; (7) name, address, phone number, and email address of the potential violator (if known); (8) potential violator's website or internet address URL (if available); (9) description of the

potential violation; and (10) any additional files or information pertinent to the potential violation.

The public and interested stakeholders can report possible tobacco product violations of the FD&C Act by submitting information on Form FDA 3779 online, via email or postal mail, or by calling FDA's Tobacco Call Center. Information on how to submit possible tobacco product violations using the options above can be found at <https://www.accessdata.fda.gov/scripts/ptvr/index.cfm>. Further details about reporting possible tobacco product violations of the FD&C Act can also be found at <https://www.fda.gov/tobacco-products/compliance-enforcement-training/report-potential-tobacco-product-violation>.

In the **Federal Register** of February 2, 2023 (88 FR 7091), FDA published a 60-day notice requesting public comment on the proposed collection of information. One comment was received that was PRA related.

(Comment) The form does not have a specific option under "Potential violation type" for reporting products that have not gone through any of the new pathways to market required by the Tobacco Control Act, including the Premarket Tobacco Product Application (PMTA). The lack of this option may be confusing and make it difficult for members of the public who want to report such violations to determine what sort of violation they are reporting. Thus, we recommend FDA add "Product without a marketing authorization" or a similar category title, as an option under "Potential violation type".

(Response) FDA has reviewed the comment requesting revisions to the Potential Tobacco Product Violations Report, Form FDA 3779 (Potential Tobacco Violation Report Form). The comment correctly points out that the Potential Tobacco Violation Report Form provides the public with a mechanism to report potential violations of the tobacco laws and regulations enforced by the FDA. FDA agrees that a revision to the Potential Tobacco Violation Report Form is warranted and would assist the public in reporting potential violations related to the premarket review and authorization requirements under the law.

The Potential Tobacco Violation Report Form includes some specific options related to potential violation types that are often reported, including, but not limited to, those related to the retail sale of tobacco products to underage purchasers, flavored cigarette sales, the distribution of free samples of tobacco products, and other marketing and advertising requirements. The form has been updated to include an additional potential violation type: "Unauthorized Tobacco Product."

The Potential Tobacco Violation Report Form is one of many ways the public can report potential tobacco product violations directly to FDA. The public and interested stakeholders can also provide detailed descriptions of potential violations by phone, email, and through the mail.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN ¹

Activity and Form FDA 3779	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Reporting potential tobacco product violations of the FD&C Act.	3,000	2	6,000	0.25 (15 minutes)	1,500

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

The burden hour estimates for this collection of information were based on the type and rate of reporting submitted through the Potential Tobacco Violation Report Form and based on a review of the information collection since our last request for OMB approval. FDA estimates that submitting the information (online, telephone, email, or mail) will take 0.25 hours (i.e., 15 minutes) per response.

FDA estimates the number of annual respondents to this collection of information will be 3,000, who will

each submit 2 reports. Each report is expected to take 0.25 hours to complete and submit; therefore, total burden hours for this collection of information is estimated to be 1,500 hours (6,000 responses × 0.25 hours per response).

Our estimated burden for the information collection reflects an overall increase of 157 hours and a corresponding increase of 630 responses. FDA attributes this adjustment to an increase in the number of submissions received over the last few years.

Dated: July 17, 2023.
Lauren K. Roth,
Associate Commissioner for Policy.
[FR Doc. 2023–15459 Filed 7–20–23; 8:45 am]
BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES**Food and Drug Administration**

[Docket No. FDA-2022-N-2796]

**Bristol Myers Products Inc.;
Withdrawal of Approval of a New Drug
Application for BUFFERIN (Aspirin)
Tablets****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice.**SUMMARY:** The Food and Drug Administration (FDA or Agency) is withdrawing approval of a new drug application (NDA) for BUFFERIN (aspirin) tablets. The basis for the withdrawal is that the holder of the NDA has repeatedly failed to file required annual reports for this NDA.**DATES:** Approval is withdrawn as of July 21, 2023.**FOR FURTHER INFORMATION CONTACT:** Jennifer Forde, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 6228, Silver Spring, MD 20993-0002, 301-348-3035, Jennifer.Forde@fda.hhs.gov.**SUPPLEMENTARY INFORMATION:** The holder of an approved application to market a new drug for human use is required to submit annual reports to FDA concerning its approved application in accordance with § 314.81 (21 CFR 314.81). In the *Federal Register* of November 23, 2022 (87 FR 71652), FDA published a notice offering an opportunity for a hearing (NOOH) on a proposal to withdraw approval of NDA 006499 for BUFFERIN (aspirin) tablets, and all amendments and supplements thereto, on the grounds that the holder of NDA 006499 has repeatedly failed to file required annual reports for this NDA.

NDA 006499 for BUFFERIN (aspirin) tablets became effective on June 30, 1948. The holder of NDA 006499 is currently identified in FDA's records as Bristol Myers Products Inc. The Agency has received conflicting information regarding the identity of the current NDA holder. However, to change the holder of record, information specified in § 314.72 (21 CFR 314.72) must be provided to the Agency. Since the time that the holder of record was identified as Bristol Myers Products Inc., the Agency has not received change of application ownership information that would satisfy the requirements of § 314.72. The Agency therefore identified Bristol Myers Products Inc. as the NDA holder of record in the NOOH

published in the *Federal Register* of November 23, 2022, but if another entity held NDA 006499, the Agency also provided notice to that entity through the same NOOH.

Bristol Myers Products Inc. did not respond to the NOOH and nor did any other party. Failure of the NDA holder to file a written notice of participation and request for hearing pursuant to § 314.200 (21 CFR 314.200) constitutes an election by the holder of the NDA not to make use of the opportunity for a hearing concerning the proposal to withdraw approval of its NDA and a waiver of any contentions concerning the legal status of the drug product.

FDA finds that the holder of NDA 006499 has repeatedly failed to submit reports required by § 314.81. In addition, under § 314.200, FDA finds that the holder of the NDA 006499 has waived the opportunity for a hearing concerning the withdrawal of approval of this NDA as well as any contentions concerning the legal status of the drug product covered by this NDA. Therefore, under these findings, approval of NDA 006499 and all amendments and supplements thereto is hereby withdrawn as of July 21, 2023.

Based on information available to the Agency, it appears that the product covered by NDA 006499 has not been marketed for many years and another buffered aspirin drug product, using the same trade name "BUFFERIN" but with a different formulation, is currently being marketed as an over the counter (OTC) monograph drug. The marketing of this current "BUFFERIN" product is subject to the requirements for legal marketing of OTC monograph drugs under section 505G of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355h). Withdrawal of the approval of NDA 006499 does not impact nonprescription aspirin products that are legally marketed without an approved application as OTC monograph drugs in accordance with section 505G of the FD&C Act, including conforming to applicable conditions of use specified in OTC Monograph M013: Internal Analgesic, Antipyretic, and Antirheumatic Drug Products for Over-the-Counter Human Use (See OTC *Monographs@FDA* web page available at <https://www.accessdata.fda.gov/scripts/cder/omuf/?event=reqOrders>).

Dated: July 17, 2023.

Lauren K. Roth,*Associate Commissioner for Policy.*

[FR Doc. 2023-15454 Filed 7-20-23; 8:45 am]

BILLING CODE 4164-01-P**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration**

[Docket No. FDA-2010-N-0601]

**Agency Information Collection
Activities; Submission for Office of
Management and Budget Review;
Comment Request; Current Good
Manufacturing Practice Regulations for
Medicated Feeds****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Notice.**SUMMARY:** The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.**DATES:** Submit written comments (including recommendations) on the collection of information by August 21, 2023.**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function. The OMB control number for this information collection is 0910-0152. Also include the FDA docket number found in brackets in the heading of this document.**FOR FURTHER INFORMATION CONTACT:** Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-8867, PRAStaff@fda.hhs.gov.**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.**Current Good Manufacturing Practice
Regulations for Medicated Feeds—21
CFR Part 225***OMB Control Number 0910-0152—
Extension*

Under section 501 of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 351), FDA has the statutory authority to issue current good manufacturing practice (CGMP) regulations for drugs, including medicated feeds. Medicated feeds are

administered to animals for the prevention, cure, mitigation, or treatment of disease, or growth promotion and feed efficiency. Statutory requirements for CGMPs have been codified under part 225 (21 CFR part 225). Medicated feeds that are not manufactured in accordance with these regulations are considered adulterated under section 501(a)(2)(B) of the FD&C Act. Under part 225, a manufacturer is required to establish, maintain, and retain records for a medicated feed, including records to document procedures required during the manufacturing process to assure that proper quality control is maintained. Such records would, for example, contain information concerning receipt and inventory of drug components, batch production, laboratory assay

results (*i.e.*, batch and stability testing), labels, and product distribution.

This information is needed so that FDA can monitor drug usage and possible misformulation of medicated feeds to investigate violative drug residues in products from treated animals and to investigate product defects when a drug is recalled. In addition, FDA will use the CGMP criteria in part 225 to determine whether the systems and procedures used by manufacturers of medicated feeds are adequate to ensure that their feeds meet the requirements of the FD&C Act as to safety, and also that they meet their claimed identity, strength, quality, and purity, as required by section 501(a)(2)(B) of the FD&C Act.

A license is required when the manufacturer of a medicated feed involves the use of a drug or drugs that FDA has determined requires more

control because of the need for a withdrawal period before slaughter or because of carcinogenic concerns. Conversely, a license is not required, and the recordkeeping requirements are less demanding, for those medicated feeds for which FDA has determined that the drugs used in their manufacture need less control. Respondents to this collection of information are commercial feed mills and mixers/feeders.

In the **Federal Register** of February 6, 2023 (88 FR 7741), FDA published a 60-day notice requesting public comment on the proposed collection of information. Although one comment was received, it was not responsive to the four collection of information topics solicited.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL RECORDKEEPING BURDEN
[Registered licensed commercial feed mills] ¹

21 CFR section; activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
225.42(b)(5) through (8) requires records of receipt, storage, and inventory control of medicated feeds.	791	260	205,660	1	205,660
225.58(c) and (d) requires records of the results of periodic assays for medicated feeds that are in accord with label specifications and also those medicated feeds not within documented permissible assay limits.	791	45	35,595	0.5 (30 minutes)	17,798
225.80(b)(2) requires that verified medicated feed label(s) be kept for 1 year	791	1,600	1,265,600	0.12 (7 minutes)	151,872
225.102(b)(1) through (5), requires records of master record files and production records for medicated feeds.	791	7,800	6,169,800	0.08 (5 minutes)	493,584
225.110(b)(1) and (2) requires maintenance of distribution records for medicated feeds.	791	7,800	6,169,800	0.02 (1 minute)	123,396
225.115(b)(1) and (2) requires maintenance of complaint files by the medicated feed manufacturer.	791	5	3,955	0.12 (7 minutes)	475
Total .....	.....	.....	.....	.....	992,785

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN
[Registered licensed mixer/feeders] ¹

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
225.42(b)(5) through (8) requires records of receipt, storage, and inventory control of medicated feeds.	100	260	26,000	0.15 (9 minutes)	3,900
225.58(c) and (d) requires records of the results of periodic assays for medicated feeds that are in accord with label specifications and also those medicated feeds not within documented permissible assay limits.	100	36	3,600	0.5 (30 minutes)	1,800
225.80(b)(2) requires that verified medicated feed label(s) be kept for 1 year	100	48	4,800	0.12 (7 minutes)	576
225.102(b)(1) through (5) requires records of master record files and production records for medicated feeds.	100	260	26,000	0.4 (24 minutes)	10,400
Total .....	.....	.....	.....	.....	16,676

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 3—ESTIMATED ANNUAL RECORDKEEPING BURDEN
[Nonregistered non-licensed commercial feed mills] ¹

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
225.142 requires procedures for identification, storage, and inventory control (receipt and use) of Type A medicated articles and Type B medicated feeds.	4,357	4	17,428	1	17,428

TABLE 3—ESTIMATED ANNUAL RECORDKEEPING BURDEN—Continued
[Nonregistered non-licensed commercial feed mills]¹

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
225.158 requires records of investigation and corrective action when the results of laboratory assays of drug components indicate that the medicated feed is not in accord with the permissible assay limits.	4,357	1	4,357	4	17,428
225.180 requires identification, storage, and inventory control of labeling in a manner that prevents label mix-ups and assures that correct labels are used for medicated feeds.	4,357	96	418,272	0.12 (7 minutes)	50,193
225.202 requires records of formulation, production, and distribution of medicated feeds.	4,357	260	1,132,820	0.65 (39 minutes)	736,333
Total .....	.....	.....	.....	.....	821,382

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 4—ESTIMATED ANNUAL RECORDKEEPING BURDEN
[Nonregistered non-licensed mixer/feeders]¹

21 CFR section; activity	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeper	Total hours
225.142 requires procedures for identification, storage, and inventory control (receipt and use) of Type A medicated articles and Type B medicated feeds.	3,400	4	13,600	1	13,600
225.158 requires records of investigation and corrective action when the results of laboratory assays of drug components indicate that the medicated feed is not in accord with the permissible assay limits.	3,400	1	3,400	4	13,600
225.180 requires identification, storage, and inventory control of labeling in a manner that prevents label mix-ups and assures that correct labels are used for medicated feeds.	3,400	32	108,800	0.12 (7 minutes)	13,056
225.202 requires records of formulation, production, and distribution of medicated feeds.	3,400	260	884,000	0.33 (20 minutes)	291,720
Total .....	.....	.....	.....	.....	331,976

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

Our estimated burden for the information collection reflects an overall decrease of 10,435 hours and an increase of 831,545 records since the last OMB approval. We attribute this adjustment due to an increase in the number of non-registered, non-licensed commercial medicated feed mills and decrease in non-licensed medicated feed mill recordkeeping the last few years.

Dated: July 17, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–15487 Filed 7–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–0343]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Current Good Manufacturing Practice for Blood and Blood Components and Reducing the Risk of Transfusion-Transmitted Infections

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by August 21, 2023.

ADDRESSES: To ensure that comments on the information collection are received,

OMB recommends that written comments be submitted to <https://www.reginfo.gov/public/do/PRAMain>. Find this particular information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. The OMB control number for this information collection is 0910–0116. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT:

Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, PRASStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Current Good Manufacturing Practice for Blood and Blood Components and Reducing the Risk of Transfusion-Transmitted Infections

OMB Control Number 0910–0116—
Revision

The FDA's Center for Biologics Evaluation and Research (CBER) is responsible for regulatory oversight of the U.S. blood supply. FDA issues and enforces requirements for blood collection and for the manufacturing of blood products, including both blood components intended for transfusion or for further manufacturing use. To implement applicable statutory provisions, regulations are codified at 21 CFR part 606—Current Good Manufacturing Practice for Blood and Blood Components; 21 CFR part 610—General Biological Products Standards; 21 CFR part 630—Requirements for Blood and Blood Components Intended for Transfusion or for Further Manufacturing Use; and 21 CFR part 640—Additional Standards for Human Blood and Blood Products. The regulations establish quality standard requirements applicable to blood and blood products including information collection provisions.

CBER works closely with other parts of the Department of Health and Human Services to identify and respond to potential threats to blood safety and to monitor the availability of the blood supply. FDA has progressively strengthened the overlapping safeguards that help to ensure donor health and the safety of the blood supply for recipients of blood and blood products. For example:

- Blood donors answer medical history questions to identify risk factors that could indicate possible infection with a relevant-transfusion transmitted infection.
- FDA requires blood establishments to maintain a record of deferred donors to prevent collections from ineligible donors.
- Blood donations are tested for several relevant transfusion-transmitted infections, including HIV, hepatitis B virus, and hepatitis C virus.

FDA also inspects blood establishments and monitors reports of errors, accidents, and adverse events associated with blood donation or transfusion.

Description of Respondents: Respondents to the collection of information are licensed and registered-only establishments that collect blood and blood components intended for transfusion or further manufacturing use.

For operational efficiency, we are revising the information collection to account for burden that may be attributable to recommendations found in associated FDA guidance documents, as listed below, and currently approved in OMB control number 0910–0681. FDA regulations in § 630.3(h) (21 CFR 630.3(h)) set forth a list of relevant transfusion-transmitted infections (RTTIs) (§ 630.3(h)(1)) and the conditions under which a TTI would meet the definition of an RTTI (§ 630.3(h)(2)). We developed Agency guidance documents, consistent with our good guidance practice regulations in 21 CFR 10.115, that provide for comment at any time. These guidance documents include recommendations specific to certain RTTI or TTI regarding the collection of blood and blood components and discuss corresponding recordkeeping and/or notification activities. The guidance documents are available for download from our website at <https://www.fda.gov/vaccines-blood-biologics/biologics-guidances/blood-guidances>.

A. Guidances Recommending Notification Based on Reactive Test Results

The following guidance documents provide recommendations for consignee and physician notification relating to donations that test reactive for an RTTI:

- Guidance for Industry: Use of Nucleic Acid Tests to Reduce the Risk of Transmission of West Nile Virus from Donors of Whole Blood and Blood Components Intended for Transfusion (November 2009);
- Use of Serological Tests to Reduce the Risk of Transmission of *Trypanosoma cruzi* Infection in Blood and Blood Components; Guidance for Industry (December 2017);
- Recommendations for Reducing the Risk of Transfusion-Transmitted Babesiosis; Guidance for Industry (May 2019); and
- Use of Serological Tests to Reduce the Risk of Transfusion-Transmitted Human T-Lymphotropic Virus Types I and II (HTLV-I/II); Guidance for Industry (February 2020).

B. Guidances Recommending Notification Based on Post Donation Information Regarding a Risk Factor or History of an RTTI or TTI

The following guidance documents provide recommendations for consignee and, in some instances, physician notification under circumstances where a blood establishment may receive information following collection that reveals the donor had a history of or risk factor for an RTTI or TTI at the time of

collection and should have been deferred for the risk factor:

- Recommendations for Assessment of Blood Donor Eligibility, Donor Deferral and Blood Product Management in Response to Ebola Virus; Guidance for Industry (January 2017);
- Recommendations to Reduce the Possible Risk of Transmission of Creutzfeldt-Jakob Disease and Variant Creutzfeldt-Jakob Disease by Blood and Blood Components; Guidance for Industry (May 2022); and
- Recommendations to Reduce the Risk of Transfusion-Transmitted Malaria; Guidance for Industry (December 2022).

In the **Federal Register** of February 21, 2023 (88 FR 10515), we published a 60-day notice requesting public comment on the proposed collection of information. Although one comment was received, it was not responsive to the four information collection topics solicited. On our own initiative we have since revised the information collection to reflect recent finalization of the guidance document entitled “Recommendations for Evaluating Donor Eligibility Using Individual Risk-Based Questions to Reduce the Risk of Human Immunodeficiency Virus Transmission by Blood and Blood Products,” announced in the **Federal Register** of May 12, 2023 (88 FR 30765). The recommendations included in the guidance document will potentially expand the number of people eligible to donate blood, while also maintaining the appropriate safeguards to protect the safety of the blood supply.

We believe the notifications discussed in the respective guidance documents are rare and that these notification practices would be part of the usual and customary business practice for blood establishments and consignees in addressing the RTTIs or TTIs under the regulations. We also believe respondents would have already developed standard operating procedures for notifying consignees and the recipient's physician of record regarding distributed blood components potentially at risk for an RTTI or TTI. However, to account for burden among respondents that may be attributable to the notification activity we allot one response and 1 hour annually. As additional guidance is developed by FDA addressing other RTTIs under § 630.3(h)(2), we will modify the information collection accordingly.

Dated: July 17, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–15458 Filed 7–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. FDA–2018–D–4417, FDA–2013–N–1619, FDA–2018–D–2613, FDA–2021–N–0341, FDA–2016–N–2066, FDA–2022–N–0862, and FDA–2022–N–1874]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approvals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of information collections that have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT:

JonnaLynn Capezzuto, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–3794, PRAStaff@fda.hhs.gov.

SUPPLEMENTARY INFORMATION: The following is a list of FDA information collections recently approved by OMB under section 3507 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The OMB control number and

expiration date of OMB approval for each information collection are shown in table 1. Copies of the supporting statements for the information collections are available on the internet at <https://www.reginfo.gov/public/do/PRAMain>. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

TABLE 1—LIST OF INFORMATION COLLECTIONS APPROVED BY OMB

Title of collection	OMB control No.	Date approval expires
Current Good Manufacturing Practice (CGMP): Manufacturing, Processing, Packing, and Holding of Drugs; GMP for Finished Pharmaceuticals (Including Medical Gases and Active Pharmaceutical Ingredients)	0910–0139	6/30/2026
Current Good Manufacturing Practice in Manufacturing, Packaging, Labeling, or Holding Operations for Dietary Supplements	0910–0606	6/30/2026
Prescription Drug Advertisements	0910–0686	6/30/2026
Federal-State Food Regulatory Program Standards	0910–0760	6/30/2026
Certification of Identity for Freedom of Information and Privacy Act Requests	0910–0832	6/30/2026
The Real Cost Campaign Outcomes Evaluation Study: Cohort 3 (Outcomes Study)	0910–0915	6/30/2026
Perceptions of Prescription Drug Products with Medication Tracking Capabilities	0910–0916	6/30/2026

Dated: July 17, 2023.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2023–15456 Filed 7–20–23; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities; Submission to OMB for Review and Approval; Public Comment Request; Mpox Vaccine Distribution Request Forms, OMB No. 0915–xxxx–New

AGENCY: Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: In compliance with of the Paperwork Reduction Act of 1995, HRSA submitted an Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. Comments submitted during the first public review

of this ICR will be provided to OMB. OMB will accept further comments from the public during the review and approval period. OMB may act on HRSA's ICR only after the 30-day comment period for this notice has closed.

DATES: Comments on this ICR should be received no later than August 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 Review—Open for Public Comments” or by using the search function.

FOR FURTHER INFORMATION CONTACT: To request a copy of the clearance requests submitted to OMB for review, email Samantha Miller, the HRSA Information Collection Clearance Officer, at paperwork@hrsa.gov or call (301) 443–3093.

SUPPLEMENTARY INFORMATION:

Information Collection Request Title: Mpox Vaccine Distribution Request Forms, OMB No. 0915–xxxx–New.

Abstract: On August 4, 2022, the mpox outbreak was declared a public health emergency (PHE) in the United States. From the outset, HRSA engaged with federal partners across HHS to provide resources to combat the spread of mpox; assist health care providers who are treating people who have mpox; and ensure those who are most at risk are the focus of vaccine response efforts.

HHS authorized HRSA to receive allotments of the JYNNEOS vaccine for mpox for rapid distribution to Ryan White HIV/AIDS Program (RWHAP) recipients. HRSA was identified as a distribution partner due to the health care services provided to individuals with HIV and the number of uninsured and underinsured persons seen in RWHAP and Health Center Programs. The allotments were meant to supplement, not replace, vaccine efforts at jurisdictional levels.

To expedite dispensing of the vaccine, HRSA provided the vaccine to dually funded RWHAP Part C and Health Center providers that care for at-risk populations. Most of the identified providers already had access to the Health Partner Ordering Portal (HPOP),

a system HHS uses to quickly distribute vaccines to HHS health partners. For providers who elected to receive the vaccine but did not have access to HPOP, HRSA registered them in the HPOP system. HRSA made 73 shipments to 57 (53 dually funded and four Part C only) RWHAP recipients who elected to receive and distribute the mpox vaccine.

RWHAP recipients that receive shipments of the JYNNEOS vaccine are required to upload administration and inventory/wastage data into HPOP on a weekly basis. The information collected includes federal or state PIN, contact, lot number, description, number of vials, expiration date, courses/doses/bottles administered, bottles available, wastage, reason, and date reported.

RWHAP recipients who accept JYNNEOS vaccine from HRSA are also asked to submit data with information necessary for HRSA to assess the quantity of mpox vaccines requested and their distribution status. The information collected includes grant number; recipient name, point of contact, and phone number; shipping

address; shipping point of contact, email address, and phone number; and number of boxes of mpox vaccine requested.

As a result of the PHE for mpox, the Assistant Secretary for Planning and Evaluation issued a Paperwork Reduction Act waiver for collection of these data. Since the PHE ended on January 31, 2023, HRSA is proposing to continue collecting these data until December 31, 2025. This action will help to improve HRSA’s ability to provide additional resources and assistance to RWHAP recipients, which may result in increased prevention of mpox among RWHAP clients.

A 60-day notice was published in the **Federal Register** on May 9, 2023, vol. 88, no. 89, pp. 29909–10. There was one comment received. There are no changes made to the information collection since the comment received is outside the scope of this information request.

Need and Proposed Use of the Information: HRSA will use the information collected to (1) assess and improve its response to the mpox

outbreak and (2) improve HRSA’s ability to provide resources and assistance to RWHAP recipients in future public health emergencies.

Likely Respondents: Dually funded RWHAP Part C and Health Center recipients who accepted at least one shipment of mpox vaccine from HRSA.

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose, or provide the information requested. This includes the time needed to review instructions; to develop, acquire, install, and utilize technology and systems for the purpose of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information; to search data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information. The total annual burden hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Number of respondents	Number of responses per respondent	Total responses	Average burden per response (in hours)	Total burden hours
Vaccine Distribution Report	57	1	57	0.20	11.40
Wastage Upload Report	57	52	2,964	0.23	681.72
Therapeutic Courses (Administered and Available)	57	52	2,964	0.23	681.72
Total	171	.....	.....	.....	1,374.84

Maria G. Button,
Director, Executive Secretariat.
[FR Doc. 2023–15463 Filed 7–20–23; 8:45 am]
BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES
National Institutes of Health
Prospective Grant of an Exclusive Patent License: Development and Commercialization of Caspase Inhibitors
AGENCY: National Institutes of Health, HHS.
ACTION: Notice.
SUMMARY: The National Center for Advancing Translational Sciences, an institute of the National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to

practice the inventions embodied in the Patents and Patent Applications listed in the **SUPPLEMENTARY INFORMATION** section of this Notice to Elgia Therapeutics Inc. (“Elgia”), headquartered in La Jolla, CA.
DATES: Only written comments and/or applications for a license which are received by the National Center for Advancing Translational Sciences’ Office of Strategic Alliances on or before August 7, 2023 will be considered.
ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Sury Vepa, Ph.D., J.D., Senior Licensing and Patenting Manager, Office of Strategic Alliances, Telephone: (301) 642–0460; Email: sury.vepa@nih.gov.
SUPPLEMENTARY INFORMATION:

Intellectual Property
1. U.S. Provisional Application No. 61/299,790, filed January 29, 2010 which is entitled “Caspase Inhibitors” (HHS Ref. No. E–308–2009–0–US–01);
2. International Patent Application No. PCT/US2011/02274 filed on January 27, 2011 which is entitled “Caspase Inhibitors” (HHS Ref. No. E–308–2009–0–PCT–02); and
3. US Patent Application No. 13/575,273 filed on July 25, 2012 which is entitled “Caspase Inhibitors” and issued as U.S. Patent No. 9,365,612 (HHS Ref. No. E–308–2009–0–US–03).
The patent rights in these inventions have been either assigned and/or exclusively licensed to the government of the United States of America.
The prospective exclusive license territory may be worldwide, and the field of use may be limited to the following:
“Development, manufacture, use and commercialization of Caspase Inhibitors

disclosed and claimed in the prospective licensed patent rights, for the treatment of inflammatory diseases, such as hidradenitis suppurativa (HS) in humans and animals.”

The subject technology discloses potent and selective caspase 1 inhibitors that target the active site of the enzyme. Several cyanopropanate containing small molecules were synthesized, including one based upon the optimized peptidic scaffold of the prodrug VX-765. A number of these compounds were potent inhibitors of caspase 1 ($IC_{50}s \leq 1$ nM). Examination of these small molecules versus a caspase panel demonstrated an impressive degree of selectivity for caspase 1 inhibition. The small molecular probe ML132 (CID-4462093; NCGC-00183434) is the most potent caspase 1 inhibitor reported to date. It also possesses a unique selectivity pattern relative to other reported caspase inhibitors. A number of these compounds were assessed for their hydrolytic stability and selected absorption, distribution, metabolism and elimination (ADME) properties. Some of the compounds of this invention could be developed as effective therapeutics for diseases such as inflammatory diseases such as hidradenitis suppurativa (HS), ischemic disorders, Huntington's disease, amyotrophic lateral sclerosis (ALS), rheumatoid arthritis, osteoarthritis, inflammatory bowel disease and sepsis.

This Notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective exclusive license will be royalty bearing, and the prospective exclusive license may be granted unless within fifteen (15) days from the date of this published Notice, the National Center for Advancing Translational Sciences receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

In response to this Notice, the public may file comments or objections. Comments and objections, other than those in the form of a license application, will not be treated confidentially and may be made publicly available.

License applications submitted in response to this Notice will be presumed to contain business confidential information and any release of information from these license applications will be made only as required and upon a request under the Freedom of Information Act, 5 U.S.C. 552.

Dated: July 16, 2023.

Joni L. Rutter,

Director, Office of the Director, National Center for Advancing Translational Sciences.

[FR Doc. 2023-15445 Filed 7-20-23; 8:45 am]

BILLING CODE 4140-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Meeting of the Substance Abuse and Mental Health Services Administration, Center for Mental Health Services National Advisory Council

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

Pursuant to Public Law 92-463, notice is hereby given of the meeting on August 29, 2023, of the Substance Abuse and Mental Health Services Administration (SAMHSA), Center for Mental Health Services National Advisory Council (CMHS NAC).

The meeting is open to the public and will include consideration of the meeting minutes from the April 25, 2023, SAMHSA, CMHS NAC meeting; updates from the CMHS Director; a discussion from SAMHSA's Assistant Secretary; a discussion from the Recovery Office; a discussion on Olmstead Activity; a discussion on Transitional Age Youth Policy Academy; a discussion on Advisory Committee for Women's Services/Gender Based Violence; and a discussion on Potential Innovation.

The meeting will be held at SAMHSA, 5600 Fishers Lane, 5W11, Rockville, MD 20857. Attendance by the public will be limited to space available and will be limited to the open sessions of the meeting. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Council. Presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making public comment must notify the contact person, Pamela Foote, CMHS NAC Designated Federal Officer (DFO) on or before August 18, 2023. Up three minutes will be allotted for each public comment as time permits.

Written comments received in advance of the meeting will be considered for inclusion in the official record.

The open meeting session may also be accessed virtually. Please register online at <https://snacregister.samhsa.gov>, to attend either on site or virtually, submit written or brief oral comments,

or request special accommodations for persons with disabilities. To communicate with the CMHS NAC DFO please see the contact information below.

Meeting information and a roster of Council members may be obtained by accessing the SAMHSA Committee website at <https://www.samhsa.gov/about-us/advisory-councils/cmhs-national-advisory-council> or by contacting the DFO.

Council Name: SAMHSA's Center for Mental Health Services National Advisory Council.

Date/Time/Type: August 29, 2023, 9:00 a.m. to 4:30 p.m. EDT, Open.

Place: SAMHSA, 5600 Fishers Lane, Rockville, Maryland 20857.

Contact: Pamela Foote, Designated Federal Officer, CMHS National Advisory Council, 5600 Fishers Lane, Rockville, Maryland 20857 (mail), Telephone: (240) 276-1279, Email: pamela.foote@samhsa.hhs.gov.

Dated: July 17, 2023.

Carlos Castillo,

Committee Management Officer, SAMHSA.

[FR Doc. 2023-15479 Filed 7-20-23; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Advisory Committee for Women's Services (ACWS); Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given of a meeting of the Substance Abuse and Mental Health Services Administration's (SAMHSA) Advisory Committee for Women's Services (ACWS) on August 29, 2023.

The meeting will include discussions on assessing SAMHSA's current strategies, including the mental health and substance use needs of the women and girls population. Additionally, the ACWS will be addressing priorities regarding Maternal Behavioral Health.

The meeting is open to the public and will be held at 5600 Fishers Lane, Rockville, Maryland, 20857. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions should be forwarded to the contact person by August 19, 2023, 3 p.m. Eastern Time. Oral presentations from the public will be scheduled at the conclusion of the meeting. Individuals interested in making oral presentations must notify the contact person on or before August 19, 2023, 3 p.m. Eastern Time. Up to five minutes will be

allotted for each presentation as time allows.

The meeting may be accessed via telephone or web meeting. To obtain the call-in number and access code, submit written or brief oral comments, or request special accommodations for persons with disabilities, please register on-line at <https://snacregister.samhsa.gov>, or communicate with SAMHSA's Designated Federal Officer, Ms. Valerie Kolick.

Substantive meeting information and a roster of ACWS members may be obtained either by accessing the SAMHSA Committees' Web <https://www.samhsa.gov/about-us/advisory-councils/acws>, or by contacting Ms. Kolick.

Committee Name: Substance Abuse and Mental Health Services Administration, Advisory Committee for Women's Services (ACWS).
Date/Time/Type: Tuesday, August 29, 2023, from: 9:00 a.m. to 4:30 p.m. EDT (OPEN).
Place: SAMHSA, 5600 Fishers Lane, Rockville, MD 20857.
Contact: Valerie Kolick, Designated Federal Officer, SAMHSA's Advisory Committee for Women's Services, 5600 Fishers Lane, Rockville, MD 20857, Telephone: (240) 276-1738, Email: Valerie.kolick@samhsa.hhs.gov.

Dated: July 18, 2023.

Carlos Castillo,

Committee Management Officer.

[FR Doc. 2023-15534 Filed 7-20-23; 8:45 am]

BILLING CODE 4162-20-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Extension and Modification of the National Customs Automation Program Test Concerning the Submission Through the Automated Commercial Environment of Certain Unique Entity Identifiers for the Global Business Identifier Evaluative Proof of Concept

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

ACTION: General notice.

SUMMARY: On December 2, 2022, U.S. Customs and Border Protection (CBP) published a notice in the **Federal Register** announcing a National Customs Automation Program Test concerning the submission of unique entity identifiers for the Global Business Identifier (GBI) Evaluative Proof of Concept (EPoC). This document

republishes and supersedes the notice published on December 2, 2022, extends the test period from July 21, 2023, through February 14, 2024, provides the correct web address for interested parties to use to obtain the Legal Entity Identifier (LEI), clarifies that CBP will allow participants to transmit one or more of the three entity identifiers, and makes additional minor technical and conforming corrections.

DATES: The GBI EPoC commenced on December 19, 2022, and will continue through February 14, 2024, subject to any extension, modification, or early termination as announced in the **Federal Register**. CBP began to accept requests from importers of record and licensed customs brokers to participate in the test on December 2, 2022, and CBP will continue to accept such requests until the GBI EPoC concludes. Public comments on the test are invited and may be submitted to the address set forth below, at any time during the test period.

FOR FURTHER INFORMATION CONTACT: For policy-related questions, contact Julie L. Stoeber, Branch Chief, 1USG, Interagency Collaboration Division, Trade Policy and Programs Directorate, Office of Trade, U.S. Customs and Border Protection, at (202) 945-7064 or via email at GBI@cbp.dhs.gov, with a subject line reading "Global Business Identifier Test-GBI." For technical questions related to the Automated Commercial Environment (ACE) or Automated Broker Interface (ABI) transmissions, importers of record and licensed customs brokers should contact their assigned ACE or ABI client representatives, respectively. Interested parties without an assigned client representative should direct their questions to Tonya Perez, Director, Client Services Division, Office of Trade, U.S. Customs and Border Protection, at (571) 421-7477 or via email at clientreputreach@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION: On December 2, 2022, U.S. Customs and Border Protection (CBP) published a General Notice (the December 2 Notice) in the **Federal Register** (87 FR 74157) announcing a National Customs Automation Program (NCAP) Test concerning the submission through the Automated Commercial Environment (ACE) of certain unique entity identifiers for the Global Business Identifier (GBI) Evaluative Proof of Concept (EPoC). This document republishes and supersedes the December 2 Notice, with minor technical and conforming corrections, in addition to the following three changes.

First, the test period has been extended from July 21, 2023, through February 14, 2024. Second, this notice provides the correct web address for interested parties to use to obtain the Legal Entity Identifier (LEI). Specifically, section III.A. of the December 2 Notice stated that an interested party may obtain its own GBI by contacting Dun and Bradstreet (D&B) regarding the Data Universal Numbering System (D-U-N-S®); GS1 regarding the Global Location Number (GLN); and the Global Legal Entity Identifier Foundation (GLEIF) regarding the LEI. Unfortunately, the web address provided in the December 2 Notice for obtaining the LEI did not send participants to the GLEIF domain, but rather to the LEI Register, which is one of many third-party entities that assigns LEI numbers. The correct web address for the GLEIF domain is <https://www.gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations>. From this website, participants can choose from a list of certified third-party entities that provide LEIs. This allows participants to obtain an LEI number from the entity that best meets the participant's needs. Lastly, this notice clarifies that CBP will allow participants to provide one or more of the three identifiers for the manufacturers, shippers, and sellers (optionally, exporters, distributors, and packagers) of merchandise covered by specified types of entries which are limited for purposes of this test to certain commodities and countries of origin, and that CBP will not require transmission of all three identifiers to participate in the test.

For ease of reference, the December 2 Notice is republished below, with the correct web address and other minor technical and conforming corrections.

I. Background

A. The National Customs Automation Program

The National Customs Automation Program (NCAP) was established by Subtitle B of Title VI—Customs Modernization, in the North American Free Trade Agreement Implementation Act (Customs Modernization Act) (Pub. L. 103-182, 107 Stat. 2057, 2170, December 8, 1993) (19 U.S.C. 1411). Through the NCAP, the thrust of customs modernization was focused on informed trade compliance and the development of the Automated Commercial Environment (ACE), the planned successor to the Automated Commercial System (ACS). ACE is an automated and electronic system for commercial trade processing, intended to streamline business processes,

facilitate growth in trade, ensure cargo security, and foster participation in global commerce, while facilitating compliance with U.S. laws and regulations and reducing costs for U.S. Customs and Border Protection (CBP) and all of its communities of interest. The ability to meet these objectives depends on successfully modernizing CBP's business functions and the information technology that supports those functions. CBP's modernization efforts are accomplished through phased releases of ACE component functionality, which update the system and add new functionality.

Sections 411 through 414 of the Tariff Act of 1930 (19 U.S.C. 1411–1414), as amended, define and list the existing and planned components of the NCAP (Section 411), promulgate program goals (Section 412), provide for the implementation and evaluation of the program (Section 413), and provide for Remote Location Filing (Section 414). Section 411(a)(1)(A) lists the electronic entry of merchandise, Section 411(a)(1)(B) lists the electronic entry summary of required information, and Section 411(a)(1)(D) lists the electronic transmission of manifest information, as existing NCAP components. Section 411(d)(2)(A) provides for the periodic review of data elements collected in order to update the standard set of data elements, as necessary.

B. Global Business Identifier Evaluative Proof of Concept (GBI EPoC)

ACE is the system through which the U.S. Government has implemented the “Single Window,” the primary system for processing trade-related import and export data required by the Partner Government Agencies (PGAs) that work alongside CBP in regulating specific commodities. The transition away from paper-based procedures has resulted in faster, more streamlined processes for both the U.S. Government and industry. To continue this progress, CBP began working with the Border Interagency Executive Council (BIEC) and the Commercial Customs Operations Advisory Committee (COAC), starting in 2017, to discuss the continuing viability of the data element known as the manufacturer or shipper identification code (MID).

Currently, importers of record provide the MID at the time of filing of the entry summary. *See generally* 19 CFR part 142. The 13-digit MID is derived from the name and address of the manufacturer or shipper, as specified on the commercial invoice, by applying a code constructed pursuant to instructions specified by CBP. *See* Customs Directive No. 3550–055, dated

November 24, 1986 (available online at https://www.cbp.gov/sites/default/files/documents/3550-055_3.pdf). Although use of the MID has served CBP and the international trade community well in the past, it has become apparent that the MID is not always a consistent or unique number. For example, the MID is based upon the manufacturer or shipper name, address, and country of origin, and this data can change over time and/or result in the same MID for multiple entities. Also, while the MID provides limited identifying information, other global unique identifiers capture a broader swath of pertinent information regarding the entities with which they are associated (e.g., legal ownership of businesses, specific business and global locations, and supply chain roles and functions). Changes in international trade and technology for tracking the flow of commodities have presented an opportunity for CBP and PGAs to explore new processes and procedures for identifying the parties involved in the supply chains of imported goods.

CBP has thus engaged in regular outreach with stakeholders, including, but not limited to, importers of record, licensed customs brokers, trade associations, and PGAs, with a goal of obtaining meaningful feedback on their existing systems and operations in order to establish a mutually beneficial global entity identifier system. As a result of these discussions, CBP developed the Global Business Identifier Evaluative Proof of Concept (GBI EPoC), which is an interagency trade transformation project that aims to test and develop a single entity identifier solution for CBP and PGAs to achieve trade facilitation and trade security by obtaining deeper insight into the legal structure of “who is who” across the spectrum of trade entities, and to understand more clearly ownership, affiliation, and parent-subsidiary relationships.

For purposes of the GBI EPoC, ACE has been modified to permit test participants to provide the following entity identifiers (GBIs) associated with manufacturers, shippers, and sellers of merchandise covered by entries that meet the GBI EPoC criteria (commodity + country of origin): nine (9)-digit Data Universal Numbering System (D–U–N–S®), thirteen (13)-digit Global Location Number (GLN), and twenty (20)-digit Legal Entity Identifier (LEI). These GBIs will be provided in addition to other required entry data (which may include the MID); any GBIs associated with the importer of record itself need not be provided as part of this test. The GBIs associated with the manufacturers, shippers and sellers will be provided

with the CBP Form 3461 (Entry/Immediate Delivery) data transmission via the Automated Broker Interface (ABI) in ACE for formal entries for consumption (“entry type 01” in ACE) and informal entries (“entry type 11” in ACE). CBP will then access the underlying data (GBI data) associated with the D–U–N–S®, GLN, and LEI, as set forth in the agreements that CBP has entered into with Dun & Bradstreet (D&B), GS1, and the Global Legal Entity Identifier Foundation (GLEIF), respectively, in order to connect a specific entry and merchandise to a more complete picture of those entities’ ownership, structure, and affiliations, among other information. D&B, GS1, and GLEIF are collectively referred to as the identity management companies (IMCs).

Through the GBI EPoC, CBP aims to leverage existing entity identifiers—the D–U–N–S®, GLN, and LEI—to develop a systematic, accurate, and efficient method for the trade to report, and the U.S. Government to uniquely identify, legal business entities, their different business locations and addresses, and their various functions and supply chain roles. CBP will consider whether these three GBIs, singly, or in concert, ensure that CBP and PGAs receive standardized trade data in a universally compatible trade language. Moreover, CBP will examine whether the GBIs submitted to CBP can be easily verified, thus reducing uncertainties that may be associated with the information related to shipments of imported merchandise. CBP will also consider whether the GBI EPoC may ultimately prove to be a more far-reaching, interagency initiative, one that keeps with the vision and actualized promise of the “Single Window,” by providing better visibility into the supply chain for CBP and PGAs, thereby further reducing paper processing, expediting cargo release, and enhancing the traceability of supply chains.

II. Authorization for the Test

The Customs Modernization Act authorizes the Commissioner of CBP to conduct limited test programs or procedures designed to evaluate planned components of the NCAP. The GBI EPoC is authorized pursuant to 19 CFR 101.9(b), which provides for the testing of NCAP programs or procedures. *See* T.D. 95–21, 60 FR 14211 (March 16, 1995).

III. Conditions for the Test

The test is voluntary, and importers of record and licensed customs brokers who wish to participate in the test must comply with all of the conditions set

forth below. The full effect of access to additional entity-related data based on submission of the GBIs will be a key evaluation metric of the test.

Participation in the test will provide test participants with the opportunity to test and give feedback to CBP on the GBI EPoC design and scope. Participation may also enable test participants to establish and test their digital fingerprints, such as more accurately identifying certain parties involved in their supply chains. In addition, participation may allow the trade community to better manage and validate their data and streamline their import data collection processes. Lastly, test participation may allow for the wider application of entity identifiers that are currently providing broad sector coverage and enhanced data analysis.

A. Obtaining Global Business Identifier (GBI) Numbers

Importers of record and licensed customs brokers who are interested in participating in the test must arrange to obtain any combination of the required D-U-N-S®, GLN, and LEI entity identifiers (the GBIs) from the manufacturers, shippers, and sellers of merchandise that are intended to be covered by future entries that will meet the conditions of the test (commodity + country of origin). For purposes of providing the information required for the test, the parties are defined as follows for each covered entry:

- **Manufacturer (or supplier)**—The party that last manufactures, assembles, produces, or grows the goods or the party supplying the finished goods in the country from which the goods are leaving for the United States.

- **Shipper**—The party that enters into a contract for carriage with, and arranges for delivery of the goods to, a carrier or transport intermediary for transportation to the United States.

- **Seller**—The last known party by whom the goods are sold or agreed to be sold. If the goods are to be imported otherwise than in pursuance of a purchase, the owner of the goods must be provided.

Optionally, test participants may also arrange to obtain the GBIs for exporters, distributors, and packagers that will be associated with these future entries and provide them to CBP on qualifying entries covered by this test.

A party may obtain its own GBI by contacting Dun and Bradstreet (D&B) at <https://www.dnb.com/duns-number.html>, regarding the D-U-N-S®; GS1 at <https://www.gs1.org/standards/id-keys/gln>, regarding the GLN; and the Global Legal Entity Identifier Foundation (GLEIF) at <https://>

www.gleif.org/en/about-lei/get-an-lei-find-lei-issuing-organizations, regarding the LEI.

Once the manufacturers, shippers, and sellers (and, optionally, the exporters, distributors, and packagers) have obtained their own GBIs (the D-U-N-S®, GLN, and LEI), these parties should provide the resulting GBIs to the relevant importer of record or licensed customs broker participating in the test. If these parties experience any difficulty with obtaining any of the GBIs, the importer of record or licensed customs broker seeking to participate in the test should reach out to CBP by email at GBI@cbp.dhs.gov. The test participant is not required to obtain or submit GBIs pertaining to its own entity.

Importers of record and licensed customs brokers are reminded that they are responsible for obtaining any necessary permissions with respect to providing to CBP the GBIs for manufacturers, shippers, and sellers (and, optionally, for exporters, distributors, and packagers) in the supply chains of the imported merchandise for which they file the specified types of entries subject to the conditions of the test (commodity + country of origin). Therefore, prior to submitting their request to participate in the test to CBP, as discussed below, importers of record and licensed customs brokers should consult with these parties to ensure that these parties are willing to grant any necessary permissions to share their GBIs (which will also result in CBP's access to the underlying GBI data associated with those GBIs, as described above) with CBP under the auspices of the test.

B. Submission of Request To Participate in the GBI EPoC

The test is open to all importers of record and licensed customs brokers provided that these parties have requested permission and are approved by CBP to participate in the test. Importers of record and licensed customs brokers seeking to participate in the test should email the GBI Inbox (GBI@cbp.dhs.gov) with the subject heading "Request to Participate in the GBI EPoC." As part of their request to participate, importers of record and licensed customs brokers must agree to provide available GBIs with entry filings for merchandise that is subject to the conditions of the test and state that they intend to participate in the test. The request must include the potential participant's filer code and evidence that it has obtained at least one of the three identifiers (D-U-N-S®, GLN, and LEI), or is in the process of obtaining an identifier, from the manufacturers,

shippers, and sellers (and, optionally, exporters, distributors, and packagers) of merchandise that is subject to the conditions of the test (commodity + country of origin). Potential participants must also advise that they intend to import commodities that are subject to the test from the countries of origin that are subject to the test.

Test participants who are importers of record and do not self-file must advise CBP in their request that they have authorized their licensed customs broker(s) to file qualifying entries under the test on their behalf. Test participants who are licensed customs brokers must advise CBP that they have been authorized to file qualifying entries on behalf of importers of record whose shipments meet the test criteria (commodity + country of origin), as set forth below.

CBP began accepting requests to participate in the test on December 2, 2022, and will continue to accept them until the test concludes. Anyone providing incomplete information, or otherwise not meeting the test requirements, will be notified by email, and given the opportunity to resubmit the request to participate in the test.

C. Approval of GBI EPoC Participants

A party who wishes to participate in this test is eligible to do so as long as it is an importer of record or licensed customs broker who files type 01 (formal) or type 11 (informal) entries of merchandise that meet the conditions of the test (commodity + country of origin), and that party obtains the required GBIs from its supply chain partners. After receipt of a request to participate in the test, CBP will notify, by email, the importers of record and licensed customs brokers who are approved for participation and inform them of the starting date of their participation (noting that test participants may have different starting dates). Test participants must provide the GBIs they have received to CBP prior to the starting date of their participation (participants will also provide the GBIs to CBP again with each qualified entry filing meeting the requirements of the test). Test participants are considered to be bound by the terms and conditions of this notice and any subsequent modifications published in the **Federal Register**.

D. Criteria for Qualifying Entries

1. Commodities Subject to the GBI EPoC

The test will be limited to type 01 and type 11 entries of certain commodities, specifically alcohol, toys, seafood, personal items, and medical devices.

Accordingly, CBP has limited the test to entries of merchandise classifiable in specific subheadings of Chapters 3, 16, 22, 30, 33, 63, 90, and 95 of the Harmonized Tariff Schedule of the United States (HTSUS), as set forth below.

Chapter 3: 0306.16.0003; 0306.16.0006; 0306.16.0009; 0306.16.0012; 0306.16.0015; 0306.16.0018; 0306.16.0021; 0306.16.0024; 0306.16.0027; 0306.16.0040; 0306.17.0004; 0306.17.0005; 0306.17.0007; 0306.17.0008; 0306.17.0010; 0306.17.0011; 0306.17.0013; 0306.17.0014; 0306.17.0016; 0306.17.0017; 0306.17.0019; 0306.17.0020; 0306.17.0022; 0306.17.0023; 0306.17.0025; 0306.17.0026; 0306.17.0028; 0306.17.0029; 0306.17.0041; 0306.17.0042; 0306.35.0020; 0306.35.0040; 0306.36.0020; 0306.36.0040; 0306.95.0020; and 0306.95.0040.

Chapter 16: 1605.21.0500; 1605.21.1020; 1605.21.1030; 1605.21.1050; 1605.29.0500; 1605.29.1010; and 1605.29.1040.

Chapter 22: 2203.00.0030; 2203.00.0060; 2203.00.0090; 2204.10.0030; 2204.10.0065; 2204.10.0075; 2204.21.5005; 2204.21.5015; 2204.21.5025; 2204.21.5028; 2204.21.5035; 2204.21.5040; 2204.21.5050; 2204.21.5055; 2204.21.5060; 2204.21.8030; 2204.21.8060; 2208.30.3030; 2208.30.3060; 2208.40.4000; and 2208.60.2000.

Chapter 30: 3005.90.5010; 3005.90.5090.

Chapter 33: 3304.99.5000.

Chapter 63: 6307.90.6800.

Chapter 90: 9018.39.0020; 9018.39.0040; 9018.39.0050; and 9018.90.8000.

Chapter 95: 9503.00.0011; 9503.00.0013; 9503.00.0071; 9503.00.0073; and 9503.00.0090.

Test participants are encouraged to submit GBIs with all qualified entry filings that meet the conditions of the test so that CBP has a fulsome data set to evaluate; however, entries will not be rejected if GBIs are not submitted. Additional commodities may be added as CBP refines the scope of the test. CBP will announce the HTSUS subheadings for any additional commodities as a modification to the test in a subsequent **Federal Register** notice.

2. Countries of Origin Subject to the GBI EPoC

CBP has limited the test to entries of imported merchandise with the

following countries of origin, which have been identified as representing both countries with a high risk of non-compliance with U.S. import laws and those that are partner countries, while covering a diversity of jurisdictions: (1) Australia; (2) Canada; (3) China; (4) France; (5) Italy; (6) Mexico; (7) New Zealand; (8) Singapore; (9) United Kingdom; and (10) Vietnam. Additional countries of origin may be added as CBP refines the scope of the test. CBP will announce any additional countries of origin as a modification to the test in a subsequent **Federal Register** notice.

E. Filing Entries With GBIs (via ABI in ACE)

Test participants must coordinate with their software vendors or technical teams to ensure that their electronic systems are capable of transmitting the D-U-N-S®, GLN, and LEI entity identifiers to CBP. During this test, CBP will only accept electronic submissions of GBIs via ABI in ACE with CBP Form 3461 (Entry/Immediate Delivery) filings for type 01 and type 11 entries. Upon selection to participate in the test, the test participants will be provided with technical information and guidance regarding the transmission of the GBIs to CBP with the CBP Form 3461 filings. The assigned ABI client representatives of the test participants will provide additional technical support, as needed.

F. CBP Access to Underlying GBI Data Associated With GBIs

As part of the test, CBP has entered into agreements with D&B, GS1, and GLEIF (the IMCs) for limited access to the underlying data (“GBI data”) that is associated with the GBIs for the duration of the test and for testing of CBP’s automated systems.¹ The data elements for which CBP has entered into agreements with D&B, GS1, and GLEIF may include, but are not limited to: (1) entity identifier numbers; (2) official business titles; (3) names; (4) addresses; (5) financial data; (6) trade names; (7) payment history; (8) economic status; and (9) executive names. The data elements will be examined as part of the test.

Consistent with the agreements, CBP may access GBI data, combine it with CBP data, and evaluate the GBIs that the test participants provide with an entry filing. The GBI data will assist CBP and PGAs in determining the optimal combination of the three entity

identifiers (the GBIs) that will provide the U.S. Government with sufficient entity data needed to support identification, monitoring, and enforcement procedures to better equip the U.S. Government to focus on high-risk shipments and bad actors.

CBP will process entries submitted pursuant to the test by analyzing the GBIs submitted via ABI in ACE and ensuring that the GBIs are submitted correctly. CBP will then evaluate the submitted entries to assess the ease and cost of obtaining each of the GBIs, evaluating each GBI to ensure that it is being submitted properly per the technical requirements that will be set forth in CBP and Trade Automated Interface Requirements (CATAIR), and ensuring that CBP is able to validate that each GBI is accurate using the underlying GBI data from the IMCs or otherwise known to CBP.

G. Partner Government Agencies (PGAs)

Partner Government Agencies (PGAs) are important to the success of the test. Certain PGAs, which may receive GBIs and GBI data and are intended as core test beneficiaries, may use the GBIs and GBI data to improve risk management and import compliance. This may result in smarter, more efficient, and more effective compliance efforts. CBP will announce the PGAs who will receive GBIs and GBI data pursuant to the test in a notice to be published in the **Federal Register** at a later date.

H. Duration of Test

The test began on December 19, 2022, and will run through February 14, 2024, subject to any extensions, modifications or early termination as announced by way of a notice to be published in the **Federal Register**.

I. Misconduct Under the Test

Misconduct under the test may include, but is not limited to, submitting false GBIs with an entry filing. Currently, CBP does not plan to assess penalties against GBI EPoC participants that fail to timely and accurately submit GBIs during the test. CBP also does not anticipate shipment delays due to the failure to file or the erroneous filing of GBIs. However, test participants are expected to follow all other applicable regulations and requirements associated with the entry process.

After an initial six-month period (or at such earlier time as CBP deems appropriate), a test participant may be subject to discontinuance from participation in this test for any of the following repeated actions:

- Failure to follow the terms and conditions of this test;

¹ As noted above, D&B, GS1, and GLEIF are IMCs. The GBI data consists of data provided by the relevant entity to the IMCs in order to generate a GBI—the D-U-N-S®, GLN, or LEI. GBIs allow CBP to link the underlying GBI data to specific entities and entries.

- Failure to exercise due diligence in the execution of participant obligations;
- Failure to abide by applicable laws and regulations that have not been waived; or
- Failure to deposit duties or fees in a timely manner.

If the Director, Interagency Collaboration Division (ICD), Trade Policy and Programs (TPP), Office of Trade (OT), finds that there is a basis to discontinue a participant's participation in the test, then CBP will provide written notice, via email, proposing the discontinuance with a description of the facts or conduct supporting the proposal. The test participant will be offered the opportunity to respond to the Director's proposal in writing within 10 business days of the date of the written notice. The response must be submitted to the ICD Director, TPP, OT, by emailing GBI@cbp.dhs.gov, with a subject line reading "Appeal—GBI Discontinuance."

The Director, ICD, will issue a final decision in writing on the proposed action within 30 business days after receiving a timely filed response from the test participant, unless such time is extended for good cause. If no timely response is received, the proposed notice becomes the final decision of CBP as of the date that the response period expires. A proposed discontinuance of a test participant's privileges will not take effect unless the response process under this paragraph has been concluded with a written decision that is adverse to the test participant, which will be provided via email.

J. Confidentiality

Data submitted and entered into the Automated Commercial Environment (ACE) may include confidential commercial or financial information which may be protected under the Trade Secrets Act (18 U.S.C. 1905), the Freedom of Information Act (5 U.S.C. 552), and the Privacy Act (5 U.S.C. 552a). However, as stated in previous notices, participation in this or any of the previous ACE tests is not confidential and, therefore, upon receipt of a written Freedom of Information Act request, the name(s) of an approved participant(s) will be disclosed by CBP in accordance with 5 U.S.C. 552.

IV. Comments on the Test

All interested parties are invited to comment on any aspect of this test at any time. CBP requests comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter,

expand, limit, continue, end, or fully implement this program. Comments should be submitted via email to GBI@cbp.dhs.gov, with the subject line reading "Comments/Questions on GBI EPoC."

V. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB).

The new GBI collection of information gathered under this test has been approved by OMB in accordance with the requirements of the PRA and assigned OMB control number 1651-0141. In addition, the Entry/Immediate Delivery Application and ACE Cargo Release (CBP Form 3461 and 3461 ALT) has been updated to accommodate the GBI test, and approved by OMB under OMB control number 1651-0024.

VI. Evaluation Criteria

The test is intended to evaluate the feasibility of replacing the current manufacturer or shipper identification code (MID) with unique entity identifiers (GBIs) to more accurately identify legal business entities, their different business locations and addresses, as well as their various functions and supply chain roles, based upon information derived from the unique D-U-N-S[®], GLN, and LEI entity identifiers. The test will assist CBP in enforcing applicable laws and protecting the revenue, while fulfilling trade modernization efforts by assisting the agency in verifying the roles, functions and responsibilities that various entities play in a given participant's importation of merchandise. CBP's evaluation of the test, including the review of any comments submitted to CBP during the duration of the test, will be ongoing with a view to possible extension or expansion of the test.

CBP will evaluate whether the test: (1) improves foreign entity data for trade facilitation, risk management, and statistical integrity; (2) ensures U.S. Government access to foreign entity data; (3) institutionalizes a global, managed identification system; (4) implements a cost-effective solution; (5) obtains stakeholder buy-in; and (6) facilitates legal compliance across the U.S. Government. At the conclusion of

the test, an evaluation will be conducted to assess the efficacy of the information received throughout the course of the test. The final results of the evaluation will be published in the **Federal Register** as required by section 101.9(b)(2) of the CBP regulations (19 CFR 101.9(b)(2)).

Should the GBI EPoC be successful and ultimately be codified under the CBP regulations, CBP anticipates that this data would greatly enhance ongoing trade entity identification and resolution, reduce risk, and improve compliance operations. CBP would also anticipate greater supply chain visibility and verified, validated information on legal entities, which will support better decision-making during customs clearance processes.

Dated: July 18, 2023.

John P. Leonard,

*Acting Executive Assistant Commissioner,
Office of Trade.*

[FR Doc. 2023-15497 Filed 7-20-23; 8:45 am]

BILLING CODE 9111-14-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-7075-N-07]

60-Day Notice of Proposed Information Collection: Evaluation of the Moving to Work (MTW) Expansion Asset Building Cohort, OMB Control No.: 2528-NEW

AGENCY: Office of Policy Development and Research, 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:* September 19, 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: Anna Guido, Reports Management Officer, REE, Department of Housing and Urban Development, 451 7th Street SW, Room 8210, Washington, DC 20410–5000 or email at PaperworkReductionActOffice@hud.gov.

FOR FURTHER INFORMATION CONTACT:

Anna Guido, Reports Management Officer, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410; email Anna Guido at Anna.P.Guido@hud.gov, telephone 202–402–5535 (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. Guido.

SUPPLEMENTARY INFORMATION: This notice informs the public that HUD is seeking approval from OMB for the information collection described in Section A.

A. Overview of Information Collection

Title of Information Collection: Evaluation of the Moving to Work (MTW) Expansion Asset Building Cohort.

OMB Approval Number: 2528–New.

Type of Request: New Collection.

Form Number: N/A.

Description of the need for the information and proposed use: The purpose of this proposed information collection is to evaluate the Moving to Work Expansion Asset Building Cohort (hereinafter “Asset Building Cohort”). This 60-day Notice informs the public of intent to collect data about the asset building programs implemented by the PHAs in the Asset Building Cohort and about the HUD-assisted residents selected to participate in the asset building programs.

HUD selected 18 Public Housing Agencies (PHAs) to participate in the Asset Building Cohort. Six of these PHAs have signaled intent to implement an opt-out savings program, 5 intend to pilot rent reporting for credit building, and 7 have designed custom asset building programs. The savings account and rent reporting programs are described in PIH Notice 2022–11. For the savings account program, PHAs will contribute at least \$10 per month for 24 months to at least 25 residents to support buildup of emergency savings.

For the rent reporting program, PHAs will report on-time rent payments made by participating public housing residents to credit agencies so that the residents’ credit reports will gain a tradeline (rental tradeline). The added rental tradeline may increase residents’ credit visibility and credit scores. HUD’s Office of Policy Development and Research (PD&R) will evaluate the impacts of these asset building programs. The evaluation requires data from several sources, including the new information collection described in this Notice.

The first phase of the evaluation of the Asset Building Cohort is guided by a few overarching questions: (1) What programs are PHAs implementing? What are the characteristics of the group of residents participating in the programs? (2) How do participants understand the programs? And what do the programs mean for them personally? The programs will run for two years. The first phase of the evaluation will collect data from the following samples:

(1) PHA staff (n = 54), staff of partner organizations (n = 18), and PHA residents (n = 32)

(2) Residents that volunteered for the rent reporting for credit building pilot program, including households that were randomly assigned to have their rent payments reported to credit agencies and households that were assigned to a control group (who don’t have their rent payments reported to credit agencies) (n = 300)

(3) Residents that volunteered for the rent reporting for credit building pilot program and agree to participate in in-depth qualitative interviews at up to four time points during the two years that the PHA is required to offer the program (n = 40)

The evaluator will conduct interviews of about 1 hour with staff from participating PHAs, organizational partners (e.g., a bank that partners with a PHA to set up savings accounts for unbanked residents), and PHA residents to better understand facilitators and challenges to starting and running the asset building programs. The evaluator will interview up to 3 staff per PHA at all 18 PHAs, up to 3 partners at 6 PHAs selected for in-depth case studies, and up to 8 residents at 4 of the case study PHAs.

Residents participating in the rent reporting programs must complete an Informed Consent Form (ICF) and Baseline Information Form (BIF). The BIF will provide important information not otherwise available from HUD’s administrative data, such as whether the household has significant barriers to employment. The BIF will take on

average 15 minutes to complete. After enrollment in the program, 40 participants, including 20 members of the treatment group and 20 members of the control group, will be asked to participate in qualitative interviews of about 90 minutes each at two different time points during the first year of the rent reporting programs. The qualitative interviews will focus on experiences with the rent reporting program, household budgeting, and the broader context of interactions with banking, credit, and financial institutions. The **Federal Register** Notice provides an opportunity to comment on the data collection instruments and associated materials to be administered to the respondents at PHAs (including staff and residents) in the Asset Building Cohort and at partner organizations.

Respondents: Adults who work at or are assisted by PHAs participating in the Asset Building Cohort.

Estimated Number of Respondents: Up to 54 PHA staff interviewees; up to 18 partner organization staff interviewees; up to 32 resident implementation interviewees; up to 300 residents who will complete the ICF and BIF for the rent reporting evaluation; up to 40 resident qualitative interviewees.

Estimated Time per Response: The ICF will take .25 hours to complete. The BIF will take .25 hours to complete. PHA and partner staff interviews will take on average 1 hour. Resident implementation interviews will take on average 1 hour. Resident qualitative interviews will take on average 1.5 hours.

Frequency of Response: Once.

Estimated Total Annual Burden Hours: The estimated annual total burden hours equals 125 with estimated cost of \$2,400.91. Total burden estimates are annualized over a 3-year period, anticipated to run from October 2023 to October 2026. The average hourly rate for HUD-assisted households (\$10.43 or \$11.05 depending on the states included in calculating the average) is based on the average minimum wage of the states the PHAs are located in. Data collection for the implementation interviews will occur at all participating PHAs in 14 states; data collection for interviews that apply only to rent reporting programs will occur in only 6 states. The average hourly rate for PHA staff (\$57.60) is based on the average employer costs for State and Local Government employees. The average hourly rate for partner organization staff (\$42.48) is based on the average employer costs for civilian employees. The source of this information is the Bureau of Labor

Statistics, December 2022 Employer Costs for Employee Compensation.

Legal Authority: The survey is conducted under Title 12, United States Code, Section 1701z.

Information collection	Assumption	Estimated respondents	Frequency of response	Burden hours per response	Annual burden hours	Hourly cost per response	Annual cost
Program Implementation PHA staff interview guide.	18 PHAs, 3 staff per PHA.	54	1	1	18	\$57.60	\$1,036.80
Program Implementation partner staff interview guide.	6 PHAs, 3 interviews per PHA.	18	1	1	6	42.48	254.88
Program Implementation resident interview guide.	4 PHAs, 8 interviews per PHA.	32	1	1	11	10.43	114.73
Rent Reporting Informed Consent Form.	6 PHAs, 25 Treatment and 25 Control residents per PHA.	300	1	.25	25	11.05	276.25
Rent Reporting Baseline Information Form.	6 PHAs, 25 Treatment and 25 Control residents per PHA.	300	1	.25	25	11.05	276.25
Rent Reporting Qualitative Interview Guide 1.	2 PHAs, 20 families per PHA.	40	1	1.5	20	11.05	221.00
Rent Reporting Qualitative Interview Guide 2.	2 PHAs, 20 families per PHA.	40	1	1.5	20	11.05	221.00

Total burden annualized over 3-year period, anticipated October 2023–October 2026.

The average hourly rate for HUD-assisted households is calculated as follows: (1) For the Program Implementation resident interview guide we averaged the minimum wages of all states in the Asset Building Cohort, which includes California, Connecticut, Florida, Iowa, Idaho, Illinois, Massachusetts, Maine, New Hampshire, New Jersey, Ohio, Oregon, and South Carolina, and calculate the average hourly minimum wage as \$10.43. (2) For the interviews that apply only to PHAs in the rent reporting study, we averaged the minimum wages of all states with a PHA in the rent reporting study, which includes Maine, Connecticut, New Hampshire, Florida, Illinois, and Idaho, and calculate the average hourly minimum wage as \$11.05.

The average hourly rate for PHA staff (\$57.60) is based on the average employer costs for State and Local Government employees (Source: Bureau of Labor Statistics, December 2022 Employer Costs for Employee Compensation).

The average hourly rate for partner organization staff (\$42.48) is based on the average employer costs for civilian employees (Source: Bureau of Labor Statistics, December 2022 Employer Costs for Employee Compensation).

Respondent's Obligation:
Participation is voluntary.

B. Solicitation of Public Comment

This notice is soliciting comments from members of the public and affected parties concerning the collection of information described in Section A on the following:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected, and

(4) Ways to minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

HUD encourages interested parties to submit comments in response to these questions.

C. Authority

Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507.

Kurt G. Usowski,
Deputy Assistant Secretary for Economic Affairs.

[FR Doc. 2023–15485 Filed 7–20–23; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0036223; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: California State University, Sacramento, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), California State University, Sacramento has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Sacramento County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after August 21, 2023.

ADDRESSES: Dr. Dianne Hyson, Dean of the College of Social Sciences and Interdisciplinary Studies, California State University, Sacramento, 6000 J Street, Sacramento, CA 95819, telephone (916) 278–6504, email dhyson@csus.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the

National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of California State University, Sacramento. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by California State University, Sacramento.

Description

Human remains representing, at minimum, three individuals were removed from CA-SAC-06 (also known as Johnson Mound) in Sacramento County, CA. These human remains and associated funerary objects came into the University's possession through donations by Anthony Zallio's estate (in 1951), the family of Charles McKee, and unknown individuals; and through a survey by the University's students (in 1974). Occupation of the site is estimated to have occurred during the Middle through Historic periods. No known individuals were identified. The 722 associated funerary objects consist of baked clay objects; basketry fragments; faunal and floral remains; flaked and ground stones; historic materials; unmodified stones; and modified bones, stones, and shells. Of this number, 15 objects are currently missing, and California State University, Sacramento continues to look for them.

Associated funerary objects were removed from site CA-SAC-21 (also known as Hollister Mound) in Sacramento County, CA, by Anthony Zallio and Charles McKee. These collections were subsequently donated to the University by their estates. Occupation of the site is estimated to have occurred during the Middle through Late periods. The 377 associated funerary objects consist of baked clay objects; faunal remains; flaked stones; historic materials; and modified bones, stones, and shells. Of this number, 25 objects are currently missing, and California State University, Sacramento continues to look for them.

Human remains representing, at minimum, 47 individuals were removed from site CA-SAC-56 (also known as Moser or Moshier Mound) in Sacramento County, CA. These human remains and associated funerary objects came into the University's possession through donations by Anthony Zallio's estate, the Bivens family, and unknown individuals; and through excavations and surveys conducted during 1958–1960 under the direction of Dr. William Beeson. Occupation of the site is

estimated to have occurred during the Middle through Historic periods. The 18,514 associated funerary objects consist of baked clay objects; basketry fragments; faunal and floral remains; flaked and ground stones; historic materials; unmodified stones; ash; modified bones, stones, and shells; textiles; and soil samples. Of this number, 22 objects are currently missing, and California State University, Sacramento continues to look for them.

Human remains representing, at minimum, one individual were removed from site CA-SAC-66 (also known as Morse Mound) in Sacramento County, CA. How these human remains and associated funerary objects came into the University's possession is unknown. Occupation of the site is estimated to have occurred during the Middle Period. The six associated funerary objects consist of flaked stones, modified bones, and modified stones. Of this number, one object is currently missing, and California State University, Sacramento continues to look for them.

Associated funerary objects were removed from site CA-SAC-72/73 (also known as Herzog and Van Lobensels Mound) in Sacramento County, CA, by Anthony Zallio and Charles McKee. These collections were subsequently donated to the University by their estates. Occupation of the site is estimated to have occurred during the Middle through Late periods. The 260 associated funerary objects consist of baked clay objects; faunal remains; flaked stones; unmodified stones; and modified bones, stones, and shells. Of this number, 23 objects are currently missing, and California State University, Sacramento continues to look for them.

An associated funerary object was removed from site CA-SAC-75 (also known as Locke Mound) in Sacramento County, CA, by Anthony Zallio. This object was donated to the University by his estate. Aside from a Historic Period component, occupation of the site is not well known. The one associated funerary object is a modified stone.

Associated funerary objects were removed from site CA-SAC-85 (also known as Nicholas Site #2) in Sacramento County, CA, by Anthony Zallio. This collection was donated to the University by his estate. Occupation of the site is estimated to have occurred during the Late through Historic periods. The 51 associated funerary objects consist of flaked stones, modified shells, and modified stones. Of this number, seven objects are currently missing, and California State University, Sacramento continues to look for them.

Human remains representing, at minimum, one individual were removed

from site CA-SAC-106 (also known as Castello Mound) in Sacramento County, CA. These human remains and associated funerary objects came into the University's possession through both a 1965 survey conducted under the direction of Dr. William Beeson and a donation by Anthony Zallio's estate. Occupation of the site is estimated to have occurred during the Middle Period. The 17 associated funerary objects consist of flaked stones, modified shells, and historic materials.

Human remains representing, at minimum, two individuals were removed from site CA-SAC-107 (also known as the Windmill site) in Sacramento County, CA. These human remains and associated funerary objects came into the University's possession through, variously, a 1953 excavation under the direction of Dr. Richard Reeve, a 1974 survey by students of the University, a donation by Anthony Zallio's estate, and a donation by the University of California, Berkeley. Occupation of the site is estimated to have occurred during the Early through Historic periods. The 88 associated funerary objects consist of flaked and ground stones; modified shells, bones, and stones; baked clay objects; and unmodified stones. Of this number, 44 objects are currently missing from the collections, and California State University, Sacramento continues to look for them.

Human remains representing, at minimum, eight individuals were removed from site CA-SAC-126 (also known as the Booth site) in Sacramento County, CA. How these human remains came into the University's possession is not known. A date range for occupation of this site is not known. No associated funerary objects are present.

Associated funerary objects were removed from site CA-SAC-Fessler Mound in Sacramento County, CA by Anthony Zallio. This collection was donated to the University by his estate. A date range for occupation of this site is not known. The 101 associated funerary objects consist of flaked stones, and modified shells, bones, wood, and stones. Of this number, one object is currently missing, and California State University, Sacramento continues to look for them.

Associated funerary objects were removed from site CA-SAC-Oak Tree in Sacramento County, CA by Anthony Zallio. This collection was donated to the University by his estate. A date range for occupation of this site is not known. The 1,428 associated funerary objects consist of modified bones and shells. Of this number, seven objects are currently missing, and California State

University, Sacramento continues to look for them.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, folkloric, geographical, historical, kinship, linguistic, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, California State University, Sacramento has determined that:

- The human remains described in this notice represent the physical remains of 62 individuals of Native American ancestry.
- The 21,565 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Buena Vista Rancheria of Me-Wuk Indians of California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Band of Miwok Indians; Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; and the Wilton Rancheria, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that

the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, California State University, Sacramento must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. California State University, Sacramento is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15520 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS-WASO-NAGPRA-NPS0036224;
PPWOCRADN0-PCU00RP14.R50000]**

Notice of Inventory Completion: California State University, Chico, Chico, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California State University Chico (CSU Chico) has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Butte County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after August 21, 2023.

ADDRESSES: Dawn Rewolinski, California State University, Chico, 400 W 1st Street, Chico, CA 95929, telephone (530) 898-3090, email drewolinski@csuchico.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative

responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of CSU Chico. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by CSU Chico.

Description

Accession 11

Human remains representing, at minimum, four individuals were removed from the Coleman Rock Shelter site in Butte County, CA. This site was first recorded by Eric Ritter in 1961 and was rerecorded by Keith Johnson of CSU Chico in 1964. When looting by local teenagers unearthed human remains in 1964, the Butte County Sheriff's Department was notified. Records suggest that these human remains were held by the Sheriff's Department and eventually were transferred to CSU Chico. In 1965, a CSU Chico field class excavated the site under the direction of Keith Johnson. The 199 associated funerary objects are five organics, 23 lots consisting of debitage, 71 modified stones, 60 projectile points, two modified shells, one ash sample, two pieces of petrified wood, one soil sample, 14 unmodified faunal elements, 10 modified faunal elements, three pieces of modified clay, two ochre samples, and five modified organics.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the California State University, Chico has determined that:

- The human remains described in this notice represent the physical remains of four individuals of Native American ancestry.
- The 199 objects described in this notice are reasonably believed to have

been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Berry Creek Rancheria of Maidu Indians of California; Enterprise Rancheria of Maidu Indians of California; and the Mechoopa Indian Tribe of Chico Rancheria, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice and, if joined to a request from one or more of the Indian Tribes, the Konkow Valley Band of Maidu, a non-federally recognized Indian group.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, CSU Chico must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. CSU Chico is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15522 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0036228; PPWOCRADN0-PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Gilcrease Museum, Tulsa, OK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Gilcrease Museum intends to repatriate certain cultural items that meet the definitions of both sacred objects and objects of cultural patrimony and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Shasta County, CA, and from northern California.

DATES: Repatriation of the cultural items in this notice may occur on or after August 21, 2023.

ADDRESSES: Laura Bryant, Gilcrease Museum, 800 South Tucker Drive, Tulsa, OK 74104, telephone (918) 596-2747, email laura-bryant@utulsa.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Gilcrease Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Gilcrease Museum.

Description

One cultural item was removed from Shasta County, California. The date and means of acquisition are unknown. The sacred object and object of cultural patrimony is a stone pipe bowl and stem.

Two cultural items were removed from unknown sites in northern California. One was collected in the early 20th century by an aunt of Bob Lengacher and later donated to Gilcrease Museum. The other was collected by William Patterson, who donated it to Gilcrease Museum in 1986. The two sacred objects and objects of cultural patrimony are baskets.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of

shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, geographical, historical, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Gilcrease Museum has determined that:

- The three cultural items described above are specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents.
- The three cultural items described above have ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Paskenta Band of Nomlaki Indians of California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, the Gilcrease Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. The Gilcrease Museum is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–15526 Filed 7–20–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS–WASO–NAGPRA–NPS0036225;
PPWOCRADN0–PCU00RP14.R50000]**

Notice of Intent To Repatriate Cultural Items: California State University, Chico, Chico, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), California State University Chico (CSU Chico) intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Butte County, CA.

DATES: Repatriation of the cultural items in this notice may occur on or after August 21, 2023.

ADDRESSES: Dawn Rewolinski, California State University, Chico, 400 W 1st Street, Chico, CA 95929, telephone (530) 898–3090, email drewolinski@csuchico.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of CSU Chico. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by CSU Chico.

Description

Accession 12

In 1962, nine cultural items were removed from Guill Ranch Mound (CA–BUT–446), in Butte County, CA. The unassociated funerary objects were collected when the site was partially destroyed through gravel mining for the portion of Highway 99 that runs through Lower Bidwell Park. Dorothy Hill recorded the site and collected these cultural items. Although the site record states that one burial was discovered, CSU Chico neither has control of any

human remains nor any knowledge of the whereabouts of any human remains from this site. The nine unassociated funerary objects are one modified stone, four projectile points, and four oversized stone tools.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, historical, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, CSU Chico has determined that:

- The nine cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Mechoopda Indian Tribe of Chico Rancheria, California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, CSU Chico must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. CSU Chico is responsible for sending a copy of this

notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–15523 Filed 7–20–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

**[NPS–WASO–NAGPRA–NPS0036218;
PPWOCRADN0–PCU00RP14.R50000]**

Notice of Inventory Completion: California State University, Los Angeles, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), California State University, Los Angeles has completed an inventory of human remains (hereafter referred to as “ancestors”) in consultation with the appropriate Indian Tribes or Native Hawaiian organizations and has determined that there is a cultural affiliation between the ancestors and Indian Tribes or Native Hawaiian organizations in this notice. The ancestors were removed from Mariposa County, CA.

DATES: Repatriation of the ancestors in this notice will occur on or after August 21, 2023.

ADDRESSES: Michele Bleuze, California State University, 5151 State University Drive, Los Angeles, CA 90032, telephone (323) 343–2440, email mbleuze@calstatela.edu and Amira Ainis, California State University, 5151 State University Drive, Los Angeles, CA 90032, telephone (323) 343–2449, email aainis2@calstatela.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of California State University, Los Angeles. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held

by California State University, Los Angeles.

Description

A minimum of two ancestors were removed from two burials during excavation at the Hackney Site (CA-MRP-283), in Mariposa County, CA. At the time of the excavation, Mr. Ray Hackney was the landowner of the property. The excavation was carried out by California State University, Fresno and California State University, Los Angeles in 1972. That same year, Fred M. Reinman, a faculty member in the Department of Anthropology at California State University, likely brought the collection to California State University, Los Angeles. Burial I was found tightly flexed and partially disturbed, and the decedent is estimated to be a young male (~25 years of age) with an estimated stature of 168 cm. Burial II was highly fragmentary, and the decedent is estimated to be six years old. The above information was reported by F. K. Mulligan and D. E. Sanburg, Jr., in 1972. No associated funerary objects are present.

Cultural Affiliation

The ancestors in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: geographical, archeological, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, California State University, Los Angeles has determined that:

- Pursuant to 25 U.S.C. 3001(9), the ancestors described in this notice represent the physical remains of two individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American ancestors described in this notice and the Chicken Ranch Rancheria of Me-Wuk Indians of California; Northfork Rancheria of Mono Indians of California; Picayune Rancheria of Chukchansi Indians of California; Tule River Indian Tribe of the Tule River Reservation, California; and the Tuolumne Band of Me-Wuk

Indians of the Tuolumne Rancheria of California.

Requests for Repatriation

Written requests for repatriation of the ancestors in this notice must be sent to the Responsible Officials identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice and, if joined to a request from one or more of the Indian Tribes, the Nashville Enterprise Miwok-Maidu-Nishinam Tribe; Northern Valley Yokuts; Southern Sierra Miwuk Nation; and the Wuksache Indian Tribe/Eshom Valley Band, non-federally recognized Indian groups.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the ancestors in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, California State University, Los Angeles must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the ancestors are considered a single request and not competing requests. California State University, Los Angeles is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15518 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0036217; PPWOCRADNO-PCU00RP14.R50000]

Notice of Inventory Completion: Eastern California Museum, Independence, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Eastern California Museum (ECM) has completed an inventory of human remains and has determined that there

is no cultural affiliation between the human remains and any Indian Tribe. The human remains were removed from Inyo County, CA.

DATES: Disposition of the human remains in this notice may occur on or after the August 21, 2023.

ADDRESSES: Shawn E. Lum, Eastern California Museum, 155 Grant Street, P.O. Box 206, Independence, CA 93526, telephone (760) 878-0258, email ecmuseum@inyocounty.us.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of Eastern California Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by Eastern California Museum.

Description

Human remains representing, at minimum, one individual were removed from Inyo County, CA. The human remains (ECM Accession #A699/NL4) were found East of Big Pine by the donor, Ed Matlick, of Bishop, CA, and were gifted to Eastern California Museum on March 15, 1958. The human remains—a human skull—belong to an individual of unknown age and sex. No associated funerary objects are present.

Aboriginal Land

The human remains in this notice were removed from known geographic locations. These locations are the aboriginal lands of one or more Indian Tribes. The following information was used to identify the aboriginal land: a final judgment of the Indian Claims Commission.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes, Eastern California Museum has determined that:

- The human remains described in this notice represent the physical remains of one individual of Native American ancestry.
- No relationship of shared group identity can be reasonably traced between the human remains and any Indian Tribe.
- The human remains described in this notice were removed from the aboriginal land of the Big Pine Paiute Tribe of the Owens Valley.

Requests for Disposition

Written requests for disposition of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for disposition may be submitted by:

1. Any one or more of the Indian Tribes identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization, or who shows that the requestor is an aboriginal land Indian Tribe.

Disposition of the human remains described in this notice to a requestor may occur on or after the August 21, 2023. If competing requests for disposition are received, Eastern California Museum must determine the most appropriate requestor prior to disposition. Requests for joint disposition of the human remains are considered a single request and not competing requests. Eastern California Museum is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9 and 10.11.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15517 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0036227;
PPWOCRADN0-PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Gilcrease Museum, Tulsa, OK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Gilcrease Museum intends to repatriate a certain cultural item that meets the definition of an object of cultural patrimony and that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural item was removed from Jefferson County, WA.

DATES: Repatriation of the cultural item in this notice may occur on or after August 21, 2023.

ADDRESSES: Laura Bryant, Gilcrease Museum, 800 S Tucker Drive, Tulsa, OK 74104, telephone (918) 596-2747, email laura-bryant@utulsa.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Gilcrease Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Gilcrease Museum.

Description

One cultural item was removed from Port Townsend, Jefferson County, WA. Frank Engles, who worked and collected in the Seattle area in the early 20th century, acquired this item during that time. Thomas Gilcrease purchased Engles's collection in 1950. Gilcrease transferred his collection to the City of Tulsa in 1955 and 1963-1964. The object of cultural patrimony is a wooden rattle.

Cultural Affiliation

The cultural item in this notice is connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, geographical, and other relevant information (including museum records).

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Gilcrease Museum has determined that:

- The one cultural item described above has ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural item and the Jamestown S'Klallam Tribe.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the Responsible

Official identified in **ADDRESSES**.

Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, the Gilcrease Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The Gilcrease Museum is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15525 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0036219;
PPWOCRADN0-PCU00RP14.R50000]

Notice of Inventory Completion: California State University, Sacramento, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California State University, Sacramento has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Yolo County, CA.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after August 21, 2023.

ADDRESSES: Dr. Dianne Hyson, Dean of the College of Social Sciences and Interdisciplinary Studies, California

State University, Sacramento, 6000 J Street, Sacramento, CA 95819, telephone (916) 278-6504, email dhyson@csus.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of California State University, Sacramento. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by California State University, Sacramento.

Description

Human remains representing, at minimum, two individuals were removed from CA-YOL-30 in Yolo County, CA. These human remains and associated funerary objects came into the University's possession through a 1960 survey carried out by a field class under the direction of Dr. William Beeson. Occupation of the site is estimated to have occurred during the Late Period. The 10 associated funerary objects consist of faunal remains, thermally-altered rocks, modified shells, and unmodified stones.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archaeological, folkloric, geographical, historical, kinship, linguistic, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, California State University, Sacramento has determined that:

- The human remains described in this notice represent the physical remains of two individuals of Native American ancestry.
- The 10 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or

later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Buena Vista Rancheria of Me-Wuk Indians of California; Cachil DeHe Band of Wintun Indians of the Colusa Indian Community of the Colusa Rancheria, California; Chicken Ranch Rancheria of Me-Wuk Indians of California; Ione Band of Miwok Indians of California; Jackson Band of Miwok Indians; Kletsel Dehe Wintun Nation of the Cortina Rancheria (*Previously* listed as Kletsel Dehe Band of Wintun Indians); Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California; United Auburn Indian Community of the Auburn Rancheria of California; Wilton Rancheria, California; and the Yocha Dehe Wintun Nation, California.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.
2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, California State University, Sacramento must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. California State University, Sacramento is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15519 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NRNL-DTS#-0936201; PPWOCRADIO, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before July 8, 2023, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by August 7, 2023.

ADDRESSES: Comments are encouraged to be submitted electronically to *National Register Submissions@nps.gov* with the subject line "Public Comment on <property or proposed district name, (County) State>." If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT:

Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, sherry_frear@nps.gov, 202-913-3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before July 8, 2023. Pursuant to section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers

Key: State, County, Property Name, Multiple Name (if applicable), Address/Boundary, City, Vicinity, Reference Number.

FLORIDA**Sumter County**

Community of Royal Rural Historic District,
Bounded by Cty. Rd. 475, Cty. Rd. 216A,
Cty. Rd. 223, and US Hwy 44, Wildwood
vicinity, SG100009226

MARYLAND**Baltimore Independent City**

Market Center Historic District (Boundary
Increase), Block bounded by Druid Hill
Ave., West Centre St., North Howard St.,
West Monument St., and North Eutaw St.,
Baltimore, BC100009235

NORTH CAROLINA**Buncombe County**

Miller, Boyce K. and Kitzi McLamb, House,
5 Hemphill Rd., Asheville vicinity,
SG100009224

Burke County

Waldensian Swiss Embroidery Company—
Valdese Weavers, Inc. Mill, 108 Praley St.
SW, Valdese, SG100009230

Caswell County

Wemple-Shelton House, 2215 US 158 West,
Yanceyville vicinity, SG100009231

Chowan County

Frinks, Golden Asro and Ruth Holley, House,
122 West Peterson St., Edenton,
SG100009229

Forsyth County

Coan-Gray House, 1121 Arbor Rd., Winston-
Salem, SG100009227

Pamlico County

Holt's Chapel School, (Rosenwald School
Building Program in North Carolina MPS),
136 Janiero Rd., Oriental vicinity,
MP100009232

Wayne County

Uzzell-Best Farm, 1361 New Hope Rd., La
Grange vicinity, SG100009228

OHIO**Summit County**

Glendale Steps, 65–99 Glendale Ave., Akron,
SG100009237

PENNSYLVANIA**Philadelphia County**

Esherick, Margaret, House, 204 Sunrise Ln.,
Philadelphia, SG100009239
First Baptist Church of Germantown, 40 East
Price St., Philadelphia, SG100009240

Schuylkill County

Fighter's Heaven, 58 Sculps Hill Rd.,
Orwigsburg, SG100009238
A request for removal has been made for
the following resource:

OREGON**Grant County**

Sumpter Valley Railway, Middle Fork-John
Day River, Sumpter Valley Railway's
Middle Fork Spur between Bates and
Susanville, Bates vicinity, OT87001066

Authority: Section 60.13 of 36 CFR
part 60.

Dated: July 12, 2023.

Sherry A. Frear,

*Chief, National Register of Historic Places/
National Historic Landmarks Program.*

[FR Doc. 2023–15455 Filed 7–20–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR**National Park Service**

**[NPS–WASO–NAGPRA–NPS0036241;
PPWOCRADNO–PCU00RP14.R50000]**

**Notice of Inventory Completion:
Peabody Museum of Archaeology and
Ethnology, Harvard University,
Cambridge, MA**

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Peabody Museum of Archaeology and Ethnology, Harvard University (PMAE) has completed an inventory of human remains and has determined that there is a cultural affiliation between the human remains and Indian Tribes or Native Hawaiian organizations in this notice. The human remains were collected at St. Michael's Mission in Fremont County, WY.

DATES: Repatriation of the human remains in this notice may occur on or after August 21, 2023.

ADDRESSES: Jane Pickering, Peabody Museum of Archaeology and Ethnology, Harvard University, 11 Divinity Avenue, Cambridge, MA 02138, telephone (617) 496–2374, email jpickering@fas.harvard.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the PMAE. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the PMAE.

Description

Human remains representing, at minimum, 18 individuals were collected at St. Michael's Mission in Ethete, Fremont County, WY. The human remains are hair clippings collected from individuals identified as "Arapaho." Four individuals were

recorded as being 14 years old, three individuals were recorded as 15 years old, two individuals were recorded as 16 years old, two individuals were recorded as 17 years old, two individuals were recorded as 21 years old, one individual was recorded as 30 years old, one individual was recorded as 32 years old, one individual was recorded as 48 years old, and two individuals were recorded as "adult." A. Abbott Hastings took the hair clippings at St. Michael's Mission in Ethete, Fremont County, Wyoming between 1930 and 1933. Hastings sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Human remains representing, at minimum, four individuals were collected at St. Michael's Mission in Ethete, Fremont County, WY. The human remains are hair clippings collected from individuals identified as "Arapaho; Gros Ventre." One individual was recorded as being 16 years old, one individual was recorded as 17 years old, one individual was recorded as 24 years old, and one individual was recorded as 49 years old. A. Abbott Hastings took the hair clippings at St. Michael's Mission in Ethete, Fremont County, Wyoming between 1930 and 1933. Hastings sent the hair clippings to George Woodbury, who donated the hair clippings to the PMAE in 1935. No associated funerary objects are present.

Cultural Affiliation

The human remains in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: kinship and anthropological.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate lineal descendants, Indian Tribes, and Native Hawaiian organizations, the PMAE has determined that:

- The human remains described in this notice represent the physical remains of 22 individuals of Native American ancestry.
- There is a relationship of shared group identity that can be reasonably traced between the human remains described in this notice and the

Northern Arapaho Tribe of the Wind River Reservation, Wyoming.

Requests for Repatriation

Written requests for repatriation of the human remains in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, the PMAE must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains are considered a single request and not competing requests. The PMAE is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15528 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS-WASO-NAGPRA-NPS0036229;
PPWOCRADN0-PCU00RP14.R50000]

Notice of Inventory Completion: Gilcrease Museum, Tulsa, OK

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Gilcrease Museum has completed an inventory of human remains and associated funerary objects and has determined that there is a cultural affiliation between the human remains and associated funerary objects and Indian Tribes or Native Hawaiian organizations in this notice. The human remains and associated funerary objects were removed from Arkansas.

DATES: Repatriation of the human remains and associated funerary objects in this notice may occur on or after August 21, 2023.

ADDRESSES: Laura Bryant, Gilcrease Museum, 800 S Tucker Drive, Tulsa, OK 74104, telephone (918) 596-2747, email laura-bryant@utulsa.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Gilcrease Museum. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the inventory or related records held by the Gilcrease Museum.

Description

Human remains representing, at minimum, two individuals were removed from an unknown location in Arkansas. The avocational archeologist Frank Soday removed these human remains in November of 1981. In 1982, Frank and Norma Soday's collection was purchased by the Thomas Gilcrease Association and then gifted to Gilcrease Museum. The human remains belong to an adult of unknown sex and an individual of unknown sex and age. The four associated funerary objects are one lot consisting of pottery sherds, one lot consisting of lithics, one lot consisting of faunal bones, and one lot consisting of lithics, faunal bones, and metal.

Human remains representing, at minimum, four individuals were removed from an unknown location in Arkansas. The human remains belong to three adults and one infant (six months to one year old). No associated funerary objects are present.

Cultural Affiliation

The human remains and associated funerary objects in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: archeological, geographical, oral traditional, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian

organizations, the Gilcrease Museum has determined that:

- The human remains described in this notice represent the physical remains of six individuals of Native American ancestry.

- The four objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.

- There is a relationship of shared group identity that can be reasonably traced between the human remains and associated funerary objects described in this notice and the Caddo Nation of Oklahoma; Quapaw Nation; and The Osage Nation.

Requests for Repatriation

Written requests for repatriation of the human remains and associated funerary objects in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by:

1. Any one or more of the Indian Tribes or Native Hawaiian organizations identified in this notice.

2. Any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the human remains and associated funerary objects in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, the Gilcrease Museum must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the human remains and associated funerary objects are considered a single request and not competing requests. The Gilcrease Museum is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.9, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15527 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS-WASO-NAGPRA-NPS0036220;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: California State University, Sacramento, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the California State University, Sacramento, Sacramento, CA intends to repatriate certain cultural items that meet the definition of unassociated funerary objects and that have a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural items were removed from Sacramento and Yolo Counties, CA.

DATES: Repatriation of the cultural items in this notice may occur on or after August 21, 2023.

ADDRESSES: Dr. Dianne Hyson, Dean of the College of Social Sciences and Interdisciplinary Studies, California State University, Sacramento, 6000 J Street, Sacramento, CA 95819, telephone (916) 278-6504, email dhyson@csus.edu.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of California State University, Sacramento. The National Park Service is not responsible for the determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by California State University, Sacramento.

Description

The 1,061 cultural items were removed from several sites in Sacramento and Yolo Counties, CA. These sites include CA-SAC-01, CA-SAC-25, CA-SAC-28, CA-SAC-35, CA-SAC-43, CA-SAC-64, CA-SAC-109, CA-SAC-111, CA-SAC-197, CA-SAC-Sherman Island, CA-SAC-Unknown, CA-YOL-29, CA-YOL-53, CA-YOL-54, and unknown locations in these counties. Many of these cultural items were part of collections donated to California State University, Sacramento by private collectors, among them Anthony Zallio and Charles

McKee. Collections from CA-SAC-109, CA-YOL-29 and CA-YOL-53 derive from surveys led by William Beeson for Sacramento State College (now California State University, Sacramento). The 1,061 unassociated funerary objects consist of faunal and floral remains; baked clay objects; flaked and ground stones; thermally-altered rocks; unmodified stones; historic materials; and modified bones, shells, and stones. Of this number, 15 objects are currently missing, and California State University, Sacramento continues to look for them.

Cultural Affiliation

The cultural items in this notice are connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following types of information were used to reasonably trace the relationship: anthropological, archeological, folkloric, geographical, historical, kinship, linguistic, oral traditional, other relevant information, and expert opinion.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, California State University, Sacramento has determined that:

- The 1,061 cultural items described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Ione Band of Miwok Indians of California and the Wilton Rancheria, California.

Requests for Repatriation

Additional, written requests for repatriation of the cultural items in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated

Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural items in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, California State University, Sacramento must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural items are considered a single request and not competing requests. California State University, Sacramento is responsible for sending a copy of this notice to the Indian Tribes identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023-15521 Filed 7-20-23; 8:45 am]

BILLING CODE 4312-52-P

DEPARTMENT OF THE INTERIOR**National Park Service**

[NPS-WASO-NAGPRA-NPS0036226;
PPWOCRADNO-PCU00RP14.R50000]

Notice of Intent To Repatriate Cultural Items: Lyon County Historical Society, Marshall, MN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: In accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), the Lyon County Historical Society intends to repatriate a certain cultural item that meets the definition of an unassociated funerary object and that has a cultural affiliation with the Indian Tribes or Native Hawaiian organizations in this notice. The cultural item was removed from Lyon County, MN.

DATES: Repatriation of the cultural item in this notice may occur on or after August 21, 2023.

ADDRESSES: Jennifer Andries, Lyon County Historical Society, 301 West Lyon Street, Marshall, MN 56258, telephone (507) 537-6580, email director@lyoncomuseum.org.

SUPPLEMENTARY INFORMATION: This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA. The determinations in this notice are the sole responsibility of the Lyon County Historical Society. The National Park Service is not responsible for the

determinations in this notice. Additional information on the determinations in this notice, including the results of consultation, can be found in the summary or related records held by the Lyon County Historical Society.

Description

The one cultural item was removed from Lyon County, MN. Known as the Camden Vase, this unassociated funerary object is a small, shell-tempered pottery vessel. It was removed by George Chamberlain from a burial mound in 1934, near what is today, Camden State Park, in southwestern Minnesota. In 1972, Chamberlain's son, Horace Chamberlain, donated the object to the Lyon County Historical Society.

The mound from which the unassociated funerary object was removed belonged to a group of mounds, all of which were completely obliterated from the landscape during road construction in the mid-1960s. Archeologists associate these mounds with the Oneota cultural tradition (circa A.D. 1000–1500). The Oneota, an agricultural society linked to the Mississippian culture at Cahokia, in southern Illinois, is thought to be ancestral to the present-day Ojibwe and Iowa.

Cultural Affiliation

The cultural item in this notice is connected to one or more identifiable earlier groups, tribes, peoples, or cultures. There is a relationship of shared group identity between the identifiable earlier groups, tribes, peoples, or cultures and one or more Indian Tribes or Native Hawaiian organizations. The following type of information was used to reasonably trace the relationship: archeological.

Determinations

Pursuant to NAGPRA and its implementing regulations, and after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, the Lyon County Historical Society has determined that:

- The one cultural item described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual.
- There is a relationship of shared group identity that can be reasonably traced between the cultural items and the Iowa Tribe of Kansas and Nebraska.

Requests for Repatriation

Additional, written requests for repatriation of the cultural item in this notice must be sent to the Responsible Official identified in **ADDRESSES**. Requests for repatriation may be submitted by any lineal descendant, Indian Tribe, or Native Hawaiian organization not identified in this notice who shows, by a preponderance of the evidence, that the requestor is a lineal descendant or a culturally affiliated Indian Tribe or Native Hawaiian organization.

Repatriation of the cultural item in this notice to a requestor may occur on or after August 21, 2023. If competing requests for repatriation are received, the Lyon County Historical Society must determine the most appropriate requestor prior to repatriation. Requests for joint repatriation of the cultural item are considered a single request and not competing requests. The Lyon County Historical Society is responsible for sending a copy of this notice to the Indian Tribe identified in this notice.

Authority: Native American Graves Protection and Repatriation Act, 25 U.S.C. 3003, and the implementing regulations, 43 CFR 10.8, 10.10, and 10.14.

Dated: July 14, 2023.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2023–15524 Filed 7–20–23; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM–2023–0038]

Notice of Availability of the Revolution Wind Farm and Revolution Wind Export Cable Project Final Environmental Impact Statement

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Notice of availability; final environmental impact statement.

SUMMARY: The Bureau of Ocean Energy Management (BOEM) announces the availability of the final environmental impact statement (FEIS) for the construction and operations plan (COP) submitted by Revolution Wind, LLC (Revolution Wind) for its proposed Revolution Wind Farm and Revolution Wind Export Cable Project (Project) offshore Rhode Island. The FEIS analyzes the potential environmental impacts of the Project as described in the COP (the proposed action) and the alternatives to the proposed action. The

FEIS will inform BOEM's decision whether to approve, approve with modifications, or disapprove the COP.

ADDRESSES: The FEIS and detailed information about the Project, including the COP, can be found on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/revolution-wind>.

FOR FURTHER INFORMATION CONTACT:

Jessica Stromberg, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, VAM–OREP, Sterling, Virginia 20166, (703) 787–1730 or jessica.stromberg@boem.gov.

SUPPLEMENTARY INFORMATION:

Proposed Action: Revolution Wind seeks approval to construct, operate, and maintain the Project on the Outer Continental Shelf (OCS) offshore Rhode Island. The Project would be developed within the range of design parameters outlined in the Revolution Wind COP, subject to applicable mitigation measures. The Project, as proposed in the COP, would have a maximum capacity ranging between 704 and 880 megawatts, would include up to 100 wind turbine generators connected by a network of inter-array cables, up to 2 offshore substations, an offshore cable linking the two substations, up to 2 export cables making landfall in North Kingstown, Rhode Island, 1 onshore substation, and 1 interconnection facility that would connect to the regional onshore transmission grid at The Narragansett Electric Company Davisville Substation. The Project would be located on the OCS approximately 15 nautical miles (18 statute miles) southeast of Point Judith, Rhode Island, within an area defined by Renewable Energy Lease OCS–A 0486. The offshore export cables would be buried below the seabed in the OCS and State of Rhode Island- owned submerged lands. The cable landfall, onshore substation, and interconnection facility would be located in North Kingstown, Rhode Island.

Alternatives: BOEM considered 18 alternatives when preparing the draft environmental impact statement (DEIS), then included 3 additional alternatives based on public comments received on the DEIS and carried forward 7 alternatives for further analysis in the FEIS. These seven alternatives include six action alternatives and the no action alternative. Fourteen alternatives were not carried forward because they did not meet the purpose and need for the proposed action or did not meet screening criteria, which are presented in FEIS chapter 2 and appendix K. The screening criteria included consistency with law and regulations; technical and

economic feasibility; environmental impacts; and geographic considerations.

Availability of the FEIS: The FEIS, Revolution Wind COP, and associated information are available on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/revolution-wind>. BOEM has distributed digital copies of the FEIS to all parties listed in FEIS appendix H. If you require a digital copy on a flash drive or a paper copy, BOEM will provide one upon request, as long as these materials are available. You may request a flash drive or paper copy of the FEIS by contacting Laura Lee Wolfson at (703) 787-1433 or Lauralee.wolfson@boem.gov.

Cooperating Agencies: The following Federal agencies and State governmental entities participated as cooperating agencies in the preparation of the FEIS: Bureau of Safety and Environmental Enforcement; Environmental Protection Agency; National Marine Fisheries Service; U.S. Army Corps of Engineers; U.S. Coast Guard; Massachusetts Office of Coastal Zone Management; Rhode Island Coastal Resources Management Council; and the Rhode Island Department of Environmental Management. The Advisory Council on Historic Preservation; National Park Service; Federal Aviation Administration; Department of Defense; U.S. Fish and Wildlife Service; and Department of the Navy participated as a participating agency.

Authority: 42 U.S.C. 4231 *et seq.* (NEPA, as amended) and 40 CFR 1506.6.

Karen Baker,
Chief, Office of Renewable Energy Programs,
Bureau of Ocean Energy Management.

[FR Doc. 2023-15387 Filed 7-20-23; 8:45 am]

BILLING CODE 4340-98-P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

[Docket No. BOEM-2023-0042]

Notice of Availability of a Draft Environmental Assessment for a Wind Energy Research Lease on the Atlantic Outer Continental Shelf Offshore Maine

AGENCY: Bureau of Ocean Energy Management (BOEM), Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: BOEM announces the availability of the draft environmental assessment (EA) for the potential issuance of a wind energy research lease to the State of Maine. The draft EA

analyzes the potential environmental impacts of the site characterization and site assessment activities that are expected to take place should this research lease be issued. This notice of availability (NOA) announces the start of the public review and comment period, as well as the dates and times for public meetings on the draft EA. After BOEM holds the public meetings and addresses public comments submitted during the review period, BOEM will publish a final EA. The EA will inform BOEM's decision whether to issue the research lease.

DATES: Comments must be received no later than August 21, 2023. BOEM's virtual public meetings will be held on the following dates at the times (eastern time) indicated.

- Tuesday, August 1; 5:00 p.m.
- Thursday, August 3; 1:00 p.m.

Registration for the virtual public meeting is required and may be completed at <https://www.boem.gov/renewable-energy/state-activities/maine/gulf-maine>. Meeting information will be sent to registrants via their email address provided during registration.

ADDRESSES: The draft EA and detailed information about the proposed research lease can be found on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/maine/gulf-maine>. Comments can be submitted in any of the following ways:

- Orally or in written form during any of the public meetings identified in this NOA.
- In written form by mail or any other delivery service, enclosed in an envelope labeled "Gulf of Maine Research Lease EA" and addressed to Chief, Office of Renewable Energy Programs, Bureau of Ocean Energy Management, 45600 Woodland Road, Mailstop VAM-OREP, Sterling, VA 20166.

• Through the *regulations.gov* web portal: Navigate to <http://www.regulations.gov> and search for Docket No. BOEM-2023-0042. Click on the "Comment" button below the document link. Enter your information and comment, then click "Submit Comment."

For more information about submitting comments, please see "Information on Submitting Comments" under the **SUPPLEMENTARY INFORMATION** heading below.

FOR FURTHER INFORMATION CONTACT: Jessica Stromberg, BOEM Office of Renewable Energy Programs, 45600 Woodland Road, Sterling, Virginia 20166, (703) 787-1730 or jessica.stromberg@boem.gov.

SUPPLEMENTARY INFORMATION:

Proposed Action: The draft EA analyzes the proposed action, which is the issuance of a research lease to the State of Maine, and the no action alternative. The EA considers the reasonably foreseeable environmental consequences associated with lease issuance, site characterization surveys, and site assessment activities, such as the deployment and recovery of a meteorological buoy, that are expected to take place should a research lease be issued to the State of Maine. BOEM has decided to prepare an EA for this proposed action in order to assist the agency's planning and decision-making (40 CFR 1501.5(b)).

Availability of the draft EA: The draft EA and associated information are available on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/maine/gulf-maine>. If you require a digital copy on a flash drive or paper copy, BOEM will provide one upon request, if supplies are available. You may request a flash drive or paper copy of the draft EA by contacting Mary Boatman at (703) 787-1662 or mary.boatman@boem.gov.

Cooperating Agencies: The following three Federal agencies participated as cooperating agencies in the preparation of the draft EA: the Bureau of Safety and Environmental Enforcement, National Marine Fisheries Service, and U.S. Coast Guard.

Information on Submitting Comments

a. Freedom of Information Act

BOEM will protect privileged or confidential information that you submit when required by the Freedom of Information Act (FOIA). Exemption 4 of FOIA applies to trade secrets and commercial or financial information that is privileged or confidential. If you wish to protect the confidentiality of such information, clearly label it and request that BOEM treat it as confidential. BOEM will not disclose such information if BOEM determines under 30 CFR 585.114(b) that it qualifies for exemption from disclosure under FOIA. Please label privileged or confidential information "Contains Confidential Information" and consider submitting such information as a separate attachment.

BOEM will not treat as confidential any aggregate summaries of such information or comments not containing such privileged or confidential information. Information that is not labeled as privileged or confidential may be regarded by BOEM as suitable for public release.

b. Personally Identifiable Information

BOEM discourages anonymous comments. Please include your name and address as part of your comment. You should be aware that your entire comment, including your name, address, and any other personally identifiable information (PII) that you include, may be made publicly available. All comments from identified individuals, businesses, and organizations will be available for public viewing on regulations.gov. Note that BOEM will make available for public inspection all comments, in their entirety, submitted by organizations and businesses, or by individuals identifying themselves as representatives of organizations or businesses.

For BOEM to consider withholding your PII from disclosure, you must identify any information contained in your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe any possible harmful consequences of the disclosure of information, such as embarrassment, injury, or other harm. Even if BOEM withholds your information in the context of this notice, your comment is subject to FOIA. If your comment is requested under FOIA, BOEM will withhold your information only if it determines that one of FOIA's exemptions to disclosure applies. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

c. Section 304 of the NHPA (54 U.S.C. 307103(a))

After consultation with the Secretary, BOEM is required to withhold the location, character, or ownership of historic resources if it determines that disclosure may, among other things, risk harm to the historic resources or impede the use of a traditional religious site by practitioners. Tribal entities should designate information that falls under section 304 of NHPA as confidential.

Authority: 42 U.S.C. 4231 *et seq.* (NEPA, as amended) and 40 CFR 1506.6.

Karen Baker,

*Chief, Office of Renewable Energy Programs,
Bureau of Ocean Energy Management.*

[FR Doc. 2023-15389 Filed 7-20-23; 8:45 am]

BILLING CODE 4340-98-P

DEPARTMENT OF THE INTERIOR**Bureau of Ocean Energy Management**

[Docket No. BOEM-2023-0021]

Final Sale Notice (FSN) for Commercial Leasing for Wind Power Development on the Outer Continental Shelf in the Gulf of Mexico (GOMW-1)

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: Final sale notice.

SUMMARY: This Final Sale Notice (FSN) contains information pertaining to the areas available for commercial wind energy leasing on the Outer Continental Shelf (OCS) in the Gulf of Mexico (GOM). Specifically, this FSN details certain provisions and conditions of the leases, auction details, the lease form, criteria for evaluating competing bids, and procedures for award, appeal, and lease execution. The Bureau of Ocean Energy Management (BOEM) will offer three leases for sale using a multiple-factor bidding auction format: Lease OCS-G 37334, Lease OCS-G37335, and Lease OCS-G37336 (Lease Areas). The issuance of any lease resulting from this sale will not constitute approval of project-specific plans to develop offshore wind energy. Such plans, if submitted by the Lessee, will be subject to environmental, technical, and public reviews prior to a BOEM decision on whether the proposed activity should be authorized.

DATES: BOEM will hold an online mock auction for potential bidders starting at 8:00 a.m. Central Daylight Time (CDT)/9:00 a.m. Eastern Daylight Time (EDT) on August 28, 2023. The monetary auction will be held online and will begin at 8:00 a.m. CDT/9:00 a.m. EDT on August 29, 2023. Additional details are provided in the section entitled, "Deadlines and Milestones for Bidders."

FOR FURTHER INFORMATION CONTACT:

Bridgette Duplantis, Bureau of Ocean Energy Management, Office of Leasing and Plans, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123, (504) 736-7502 or bridgette.duplantis@boem.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The OCS Lands Act authorizes BOEM to offer renewable energy leases for sale on the OCS competitively, unless BOEM determines there is no competitive interest. On June 11, 2021, BOEM published a Request for Interest (RFI) for commercial leasing for wind power development in the Gulf of Mexico OCS (88 FR 31339). The RFI Area comprised

the entire Central Planning Area (CPA) and Western Planning Area (WPA) of the Gulf of Mexico, excluding the portions of those areas located in water depths greater than 1,300 meters. On November 1, 2021, BOEM published the Call for Information and Nominations (86 FR 60283) encompassing an area of almost 30 million acres just west of the Mississippi River to the Texas/Mexican border. On July 20, 2022, BOEM announced that it was seeking public comments on two draft Wind Energy Areas (WEAs) totaling 7,364,668 acres offshore Galveston, Texas, and Lake Charles, Louisiana. In response to feedback collected, BOEM announced the Area Identification on October 31, 2022. BOEM published the Proposed Sale Notice (PSN) in the **Federal Register** (88 FR 11939) on February 22, 2023. A 60-day comment period followed. BOEM requested any prospective bidders who wished to participate in the GOM lease sale to submit qualification materials postmarked no later than April 25, 2023. BOEM also hosted an auction seminar for prospective bidders on March 23, 2023, to discuss the proposed auction format. BOEM received 330 comment submissions in response to the PSN, which are available on [regulations.gov](https://www.regulations.gov) (Docket ID: BOEM-2023-0021) at: <https://www.regulations.gov/document/BOEM-2023-0021-0001>. BOEM has posted its responses to the comments that were submitted during the PSN comment period. The document entitled, *Response to Comments*, can be found on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>.

In response to the comments received, BOEM made several changes to the GOMW-1 sale format and procedures from those proposed in the PSN and to the lease stipulations in the Proposed Leases. BOEM will offer all three lease areas during one multi-factor GOMW-1 auction. In each round of the auction, a bidder can bid for, at most, one of the offered leases at a time. A bidder may switch between different Lease Areas from round to round subject to the auction rules, but must bid in each round, and ultimately can acquire, at most, one lease in the auction.

II. List of Eligible Bidders

BOEM has determined that the following 16 entities are legally, technically, and financially qualified to hold a commercial wind lease offshore the GOM, pursuant to 30 CFR 585.107 and 585.108, and therefore may participate in this lease sale as bidders subject to meeting the requirements

outlined in this notice. Those entities are listed below:

Company name	Company No.
547 Energy LLC	15123
Avangrid Renewables, LLC	15019
Coastal Offshore Renewable Energy LLC	15173
energyRe Offshore Wind Holdings, LLC	15171
Equinor Wind US LLC	15058
Gulf Coast Offshore Wind LLC	15172
Gulf Wind Offshore LLC	15178
Hanwha Offshore North America LLC	15176
Hanwha Q CELLS USA Corp	15156
Hecate Energy LLC	15166
Invenenergy GOM Offshore Wind LLC	15177
RWE Offshore US Gulf, LLC	15169
Shell New Energies US LLC	15140
TotalEnergies Renewables USA, LLC	15136
US Mainstream Renewable Power, Inc	15089

a. *Affiliated Entities:* On the Bidder's Financial Form (BFF), discussed in sections III(a)(i) and X below, eligible bidders must list any other eligible bidders with whom they are affiliated. An affiliate means a bidding entity who controls, is controlled by, or is under common control with another bidding entity. For the purpose of identifying affiliated entities, a bidding entity is any individual, firm, corporation, association, partnership, consortium, or joint venture (when established as a separate entity) that is participating in the same auction. BOEM considers bidding entities to be affiliated when:

i. They own or have common ownership of more than 50 percent of the voting securities, or instruments of ownership or other forms of ownership, of another bidding entity. Ownership of less than 10 percent of another bidding entity constitutes a presumption of non-control that BOEM may rebut.

ii. They own or have common ownership of 10 through 50 percent of the voting securities or instruments of ownership, or other forms of ownership, of another bidding entity, and BOEM determines that there is control upon consideration of factors including the following:

a. The extent to which there are common officers or directors.

b. With respect to the voting securities, or instruments of ownership or other forms of ownership: The percentage of ownership or common ownership, the relative percentage of ownership or common ownership compared to the percentage(s) of ownership by other bidding entities, if a bidding entity is the greatest single owner, or if there is an opposing voting bloc of greater ownership.

c. Shared ownership, operation, or day-to-day management of a lease, grant,

or facility, as those terms are defined in BOEM's regulations at 30 CFR 585.113.

iii. They are both direct, or indirect, subsidiaries of the same parent company.

iv. With respect to any lease(s) offered in this auction, they have entered into an agreement prior to the auction regarding the shared ownership, operation, or day-to-day management of such lease.

v. Other evidence indicates the existence of power to exercise control, such as evidence that one bidding entity has power to exercise control over the other, or that multiple bidders collectively have the power to exercise control over another bidding entity or entities.

Affiliated entities are not permitted to compete against each other in the auction. Where two or more affiliated entities have qualified to bid in the auction, the affiliated entities must decide prior to the auction which one (if any) will participate in the auction. If two or more affiliated entities attempt to participate in the auction, BOEM will disqualify those bidders from the auction.

III. Deadlines and Milestones for Bidders

This section describes the major deadlines and milestones in the auction process from publication of this FSN to execution of the lease pursuant to this sale.

a. *FSN Waiting Period:* During the period between FSN publication and the lease auction (a minimum of 30 days), qualified bidders must take several steps to remain eligible to participate in the auction.

i. *Bidder's Financial Form:* Each bidder must submit a BFF to BOEM to participate in the auction. The BFF submission must include the bidder's

Conceptual Strategy for each non-monetary credit (also referred to herein as "bidding credit") for which the bidder wishes to be considered. BOEM will consider any BFF received on or before August 6, 2023, and it is each bidder's responsibility to ensure BOEM's timely receipt. If a bidder does not submit a BFF by this deadline, BOEM, in its sole discretion, may grant an extension to that bidder only if BOEM determines the bidder's failure to timely submit a BFF was caused by events beyond the bidder's control. The BFF can be downloaded at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>.

For purposes of this auction, BOEM will not consider BFFs submitted for previous lease sales. The BFF must be executed on paper with a wet signature or with a digital signature affixed by an authorized representative listed on the bidder's current legal qualification card on file with BOEM, subject to 18 U.S.C. 1001 (Fraud and False Statements). Further information about the BFF can be found in the "Bidder's Financial Form" section X of this notice.

ii. *Bid Deposit:* Once BOEM has processed a BFF and provided the appropriate information to the Office of Natural Resources Revenue (ONRR), ONRR will populate the Bid Deposit Forms and notify the bidders of access to [pay.gov](https://www.pay.gov) for the bid deposits. The bidder must log into <https://www.pay.gov> to submit a bid deposit. To participate in the mock auction and the monetary auction, each qualified bidder must provide a bid deposit of \$2,000,000 no later than August 13, 2023. BOEM will grant extensions to this deadline only if BOEM, in its sole discretion, determines that the failure to timely submit the bid deposit was caused by events beyond the bidder's control. Further information about bid

deposits can be found in the “Bid Deposit” section XI of this notice. In accordance with 30 CFR 585.222(e), BOEM will send a written notice of its decision to accept or reject bids to all bidders whose deposits we hold.

b. Conducting the Auction:

i. Affirmative Action: Prior to bidding in the monetary auction, each bidder must file the Equal Opportunity Affirmative Action Representation Form BOEM–2032 (February 2020, available on BOEM’s website at <http://www.boem.gov/BOEM-2032/>) and the Equal Opportunity Compliance Report Certification Form BOEM–2033 (February 2020, available on BOEM’s website at <http://www.boem.gov/BOEM-2033/>) with the BOEM GOM Regional Office. The forms can be submitted digitally to boemadjudication@boem.gov or mailed to the BOEM GOM Regional Office. This certification is required by 41 CFR part 60 and Executive Order (E.O.) 11246, issued September 24, 1965, as amended by E.O. 11375, issued October 13, 1967, and by E.O. 13672, issued July 21, 2014. Both forms must be on file for the bidder(s) in the BOEM GOM Regional Office prior to the execution of any lease contract.

ii. Mock Auction: BOEM will hold a Mock Auction on August 28, 2023, beginning at 8:00 a.m. CDT/9:00 a.m. EDT. BOEM will hold the Mock Auction online. BOEM will contact each bidder that has timely submitted a BFF and bid deposit and provide instructions for participation. Only bidders that have timely submitted BFFs and bid deposits may participate in the Mock Auction.

iii. Multiple-Factor Auction: On August 29, 2023, BOEM, through its contractor, will commence the multiple-factor auction. The first round of the

auction will start at 8:00 a.m. CDT/9:00 a.m. EDT. The auction will proceed electronically according to a schedule to be distributed by the BOEM Auction Manager at the beginning of the auction, subject to any revisions (which will be communicated to bidders during the auction). BOEM anticipates that the auction will last one or two business days, but the auction may continue for additional business days, as necessary, until the auction ends in accordance with the procedures described in the “Auction Procedures” section of this notice.

iv. Announce Provisional Winners: BOEM will announce the provisional winners of the lease sale after the auction ends.

c. From the Auction to Lease Execution:

i. Notice and Refunds to Non-Winners: Once the provisional winners have been announced, BOEM will return the non-winners bid deposits.

ii. Department of Justice (DOJ) Review: DOJ will have 30 days in which to conduct an antitrust review of the auction, pursuant to 43 U.S.C. 1337(c).

iii. Delivery of the Lease: BOEM will send three copies of the lease to each provisional winner, with instructions for executing the lease. The first year’s rent is due 45 calendar days after the winners receive the lease copies for execution.

iv. Return the Lease: Within 10 business days of receiving the lease copies, the auction winners must post financial assurance, pay any outstanding balance of their bonus bids (*i.e.*, winning cash bid minus bid deposit), and sign and return the three executed lease copies. In the event of a delay, BOEM may extend the 10-

business-day-time period for executing and returning the lease if BOEM, in its sole discretion, determines the delay to be caused by events beyond the winner’s control, pursuant to 30 CFR 585.224(e).

v. Execution of Lease: Once BOEM has received the signed lease copies and verified that all other required obligations have been met, BOEM will make a final determination regarding its issuance of the leases and will execute the leases, if appropriate.

IV. Areas Offered for Leasing

BOEM considered the following criteria in delineating the Lease Areas included in this FSN: reasonably comparable commercial viability and size; prevailing wind direction and minimal wake effects; maximized energy generating potential; distance to shore, port infrastructure, and electrical grid interconnections; and fair return to the Federal Government, pursuant to the OCS Lands Act through competition for commercially viable lease areas.

The three Lease Areas included in this FSN are the same size and orientation described in the PSN. BOEM’s designation of the three Lease Areas offered in the FSN is informed by extensive coordination with BOEM’s intergovernmental task force members, consultation and engagement with Tribes, stakeholder engagement, a partnership with NOAA’s National Centers for Coastal Ocean Science (NCCOS) to utilize spatial modeling to inform the identification of Wind Energy Areas, and consideration of the 330 comments that BOEM received in response to the PSN. BOEM is offering three Lease Areas totaling 301,746 acres for sale through this notice (Figure 1).

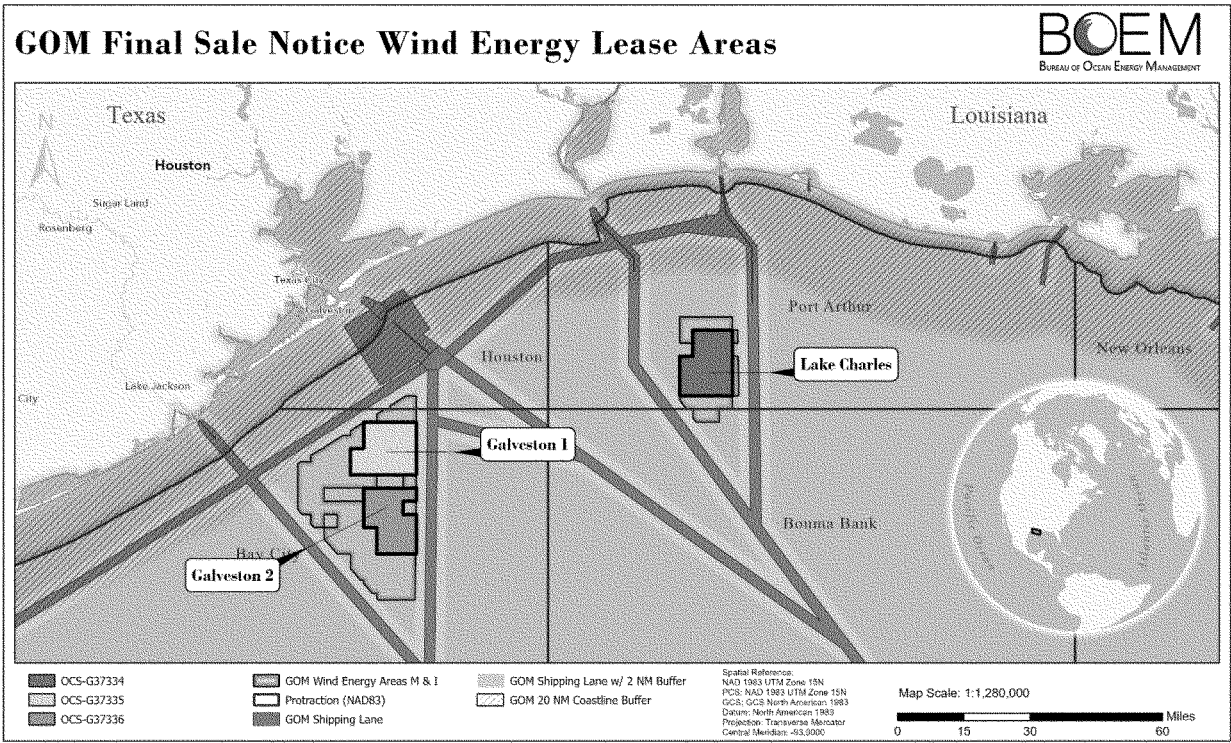


Figure 1: GOMW-1 Map of Final Lease Areas

The areas available for lease will be auctioned in a single auction as listed in Table 1.

TABLE 1—GOMW-1 FINAL LEASE AREAS

Lease area name	Lease area ID	Acres
Lake Charles	OCS-G 37334	102,480
Galveston I	OCS-G 37335	102,480
Galveston II	OCS-G 37336	96,786
Total .....	.....	301,746

Due to United States Coast Guard (USCG) concerns about lightering areas in the southern portion of the Galveston WEA (Option I), BOEM will continue to work with USCG to identify, quantify, and mitigate potential impacts and risks to lightering operations within the traditional lightering use areas within Galveston leases when considering any plans submitted for BOEM’s consideration and approval after lease issuance.

a. *Map of the Areas for Leasing:* A map of the Lease Areas and GIS spatial files X, Y (eastings, northings) UTM Zone 18, NAD83 Datum, and geographic X, Y (longitude, latitude), NAD83 Datum can be found on BOEM’s website at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>.

V. Environmental Review

On January 11, 2021, BOEM published a notice of intent to prepare an environmental assessment (EA) to consider potential environmental consequences of site characterization activities (e.g., biological, archaeological, geological, and geophysical surveys and core samples) and site assessment activities (e.g., installation of meteorological buoys) that are expected to take place after issuance of wind energy leases in the Call Area. As part of the scoping process for the EA, BOEM sought comments on the issues and alternatives that should inform the EA. BOEM received 18 comments, which can be found at <http://www.regulations.gov> under Docket No. BOEM–2021–0092. In addition to the preparation of the Draft

EA, BOEM has completed consultations under the Endangered Species Act (ESA), the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), and the Coastal Zone Management Act (CZMA). On July 20, 2022, BOEM issued a press release soliciting comments on the Draft EA, with a 30-day comment period, but, in response to several requests, BOEM extended the comment period to 45 days. During this time, BOEM held two public meetings, one on August 9, 2022, and one on August 11, 2022. BOEM published the Final EA and Finding of No Significant Impact (FONSI) on May 26, 2023. They can be found at <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>. BOEM will conduct additional environmental reviews upon receipt of a Lessee’s

Construction and Operations Plan (COP) if the proposed leases reach that stage of development.

VI. New and Modified Lease Stipulations

Based on feedback received on the PSN, BOEM is adding lease stipulations that: (i) were discussed conceptually in the PSN, and (ii) include conditions from the Department of Defense (DoD) to protect national defense capabilities and military operations. BOEM is also refining certain stipulations identified in the PSN and proposed leases.

a. *Reporting requirements:* BOEM is building upon stipulations in previous leases requiring a semi-annual progress report from Lessees and regular engagement with Tribes and parties that may be affected by Lessees' activities on the OCS. The lease stipulations require working with BOEM to identify: Tribes that have cultural and/or historical ties to the Lease Areas; coastal communities; commercial and recreational fishing industries and stakeholders; educational and research institutions; environmental and public interest non-governmental organizations; Federal, State, and local agencies; mariners and the maritime industry; ocean users; submarine cable operators; and underserved communities, as defined in section 2 of E.O. 13985. The report must identify Tribes and parties that may be affected by Lessees' activities on the OCS and with whom the Lessees have engaged; provide updates on engagement activities; document potential adverse effects to the interests of Tribes and parties; document how, if at all, a project has been informed or altered to address those potential effects; include feedback from engagement regarding transmission planning prior to proposing any export cable route; provide information that can be made available to the public; and include strategies to reach potentially affected individuals with Limited English Proficiency.

The stipulations include requirements for Lessees to engage in ways that minimize linguistic, technological, cultural, capacity, or other obstacles. The stipulations encourage Lessees to work collaboratively with governments, community leadership and organizations, and Tribes and to develop specific frameworks for capacity building.

In acknowledgment of the existing and growing consultation burden placed on many of the Tribes and parties, the stipulation also requires, to the maximum extent practicable, that Lessees coordinate with one another on engagement activities. It is BOEM's

intention that this requirement for Lessees to coordinate their engagement apply not only to meetings proposed by Lessees, but also to reasonable requests to coordinate engagement made by Tribes and parties. Coordinated engagement among Tribes and Lessees is strongly encouraged and is in addition to BOEM's responsibilities to federally recognized Tribes under E.O. 13175.

In addition, the reporting stipulation requires that the progress report incorporate separate lease requirements for the development of communication plans for Tribal governments (Native American Tribes Communications Plan), agencies (Agency Communications Plan), and fisheries (Fisheries Communications Plan). Lastly, the progress report must include an update on activities executed under any survey plan.

b. *Commercial Fisheries:* BOEM is including a stipulation that would contain components of stipulations included in prior commercial leases issued by BOEM, including a requirement for a Fisheries Communications Plan (FCP).

c. *Protected Species:* The Lessee must coordinate with BOEM, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (USFWS) prior to designing and conducting biological surveys intended to support offshore renewable energy plans that could interact with protected species.

BOEM has completed a consultation with NMFS and USFWS under section 7(a)(2) of the ESA for Gulf of Mexico wind energy lease issuance and associated site characterization and site assessment activities that may occur following lease issuance. NMFS and USFWS have issued letters of concurrence in response to BOEM's requests for informal programmatic consultation (<https://www.boem.gov/renewable-energy/state-activities/esanmfssero> and <https://www.boem.gov/renewable-energy/state-activities/boem-gomr-ren-leasing-esausfws-concurrence>). Best management practices (collectively referred to as protocols) associated with the mitigation, monitoring, and reporting conditions resulting from these ESA consultations have been developed for those data collection activities covered in the consultations. These protocols will become provisions of all leases: <https://www.boem.gov/regions/gulf-mexico-ocs-region/renewable-energy-esa-consultations-guidance>.

d. *Marine Mammal Protection Act Authorization(s):* If the Lessee is required to obtain an authorization

pursuant to section 101(a)(5) of the Marine Mammal Protection Act prior to conducting survey activities in support of plan submittal, the Lessee must provide to BOEM a copy of the authorization prior to commencing these activities.

e. *Project Labor Agreements (PLAs) and Supply Chain:* BOEM is committed to workforce safety and the establishment of a durable domestic supply chain that can sustain the U.S. offshore wind energy industry, including for the leases offered in this sale. To advance these goals, BOEM is including two lease stipulations, one that encourages construction efficiency for projects and one that contributes towards establishing a domestic supply chain:

i. The first stipulation requires Lessees to make every reasonable effort to enter into a PLA covering the construction stage of any project for the Lease Areas.

ii. The second stipulation requires Lessees to establish a Statement of Goals in which the Lessee describes its plans for contributing to the creation of a robust and resilient U.S.-based offshore wind industry supply chain that would facilitate this or other renewable energy projects permitted by BOEM. The Lessee is required to provide regular progress updates on the achievement of those goals to BOEM, and BOEM will make those updates publicly available.

f. *Research Site Access:* This stipulation makes explicit that BOEM, its designated representative, or any entity to which BOEM provides access retains the right to access the Lease Area for purposes of future research. This provision does not limit the Lessor's authority to access the lease for other purposes, including, but not limited to, inspections conducted pursuant to 30 CFR 285.822.

g. *Archaeological Survey Requirements:* BOEM is including a modification of a lease stipulation that was used in previous commercial leases regarding archaeological survey requirements. The revised stipulation requires that the Lessee provide to BOEM, in the associated plan submissions, a description of the methods it will use to conduct archaeological surveys in support of plans (i.e., Site Assessment Plan (SAP) and/or COP), in addition to the survey results. The Lessee is required to coordinate a Tribal pre-survey meeting with Tribes that have cultural and/or historical ties to the Lease Area, and the Lessee must work with BOEM to identify such Tribes. In the post-review discovery clauses, the revised stipulation requires that, in the event of

an unanticipated discovery of a potential archaeological resource, the Lessee will immediately halt bottom-disturbing activities within the area of the discovery by a minimum of 305 meters (1,000 feet), and that the avoidance distance must be calculated from the maximum discernible extent of the archaeological resource.

h. Foreign Interest: To protect national defense capabilities and military operations, BOEM is requiring the Lessee to provide to DoD specific information about the personnel allowed to access the wind turbine structures and associated data systems. That information includes the names of entities or persons having a direct ownership interest in an offshore wind facility, as well as any changes in ownership interests; the names of the material vendors, entities, and persons with which the Lessee will potentially execute contracts to perform construction, supply turbines or other components, or conduct construction and operational activities at the facility; and the names of any foreign entities and persons (as those terms are defined at 31 CFR 800.220 and 31 CFR 800.224). In addition, the Lessee must resolve DoD's security concerns before it allows access to the site by foreign persons or representatives of foreign entities for which DoD has raised concerns and before the Lessee uses wind turbines or other permanent on-site equipment manufactured by such an entity.

i. Notice of Assignment to the Committee on Foreign Investment in the United States (CFIUS): Under BOEM's regulations, a Lessee must be one of the following: (1) a citizen or national of the United States; (2) an alien lawfully admitted for permanent residence in the United States, as defined in 8 U.S.C. 1101(a)(20); (3) a private, public, or municipal corporation organized under the laws of any State of the United States, the District of Columbia, or any territory or insular possession subject to U.S. jurisdiction; (4) an association of such citizens, nationals, resident aliens, or corporations; (5) an Executive Agency of the United States, as defined in 5 U.S.C. 105; (6) a State of the United States; or (7) a political subdivision of States of the United States. BOEM is including a stipulation that requires any proposed Lessee that is a foreign-controlled business entity under the regulations at 31 CFR part 800 to provide joint notice, with BOEM, to CFIUS of the proposed leasing transaction, in accordance with applicable regulations at 31 CFR part 800, subpart D, and provide a copy of the notice to the DoD. In addition, approval of any assignment of lease

interest to a foreign-controlled business entity under 31 CFR part 800 is subject to this CFIUS notice stipulation. Such leasing decisions or assignments would take place only after CFIUS provides notice that it has concluded all necessary reviews under section 721 of the Defense Production Act of 1950, as amended, with respect to the leasing decision or assignment.

j. Transmission Planning: The Lessee must—to the extent that it is technically and economically practical or feasible—consider the use of cable corridors, regional transmission systems, meshed systems, or other mechanisms for transmission facilities proposed in a COP. Such consideration must be done in accordance with stipulation 3.1.1, which requires the Lessee to engage with Tribes and parties regarding transmission planning prior to proposing any export cable route. The foregoing does not prevent the Lessee from proposing the use of transmission systems traditionally constructed in a Project easement in any COP that the Lessee submits; nor does it prevent BOEM from requiring in a COP approval the use of cable corridors, regional transmission systems, meshed systems, or other mechanisms for transmission facilities, if deemed technically and economically practical or feasible by BOEM.

VII. Potential Future Restrictions

a. Potential Future Restrictions To Ensure Navigational Safety:

i. USCG Navigational Safety Measures: Potential bidders are advised that portions of the lease area may not be available for future development (*i.e.*, installation of wind energy facilities) because of navigational safety concerns. The USCG recommended that BOEM add a 2-nautical mile (3704 m) buffer around the shipping fairways in the GOM. BOEM may require additional mitigation measures at the COP stage when the Lessee's site-specific navigational safety risk assessment is available to inform BOEM's decision-making.

ii. Vessel Transit Corridors: Members of the fishing community have requested that offshore wind energy facilities be designed in a manner that, among other things, provides for safe transit to fishing grounds where relevant. The information currently available does not indicate that transit corridors are warranted. However, at the COP stage, BOEM may nonetheless consider designating portions of the Lease Areas as areas of no surface occupancy to facilitate vessel transit and continuance of existing uses.

b. Potential Future Restrictions To Mitigate Potential Conflicts With Department of Defense Activities: Potential bidders should be aware of potential conflicts with DoD's existing uses of the OCS. BOEM coordinates with DoD throughout the leasing process.

i. Air Surveillance and Radar: The Military Aviation and Installation Assurance Siting Clearinghouse conducted a DoD assessment of the Call Area. That assessment concluded that the North American Aerospace Defense Command (NORAD) mission may be affected by the development of the Lease Area(s). Considering both the expected height of offshore turbines and future cumulative wind turbine effects, adverse impacts can be mitigated through the use of Radar Adverse-impact Management (RAM)¹ and overlapping radar coverage. For projects where RAM mitigation is acceptable, BOEM anticipates including the following stipulations in any project approval conditions:

(1) Lessee will notify NORAD when the project is within 30–60 days of completion and, again, when the project is complete and operational for RAM scheduling;

(2) Lessee will contribute funds to DoD in the amount of no less than \$80,000 toward the cost of DoD's execution of the RAM procedures for each Radar system affected; and

(3) Lessee will curtail wind turbine operations for National Security or Defense Purposes, as described in the lease.

BOEM will require the Lessee to enter into an agreement with the DoD to implement these conditions and mitigate any identified impacts. Sixth Generation Over the Horizon Radar is currently in development. Offshore wind turbines in the Gulf of Mexico may create adverse impacts to that system. BOEM will further coordinate with DoD and the Lessee to deconflict potential impacts throughout the project review stage, which may result in adding mitigation measures or terms and conditions as part of any plan approval.

c. Potential Future Restrictions Within Significant Sediment Resource Areas: Potential bidders are advised that BOEM has designated certain lease blocks in the GOM as Significant OCS Sediment Resource Areas. OCS sediment resources are minerals that are composed of sediment deposits, including clay, silt, sand, gravel-sized

¹ RAM is the technical process designed to minimize the adverse impact of obstruction interference on a radar system.

particles, and shells found on or below the surface of the OCS seabed. Where feasible, project design and construction should consider on-lease access to sediment resources by other users.

Regarding off-lease activities that may support a Lessee's operations (*e.g.*, a right-of-use and easement or right-of-way), BOEM has implemented measures to prevent obstructions to the use of the most Significant OCS Sediment Resources, reduce multiple use conflicts, and minimize interference with oil and gas operations. For the most current listing of Significant OCS Sediment Resource blocks, see <https://www.boem.gov/marine-minerals/managing-multiple-uses-gulf-mexico>. If it is determined that significant OCS sediment resources may be impacted by a proposed activity, BOEM and/or BSEE may require the Lessee to undertake measures deemed economically, environmentally, and technically feasible to protect the resources to the maximum extent practicable. Such measures may include modification of operations and monitoring of infrastructure after installation.

BSEE will not approve future requests for in-place decommissioning of any infrastructure in these designated areas, unless the BSEE GOM Regional Supervisor determines that the infrastructure does not constitute a hazard or obstruction to navigation and commercial fishing operations, unduly interfere with other uses of the OCS, or pose adverse environmental effects.

d. Potential Future Restrictions for Deepwater Port Applications for Offshore Oil and Liquefied Gas Facilities: Potential bidders are advised that the USCG and the Maritime Administration (MARAD) may process applications for the licensing of deepwater ports involving both proposed liquefied natural gas (LNG) importation/exportation facilities and oil importation/exportation facilities in the GOM. There is currently only one such active facility in the GOM: the Louisiana Offshore Oil Port, located 16 miles southeast of Port Fourchon. Applications for new deepwater port import and/or export facilities may be received by MARAD at any time. Those applications will be processed by MARAD and the USCG in the order they are received. A list of approved, pending, and withdrawn/disapproved DWP license applications may be found at the following web pages:

- <https://www.maritime.dot.gov/ports/deepwater-ports-and-licensing/licensing-process>
- <https://www.maritime.dot.gov/ports/deepwater-ports-and-licensing/approved-applications>

Bidders and Lessees also are advised to review and monitor U.S. DOT MARAD sources, such as MARAD records of decision and port licenses, for relevant deepwater port application information to assess safety zones, no anchoring zones, avoidance areas, recommended routes, and other ships' routing measures that could prevent or otherwise impact offshore wind operations around both existing and proposed deepwater port locations.

For more information, contact:

Commandant (CG-OES-22), U.S. Coast Guard Headquarters, 2703 Martin Luther King Ave. SE (STOP 7509), Attn: Deepwater Ports Standards Division, Washington, DC 20593-7509, (202) 372-1444, POC: Mr. Matthew Layman, Email: matthew.d.layman@uscg.mil or DWP@comdt.uscg.mil, Web Address: <https://www.dco.uscg.mil/Our-Organization/Assistant-Commandant-for-Prevention-Policy-CG-5P/Commercial-Regulations-standards-CG-5PS/Office-of-Operating-and-Environmental-Standards/vfos/DWP/>
Ms. Yvette M. Fields, Director Maritime Administration, Office of Deepwater Ports and Offshore Activities, 1200 New Jersey Avenue SE, W21-309 (MAR-530), Washington, DC 20590, Telephone: (202) 366-0926, Fax: (202) 366-5123, Email: yvette.fields@dot.gov, Web Address: <https://www.maritime.dot.gov/ports/deepwater-ports-and-licensing/approved-applications-and-operational-facilities>

VIII. Lease Terms and Conditions

BOEM has included terms and conditions for the OCS commercial wind leases to be offered through this sale. After the leases are issued, BOEM reserves the right to require compliance with additional terms and conditions associated with approval of a SAP and COP. The leases are available on BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>. Each lease will include the following attachments:

1. Addendum A ("Description of Leased Area and Lease Activities");
 2. Addendum B ("Lease Term and Financial Schedule");
 3. Addendum C ("Lease-Specific Terms, Conditions, and Stipulations");
 4. Addendum D ("Project Easement"); and
 5. Addendum E ("Rent Schedule").
- Addenda A, B, and C provide detailed descriptions of lease terms and conditions. Addenda D and E will be completed at the time of COP approval

or approval with modifications, should a COP be approved.

a. *Required Plans for Potential Development of Executed Leases:* To the extent required under 30 CFR part 585, the Lessee will submit a SAP within 12 months of lease issuance if the Lessee intends to conduct site assessment activities. Approval of the SAP will initiate the Lessee's five-year site assessment term. If the Lessee intends to continue its commercial lease with an operations term, the Lessee will be required to submit a COP at least six months before the end of the site assessment term.

IX. Financial Terms and Conditions

This section provides an overview of the annual payments required of the Lessee that are more fully described in the lease, and of the financial assurance requirements that will be associated with the lease.

a. *Rent:* Pursuant to 30 CFR 585.224(b) and 585.503, the first year's rent payment of \$3 per acre will be due within 45 calendar days after the Lessee receives the lease copies from BOEM for execution. For example, for the 102,480 acres Lease Area of OCS-G 37334, the rent payment will be \$307,440 per year until commercial operations begin. Thereafter, until commercial operations begin, annual rent payments are due on the anniversary of the effective date of the lease (the "Lease Anniversary"). Once commercial operations under the lease begin, BOEM will charge rent only for the portions of the Lease Area remaining undeveloped (*i.e.*, non-generating acreage).

If the Lessee submits an application for relinquishment of a portion of its leased area within the first 45 calendar days after receiving the lease copies from BOEM and BOEM approves that application, no rent payment will be due on the relinquished portion of the Lease Area. Later relinquishments of any portion of the Lease Area will reduce the Lessee's rent payments starting in the year following BOEM's approval of the relinquishment. A lease issued under this part confers on the Lessee the right to one or more project easements, without further competition, for the purpose of installing gathering, transmission, and distribution cables, pipelines, and appurtenances on the OCS as necessary for the full enjoyment of the lease. A Lessee must apply for the project easement as part of the COP or SAP, as provided under subpart F of 30 CFR part 585.

The Lessee must also pay rent for any project easement associated with the lease, commencing on the date that BOEM approves the COP (or

modification thereof) that describes the project easement, with the first rent payment due when the operations term begins, as outlined in 30 CFR 585.500(a)(5) and 585.507(b). Annual rent for a project easement is \$5 per acre, subject to a minimum of \$450 per year.

b. *Operating Fee*: For purposes of calculating the initial annual operating fee payment under 30 CFR 585.506, BOEM applies an operating fee rate to a proxy for the wholesale market value of the electricity expected to be generated from the project during its first 12 months of operations. This

initial payment will be prorated to reflect the period between the commencement of commercial operations and the Lease Anniversary. The initial annual operating fee payment is due within 45 days after commencement of commercial operations. Thereafter, subsequent annual operating fee payments are due on or before the Lease Anniversary.

The subsequent annual operating fee payments are calculated by multiplying the operating fee rate by the imputed wholesale market value of the projected annual electric power production. For the purposes of this calculation, the

imputed market value is the product of the project's annual nameplate capacity, the total number of hours in the year (8,760), the capacity factor, and the annual average price of electricity derived from a regional wholesale power price index. For example, the annual operating fee for a 976-megawatt (MW) wind facility operating at a 30 percent capacity (*i.e.*, capacity factor of 0.3) with a regional wholesale power price of \$40 per megawatt hour (MWh) and an operating fee rate of 0.02 will be calculated as follows:

$$\text{Annual Operating Fee} = 976 \text{ MW} \times 8,760 \frac{\text{hrs}}{\text{year}} \times 0.3 \times \frac{\$40}{\text{MWh}} \text{Power Price} \times 0.02 = \$2,051,942$$

i. *Operating Fee Rate*: The operating fee rate is the share of imputed wholesale market value of the projected annual electric power production due to ONRR as an annual operating fee. For the Lease Areas, BOEM will set the fee rate at 0.02 (*i.e.*, 2 percent) for the entire life of commercial operations.

ii. *Nameplate Capacity*: Nameplate capacity is the maximum rated electric output, expressed in MW, that the turbines of the wind facility under commercial operations can produce at their rated wind speed, as designated by the turbine's manufacturer. The nameplate capacity available at the start of each year of commercial operations on the lease will be the capacity provided in the Fabrication and Installation Report (FIR). For example, if the Lessee installed 100 turbines, as documented in its FIR, and each is rated by the manufacturer at 12 MW, the nameplate capacity of the wind facility would be 1,200 MW.

iii. *Capacity Factor*: The capacity factor relates to the amount of energy delivered to the grid during a period of time compared to the amount of energy the wind facility would have produced at full capacity during that same period of time. This factor is represented as a decimal between zero (0) and one (1). There are several reasons why the amount of power delivered is less than the theoretical 100 percent of capacity. For a wind facility, the capacity factor is mostly determined by the availability of wind. Transmission line loss and downtime for maintenance or other purposes also affect the capacity factor.

BOEM will set the capacity factor at 0.3 (*i.e.*, 30 percent) for the year in which the commercial operations begin and for the first six full years of commercial operations on the lease. At

the end of the sixth year, BOEM may adjust the capacity factor to reflect the performance over the previous five years based upon the actual metered electricity generation at the delivery point to the electrical grid. BOEM may make similar adjustments to the capacity factor once every five years thereafter.

iv. *Wholesale Power Price Index*: Under 30 CFR 585.506(c)(2)(i), the wholesale power price, expressed in dollars per MWh, is determined at the time each annual operating fee payment is due. For the leases offered in this sale, BOEM will use the ERCOT (Galveston leases OCS-G 37335 and OCS-G 37336) and Louisiana MISO (Lake Charles lease OCS-G-37334) average price per MW from the Enerfax power prices dataset within Hitachi's ABB Velocity Suite. The Lessee may also use aggregated data from commercial subscription services, such as S&P Global Market Intelligence Platform.

c. *Financial Assurance*: Within 10 business days after receiving the lease copies for execution and pursuant to 30 CFR 585.515–585.516, each provisional winner must provide an initial lease-specific bond or other BOEM-approved financial assurance instrument in the amount of \$100,000. The provisional winners may meet financial assurance requirements by posting a surety bond or financial assurance instrument or alternative detailed in 30 CFR 585.526–585.529. BOEM encourages the provisionally winning bidders to discuss the financial assurance instrument requirements with BOEM as soon as possible after the auction has concluded.

BOEM will base the amount of all SAP, COP, and decommissioning financial assurance on cost estimates for

meeting all accrued lease obligations at the respective stages of development. BOEM will determine the required amount of supplemental and decommissioning financial assurance on a case-by-case basis.

d. *Payments*: The annual lease payments and financial assurance requirements described above can be found in Addendum "B" of the leases, which BOEM has made available with this notice on its website at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>.

X. Bidder's Financial Form

Each bidder must fill out the BFF referenced in this FSN. A copy of the form is available at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>. Bidders seeking to use bidding credits must mark the appropriate box(es) on their BFF and submit a Conceptual Strategy(ies) with their BFF, as described in the BFF Addendum. Bidders are encouraged to carefully read the BFF, BFF Addendum, and lease. Bidders who do not wish to qualify for a bidding credit should mark the box on their BFF next to the paragraph declining the bidding credits. If the bidder does not select bidding credits on the BFF or does not submit Conceptual Strategy(ies), then BOEM will conclude that the bidder has no interest in qualifying for a bidding credit. BOEM must receive each BFF and Conceptual Strategy(ies) no later than August 6, 2023. If a bidder does not submit a BFF for this sale by the deadline, BOEM, in its sole discretion, may grant an extension to that bidder only if BOEM determines the bidder's failure to timely submit a BFF was

caused by events beyond the bidder's control.

BFFs submitted by bidders for previous lease sales will not satisfy the requirements of this auction. For the GOMW-1, BOEM will accept bidder's BFFs and Conceptual Strategies electronically or by mail. Instructions for submission can be found in the BFF. The BFF must be executed on paper with a wet signature or with the application of a digital signature by an authorized representative listed on the legal qualification card currently on file with BOEM as authorized to bind the company. Winning bidders who have committed to bidding credit(s) must meet the bidding credit requirements no later than submission of their first Facility Design Report (FDR) or applicable Lease Anniversary, whichever is sooner.

XI. Bid Deposit

A bid deposit is an advance cash payment submitted to BOEM to participate in the auction. ONRR will notify the bidders that they have access to the Bid Deposit Form in *pay.gov*, and bidders must use the Bid Deposit Form on the *pay.gov* website to leave a deposit. Bidders may need to create an account in *pay.gov* to access the Bid Deposit Form and submit a deposit. Each bidder must submit a bid deposit of \$2,000,000 no later than August 13, 2023, to be eligible to bid for one lease area. Any bidder who fails to submit the bid deposit by this deadline may be disqualified from participating in the auction. BOEM will consider extensions to this deadline only if BOEM, in its sole discretion, determines that the failure to timely submit the bid deposit was caused by events beyond the bidder's control.

Following the auction, bid deposits will be applied against bonus bids. Once BOEM has announced the provisional winners, BOEM will refund bid deposits to the other bidders.

If BOEM offers a lease to a provisionally winning bidder and that bidder fails to timely return the signed lease form, establish financial assurance, or pay the balance of its bid,

BOEM may retain the bidder's \$2,000,000 bid deposit. In such a circumstance, BOEM may determine which bid would have won in the absence of the bid previously determined to be the winning bid and may offer a lease to this next highest bidder if the bidder that tendered it is not a provisionally winning bidder of one of the other Lease Areas. This process will be repeated if needed.

XII. Minimum Bid

The minimum bid is the lowest dollar amount per acre that BOEM will accept as a winning bid and is the amount at which BOEM will start the bidding in the auction. BOEM has established a minimum bid of \$50.00 per acre for this lease sale. See the table in section XIII.d below for total minimum bids for each lease to be offered in this sale.

XIII. Auction Procedures

Multiple-Factor Bidding Auction: As authorized by 30 CFR 585.220(a)(4) and 585.221(a)(6), BOEM will use a multiple-factor bidding auction for this lease sale. The bidding system for this lease sale will be a multiple-factor combination of a monetary bid and a non-monetary factor. BOEM will grant bidding credits to potential bidders for commitments to:

(1) supporting workforce training programs for the offshore wind industry or developing a domestic supply chain for the offshore wind industry, or a combination of both;

(2) establishing and contributing to a fisheries compensatory mitigation fund or contributing to an existing fund to mitigate potential negative impacts to commercial and for-hire recreational fisheries caused by OCS offshore wind development in the GOM.

This auction format was selected to:

(1) enhance, through training, the offshore wind workforce and accelerate the establishment of a domestic supply chain for offshore wind manufacturing, assembly, or services, each of which will contribute to the expeditious and orderly development of offshore wind resources on the OCS;

(2) support the expeditious and orderly development of OCS resources

by mitigating potential direct impacts from proposed projects and encouraging the investment in infrastructure necessary or beneficial to the offshore wind industry; and

(3) minimize potential economic effects on commercial fisheries impacted by potential offshore wind development.

BOEM appoints a panel to review the Conceptual Strategies, as they are described in the BFF Addendum, prior to the auction. This panel will later verify the results of the lease sale. Following the panel's review of the Conceptual Strategy(ies) submitted by each bidder attempting to qualify for a bidding credit, BOEM will notify the bidder if it qualifies for a credit(s) prior to the mock auction. The bid made by a particular bidder in each round is comprised of the sum of a monetary factor (cash bid) and the value of any non-monetary factors (bidding credit(s)). The structure of the proposed bidding credits is explained in the subsection below.

A bidder may seek to qualify for one or both of the bidding credits. The workforce training and/or domestic supply chain development bidding credits is worth 20 percent of the cash bid. A bidder may commit to both workforce training and supply chain development, but the bidding credit for these commitments combined would still be worth 20 percent of the cash bid. The GOM fisheries compensatory mitigation fund bidding credit is worth 10 percent of the cash bid. If a bidder qualifies for both of the bidding credits, the credits are additive for a total credit of 30 percent of the cash bid. Bidders are encouraged to review the BFF Addendum and lease obligations if they are interested in qualifying for these bidding credits.

a. *Bidding Credit Calculation:* BOEM provides the following example. For a cumulative 30 percent of cash bid bidding credit with a \$50 million Asking Price, the bidding credit will be calculated (subject to rounding) as follows:

$$\text{Cash Bid} = \frac{\{\text{Asking Price}\}}{\{1 + \text{Credit}\%}\} = \frac{\{\$50 \text{ million}\}}{1 + 30\%} = \$38,461,538$$

Workforce or Supply Chain Credit =
\$38,461,538 * 20% = \$7,692,308

Fishing Mitigation Credit = \$38,461,538
* 10% = \$3,846,154

Both the 20 percent workforce training/supply chain development credit and the 10 percent fisheries compensatory mitigation fund will require an explicit financial

commitment equal to the amount of the credit.

BOEM has prepared a table demonstrating the credit value calculations if a \$50 million Asking

Price is paid for in part with various bidding credits. The same calculations of cash bids and credits are applicable

to exit bids, as well as to live bids. Note that, in the monetary auction, all

fractional dollar amounts will be subject to rounding to the nearest dollar.

Qualified bidding credits	Asking price (million)	Cash bid	Credit value	Workforce training/supply chain development value	Fisheries compensatory mitigation fund value
Workforce Training/Supply Chain Development; and Fisheries Compensatory Mitigation Fund (30%)	\$50	\$38,461,538	\$11,538,462	\$7,692,308	\$3,846,154
Workforce Training/Supply Chain Development (20%)	50	41,666,667	8,333,333	8,333,333	0
Fisheries compensatory mitigation fund (10%)	50	45,454,545	4,545,455	0	4,545,455

Note: Cash bid and credit values are rounded to the nearest dollar in the Power Auctions software. BOEM will then use those values to calculate the credit values and will also round to the nearest dollar.

b. 20 Percent Bidding Credit for Workforce Training or Supply Chain Development or a Combination of Both:

This bidding credit allows a bidder to receive a credit of 20 percent of its cash bid in exchange for a commitment to make a qualifying monetary contribution ("Contribution"), in the same amount as the bidding credit received, to programs or initiatives that support workforce training programs for the U.S. offshore wind industry or development of a U.S. domestic supply chain for the offshore wind industry, or both, as described in the Lease.

i. The Contribution to workforce training must result in a better trained and/or larger domestic offshore wind workforce that will provide for more efficient operations via increasing the supply of fully trained personnel. Training of existing Lessee employees, Lessee contractors, or employees of affiliated entities will not qualify.

ii. The Contribution to domestic supply chain development must result in (i) overall benefits to the U.S. offshore wind supply chain available to all potential purchasers of offshore wind services, components, or subassemblies, not solely the Lessee's project; (ii) either the demonstrable development of new domestic capacity (including vessels) or the demonstrable buildout of existing capacity; (iii) an offshore wind domestic supply chain improved by a reduction in the upfront capital or certification cost for manufacturing offshore wind components, including the building of facilities, the purchasing of capital equipment, and the certifying of existing manufacturing facilities; or (iv) the development of a supply chain supporting the manufacture of offshore wind facility components.

iii. Contributions cannot be used to satisfy private cost shares for any Federal tax or other incentive programs where cost sharing is a requirement. No portion of the Contribution may be used to meet the requirements of any other bidding credits in this or in other

Federal lease sales for which the Lessee qualifies.

iv. Bidders interested in obtaining this bidding credit may choose to commit to workforce training programs, domestic supply chain initiatives, or a combination of both. The Conceptual Strategy must describe verifiable actions that the Lessee will take that will allow BOEM to confirm compliance when the documentation for satisfying the bidding credit is submitted. The Contribution must be tendered in full, and the Lessee must provide documentation evidencing it has made the Contribution and complied with applicable requirements, no later than the date the Lessee submits its first Facility Design Report (FDR) or tenth Lease Anniversary, whichever is sooner.

v. Contributions to workforce training will need to promote and support one or more of the following purposes: (i) Union apprenticeships, labor management training partnerships, stipends for workforce training, or other technical training programs or institutions focused on providing skills necessary for the planning, design, construction, operation, maintenance, or decommissioning of offshore wind energy projects in the United States; (ii) Maritime training necessary for the crewing of vessels to be used for the construction, servicing, and/or decommissioning of wind energy projects in the United States; (iii) Training workers in skills or techniques necessary to manufacture or assemble offshore wind components, subcomponents, or subassemblies. (Examples of these skills and techniques include welding; wind energy technology; hydraulic maintenance; braking systems; mechanical systems, including blade inspection and maintenance; or computers and programmable logic control systems.); (iv) Tribal offshore wind workforce development programs or training for employees of wholly owned Tribal corporations in skills necessary in the

offshore wind industry, that lead to the expeditious and orderly development of offshore wind; or (v) Training in any other job skills that the Lessee can demonstrate are necessary for the planning, design, construction, operation, maintenance, or decommissioning of offshore wind energy projects in the United States.

vi. Contributions to domestic supply chain development must promote and support one or more of the following: (i) Development of a domestic supply chain for the offshore wind industry, including manufacturing of components and sub-assemblies and the expansion of related services; (ii) Domestic Tier 2 and Tier 3 offshore wind component suppliers and domestic Tier-1 supply chain efforts, including quay-side fabrication; (iii) Technical assistance grants to help U.S. manufacturers re-tool or certify (e.g., ISO-9001) for offshore wind manufacturing; (iv) Development of Jones Act-compliant vessels for the construction, servicing, and/or decommissioning of wind energy projects in the United States; (v) Purchase and installation of lift cranes capable of lifting foundations, lift cranes on vessels, towers and nacelles quayside; (vi) Port infrastructure directly related to offshore wind component manufacturing or assembly of major offshore wind facility components; (vii) Establishing a new or existing bonding support reserve or revolving fund available to all businesses providing goods and services to offshore wind energy companies, including disadvantaged businesses and/or wholly owned Tribal corporations; or (viii) Other supply chain development efforts that the Lessee can demonstrate advance the manufacturing of offshore wind components or subassemblies, or the provision of offshore wind services, in the United States.

vii. Documentation: If a lease is issued pursuant to a winning bid that includes a bidding credit for workforce training/

supply chain development, the Lessee is required to provide documentation showing that the Lessee has met the financial commitment before the Lessee submits the first FDR for the lease or the tenth Lease Anniversary, whichever is sooner. The documentation must allow BOEM to objectively verify the amount of the Contribution and the beneficiary(ies) of the Contribution.

At a minimum, the documentation must include: all written agreements between the Lessee and beneficiary(ies) of the Contribution, which agreement must detail the amount of the Contribution(s) and how it will be used by the beneficiaries of the Contribution(s) to satisfy the goals of the bidding credit for which the Contribution was made; all receipts documenting the amount, date, financial institution, and the account and owner of the account to which the Contribution was made; and sworn statements by the entity that made the Contribution and attesting that all information provided in the above documentation is true and accurate. The documentation needs to describe how the funded initiative or program has advanced, or is expected to advance, U.S. offshore wind workforce training or supply chain development. The documentation must also provide qualitative and/or quantitative information that includes the estimated number of trainees or jobs supported, or the estimated leveraged supply chain investment resulting or expected to result from the Contribution. The documentation must contain any information called for in the conceptual strategy that the Lessee submitted with its BFF and allow BOEM to objectively verify (i) the amount of the Contribution; (ii) the beneficiary(ies) of the Contribution; and (iii) compliance with the bidding credit criteria provided in Addendum “C” of the Lease. If the Lessee’s implementation of its Conceptual Strategy changes due to market needs or other factors, the Lessee must explain the changes. BOEM reserves the right to determine that the bidding credit has not been satisfied if changes from the Lessee’s Conceptual Strategy result in the Lessee not meeting the criteria for the bidding credit described in Addendum “C” of the Lease.

viii. Enforcement: The commitment for the bidding credit is made via the BFF and will be included in a lease addendum that binds the Lessee and all future assignees of the lease. If BOEM were to determine that a Lessee or assignee had failed to satisfy the requirements of the bidding credit, or if a Lessee were to relinquish or otherwise

fail to develop the lease by the tenth Lease Anniversary, the amount corresponding to the bidding credit awarded will be immediately due and payable to the Office of Natural Resources Revenue (ONRR) with interest from the lease Effective Date. The interest rate is the underpayment interest rate identified by ONRR. The Lessee need not be required to pay said amount if the Lessee satisfied its bidding credit requirements but failed to develop the lease by the tenth Lease Anniversary. BOEM may, at its sole discretion, extend the documentation deadline beyond the first FDR submission or extend the lease development deadline beyond the 10-year timeframe.

c. 10 Percent Bidding Credit for Fisheries Compensatory Mitigation Fund: The second bidding credit allows a bidder to receive a credit of 10 percent of its cash bid in exchange for a commitment to establish—and contribute the bidding credit amount to—a Fisheries Compensatory Mitigation Fund, or to contribute to such an existing fund, to compensate for potential negative impacts from project development to commercial and for-hire recreational fisheries. The term “commercial fisheries” refers to commercial and processor businesses engaged in the act of catching and marketing fish and shellfish for sale from the GOM. The term “for-hire recreational fisheries” refers to charter and head boat fishing operations involving vessels-for-hire engaged in recreational fishing in the GOM that are hired for a charter fee by an individual or group of individuals (for the exclusive use of that individual or group of individuals). Lessees are encouraged to contribute to a regional fund that will compensate fisheries losses resulting from all OCS wind energy leases and easements in the GOM. The compensation must address the following:

- Gear loss or damage
 - Lost fishing income in GOM wind energy Lease or Project Areas
- The fisheries compensatory mitigation fund will assist commercial and for-hire recreational fisheries directly impacted by income or gear losses due to offshore wind activities on offshore wind leases or easements and is intended to address the impacts identified in BOEM’s environmental and project reviews. The compensatory mitigation must cover impacts that result directly from the preconstruction, construction, operations and/or decommissioning of an offshore wind project being developed on GOM wind energy leases or easements. The fund must be

established and the Contribution made before the Lessee submits the lease’s first FDR or the fifth Lease Anniversary, whichever is sooner. To qualify for this credit, the bidder must commit to the bidding credit requirements on the BFF and submit a Conceptual Strategy as described in the BFF Addendum.

i. Bidders committing to use the Fisheries Compensatory Mitigation Fund bidding credit must submit their Conceptual Strategy with their BFF, as described in the BFF Addendum. The Conceptual Strategy must describe the actions that the Lessee intends to take that will allow BOEM to verify compliance when the Lessee seeks to demonstrate satisfaction of the requirements for the bidding credit. The Lessee will be required to provide documentation showing that the Lessee has met the commitment and complied with the applicable bidding credit requirements before the Lessee submits the lease’s first FDR or the fifth Lease Anniversary, whichever is sooner.

ii. Gear loss and damage, and fishing income loss claims must be prioritized at each phase of offshore wind project development, including impacts from surveys conducted before the establishment of the fund. BOEM encourages Lessees to coordinate with other Lessees to establish or contribute to a regional fund. A regional fund should be flexible enough to incorporate future contributions from future lease auctions and actuarially sound, in recognition of the multi-decade life of offshore wind projects in the GOM. While the fund’s first priority must be to compensate for gear loss or damage and income loss, funds that exceed this compensation need based on an actuarial accounting may, for example, be used to:

- a. Promote participation of fishers and fishing communities in the project development process or other programs that better enable the fishing and offshore wind industries to co-exist;
- b. Offset the cost of gear and navigational aid upgrades and other transitions for operating within an offshore wind project.

Any fund established or selected by the Lessee to meet this sale’s bidding credit requirement must include a process for evaluating the actuarial status of funds every five years and publicly reporting information on fund disbursements and administrative costs at least annually.

iii. The fisheries compensatory mitigation fund must be independently managed by a third party and designed with fiduciary governance and strong internal controls while minimizing administrative expenses. The

Contribution may be used for fund startup costs, but the Fund should minimize costs by leveraging existing processes, procedures and information from BOEM Fisheries Mitigation Guidance, the Eleven Atlantic States' Fisheries Mitigation Project or other sources.

iv. *Documentation:* If a lease is awarded pursuant to a winning bid that includes a Fisheries Compensatory Mitigation Fund bidding credit, the Lessee must provide written documentation to BOEM that demonstrates that it completed the fund contribution before it submits the lease's first FDR or the fifth Lease Anniversary, whichever is sooner. The documentation must enable BOEM to objectively verify the contribution has met all applicable requirements as outlined in Addendum "C" of the Lease. At a minimum, this documentation must include:

- the procedures established to compensate for gear loss or damage resulting from all phases of the project development on the Lease Area (pre-construction, construction, operation, and decommissioning);
- the fisheries compensatory mitigation fund charter, including the governance structure, audit and public reporting procedures, internal controls, and standards for paying compensatory mitigation for impacts to fishers from development on wind energy Lease Areas in the GOM;

- all receipts documenting the amount, date, financial institution, and the account and owner of the account to which the Contribution was made, including any qualifying payments made in advance of the fund being established; and

- sworn statements by the entity that made the Contribution, and the independent Fund custodian attesting:
 - the amount and date(s) of the Contribution;
 - that the Contribution is being (or will be) used in accordance with the bidding credit requirements in the lease; and
 - that all information provided is true and accurate.

The documentation must contain any information specified in the conceptual strategy that was submitted with the BFF, including the mechanism established to compensate for lost income or for gear loss or damage during pre-construction, construction, operation, and decommissioning activities. If the Lessee's implementation of its Conceptual Strategy changes due to market needs or other factors, the Lessee must explain the changes. BOEM reserves the right to determine that the bidding credit has not been satisfied if changes from the Lessee's Conceptual Strategy result in the Lessee not meeting the criteria for the bidding credit described in Addendum "C" of the Lease.

v. *Enforcement:* The commitment to the fisheries compensatory mitigation fund bidding credit will be made in the BFF. It will be included in Addendum "C" of the Lease, and will bind the Lessee and all future assignees of the lease. If BOEM determines that a Lessee or assignee had failed to satisfy the commitment at the time the first FDR is submitted, or by the fifth Lease Anniversary, the amount corresponding to the bidding credit awarded will be immediately due and payable to ONRR with interest from the lease Effective Date. The interest rate is the underpayment interest rate identified by ONRR. The Lessee will not be required to pay said amount if the Lessee satisfied its bidding credit requirements by the fifth Lease Anniversary. BOEM may, at its sole discretion, extend the documentation deadline beyond the first FDR submission or beyond the 5-year timeframe.

d. *The Auction:* Using an online bidding system to host the auction, BOEM will start the bidding for Lease Areas OCS-G 37334 through 37336, as described below. All three Lease Areas will be offered in a single auction. BOEM is employing a 'one-per-customer' rule for this auction. Each bidder may only bid for one of the offered Lease Areas at a time and, ultimately, acquire only one of the Lease Areas in the auction.

Lease area name	Lease area ID	Acres	Minimum bid
Lake Charles	OCS-G37334	102,480	\$5,124,000
Galveston I	OCS-G37335	102,480	5,124,000
Galveston II	OCS-G37336	96,786	4,839,300

e. *Live Bids:* The auction will be conducted in a series of rounds. At the start of each round, BOEM will state an asking price for each Lease Area. If a bidder is willing to meet that asking price for one of the Lease Areas, it will indicate its intent by submitting a bid equal to the asking price for the selected lease area. A bid at the full asking price is referred to as a "live bid." If the bidder has qualified for a non-monetary credit, it will meet the asking price by submitting a multiple-factor bid—that is, a live bid that consists of a monetary (cash) element and a non-monetary credit (10%, 20%, or 30% of the cash element, depending on the bidder's qualification for bidding credits), the sum of which equals the asking price. A bidder without a non-monetary credit will submit a cash bid equal to the asking price. To participate in the next round of the auction, a bidder is

required to have submitted a live bid for one of the Lease Areas (or have a carried-forward bid) in each previous round.

As long as there are two or more live bids (including carried-forward bids) for at least one of the Lease Areas, the auction moves to the next round. BOEM will raise the asking price for each Lease Area that received two or more live bids in the previous round. Asking price increments will be determined based on several factors, including, but not necessarily limited to, the expected time needed to conduct the auction and the number of rounds that have already occurred. BOEM reserves the right to increase or decrease bidding increments as it deems appropriate. If there was only one live bid (including carried-forward bids) or no live bids for a Lease Area in the previous round, the asking price will not be increased.

A live bid is automatically carried forward if it was uncontested in the previous round (*i.e.*, if it was the only live bid for that Lease Area in the previous round), and the bidder who placed the uncontested bid will not be permitted to place any other bid in the current round of the auction.

Conversely, if a live bid was contested in the previous round (*i.e.*, if there was at least one other live bid for the same Lease Area, including carried-forward bids), the bidder who placed the contested bid is free to bid on any Lease Area in the auction in the next round, at the new asking price.

A bidder's eligibility is for either one or zero lease areas and corresponds to the maximum number of lease areas that a bidder may include in a live bid during a single round of the auction. The initial eligibility of a bidder who has submitted a bidding deposit is one.

The bidder's eligibility drops to zero following a round in which the bidder's live bid is not carried forward and in which the bidder does not submit a new live bid for one of the Lease Areas. The bidder's eligibility can never increase from zero to one.

If a bidder decides to stop bidding before the final round of the auction, there are circumstances in which the bidder could nonetheless win a lease. For example, that bidder could be ultimately selected in the winner determination that is described in detail below, or the provisionally winning bidder could be disqualified at the award stage of the auction. In these circumstances, the bidder will be bound by its bid and thus obligated to pay the full bid amount. Bidders therefore might be bound by any of their bids up to and until the point at which the auction results are finalized.

Between rounds, BOEM will disclose to all bidders that submitted bids: (1) the number of live bids (including carried-forward bids) for each Lease Area in the previous round of the auction (*i.e.*, the level of demand at the asking price); and (2) the asking price for each Lease Area in the upcoming round of the auction.

f. Exit Bids: In any round after the first round, a bidder may submit an "exit bid" (also known as an "intra-round bid") only for the same Lease Area as the bidder's contested live bid in the previous round. An exit bid is a bid that is greater than the previous round's asking price, but less than the current round's asking price. An exit bid is *not* a live bid, and it represents the final bid that a bidder may submit in the auction. A bidder may not submit both an exit bid on one of the Lease Areas and a live bid on a different Lease Area. During the auction, the exit bid can be seen only by BOEM and not by other bidders.

The auction ends when a round occurs in which each of the Lease Areas in the auction receives one or zero live bids (including carried-forward bids), regardless of the number of exit bids on any Lease Area.

Determination of Provisional Winners: After the bidding ends, BOEM will determine the provisionally winning bid for each Lease Area by the following two-stage procedure.

In stage one, the highest bid (live bid, including any carried-forward bid, or exit bid) received for each Lease Area in the final round will be designated the provisionally winning bid, if there is a single highest bid. In the event of a tie (*i.e.*, if two or more bidders submitted identical highest exit bids for the same Lease Area), the selection of one of the

highest exit bids will be deferred until stage two.

In stage two, BOEM will consider bids from all bidding rounds for Lease Areas that were not assigned in stage one made by bidders who were not assigned a Lease Area in stage one. BOEM will select the combination of such bids that maximizes the sum of the bid amounts of the selected bids, subject to the following constraints: (1) each Lease Area that received multiple highest exit bids in the final round (but no live bid) must be assigned to one of the bidders that submitted the highest exit bid; (2) at most one bid from each bidder can be selected; and (3) at most one bid for each Lease Area can be selected. If there is a unique combination of bids that solves this maximization problem, then these bids will be deemed to be the remaining provisionally winning bids. If two or more combinations of bids tie by producing the same maximized sum of bid amounts, the auction system will select one of the combinations by use of pseudorandom numbers. The provisional winners will pay the amounts of their provisionally winning bids, or risk forfeiting their bid deposits. A provisional winner will be disqualified if it is subsequently found to have violated auction rules or BOEM regulations, or otherwise engaged in conduct detrimental to the integrity of the competitive auction. If a bidder submits a bid that BOEM determines to be a provisionally winning bid, the bidder must sign the applicable lease documents, establish financial assurance, and submit the cash balance (if any) of its bid (*i.e.*, its winning cash bid less its bid deposit) within 10 business days of receiving the lease copies, pursuant to 30 CFR 585.224. BOEM reserves the right not to issue the lease to a provisionally winning bidder if that bidder fails to: timely return the signed lease form, establish adequate financial assurance, pay the balance of its winning bid, or otherwise comply with applicable regulations or the terms of the FSN. In that case, the bidder will forfeit its bid deposit.

BOEM will publish the provisional winners and the provisionally winning bid amounts shortly after the conclusion of the sale. Full bid results, including round-by-round results of the entire sale, including exit bids, will be published on BOEM's website after review of the results and announcement of the provisional winners.

g. Additional Information Regarding the Auction Format:

i. Authorized Individuals and Bidder Authentication: A company that is eligible to participate in the auction will identify on its BFF up to three

individuals who are authorized to bid on behalf of the company, including their names, business telephone numbers, and email addresses. After BOEM has processed the bid deposits, the auction contractor will send several emails to the authorized individuals. The emails will contain user login information and instructions for accessing the bidder manual for the auction system and any auction system technical supplement (ASTS) that may be issued.

The auction system will require software tokens for two-factor authentication. To set up the tokens, authorized individuals will download an app onto their smartphone or tablet with a recent operating system. One of the emails sent to authorized individuals will contain instructions for installing the app and the credentials needed to activate the software token. A short telephone conversation with the auction contractor may also be required to use the credentials. The login information, along with the tokens, will be tested during the mock auction. If an eligible bidder fails to submit a bid deposit or does not participate in the auction, BOEM will deactivate that bidder's tokens and login information.

ii. Timing of Auction: The auction will begin at 8:00 a.m. CDT on August 29, 2023. Bidders may log in as early as 7:30 a.m. CDT on that day. BOEM recommends that bidders log in earlier than 8:00 a.m. CDT on that day to ensure that any login issues are resolved prior to the start of the auction. Once bidders have logged in, they should review the auction schedule, which lists the anticipated start times, end times, and recess times of each round in the auction. Each round is structured as follows:

- Round bidding begins;
- Bidders enter their bids;
- Round bidding ends and the recess begins;
- During the recess, previous round results and next round asking prices are posted;
- Bidders review the previous round results and prepare their next round bids; and
- Next round bidding begins.

The first round will last about 30 minutes, though subsequent rounds will be substantially shorter. Recesses are anticipated to last approximately 10 minutes. This description of the auction schedule is tentative. Bidders should consult the auction schedule on the auction system during the auction for updated times. Bidding will continue until about 5:00 p.m. CDT each day. BOEM anticipates that the auction will last one to two business days, but may

continue for additional business days as necessary until the auction has concluded.

iii. Messaging Service: BOEM and its auction contractors will use the auction platform messaging service to keep bidders informed on issues of interest during the auction. For example, BOEM may change the schedule at any time, including during the auction. If BOEM changes the schedule during an auction, it will use the messaging service to notify bidders that a revision has been made and will direct bidders to the relevant page. BOEM will also use the messaging service for other updates during the auction.

Bidders may place bids at any time during the round. At the top of the bidding page, a countdown clock shows how much time remains in the round. Bidders have until the end of the round to place bids. Bidders should place bids according to the procedures described in this notice and the Bidder Manual. Information about the round results will only be made available after the round has closed, so there is no strategic advantage in placing bids early or late in the round.

BOEM may issue an ASTS to elaborate on the auction procedures described in this FSN. In the event of any inconsistency between the Bidder Manual, the ASTS, and the FSN, the FSN will be controlling.

iv. Alternate Bidding Procedures: Redundancy is the most effective way to mitigate technical and human issues during an auction. Bidders should strongly consider authorizing more than one individual to bid in the auction—and confirming during the mock auction that each individual is able to access the auction system. A 4G card or other form of wireless access is helpful in case a company's main internet connection should fail. As a last resort, an authorized individual who is facing technical issues may request to submit its bid by telephone. In order to be authorized to place a telephone bid, an authorized individual must call the help desk number listed in the auction manual *before* the end of the round. BOEM will authenticate the caller's identity, including requiring the caller to provide a code from the software token. The caller must also explain the reasons why a telephone bid needs to be submitted. BOEM may, in its sole discretion, permit or refuse to accept a request for the placement of a bid using this alternate telephonic bidding procedure.

h. Prohibition on Communications Between Bidders During Auction: During the auction, bidders are prohibited from communicating with

each other regarding their participation in the auction. Also, during the auction, bidders are prohibited from communicating to the public regarding any aspect of their participation or lack thereof in the auction, including, but not limited to, through social media, updated websites, or press releases.

XIV. Post-Auction Procedures

a. Rejection or Non-Acceptance of Bids

BOEM reserves the right to reject any and all bids that do not satisfy the requirements and rules of the auction, the FSN, or applicable regulations and statutes.

b. Anti-Competitive Review

Bidding behavior in this sale is subject to Federal antitrust laws. Following the auction, but before the acceptance of bids and the issuance of the lease, BOEM will “allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of [the] lease sale.” 43 U.S.C. 1337(c)(1). If a provisionally winning bidder is found to have engaged in anti-competitive behavior in connection with this lease sale, BOEM will reject its provisionally winning bid. Compliance with BOEM's auction procedures and regulations is not an absolute defense to violations of antitrust laws.

Anti-competitive behavior determinations are fact-specific. Such behavior may manifest itself in several different ways, including, but not limited to:

1. An express or tacit agreement among bidders not to bid in an auction, or to bid a particular price;
2. An agreement among bidders not to bid;
3. An agreement among bidders not to bid against each other; or
4. Other agreements among bidders that have the potential to affect the final auction price.

Pursuant to 43 U.S.C. 1337(c)(3), BOEM will decline to award a lease if the Attorney General, in consultation with the Federal Trade Commission, determines that awarding the lease would be inconsistent with antitrust laws.

For more information on whether specific communications or agreements could constitute a violation of Federal antitrust law, please see <https://www.justice.gov/atr/business-resources> or consult legal counsel.

c. Process for Issuing the Lease

Once all post-auction reviews have been completed to BOEM's satisfaction, BOEM will provide three unsigned

copies of the lease to each provisionally winning bidder. Within 10 business days after receiving the lease copies, the provisionally winning bidders must:

1. Sign and return the lease copies on the bidder's behalf;
2. File financial assurance, as required under 30 CFR 585.515–537; and
3. Pay by electronic funds transfer (EFT) the balance (if any) of the bonus bid (winning cash bid less the bid deposit). BOEM requires bidders to use EFT procedures (not pay.gov, the website bidders used to submit bid deposits) for payment of the balance of the bonus bid, following the detailed instructions available on ONRR's website at: <https://onrr.gov/paying/payment-options?tabs=renewable-energy,bid-deposit-options>.

BOEM will not execute the lease until the three requirements above have been satisfied. BOEM has accepted the provisionally winning bidder's financial assurance pursuant to 30 CFR 585.515, and BOEM has processed the provisionally winning bidder's payment. BOEM may extend the 10-business-day deadline for signing a lease, filing the required financial assurance, and paying the balance of the bonus bid if BOEM determines, in its sole discretion, that the provisionally winning bidder's inability to comply with the deadline was caused by events beyond the provisionally winning bidder's control pursuant to 30 CFR 585.224(e).

If a provisionally winning bidder does not meet these requirements or otherwise fails to comply with applicable regulations or the terms of the FSN, BOEM reserves the right not to issue the lease to that bidder. In such a case, the provisionally winning bidder will forfeit its bid deposit. Also, in such a case, BOEM reserves the right to identify the next highest bid for that Lease Area submitted during the lease sale by a bidder who has not won one of the other Lease Areas and to offer the lease to that bidder pursuant to its bid.

Within 45 calendar days of the date that a provisionally winning bidder receives lease copies, each provisionally winning bidder will be required to pay the first year's rent using the “ONRR Renewable Energy Initial Rental Payments” form available at: <https://www.pay.gov/public/form/start/27797604/>.

Subsequent annual rent payments will be required to be made following the detailed instructions available on ONRR's website at: <https://onrr.gov/paying/payment-options?tabs=rent-payments>.

d. Non-Procurement Debarment and Suspension Regulations

Pursuant to 43 CFR part 42, subpart C, an OCS renewable energy Lessee will be required to comply with the Department of the Interior's non-procurement debarment and suspension regulations at 2 CFR parts 180 and 1400. The Lessee must also communicate this requirement to persons with whom the Lessee does business relating to this lease by including this requirement as a condition in their contracts and other transactions.

e. Changes to Auction Details

The Regional Director of BOEM's Gulf of Mexico Regional Office has the discretion to change any auction detail specified in the FSN, including the date and time, if s/he deems that events outside BOEM's control may interfere with a fair and proper lease sale. Such events may include, but are not limited to, natural disasters (e.g., earthquakes, hurricanes, floods, and blizzards), wars, riots, act of terrorism, fire, strikes, civil disorder, Federal Government shutdowns, cyberattacks against relevant information systems, or other events of a similar nature. In case of such events, BOEM would notify all qualified bidders via email, phone, and BOEM's website at: <https://www.boem.gov/renewable-energy/state-activities/gulf-mexico-activities>. Bidders should call (504) 736-7502 if they have concerns.

f. Withdrawal of Blocks

BOEM reserves the right to withdraw all or portions of the Lease Areas prior to executing the leases with the winning bidders. If BOEM exercises this right, it will refund bid deposits to winning bidders, without interest, as provided in 30 CFR 585.224(f).

g. Appeals

The bid rejection procedures are provided in BOEM's regulations at 30 CFR 585.225 and 585.118(c). Under 30 CFR 585.225:

(a) If BOEM rejects your bid, BOEM will provide a written statement of the reasons and will refund any money deposited with your bid, without interest.

(b) You will then be able to ask the BOEM Director for reconsideration, in writing, within 15 business days of bid rejection, under 30 CFR 585.118(c)(1). The Director will send you a written response either affirming or reversing the rejection.

The procedures for requesting reconsideration of a bid rejection are described in 30 CFR 585.118(c).

h. Protection of Privileged or Confidential Information

BOEM will protect privileged or confidential information that the Lessee submits, as authorized by the Freedom of Information Act (FOIA), 30 CFR 585.114, or other applicable statutes. If the Lessee wishes to protect the confidentiality of information, the Lessee should clearly mark it "Contains Privileged or Confidential Information" and consider submitting such information as a separate attachment. BOEM will not disclose such information, except as required by FOIA. If your submission is requested under the FOIA, your information will only be withheld if a determination is made that one of the FOIA's exemptions to disclosure applies. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law. Labeling information as privileged or confidential will alert BOEM to more closely scrutinize whether it warrants withholding. Further, BOEM will not treat as confidential aggregate summaries of otherwise nonconfidential information.

XV. Compliance With the Inflation Reduction Act (Pub. L. 117-169 (Aug. 16, 2022) (Hereinafter, the "IRA"))

Section 50265(b)(2) of the IRA provides that "[d]uring the 10-year period beginning on the date of enactment of this Act . . . the Secretary may not issue a lease for offshore wind development under section 8(p)(1)(C) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(p)(1)(C)) unless—(A) an offshore [oil and gas] lease sale has been held during the 1-year period ending on the date of the issuance of the lease for offshore wind development; and (B) the sum total of acres offered for lease in offshore [oil and gas] lease sales during the 1-year period ending on the date of the issuance of the lease for offshore wind development is not less than 60,000,000 acres." Section 50264(d) of the IRA provides that ". . . not later than March 31, 2023, the Secretary shall conduct Lease Sale 259[.]". Lease Sale 259 was held on March 29, 2023, and at least one lease from the sale has been issued, satisfying the requirements in section 50265(b)(2) of the IRA for any lease issued by March 29, 2024. BOEM expects to issue any leases resulting from GOMW-1 no later than the one-year anniversary of Lease Sale 259.

Authority: 43 U.S.C. 1337(p); 30 CFR 585.211 and 585.216.

Elizabeth Klein,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2023-15501 Filed 7-20-23; 8:45 am]

BILLING CODE 4340-98-P

INTERNATIONAL TRADE COMMISSION

[USITC SE-23-034]

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: United States International Trade Commission.

TIME AND DATE: July 27, 2023 at 11:00 a.m.

PLACE: Room 101, 500 E Street SW, Washington, DC 20436, Telephone: (202) 205-2000.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. *Agendas for future meetings:* none.
2. Minutes.
3. Ratification List.
4. Commission vote on Inv. Nos. 701-TA-442 and 731-TA-1095-1096 (Third Review) (Lined Paper School Supplies from China and India). The Commission currently is scheduled to complete and file its determination and views on August 4, 2023.
5. *Outstanding action jackets:* none.

CONTACT PERSON FOR MORE INFORMATION: Sharon Bellamy, Acting Supervisory Hearings and Information Officer, 202-205-2000.

The Commission is holding the meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b). In accordance with Commission policy, subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting. Earlier notification of meeting was not possible.

By order of the Commission.

Issued: July 19, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-15630 Filed 7-19-23; 4:15 pm]

BILLING CODE 7020-02-P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1308]

Certain Power Semiconductors, and Mobile Devices and Computers Containing Same Notice of a Commission Determination To Review in Part and, on Review, To Affirm a Final Initial Determination Finding No Violation of Section 337; Termination of Investigation

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part and, on review, to affirm a final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) finding no violation of section 337. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Paul Lall, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2043. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket system (“EDIS”) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 1, 2022, based on a complaint filed on behalf of Arigna Technology Limited (“Arigna”) of Dublin, Ireland. 87 FR 19124-25 (Apr. 1, 2022). The complaint, as amended and supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain power semiconductors, and mobile devices and computers containing same by reason of infringement of claims 1 and 2 of U.S. Patent No. 7,183,835 (“the ‘835 Patent”) The Commission’s notice of investigation named thirteen (13) respondents: (1) Samsung Electronics Co., Ltd. of Suwon, Republic of Korea and Samsung Electronics America, Inc.

of Ridgefield Park, New Jersey (collectively, “the Samsung Respondents”); (2) Google LLC of Mountain View, California; Lenovo Group Ltd. of Beijing, China; Lenovo (United States) Inc. of Morrisville, North Carolina; Motorola Mobility LLC of Chicago, Illinois; Microsoft Corporation of Redmond, Washington; and OnePlus Technology (Shenzhen) Co., Ltd. of Guangdong, China (collectively, “the Additional Settling Respondents”); (3) TCL Electronics Holdings Limited and TCL Communication Limited, both of Hong Kong Science Park, Hong Kong; TTE Technology Inc. of Corona, California; and TCT Mobile (USA) Inc. of Irvine, California (collectively, “the TCL Respondents”); and (4) Apple Inc. of Cupertino, California. The Office of Unfair Import Investigations is participating in the investigation.

On December 8, 2022, the Commission terminated this investigation as to the Samsung Respondents and the Additional Settling Respondents based on respective settlement and license agreements. (Order Nos. 24, 25) (Nov. 10, 2022), *unreviewed by Comm’n Notice* (Dec. 8, 2022).

The presiding ALJ held an evidentiary hearing in this investigation on February 13–17, 2023.

On June 7, 2023, the Commission terminated this investigation as to the TCL Respondents based on a settlement agreement. Order No. 51, *unreviewed by Comm’n Notice* (June 7, 2023).

On May 18, 2023, the presiding ALJ issued the subject ID finding no violation of section 337 because: (1) Arigna failed to prove that the accused Qualcomm Chips or Qorvo Chips infringe the asserted claims of the ‘835 Patent; (2) Arigna failed to satisfy the technical prong of the domestic industry requirement; and (3) Arigna failed to satisfy the economic prong of the domestic industry requirement. The ID also finds that the asserted claims of the ‘835 patent have not been shown to be invalid as anticipated and/or obvious in view of certain asserted prior art or for lack of written description.

No party filed a petition for review of the subject ID.

Having reviewed the record of the investigation, including the final ID and the parties’ submissions to the ALJ, the Commission has determined to review the ID in part and, on review, to affirm the ID’s finding that Arigna has not satisfied the economic prong of the domestic industry requirement.¹ The

¹ On review, Commissioner Karpel notes that she disagrees with the ID’s *per se* exclusion of investments in post-sale technical service and

Commission has determined not to review the remainder of the final ID. The investigation is hereby terminated.

The Commission vote for this determination took place on July 17, 2023.

The authority for the Commission’s determinations is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission’s Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: July 17, 2023.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2023-15465 Filed 7-20-23; 8:45 am]

BILLING CODE 7020-02-P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On July 13, 2023, the Department of Justice lodged a proposed consent decree with the United States District Court for the Northern District of New York in *United States v. Upstate Shredding, LLC, and Weitsman Shredding, LLC*, 3:23-cv-847 (N.D.N.Y.).

The United States filed a complaint against Upstate Shredding, LLC and Weitsman Shredding, LLC (“Upstate”) under section 113(a)(1) of the Clean Air

support, including field engineering and product line marketers, who engage in customer-facing engineering activities as non-qualifying investments. In her view, the statute does not require the *per se* exclusion of plant and equipment investments or employment of labor or capital in customer-facing engineering activities with respect to articles protected by a patent, whether or not they are characterized as sales and marketing. *See Certain Artificial Eyelash Extension Systems, Products Containing Same, and Components Thereof*, Inv. No. 337-TA-1226, Separate Views of Commissioners Karpel and Schmidlein, at 35–36 (Oct. 24, 2022) (“There is no statutory prohibition against inclusion of these types of expenses; rather, the key is whether the expenses properly fall within (A) or (B).”); *Certain Vacuum Insulated Flasks and Components Thereof*, Inv. No. 337-TA-1216, Comm’n Notice, 86 FR 59424, 49425 (Oct., 27, 2021) (“As the Commission has previously stated, “[w]hile marketing and sales activity, alone, may not be sufficient to meet the domestic industry test, those activities may be considered as part of the overall evaluation of whether or not a Complainant meets the economic prong.” (quoting *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing the Same*, Inv. No. 337-TA-1097, Comm’n Op. at 22 (June 29, 2018))). In this investigation, Arigna has failed to establish that any articles practice one or more claims of the ‘835 patent, and thus Arigna cannot satisfy the domestic industry requirement regardless of the magnitude or alleged significance of Microchip expenditures considered for the economic prong of the domestic industry requirement.

Act, 42 U.S.C. 7413(a)(1), and the New York state implementation plan. In the complaint, the United States seeks injunctive relief and civil penalties arising from alleged excess emissions of volatile organic compounds at the defendants' metal shredding facility in Owego, NY. The proposed consent decree requires the defendants to pay a civil penalty of \$400,000, plus interest accruing from the date of entry to the payment date; and to install pollution control technology to limit future emissions of volatile organic compounds.

The publication of this notice opens a period for public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Upstate Shredding, LLC, and Weitsman Shredding, LLC*, D.J. Ref. No. 90–5–2–1–12564. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By email	<i>pubcomment-ees.enrd@usdoj.gov.</i>
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the proposed consent decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the proposed consent decree upon email request to *pubcomment-ees.enrd@usdoj.gov*.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2023–15513 Filed 7–20–23; 8:45 am]

BILLING CODE 4410–15–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–077]

Privacy Act of 1974; System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, the National Aeronautics and Space Administration (NASA) is providing public notice of modification to a previously announced system of records, Office of the Inspector General Investigations Case Files/NASA 10IGIC. This notice incorporates locations and NASA Standard Routine Uses previously published separately from, and cited by reference in, this and other NASA systems of records notices.

DATES: Submit comments within 30 calendar days from the date of this publication. The changes will take effect at the end of that period if no adverse comments are received.

ADDRESSES: Bill Edwards-Bodmer, Privacy Act Officer, Office of the Chief Information Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546–0001, (757) 864–7998, *NASA-PAOfficer@nasa.gov*.

FOR FURTHER INFORMATION CONTACT: NASA Privacy Act Officer, Bill Edwards-Bodmer, (757) 864–7998, *NASA-PAOfficer@nasa.gov*.

SUPPLEMENTARY INFORMATION: This system notice includes minor revisions to NASA's existing system of records notice to bring its format into compliance with OMB guidance and to update records access, notification, and contesting procedures consistent with NASA Privacy Act regulations. It incorporates in whole, as appropriate, information formerly published separately in the **Federal Register** as Appendix A, Location Numbers and Mailing Addresses of NASA Installations at which Records are Located, and Appendix B, Standard Routine Uses—NASA, and removes reference to Appendix A and Appendix B.

William Edwards-Bodmer,
NASA Privacy Act Officer.

SYSTEM NAME AND NUMBER:

Office of the Inspector General Investigations Case Files, NASA 10IGIC.

SECURITY CLASSIFICATION:

Some of the material contained in the system has been classified in the interests of national security pursuant to Executive Order 11652.

SYSTEM LOCATION:

Electronic records are migrating from a secure NASA server to a secure cloud maintained by Amazon Web Services (AWS), 410 Terry Ave., North Seattle, WA 98109. Paper records are maintained at the following locations and other OIG offices at NASA Centers.

- Mary W. Jackson NASA Headquarters, National Aeronautics and Space Administration (NASA), Washington, DC 20546–0001
- New Jersey Post of Duty, 402 East State Street, Trenton, NJ 08608
- Western Field Office, Glenn Anderson Federal Building, 501 West Ocean Blvd., Long Beach, CA 90802–4222
- Rocky Mountain Post of Duty, 6430 S. Fiddlers Green Circle, Suite 350, Greenwood Village, CO 80111

SYSTEM MANAGER(S):

Assistant Inspector General for Investigations, Mary W. Jackson NASA Headquarters, National Aeronautics and Space Administration (NASA), Washington, DC 20546–0001. Subsystem Managers Special and Resident Agents in Charge at:

- New Jersey Post of Duty, 402 East State Street, Trenton, NJ 08608
- Western Field Office, Glenn Anderson Federal Building, 501 West Ocean Blvd., Long Beach, CA 90802–4222
- Rocky Mountain Post of Duty, 6430 S. Fiddlers Green Circle, Suite 350, Greenwood Village, CO 80111

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

- 51 U.S.C. 20113—Powers of the Administration in performance of functions
- 51 U.S.C. 20114—Administration and Department of Defense coordination
- 44 U.S.C. 3101—Records management by agency heads; general duties
- 5 U.S.C. 404(a)(1) and (a)(3)—Inspector General Act of 1978, as amended; Duties and Responsibilities

PURPOSE(S) OF THE SYSTEM:

Information in this system of records is collected in the course of investigating alleged crimes and other violations of law or regulations that affect NASA. The information is used by prosecutors, Agency managers, law enforcement agencies, Congress, NASA contractors, and others to address the crimes and other misconduct discovered during investigations.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains information on (1) current and former employees of NASA; (2) current and former NASA contractors and subcontractors; (3) and others whose actions have affected NASA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Case files pertaining to matters including, but not limited to, the following classifications of cases: (1)

Fraud against the Government; (2) theft of Government property; (3) bribery; (4) lost or stolen lunar samples; (5) misuse of Government property; (6) conflict of interest; (7) waiver of claim for overpayment of pay; (8) leaks of Source Evaluation Board information; (9) improper personal conduct; (10) irregularities in awarding contracts; (11) computer crimes; (12) research misconduct; and (13) whistleblower protection investigations under various statutes and regulations.

RECORD SOURCE CATEGORIES:

Exempt, see Exemptions Promulgated for the System below.

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

Any disclosures of information will be compatible with the purpose for which the Agency collected the information. Under the following routine uses that are unique to this system of records, information in this system may be disclosed:

1. Responding to inquiries from the White House, the Office of Management and Budget, and other organizations in the Executive Office of the President.

2. Disclosing to a Federal, State, local, tribal, or territorial government or agency lawfully engaged in the collection of intelligence (including national intelligence, foreign intelligence, and counterintelligence), counterterrorism, or homeland security, law enforcement or law enforcement intelligence, and other information, where disclosure is undertaken for intelligence, counterterrorism, homeland security, or related law enforcement purposes, as authorized by U.S. Law or Executive Order, and in accordance with applicable disclosure policies.

3. Disclosing to any official (including members of the Council of Inspectors General on Integrity and Efficiency (CIGIE) and staff and authorized officials of the Department of Justice and Federal Bureau of Investigation) charged with the responsibility to conduct qualitative assessment reviews of internal safeguards and management procedures employed in Office of Inspector General (OIG) operations.

4. Disclosing to members of the CIGIE for the preparation of reports to the President and Congress on the activities of the Inspectors General.

5. Disclosing to the public when: the matter under investigation has become public knowledge, or when the Inspector General determines that such disclosure is necessary to preserve confidence in the integrity of the OIG

investigative process, or to demonstrate the accountability of NASA officers, or employees, or other individuals covered by this system, unless the Inspector General determines that disclosure of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

6. Disclosing to the news media and public when there exists a legitimate public interest (e.g., to provide information on events in the criminal process, such as indictments), or when necessary for protection from imminent threat to life or property, unless the Inspector General determines that disclosure of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

7. Disclosing to any individual or entity, such as a witness or subject matter expert, when necessary to elicit information that will assist an OIG investigation.

8. Disclosing 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.

In addition, information may be disclosed under the following NASA Standard Routine Uses wherein references to NASA shall be deemed to include NASA OIG:

1. *Law Enforcement*—When a record on its face, or in conjunction with other information, indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order, disclosure may be made to the appropriate agency, whether Federal, foreign, State, local, or tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order, if NASA determines by careful review that the records or information are both relevant and necessary to any enforcement, regulatory, investigative or prosecutive responsibility of the receiving entity.

2. *Certain Disclosures to Other Agencies*—A record from this SOR may be disclosed to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary, to obtain information relevant to a NASA decision concerning the hiring or

retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

3. *Certain Disclosures to Other Federal Agencies*—A record from this SOR may be disclosed to a Federal agency, in response to its request, for a matter concerning the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

4. *Department of Justice*—A record from this SOR may be disclosed to the Department of Justice when a) NASA, or any component thereof; or b) any employee of NASA in his or her official capacity; or c) any employee of NASA in his or her individual capacity where the Department of Justice has agreed to represent the employee; or d) the United States, where NASA determines that litigation is likely to affect NASA or any of its components, is a party to litigation or has an interest in such litigation, and by careful review, the use of such records by the Department of Justice is deemed by NASA to be relevant and necessary to the litigation.

5. *Courts*—A record from this SOR may be disclosed in an appropriate proceeding before a court, grand jury, or administrative or adjudicative body, when NASA determines that the records are relevant and necessary to the proceeding; or in an appropriate proceeding before an administrative or adjudicative body when the adjudicator determines the records to be relevant and necessary to the proceeding.

6. *Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to appropriate agencies, entities, and persons when (1) NASA suspects or has confirmed that there has been a breach of the system of records; (2) NASA has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, NASA (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with NASA's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

7. *Contractors*—A record from this SOR may be disclosed to contractors,

grantees, experts, consultants, students, volunteers, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for the Federal Government, when necessary to accomplish a NASA function related to this SOR. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to NASA employees.

8. *Members of Congress*—A record from this SOR may be disclosed to a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

9. *Disclosures to Other Federal Agencies in Response to an Actual or Suspected Compromise or Breach of Personally Identifiable Information*—A record from this SOR may be disclosed to another Federal agency or Federal entity, when NASA determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

10. *National Archives and Records Administration*—A record from this SOR may be disclosed as a routine use to the officers and employees of the National Archives and Records Administration (NARA) pursuant to records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

11. *Audit*—A record from this SOR may be disclosed to another agency, or organization for purpose of performing audit or oversight operations as authorized by law, but only such information as is necessary and relevant to such audit or oversight function.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records in this system are maintained as hard-copy documents and on electronic media.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Each OIG investigation is assigned a case number and all records relating to a particular investigation are filed and retrieved by that case number. Records may also be retrieved from the system by the name of an individual.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are maintained in Agency files and destroyed in accordance with NASA Procedural Requirements (NPR) 1441.1, NASA Records Management Program Requirements, and NASA Records Retention Schedules (NRRS) 1441.1, Schedule 9.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Electronic records are maintained on a secure NASA server until migration to a secure cloud maintained by AWS. Paper and electronic records are protected in accordance with all Federal standards and those established in NASA regulations at 14 CFR 1212.605. Additionally, server and data management environments employ infrastructure encryption technologies both in data transmission and at rest on servers. Electronic messages sent within and outside of the Agency that convey sensitive data are encrypted and transmitted by staff via pre-approved electronic encryption systems as required by NASA policy. Approved security plans are in place for information systems containing the records in accordance with the Federal Information Security Management Act of 2002 (FISMA) and OMB Circular A-130, Management of Federal Information Resources. Only authorized personnel requiring information in the official discharge of their duties are authorized access to records through approved access or authentication methods. Access to electronic records is achieved only from workstations within the NASA Intranet or via a secure Virtual Private Network (VPN) connection that requires two-factor hardware token authentication or via employee PIV badge authentication from NASA-issued computers. Non-electronic records are secured in locked rooms or files.

RECORD ACCESS PROCEDURES:

System is exempt. NASA has published a rule, entitled "Privacy Act—NASA Regulations" to establish procedures related to the Privacy Act, including its exemptions relating to access, maintenance, disclosure, and amendment of records which are in this NASA system of records per the Privacy Act, promulgated at 14 CFR part 1212.501 (<https://www.ecfr.gov/current/title-14/chapter-V/part-1212/subpart-1212.5/section-1212.501>).

CONTESTING RECORD PROCEDURES:

See "Records Access Procedures" above.

NOTIFICATION PROCEDURES:

See "Records Access Procedures" above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

(1) The Inspector General Investigations Case Files system of records is exempt from any part of the Privacy Act (5 U.S.C. 552 a), EXCEPT the following subsections: (b) relating to conditions of disclosure; (c)(1) and (2) relating to keeping and maintaining a disclosure accounting; (e)(4)(A)—(F) relating to publishing a system notice setting forth name, location, categories of individuals and records, routine uses, and policies regarding storage, retrievability, access controls, retention and disposal of the records; (e)(6), (7), (9), (10), and (11) relating to the dissemination and maintenance of records; (i) relating to criminal penalties. This exemption applies to those records and information contained in the system of records pertaining to the enforcement of criminal laws.

(2) To the extent that there may exist noncriminal investigative files within this system of records, the Inspector General Investigations Case Files system of records is exempt from the following subsections of the Privacy Act (5 U.S.C. 552a): (c)(3) relating to access to disclosure accounting, (d) relating to access to reports, (e)(1) relating to the type of information maintained in the records; (e)(4)(G), (H), and (I) relating to publishing the system notice information as to agency procedures for access and amendment and information as to the categories of sources of records, and (f) relating to developing agency rules for gaining access and making corrections.

The determination to exempt this system of records has been made by the Administrator of NASA in accordance with 5 U.S.C. 552a (j) and (k) and subpart 5 of the NASA regulations appearing in 14 CFR part 1212, for the reason that a component of the Office of Inspector General, NASA, performs as its principal function activities pertaining to the enforcement of criminal laws, within the meaning of 5 U.S.C. 552a(j)(2).

HISTORY:

- (15–115, 80 FR 79937, pp. 79937–79947)
- (13–149, 78 FR 77503, pp. 77503–77508)
- (09–085, 74 FR 50247, pp. 50247–50255)
- (07–081, 72 FR 55817, pp. 55817–55833)
- (04–060, 69 FR 25613, pp. 25613–25615)
- (99–155, 64 FR 69556, pp. 69556–69571)

- (98–007, 63 FR 4290, pp. 4290–4306)

[FR Doc. 2023–15482 Filed 7–20–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (23–074)]

Notice of Intent To Grant an Exclusive, Co-Exclusive or Partially Exclusive Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of intent to grant exclusive, co-exclusive or partially exclusive patent license.

SUMMARY: NASA hereby gives notice of its intent to grant an exclusive, co-exclusive or partially exclusive patent license to practice the inventions described and claimed in the patents and/or patent applications listed in **SUPPLEMENTARY INFORMATION** below.

DATES: The prospective exclusive, co-exclusive or partially exclusive license may be granted unless NASA receives written objections including evidence and argument, no later than August 7, 2023 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dole Act and implementing regulations. Competing applications completed and received by NASA no later than August 7, 2023 will also be treated as objections to the grant of the contemplated exclusive, co-exclusive or partially exclusive license. Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

Objections and Further Information: Written objections relating to the prospective license or requests for further information may be submitted to Agency Counsel for Intellectual Property, NASA Headquarters at Email: hq-patentoffice@mail.nasa.gov. Questions may be directed to Phone: (202) 358–0646.

SUPPLEMENTARY INFORMATION: NASA intends to grant an exclusive, co-exclusive, or partially exclusive patent license in the United States to practice the inventions described and claimed in U.S. Patent No. 8,672,107 titled “Compact Vibration Damper” and U.S. Patent No. 10,619,699 titled “Self-Tuning Compact Vibration Damper” to GE Renewables North America, LLC, having its principal place of business at

201 Brookfield Parkway, Greenville, South Carolina 29607. The fields of use may be limited. NASA has not yet made a final determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

This notice of intent to grant an exclusive, co-exclusive or partially exclusive patent license is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at <http://technology.nasa.gov>.

Trenton Roche,

Agency Counsel for Intellectual Property.

[FR Doc. 2023–15452 Filed 7–20–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 23–076]

Notice of Intent To Grant an Exclusive, Co-Exclusive or Partially Exclusive Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of intent to grant exclusive, co-exclusive or partially exclusive patent license.

SUMMARY: NASA hereby gives notice of its intent to grant an exclusive, co-exclusive or partially exclusive patent license to practice the inventions described and claimed in the patents and/or patent applications listed in **SUPPLEMENTARY INFORMATION** below.

DATES: The prospective exclusive, co-exclusive or partially exclusive license may be granted unless NASA receives written objections including evidence and argument, no later than August 7, 2023 that establish that the grant of the license would not be consistent with the requirements regarding the licensing of federally owned inventions as set forth in the Bayh-Dole Act and implementing regulations. Competing applications completed and received by NASA no later than August 7, 2023 will also be treated as objections to the grant of the contemplated exclusive, co-exclusive or partially exclusive license. Objections submitted in response to this notice will

not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act.

ADDRESSES: *Objections and Further Information:* Written objections relating to the prospective license or requests for further information may be submitted to Agency Counsel for Intellectual Property, NASA Headquarters at Email: hq-patentoffice@mail.nasa.gov. Questions may be directed to Phone: (202) 358–0646.

SUPPLEMENTARY INFORMATION: NASA intends to grant an exclusive, co-exclusive, or partially exclusive patent license in the United States to practice the inventions described and claimed in: U.S. Patent No. 9,591,417 titled “Extreme Low Frequency Acoustic Measurement System,” U.S. Patent No. 8,401,217 titled “Extreme Low Frequency Acoustic Measurement System,” U.S. Patent No. 8,671,763 titled “Sub-Surface Windscreen for Outdoor Measurement of Infrasound,” U.S. Patent No. 10,392,125 titled “System and Method for Onboard Wake and Clear Air Turbulence Avoidance,” U.S. Patent No. 9,620,025 titled “Wake Vortex Avoidance System and Method,” and U.S. Patent No. 10,802,107 titled “Adaptive Algorithm and Software for Recognition of Ground-based Airborne, Underground, and Underwater Low Frequency Events” to Stratodynamics Inc. having its principal place of business in Kenilworth, Ontario, Canada. The fields of use may be limited. NASA has not yet made a final determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

This notice of intent to grant an exclusive, co-exclusive or partially exclusive patent license is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective license will comply with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Information about other NASA inventions available for licensing can be found online at <http://technology.nasa.gov>.

Trenton Roche,

Agency Counsel for Intellectual Property.

[FR Doc. 2023–15491 Filed 7–20–23; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES**National Endowment for the Humanities****Meeting of Humanities Panel**

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Notice of meeting.

SUMMARY: The National Endowment for the Humanities (NEH) will hold thirty-four meetings, by videoconference, of the Humanities Panel, a federal advisory committee, during August 2023. The purpose of the meetings is for panel review, discussion, evaluation, and recommendation of applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965.

DATES: See **SUPPLEMENTARY INFORMATION** for meeting dates. The meetings will open at 8:30 a.m. and will adjourn by 5 p.m. on the dates specified below.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Committee Management Officer, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606-8322; evoyatzis@neh.gov.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. 10), notice is hereby given of the following meetings:

1. Date: August 1, 2023

This video meeting will discuss applications on the topic of COVID-19, for the Community and Cultural Resilience grant program, submitted to the Division of Preservation and Access.

2. Date: August 1, 2023

This video meeting will discuss applications on the topics of Religious Studies and American Studies, for the Fellowships grant program, submitted to the Division of Research Programs.

3. Date: August 1, 2023

This video meeting—the first of two on this date—will discuss applications for the Humanities Initiatives at Colleges and Universities grant program, submitted to the Division of Education Programs.

4. Date: August 1, 2023

This video meeting—the second of two on this date—will discuss applications for the Humanities Initiatives at Colleges and Universities grant program, submitted to the Division of Education Programs.

5. Date: August 2, 2023

This video meeting will discuss applications on the topics of Conservation and Collections Care, for the Research and Development grant program, submitted to the Division of Preservation and Access.

6. Date: August 2, 2023

This video meeting—the first of two on this date—will discuss applications for the Humanities Initiatives at Historically Black Colleges and Universities grant program, submitted to the Division of Education Programs.

7. Date: August 2, 2023

This video meeting—the second of two on this date—will discuss applications for the Humanities Initiatives at Historically Black Colleges and Universities grant program, submitted to the Division of Education Programs.

8. Date: August 2, 2023

This video meeting will discuss applications on the topics of Africa, Middle East, and Ancient World, for the Fellowships grant program, submitted to the Division of Research Programs.

9. Date: August 2, 2023

This video meeting will discuss applications on the topics of Art History and American Studies, for Fellowships grant program, submitted to the Division of Research Programs.

10. Date: August 3, 2023

This video meeting will discuss applications on the topic of Social Sciences, for the Fellowships grant program, submitted to the Division of Research Programs.

11. Date: August 3, 2023

This video meeting will discuss applications for the Humanities Initiatives at Hispanic-Serving Institutions grant program, submitted to the Division of Education Programs.

12. Date: August 3, 2023

This video meeting will discuss applications on the topics of Archives and Special Collections, for the Preservation and Access Education and Training grant program, submitted to the Division of Preservation and Access.

13. Date: August 3, 2023

This video meeting will discuss applications for the Humanities Initiatives at Community Colleges grant program, submitted to the Division of Education Programs.

14. Date: August 3, 2023

This video meeting will discuss applications on the topics of Latin America, Caribbean, American History, and Studies, for the Fellowships grant program, submitted to the Division of Research Programs.

15. Date: August 3, 2023

This video meeting will discuss applications on the topic of Philosophy, for the Fellowships grant program, submitted to the Division of Research Programs.

16. Date: August 4, 2023

This video meeting will discuss applications for the Humanities Initiatives at Hispanic-Serving Institutions grant program, submitted to the Division of Education Programs.

17. Date: August 7, 2023

This video meeting will discuss applications on the topic of Cultural Anthropology, for the Cultural and Community Resilience grant program, submitted to the Division of Preservation and Access.

18. Date: August 7, 2023

This video meeting will discuss applications for the Humanities Initiatives at Colleges and Universities grant program, submitted to the Division of Education Programs.

19. Date: August 8, 2023

This video meeting—the first of two on this date—will discuss applications for the Humanities Initiatives at Colleges and Universities grant program, submitted to the Division of Education Programs.

20. Date: August 8, 2023

This video meeting—the second of two on this date—will discuss applications for the Humanities Initiatives at Colleges and Universities grant program, submitted to the Division of Education Programs.

21. Date: August 8, 2023

This video meeting will discuss applications on the topic of Cultural Anthropology, for the Cultural and Community Resilience grant program, submitted to the Division of Preservation and Access.

22. Date: August 9, 2023

This video meeting will discuss applications on the topic of Climate Change, for the Cultural and Community Resilience grant program, submitted to the Division of Preservation and Access.

23. Date: August 9, 2023

This video meeting will discuss applications for the Humanities Initiatives at Hispanic-Serving Institutions grant program, submitted to the Division of Education Programs.

24. Date: August 10, 2023

This video meeting will discuss applications on the topic of Digital and Audiovisual Collections, for the Preservation and Access Education and Training grant program, submitted to the Division of Preservation and Access.

25. Date: August 10, 2023

This video meeting will discuss applications for the Humanities Initiatives at Colleges and Universities grant program, submitted to the Division of Education Programs.

26. Date: August 11, 2023

This video meeting will discuss applications for the Humanities Initiatives at Tribal Colleges and Universities grant program, submitted to the Division of Education Programs.

27. Date: August 24, 2023

This video meeting will discuss applications on the topics of Arts, Culture, and Media, for the Digital Humanities Advancement Grants program, submitted to the Office of Digital Humanities.

28. Date: August 25, 2023

This video meeting will discuss applications on the topic of Scholarly Communications, for the Digital Humanities Advancement Grants program, submitted to the Office of Digital Humanities.

29. Date: August 29, 2023

This video meeting will discuss applications on the topics of Teaching and Learning, for the Digital Humanities Advancement Grants program, submitted to the Office of Digital Humanities.

30. Date: August 29, 2023

This video meeting will discuss applications on the topic of Global Culture, for the Digital Projects for the Public: Production Grants program, submitted to the Division of Public Programs.

31. Date: August 30, 2023

This video meeting will discuss applications on the topic of U.S. History, for the Digital Projects for the Public: Production Grants program, submitted to the Division of Public Programs.

32. Date: August 30, 2023

This video meeting will discuss applications on the topic of Spatial Humanities, for the Digital Humanities Advancement Grants program, submitted to the Office of Digital Humanities.

33. Date: August 31, 2023

This video meeting will discuss applications on the topics of Collections and Access, for the Digital Humanities Advancement Grants program, submitted to the Office of Digital Humanities.

34. Date: August 31, 2023

This video meeting will discuss applications on the topics of Arts and Culture, for the Digital Projects for the Public: Production Grants program, submitted to the Division of Public Programs.

Because these meetings will include review of personal and/or proprietary financial and commercial information given in confidence to the agency by grant applicants, the meetings will be closed to the public pursuant to sections 552b(c)(4) and 552b(c)(6) of Title 5, U.S.C., as amended. I have made this determination pursuant to the authority granted me by the Chair's Delegation of Authority to Close Advisory Committee Meetings dated April 15, 2016.

Dated: July 17, 2023.

Jessica Graves,

Legal Administrative Specialist, National Endowment for the Humanities.

[FR Doc. 2023-15481 Filed 7-20-23; 8:45 am]

BILLING CODE 7536-01-P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT:

The meeting was noticed on July 17, 2023, at 88 FR 45450.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:

Wednesday, July 19, 2023, from 10:30–11:30 a.m. EDT.

CHANGES IN THE MEETING: The meeting is CANCELLED.

CONTACT PERSON FOR MORE INFORMATION:

Point of contact for this meeting is: Chris Blair, cblair@nsf.gov, 703/292-7000.

Christopher Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2023-15632 Filed 7-19-23; 4:15 pm]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

[NRC-2022-0207]

Information Collection: NRC Form 241, Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters

AGENCY: Nuclear Regulatory Commission.

ACTION: Renewal of existing information collection; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment on the renewal of Office of Management and Budget (OMB) approval for an existing collection of information. The information collection is entitled, NRC Form 241, "Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters."

DATES: Submit comments by September 19, 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-2022-0207. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301-415-0624; email: Stacy.Schumann@nrc.gov. For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.

- **Mail comments to:** David C. Cullison, Office of the Chief Information Officer, Mail Stop: T-6 A10M, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

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:

David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; telephone: 301-415-2084; email: Infocollects.Resource@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2022–0207 when contacting the NRC about the availability of information for this action. You may obtain publicly available information related to this action by any of the following methods:

- *Federal Rulemaking website*: Go to <https://www.regulations.gov> and search for Docket ID NRC–2022–0207. A copy of the collection of information and related instructions may be obtained without charge by accessing Docket ID NRC–2022–0207 on this website.

- *NRC's Agencywide Documents Access and Management System (ADAMS)*: You may obtain publicly available documents online in the ADAMS Public Documents collection at <https://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "Begin Web-based ADAMS Search." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to PDR.Resource@nrc.gov. A copy of the collection of information and related instructions may be obtained without charge by accessing ADAMS Accession No. ML23117A086. The supporting statement is available in ADAMS under Accession No. ML23117A083.

- *NRC's PDR*: The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to PDR.Resource@nrc.gov or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

- *NRC's Clearance Officer*: A copy of the collection of information and related instructions may be obtained without charge by contacting the NRC's Clearance Officer, David C. Cullison, Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2084; email: Infocollects.Resource@nrc.gov.

B. Submitting Comments

The NRC encourages electronic comment submission through the Federal rulemaking website (<https://www.regulations.gov>). Please include Docket ID NRC–2022–0207, in your comment submission.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. All comment

submissions are posted at <https://www.regulations.gov> and entered into ADAMS. Comment submissions are not routinely edited to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the 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 comment submissions are not routinely edited to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the NRC is requesting public comment on its intention to request the OMB's approval for the information collection summarized below.

1. *The title of the information collection*: NRC Form 241, Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters.
2. *OMB approval number*: 3150–0013.
3. *Type of submission*: Extension.
4. *The form number, if applicable*: NRC Form 241.

5. *How often the collection is required or requested*: On Occasion.

6. *Who will be required or asked to respond*: Non-Agreement States.

7. *The estimated number of annual responses*: 1,689 responses.

8. *The estimated number of annual respondents*: 179 respondents.

9. *The estimated number of hours needed annually to comply with the information collection requirement or request*: 467 hours (89.5 hours for initial submissions + 377.5 for changes + 0 hours for clarifications).

10. *Abstract*: Any Agreement State licensee who engages in the use of radioactive material in non-Agreement States, areas of exclusive Federal jurisdiction, or offshore waters, under the general license in section 150.20 of title 10 of the *Code of Federal Regulations* (10 CFR), is required to file, with the NRC Regional Administrator for the Region in which the Agreement State that issues the license is located, a copy of NRC Form 241, "Report of Proposed Activities in Non-Agreement States, Areas of Exclusive Federal Jurisdiction, or Offshore Waters," a copy of its Agreement State specific license, and the appropriate fee as prescribed in 10 CFR 170.31, at least three days before engaging in such activity. This

mandatory notification permits the NRC to schedule inspections of the activities to determine whether the activities are being conducted in accordance with requirements for protection of the public health and safety.

III. Specific Requests for Comments

The NRC is seeking comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility? Please explain your answer.

2. Is the estimate of the burden of the information collection accurate? Please explain your answer.

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection on respondents be minimized, including the use of automated collection techniques or other forms of information technology?

Dated: July 18, 2023.

For the Nuclear Regulatory Commission.

David C. Cullison,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 2023–15499 Filed 7–20–23; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2023–0001]

Sunshine Act Meetings

TIME AND DATE: Weeks of July 24, 31, August 7, 14, 21, 28, 2023. The schedule for Commission meetings is subject to change on short notice. The NRC Commission Meeting Schedule can be found on the internet at: <https://www.nrc.gov/public-involve/public-meetings/schedule.html>.

PLACE: The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify Anne Silk, NRC Disability Program Specialist, at 301–287–0745, by videophone at 240–428–3217, or by email at Anne.Silk@nrc.gov. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

STATUS: Public.

Members of the public may request to receive the information in these notices electronically. If you would like to be

added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555, at 301-415-1969, or by email at Wendy.Moore@nrc.gov.

MATTERS TO BE CONSIDERED:

Week of July 24, 2023

There are no meetings scheduled for the week of July 24, 2023.

Week of July 31, 2023—Tentative

There are no meetings scheduled for the week of July 31, 2023.

Week of August 7, 2023—Tentative

There are no meetings scheduled for the week of August 7, 2023.

Week of August 14, 2023—Tentative

There are no meetings scheduled for the week of August 14, 2023.

Week of August 21, 2023—Tentative

There are no meetings scheduled for the week of August 21, 2023.

Week of August 28, 2023—Tentative

There are no meetings scheduled for the week of August 28, 2023.

CONTACT PERSON FOR MORE INFORMATION:

For more information or to verify the status of meetings, contact Wesley Held at 301-287-3591 or via email at Wesley.Held@nrc.gov.

The NRC is holding the meetings under the authority of the Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: July 19, 2023.

For the Nuclear Regulatory Commission.

Monika G. Coffin,

Technical Coordinator, Office of the Secretary.

[FR Doc. 2023-15647 Filed 7-19-23; 4:15 pm]

BILLING CODE 7590-01-P

PENSION BENEFIT GUARANTY CORPORATION

Submission of Information Collection for OMB Review; Comment Request; Liability for Termination of Single-Employer Plans

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice of request for extension of OMB approval of collection of information.

SUMMARY: The Pension Benefit Guaranty Corporation (PBGC) is requesting that the Office of Management and Budget (OMB) extend approval, under the Paperwork Reduction Act, of a collection of information contained in its regulation on Liability for Termination of Single-Employer Plans

(OMB control number 1212-0017; expires August 31, 2023). This notice informs the public of PBGC's request and solicits public comment on the collection of information.

DATES: Comments must be received on or before August 21, 2023 to be assured of consideration.

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. All comments received will be posted without change to PBGC's website, <https://www.pbgc.gov>, including any personal information provided. Do not submit comments that include any personally identifiable information or confidential business information. Copies of the collection of information may be obtained by writing to Disclosure Division (disclosure@pbgc.gov), Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024-2101, or calling 202-229-4040 during normal business hours. If you are deaf or hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

FOR FURTHER INFORMATION CONTACT:

Melissa Rifkin (rifkin.melissa@pbgc.gov), Attorney, Regulatory Affairs Division, Office of the General Counsel, Pension Benefit Guaranty Corporation, 445 12th Street SW, Washington, DC 20024-2101; 202-229-6563. If you are deaf or hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Section 4062 of the Employee Retirement Income Security Act of 1974, as amended, provides that the contributing sponsor of a single-employer pension plan and members of the sponsor's controlled group ("the employer") incur liability ("employer liability") if the plan terminates with assets insufficient to pay benefit liabilities under the plan. PBGC's statutory lien for employer liability and the payment terms for employer liability are affected by whether and to what extent employer liability exceeds 30 percent of the employer's net worth. Section 4062.6 of PBGC's employer liability regulation (29 CFR part 4062) requires a contributing sponsor or member of the contributing sponsor's controlled group that believes employer liability upon plan termination exceeds 30 percent of the employer's net worth to so notify PBGC

and submit net worth information to PBGC. This information is necessary to enable PBGC to determine whether and to what extent employer liability exceeds 30 percent of the employer's net worth.

The collection of information under the regulation has been approved by OMB under control number 1212-0017 (expires August 31, 2023). On May 16, 2023, PBGC published in the **Federal Register** a notice (at 88 FR 31289) informing the public of its intent to request an extension of this collection of information and solicited public comment. No comments were received. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

PBGC estimates that an average of 21 contributing sponsors or controlled group members per year will respond to this collection of information. PBGC further estimates that the average annual burden of this collection of information will be 12 hours and \$5,400 per respondent, with an average total annual burden of 252 hours and \$113,400.

Issued in Washington, DC.

Hilary Duke,

Assistant General Counsel for Regulatory Affairs, Pension Benefit Guaranty Corporation.

[FR Doc. 2023-15509 Filed 7-20-23; 8:45 am]

BILLING CODE 7709-02-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97927; File No. SR-C2-2023-014]

Self-Regulatory Organizations; Cboe C2 Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe C2 Exchange, Inc. (the "Exchange" or "C2") 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe C2 Exchange, Inc. (the "Exchange" or "C2 Options") proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/ctwo/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees, effective July 3, 2023.

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Trading Permit Holders ("TPHs") and non-TPHs on a monthly basis: \$2,500 per physical port for a 1 gigabit ("Gbps") circuit and \$7,500 per physical port for a 10 Gbps circuit. The Exchange proposes to increase the monthly fee for 10 Gbps physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar

connections.³ The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe EDGA Exchange, Inc., ("Affiliate Exchanges").⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a

moderate increase in physical connectivity fees for 10Gbps physical ports. Further, the current 10 Gbps physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gbps physical port was last modified.¹⁰ Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, TPHs are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, TPHs and non-TPHs will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a TPH of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct

³ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10 Gbps physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

⁷ *Id.*

⁸ 15 U.S.C. 78f(b)(4).

⁹ See Securities and Exchange Release No. 83455 (June 15, 2018), 83 FR 28892 (June 21, 2018) (SR-C2-2018-014).

¹⁰ See <https://www.officialdata.org/us/inflation/2010?amount=1>.

¹¹ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed \$22,000 per month, per port.

connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options, some of which have similar or lower connectivity fees.¹² Based on publicly available information, no single options exchange has more than approximately 19% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.*, Nasdaq MRX, LLC, MIAX Pearl, LLC, and MIAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.*, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 52 TPHs, Cboe BZX has 61 members that trade options, and Cboe EDGX has 51 members that trade options. There is also no firm that is a Member of C2 Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,¹⁴ and NYSE Arca Options has 69 members,¹⁵ MIAX Options has 46

members¹⁶ and MIAX Pearl Options has 40 members.¹⁷

Additionally, the Exchange notes that non-TPHs such as Service Bureaus and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-TPHs and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of TPHs that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 options markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated TPHs equally (*i.e.*, all market participants that choose to purchase the 10 Gbps physical port).

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gbps physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁸ and paragraph (f) of Rule 19b-4¹⁹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹² *Id.*

¹³ See Cboe Global Markets U.S. Options Market Volume Summary (June 27, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

¹⁴ See <https://www.nyse.com/markets/american-options/membership#directory>.

¹⁵ See <https://www.nyse.com/markets/arca-options/membership#directory>.

¹⁶ See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.

¹⁷ See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f).

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-C2-2023-014 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-C2-2023-014. 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-C2-2023-014 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2023-15480 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97925; File No. SR-CboeEDGA-2023-011]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe EDGA Exchange, Inc. (the "Exchange" or "EDGA") 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

Cboe EDGA Exchange, Inc. (the "Exchange" or "EDGA Equities") proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/edga/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees, effective July 3, 2023. By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabit ("Gb") circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.³ The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., and Cboe C2 Exchange, Inc., ("Affiliate Exchanges").⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and

³ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

²⁰ 17 CFR 200.30-3(a)(12).

practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹⁰ Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted

above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities, some of which have similar or lower connectivity fees.¹² Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect

at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 103 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe BYX has 110 members and Cboe BZX has 132 members. There is also no firm that is a Member of EDGA Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,¹⁴ IEX has 129 members,¹⁵ and MIAX Pearl has 51 members.¹⁶

Additionally, the Exchange notes that non-Members such as Service Bureaus and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to

⁷ *Id.*

⁸ 15 U.S.C. 78f(b)(4)1

⁹ See Securities and Exchange Release No. 83449 (June 15, 2018), 83 FR 28890 (June 21, 2018) (SR-CboeEDGA-2018-010).

¹⁰ See <https://www.officialdata.org/us/inflation/2010?amount=1>.

¹¹ See *e.g.*, The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

¹² *Id.*

¹³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at https://www.cboe.com/us/equities/market_statistics/.

¹⁴ See <https://www.nyse.com/markets/nyse/membership>.

¹⁵ See <https://www.iexexchange.io/membership>.

¹⁶ See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.

it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 equities markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e., all market participants that choose to purchase the 10 Gb physical port).

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁷ and paragraph (f) of Rule

19b-4¹⁸ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeEDGA-2023-011 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to file number SR-CboeEDGA-2023-011. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<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-CboeEDGA-2023-011 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2023-15473 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97923; File No. SR-CboeBYX-2023-010]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe BYX Exchange, Inc. (the "Exchange" or "BYX") 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

Cboe BYX Exchange, Inc. (the "Exchange" or "BYX Equities") proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/byx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule relating to physical connectivity fees, effective July 3, 2023.

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabit ("Gb") circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.³ The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Cboe BZX Exchange, Inc. (options and equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe

EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., ("Affiliate Exchanges").⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹⁰ Accordingly, the Exchange believes the proposed fee is reasonable as it

represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities, some of which have similar or lower connectivity fees.¹² Based on publicly available information, no single

³ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

⁷ *Id.*

⁸ 15 U.S.C. 78f(b)(4).

⁹ See Securities and Exchange Release No. 83441 (June 14, 2018), 83 FR 28684 (June 20, 2018) (SR-CboeBYX-2018-006).

¹⁰ See <https://www.officialdata.org/us/inflation/2010?amount=1>.

¹¹ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

¹² *Id.*

equities exchange has more than approximately 16% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 110 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BZX has 132 members. There is also no firm that is a Member of BYX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,¹⁴ IEX has 129 members,¹⁵ and MIAX Pearl has 51 members.¹⁶

Additionally, the Exchange notes that non-Members such as Service Bureaus and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be

assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 equities markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port).

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the

Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁷ and paragraph (f) of Rule 19b-4¹⁸ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBYX-2023-010 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-CboeBYX-2023-010. 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

¹³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at https://www.cboe.com/us/equities/market_statistics/.

¹⁴ See <https://www.nyse.com/markets/nyse/membership>.

¹⁵ See <https://www.iexexchange.io/membership>.

¹⁶ See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

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-CboeBYX-2023-010 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2023-15472 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97924; File No. SR-CboeBZX-2023-046]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") 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

Cboe BZX Exchange, Inc. (the "Exchange" or "BZX Equities") proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity platform ("BZX Equities") relating to physical connectivity fees, effective July 3, 2023.

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabit ("Gb") circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.³ The physical ports may

also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (BZX Options), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., ("Affiliate Exchanges").⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10Gb physical ports. Further, the current 10 Gb

charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

⁷ *Id.*

⁸ 15 U.S.C. 78f(b)(4).

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges

physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹⁰ Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The

Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities, some of which have similar or lower connectivity fees.¹² Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 132 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of BZX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,¹⁴ IEX has 129 members,¹⁵ and MIAX Pearl has 51 members.¹⁶

Additionally, the Exchange notes that non-Members such as Service Bureaus

and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 equities markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port).

⁹ See Securities and Exchange Release No. 83442 (June 14, 2018), 83 FR 28675 (June 20, 2018) (SR-CboeBZX-2018-037).

¹⁰ See <https://www.officialdata.org/us/inflation/2010?amount=1>.

¹¹ See *e.g.*, The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

¹² *Id.*

¹³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at https://www.cboe.com/us/equities/market_statistics/.

¹⁴ See <https://www.nyse.com/markets/nyse/membership>.

¹⁵ See <https://www.iexexchange.io/membership>.

¹⁶ See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁷ and paragraph (f) of Rule 19b-4¹⁸ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-046 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-CboeBZX-2023-046. 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-CboeBZX-2023-046 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2023-15476 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97926; File No. SR-CboeEDGX-2023-044]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX") 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

Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX Equities") proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

¹⁹ 17 CFR 200.30-3(a)(12).

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

The Exchange proposes to amend its fee schedule for its equity platform ("EDGX Equities") relating to physical connectivity fees, effective July 3, 2023.

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabit ("Gb") circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.³ The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's options platform (EDGX Options), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., ("Affiliate Exchanges").⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of

an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹⁰ Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted

above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered equities exchanges that trade equities, some of which have similar or lower connectivity fees.¹² Based on publicly available information, no single equities exchange has more than approximately 16% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).

As noted above, there is no regulatory requirement that any market participant connect to any one equities exchange,

Gb physical port) are assessed \$22,000 per month, per port.

¹² *Id.*

¹³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29 2023), available at https://www.cboe.com/us/equities/market_statistics/.

³ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

⁷ *Id.*

⁸ 15 U.S.C. 78f(b)(4).

⁹ See Securities and Exchange Release No. 83450 (June 15, 2018), 83 FR 28884 (June 21, 2018) (SR-CboeEDGX-2018-016).

¹⁰ See <https://www.officialdata.org/us/inflation/2010?amount=1>.

¹¹ See e.g., The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10

nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one equities exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 124 members that trade equities, Cboe BZX has 132 members that trade equities, Cboe EDGA has 103 members and Cboe BYX has 110 members. There is also no firm that is a Member of EDGX Equities only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members,¹⁴ IEX has 129 members,¹⁵ and MIAX Pearl has 51 members.¹⁶

Additionally, the Exchange notes that non-Members such as Service Bureaus and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the

Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 equities markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port).

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁷ and paragraph (f) of Rule

19b-4¹⁸ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeEDGX-2023-044 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-CboeEDGX-2023-044. 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

¹⁴ See <https://www.nyse.com/markets/nyse/membership>.

¹⁵ See <https://www.iexexchange.io/membership>.

¹⁶ See https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeEDGX–2023–044 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2023–15471 Filed 7–20–23; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97928; File No. SR–CboeBZX–2023–047]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe BZX Exchange, Inc. (“Exchange” or “BZX”) 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

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX Options”) proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (“BZX Options”) relating to physical connectivity fees, effective July 3, 2023.

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange’s servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabit (“Gb”) circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.³ The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange’s equities platform (BZX Equities), Cboe EDGX Exchange, Inc. (options and equities platforms), Cboe

BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., (“Affiliate Exchanges”).⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹⁰ Accordingly, the Exchange believes the

³ See e.g., The Nasdaq Stock Market LLC (“Nasdaq”), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange’s 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange’s 10 Gb physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78ff(b).

⁶ 15 U.S.C. 78ff(b)(5).

⁷ Id.

⁸ 15 U.S.C. 78ff(b)(4).

⁹ See Securities and Exchange Release No. 83429 (June 14, 2018), 83 FR 28685 (June 20, 2018) (SR–CboeBZX–2018–038).

¹⁰ See <https://www officialdata.org/us/inflation/2010?amount=1>.

¹⁹ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options, some of which have similar or lower connectivity fees.¹² Based on

publicly available information, no single options exchange has more than approximately 19% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.*, Nasdaq MRX, LLC, MIAAX Pearl, LLC, and MIAAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.*, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 61 members that trade options, Cboe EDGX has 51 members that trade options, and Cboe C2 has 52 Trading Permit Holders ("TPHs") (*i.e.*, members). There is also no firm that is a Member of BZX Options only. Further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE American Options has 71 members,¹⁴ and NYSE Arca Options has 69 members,¹⁵ MIAAX Options has 46 members¹⁶ and MIAAX Pearl Options has 40 members.¹⁷

Additionally, the Exchange notes that non-Members such as Service Bureaus and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which

alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 options markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port).

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to

¹¹ See *e.g.*, The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

¹² *Id.*

¹³ See Cboe Global Markets U.S. Options Market Volume Summary (June 27, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

¹⁴ See <https://www.nyse.com/markets/american-options/membership#directory>.

¹⁵ See <https://www.nyse.com/markets/arca-options/membership#directory>.

¹⁶ See https://www.miaaxglobal.com/sites/default/files/page-files/MIAAX_Options_Exchange_Members_April_2023_04282023.pdf.

¹⁷ See https://www.miaaxglobal.com/sites/default/files/page-files/MIAAX_Pearl_Exchange_Members_01172023_0.pdf.

the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁸ and paragraph (f) of Rule 19b-4¹⁹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-047 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-CboeBZX-2023-047. 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-CboeBZX-2023-047 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2023-15477 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97929; File No. SR-CboeEDGX-2023-045]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Related to Physical Port Fees

July 17, 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 July 3, 2023, Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX") 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

Cboe EDGX Exchange, Inc. (the "Exchange" or "EDGX Options") proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/options/regulation/rule_filings/edgx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform ("EDGX Options") relating to physical connectivity fees, effective July 3, 2023.

By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located. The Exchange currently assesses the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabit ("Gb") circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port. The Exchange notes the proposed fee change better enables it to continue to maintain and improve its market

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.³ The physical ports may also be used to access the Systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: the Exchange's equities platform (EDGX Equities), Cboe BZX Exchange, Inc. (options and equities platforms), Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc., ("Affiliate Exchanges").⁴

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.⁵ Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁶ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)⁷ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with section 6(b)(4)⁸ of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable

dues, fees, and other charges among its Members and other persons using its facilities.

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.⁹ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹⁰ Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹¹ As noted above, the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges. Further, Members are able to utilize a single port to connect to any of the Affiliate Exchanges with no additional fee assessed for that same physical port. Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory as it is assessed only once, even if it connects with another affiliate exchange since only one port is being used and the Exchange does not wish to charge multiple fees for the same port.

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports. Further, Members and non-Members will continue to choose the method of connectivity based on their

specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange. There is also no regulatory requirement that any market participant connect to any one particular exchange. Moreover, direct connectivity is not a requirement to participate on the Exchange. The Exchange also believes substitutable products and services are available to market participants, including, among other things, other options exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any options product, such as within the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options, some of which have similar or lower connectivity fees.¹² Based on publicly available information, no single options exchange has more than approximately 19% of the market share.¹³ Further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.*, Nasdaq MRX, LLC, MIAAX Pearl, LLC, and MIAAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.*, MEMX LLC).

As noted above, there is no regulatory requirement that any market participant connect to any one options exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product offered on an exchange. Moreover, membership is not a requirement to participate on the Exchange. A market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity. Indeed, the Exchange is unaware of any one options exchange whose membership includes every registered broker-dealer. By way of example, while the Exchange currently has 51 members that trade options, Cboe BZX has 61 members that trade options, and Cboe C2 has 52 Trading Permit Holders ("TPHs") (*i.e.*, members). There is also no firm that is a Member of EDGX Options only. Further, based on publicly available information regarding

³ See *e.g.*, The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

⁴ The Affiliate Exchanges are also submitting contemporaneous identical rule filings.

⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(5).

⁷ *Id.*

⁸ 15 U.S.C. 78f(b)(4).

⁹ See Securities and Exchange Release No. 83430 (June 14, 2018), 83 FR 28697 (June 20, 2018) (SR-CboeEDGX-2018-017).

¹⁰ See <https://www.officialdata.org/us/inflation/2010?amount=1>.

¹¹ See *e.g.*, The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.

¹² *Id.*

¹³ See Cboe Global Markets U.S. Options Market Volume Summary (June 27, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

a sample of the Exchange's competitors, NYSE American Options has 71 members,¹⁴ and NYSE Arca Options has 69 members,¹⁵ MIAX Options has 46 members¹⁶ and MIAX Pearl Options has 40 members.¹⁷

Additionally, the Exchange notes that non-Members such as Service Bureaus and Extranets resell exchange connectivity. This indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange. The Exchange notes that it could, but chooses not to, preclude market participants from reselling its connectivity. The Exchange also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party). Indeed, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.

Accordingly, the vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it. In the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 15 options markets. Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business

purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.

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 fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port).

The Exchange's proposed fee is still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange. Further, if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result. The Exchange operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act¹⁸ and paragraph (f) of Rule 19b-4¹⁹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 17 CFR 240.19b-4(f).

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-CboeEDGX-2023-045 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-CboeEDGX-2023-045. 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-CboeEDGX-2023-045 and should be submitted on or before August 11, 2023.

²⁰ 17 CFR 200.30-3(a)(12).

¹⁴ See <https://www.nyse.com/markets/american-options/membership#directory>.

¹⁵ See <https://www.nyse.com/markets/arca-options/membership#directory>.

¹⁶ See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Options_Exchange_Members_April_2023_04282023.pdf.

¹⁷ See https://www.miaxglobal.com/sites/default/files/page-files/MIAX_Pearl_Exchange_Members_01172023_0.pdf.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2023-15475 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97922; File No. SR-NASDAQ-2023-019]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under Nasdaq Rule 5711(d), Commodity-Based Trust Shares

July 17, 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 July 3, 2023, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the Valkyrie Bitcoin Fund (the “Trust”) under Nasdaq Rule 5711(d) (“Commodity-Based Trust Shares”). The shares of the Trust are referred to herein as the “Shares.”

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade Shares of the Trust under Nasdaq Rule 5711(d), which governs the listing and trading of Commodity-Based Trust Shares on the Exchange.³

Description of the Trust

The Shares will be issued by the Trust, a Delaware statutory trust. The Trust will operate pursuant to a trust agreement (the “Trust Agreement”) between Valkyrie Digital Assets, LLC (the “Sponsor”) and Delaware Trust Company, as the Trust’s trustee (the “Trustee”). The Shares will be registered with the Commission by means of the Trust’s registrations statement on Form S-1 (the “Registration Statement”).⁴ Pursuant to the Trust Agreement, the Sponsor will enter into a custodian agreement (the “Custodian Agreement”) with a qualified custodian (the “Custodian”) to act as custodian for the Trust’s bitcoins. Pursuant to the Custodian Agreement, the Custodian will establish accounts that hold the bitcoins deposited with the Custodian on behalf of the Trust. U.S. Bancorp Fund Services, LLC will act as the transfer agent for the Trust (the “Transfer Agent”) and as the administrator of the Trust (the “Administrator”) to perform various administrative, accounting and recordkeeping functions on behalf of the Trust.

The investment objective of the Trust is for the Shares to reflect the performance of the value of a bitcoin as represented by the CME CF Bitcoin Reference Rate—New York Variant (the “Index”), less the Trust’s liabilities and expenses. The purpose of the Trust is to provide investors with a cost-effective and convenient way to invest in bitcoin in a manner that is more efficient and

³ Nasdaq Rule 5711(d)(iv)(A) defines Commodity-Based Trust Shares as “a security (1) that is issued by a trust (“Trust”) that holds a specified commodity deposited with the Trust; (2) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity; and (3) that, when aggregated in the same specified minimum number, may be redeemed at a holder’s request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity.”

⁴ See Amendment No. 2 to Registration Statement on Form S-1, dated May 8, 2023 filed with the Commission by the Sponsor on behalf of the Trust (File No. 333-252344). The descriptions of the Trust contained herein are based, in part, on information in the Registration Statement. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

convenient than the purchase of a stand-alone bitcoin, while also mitigating some of the risk by reducing the volatility typically associated with the purchase of stand-alone bitcoin and without the uncertain and often complex requirements relating to acquiring and/or holding bitcoin.

The Trust will only hold bitcoin, and will, from time to time, issue Baskets⁵ in exchange for deposits of bitcoins and to distribute bitcoins in connection with redemptions of Baskets. The Shares of the Trust represent units of fractional undivided beneficial interest in, and ownership of, the Trust. The bitcoins held by the Custodian on behalf of the Trust will be transferred out of the Bitcoin Account only in the following circumstances: transferred to pay the Sponsor’s Fee, distributed to Authorized Participants or Liquidity Providers, as applicable, in connection with the redemption of Baskets, transferred to be sold on an as-needed basis to pay Additional Trust Expenses, sold on behalf of the Trust in the event the Trust terminates and liquidates its assets or as otherwise required by law or regulation.

Custody of the Trust’s Bitcoins

The Trust will engage a Custodian to custody the Trust’s bitcoin. The Trust will select a Custodian that is a qualified custodian under the Investment Advisers Act of 1940. Under the Custodian Agreement, the Custodian will be responsible for the safety and security of the Trust’s Bitcoins as well as overseeing the process of deposit, withdrawal, sale and purchase of the Trust’s bitcoins. The Custodian will custody the bitcoin in accordance with the terms of the Custodian Agreement.

All bitcoins exist and are stored on the Blockchain, the decentralized transaction ledger of the Bitcoin Network. The Blockchain records most transactions (including mining of new bitcoins) for all bitcoins in existence, and in doing so verifies the location of each bitcoin (or fraction thereof) in a particular digital wallet. The Bitcoin Account will be maintained by the Custodian and cold storage⁶ mechanisms will be used for the Vault Account by the Custodian. Each digital wallet of the Trust may be accessed

⁵ A Basket equals a block of 50,000 Shares.

⁶ The term “cold storage” refers to a safeguarding method by which the private keys corresponding to bitcoins stored on a digital wallet are removed from any computers actively connected to the internet. Cold storage of private keys may involve keeping such wallet on a non-networked computer or electronic device or storing the public key and private keys relating to the digital wallet on a storage device (for example, a USB thumb drive) or printed medium (for example, papyrus or paper) and deleting the digital wallet from all computers.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

using its corresponding private key. The Custodian's custodial operations will maintain custody of the private keys that have been deposited in cold storage at its various vaulting premises which are located in geographically dispersed locations across the world, including but not limited to the United States, Europe, including Switzerland, and South America. The locations of the vaulting premises may change regularly and are kept confidential by the Custodian for security purposes.

The Custodian is the custodian of the Trust's private keys in accordance with the terms and provisions of the Custodian Agreement and will utilize the certain security procedures such as algorithms, codes, passwords, encryption or telephone call-backs (together, the "Security Procedures") in the administration and operation of the Trust and the safekeeping of its bitcoins and private keys. The Custodian will create a Vault Account for the Trust assets in which private keys are placed in cold storage. The Custodian will segregate the private keys stored with it from any other assets it holds or holds for others. Further, multiple distinct private keys must sign any transaction in order to transfer the Trust's bitcoins from a multi-signature address to any other address on the Bitcoin blockchain. Distinct private keys required for multi-signature address transfers reside in geographically dispersed vault locations, known as "signing vaults." In addition to multiple signing vaults, the Custodian maintains multiple "back-up vaults" in which backup private keys are stored. In the event that one or more of the "signing vaults" is compromised, the back-up vaults would be activated and used as signing vaults to complete a transaction within 72 hours. As such, if any one signing vault is compromised, it would have no impact on the ability of the Trust to access its bitcoins, other than a possible delay in operations of 72 hours, while one or more of the "backup vaults" is transitioned to a signing vault. These Security Procedures ensure that there is no single point of failure in the protection of the Trust's assets.

Calculation of Net Asset Value

The Trust's net asset value ("NAV") is calculated by taking the current market value of its total assets, less any liabilities of the Trust, and dividing that total by the total number of outstanding Shares. The bitcoin held by the Trust will be valued based on the price set by the Index. The Administrator will calculate the NAV of the Trust once each Exchange trading day. The Exchange's Regular Market Session closes at 4:00 p.m. EST. The NAV for a

normal trading day will be released after the end of the Regular Market Session. However, NAVs are not officially struck until later in the day (often by 5:30 p.m. EST and almost always by 8:00 p.m. EST). The pause between 4:00 p.m. EST and 5:30 p.m. EST provides an opportunity to algorithmically detect, flag, investigate, and correct unusual pricing should it occur. The NAV for the Trust's Shares will be disseminated daily to all market participants at the same time. The Sponsor anticipates that the Index will be reflective of a reasonable valuation of the average spot price of bitcoin. However, in the event the Index is not available or determined by the Sponsor to not be reliable, the Sponsor would "fair value" the Trust's bitcoin holdings. The Sponsor does not anticipate that the need to "fair value" bitcoin will be a common occurrence. The Sponsor will publish the NAV and NAV per Share at <https://valkyrieinvest.com/> as soon as practicable after their determination and availability.

Intraday Indicative Value

In order to provide updated information relating to the Trust for use by Shareholders and market professionals, the Trust will disseminate an updated intraday indicative value ("IIV") per Share updated every 15 seconds by one of more major market data vendors during the Exchange's Regular Market Session.⁷ The IIV will be calculated by a third-party financial data provider during the Exchange's Regular Market Session. The IIV will be calculated by using the prior day's closing NAV per Share of the Trust as a base and updating that value throughout the trading day to reflect changes in the most recently reported price level of the CME CF Bitcoin Real-Time Index ("BRTI"), as reported by CME Group, Inc., Bloomberg, L.P. or another reporting service. The BRTI is calculated in real time based on the Relevant Order Books of all Constituent Bitcoin Exchanges. A "Relevant Order Book" is the universe of the currently unmatched limit orders to buy or sell in the BTC/USD pair that is reported and disseminated by CF Benchmarks Ltd., as the BRTI calculation agent.

Creation and Redemption of Shares

The Trust will issue Shares on an ongoing basis, but only in one or more Baskets. The creation and redemption of

a Basket requires the delivery to the Trust, or the distribution by the Trust, of the number of whole and fractional bitcoins represented by each Basket being created or redeemed, the number of which is determined by dividing the number of bitcoins owned by the Trust at 4:00 p.m., New York time, on the trade date of a creation or redemption order, as adjusted for the number of whole and fractional bitcoins constituting accrued but unpaid fees and expenses of the Trust, by the number of Shares outstanding at such time (the quotient so obtained calculated to one-hundred-millionth of one bitcoin), and multiplying such quotient by 50,000 (the "Basket Bitcoin Amount"). The Basket Bitcoin Amount multiplied by the number of Baskets being created or redeemed is the "Total Basket Bitcoin Amount."

Authorized Participants are the only persons that may place orders to create or redeem Baskets. Each Authorized Participant must (i) be a registered broker-dealer, (ii) enter into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent and the Liquidity Providers and (iii) in the case of the creation or redemption of Baskets that do not use the Conversion Procedures, own a bitcoin wallet address that is recognized by the Custodian as belonging to the Authorized Participant (an "Authorized Participant Self-Administered Account"). Authorized Participants may act for their own accounts or as agents for broker-dealers, custodians and other securities market participants that wish to create or redeem Baskets. Shareholders who are not Authorized Participants will only be able to redeem their Shares through an Authorized Participant.

Although the Trust will create Baskets only upon the receipt of bitcoins, and will redeem Baskets only by distributing bitcoins, an Authorized Participant may deposit cash with the Administrator, which will facilitate the purchase or sale of bitcoins through a Liquidity Provider on behalf of an Authorized Participant (the "Conversion Procedures"). Liquidity Providers must (i) enter into a Participant Agreement with the Sponsor, the Administrator, the Marketing Agent and each Authorized Participant and (ii) own a Liquidity Provider Account.

The Conversion Procedures will be facilitated by a single Liquidity Provider. On an order-by-order basis, the Sponsor will select the Liquidity Provider that it believes will provide the best execution of the Conversion Procedures, and will base its decision on factors such as the Liquidity

⁷ Several major market data vendors display and/or make widely available IIVs taken from the Consolidated Tape Association ("CTA") or other data feeds. In addition, the indicative fund value will be available through on-line information services such as Bloomberg and Reuters.

Provider's creditworthiness, financial stability, the timing and speed of execution, liquidity and the likelihood of, and capabilities in, execution, clearance and settlement. In the event that an order cannot be filled in its entirety by a single Liquidity Provider, additional Liquidity Provider(s) will be selected by the Sponsor to fill the remaining amount based on the criteria above.

Creation Procedures

On any Business Day, an Authorized Participant may order one or more Creation Baskets from the Trust by placing a creation order with the Administrator. Creation orders may be placed either "in-kind" or "in-cash." Creation orders must be placed no later than 3:59:59 p.m., New York time, for in-kind creations, and 4:59:59 p.m., New York time, for in-cash creations, on each Business Day. Authorized Participants may only create Baskets and cannot create any Shares in an amount less than a Basket.

In-Kind Creations

In-kind creations will take place as follows, where "T" is the trade date and each day in the sequence is a Business Day:

T

- The Authorized Participant places a creation order with the Administrator.
- The Marketing Agent accepts (or rejects) the creation order, which is communicated to the Authorized Participant by the Administrator.
- The Total Basket Bitcoin Amount is determined as soon as practicable after 4:00 p.m., New York time.

T + 1

- The Authorized Participant transfers the Total Basket Bitcoin Amount from its Authorized Participant Self-Administered Account to the Custodian.
- Once the Total Basket Bitcoin Amount is received by the Custodian, the Administrator directs the Transfer Agent to credit the Creation Baskets to the Authorized Participant's DTC account.

In-Cash Creations

Upon receiving instruction from the Administrator that a creation order has been accepted by the Marketing Agent, the Authorized Participant will send 110% of the U.S. Dollar value of the Total Basket Bitcoin Amount, as calculated using the most recently published Bitcoin Index Price (the "Cash Collateral Amount"). Once the Cash Collateral Amount is received by

the Administrator, the Sponsor will notify the Liquidity Provider of the creation order. The Liquidity Provider will then (i) determine the Cash Exchange Rate, which, in the case of a creation order, is the Index spot price at the time at which the Cash Collateral Amount is received by the Administrator, plus the 1% Liquidity Provider Fee, and (ii) provide a firm quote to the Authorized Participant for the Total Basket Bitcoin Amount, determined by using the Cash Exchange Rate. If the Liquidity Provider's quote is greater than the Cash Collateral Amount received, the Authorized Participant will be required to pay the difference on the same day. Under the Conversion Procedures, the Authorized Participant does not pay more than the firm quote provided by the Liquidity Provider. The Liquidity Provider bears the risk of any change in the Total Basket Bitcoin Amount and of any change in the price of bitcoin once the Cash Exchange Rate has been determined. Provided that payment for the Total Basket Bitcoin Amount is received by the Administrator, the Liquidity Provider will deliver the bitcoins to the Custodian on the settlement date on behalf of the Authorized Participant. After the Custodian receives the Total Basket Bitcoin Amount, the Administrator will instruct the Transfer Agent to deliver the Creation Baskets to the Authorized Participant. The Administrator will then send the Liquidity Provider the cash equal to the Cash Exchange Rate times the Total Basket Bitcoin Amount, plus the 1% Liquidity Provider Fee. The Administrator will return any remaining amount of the Cash Collateral Amount to the Authorized Participant.

Redemption Procedures

The procedures by which an Authorized Participant can redeem one or more Baskets mirror the procedures for the creation of Baskets. On any Business Day, an Authorized Participant may place a redemption order specifying the number of Redemption Baskets to be redeemed. Redemption orders may be placed either "in-kind" or "in-cash." Redemption orders must be placed no later than 3:59:59 p.m., New York time, for in-kind redemptions, and 4:59:59 p.m., New York time, for in-cash redemption, on each Business Day. Authorized Participants may only redeem Baskets and cannot redeem any Shares in an amount less than a Basket.

In-Kind Redemptions

In-kind redemptions will take place as follows, where "T" is the trade date and

each day in the sequence is a Business Day:

T

- The Authorized Participant places a redemption order with the Administrator.
- The Marketing Agent accepts (or rejects) the redemption order.
- The Total Basket Bitcoin Amount is determined as soon as practicable after 4:00 p.m., New York time.

T + 1

- The Authorized Participant delivers to the Transfer Agent Redemption Baskets from its DTC account.
- Once the Redemption Baskets are received by the Transfer Agent, the Custodian transfers the Total Basket Bitcoin Amount to the Authorized Participant and the Transfer Agent cancels the Shares.

In-Cash Redemptions

To redeem Baskets using the Conversion Procedures, Authorized Participants will send the Administrator a redemption order. The Marketing Agent will accept or reject the redemption order on that same date. A Liquidity Provider will then (i) determine the Cash Exchange Rate, which, in the case of a redemption order, is the Index spot price minus the 1% Liquidity Provider Fee at the time at which the Administrator notifies the Authorized Participant that an order has been accepted and (ii) provide a firm quote to an Authorized Participant for the Total Basket Bitcoin Amount, determined by using the Cash Exchange Rate. Under the Conversion Procedures, the Authorized Participant does not receive less than the firm quote provided by the Liquidity Provider. The Liquidity Provider bears the risk of any change in the Total Basket Bitcoin Amount and of any change in the price of bitcoin once the Cash Exchange Rate has been determined. The Liquidity Provider will send the Administrator the cash proceeds equal to the Cash Exchange Rate times the Total Basket Bitcoin Amount, minus the 1% Liquidity Provider Fee. Once the Authorized Participant delivers the Redemption Baskets to the Transfer Agent, the Administrator will send the cash proceeds to the Authorized Participant and the Transfer Agent will cancel the Shares. At the instruction of the Administrator, the Custodian will then send the Liquidity Provider the Total Basket Bitcoin Amount.

Overview of the Bitcoin Industry and Market⁸

Bitcoin

Bitcoin is the digital asset that is native to, and created and transmitted through the operations of, the peer-to-peer Bitcoin network, a decentralized network of computers that operates on cryptographic protocols. No single entity owns or operates the Bitcoin network, the infrastructure of which is collectively maintained by a decentralized user base. The Bitcoin network allows people to exchange tokens of value, called bitcoin, which are recorded on a public transaction ledger known as the Blockchain. Bitcoin can be used to pay for goods and services, or it can be converted to fiat currencies, such as the U.S. dollar, at rates determined on bitcoin trading platforms or in individual end-user-to-end-user transactions under a barter system.

The value of bitcoin is determined by the supply of and demand for bitcoin. New bitcoins are created and rewarded to the parties providing the Bitcoin network's infrastructure ("miners") in exchange for their expending computational power to verifying transactions and add them to the Blockchain. The Blockchain is effectively a decentralized database that includes all blocks that have been solved by miners and it is updated to include new blocks as they are solved. Each bitcoin transaction is broadcast to the Bitcoin network and, when included in a block, recorded in the Blockchain. As each new block records outstanding bitcoin transactions, and outstanding transactions are settled and validated through such recording, the Blockchain represents a complete, transparent and unbroken history of all transactions of the Bitcoin network.

Bitcoin Network

Bitcoin was first described in a white paper released in 2008 and published under the pseudonym "Satoshi Nakamoto." The protocol underlying Bitcoin was subsequently released in 2009 as open source software and currently operates on a worldwide network of computers.

The first step in directly using the Bitcoin network for transactions is to download specialized software referred

to as a "bitcoin wallet." A user's bitcoin wallet can run on a computer or smartphone, and can be used both to send and to receive bitcoin. Within a bitcoin wallet, a user can generate one or more unique "bitcoin addresses," which are conceptually similar to bank account numbers. After establishing a bitcoin address, a user can send or receive bitcoin from his or her bitcoin address to another user's address. Sending bitcoin from one bitcoin address to another is similar in concept to sending a bank wire from one person's bank account to another person's bank account; provided, however, that such transactions are not managed by an intermediary and erroneous transactions generally may not be reversed or remedied once sent.

The amount of bitcoin associated with each bitcoin address, as well as each bitcoin transaction to or from such address, is transparently reflected in the Blockchain and can be viewed by websites that operate as "blockchain explorers." Copies of the Blockchain exist on thousands of computers on the Bitcoin network. A user's bitcoin wallet will either contain a copy of the blockchain or be able to connect with another computer that holds a copy of the blockchain. The innovative design of the Bitcoin network protocol allows each Bitcoin user to trust that their copy of the Blockchain will generally be updated consistent with each other user's copy.

Bitcoin Protocol

The Bitcoin protocol is open source software, meaning any developer can review the underlying code and suggest changes. There is no official company or group that is responsible for making modifications to Bitcoin. There are, however, a number of individual developers that regularly contribute to a specific distribution of Bitcoin software known as the "Bitcoin Core," which is maintained in an open-source repository on the website Github. There are many other compatible versions of Bitcoin software, but Bitcoin Core provides the de-facto standard for the Bitcoin protocol, also known as the "reference software." The core developers for Bitcoin Core operate under a volunteer basis and without strict hierarchical administration.

Significant changes to the Bitcoin protocol are typically accomplished through a so-called "Bitcoin Improvement Proposal" or BIP. Such proposals are generally posted on websites, and the proposals explain technical requirements for the protocol change as well as reasons why the change should be accepted. Upon its

inclusion in the most recent version of Bitcoin Core, a new BIP becomes part of the reference software's Bitcoin protocol. Several BIPs have been implemented since 2011 and have provided various new features and scaling improvements.

Because Bitcoin has no central authority, updating the reference software's Bitcoin protocol will not immediately change the Bitcoin network's operations. Instead, the implementation of a change is achieved by users and miners downloading and running updated versions of Bitcoin Core or other Bitcoin software that abides by the new Bitcoin protocol. Users and miners must accept any changes made to the Bitcoin source code by downloading a version of their Bitcoin software that incorporates the proposed modification of the Bitcoin network's source code. A modification of the Bitcoin network's source code is only effective with respect to the Bitcoin users and miners that download it. If an incompatible modification is accepted only by a percentage of users and miners, a division in the Bitcoin network will occur such that one network will run the pre-modification source code and the other network will run the modified source code. Such a division is known as a "fork" in the Bitcoin network.

Such a fork in the Bitcoin network occurred on August 1, 2017, when a group of developers and miners accepted certain changes to the Bitcoin network software intended to increase transaction capacity. Blocks mined on this network now diverge from blocks mined on the Bitcoin network, which has resulted in the creation of a new blockchain whose digital asset is referred to as "bitcoin cash." Bitcoin and bitcoin cash now operate as separate, independent networks, and have distinct related assets (bitcoin and bitcoin cash). Additional forks have followed the Bitcoin Cash fork, including those for Bitcoin Gold and Bitcoin SegWit2X, in the months after the creation of Bitcoin Cash.

Bitcoin Transactions

A bitcoin transaction contains the sender's bitcoin address, the recipient's bitcoin address, the amount of bitcoin to be sent, a transaction fee and the sender's digital signature. Bitcoin transactions are secured by cryptography known as public-private key cryptography, represented by the bitcoin addresses and digital signature in a transaction's data file. Each Bitcoin network address, or wallet, is associated with a unique "public key" and "private key" pair, both of which are lengthy

⁸For the purpose of this section, Bitcoin with an upper case "B" is used to describe the system as a whole that is involved in maintaining the ledger of bitcoin ownership and facilitating the transfer of bitcoin among parties. When referring to the digital asset within the bitcoin network, bitcoin is written with a lower case "b" (except, at the beginning of sentences or paragraph sections).

alphanumeric codes, derived together and possessing a unique relationship. The public key is visible to the public and analogous to the Bitcoin network address. The private key is a secret and may be used to digitally sign a transaction in a way that proves the transaction has been signed by the holder of the public-private key pair, without having to reveal the private key.

The Bitcoin network incorporates a system to prevent double-spending of a single bitcoin. To prevent the possibility of double-spending a single bitcoin, each validated transaction is recorded, time stamped and publicly displayed in a “block” in the Blockchain, which is publicly available. Any user may validate, through their Bitcoin wallet or a blockchain explorer, that each transaction in the Bitcoin network was authorized by the holder of the applicable private key, and Bitcoin network mining software consistent with reference software requirements typically validates each such transaction before including it in the Blockchain.

Bitcoin Mining—Creation of New Bitcoins

The process by which bitcoins are created and bitcoin transactions are verified is called mining. To begin mining, a user, or “miner,” can download and run a mining client, which, like regular Bitcoin network software, turns the user’s computer into a “node” on the Bitcoin network that validates blocks. Each time transactions are validated and bundled into new blocks added to the Blockchain, the Bitcoin network awards the miner solving such blocks with newly issued bitcoin and any transaction fees paid by bitcoin transaction senders. This reward system is the method by which new bitcoins enter into circulation to the public.

Mathematically Controlled Supply

The method for creating new bitcoin is mathematically controlled in a manner so that the supply of bitcoin grows at a limited rate pursuant to a pre-set schedule. The number of bitcoin awarded for solving a new block is automatically halved every 210,000 blocks. Thus, the current fixed reward for solving a new block is 6.25 bitcoin per block; the reward decreased from twenty-five (25) bitcoin in July 2016 and 12.5 in May 2020. It is estimated to halve again at the start of 2024. This deliberately controlled rate of bitcoin creation means that the number of bitcoin in existence will never exceed twenty-one (21) million and that bitcoin cannot be devalued through excessive production unless the Bitcoin network’s

source code (and the underlying protocol for bitcoin issuance) is altered. As of January 1, 2023, approximately 19,250,000 bitcoin have been mined.

Bitcoin Value

The value of Bitcoin is determined by the value that various market participants place on Bitcoin through their transactions. The most common means of determining the value of a Bitcoin is by surveying one or more Bitcoin Exchanges where Bitcoin is traded publicly and transparently (*e.g.*, Bitstamp, Coinbase, Kraken, itBit, Gemini and LMAX Digital). Additionally, in parallel to the open bitcoin exchanges, informal “over-the-counter” or “OTC markets” for bitcoin trading also exist as a result of the peer-to-peer nature of the Bitcoin Network, which allows direct transactions between any seller and buyer.

On each exchange, bitcoin is traded with publicly disclosed valuations for each executed trade, measured by one or more fiat currencies such as the U.S. dollar or Euro. OTC markets do not typically disclose their trade data. Currently, there are many exchanges operating worldwide, and each such exchange represents a substantial percentage of bitcoin buying and selling activity.

The Index

As described in the Registration Statement, the Fund will use the Index to calculate the Trust’s NAV. The Index is not affiliated with the Sponsor and was created and is administered by CF Benchmarks Ltd. (the “Benchmark Administrator”), an independent entity, to facilitate financial products based on bitcoin. The Index is designed based on the IOSCO Principals for Financial Benchmarks and serves as a once-a-day benchmark rate of the U.S. dollar price of bitcoin (USD/BTC), calculated as of 4 p.m. Eastern time. The Index is based on materially the same methodology (except calculation time)⁹ as the Benchmark Administrator’s CME CF Bitcoin Reference Rate (the “BRR”), which was first introduced on November 14, 2016 and is the rate on which bitcoin futures contracts (“Bitcoin Futures”) are cash-settled in U.S. dollars at the CME. The Index aggregates the trade flow of several bitcoin exchanges, during an observation window between 3:00 p.m. and 4:00 p.m. Eastern time into the U.S. dollar price of one bitcoin at 4:00 p.m. Eastern time. The current constituent

bitcoin exchanges of the Index are Bitstamp, Coinbase, Gemini, itBit, Kraken and LMAX Digital (the “Constituent Bitcoin Exchanges”).

The Index is calculated based on the “Relevant Transactions”¹⁰ of all of its Constituent Bitcoin Exchanges, as follows:

- All Relevant Transactions are added to a joint list, recording the time of execution, trade price and size for each transaction.

- The list is partitioned by timestamp into 12 equally-sized time intervals of 5 (five) minute length.

- For each partition separately, the volume-weighted median trade price is calculated from the trade prices and sizes of all Relevant Transactions, *i.e.*, across all Constituent Bitcoin Exchanges. A volume-weighted median differs from a standard median in that a weighting factor, in this case trade size, is factored into the calculation.

- The Index is then determined by the arithmetic mean of the volume-weighted medians of all partitions.

By employing the foregoing steps, the Index thereby seeks to ensure that transactions in bitcoin conducted at outlying prices do not have an undue effect on the value of a specific partition, large trades or clusters of trades transacted over a short period of time will not have an undue influence on the index level, and the effect of large trades at prices that deviate from the prevailing price are mitigated from having an undue influence on the benchmark level. In addition, the Sponsor notes that an oversight function is implemented by the Benchmark Administrator in seeking to ensure that the Index is administered through codified policies for Index integrity.

The Index provides an accurate reference to the average spot price of Bitcoin and the methodology employed in constructing the Index, specifically its use of medians in filtering out small trades, makes the Index more resistant to manipulation than other measurements that employ different methodologies. In addition, the Index included over \$375 billion in bitcoin trades (approximately 12,500 bitcoins) during the one-year period ended December 31, 2022. Finally, an oversight committee is responsible for regularly reviewing and overseeing the

⁹ The Index is calculated as of 4 p.m. Eastern Time, whereas the BRR is calculated as of 4 p.m. London Time.

¹⁰ A “Relevant Transaction” is any cryptocurrency versus U.S. dollar spot trade that occurs during the observation window between 3:00 p.m. and 4:00 p.m. Eastern time on a Constituent Bitcoin Exchange in the BTC/USD pair that is reported and disseminated by a Constituent Bitcoin Exchange through its publicly available API and observed by the Benchmark Administrator, CF Benchmarks Ltd.

methodology, practice, standards and scope of the Index to ensure that it continues to accurately track the spot prices of Bitcoin.

Background

The Commission has historically approved or disapproved exchange filings to list and trade series of Trust Issued Receipts, including spot-based Commodity-Based Trust Shares, on the basis of whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size related to the underlying commodity to be held.¹¹ Prior orders from the Commission have pointed out that in every prior approval order for Commodity-Based Trust Shares, there has been a derivatives market that represents the regulated market of significant size, generally a Commodity Futures Trading Commission regulated futures market.¹² Further to this point,

¹¹ See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018). This proposal was subsequently disapproved by the Commission. See Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (August 1, 2018) (the “Winklevoss Order”).

¹² See *streetTRACKS Gold Shares*, Exchange Act Release No. 50603 (Oct. 28, 2004), 69 FR 64614, 64618–19 (Nov. 5, 2004) (SR–NYSE–2004–22) (the “First Gold Approval Order”); *iShares COMEX Gold Trust*, Exchange Act Release No. 51058 (Jan. 19, 2005), 70 FR 3749, 3751, 3754–55 (Jan. 26, 2005) (SR–Amex–2004–38); *iShares Silver Trust*, Exchange Act Release No. 53521 (Mar. 20, 2006), 71 FR 14967, 14968, 14973–74 (Mar. 24, 2006) (SR–Amex–2005–072); *ETFS Gold Trust*, Exchange Act Release No. 59895 (May 8, 2009), 74 FR 22993, 22994–95, 22998, 23000 (May 15, 2009) (SR–NYSEArca–2009–40); *ETFS Silver Trust*, Exchange Act Release No. 59781 (Apr. 17, 2009), 74 FR 18771, 18772, 18775–77 (Apr. 24, 2009) (SR–NYSEArca–2009–28); *ETFS Palladium Trust*, Exchange Act Release No. 61220 (Dec. 22, 2009), 74 FR 68895, 68896 (Dec. 29, 2009) (SR–NYSEArca–2009–94) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant palladium futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60971 (Nov. 9, 2009), 74 FR 59283, 59285–86, 59291 (Nov. 17, 2009)); *ETFS Platinum Trust*, Exchange Act Release No. 61219 (Dec. 22, 2009), 74 FR 68886, 68887–88 (Dec. 29, 2009) (SR–NYSEArca–2009–95) (notice of proposed rule change included NYSE Arca’s representation that “[t]he most significant platinum futures exchanges are the NYMEX and the Tokyo Commodity Exchange,” that “NYMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which NYMEX is a member, Exchange Act Release No. 60970 (Nov. 9, 2009), 74 FR 59319, 59321, 59327 (Nov. 17, 2009)); *Sprott Physical Gold Trust*, Exchange Act Release No. 61496 (Feb. 4, 2010), 75 FR 6758, 6760 (Feb. 10, 2010) (SR–NYSEArca–2009–113) (notice of proposed rule change included NYSE Arca’s representation that the COMEX is one of the “major world gold markets,” that NYSE Arca “may obtain

trading information via the Intermarket Surveillance Group,” and that NYMEX, of which COMEX is a division, is a member of the Intermarket Surveillance Group, Exchange Act Release No. 61236 (Dec. 23, 2009), 75 FR 170, 171, 174 (Jan. 4, 2010));

Sprott Physical Silver Trust, Exchange Act Release No. 63043 (Oct. 5, 2010), 75 FR 62615, 62616, 62619, 62621 (Oct. 12, 2010) (SR–NYSEArca–2010–84); *ETFS Precious Metals Basket Trust*, Exchange Act Release No. 62692 (Aug. 11, 2010), 75 FR 50789, 50790 (Aug. 17, 2010) (SR–NYSEArca–2010–56) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold, silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62402 (Jun. 29, 2010), 75 FR 39292, 39295, 39298 (July 8, 2010)); *ETFS White Metals Basket Trust*, Exchange Act Release No. 62875 (Sept. 9, 2010), 75 FR 56156, 56158 (Sept. 15, 2010) (SR–NYSEArca–2010–71) (notice of proposed rule change included NYSE Arca’s representation that “the most significant silver, platinum and palladium futures exchanges are the COMEX and the TOCOM” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 62620 (July 30, 2010), 75 FR 47655, 47657, 47660 (Aug. 6, 2010)); *ETFS Asian Gold Trust*, Exchange Act Release No. 63464 (Dec. 8, 2010), 75 FR 77926, 77928 (Dec. 14, 2010) (SR–NYSEArca–2010–95) (notice of proposed rule change included NYSE Arca’s representation that “the most significant gold futures exchanges are the COMEX and the Tokyo Commodity Exchange,” that “COMEX is the largest exchange in the world for trading precious metals futures and options,” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 63267 (Nov. 8, 2010), 75 FR 69494, 69496, 69500–01 (Nov. 12, 2010)); *Sprott Physical Platinum and Palladium Trust*, Exchange Act Release No. 68430 (Dec. 13, 2012), 77 FR 75239, 75240–41 (Dec. 19, 2012) (SR–NYSEArca–2012–111) (notice of proposed rule change included NYSE Arca’s representation that “[f]utures on platinum and palladium are traded on two major exchanges: The New York Mercantile Exchange . . . and Tokyo Commodities Exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, Exchange Act Release No. 68101 (Oct. 24, 2012), 77 FR 65732, 65733, 65739 (Oct. 30, 2012)); *APMEX Physical—1 oz. Gold Redeemable Trust*, Exchange Act Release No. 66930 (May 7, 2012), 77 FR 27817, 27818 (May 11, 2012) (SR–NYSEArca–2012–18) (notice of proposed rule change included NYSE Arca’s representation that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” of which COMEX is a member, and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 66627 (Mar. 20, 2012), 77 FR 17539, 17542–43, 17547 (Mar. 26, 2012)); *JPM XF Physical Copper Trust*, Exchange Act Release No. 68440 (Dec. 14, 2012), 77 FR 75468, 75469–70, 75472, 75485–86 (Dec. 20, 2012) (SR–NYSEArca–2012–28); *iShares Copper Trust*, Exchange Act Release No. 68973 (Feb. 22, 2013), 78 FR 13726, 13727, 13729–30, 13739–40 (Feb. 28, 2013) (SR–NYSEArca–2012–66); *First Trust Gold Trust*, Exchange Act Release No. 70195 (Aug. 14, 2013), 78 FR 51239, 51240 (Aug. 20, 2013) (SR–NYSEArca–2013–61) (notice of proposed rule change included NYSE Arca’s representation that FINRA, on behalf of the exchange, may obtain

the Commission’s prior orders have noted that the spot commodities and currency markets for which it has previously approved spot ETPs are generally unregulated and that the Commission relied on the underlying futures market as the regulated market of significant size that formed the basis for approving the series of Currency and Commodity-Based Trust Shares, including gold, silver, platinum, palladium, copper, and other commodities and currencies. The Commission specifically noted in the Winklevoss Order that the First Gold Approval Order “was based on an assumption that the currency market and the spot gold market were largely unregulated.”¹³

As such, the regulated market of significant size test does not require that the spot bitcoin market be regulated in order for the Commission to approve this proposal, and precedent makes clear that an underlying market for a spot commodity or currency being a regulated market would actually be an exception to the norm. These largely unregulated currency and commodity markets do not provide the same protections as the markets that are subject to the Commission’s oversight, but the Commission has consistently looked to surveillance sharing agreements with the underlying futures market in order to determine whether such products were consistent with the Act. With this in mind, the Bitcoin Futures market, as defined below, is the proper market to consider in determining whether there is a related regulated market of significant size.

trading information regarding gold futures and options on gold futures from members of the Intermarket Surveillance Group, including COMEX, or from markets “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” and that gold futures are traded on COMEX and the Tokyo Commodity Exchange, with a cross-reference to the proposed rule change to list and trade shares of the ETFS Gold Trust, in which NYSE Arca represented that COMEX is one of the “major world gold markets,” Exchange Act Release No. 69847 (June 25, 2013), 78 FR 39399, 39400, 39405 (July 1, 2013)); *Merk Gold Trust*, Exchange Act Release No. 71378 (Jan. 23, 2014), 79 FR 4786, 4786–87 (Jan. 29, 2014) (SR–NYSEArca–2013–137) (notice of proposed rule change included NYSE Arca’s representation that “COMEX is the largest gold futures and options exchange” and that NYSE Arca “may obtain trading information via the Intermarket Surveillance Group,” including with respect to transactions occurring on COMEX pursuant to CME and NYMEX’s membership, or from exchanges “with which [NYSE Arca] has in place a comprehensive surveillance sharing agreement,” Exchange Act Release No. 71038 (Dec. 11, 2013), 78 FR 76367, 76369, 76374 (Dec. 17, 2013)); *Long Dollar Gold Trust*, Exchange Act Release No. 79518 (Dec. 9, 2016), 81 FR 90876, 90881, 90886, 90888 (Dec. 15, 2016) (SR–NYSEArca–2016–84).

¹³ See Winklevoss Order at 37592.

Further to this point, the Exchange notes that the Commission has recently approved proposals related to the listing and trading of funds that would primarily hold Bitcoin Futures that are registered under the Securities Act of 1933 instead of the Investment Company Act of 1940, as amended (the “1940 Act”).¹⁴ In the Teucrium Approval, the Commission found the Bitcoin Futures market to be a regulated market of significant size as it relates to Bitcoin Futures, an odd tautological truth that is also inconsistent with prior disapproval orders for exchange traded products (“ETPs”) that would hold actual bitcoin instead of derivatives contracts (“Spot Bitcoin ETPs”) that use the exact same pricing methodology as the Bitcoin Futures. As further discussed below, both the Exchange and the Sponsor believe that this proposal and the included analysis are sufficient to establish that the Bitcoin Futures market represents a regulated market of significant size as it relates both to the Bitcoin Futures market and to the spot bitcoin market and that this proposal should be approved.

Bitcoin Futures ETPs

The Exchange and Sponsor applaud the Commission for allowing the launch of ETFs registered under the 1940 Act and the recent Bitcoin Futures Approvals that provide exposure to bitcoin primarily through Bitcoin Futures (“Bitcoin Futures ETFs”). Allowing such products to list and trade is a productive first step in providing U.S. investors and traders with transparent, exchange-listed tools for expressing a view on bitcoin. The Bitcoin Futures Approvals, however, have created a logical inconsistency in the application of the standard the Commission applies when considering bitcoin ETP proposals.

As discussed further below, the standard applicable to bitcoin ETPs is whether the listing exchange has in place a comprehensive surveillance sharing agreement with a regulated market of significant size in the underlying asset. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.¹⁵ Leaving aside the

analysis of that standard until later in this proposal,¹⁶ the Exchange believes that the following rationale that the Commission applied to a Bitcoin Futures ETF should result in the Commission approving this and other Spot Bitcoin ETP proposals:

The CME “comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts.” Thus, the CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by trading outside of the CME bitcoin futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.¹⁷

Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts . . . indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. If CME is able to detect such attempts at manipulation in the complex and

numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that “when the spot market is unregulated—the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset.” As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be “regulated” in order for a spot commodity ETP to be approved by the Commission, and in fact that it’s been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

¹⁶ As further outlined below, both the Exchange and the Sponsor believe that the Bitcoin Futures market represents a regulated market of significant size and that this proposal and others like it should be approved on this basis.

¹⁷ See Teucrium Approval at 21679.

interconnected spot bitcoin market, how would such an ability to detect attempted manipulation and the utility in sharing that information with the listing exchange apply only to Bitcoin Futures ETFs and not Spot Bitcoin ETPs? Stated a different way, given that there is significant trading volume on numerous bitcoin exchanges that are not part of the CME CF Bitcoin Reference Rate and that arbitrage opportunities across bitcoin exchanges means that such trading volume will influence spot bitcoin prices across the market and, despite this, the Commission still believes that CME can detect attempted manipulation of the Bitcoin Futures through “trading outside of the CME bitcoin futures market,” it is clear that such ability would apply equally to both Bitcoin Futures ETFs and Spot Bitcoin ETPs. To take it a step further, such an ability would also seem to be a strong indication that the CME Bitcoin Futures market represents a regulated market of significant size. To be clear, the Exchange agrees with the Commission on this point (and the implications of their conclusions) and notes that the pricing mechanism applicable to the Shares is similar to the CME CF Bitcoin Reference Rate, as further discussed below.

The Exchange also notes that a Bitcoin Futures ETF may also be more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and redemption because Bitcoin Futures pricing (and thus the value of the underlying holdings of a Bitcoin Futures ETF) is based on a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. As such, the Exchange believes that, in addition to the CME Bitcoin Futures market representing a regulated market of significant size as it relates to the spot bitcoin market, in-kind Spot Bitcoin ETPs are likely less susceptible to manipulation than Bitcoin Futures ETFs because of the underlying creation and redemption arbitrage mechanism that will operate in the same manner as it does for all other ETFs.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as

¹⁴ See Exchange Act Release No. 94620 (April 6, 2022), 87 FR 21676 (April 12, 2022) (the “Teucrium Approval”) and 94853 (May 5, 2022) (collectively, with the Teucrium Approval, the “Bitcoin Futures Approvals”).

¹⁵ See Winklevoss Order at 37593, specifically footnote 202, which includes the language from

compared to a Spot Bitcoin ETP.¹⁸ Specifically, the cost of rolling Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the Commission with this important investor protection context in mind.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying

the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated as described throughout this proposal. After issuing the Bitcoin Futures Approvals which conclude the CME Bitcoin Futures market is a regulated market of significant size as it relates to Bitcoin Futures, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the Bitcoin Futures market is also a regulated market of significant size as it relates to the bitcoin spot market. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

Spot and Proxy Exposure to Bitcoin

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot bitcoin directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold bitcoin through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for

retail investors compared to owning spot bitcoin directly.

Finally, a number of operating companies largely engaged in unrelated businesses—such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company)—have announced significant investments in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.¹⁹ In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.²⁰ Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.²¹ In other words, investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

¹⁹ In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims.

²⁰ See e.g., "7 public companies with exposure to bitcoin" (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and "Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas" (February 19, 2021) available at: <https://www.cnbc.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself.html>.

²¹ See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm.

¹⁸ See e.g., "Bitcoin ETF's Success Could Come at Fundholders' Expense," Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; "Physical Bitcoin ETF Prospects Accelerate," ETF.com (October 25, 2021), available at: https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf_chl_jschl_tk=pmd_JsK.fjXz9eAQW9zo10qpzhXDrrlplVdoCioLXblJl44-1635476946-0-gqNtZGzNAPCjcnBsZQql.

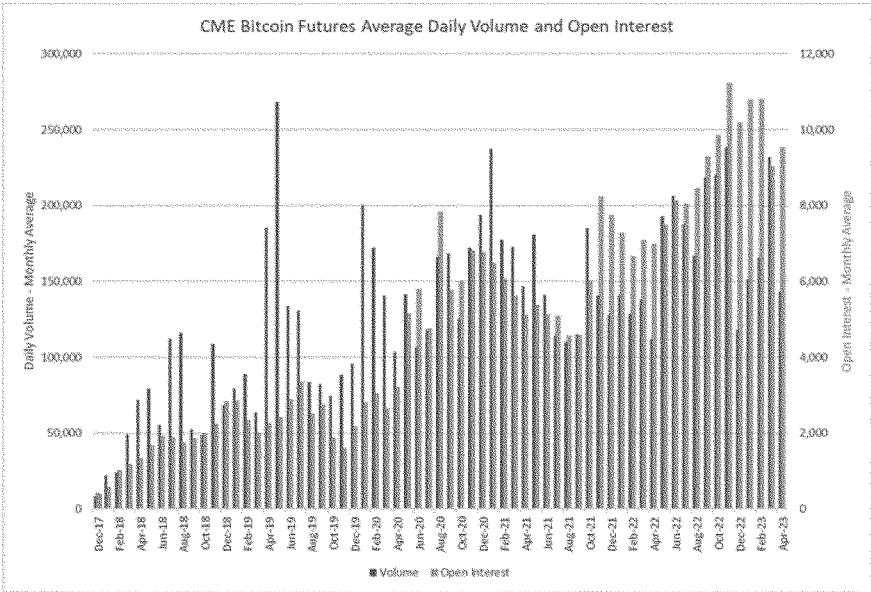
Bitcoin Futures

CME began offering trading in Bitcoin Futures in 2017. Each contract represents five bitcoin and is based on the CME CF Bitcoin Reference Rate.²² The contracts trade and settle like other

cash-settled commodity futures contracts. Nearly every measurable metric related to Bitcoin Futures has generally trended up since launch, although certain notional volume calculations have decreased roughly in line with the decrease in the price of

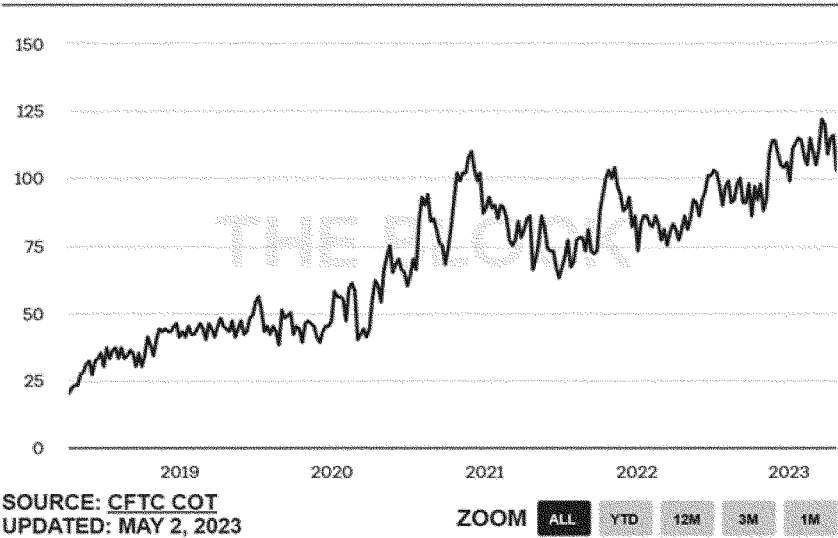
bitcoin. For example, there were 276,542 Bitcoin Futures contracts traded in March 2023 compared to 165,567, 233,345, and 183,131 contracts traded in March 2020, March 2021, and March 2023, respectively.

BILLING CODE 8011-01-P



Source: CME 4/20/23.

 Large Open Interest Holders of CME Bitcoin Futures



SOURCE: CFTC COT
UPDATED: MAY 2, 2023

ZOOM ALL YTD 12M 3M 1M

The number of large open interest holders and *unique accounts trading Bitcoin Futures* have both increased, even in the face of heightened Bitcoin price volatility.

A large open interest holder in Bitcoin Futures is an entity that holds at least 25 contracts, which is the equivalent of 125 bitcoin.

²² The CME CF Bitcoin Reference Rate is based on a publicly available calculation methodology based on pricing sourced from several crypto exchanges and trading platforms, including Bitstamp, Coinbase, Gemini, itBit, Kraken, and LMAX Digital.

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The Sponsor further believes that publicly available research, including research done as part of rule filings proposing to list and trade shares of Spot Bitcoin ETPs, corroborates the overall trend outlined above and supports the thesis that the Bitcoin Futures pricing leads the spot market and, thus, a person attempting to manipulate the Shares would also have to trade on that market to manipulate the ETP. Specifically, the Sponsor believes that such research indicates that bitcoin futures lead the bitcoin spot market in price formation.²³

Preventing Fraudulent and Manipulative Practices

In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices;²⁴ and

²³ See Exchange Act Releases No. 94080 (January 27, 2022), 87 FR 5527 (April 12, 2022) (specifically "Amendment No. 1 to the Proposed Rule Change To List and Trade Shares of the Wise Origin Bitcoin Trust Under BZX Rule 14.11(3)(4), Commodity-Based Trust Shares"); 94982 (May 25, 2022), 87 FR 33250 (June 1, 2022); 94844 (May 4, 2022), 87 FR 28043 (May 10, 2022); and 93445 (October 28, 2021), 86 FR 60695 (November 3, 2021). See also Hu, Y., Hou, Y. and Oxley, L. (2019). "What role do futures markets play in Bitcoin pricing? Causality, cointegration and price discovery from a time-varying perspective" (available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7481826/>). This academic research paper concludes that "There exist no episodes where the Bitcoin spot markets dominates the price discovery processes with regard to Bitcoin futures. This points to a conclusion that the price formation originates solely in the Bitcoin futures market. We can, therefore, conclude that the Bitcoin futures markets dominate the dynamic price discovery process based upon time-varying information share measures. Overall, price discovery seems to occur in the Bitcoin futures markets rather than the underlying spot market based upon a time-varying perspective."

²⁴ The Exchange believes that bitcoin is resistant to price manipulation and that "other means to prevent fraudulent and manipulative acts and practices" exist to justify dispensing with the requisite surveillance sharing agreement. The geographically diverse and continuous nature of bitcoin trading render it difficult and prohibitively costly to manipulate the price of bitcoin. The fragmentation across bitcoin platforms, the relatively slow speed of transactions, and the capital necessary to maintain a significant presence on each trading platform make manipulation of bitcoin prices through continuous trading activity challenging. To the extent that there are bitcoin exchanges engaged in or allowing wash trading or other activity intended to manipulate the price of bitcoin on other markets, such pricing does not normally impact prices on other exchange because participants will generally ignore markets with quotes that they deem non-executable. Moreover, the linkage between the bitcoin markets and the presence of arbitrageurs in those markets means

(ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of section 6(b)(5) of the Act and that this filing sufficiently demonstrates that the Bitcoin Futures market represents a regulated market of significant size and that, on the whole, the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by quantifiable investor protection issues that would be resolved by approving this proposal.

(i) Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order to meet this standard in a proposal to list and trade a series of Commodity-Based Trust Shares, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place²⁵ with a regulated market of significant size. Both the Exchange and CME are members of ISG.²⁶ The only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of

that the manipulation of the price of bitcoin price on any single venue would require manipulation of the global bitcoin price in order to be effective. Arbitrageurs must have funds distributed across multiple trading platforms in order to take advantage of temporary price dislocations, thereby making it unlikely that there will be strong concentration of funds on any particular bitcoin exchange or OTC platform. As a result, the potential for manipulation on a trading platform would require overcoming the liquidity supply of such arbitrageurs who are effectively eliminating any cross-market pricing differences.

²⁵ As previously articulated by the Commission, "The standard requires such surveillance-sharing agreements since 'they provide a necessary deterrent to manipulation because they facilitate the availability of information needed to fully investigate a manipulation if it were to occur.'" The Commission has emphasized that it is essential for an exchange listing a derivative securities product to enter into a surveillance-sharing agreement with markets trading underlying securities for the listing exchange to have the ability to obtain information necessary to detect, investigate, and deter fraud and market manipulation, as well as violations of exchange rules and applicable federal securities laws and rules. The hallmarks of a surveillance-sharing agreement are that the agreement provides for the sharing of information about market trading activity, clearing activity, and customer identity; that the parties to the agreement have reasonable ability to obtain access to and produce requested information; and that no existing rules, laws, or practices would impede one party to the agreement from obtaining this information from, or producing it to, the other party." The Commission has historically held that joint membership in the Intermarket Surveillance Group ("ISG") constitutes such a surveillance sharing agreement. See Securities Exchange Act Release No. 88284 (February 26, 2020), 85 FR 12595 (March 3, 2020) (SR-NYSEArca-2019-39) (the "Wilshire Phoenix Disapproval").

²⁶ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

significant size, which both the Exchange and the Sponsor believe that it does. The terms "significant market" and "market of significant size" include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.²⁷

The Commission has also recognized that the "regulated market of significant size" standard is not the only means for satisfying section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement.²⁸

(a) Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on That Market To Manipulate the ETP

Bitcoin Futures represent a growing influence on pricing in the spot bitcoin market as has been laid out above and in other proposals to list and trade Spot Bitcoin ETPs. Pricing in Bitcoin Futures is based on pricing from spot bitcoin markets. As noted above, the statement from the Teucrium Approval that "CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts . . . indirectly by trading outside of the CME bitcoin futures market," makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. While the Commission makes clear in the Teucrium Approval that the analysis only applies to the Bitcoin Futures market as it relates to an ETP that invests in Bitcoin Futures as its only non-cash or cash equivalent holding, if

²⁷ See Wilshire Phoenix Disapproval.

²⁸ See Winklevoss Order at 37580. The Commission has also specifically noted that it "is not applying a 'cannot be manipulated' standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met." *Id.* at 37582.

CME's surveillance is sufficient to mitigate concerns related to trading in Bitcoin Futures for which the pricing is based directly on pricing from spot bitcoin markets, it's not clear how such a conclusion could apply only to ETPs based on Bitcoin Futures and not extend to Spot Bitcoin ETPs.

Additionally, a Bitcoin Futures ETF is actually potentially more susceptible to manipulation than a Spot Bitcoin ETP where the underlying trust offers only in-kind creation and redemption. Specifically, the pricing of Bitcoin Futures is based on prices from spot bitcoin markets, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. Potential manipulation of a Bitcoin Futures ETF would require manipulation on the spot markets on which the pricing for Bitcoin Futures are based while the in-kind creation and redemption process and fungibility of bitcoin means that a would be manipulator of a Spot Bitcoin ETP would need to manipulate the price across all bitcoin markets or risk simply providing arbitrage opportunities for authorized participants. Further to this point, this arbitrage opportunity also acts to reduce any incentives to manipulate the price of a Spot Bitcoin ETP because the underlying trust will create and redeem shares at set rates of bitcoin per share without regard to the price that the ETP is trading at in the secondary market or the price of the underlying index. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the in-kind creation and redemption process, the spot market arbitrage opportunities that such in-kind creation and redemption process creates, the significant volume in the Bitcoin Futures market, the size of bitcoin's market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According

to data from Skew, the cost to buy or sell \$5 million worth of bitcoin averages roughly 48 basis points with a market impact of \$139.08.²⁹ Stated another way, a market participant could enter a market buy or sell order for \$5 million of bitcoin and only move the market 0.48%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market—which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.

As such, the combination of the in-kind creation and redemption process, the Bitcoin Futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices SSA With Bitcoin Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 30, 2023, the Exchange executed a term sheet with Coinbase, Inc. ("Coinbase") to enter into a surveillance-sharing agreement ("Spot BTC SSA"). Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring

on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC-USD spot trading volume.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present. Consistent with prior points above, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not

²⁹ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase, FTX and Kraken during the one year period ending May 2022.

particularly important.³⁰ When authorized participants are creating with the Trust, they need to deliver a certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

Availability of Information

The Trust's website (<https://valkyrieinvest.com/>) will include quantitative information on a per Share basis updated on a daily basis, including (i) the current NAV per Share daily and the prior business day's NAV and the reported closing price; (ii) the mid-point of the bid-ask price³¹ in relation to the NAV as of the time the NAV is calculated ("Bid-Ask Price") and a calculation of the premium or discount of such price against such NAV; and (iii) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid-Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters (or for the life of the Trust, if shorter). In addition, on each business day the Trust's website will provide pricing information for the Shares. Also, an estimated value that reflects an estimated intraday value of the Trust's portfolio (the "Intraday Indicative Value"), will be disseminated.

The Trust's website will provide an IIV per Share updated every 15 seconds, as calculated by the Exchange or a third-party financial data provider during the Exchange's Regular Market Session (9:30 a.m. to 4:00 p.m. (Eastern time)).³² The IIV will be calculated by using the prior day's closing NAV per Share as a

base and updating that value during the Exchange's Regular Market Session to reflect changes in the value of the Trust's NAV during the trading day.

The IIV disseminated during the Exchange's Regular Market Session should not be viewed as an actual real-time update of the NAV, which will be calculated only once at the end of each trading day. The IIV will be widely disseminated on a per Share basis every 15 seconds during the Exchange's Regular Market Session by one or more major market data vendors. In addition, the IIV will be available through on-line information services.

The NAV for the Trust will be calculated by the Sponsor once a day and will be disseminated daily to all market participants at the same time. Quotation and last-sale information regarding the Shares will be disseminated through the facilities of the Consolidated Tape Association ("CTA").

Initial and Continued Listing

The Shares will be subject to Nasdaq Rule 5711(d)(vi), which sets forth the initial and continued listing criteria applicable to Commodity-Based Trust Shares. The Exchange will obtain a representation that the Trust's NAV will be calculated daily and will be made available to all market participants at the same time. Upon termination of the Trust, the Shares will be removed from listing. The Trustee, Delaware Trust Company, is a trust company having substantial capital and surplus and the experience and facilities for handling corporate trust business, as required under Nasdaq Rule 5711(d)(vi)(D) and no change will be made to the trustee without prior notice to and approval of the Exchange.

As required in Nasdaq Rule 5711(d)(vii), the Exchange notes that any registered market maker ("Market Maker") in the Shares must file with the Exchange, in a manner prescribed by the Exchange, and keep current a list identifying all accounts for trading the underlying commodity, related futures or options on futures, or any other related derivatives, which the registered Market Maker may have or over which it may exercise investment discretion. No registered Market Maker in the Shares shall trade in the underlying commodity, related futures or options on futures, or any other related derivatives, in an account in which a registered Market Maker, directly or indirectly, controls trading activities, or has a direct interest in the profits or losses thereof, which has not been reported to the Exchange as required by Nasdaq Rule 5711(d). In addition to the

existing obligations under Exchange rules regarding the production of books and records, the registered Market Maker in the Shares shall make available to the Exchange such books, records or other information pertaining to transactions by such entity or any limited partner, officer or approved person thereof, registered or non-registered employee affiliated with such entity for its or their own accounts in the underlying commodity, related futures or options on futures, or any other related derivatives, as may be requested by the Exchange.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The Exchange will allow trading in the Shares from 4:00 a.m. to 8:00 p.m. (Eastern time). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The Shares of the Trust will conform to the initial and continued listing criteria set forth in Nasdaq Rule 5711(d).

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. The Exchange will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including without limitation the conditions specified in Nasdaq Rule 4120(a)(9) and the trading pauses under Nasdaq Rules 4120(a)(11) and (12).

Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) the extent to which trading is not occurring in the bitcoin underlying the Shares; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the IIV or the value of the underlying futures contract is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the IIV or the value of the underlying futures contract occurs. If the interruption to the dissemination of the IIV or the value of the underlying bitcoin persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. In addition, if the Exchange becomes aware that the NAV

³⁰ While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

³¹ The bid-ask price of the Trust is determined using the highest bid and lowest offer on the Consolidated Tape as of the time of calculation of the closing day NAV.

³² The IIV on a per Share basis disseminated during the Regular Market Session should not be viewed as a real-time update of the NAV, which is calculated once a day.

with respect to the Shares is not disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of Shares on the Exchange will be subject to the Exchange's surveillance procedures for derivative products. The Exchange will require the Trust to represent to the Exchange that it will advise the Exchange of any failure by the Trust to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series. In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

On June 30, 2023, the Exchange executed a term sheet with Coinbase to enter into a Spot BTC SSA. Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of US-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase consistently accounts for over 50% of market share of BTC–USD spot trading volume.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-

sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) the procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Section 10 of Nasdaq General Rule 9, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the IIV is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated IIV will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

Additionally, the Information Circular will reference that the Trust is subject to various fees and expenses described in the Draft Registration Statement. The Information Circular will also disclose the trading hours of the Shares. The Information Circular will disclose that information about the Shares will be publicly available on the Trust's website.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b)

of the Act³³ in general and section 6(b)(5) of the Act³⁴ 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 Commission has approved numerous series of Trust Issued Receipts,³⁵ including Commodity-Based Trust Shares,³⁶ to be listed on U.S. national securities exchanges. In order for any proposed rule change from an exchange to be approved, the Commission must determine that, among other things, the proposal is consistent with the requirements of section 6(b)(5) of the Act, specifically including: (i) the requirement that a national securities exchange's rules are designed to prevent fraudulent and manipulative acts and practices; and (ii) the requirement that an exchange proposal be designed, in general, to protect investors and the public interest. The Exchange believes that this proposal is consistent with the requirements of section 6(b)(5) of the Act because this filing sufficiently demonstrates that the standard that has previously been articulated by the Commission applicable to Commodity-Based Trust Shares has been met as outlined below.

Designed To Prevent Fraudulent and Manipulative Acts and Practices

In order for a proposal to list and trade a series of Commodity-Based Trust Shares to be deemed consistent with the Act, the Commission requires that an exchange demonstrate that there is a comprehensive surveillance-sharing agreement in place with a regulated market of significant size. Both the Exchange and CME are members of ISG.³⁷ As such, the only remaining issue to be addressed is whether the Bitcoin Futures market constitutes a market of significant size, which the Exchange believes that it does. The terms "significant market" and "market of significant size" include a market (or group of markets) as to which: (a) there is a reasonable likelihood that a person

³³ 15 U.S.C. 78f.

³⁴ 15 U.S.C. 78f(b)(5).

³⁵ See Exchange Rule 5720.

³⁶ Commodity-Based Trust Shares, as described in Exchange Rule 5711(d), are a type of Trust Issued Receipt.

³⁷ For a list of the current members and affiliate members of ISG, see <https://www.isgportal.com/>.

attempting to manipulate the ETP would also have to trade on that market to manipulate the ETP, so that a surveillance-sharing agreement would assist the listing exchange in detecting and deterring misconduct; and (b) it is unlikely that trading in the ETP would be the predominant influence on prices in that market.³⁸

The Commission has also recognized that the “regulated market of significant size” standard is not the only means for satisfying section 6(b)(5) of the act, specifically providing that a listing exchange could demonstrate that “other means to prevent fraudulent and manipulative acts and practices” are sufficient to justify dispensing with the requisite surveillance-sharing agreement.³⁹

(a) Reasonable Likelihood That a Person Attempting To Manipulate the ETP Would Also Have To Trade on That Market To Manipulate the ETP

Bitcoin Futures represent a growing influence on pricing in the spot bitcoin market as has been laid out above and in other proposals to list and trade Spot Bitcoin ETPs. Pricing in Bitcoin Futures is based on pricing from spot bitcoin markets. As noted above, the statement from the Teucrium Approval that “CME’s surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts . . . indirectly by trading outside of the CME bitcoin futures market,” makes clear that the Commission believes that CME’s surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. While the Commission makes clear in the Teucrium Approval that the analysis only applies to the Bitcoin Futures market as it relates to an ETP that invests in Bitcoin Futures as its only non-cash or cash equivalent holding, if CME’s surveillance is sufficient to mitigate concerns related to trading in Bitcoin Futures for which the pricing is based directly on pricing from spot bitcoin markets, it’s not clear how such a conclusion could apply only to ETPs

based on Bitcoin Futures and not extend to Spot Bitcoin ETPs.

Additionally, a Bitcoin Futures ETF is actually potentially more susceptible to manipulation than a Spot Bitcoin ETP where the underlying trust offers only in-kind creation and redemption. Specifically, the pricing of Bitcoin Futures is based on prices from spot bitcoin markets, while shares of a Spot Bitcoin ETP would represent an interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. Potential manipulation of a Bitcoin Futures ETF would require manipulation on the spot markets on which the pricing for Bitcoin Futures are based while the in-kind creation and redemption process and fungibility of bitcoin means that a would be manipulator of a Spot Bitcoin ETP would need to manipulate the price across all bitcoin markets or risk simply providing arbitrage opportunities for authorized participants. Further to this point, this arbitrage opportunity also acts to reduce any incentives to manipulate the price of a Spot Bitcoin ETP because the underlying trust will create and redeem shares at set rates of bitcoin per share without regard to the price that the ETP is trading at in the secondary market or the price of the underlying index. As such, the Exchange believes that part (a) of the significant market test outlined above is satisfied and that common membership in ISG between the Exchange and CME would assist the listing exchange in detecting and deterring misconduct in the Shares.

(b) Predominant Influence on Prices in Spot and Bitcoin Futures

The Exchange and Sponsor also believe that trading in the Shares would not be the predominant force on prices in the Bitcoin Futures market or spot market for a number of reasons, including the in-kind creation and redemption process, the spot market arbitrage opportunities that such in-kind creation and redemption process creates, the significant volume in the Bitcoin Futures market, the size of bitcoin’s market cap, and the significant liquidity available in the spot market. In addition to the Bitcoin Futures market data points cited above, the spot market for bitcoin is also very liquid. According to data from Skew, the cost to buy or sell \$5 million worth of bitcoin averages roughly 48 basis points with a market

impact of \$139.08.⁴⁰ Stated another way, a market participant could enter a market buy or sell order for \$5 million of bitcoin and only move the market 0.48%. More strategic purchases or sales (such as using limit orders and executing through OTC bitcoin trade desks) would likely have less obvious impact on the market—which is consistent with MicroStrategy, Tesla, and Square being able to collectively purchase billions of dollars in bitcoin.

As such, the combination of the in-kind creation and redemption process, the Bitcoin Futures leading price discovery, the overall size of the bitcoin market, and the ability for market participants, including authorized participants creating and redeeming in-kind with the Trust, to buy or sell large amounts of bitcoin without significant market impact will help prevent the Shares from becoming the predominant force on pricing in either the bitcoin spot or Bitcoin Futures markets, satisfying part (b) of the test outlined above.

(c) Other Means To Prevent Fraudulent and Manipulative Acts and Practices SSA With Bitcoin Spot Market

The Exchange is also proposing to take additional steps to those described above to supplement its ability to obtain information that would be helpful in detecting, investigating, and deterring fraud and market manipulation in the Commodity-Based Trust Shares.

On June 30, 2023, the Exchange executed a term sheet with Coinbase to enter into a Spot BTC SSA. Based on this agreement, the Exchange and Coinbase will finalize and execute a definitive agreement that the parties expect to be executed prior to allowing trading of the Commodity-Based Trust Shares. Trading of Bitcoin on Coinbase represents a significant portion of U.S.-based Bitcoin trading. According to the Sponsor, the Exchange aims to enter into a surveillance-sharing agreement with Coinbase, the operator of the largest United States-based spot trading platform for Bitcoin representing a majority of global spot BTC trading paired with USD. The surveillance-sharing agreement would give the Exchange supplemental access to data regarding spot Bitcoin trades occurring on Coinbase if it is determined to be a necessary as part of its surveillance program for the Commodity-Based Trust Shares. Trading on Coinbase

⁴⁰ These statistics are based on samples of bitcoin liquidity in USD (excluding stablecoins or Euro liquidity) based on executable quotes on Coinbase, FTX and Kraken during the one year period ending May 2022.

³⁸ See Wilshire Phoenix Disapproval.

³⁹ See Winklevoss Order at 37580. The Commission has also specifically noted that it “is not applying a “cannot be manipulated” standard; instead, the Commission is examining whether the proposal meets the requirements of the Exchange Act and, pursuant to its Rules of Practice, places the burden on the listing exchange to demonstrate the validity of its contentions and to establish that the requirements of the Exchange Act have been met. *Id.* at 37582.

consistently accounts for over 50% of market share of BTC–USD spot trading volume.

The Spot BTC SSA is expected to be a bilateral surveillance-sharing agreement between Nasdaq and Coinbase that is intended to supplement the Exchange's market surveillance program. The Spot BTC SSA is expected to have the hallmarks of a surveillance-sharing agreement between two members of the ISG, which would give the Exchange supplemental access to data regarding spot Bitcoin trades on Coinbase where the Exchange determines it is necessary as part of its surveillance program for the Commodity-Based Trust Shares. This means that the Exchange expects to receive market data for orders and trades from Coinbase, which it will utilize in surveillance of the trading of Commodity-Based Trust Shares. In addition, the Exchange can request further information from Coinbase related to spot bitcoin trading activity on the Coinbase exchange platform, if the Exchange determines that such information would be necessary to detect and investigate potential manipulation in the trading of the Commodity-Based Trust Shares.

As noted above, the Commission also permits a listing exchange to demonstrate that "other means to prevent fraudulent and manipulative acts and practices" are sufficient to justify dispensing with the requisite surveillance-sharing agreement. The Exchange and Sponsor believe that such conditions are present. Consistent with prior points above, offering only in-kind creation and redemption will provide unique protections against potential attempts to manipulate the Shares. While the Sponsor believes that the Benchmark which it uses to value the Trust's bitcoin is itself resistant to manipulation based on the methodology further described below, the fact that creations and redemptions are only available in-kind makes the manipulability of the Benchmark significantly less important. Specifically, because the Trust will not accept cash to buy bitcoin in order to create new shares or, barring a forced redemption of the Trust or under other extraordinary circumstances, be forced to sell bitcoin to pay cash for redeemed shares, the price that the Sponsor uses to value the Trust's bitcoin is not particularly important.⁴¹ When authorized participants are creating with the Trust, they need to deliver a

certain number of bitcoin per share (regardless of the valuation used) and when they're redeeming, they can similarly expect to receive a certain number of bitcoin per share. As such, even if the price used to value the Trust's bitcoin is manipulated (which the Sponsor believes that its methodology is resistant to), the ratio of bitcoin per Share does not change and the Trust will either accept (for creations) or distribute (for redemptions) the same number of bitcoin regardless of the value. This not only mitigates the risk associated with potential manipulation, but also discourages and disincentivizes manipulation of the Benchmark because there is little financial incentive to do so.

The Exchange also believes that reviewing this proposal through the lens of the Bitcoin Futures Approvals would also lead the Commission to approving this proposal. Previous disapproval orders have made clear that a market that constitutes a regulated market of significant size is generally a futures and/or options market based on the underlying reference asset rather than the spot commodity markets, which are often unregulated.⁴² The Exchange believes that the following excerpt from the Teucrium Approval is particularly informative:

The CME "comprehensively surveils futures market conditions and price movements on a real-time and ongoing basis in order to detect and prevent price distortions, including price distortions caused by manipulative efforts." Thus, the CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts, whether that attempt is made by directly trading on the CME bitcoin futures market or indirectly by

trading outside of the CME bitcoin futures market. As such, when the CME shares its surveillance information with Arca, the information would assist in detecting and deterring fraudulent or manipulative misconduct related to the non-cash assets held by the proposed ETP.⁴³

Bitcoin Futures pricing is based on pricing from spot bitcoin markets. The statement from the Teucrium Approval that "CME's surveillance can reasonably be relied upon to capture the effects on the CME bitcoin futures market caused by a person attempting to manipulate the proposed futures ETP by manipulating the price of CME bitcoin futures contracts . . . indirectly by trading outside of the CME bitcoin futures market," makes clear that the Commission believes that CME's surveillance can capture the effects of trading on the relevant spot markets on the pricing of Bitcoin Futures. If CME is able to detect such attempts at manipulation in the complex and interconnected spot bitcoin market, how would such an ability to detect attempted manipulation and the utility in sharing that information with the listing exchange apply only to Bitcoin Futures ETFs and not Spot Bitcoin ETPs? Stated a different way, given that there is significant trading volume on numerous bitcoin exchanges that are not part of the CME CF Bitcoin Reference Rate and that arbitrage opportunities across bitcoin exchanges means that such trading volume will influence spot bitcoin prices across the market and, despite this, the Commission still believes that CME can detect attempted manipulation of the Bitcoin Futures through "trading outside of the CME bitcoin futures market," it is clear that such ability would apply equally to both Bitcoin Futures ETFs and Spot Bitcoin ETPs. To take it a step further, such an ability would also seem to be a strong indication that the CME Bitcoin Futures market represents a regulated market of significant size. To be clear, the Exchange agrees with the Commission on this point (and the implications of their conclusions) and notes that the pricing mechanism applicable to the Shares is similar to the CME CF Bitcoin Reference Rate, as further discussed below.

The Exchange also notes that a Bitcoin Futures ETF may also be more susceptible to potential manipulation than a Spot Bitcoin ETP that offers only in-kind creation and redemption because Bitcoin Futures pricing (and thus the value of the underlying holdings of a Bitcoin Futures ETF) is based on a single price derived from spot bitcoin pricing, while shares of a Spot Bitcoin ETP would represent

⁴¹ While the Benchmark will not be particularly important for the creation and redemption process, it will be used for calculating fees.

⁴² See Winklevoss Order at 37593, specifically footnote 202, which includes the language from numerous approval orders for which the underlying futures markets formed the basis for approving series of ETPs that hold physical metals, including gold, silver, palladium, platinum, and precious metals more broadly; and 37600, specifically where the Commission provides that "when the spot market is unregulated—the requirement of preventing fraudulent and manipulative acts may possibly be satisfied by showing that the ETP listing market has entered into a surveillance-sharing agreement with a regulated market of significant size in derivatives related to the underlying asset." As noted above, the Exchange believes that these citations are particularly helpful in making clear that the spot market for a spot commodity ETP need not be "regulated" in order for a spot commodity ETP to be approved by the Commission, and in fact that it's been the common historical practice of the Commission to rely on such derivatives markets as the regulated market of significant size because such spot commodities markets are largely unregulated.

interest in bitcoin directly and authorized participants for a Spot Bitcoin ETP (as proposed herein) would be able to source bitcoin from any exchange and create or redeem with the applicable trust regardless of the price of the underlying index. As such, the Exchange believes that, in addition to the CME Bitcoin Futures market representing a regulated market of significant size as it relates to the spot bitcoin market, in-kind Spot Bitcoin ETPs are likely less susceptible to manipulation than Bitcoin Futures ETFs because of the underlying creation and redemption arbitrage mechanism that will operate in the same manner as it does for all other ETFs.

In addition to potentially being more susceptible to manipulation than a Spot Bitcoin ETP, the structure of Bitcoin Futures ETFs provides negative outcomes for buy and hold investors as compared to a Spot Bitcoin ETP.⁴⁴ Specifically, the cost of rolling Bitcoin Futures contracts will cause the Bitcoin Futures ETFs to lag the performance of bitcoin itself and, at over a billion dollars in assets under management, would cost U.S. investors significant amounts of money on an annual basis compared to Spot Bitcoin ETPs. Such rolling costs would not be required for Spot Bitcoin ETPs that hold bitcoin. Further, Bitcoin Futures ETFs could potentially hit CME position limits, which would force a Bitcoin Futures ETF to invest in non-futures assets for bitcoin exposure and cause potential investor confusion and lack of certainty about what such Bitcoin Futures ETFs are actually holding to try to get exposure to bitcoin, not to mention completely changing the risk profile associated with such an ETF. While Bitcoin Futures ETFs represent a useful trading tool, they are clearly a sub-optimal structure for U.S. investors that are looking for long-term exposure to bitcoin that will, based on the calculations above, unnecessarily cost U.S. investors significant amounts of money every year compared to Spot Bitcoin ETPs and the Exchange believes that any proposal to list and trade a Spot Bitcoin ETP should be reviewed by the

Commission with this important investor protection context in mind.

Based on the foregoing, the Exchange and Sponsor believe that any objective review of the proposals to list Spot Bitcoin ETPs compared to the Bitcoin Futures ETFs and the Bitcoin Futures Approvals would lead to the conclusion that Spot Bitcoin ETPs should be available to U.S. investors and, as such, this proposal and other comparable proposals to list and trade Spot Bitcoin ETPs should be approved by the Commission. Stated simply, U.S. investors will continue to lose significant amounts of money from holding Bitcoin Futures ETFs as compared to Spot Bitcoin ETPs, losses which could be prevented by the Commission approving Spot Bitcoin ETPs. Additionally, any concerns related to preventing fraudulent and manipulative acts and practices related to Spot Bitcoin ETPs would apply equally to the spot markets underlying the futures contracts held by a Bitcoin Futures ETF. While the 1940 Act does offer certain investor protections, those protections do not relate to mitigating potential manipulation of the holdings of an ETF in a way that warrants distinction between Bitcoin Futures ETFs and Spot Bitcoin ETPs. To be clear, both the Exchange and Sponsor believe that the Bitcoin Futures market is a regulated market of significant size and that such manipulation concerns are mitigated as described throughout this proposal. After issuing the Bitcoin Futures Approvals which conclude the CME Bitcoin Futures market is a regulated market of significant size as it relates to Bitcoin Futures, the only consistent outcome would be approving Spot Bitcoin ETPs on the basis that the Bitcoin Futures market is also a regulated market of significant size as it relates to the bitcoin spot market. Including in the analysis the significant and preventable losses to U.S. investors that comes with Bitcoin Futures ETFs, disapproving Spot Bitcoin ETPs seems even more arbitrary and capricious. Given the current landscape, approving this proposal (and others like it) and allowing Spot Bitcoin ETPs to be listed and traded alongside Bitcoin Futures ETFs would establish a consistent regulatory approach, provide U.S. investors with choice in product structures for bitcoin exposure, and offer flexibility in the means of gaining exposure to bitcoin through transparent, regulated, U.S. exchange-listed vehicles.

Spot and Proxy Exposure to Bitcoin

Exposure to bitcoin through an ETP also presents certain advantages for retail investors compared to buying spot

bitcoin directly. The most notable advantage from the Sponsor's perspective is the elimination of the need for an individual retail investor to either manage their own private keys or to hold bitcoin through a cryptocurrency exchange that lacks sufficient protections. Typically, retail exchanges hold most, if not all, retail investors' bitcoin in "hot" (internet-connected) storage and do not make any commitments to indemnify retail investors or to observe any particular cybersecurity standard. Meanwhile, a retail investor holding spot bitcoin directly in a self-hosted wallet may suffer from inexperience in private key management (e.g., insufficient password protection, lost key, etc.), which could cause them to lose some or all of their bitcoin holdings. Thus, with respect to custody of the Trust's bitcoin assets, the Trust presents advantages from an investment protection standpoint for retail investors compared to owning spot bitcoin directly.

Finally, a number of operating companies largely engaged in unrelated businesses—such as Tesla (a car manufacturer) and MicroStrategy (an enterprise software company)—have announced significant investments in bitcoin. Without access to bitcoin exchange-traded products, retail investors seeking investment exposure to bitcoin may end up purchasing shares in these companies in order to gain the exposure to bitcoin that they seek.⁴⁵ In fact, mainstream financial news networks have written a number of articles providing investors with guidance for obtaining bitcoin exposure through publicly traded companies (such as MicroStrategy, Tesla, and bitcoin mining companies, among others) instead of dealing with the complications associated with buying spot bitcoin in the absence of a bitcoin ETP.⁴⁶ Such operating companies, however, are imperfect bitcoin proxies and provide investors with partial bitcoin exposure paired with a host of additional risks associated with whichever operating company they

⁴⁵ In August 2017, the Commission's Office of Investor Education and Advocacy warned investors about situations where companies were publicly announcing events relating to digital coins or tokens in an effort to affect the price of the company's publicly traded common stock. See https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims.

⁴⁶ See e.g., "7 public companies with exposure to bitcoin" (February 8, 2021) available at: <https://finance.yahoo.com/news/7-public-companies-with-exposure-to-bitcoin-154201525.html>; and "Want to get in the crypto trade without holding bitcoin yourself? Here are some investing ideas" (February 19, 2021) available at: <https://www.cnn.com/2021/02/19/ways-to-invest-in-bitcoin-without-holding-the-cryptocurrency-yourself.html>.

⁴⁴ See e.g., "Bitcoin ETF's Success Could Come at Fundholders' Expense," Wall Street Journal (October 24, 2021), available at: <https://www.wsj.com/articles/bitcoin-etfs-success-could-come-at-fundholders-expense-11635080580>; "Physical Bitcoin ETF Prospects Accelerate," ETF.com (October 25, 2021), available at: https://www.etf.com/sections/blog/physical-bitcoin-etf-prospects-shine?nopaging=1&cf_chl_jschl_tk_=pmd_JsK.fjXz9eAQW9zo10qpzhXDrrlpiVdoCLOLXblj44-1635476946-0-gqNtZGzNAPCjcnBszQql.

decide to purchase. Additionally, the disclosures provided by the aforementioned operating companies with respect to risks relating to their bitcoin holdings are generally substantially smaller than the registration statement of a bitcoin ETP, including the Registration Statement, typically amounting to a few sentences of narrative description and a handful of risk factors.⁴⁷ In other words, investors seeking bitcoin exposure through publicly traded companies are gaining only partial exposure to bitcoin and are not fully benefitting from the risk disclosures and associated investor protections that come from the securities registration process.

Commodity-Based Trust Shares

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed on the Exchange pursuant to the initial and continued listing criteria in Exchange Rule 5711(d). The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of the Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products, including Commodity-Based Trust Shares. The issuer has represented to the Exchange that it will advise the Exchange of any failure by the Trust or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements. If the Trust or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under Exchange Rule 5800 and following. The Exchange may obtain information regarding trading in the Shares and listed bitcoin derivatives via the ISG, from other exchanges who are members or affiliates of the ISG, or with which the Exchange has entered into a comprehensive surveillance sharing agreement.

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 purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of additional actively-managed exchange-traded products that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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-NASDAQ-2023-019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to file number SR-NASDAQ-2023-019. 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-NASDAQ-2023-019 and should be submitted on or before August 11, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁸

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2023-15474 Filed 7-20-23; 8:45 am]

BILLING CODE 8011-01-P

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21108]

Academy Express, LLC and Franmar Leasing, LLC—Purchase of Certain Assets of James River Bus Lines

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: Academy Express LLC (Express), a motor carrier of passengers; Franmar Leasing LLC (Franmar), a noncarrier; and James River Bus Lines (James), a motor carrier of passengers (collectively, Applicants), filed an application for approval of the sale of certain assets of James to Express and Franmar. The Board is tentatively approving and authorizing this transaction. If no opposing comments are timely filed, this notice will be the final Board action.

⁴⁸ 17 CFR 200.30-3(a)(12).

⁴⁷ See, e.g., Tesla 10-K for the year ended December 31, 2020, which mentions bitcoin just nine times: https://www.sec.gov/ix?doc=/Archives/edgar/data/1318605/000156459021004599/tsla-10k_20201231.htm.

DATES: Comments must be filed by September 5, 2023. If any comments are filed, Applicants may file a reply by September 19, 2023. If no opposing comments are filed by September 5, 2023, this notice will be final on September 6, 2023.

ADDRESSES: Comments may be filed with the Board either via e-filing on the Board's website or mailing to the Board's offices and must reference Docket No. MCF 21108. Comments may be e-filed at www.stb.gov/proceedings-actions/e-filing/other-filings/. Mailed comments may be sent to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423-0001. In addition, one copy of comments must be sent to Applicants' representative: Joseph J. Ferrara, Ferrara and Associates, 1111 Paterson Ave., Hoboken, NJ 07030.

FOR FURTHER INFORMATION CONTACT: Amanda Gorski at (202) 245-0291. If you require an accommodation under the Americans with Disabilities Act, please call (202) 245-0245.

SUPPLEMENTARY INFORMATION: According to the application,¹ Express and Franmar² are affiliated entities under the common control of the Tedesco Family ESBT Trust (the ESBT Trust). (Appl. 1; Suppl. 9, June 21, 2023.) Express is a motor carrier licensed by the Federal Motor Carrier Safety Administration (FMCSA) that operates interstate charter and contract motor coach passenger services in states along the East Coast, primarily in the Northeast, from garage facilities located in Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, Northern Virginia, and North Carolina. (Appl. 7; Suppl. 3, June 21, 2023.) Franmar, a non-carrier, is engaged exclusively in the ownership and leasing of passenger motor coaches for use by Express and its motor carrier affiliates, as described below. (Appl. 5.) James is a family-owned motor carrier engaged in passenger transportation services in and from Virginia from customer bases centered in the Richmond and Norfolk areas. (Appl. 1, 7; Suppl. 4, June 21, 2023.)³

¹ The application was filed on May 9, 2023. By decision served June 8, 2023, Applicants were directed to file certain supplemental information. Applicants filed the supplement on June 21, 2023. Therefore, for purposes of determining the procedural schedule and statutory deadlines, the filing date of the application is June 21, 2023. See 49 CFR 1182.4(a). On July 11, 2023, Applicants submitted a second supplement clarifying various points in their June 21, 2023 supplement.

² The application refers to this party as both "Franmar Leasing LLC" and "Franmar Leasing, Inc." (See Appl. 5-6.)

³ Further information about James—including its U.S. Department of Transportation (USDOT)

Applicants state that the ESBT Trust owns and controls three FMCSA carriers—Express, Academy Lines LLC (Lines), and Airport Express LLC (Airport)—along with Franmar and several other non-carrier companies. (Suppl. 8, June 21, 2023.) According to Applicants, Francis and Mark Tedesco (the Tedescos) are the lifetime beneficiaries of the ESBT Trust as well as a second trust—the Academy (Florida) ESB Trust (the Florida Trust)—that owns and controls a fourth FMCSA carrier, Academy Bus LLC (FL) (Bus FL). (*Id.* at 8, 10.)⁴ Applicants explain that through these respective trusts, the Tedescos exercise ownership and control of the carriers and affiliated non-carriers identified in their filings. (*Id.* at 8-11.)

James proposes to sell assets used in its motor coach passenger transportation business pursuant to an asset purchase agreement dated April 23, 2023. (Appl. 1, Ex. C.) According to Applicants, this transaction is a result of a business decision by James to permanently withdraw from the motor coach transportation business so that its principal can focus on transportation consulting activities. (Appl. 1-2.)⁵ The application states that, under the terms of the agreement, Franmar will acquire the motor carrier assets of James (consisting of 28 motor coaches and 17 mini-motor coaches) and Express will acquire the non-motor carrier assets of James (consisting of customer lists, telephone numbers, website and related software, pending charter customer contracts and associated deposits, parts, equipment, supplies, and intangibles used by James in its charter business operation). (*Id.* at 2.)

Under 49 U.S.C. 14303(b), the Board must approve and authorize a

number, motor carrier number, and USDOT safety fitness rating—can be found in the application and the supplement. (See Appl. 6-7, 9; Suppl. 2-3, 6, June 21, 2023; see also Second Suppl., July 11, 2023 (clarifying information relating to James' interstate motor coach passenger operations).)

⁴ Further information about the motor carriers controlled by the Tedescos—including their USDOT numbers, motor carrier numbers, and USDOT safety fitness ratings—can be found in the application and the supplement. (See Appl. 4-5, 7, 9; Suppl. 3-4, 7, 9-11, June 21, 2023.) According to Applicants, Lines operates interstate passenger commuter service and charter passenger service primarily in New York and New Jersey; Airport does not currently conduct any motor coach or transportation services but previously operated in New Jersey; and Bus (FL) operates interstate charter and contract motor coach passenger service primarily in North Carolina, South Carolina, Georgia, and Florida. (See Appl. 5, 7; Suppl. 10-11, June 21, 2023.) The operations of Express are described above.

⁵ (See also Appl. 6-7; Suppl. 6, 8, June 21, 2023 (explaining that James will surrender its operating certificates and cease operations as a motor coach passenger transportation carrier).)

transaction that it finds consistent with the public interest, taking into consideration at least: (1) the effect of the proposed transaction on the adequacy of transportation to the public, (2) the total fixed charges resulting from the proposed transaction, and (3) the interest of affected carrier employees. Applicants have submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b), see 49 CFR 1182.2(a)(7), and a jurisdictional statement under 49 U.S.C. 14303(g) that the aggregate gross annual operating revenues of the involved carriers exceed \$2 million, see 49 CFR 1182.2(a)(5). (See Appl. 7-9; Suppl. 2-9, 11, June 21, 2023.)

Applicants assert that the proposed transaction is in the public interest because James is permanently withdrawing from the motor coach passenger transportation business and would sell its motor coach vehicles and related assets, which it no longer desires to operate, to Franmar and Express for continued use in the delivery of passenger motor coach transportation services. (Appl. 8.) No operable motor vehicles would be scrapped, and no new busses would need to be purchased by Franmar at this time, conserving metals and energy resources. (*Id.*) Applicants represent that the public would not lose service because the same number of buses will continue to operate. (*Id.*) Applicants also state that the transaction would promote efficiencies, competitive pricing, and exemplary service. (*Id.* at 8-9; see also *id.* at 3 (stating that the transaction would increase operating efficiencies, reduce operating costs, and promote greater economic use of existing transportation capital resources, maintaining service options to customers of both James and Express).) Applicants also assert that the proposed transaction would not result in an increase to fixed charges, as the proposed transaction is expected to be for cash. (*Id.* at 8.)

Additionally, Applicants assert that the proposed transaction would not adversely affect qualified employees at the locations from which James operates. (*Id.* at 9.) Applicants state that Express will interview and offer employment opportunities to those employees, which Applicants claim is "a necessity to permit Express to continue to operate the assets acquired as a carrier." (*Id.*)

According to Applicants, the proposed transaction would not adversely affect competition or the

adequacy of transportation offerings. Applicants state that Express will continue to provide the same level of services in all states in which it operates. (Suppl. 3, June 21, 2023.) Applicants further explain that, following the transaction, Express will offer substantially the same charter and contract transportation services currently provided by James, and that James' current motor coach fleet is sufficient in size to meet the requirements of James' charter and contract service customer base. (*Id.* at 3–5.) Thus, the transaction will have little or no impact on competing passenger charter and contract motor carriers because Express would simply be replacing James as the operator in the Richmond and Norfolk markets that James primarily serves, which, according to Applicants, are separate from the markets served by Express from Northern Virginia. (*Id.* at 6.) Applicants also assert that James' motor coach operations outside Virginia are “minimal, approximately 13% of total charter and contract operations”; state that the Express motor carrier affiliates (Lines, Airport, and Bus (FL)) do not conduct any regular and primary charter or contract passenger service operations in Virginia, the primary market in which James operates; and claim that due to these limiting factors, they do not anticipate that the acquisition of James' motor coach assets will have a substantial negative impact on competitors. (*Id.* at 6–7.)⁶

Based on Applicants' representations, the Board finds that the proposed acquisition is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. See 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

⁶ The Board notes that the asset purchase agreement contains a non-compete agreement, which prohibits James and its affiliates (except for Stephen Story, whose arrangement is governed by a consulting agreement), for a period of time, from soliciting the customer client base sold to Express or otherwise competing with Express in the geographic areas in which James currently conducts business operations. (Appl., Ex. C art. 10.01.) After a review of the contractual provision, and based on the verified information submitted by Applicants regarding the limited amount of market overlap, the Board finds that the clause does not appear to have an anticompetitive effect, on balance, in the markets in which Applicants operate.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available at www.stb.gov.

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.
2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.
3. This notice will be effective September 6, 2023, unless opposing comments are filed by September 5, 2023. If any comments are filed, Applicant may file a reply by September 19, 2023.
4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: July 17, 2023.

By the Board, Board Members Fuchs, Hedlund, Oberman, Primus, and Schultz.

Eden Besera,

Clearance Clerk.

[FR Doc. 2023–15531 Filed 7–20–23; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

Senior Executive Service Performance Review Board (PRB) and Executive Resources Board (ERB) Membership

AGENCY: Surface Transportation Board.

ACTION: Notice of Senior Executive Service Performance Review Board (PRB) and Executive Resources Board (ERB) Membership.

SUMMARY: Effective immediately, the memberships of the PRB and ERB are as follows:

Performance Review Board

Craig Keats, Chairman
Rachel Campbell, Member
Mai Dinh, Member
Danielle Gosselin (Alternate Member)

Executive Resources Board

Rachel Campbell, Chairman
Danielle Gosselin, Member
Janie Sheng Lee, Member
Craig Keats (Alternate Member)

FOR FURTHER INFORMATION CONTACT: If you have any questions, please contact

Jennifer Layne at jennifer.layne@stb.gov or 202–245–0340.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2023–15514 Filed 7–20–23; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on a Land Release Request at Malden Regional Airport & Industrial Park (MAW), Malden, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of request to release of airport land.

SUMMARY: The FAA proposes to rule and invites public comment on the request to release and sell a 1.42 acre parcel of federally obligated airport property at the Malden Regional Airport & Industrial Park (MAW), Malden, Missouri.

DATES: Comments must be received on or before August 21, 2023.

ADDRESSES: Comments on this application may be mailed or delivered to the FAA at the following address: Amy J. Walter, Airports Land Specialist, Federal Aviation Administration, Airports Division, ACE–620G, 901 Locust, Room 364, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to: David Blalock, Airport Manager, City of Malden Regional Airport & Industrial Park, 3077 Mitchell Drive, P.O. Box 411, Malden, MO 63863–0411, (573) 276–2279.

FOR FURTHER INFORMATION CONTACT: Amy J. Walter, Airports Land Specialist, Federal Aviation Administration, Airports Division, ACE–620G, 901 Locust, Room 364, Kansas City, MO 64106, (816) 329–2603, amy.walter@faa.gov. The request to release property may be reviewed, by appointment, in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA invites public comment on the request to release a 1.42 acre parcel of airport property at the Malden Regional Airport & Industrial Park (MAW) under the provisions of 49 U.S.C. 47107(h)(2). This is a Surplus Property Airport. The City of Malden requested a release from the FAA to sell a 1.42 acre parcel to Kenneth W. Huey for commercial development. The FAA determined this

request to release and sell property at the Malden Regional Airport & Industrial Park (MAW) submitted by the Sponsor meets the procedural requirements of the FAA and the release and sale of the property does not and will not impact future aviation needs at the airport. The FAA may approve the request, in whole or in part, no sooner than thirty days after the publication of this notice.

The following is a brief overview of the request:

The Malden Regional Airport & Industrial Park (MAW) is proposing the release from obligations and sale of a 1.42 acre parcel of airport property. The release of land is necessary to comply with Federal Aviation Administration Grant Assurances that do not allow federally acquired airport property to be used for non-aviation purposes. The sale of the subject property will result in the land at the Malden Regional Airport & Industrial Park (MAW) being changed from aeronautical to non-aeronautical use and release the lands from the conditions of the Airport Improvement Program Grant Agreement Grant Assurances in order to sell the land. In accordance with 49 U.S.C. 47107(c)(2)(B)(i) and (iii), the airport will receive fair market value for the property, which will be subsequently reinvested in another eligible airport improvement project for general aviation use.

Any person may inspect, by appointment, the request in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**. In addition, any person may request an appointment to inspect the application, notice and other documents determined by the FAA to be related to the application in person at the Malden City Hall.

Issued in Kansas City, MO, on July 17, 2023.

James A. Johnson,

Director, FAA Central Region, Airports Division.

[FR Doc. 2023–15450 Filed 7–20–23; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2023–0002–N–17]

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, FRA seeks approval of the Information Collection Request (ICR) abstracted below. Before submitting this ICR to the Office of Management and Budget (OMB) for approval, FRA is soliciting public comment on specific aspects of the activities identified in the ICR.

DATES: Interested persons are invited to submit comments on or before September 19, 2023.

ADDRESSES: Written comments and recommendations for the proposed ICR should be submitted on *regulations.gov* to the docket, Docket No. FRA–2023–0002. All comments received will be posted without change to the docket, including any personal information provided. Please refer to the assigned OMB control number (2130–NEW) in any correspondence submitted. FRA will summarize comments received in response to this notice in a subsequent notice and include them in its information collection submission to OMB for approval.

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 provide 60-days' notice to the public to allow comment on information collection activities before seeking OMB approval of the activities. *See* 44 U.S.C. 3506, 3507; 5 CFR 1320.8 through 1320.12. Specifically, FRA invites interested parties to comment on the following ICR regarding: (1) whether the information collection activities are necessary for FRA to properly execute its functions, including whether the activities 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 for FRA to minimize the burden of information collection activities on the public, including the use of automated collection techniques or other forms of

information technology. *See* 44 U.S.C. 3506(c)(2)(A); 5 CFR 1320.8(d)(1).

FRA believes that soliciting public comment may reduce the administrative and paperwork burdens associated with the collection of information that Federal statutes and regulations mandate. In summary, FRA reasons that comments received will advance three objectives: (1) reduce reporting burdens; (2) organize information collection requirements in a “user-friendly” format to improve the use of such information; and (3) accurately assess the resources expended to retrieve and produce the information requested. *See* 44 U.S.C. 3501.

The summary below describes the ICR that FRA will submit for OMB clearance as the PRA requires:

Title: Class I Freight-Train Length Reporting.

OMB Control Number: 2130–NEW.

Abstract: On May 2, 2023, FRA issued Safety Advisory 2023–03, “Accident Mitigation and Train Length,” (Safety Advisory) to ensure railroads and railroad employees are aware of the potential complexities associated with operating longer trains and to recommend that they take appropriate measures to address those complexities to ensure the safe operation of such trains.¹ The Safety Advisory cited three significant incidents that occurred since 2022 involving trains with more than 200 cars, each approximately more than 10,000 feet in length and weighing more than 17,000 trailing tons, where train handling and train makeup is believed to have caused, or contributed to, the incidents. In the Safety Advisory, FRA explained that the operation of these longer trains presents different, more complex, operational challenges, which can be exacerbated by the weight and makeup of trains. Consequently, FRA recommended that railroads review their operating rules and existing locomotive engineer certification programs to address operational complexities of train length, take appropriate action to prevent the loss of communications between end-of-train devices, and mitigate the impacts of long trains on blocked crossings.²

In the Safety Advisory, FRA also explained that in 2019, the U.S. Government Accountability Office (GAO) issued a report finding that freight-train length, particularly for Class I railroads, increased in recent years.³ GAO was only able to procure

¹ 88 FR 27570.

² *Id.*

³ *Id.* (citing GAO's May 2019 report titled RAIL SAFETY: Freight Trains Are Getting Longer, and

limited data from some of the Class I railroads but, one Class I railroad provided data indicating an average train length of 6,100 feet and a second Class I railroad provided data indicating an average train length of 7,500 feet.⁴ These data represent an increase in the average length of a train of about 25 percent for both railroads over a 10-year period.⁵ Each Class I railroad reportedly told GAO that they operate some longer trains, with one railroad operating a train on a regular basis that was over 12,000 feet long and another railroad operating a train on a regular basis that was over 16,000 feet long.⁶ These same railroads responded that trains over 10,000 feet long were only 1 to 2 percent of their total train-miles.⁷

In the Safety Advisory, FRA also acknowledged that it was in the process of conducting research on the operational complexities of longer trains, including air brake system performance and resulting train dynamics.⁸ The Safety Advisory also noted that in response to a statutory requirement, FRA entered into an agreement with the National Academies of Sciences, Engineering and Medicine (NAS) to examine factors associated with the operation of freight trains longer than 7,500 feet. FRA notes, however, that any data collected from the industry in the course of these studies is likely to be limited in the same way that the GAO was only able to procure limited data for its report.⁹

As a next step, FRA is initiating a new ICR to gather train length data from Class I freight railroads as the safety concerns of long trains is largely an

issue particular to these railroads.¹⁰ Specifically, the proposed information collection would require Class I freight railroads to provide FRA, on a monthly basis, with data regarding the total number of trains operated, the total number of cars in those trains, as well as the total trailing tonnage in specified train length categories (e.g., less than or equal to 7,500 feet, greater than 7,500 feet). In addition, FRA proposes to collect data from the Class I freight railroads that may inform potential complexities and safety concerns associated with operating longer trains, such as the number of emergency events, the number of communication event losses, the number of broken knuckles, the number of air hose separations, the number of PTC enforcements, and the number of locomotive engineer revocations under 49 CFR part 240. The requested data will be collected monthly using an Excel-based form (Form FRA F 6180.277).

This data collection is necessary to allow objective findings to be made that can be used to either justify the status quo or to provide justification for further recommendations or agency action. Of note, FRA is seeking to collect data on train length on an ongoing basis, as opposed to this being a one-time study. FRA will use the collected data to establish an initial baseline for the length of trains operating within the U.S. rail system as well as to determine if train lengths are changing over time. FRA may also use the collected data in future analyses to better understand the impact of train length on safety (e.g., to

determine whether trains of certain lengths are disproportionately involved in certain type of accidents/incidents or other undesired events such as loss of communications or train stalling).

FRA has incorporated several measures to minimize the respondents' paperwork burden in this proposed collection. For example, to avoid duplicating efforts, FRA is not asking railroads to provide train length information for any FRA-reportable accident or incident for which a form F6180.54 is filed. Instead, for any train involved in an accident for which a form F6180.54 is filed, FRA will review train length data collected on that form and will not seek to collect the same data proposed in this collection.

As delegated by Congress to the Secretary of the Department of Transportation, FRA has broad statutory authority to oversee matters related to rail safety.¹¹ As noted in the Safety Advisory, the greater operational complexities associated with longer trains necessitate that railroads take appropriate safety measures to manage their potentially more complex in-train forces. This proposed collection is another component of FRA's ongoing research to closely monitor and analyze the impact of train length on rail safety.

Type of Request: Approval of a new collection of information.

Affected Public: Businesses.

Form(s): FRA F Form 6180.277.

Respondent Universe: Class I freight railroads.

Frequency of Submission: Monthly/recurring.

Reporting Burden:

	Respondent universe	Total annual responses (reports)	Average time per response ¹² (hours)	Total annual burden hours	Total cost equivalent
		(A)	(B)	(C) = A * B	(D) = C * wage rate ¹³
Form FRA F 6180.277	Class I railroads	72	8	576	\$49,496

Total Estimated Annual Responses: 72 reports.

Total Estimated Annual Burden: 576 hours.

Total Estimated Annual Burden Hour Dollar Cost Equivalent: \$49,496.

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.

Allison Ishihara Fultz,
Chief Counsel.
[FR Doc. 2023–15437 Filed 7–20–23; 8:45 am]
BILLING CODE 4910–06–P

Additional Information is Needed to Assess Their Impact, GAO–19–443 (available at <https://www.gao.gov/assets/gao-19-443.pdf>).

⁴ *Id.* at 11.

⁵ *Id.*

⁶ *Id.* at 12.

⁷ *Id.*

⁸ https://railroads.dot.gov/sites/fra.dot.gov/files/2022-2/2023_RDT_CurrentProjects_complete_FINAL.pdf.

⁹ Information about NAS's study and its meeting agendas are available at <https://www.nationalacademies.org/our-work/impacts-of-trains-longer-than-7500-feet>. The study was required by the Infrastructure Investment and Jobs Act, Public Law 117–58, 22422, 35 Stat. 751 (2021).

¹⁰ This ICR is limited to Class I railroads.

¹¹ 49 U.S.C. 20103(a).

¹² The average burden also includes time for reviewing the provided instructions, searching

existing data sources, gathering, and maintaining necessary data, and completing and reviewing the information collection.

¹³ The dollar equivalent cost is derived from the Surface Transportation Board's 2022 Full Year Wage A&B data series for railroad workers. The wage rate of \$85.93 per hour includes a 75-percent overhead charge.

DEPARTMENT OF THE TREASURY**Alcohol and Tobacco Tax and Trade Bureau**

[Docket No. TTB–2023–0005]

Proposed Information Collections; Comment Request (No. 90)**AGENCY:** Alcohol and Tobacco Tax and Trade Bureau (TTB); Treasury.**ACTION:** Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the continuing or proposed information collections listed below in this document.

DATES: We must receive your written comments on or before September 19, 2023.

ADDRESSES: You may send comments on the information collections described in this document using one of these two methods:

- *Internet*—To submit comments electronically, use the comment form for this document posted on the “Regulations.gov” e-rulemaking website at <https://www.regulations.gov> within Docket No. TTB–2023–0005.

- *Mail*—Send comments to the Paperwork Reduction Act Officer, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005.

Please submit separate comments for each specific information collection described in this document. You must reference the information collection’s title, form or recordkeeping requirement number (if any), and OMB control number in your comment.

You may view copies of this document, the relevant TTB forms, and any comments received at <https://www.regulations.gov> within Docket No. TTB–2022–0002. TTB has posted a link to that docket on its website at <https://www.ttb.gov/rrd/information-collection-notice>. You also may obtain paper copies of this document, the listed forms, and any comments received by contacting TTB’s Paperwork Reduction Act Officer at the addresses or telephone number shown below.

FOR FURTHER INFORMATION CONTACT: Michael Hoover, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW, Box 12, Washington, DC 20005; 202–453–1039, ext. 135; or complete the Regulations and Rulings Division contact form at <https://www.ttb.gov/contact-rrd>.

SUPPLEMENTARY INFORMATION:**Request for Comments**

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of a continuing effort to reduce paperwork and respondent burden, invite the public and other Federal agencies to comment on the proposed or continuing information collections described below, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this document will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether an information collection is necessary for the proper performance of the agency’s functions, including whether the information has practical utility; (b) the accuracy of the agency’s estimate of the information collection’s burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection’s burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

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 has a valid OMB control number.

Information Collections Open for Comment

Currently, we are seeking comments on the following forms, letterhead applications or notices, recordkeeping requirements, questionnaires, or surveys:

OMB Control No. 1513–0001

Title: Tax Information Authorization.

TTB Form Number: TTB F 5000.19.

Abstract: In general, the Internal Revenue Code (IRC) at 26 U.S.C. 6103 protects the privacy of taxpayer information by, among other things, prohibiting the disclosure of tax returns and taxpayer information to unauthorized persons. However, under 26 U.S.C. 6103(c), a taxpayer may authorize a representative to receive otherwise confidential tax information.

Under that IRC authority and the related Department of Treasury regulations, the Alcohol and Tobacco Tax and Trade Bureau (TTB) provides form TTB F 5000.19 for taxpayers to use to authorize a representative who does not have a power of attorney to receive otherwise confidential information regarding the taxpayer. TTB uses the information provided on that form to properly identify the taxpayer’s representative and the scope of their authority to obtain the confidential information.

Current Actions: There are no program changes associated with this information collection at this time, and TTB is submitting it for extension purposes only. As for adjustments, due to a change in agency estimates, TTB is decreasing the number of annual responses, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits; Individuals or households.

Estimated Annual Burden

- *Number of Respondents:* 10.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 10.
- *Average per-Response Burden:* 1 hour.
- *Total Burden:* 10 hours.

OMB Control No. 1513–0003

Title: Referral of Information.

TTB Form Number: TTB F 5000.21.

Abstract: During the course of their duties, TTB personnel sometimes discover apparent violations of statutes and regulations under the jurisdiction of State, local, or tribal government agencies. Using form TTB F 5000.21, TTB personnel refer information regarding such violations to external agencies if the disclosure is authorized under 26 U.S.C. 6103 or other Federal laws. The referral form includes a section for the external agency to respond to TTB regarding its action on the referral. This form provides a consistent means of conveying the relevant information to external agencies, and it facilitates information-sharing between TTB and such agencies to support enforcement efforts. The response that TTB requests from external agencies also provides information as to the utility of the referrals and potential enforcement actions that those agencies take against the same entities that TTB regulates.

Current Actions: There no program changes or adjustments associated with this information collection, and TTB is

submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local, and tribal governments.

Estimated Annual Burden

- *Number of Respondents:* 125.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 125.
- *Average per-Response Burden:* 1 hour.
- *Total Burden:* 125 hours.

OMB Control No. 1513-0005

Title: Brewer's Notices; and Letterhead Applications and Notices Filed by Brewers.

TTB Form Number: TTB F 5130.10.

TTB Recordkeeping Number: TTB REC 5130/2.

Abstract: The IRC at 26 U.S.C. 5401 requires brewers to file a notice of intent to operate a brewery, containing the information the Secretary of the Treasury (the Secretary) prescribes by regulation. Under that IRC authority, the TTB regulations in 27 CFR part 25, Beer, require new brewery applicants to submit TTB F 5130.10, Brewer's Notice, which provides TTB with information similar to that collected on a permit application. The part 25 regulations also require brewers to submit an amended Brewer's Notice when certain changes occur to the brewery's ownership, control, location, description, and bond or operating status. Additionally, the TTB regulations require brewers to submit letterhead applications or notices regarding certain changes in brewery operations and the destruction, loss, or return of beer. The TTB regulations require brewers to maintain a file at their premises containing their Brewer's Notice, its incorporated supporting documents, and the related letterhead applications and notices, available for inspection by TTB officers. This information collection request is necessary to protect the revenue and ensure that brewers conduct their operations in compliance with relevant Federal laws and regulations.

Current Actions: There are no program changes associated with this information collection at this time, and TTB is submitting it for extension purposes only. As for adjustments, due to a change in agency estimates, TTB is decreasing the number of annual responses, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 9,700.
- *Average Responses per Respondent:* 2.5.
- *Number of Responses:* 24,250.
- *Average per-Response Burden:* 0.7 hours.
- *Total Burden:* 16,975 hours.

OMB Control No. 1513-0051

Title: Application for an Alcohol Fuel Producer Permit Under 26 U.S.C. 5181.

TTB Form Number: TTB F 5110.74.

Abstract: Under the authority of the IRC at 26 U.S.C. 5181(a)(1), persons wishing to establish a distilled spirits plant for the sole purpose of producing and receiving distilled spirits for fuel use must provide an application and bond as the Secretary may prescribe by regulation. Under this authority, TTB has issued regulations concerning the establishment of such alcohol fuel plants (AFPs) in 27 CFR part 19, subpart X. Those regulations require that a person wishing to establish a new AFP must apply for an alcohol fuel producer permit using form TTB F 5110.74. The regulations also require existing AFP proprietors to use that form to make certain amendments to their permit information. The form and its required supporting documents identify or describe, among other things, the applicant, the proposed AFP's location and layout, its stills, its size category (small, medium, or large) based on the amount of alcohol fuel to be produced annually, and the security measures to be taken to prevent theft and diversion of the distilled spirits produced. The collected information allows TTB to determine the applicant's eligibility under the IRC to obtain or modify an alcohol fuel producer permit, and to determine whether the applicant's AFP operations will conform to Federal law and regulations. Such determinations are necessary to protect the revenue as distilled spirits produced at an AFP are potable and thus subject to Federal excise tax until denatured for fuel use. Once distilled spirits are denatured at an AFP, the resulting alcohol fuel may be withdrawn free of tax as authorized by the IRC at 26 U.S.C. 5214(a)(12).

Current Actions: There are no program changes associated with this information collection at this time, and TTB is submitting it for extension purposes only. As for adjustments, due to a change in agency estimates, TTB is decreasing the number of annual responses, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits, farms; Individuals or households.

Estimated Annual Burden

- *Number of Respondents:* 100.
- *Average Responses per Respondent:* 1 (one) per year.
- *Number of Responses:* 1 (one).
- *Average per-Response Burden:* 1.5 hours.
- *Total Burden:* 150.

OMB Control No. 1513-0062

Title: Usual and Customary Business Records Relating to Denatured Spirits (TTB REC 5150/1).

TTB Recordkeeping Number: TTB REC 5150/1.

Abstract: Denatured distilled spirits may be used for industrial purposes in the manufacture of nonbeverage products. To prevent diversion of denatured spirits to taxable beverage use, the IRC at 26 U.S.C. 5271-5275 imposes a system of permits, bonds, recordkeeping, and reporting requirements on persons that procure or use such alcohol. Those IRC sections also authorize the Secretary to issue regulations regarding those matters. Under those IRC authorities, the TTB regulations in 27 CFR part 20 require industrial alcohol users to keep certain usual and customary business records regarding the distribution, procurement, and use of denatured spirits. TTB uses the required records to account for denatured spirits and ensure compliance with statutory and regulatory requirements.

Current Actions: There no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 3,100.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 3,100.
- *Average per-Response and Total Burden:* None. This information collection consists of usual and customary records kept by respondents during the normal course of business, regardless of any regulatory requirement to do so. As such, under 5 CFR 1320.3(b)(2), this information collection imposes no additional burden on respondents.

OMB Control No. 1513-0085

Title: Principal Place of Business Address and Place of Production Coding on Beer and Malt Beverage Labels.

TTB Recordkeeping Number: TTB REC 5130/5.

Abstract: Under the authority of the IRC at 26 U.S.C. 5412 and the Federal Alcohol Administration Act (FAA Act) at 27 U.S.C. 205(e), the TTB regulations require consumer containers of beer to be marked with the name and address of the brewer. In the case of brewers that operate multiple breweries, the TTB regulations in 27 CFR parts 7 and 25 allow such brewers to label beer containers with their principal place of business, provided that the brewer also places a code on each beer container indicating its actual place of production. This option allows multi-plant brewers to use an identical label at all their breweries. The labeling of beer containers with the producer's name and place of production is a usual and customary business practice undertaken by brewers to identify their products to consumers and facilitate recall of adulterated products. In addition, TTB uses the required information to verify tax refund claims for the loss or destruction of beer.

Current Actions: There are no program changes associated with this information collection, and TTB is submitting it for extension purposes only. As for adjustments, due to changes in agency estimates, TTB is increasing the estimated number of annual respondents and responses to this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 1,150.
- *Average Responses per Respondent:* 2.4.
- *Number of Responses:* 2,760.
- *Average per-Response and Total Burden:* None. This information

collection consists of usual and customary labeling practices undertaken by respondents during the normal course of business, regardless of any regulatory requirement to do so. As such, under 5 CFR 1320.3(b)(2), this information collection imposes no additional burden on respondents.

OMB Control No. 1513-0095

Title: Application for Registration for Tax-Free Firearms and Ammunition Transactions under 26 U.S.C. 4221.

TTB Form Number: TTB F 5300.28.

Abstract: The IRC at 26 U.S.C. 4181 imposes a Federal excise tax on the sale

of firearms and ammunition sold by manufacturers, producers, and importers. However, under 26 U.S.C. 4221, no tax is imposed on certain sales of firearms and ammunition, provided that the seller and purchaser of the articles (with certain exceptions) are registered as required by 26 U.S.C. 4222. Section 4222 further provides that the Secretary may prescribe regulations regarding the manner, forms, terms, and conditions of such registrations. The TTB regulations at 27 CFR 53.140 prescribe the use of TTB F 5300.28 as the application to obtain an approved Certificate of Registry to sell or purchase firearms and ammunition tax free. Also, once registered, respondents amend their registration information by filing a revised TTB F 5300.28 or by filing a letterhead notice. TTB uses the collected information to determine if the respondent is qualified to engage in tax-free sales of firearms and ammunition.

Current Actions: There are no program changes to this information collection, and TTB is submitting for extension purposes only. As for adjustments, due to a change in agency estimates, TTB is increasing the estimated number of annual respondents, total responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses and other for-profits; State, local, and tribal governments.

Estimated Annual Burden

- *Number of Respondents:* 110.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 110.
- *Average per-Response Burden:* 3 hours.
- *Total Burden:* 330 hours.

OMB Control No. 1513-0127

Title: Petitions to Establish or Modify American Viticultural Areas.

Abstract: The FFA Act at 27 U.S.C. 205(e) authorizes the Secretary to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. Under that FAA Act authority, TTB regulates the use of appellations of origin on wine labels, including the use of American viticultural area (AVA) names. In response to petitions submitted by interested parties, TTB

establishes new AVAs or modifies existing AVAs through the rulemaking process. The TTB regulations in 27 CFR part 9 specify the information to be included in such petitions. TTB uses the provided information to evaluate a petitioner's proposal and, if accepted for rulemaking, draft a notice of proposed rulemaking requesting public comment regarding the creation of a new AVA or the amendment of the name, boundary, or other terms of an existing AVA.

Current Actions: There no program changes or adjustments associated with this information collection, and TTB is submitting it for extension purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits; Individuals or households.

Estimated Annual Burden

- *Number of Respondents:* 15.
- *Average Responses per Respondent:* 1 (one).
- *Number of Responses:* 15.
- *Average per-Response Burden:* 130 hours.
- *Total Burden:* 1,950 hours.

OMB Control No. 1513-0139

Title: Record of Carbon Dioxide Measurement in Effervescent Products Taxed as Hard Cider.

Abstract: The IRC at 26 U.S.C. 5041 defines and imposes six Federal excise tax rates on wine, which vary by the wine's alcohol and carbon dioxide content. Wines with no more than 0.392 grams of carbon dioxide per 100 milliliters are taxed as still wine at \$1.07, \$1.57, or \$3.15 per gallon, depending on their alcohol content, while wines with more than 0.392 grams of carbon dioxide per 100 milliliters are taxed as effervescent wine at \$3.30 per gallon if artificially carbonated or \$3.40 per gallon if naturally carbonated. However, under those IRC provisions, certain apple- and pear-based wines are subject to the "hard cider" tax rate of \$0.226 per gallon if the product contains no more than 0.64 grams of carbon dioxide per 100 milliliters of wine and does not exceed 8.5 percent alcohol by volume. Given the significant difference in those excise tax rates which, in part, depend on the level of a wine's effervescence, the TTB regulations at 27 CFR 24.302 require proprietors who produce or receive effervescent hard cider to record the amount of carbon dioxide in the product. This recordkeeping requirement is necessary to protect the revenue as it allows TTB to verify a respondent's compliance with the

statutory definition of wine eligible for the hard cider tax rate.

Current Actions: There are no program changes associated with this information collection at this time, and TTB is submitting it for extension purposes only. As for adjustments, due to a change in agency estimates, TTB is decreasing the number of annual responses, responses, and burden hours associated with this information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profits.

Estimated Annual Burden

- *Number of Respondents:* 50.
- *Average Responses per Respondent:* 2 (one).

- *Number of Responses:* 100.
- *Average per-Response Burden:* 1 hour.
- *Total Burden:* 100 hours.

Dated: July 18, 2023.

Amy R. Greenberg,

Director, Regulations and Rulings Division.

[FR Doc. 2023–15562 Filed 7–20–23; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Quarterly Publication of Individuals, Who Have Chosen To Expatriate

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

This notice is provided in accordance with IRC section 6039G of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, as amended. This listing contains the name of each individual losing United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending June 30, 2023. For purposes of this listing, long-term residents, as defined in section 877(e)(2), are treated as if they were citizens of the United States who lost citizenship.

Last name	First name	Middle name/initials
ADMUSSEN	MATTHEW	SPENCER
AITKEN-FRAPPIER	ISABELLA	ROSALIE
AKANA	MIHO	KAWANA
AL HARBI	ALAA	NAWAF M
AL MUKHTAR	RANA	AHMED
ALBUTT	JONATHAN	E.
ALGAR	GERALDINE	MARIE
ALGAR	WILLIAM	R.
AL-HAMAR	YASMEEN.	
ALLAL	LINDA	KATHLEEN
ALLAVOINE	MARGARET	ANN
AMAYA	LENIN	TAKASHI
AMORIM	CHRISTOPHER	JOHN
ANAYIOTOS	GEORGE	CONSTANTINOU
ANDERSON	LEONORA	ANN
ANDERSON	ALBERT	RYAN
ANDERSON	ANDREW	BRYCE
ANDERSON	ROBERT	LOUIS
ANDERSON	TERESA	JEAN
ANDERSON	WILLIAM	HALDEN
ANDERSON	ALLISON	MARGARET
ANDO	KOICHI.	
AOKI	NOZOMI	SARAH
AOKI	YOSHIE.	
ARAKAWA	MIKE.	
ARD	EMILY	JANE
ARIMURA	YUMIKO.	
ASNANI	HIMANSHU.	
ASSELIN	BRIAN.	
AVERILL	GAGE.	
BAARS	HANNY	MARIANNE
BACH	FRANCES	ELLEN
BAERG	GREGORY	KENNETH
BAKER	MICHAEL	JAY
BATALLER	WILLIAM	GARY
BAUDISCH	PATRICK	MARKUS
BAUTISTA	HENRY	PETER
BAUTISTA	TERRY	LYNN
BECKER	MICHAEL	TOM
BEEKMAN	WILLEM	J.
BEGIN	CAROLYNE	NICOLE
BEHNKE	PAULINE	ANN
BELIARD	PATRICE	ERIC PASCAL
BENINO	CONCETTINA.	
BENNER	SANDRA	M.
BENNETT	DOMINIQUE	MARIE
BENNETT	KELLY	BRIAN
BERARDI	SAMANTHA	ROSARIA
BERESFORD	NIGEL	EDWARD
BERETTA	TROY	DEAN
BERG	MICHELLE	LYNN

Last name	First name	Middle name/initials
BERGER	DANIEL	MICHAEL
BERNARD DE SAINT AFFRIQUE	LOUIS	ANTOINE HERVE ARNAULD
BERNOTAS	CHRISTOPHER	JOSEPH
BERTCH	BARBARA	ANN
BERTRAM	BENJAMIN	GREGORY
BEYMER	CHARLES	JOSEPH
BHAYANI	AMIT	
BINER	ANNA	FIONA
BISHOP-PFUNDTI	DONNA	ELIZABETH
BLACKER	SUSANN	MARIE
BLAFF	MIRINHA	S.
BLAIR	DEREK	
BLANCHARD	KWAN-YIN	FRANCES
BLANCKAERT	PIETER	WIM C
BLATTER	ALBERT	JOSEF
BLITVIC	NATASA	
BOCK	EMILE	OLIVIER
BOEFFARD	PHILIP	ALAIN
BOIX	VIRGINIE	MADELEINE
BONNELL	CLIFFORD	JAMES
BOOCOOCK	DAVID	
BOSCHET	RODOLPHE	THIERRY
BOYD	RONA	
BRABERS	GREGORIUS	WILLIAM ANTONIUS JOHANNES
BRACEWELL	HANNAH	LOUISE
BRATT	VALERY	G.
BRENNAN	COLLEEN	PATRICE
BRENNINKMEYER	GABRIELLE	
BROCKWELL	PAMELA	AUDREY
BROCKWELL	PETER	JOHN
BROOKS	PHILIPPA	MARGARET MARY
BROWN	ALEXANDER	FREDERIC
BROWN	PHILIPPA	SYLVIA
BRUCE	DUNCAN	ALEXANDER
BRUNET	HERVE	RENE
BRUTTO	MARY	ANNE
BRUTTO	ROSEMARY	JANET
BRYANT	MAEVE	MARTINA
BRYANT	MARTIN	JAMES
BUTLER	MARGARET	J.
BYDELEY	DAVID	KENNETH
BYRNE	ANDREW	DAVID
BYRNE	COLIN	MICHAEL
CABRAL	SUSANA	MARIA
CAMERON	ALISON	MARY
CAMERON	ANDREW	MICHAEL
CAMERON	ALEXANDRE	IAN
CARADONNA	NANCY	
CARDOTT	RUSSEL	BERT
CARIGNAN	MARC	A.
CARNEY	LOIS	ANN
CARPENTER	ELAINE	STEPHANIE
CASSELL	MICHAEL	JOHN
CHAN	KA	YAN
CHANDRAN	ULLATIL	SARAT
CHANG	YUKO	
CHANG	ERIC	
CHAO	CHARLES	GUOWEI
CHAPMAN	YUKA	
CHAPMAN	GEORGINA	TAMARA
CHEN	TE-YU	
CHEN	ZHENQI	
CHEUNG	LAI	PING
CHEUNG	TERESA	K.
CHIRAPHASO	NISAGORN	
CHO	KYUNG	HEE
CHUMACHENCO	ANA	ELIZABETH
CHUN	KYOUNG	YONG
CHUPRYNENKO	IRYNA	A.
CLARK	DAVID	RAY
CLARKE	STEPHANIE	ANNE
COELHO	LUCIANA	SPENGLER
COELHO	LUIZA	S.
COGER	JOSHUA	REAGAN

Last name	First name	Middle name/initials
CONCHA NEME	DAVID	EDUARDO
CONDON	ALEXANDRA	
COOK	TIMOTHY	
COOPER	HANNAH	NOELLE
CORTES LEFRANC	ALEJANDRO	
COSTAGLI	PAOLO	
COSTELLO	MARJORIE	POUGET
CRAIG	LAURA	BETH
CRAN	ALISON	JANE
CRITCHFIELD	EMILY	CAROLYN
CROTEAU	JEAN	FRANCOIS
CROYSBILL	JOHN	HARWOOD
CUMMING	ROBERT	JAMES
DALAL	PARAG	SHASHIKANT
DANIELS	PATRICK	
DANNHEISSER	MAX	EDWARD
DART	JUSTIN	MC PHERSON
DART	WILAWAN	
DASHAWETZ	KATHERINE	
DATZ	HEATHER	LYNN
DAVID	LAURIE	DIANE
DAWN	ARIA	
DE GELDER	SYLVIAN	ANTONIN
DE GIROLAMO	CARLO	
DE JONCH	ROBERT	PIER
DE RUIJTER	EVA	MARIA DYMPHNA
DEARING	JUDITH	ANN
DEN BREEKER	MATTHEW	CRAIG
DESNOYERS	FANNY	SUZANNE L
DEUTSCH	NELLY	
DEVERS	CATHLEEN	TINA
DIJKMAN	WENDY	JEANNE
DING	QIANG	
DING	CHUNHUA	
DINNIWELL	ALAN	ROBERT
DOHM	FAITH	ANNE
DOUGLAS	CHARLOTTE	ASHLEY
DOUGLAS	JAMES	MALCOLM
DOWDESWELL	MARCUS	PAUL
DOYEN	ANDREA	MAUREEN
DOYLE	LEONARD	JOHN
DROGHINI	GARY	RICHARD
DUMON	GISLAINE	ALINE
DWYER	LAURA	E.
DYMKOWSKI	CHRISTINE	
EDRI	DVIR	
EGAN	MICHAEL	JOSEPH
EICHENBERGER	RENE	PIERRE
ELLIOTT-GORDO	ELIZABETH	M.
ENKERLI	LENA	REBEKKA
ENNING	DENNIS	RICHARD
ERFTEMEIJER	LUCAS	PAULUS
ESTELLE	ABIGAIL	ELISABETH
ETCHARREN	MARIA	ELENA
FAGERBLAD	PATRICK	ULF ANDREAS
FAN	ADRIAN	KA CHEONG
FARRELL	DAVID	ROGERS
FARROW	BRADLEY	ROBIN
FEHR	MICHELE	
FERNANDEZ DEL VALLE	MARIA	
FERNBACK	ANNE	KATHLEEN
FICIUR	BRIAN	CRAIG
FILORIO	PETER	
FITZPATRICK	MAIREAD	BRIDGET
FIX	THOMAS	JACOB HOLLIFIELD
FOLINSBEE	ROBERT	IAN
FONG III	MANUEL	CHRISTIAN QUI
FORDE	MATTHEW	PATRICK
FORSYTHE	TODD	STUART
FOUCHET-NAHAS	JEANNINE	MARIE
FOX	TIMOTHY	STEPHEN
FRANKEL	JORDAN	BRADLEY
FRETZ	TERRY	LYNN
FRITZENWALDER	JENS	

Last name	First name	Middle name/initials
FUKUOKA	YOSHIHIRO.	
FUKUSHIMA	SHOJI.	
FUKUYAMA	KOZO.	
GALLAGHER	THOMAS	MARTIN
GAN	ZHAOXU.	
GANNON	PHILIP	CHARLES
GARCIA-GARCIA	MARIA	J.
GARDINER	BETH	ANN
GARDNER	HENRY	JAMES
GARNIER	ARNAUD	PIERRE
GAUGER	DEREK	KAZAN
GAUL	MATTHEW.	
GAYLOR	JACK	ALEXANDER
GEISINGER	ESTELLE	CAROLINE
GELIN	RENAUD	FRANCOIS HENRI
GEORGE	TIMOTHY	JOHN
GIANGASPRO	ADELAIDE	ELENA
GIBSON	YUKI	AOI
GIESEN	PETER	JOHANNES
GIGNAC	MARIE	SUZANNE
GILBERT	ANDREW	JAMES
GIRARD	JULIEN	JEAN ROBERT
GLARDON	XAVIER.	
GNUECHTEL	GABRIELE	INGE
GOFMAN	PAULINA.	
GOLD	CHAD	MICHAEL
GOLDBLATT	LINDA	SUSAN
GOLDSTON BLUMENFELD	JILL	ANN
GONSALVES	AYESHA	M.
GONSALVES	MARK	R.
GONTHIER	VIDAN.	
GONZALEZ	YVONNE.	
GOODALL	SIMON	JONATHAN
GORE	DHANANJAY	A.
GORE	SUJATA	D.
GOWEN	SARAH	FRANCES
GRAHAM	JAMES	ANTHONY
GRAU	ALLEN.	
GREEN	PAUL	PHILLIP
GRUBER	GILAD	ZIGMUND
GUEDJ	MARGAUX	SHANNON
GUENDISCH	DANIELA.	
GUENTZEL	RALPH	PETER
GUO	YU.	
GUO	HUACAI.	
GUPTA	JAI.	
GURLE	VALERIE.	
GUST	BETH	ANNETTE
HACHIUMA	MACHIKO.	
HAHN	SEUNGYONG.	
HALL	DAVID	SCOTT
HALLAK	NADINE	ELIAS
HAMABE	YASUYUKI.	
HAMADA	MIKI.	
HAMPSHIRE	BRIAN	BENJAMIN
HAN	KYU	HAN
HAN	CHRISTOPHER	TING
HANEDA	HIROHISA.	
HANEDA	HIROKO.	
HANNON	FAY	ELIZABETH
HANSSSEN	ELKE	ASTRID
HARRIS	GARY	MICHAEL
HARROD	SUSAN	JANE
HASSAN	ZEHRA.	
HASSON	GARY	LEE
HATT	ANNE-SOLENNE	DANIELE MARIE
HAWKINS	ANTONIA	MARGUERITA CARMELLA
HAZELHOFF	HENK	L.
HEBERT	SERGE	PHILIPPE
HEESTAND	JOHN W	WARREN
HEMMENDINGER	ANNA.	
HENDERSON	CHERYL	LOUISE
HENDERSON	KAYE	LYNETTE
HENDERSON	KIM	ELLIOT

Last name	First name	Middle name/initials
HENRY	RUSSELL	CHARLESWORTH
HERSELMAN	EILEEN	PATRICIA
HEWETT	ANDREW	SHAUN
HIGHNAM	KENT	MICHAEL
HIKOSAKA	MARY	KAZUKO
HILDER	THOMAS	ERNEST
HILL	JUDY	ANN
HO	SHEN	BEN
HOCHSTRASSER	HEDWIG	ELISABETH
HODKINSON	ROBERT	JAMES
HOFFMAN	CORNELL	ROBERT
HOLLIDAY	JAMES	IAN
HOLT	JOHN	LOFTON
HOLT	WILLIAM	PAUL
HOLT	JOHN	DAVID
HOLT	MIKI	TANAMI
HONG	YOUNG	KI
HONNEFFER	DAVID	JACOB
HOOKER	LISA	DAWN
HORIE	MEIKO.	
HORIE	MAYUMI.	
HOSKEN	JEFFREY	ALLEN
HOVEN	REBECCA	JULIET
HSU	CHRISTOPHER	CHUNG-YI
HSU	TING	NING
HSU	TSUNG-PIN.	
HUANG	CHENMIN.	
HUBER	KRISTIAN	SCHNEIDER
HUEBNER	CONSTANZE	MARIA
HUH	EUN	MI
HUH	KEE	JUNE
HUH	SANG	HEE
HUNG	HECTOR	CHEUNG HIM
HWANG	KYUNG.	
ICHINOSE	KOICHI.	
IGNATOVICH	JAMES	DANIEL
ILIES	REMUS.	
IMAMURA	ERI	LOUISE
INDIG	DEVON	TILFORD
INMAN	STEPHEN	DOMINIQUE
IP	KENNETH	KA CHUN
IPEK	SEVGI.	
IRWIN	MICHAEL	JOHN
ISHIHARA-BRITO	REIKO.	
ISHII	CHIE	ISHII
ISHII	SHINGO.	
ISHII	SUMIKO.	
ISHIKAWA	MICHIKO.	
ITO	AI.	
ITSCHNER	MIO	LENA
IWAOKA	YOKO.	
JAMAL	JODIE	ANN
JAMES	SHARON.	
JAMES	JOHN	HUGH ALEXANDER
JAMES	SUSAN	JANE ALEXANDER
JAMRA	RAMY	MANSOUR ABU
JANG	YI	FENG
JAP	JENS	J.
JARAMILLO GOMEZ	MARIA	FERNANDA
JARDINE-SCOTT	KARINA	MARIA
JARMOUNE	ABRAHAM	JEROME
JARZYNSKA	SCOTT	JAMES
JENSEN	CHRIS	ALLEN
JENSEN-STEVENSON	MONIKA	EMMA MINNA
JESZENSZKY	PAUL	S.
JIANG	WENYU.	
JOHANNESSON	CARYN	MARIE
JOHNSON DOMINICE	ELIZABETH	ANN
JOHNSTON	LISE	DORIS
JOHNSTON	RAYMOND	JOSEPH
JONES	FREDERICK	DOUGLAS
JORDAN	JAROD	MCDONALD
JUNGARO	JO ANN.	
KAGONA	YOAN	YVES

Last name	First name	Middle name/initials
KAI	FUMIYA.	
KAMBARA	TAKAO.	
KAMEYAMA	YUKA.	
KANAAN	MONA	MAHIR MISBAH
KANG	YEO	WOOL
KANT	OLIVER.	
KAPTEIN	FRANK.	
KARJALA-SVENDSEN	JOSHUA.	
KARP	GEOFFREY	LAURENCE
KAWAMURA	MANAMI.	
KAZANJIAN	VINCE	GEORGE
KEHOE	JOHN	MARTIN
KELLEY	LORI	ANN
KELLEY	MATTHEW	JAMES
KELLY	BENJAMIN	THOMAS
KERR	DAVID	GEORGE
KERR	MARTIN	PHILIP
KHANDELWAL	SMITA.	
KIM	JUNGTAE.	
KIM	JIHO.	
KIM	SUN	WOO
KIM	SAEJIN	JIN
KIMBER	ANDREW	JOHN
KISHIMOTO	YOSHIMI.	
KITAMURA	KIYOMI.	
KLASSEN	LAINI	SIMONE
KLOCKMANN	ARNE.	
KLUGE	STEVEN	THOMAS
KNAUS	ULLA	G.
KNIGHT	TRACY	ANN
KO	BO	KYUNG
KOBAYASHI	KENT	P.
KOCHMAN	ANN	GARDINER
KOCHMAN	STANLEY	OSCAR
KOERNER	JAN	CHRISTOPH
KOFFMAN	OFRA.	
KOKKEDEE	WILLEM.	
KOMPOSCH	PETER	R.
KONDA	HISAKO.	
KONDA	MAHO.	
KONDA	SHINICHI.	
KONDO	MIDORI.	
KONDO	NORIKO.	
KOPEL	SUSANNE.	
KORST	MARK	ROBERT
KOSHIMURA	CHIIHIRO.	
KOSHIMURA	SHO.	
KOSTOLNIK	CAROL	ANN
KREHM	RACHEL L	LILY GLADYS
KRICKLER	LEANN	LYNN
KRUMDIECK	ERIK	DIETER
KRYSHKA	KAREN	ANN
KUECHLIN	STEPHAN	KURT
KUKIELSKI	PETER	GERALD JAN
KUMAGAI	MIYUKI	ASHLEY
KUNITO	KIYOMI.	
KURAHASHI	MARIKO.	
KURDL	MOHAMAD.	
KUROKAWA	MIKI	CYNTHIA
KUROSAWA	AKIKO.	
KUROSAWA	YOSHIHARU.	
KWAK	EUN	SUN
KWOK	LILLIAN	MAGGIE
KWOK	WING	HEI
KWONG	MING	HAY
KYOGOKU	REIKO.	
LA VALLA	RYUSUKE	TOMINAGA
LAJERET	MARION	YVONNE
LALTOO	ANDREA	BRETT EMMA
LAMBA	GAGAN.	
LANDELL	BARBARA	JEANETTE
LANGHEENNING	YUMIKO.	
LANIGAN	EMMA	CLARE
LANNUNG	ELSE	MERETE

Last name	First name	Middle name/initials
LANZ	ROBERT	ADALBERT
LAPLACE	PATRICK	PIERRE
LAROCLETTE	ALAIN	MICHAEL
LAUX	SACHIKO	KAWASE
LEE	YUN	HEE
LEE	KYOUNGHEE.	
LEE	JOO	YOUNG
LEE	WOOJIN.	
LEE	WILSON	CHEOW PENG
LEE	JUI YUNG.	
LEE	SEUNG-JOO.	
LEFEBVRE	ALYSSA	MARIE
LENTILE	ANDREA	BIANCA
LEONG	MUN	YING
LEUTHOLD	SYLVIA	PHUONG
LEWIS	WILLIAM	RANDALL
LI	CHENG.	
LI	YUK	KING AVON
LIGTENBERG	SWANICA.	
LIM	MARY	YULING
LIN	HSIU	LI
LIN	YANG.	
LINDSEY	JASON	MARCUS
LIPP	ANNA	M.
LITWILLER	DUANE	CURTIS
LIVERMORE	HEIDI	A.
LO	PAUL	CHIT KIT
LOCKE	BRENDA	LOUISE
LONERAGAN	CELIA	M.
LONG	MEGAN	KATHLEEN
LOPES DE FARIA JUNIOR	PAULO.	
LOW	ERIC	TECK ENG
MA	WENISA	WANYI
MAASKANT	ELLEN.	
MACIAS	ERIC	M.
MACINTOSH	CATHERINE	ELIZABETH
MACKENZIE	DONALD	ANDREW
MACKENZIE	LEANNE	R.
MAIDEN	ANNA	MICHELLE
MAMMEN	GEORGE.	
MAMONDEZ	SANTOS.	
MAMONDEZ	SIMON.	
MANTZARI	VASILIKI.	
MARTI	JUAN	MANUEL
MARTIN	TESSA	LOUISE
MARTIN	MAGARET	PAULINE
MARTIN	RICHARD	GEORGE
MASUISHI	CHISAKO.	
MASUISHI	TETSUYA.	
MATHIAS	ANN-CATHERINE	GABRIELE
MAUNDER	JOANNA	L.
MAXWELL	JESSE	STEFAN HO
MAXWELL	BETH	ANN
MCADAMS	STEPHEN	EDWARDS
MCCALLUM	JANET	LOUISE
MCLENNAN	IAN	ANDREW WESLEY
MCCLUNG	DAVID	MICHAEL
MCCONNELL	SARAH.	
MCCREADY	WENDY.	
MCDANIEL-MCLEAN	KEYONNA	LYNN
MCDUGALL	IAN	PAUL
MCGILLICUDDY	SUZANNA	MARIA
MCGLOIN	MARTHA	ANN
MCLARNEY	CATHERINE	JANE
MCMAMARA	JOAN	MARIE
MCVEIGH	SHAWN	PHILIP IKAIKA
MCWHIRTER	SUSAN	ANN
MCWHORTER	JOHN	ROBERT
MEAD	ROBERT	SEMANS
MEIER	MARCO	WERNER
MEINHARDT	MAXIMILLIAN.	
MELLI	NICOLO.	
MERGELAS	JAMES	ELIAS
MERLER	AARON	THOMAS

Last name	First name	Middle name/initials
MERRY	MICHELLE	ELIZABETH
METCALF	RICHARD	JOHN
METCALFE	RODERICK	BRYAN
MEYEN	JOHANNES	ARNE
MICHAUD	ROLAND	
MIHARA	KOSUKE	
MILANO	DANIEL	N.
MILTON	DANIEL	JOSEPH
MISAWA	MIYUKI	
MIZUTANI	HIROTAKE	
MIZUTANI	MIHO	
MOHINANI	SANJAY	TULSIDAS
MOLLOY	JOEY	
MOLONEY	ADRIAN	M.
MOORES	JOSIAH M	MARK
MORIMOTO	YUMIKO	
MORIMOTO	YOSHIKO	
MORIMOTO	KIICHI	
MORIN	JULIE	
MORROW	IAN	ROGER
MORROW	CRAIG	STEWART
MORSE	JASON	DALE
MOSEN	RACHEL	FAITH
MOSER	THEODORE	
MURAKAMI	MASAKI	
MURATA	KEIKO	
MURPHY	ERIN	LOU ANNE
MURPHY	KATHLEEN	ANN
NAISBITT	LEIGHTON	IAN SLADE
NAKAZATO	ANNA	
NAKAZAWA	KEISUKE	
NAMMOUR	RICHARD	PAUL
NAVARRO	AARON	LEE
NELSON	KUMI	ASAO
NEMOTO	HIROMORI	
NEMOTO	YUKO	
NENKOV	IVAYLO	N.
NEUBAUER	THOMAS	ALAN
NEZU	NOBIYUKI	
NG	PATRICK	PUI KI
NGUYEN	TAM	THANH
NGUYEN	TAN	NHAT
NIELSEN	KAIA	PERNILLE
NIELSEN	ROBERT	ANDREW
NIKI	RUMI	
NOESTELBACHER	MARC	
NOGA	SEAN	DAVID
NOMURA	NAOBUMI	
NOORBAKHS	SARAH	M.
NYANDAK	JIGTEN	NORBU
NYBORG	BRIAN	
NYSVEEN	RUNE	
OBIZHAEVA	ANNA	
OGATA	RYOSUKE	
OGAWA	YUKINO	O.
OGLOFF	SUSAN	ANN
OH	JUNG	YONG
OHARA	MICHAEL	GREGORY
OKAMOTO	NELSON	YOSHIHIRO
OKAMOTO	REIKO	
OKITA	MIDORI	
OKU	ISAMU	
OKU	KIYOKO	
OLKUSZ	GESA	
ONG	NEIL	ANTHONY
OPIE	AVIV	GLUSKA
ORD	BRENDA	JEAN
OROZCO	MIGUEL	ANGEL
ORY	JESSE	AARON
OSBOURNE PULSIFER	CHRISTINE	ELIZABETH
OSSEIRAN	SAMMY	
OSSEIRAN	DANNY	
O'SULLIVAN	KATHRYN	GUTHEIL
OVE	CHRISTOPHER	ROBERT

Last name	First name	Middle name/initials
OZAWA	KEIKO.	
PADDON	LILIAS-MARY	WREFORD
PARE	PHILIPPE	GEORGES
PARK	JOONGSUK	SUK
PASI	TATIANA	E.
PATE	ALISON	ELIZABETH
PATEL	NEETA.	
PELKEN	PAUL	MICHAEL
PELLET	MARIE	ANAIIS
PERRY	NICOLA	JANE
PETCH	SHARALEE	BETH
PICHLMAYR	RAPHAEL	URS
PIERI	MICHELE.	
PIGULA	ELAN	MARIE
PILON	MARINUS.	
PILON-SMITS	ELIZABETH	ANNETJE HENDRIKA
PINK	JANET	LESLEY
PINK	NIGEL	CHRISTOPHER
PITTAWAY	NEIL	MCDONALD
PULIMI	MOHANALATHA.	
PULSIFER	KIRK	ANDREW
QIAN	LI.	
QUINN	LINDA	GRACE
RAJ	REETA.	
RAMADAN	JAD.	
RANCOURT	MARY	KATHERINE JANET
RATHBONE	BRETT.	
REBSTOCK	MARY	ELIZABETH
REES-JONES	MILLICENT	ANN
REMEDIOS	ALISON	TERESA
REMEDIOS	IRVIN	JUDE
REYNOLDS	MITCHELL.	
RICKMANN	JOHANNES	GEORG
RIDDLE	CECILE	ANNE
ROBBINS	MICHAEL	ARTHUS
ROBINS	NICHOLAS	F.
RODORFF	WERNER	JOHANNES MATHIAS
ROGERS	SAMUEL	ALVIN
ROOSENBRAND	MAX.	
ROPER	CHRISTOPHER	STANLEY
ROSATI	ALEXANDRA	OLIVIA GERREN ANNE
ROSE	SUSAN	LESLIE
ROSE	REBECCA	FRANCES
ROWE	STEVEN	JAY
ROWEN	PIERRE	JAMES
ROZDAY	CHRISTINE	RUTH
RUBIN	MAURY	DANIEL
RUSSELL	HENRY	ALDEN VERPLANCK
RUSSO	TATIANA	SARAH
RYAN	RICHARD	JAMES
RYU	HYE	SUE
SABBAGHA	ELIE	ANTOUN
SABBAGHA	NADINE	ELIE
SAKAMOTO	MITSUO.	
SANO	KOHAKU.	
SATO	TAEKO.	
SCHERER	HARALD	GEORG
SCHINAZI	ISABELLE	CORINNE
SCHLEIFER	MARGARET	ELIZABETH
SCHMID	DOMINIQUE	RACHEL
SCHMID	ENRIQUE.	
SCHMUTZ	RACHEL	JEAN
SCHNEIDER	PIER	FILIPPO
SCHNEIDER	FRANZ	CHRISTIAN
SCHOCH	PETER.	
SCHUCK	LARRY	MICHAEL
SCOTT	BARBARA	JEAN
SHAMMAH	HANI	RAMIZ
SHANG	YUNHUA.	
SHAO	YANG.	
SHEEHAN	JOHN	DAVID
SHEHADEH	HALIM	ISAM
SHERIDAN	KAREN	MARIE
SHIBATSUJI	YASUHIKO.	

Last name	First name	Middle name/initials
SHIIMURA	MIKU.	
SHIMA	MIKKIKO	CLAIRE
SHIN	DONG	GUN
SHIPP	ALEXANDER	FRANK
SHIRABA	KYOKO.	
SHIRAI	YOSHIKO.	
SHOEBRIDGE	GAVIN	WILLIAM
SHUM	HEUNG	YEUNG
SILBERMANN	MICHAEL	RUBEN
SKARSTEIN	IAN	PEDER
SLAPE (FKA MORROW)	SHANNON	LISA
SMITH	MICHELLE	PATRICIA
SMITH	TINA	FAY
SONDERMANN	HOLGER.	
SOROKO	ANNA	MARIA
SOTIN	CHRISTOPHE	JOSEPH
SOUTTER	KARI	JANE
SOWA	JESSICA	ELIZABETH
SPELLINS	GARY	WADE
SPIOTTA	DOROTHY	ANNE
SPRINGATE	JILL	P.
STEENHAUT	MATTHIAS	JO
STERPIN	ROBERT	S.
STEWART	KAREN	JOAN
STOCKEBRAND	MARIANNE	CHARLOTTE
STOHR	EVANGELIA.	
STOKES	KEVIN	WADE
STOTT	ALAN	TAYLOR
STOTT	CLAIRE	LOUISE
STREIT	KEVIN	ERICH
SUGAMA	TAKAO.	
SUGAMA	KAZUKO.	
SUN	YONGCHEN.	
SUNWOO	LEONARD	YOU
SUPAPANNACHART	RARINTHIP	JUNE
SUSSMAN	AARON	NATHANIEL
SUTHERLAND	LORNA	EILEEN
SUTTON	LOIS	ANN
SUZUKI	HARUMI.	
SUZUKI	KENJI.	
SZE	DIANE	CHONG
SZETO	ANITA.	
SZU	EVAN.	
TAKADA	WAKA.	
TAKAHASHI	SHIN.	
TAKAYAMA	SETSUKO.	
TAKAYAMA	TAKEHISA.	
TAKEDA	HINA	M.
TAKEDA	SHOUGO W	WILLIAM
TAKIURA	NAOMI.	
TAMURA	TOSHIO.	
TAN	JI	AN
TANAKA	CHISAKO.	
TANAKA	KATSUYUKI.	
TANAKA	AKIHIKO.	
TANAKA	SHOKO.	
TANG	BRONSON	RYAN
TATKO	THOMAS	A.
TAYLOR	HELENE	MARIE
TAYLOR	BRENDAN	FRANCIS
TAYLOR	ADAM	JAMES
TAYLOR	SALLY	MIRANDA
TE BRAKE-BALDOCK	KAREN	ELIZABETH
TEATHER	DAVID	HENRY
TEGNER	ELISABETH	MONICA
TEH	ADAM	RAY
TERAKI	MICHIAKI.	
TESHIGAHARA	KIRI.	
THATCHER	REGAN	COLIN
THEVES	CLAIRE	LAUREN
THIEME	SARAH.	
THOMMEN	CEDRIC	JULIEN
THORN	CALVIN	MICHAEL
THORN	DAWN	MARIE

Last name	First name	Middle name/initials
THORPE	SARAH	LOUISE
TIAN	TIAN	
TIMMINS	STUART	LEE
TOH	HOON	CHEW
TOKUSUMI	AKANE	
TOMITA	MAKO	
TONDATO	FEDERICA	
TOPEL	ISAAC	
TOSATTO	LUCA	
TOSTMANN	LARS	TOBIAS
TOUMA	JOHN	FAHD
TOWNSEND-TARANTINI	JONI	MEREDITH
TOYAMA	MASAKO	
TOYAMA	NOBORU	
TREMAIN	MARCUS	
TREMBLAY	MARTIN	
TROU	CAMILLE	M.
TSCHAN	BENJAMIN	
TULBA	STEPHEN	
UKRIT	PIYASAK	TEMBUNNAK
UPPALURI	VENKATA	M.
USAMI	ETSUKO	
UTSUMI	MARIA	
VADHRI	SUBBARAO	VENKATA SURYA
VAJPAYEE	SHALEEN	
VAN DE COEVERING	DEMYAN	GROVER
VAN DE MUNT	FRANCISCUS	EDWARD
VAN DIJK	JESSICA	HESTER
VAN DOORN	JAN	REINEIR
VAN TRIGT	BENEDICT	MICHAEL
VARGA	GEOFFREY	E.
VARMA	ANIL	
VASICEK	CATHERINE	LYNNE
VERMEULEN	EVA	FREDERIKE
VIKANDER	SVEA	NAHANNI
VIOT	FREDERIQUE	
VIVALT	EVA	LOVE
VOHRA	ARVIND	KUMAR
VOHWINKEL	IMELDA	ROSA MARIA
WADELED	HEIDI	MIA
WAGNER-OMARA	CLAUDIA	SABINE
WAINWRIGHT	JENNIFER	ALEXANDRA
WAITZMAN	MARIAN	SONIA
WAKABAYASHI	JUDY	FEATHERSTONE
WAKANA	SETSU	
WANG	RONGZHENG	
WANG	ZHEN	
WANG	ALBERT	Y Y
WANG	TA-YU	
WANG	CHIH-HUNG	
WANG	JIAWEI	
WANG	XIN	
WARD	SUSAN	LEE
WARRICK	DANIEL	JOSEPH
WATKINS	INGRID	ELFRIEDE
WATKISS	JACQUELINE	MICHELLE
WATSON	CONSTANCE	SUSAN
WATSON	LANI	DARYL
WATTS	CHARLES	JAMES
WATTS	CHARLOTTE	MARY
WATTS	HARRY	ANTHONY
WATTS	IAN	JAMES
WAYNE	ANALEA	MICHAELA
WEATHERWAX	ANTHONY	CHARLES
WEETMAN	HELEN	FRANCES
WEHRLI	PASCAL	
WEISS	EDWARD	SOLOMON
WENZEL	ERIC	
WERICK	MARY	FRANCES
WESARG	KAJA	
WHEELER	FELIX J O.	
WHITNEY	KAREN	L.
WHYTE	DAVID	SCOTT
WILLIAMS	CAROLE	

Last name	First name	Middle name/initials
WILLIAMS	JOHN	HENRY
WILLMS	BENJAMIN	JOHN
WINBERG	ANNA	HELENA
WIXTED	TERESA	MARIE
WÖEGINGER	IRENE	
WOLFES	ANDREA	MARIA
WONG	KING	TAI
WONG	KENG	CHOONG
WOODLAND	NIGEL	STUART
WOODSTOCK	STEPHANIE	ANN
WRIGHT	JACOB	TYLER
WRONA	LYNSEY	KAREN
WU	XIAONING	
WUDRICK	CHARLENE	RUTH
WULTZ	EINAT	
WULTZ	EYAL	
XIE	YULI	
XIONG	SHIJIANG	
YACHMENEV	TINA	ISABELLA
YAMADA	MIHO	
YAMAGUCHI	YUKINO	
YAMANAKA	HITOSHI	
YAMANAKA	TERUKO	
YAMANAMI	KENJI	
YAMASHIRO	MARIKO	
YANAKA	YOSHIE	
YAU	DARREN	TSAIWAI
YI	ADELINE	MEI CHUN
YI	PATRICK	KONG JUAN
YING	DA	
YOO	MIN	JAE
YOSHIDA	YUKA	
YOSHIDA	MIO	BELLE
ZABY	CHRISTOPHER	HELMUTH
ZABY	KIM	THUY
ZBINDEN	ERIC	JEAN
ZEIDAN	ROSALIE	CHAHID
ZHENG	LI	
ZHOU	HONGCHAO	

Dated: July 18, 2023.

Steven B. Levine,

Manager Team 1940, CSDC—Compliance
Support, Development & Communications.

[FR Doc. 2023–15540 Filed 7–20–23; 8:45 am]

BILLING CODE 4830–01–P

UNIFIED CARRIER REGISTRATION PLAN

Sunshine Act Meetings

TIME AND DATE: July 27, 2023, 10:00 a.m.
to 4:30 p.m., Mountain Time.

PLACE: This meeting will take place at
the Denver Sonesta Downtown,
Ellington A/B, 1450 Glenarm Place,
Denver, CO 80202. This meeting will
also be accessible via conference call
and via Zoom Meeting and Screenshare.
Any interested person may call (i) 1–
929–205–6099 (US Toll) or 1–669–900–
6833 (US Toll), Meeting ID: 961 1570
6827, to listen and participate in this
meeting. The website to participate via
Zoom Meeting and Screenshare is
<https://kellen.zoom.us/meeting/register/>

*t/Isduyvrj0iGNOpIt-
GS3uP5C7Oz7U2K0Mo.*

STATUS: This meeting will be open to the
public.

MATTERS TO BE CONSIDERED: The Unified
Carrier Registration Plan Board of
Directors (the “Board”) will continue its
work in developing and implementing
the Unified Carrier Registration Plan
and Agreement. The subject matter of
this meeting will include:

Proposed Agenda

I. Welcome and Call to Order—UCR Board Chair

The UCR Board Chair will welcome
attendees, call the meeting to order, call
roll for the Board, confirm the presence
of a quorum, and facilitate self-
introductions.

II. Verification of Publication of Meeting Notice—UCR Executive Director

The UCR Executive Director will
verify publication of the meeting notice
on the UCR website and distribution to
the UCR contact list via email, followed

by subsequent publication of the notice
in the **Federal Register**.

III. Review and Approval of Board Agenda—UCR Board Chair

*For Discussion and Possible Board
Action*

The proposed Agenda will be
reviewed, and the Board will consider
adoption.

Ground Rules

➤Board actions taken only in
designated areas on agenda.

IV. Approval of Minutes of the June 8, 2023, UCR Board Meeting—UCR Board Chair

*For Discussion and Possible Board
Action*

Draft Minutes from the June 8, 2023
UCR Board meeting will be reviewed.
The Board will consider action to
approve.

V. Report of FMCSA—FMCSA Representative

The Federal Motor Carrier Safety Administration (FMCSA) will provide a report on relevant activity.

VI. Appearance Before the Board by the States of California, Idaho, Delaware, Indiana, Mississippi, North Dakota, Pennsylvania, and South Carolina To Explain Their Non-Compliance With State Performance Standards—UCR Executive Director

The UCR Executive Director will provide background regarding the non-compliance of California, Idaho, Delaware, Indiana, Mississippi, North Dakota, Pennsylvania, and South Carolina with state performance standards for reporting year 2022 and introduce a representative from each of the non-compliant 8 states. The UCR Plan is requesting each state to explain why the deficiency occurred, and what is being done to prevent a deficiency in the future.

VII. Renewal and Renaming of Existing Audit “Pilot Projects”—UCR Executive Director

For Discussion and Possible Board Action

The UCR Executive Director will lead a discussion on the renewal and renaming of Existing Audit “Pilot Projects” into “Compliance Specialist Agreements.” The Board may take action to approve the renewal and renaming of existing “Pilot Projects” under contractual terms adopted by the Board.

VIII. Proposal To Contract With DSL for One Additional Compliance Specialist FTE—UCR Executive Director

For Discussion and Possible Board Action

The UCR Executive Director will lead a discussion to contract with DSL for one additional Compliance Specialist whose scope of work is concentrated on, but not limited to, FARs audits. The Board may take action to approve an agreement with DSL that adds an additional Compliance Specialist FTE.

IX. Discussion of Proposed Changes to UCR Agreement—UCR Board Chair, UCR Board Vice-Chair, UCR Audit Subcommittee Chair, UCR Executive Director, UCR Chief Legal Officer

For Discussion and Possible Board Action

The UCR Board Chair, UCR Board Vice-Chair, UCR Audit Subcommittee Chair, UCR Executive Director, and UCR

Chief Legal Officer will discuss proposed changes to the UCR Agreement. The Board may take additional action on the proposed amendments to the UCR Agreement, including possible adoption.

X. UCR Penetration Test—Kellen Representative

Kellen’s Chief Technology Officer will provide an update and report on relevant activity.

XI. Discussion of Automatic Annual Renewal of UCR Registration—UCR Executive Director and Seikoso

For Discussion and Possible Board Action

The UCR Executive Director and Seikoso will lead a discussion on the issues involved in the voluntary annual automatic renewal of UCR registrations. The Board may take action to allow Seikoso to design and implement a system that allows for the voluntary annual automatic renewal of UCR registrations using business rules defined by the Board.

XII. Discussion of a Possible Agreement Between Henry Su and the UCR Plan—UCR

Executive Director and UCR Chief Legal Officer

For Discussion and Possible Board Action

The UCR Executive Director and UCR Chief Legal Officer will present an agreement between the UCR Plan and Henry Su that engages Henry Su to assist with analysis and the drafting of necessary documents as part of the 2025 fee recommendation to the US DOT Secretary. The Board may take action to adopt an agreement between the UCR Plan and Henry Su to assist with analysis and the drafting of necessary documents as part of the 2025 fee recommendation to the US DOT Secretary.

XIII. Subcommittee Reports

Audit Subcommittee—UCR Audit Subcommittee Chair

A. Update on the Project To Replace the Retreat Audit Program With a Program That Relies on Roadside Inspection Data—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, DSL Transportation Representative, Seikoso Representative

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, DSL Transportation Representative and a Seikoso Representative will lead a discussion on options to replace the Retreat Audit Program currently utilized

by the States with a roadside inspection data driven audit for non-IRP plated commercial motor vehicles and the motor carriers operating this type of registered equipment.

B. Options To Clean Up the Unregistered Motor Carrier UCR Universe in Shadow MCMIS—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, Seikoso Representative

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair and a Seikoso Representative will lead a discussion on steps necessary for the NRS and State Auditors to address the 2022/2023 unregistered motor carriers.

C. Update on the Upcoming Question and Answer Session for State Auditors—UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair, UCR Executive Director

The UCR Audit Subcommittee Chair, UCR Audit Subcommittee Vice-Chair and UCR Executive Director will lead a discussion regarding the upcoming 60-minute virtual question and answer sessions.

Finance Subcommittee—UCR Finance Subcommittee Chair

A. Amendments to the Unbudgeted Expense Reserve Policy—UCR Finance Subcommittee Chair

For Discussion and Possible Board Action

The UCR Finance Subcommittee Chair will lead a discussion regarding possible amendments to the Unbudgeted Expense Reserve Policy. The UCR Finance Subcommittee Chair may move and the Board may adopt the UCR Finance Subcommittee’s recommended amendments to the Unbudgeted Expense Reserve Policy.

B. Amendments To Change the Method of Estimating Collections for the Future Months Remaining in a Registration Year—UCR Finance Subcommittee Chair

For Discussion and Possible Board Action

The UCR Finance Subcommittee Chair will lead a discussion regarding possible amendments to Section 6.c.ii of the Fee Change Recommendation Policy to change the method of estimating collections for the future months remaining in a registration year. The UCR Finance Subcommittee Chair may move and the Board may adopt the UCR Finance Subcommittee’s recommended amendments to the method of estimating collections for future months remaining in a registration year.

C. 2025 Registration Fee Analysis and Recommendation—UCR Finance Subcommittee Chair

For Discussion and Possible Board Action

The UCR Finance Subcommittee Chair will provide an analysis pertaining to the setting of 2025 registration fees and a 2025 registration fee recommendation. The UCR Finance Subcommittee Chair may move and the Board may adopt the UCR Finance Subcommittee's recommendation for a 2025 fee recommendation to the US DOT Secretary.

Education and Training Subcommittee—UCR Education and Training Subcommittee Chair

Update on Current and Future Training Initiatives—UCR Education and Training Subcommittee Chair

The Education and Training Subcommittee Chair will provide an update on current and future training initiatives and the E-Certificate program.

Industry Advisory Subcommittee—UCR Industry Advisory Subcommittee Chair

Update on Current Initiatives—UCR Industry Advisory Subcommittee Chair

The UCR Industry Advisory Subcommittee Chair will provide an update on current and future initiatives regarding motor carrier industry concerns.

Enforcement Subcommittee—UCR Enforcement Subcommittee Chair

Update on Current Initiatives—UCR Enforcement Subcommittee Chair

The UCR Enforcement Subcommittee Chair will provide an update on current and future initiatives.

Dispute Resolution Subcommittee—UCR Dispute Resolution Subcommittee Chair

Update on Current Initiatives—UCR Dispute Resolution Subcommittee Chair

The UCR Dispute Resolution Subcommittee Chair will provide an update on future initiatives.

XIV. Contractor Reports—UCR Board Chair

UCR Executive Director's Report

The UCR Executive Director will provide a report covering recent activity for the UCR Plan.

DSL Transportation Services, Inc.

DSL Transportation Services, Inc. will report on the latest data from the Focused Anomaly Reviews (FARs) program, discuss motor carrier

inspection results, pilot projects and other matters.

Seikosoft

Seikosoft will provide an update on recent/new activity related to the National Registration System (NRS).

UCR Administrator Report (Kellen)

The UCR Chief of Staff will provide a management report covering recent activity for the Depository, Operations, and Communications.

XV. Other Business—UCR Board Chair

The UCR Board Chair will call for any other business, old or new, from the floor.

XVI. Adjournment—UCR Board Chair

The UCR Board Chair will adjourn the meeting.

The agenda will be available no later than 5:00 p.m. Eastern time, July 19, 2023, at: <https://plan.ucr.gov>.

CONTACT PERSON FOR MORE INFORMATION: Elizabeth Leaman, Chair, Unified Carrier Registration Plan Board of Directors, (617) 305-3783, eleaman@board.ucr.gov.

Alex B. Leath,
Chief Legal Officer, Unified Carrier
Registration Plan.

[FR Doc. 2023-15627 Filed 7-19-23; 4:15 pm]

BILLING CODE 4910-YL-P

DEPARTMENT OF VETERANS AFFAIRS

Solicitation of Nominations for Appointment to the Health Services Research and Development Scientific Merit Review Board Subcommittees

AGENCY: Department of Veterans Affairs.

ACTION: Notice of solicitation for nominations.

SUMMARY: The Department of Veteran Affairs (VA) Health Services Research and Development (HSR&D) is committed to having a diverse and inclusive membership in its Scientific Merit Review Board (SMRB) subcommittees. It is seeking nominations for qualified candidates who promote racial and ethnic diversity, as well as sex, geographic, religious, disability/mobility, and prior military service diversity in membership.

DATES: Nominations for membership on the subcommittees must be received by August 31, 2023, no later than 4:00 p.m., eastern standard time. Submission of an application does not guarantee selection.

ADDRESSES: All nomination packages should be sent to the HSRD Scientific Review mailbox at: vhaoscirev@va.gov.

SUPPLEMENTARY INFORMATION: In carrying out the duties set forth, the Board members and its subcommittees will:

(1) Conduct scientific merit peer review of applications submitted by VA investigators to HSRD for funding consideration,

(2) Prepare written critiques of scientific and technical merit of assigned applications, participate in a panel discussion of applications, and score all applications presented to the subcommittees to provide group consensus for consideration by the HSRD Director and the Principal Investigator.

Authority: The Board and its subcommittees were established in accordance with 38 U.S.C. 545 and operates under the provisions of the Federal Advisory Committee Act, as amended, 5. U.S.C. ch. 10. In accordance with 38 U.S.C. 545, the Board and subcommittees provide a fair and equitable selection of the most meritorious research projects for support by VA research funds and to offer advice for research program officials on program priorities and policies. The ultimate objective of the Board is to ensure the high quality and mission relevance of VA's legislatively mandated Health Services Research and Development Program.

Membership Composition: The Board is composed of members having training and expertise in a variety of scientific, technical and medical disciplines. The Board shall represent the required technical skills along with diversity in race/ethnicity, gender, religion, disability, geographical background and Veterans of diverse eras and branches of service when possible. Members will serve 2 to 4-year staggered appointments. A copy of the Committee's most recent charter and a list of the current membership can be found at www.va.gov/ADVISORY/.

The Subcommittee meets at least two times annually. In accordance with Federal Travel Regulation, VA will cover travel expenses—to include per diem—for all members of the Subcommittee, for any travel associated with official Subcommittee duties. Subcommittees may select to convene virtually, hybrid, or in-person.

Non-VA board members also may be authorized to receive a stipend for their services. In accordance with recently revised guidance regarding the ban on lobbyists serving as members of advisory boards and commissions,

federally registered lobbyists are prohibited from serving on Federal advisory committees in an individual capacity. Additional information regarding this issue can be found at **Federal Register**:: Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions.

Eligibility for Nomination Submission: Interested individuals must be a U.S. citizen and hold an M.D., Ph.D., or equivalent doctoral degree.

Preferences are for candidates who:

- Promote racial and ethnic diversity, as well as sex, geographic, disability/mobility, and prior military service diversity in membership.
- Have previous federal research funding resulting in professional publications.

HSRD is looking for individuals with health services related expertise in the following areas that correspond with some of our Subcommittees:

(1) Health care and delivery to include medical care; medical/surgical management; provider preferences and behaviors; provider burnout; diagnosis; prognosis; best practices; guidelines; quality and safety of healthcare; COVID disruption in patient care; chronic pain management; opioid use and management; pharmacology; and pharmacotherapeutics.

(2) Patient preferences, perceptions, and behaviors (including engagement and self-management); personal, sociodemographic, rural health, and cultural factors affecting health and care (patient/population/provider/community); complementary, alternative or integrative health; rural health, patient decision-making; focused patient-centered health care improvements and innovations; whole health, patient-provider interactions and communication; populations with disparities in health (rural, minorities, LGBTQIA+); and health disparities related to COVID disruption in patients care.

(3) Research in informatics and health information technology (HIT) tools and systems to enhance effectiveness, efficiency, and quality of VHA care, including impact of new information technology on patient experience,

clinical analysis of big data to generate new evidence and scientific discovery (MVP data; genomics data, phenotypic data; emerging health data); development, testing and evaluation of novel and innovative digital HIT tools, emerging health data standards, EHR Modernization and research methods.

(4) Research on assessment, treatment, and prevention of mental health conditions (such as anxiety, depression, serious mental illness, and PTSD) and behavioral health disorders (such as substance use disorder and addictive disorders); suicide and suicide ideation; mental health—primary care integration (MH-PCI); measurement-based care; access to mental health care; and COVID disruption of mental health care.

(5) Research on (1) health systems and (2) women's health. This includes research on: organizational models affecting delivery of care across systems (different care settings or healthcare systems), best practices in implementation of health care interventions and improvements, methods to improve the efficiency and quality of care for Veterans, system efficiency and redesign, cost efficiencies, resource optimization, COVID system wide disruption in care, access to care; management and human factors affecting care, and improving care delivery across the lifespan for women Veterans.

(6) Research focused on two broad areas: (1) Rehabilitation and functional outcomes, including activity, mobility, and exercise; (2) Aging and care settings (e.g., home, long-term care, frailty) as well as supportive services, caregiving, palliative, and end-of-life care, and COVID disruption in aging patients' care.

(7) Partnered initiatives/centers focused on addressing VA priorities, supporting VHA's transformation to a Learning Health System, and moving the needle on quality of care for Veterans by leveraging evidence-based implementation, evaluation, and/or quality improvement methods and partnering closely with health system leaders, managers, and frontline staff to support the uptake of effective programs, policies, and practices across VHA.

Requirements for Nomination

Submission: Subcommittee packages must be typed (12-point font) and include:

(1) a cover letter from the nominee summarizing the individual's interest in serving on a subcommittee and contributions she/he/they can make to the work of the committee; any relevant Veterans service activities she/he/they are currently engaged. To promote inclusion and demographic balance of membership, please include as much information related to your race, national origin, disability status, or any other factors that may give you a diverse perspective on Veterans matters;

(2) a current Curriculum Vitae (CV) that shows all relevant professional and/or work experience;

(3) The nominee's contact information, including name, mailing address, telephone numbers, and email address;

(4) a statement confirming that the nominee is not a federally registered lobbyist.

Packages will be reviewed by scientific review staff and individuals selected for appointment to a Subcommittee will be notified via email.

The Department makes every effort to ensure that the membership of its advisory committees is fairly balanced, in terms of points of view represented. Consideration is given to nominees' potential to address the Board and subcommittee's scientific needs (see above) and demographic needs (regional representation, race/ethnicity representation, professional expertise, gender, and Veteran status, etc.). In addition, the composition of each Subcommittee may vary based on the review cycle to mitigate potential or perceived conflicts of interest and ensure the subcommittee's expertise aligns with the applications under review.

Dated: July 17, 2023.

LaTonya L. Small,

Federal Advisory Committee Management Officer.

[FR Doc. 2023-15464 Filed 7-20-23; 8:45 am]

BILLING CODE P



FEDERAL REGISTER

Vol. 88

Friday,

No. 139

July 21, 2023

Part II

Department of Labor

Occupational Safety and Health Administration

29 CFR Part 1904

Improve Tracking of Workplace Injuries and Illnesses; Final Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA–2021–0006]

RIN 1218–AD40

Improve Tracking of Workplace Injuries and Illnesses

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Final rule.

SUMMARY: OSHA is amending its occupational injury and illness recordkeeping regulation to require certain employers to electronically submit injury and illness information to OSHA that employers are already required to keep under the recordkeeping regulation. Specifically, OSHA is amending its regulation to require establishments with 100 or more employees in certain designated industries to electronically submit information from their OSHA Forms 300 and 301 to OSHA once a year. OSHA will not collect employee names or addresses, names of health care professionals, or names and addresses of facilities where treatment was provided if treatment was provided away from the worksite from the Forms 300 and 301. Establishments with 20 to 249 employees in certain industries will continue to be required to electronically submit information from their OSHA Form 300A annual summary to OSHA once a year. All establishments with 250 or more employees that are required to keep records under OSHA's injury and illness regulation will also continue to be required to electronically submit information from their Form 300A to OSHA on an annual basis. OSHA is also updating the NAICS codes used in appendix A, which designates the industries required to submit their Form 300A data, and is adding appendix B, which designates the industries required to submit Form 300 and Form 301 data. In addition, establishments will be required to include their company name when making electronic submissions to OSHA. OSHA intends to post some of the data from the annual electronic submissions on a public website after identifying and removing information that could reasonably be expected to identify individuals directly, such as individuals' names and contact information.

DATES: This final rule becomes effective on January 1, 2024.

Collections of information: There are collections of information contained in this final rule (see Section V, OMB Review Under the Paperwork Reduction Act of 1995). Notwithstanding the general date of applicability for the requirements contained in the final rule, affected parties do not have to comply with the collections of information until the Department of Labor publishes a separate document in the **Federal Register** announcing that the Office of Management and Budget has approved them under the Paperwork Reduction Act.

ADDRESSES: Electronic copies of this **Federal Register** document and news releases are available at OSHA's website at <https://www.osha.gov>.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Frank Meilinger, Director, Office of Communications, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693–1999; email: meilinger.francis2@dol.gov.

For general information and technical inquiries: Lee Anne Jillings, Director, Directorate of Technical Support and Emergency Management, U.S. Department of Labor; telephone (202) 693–2300; email: Jillings.LeeAnne@dol.gov.

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I. Background

A. References and Exhibits

In this preamble, OSHA references documents in Docket No. OSHA–2021–

0006, the docket for this rulemaking. The docket is available at <http://www.regulations.gov>, the Federal eRulemaking Portal.

When citing exhibits in the docket, OSHA includes the term “Document ID” followed by the last four digits of the Document ID number. For example, OSHA’s preliminary economic analysis is in the docket as OSHA–2021–0006–0002. Citations also include the attachment number or other attachment identifier, if applicable, page numbers (designated “p.” or “Tr.” for pages from a hearing transcript), and in a limited number of cases a footnote number (designated “Fn.”). In a citation that contains two or more Document ID numbers, the Document ID numbers are separated by semi-colons (e.g., “Document ID 1231, Attachment 1, p. 6; 1383, Attachment 1, p. 2”).

All materials in the docket, including public comments, supporting materials, meeting transcripts, and other documents, are listed on <http://www.regulations.gov>. However, some exhibits (e.g., copyrighted material) are not available to read or download from that web page. All materials in the docket, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

B. Introduction

OSHA’s regulation at 29 CFR part 1904 requires employers with more than 10 employees in most industries to keep records of occupational injuries and illnesses at their establishments. Employers covered by the regulation must use three forms, or their equivalent, to record recordable employee injuries and illnesses:

- OSHA Form 300, the Log of Work-Related Injuries and Illnesses. This form includes information about the employee’s name, job title, date of the injury or illness, where the injury or illness occurred, description of the injury or illness (e.g., body part affected), and the outcome of the injury or illness (e.g., death, days away from work, job transfer or restriction).
- OSHA Form 301, the Injury and Illness Incident Report. This form includes the employee’s name and address, date of birth, date hired, and gender and the name and address of the health care professional that treated the employee, as well as more detailed information about where and how the injury or illness occurred.
- OSHA Form 300A, the Annual Summary of Work-Related Injuries and Illnesses. This form includes general

information about an employer’s workplace, such as the average number of employees and total number of hours worked by all employees during the calendar year. It does not contain information about individual employees. Employers are required to prepare this form at the end of each year and post the form in a visible location in the workplace from February 1 to April 30 of the year following the year covered by the form.

Section 1904.41 of the previous recordkeeping regulation also required two groups of establishments to electronically submit injury and illness data to OSHA once a year.

- § 1904.41(a)(1) required establishments with 250 or more employees in industries that are required to routinely keep OSHA injury and illness records to electronically submit information from the Form 300A summary to OSHA once a year.

- § 1904.41(a)(2) required establishments with 20–249 employees in certain designated industries (those listed on appendix A of part 1904 subpart E) to electronically submit information from their Form 300A summary to OSHA once a year.

Also, § 1904.41(a)(4) required each establishment that must electronically submit injury and illness information to OSHA to provide their Employer Identification Number (EIN) in their submittal.

Under this final rule, three groups of establishments will be required to electronically submit information from their injury and illness recordkeeping forms to OSHA once a year.

- Establishments with 20–249 employees in certain designated industries (listed in appendix A to subpart E) will continue to be required to electronically submit information from their Form 300A annual summary to OSHA once a year (final § 1904.41(a)(1)(i)). OSHA is also updating the NAICS codes used for appendix A to subpart E.
- Establishments with 250 or more employees in industries that are required to routinely keep OSHA injury and illness records will continue to be required to electronically submit information from the Form 300A to OSHA once a year (final § 1904.41(a)(1)(ii)).
- Establishments with 100 or more employees in certain designated industries (listed in new appendix B to subpart E) will be newly required to electronically submit information from their OSHA Forms 300 and 301 to OSHA once a year (final § 1904.41(a)(2)). The industries listed in new appendix B were chosen based on

three measures of industry hazardousness.

OSHA will also require establishments to include their company name when making electronic submissions to OSHA (final § 1904.41(b)(10)).

Additionally, although publication is not part of the regulatory requirements of this final rule, OSHA intends to post the collected establishment-specific, case-specific injury and illness information online. As discussed in more detail below, the agency will seek to minimize the possibility of the release of information that could reasonably be expected to identify individuals directly, such as employee name, contact information, and name of physician or health care professional. OSHA will minimize the possibility of releasing such information in multiple ways, including by limiting the worker information collected, designing the collection system to provide extra protections for some of the information that employers will be required to submit, withholding certain fields from public disclosure, and using automated software to identify and remove information that could reasonably be expected to identify individuals directly.

OSHA has determined that the data collection will assist the agency in its statutory mission to assure safe and healthful working conditions for working people (see 29 U.S.C. 651(b)). In addition, OSHA has determined that the expanded public access to establishment-specific, case-specific injury and illness data will allow employers, employees, potential employees, employee representatives, customers, potential customers, researchers, and the general public to make more informed decisions about workplace safety and health at a given establishment. OSHA believes that this accessibility will ultimately result in the reduction of occupational injuries and illnesses.

OSHA estimates that this rule will have economic costs of \$7.7 million per year, including \$7.1 million per year to the private sector, with average costs of \$136 per year for affected establishments with 100 or more employees, annualized over 10 years with a discount rate of seven percent. The agency believes that the annual benefits, while unquantified, significantly exceed the annual costs.

C. Regulatory History

As discussed in section II, Legal Authority, the Occupational Safety and Health Act (OSH Act or Act) requires employers to keep records of employee

illnesses and injuries as prescribed by OSHA through regulation. OSHA's regulations on recording and reporting occupational injuries and illnesses (29 CFR part 1904) were first issued in 1971 (36 FR 12612 (July 2, 1971)). These regulations require the recording of work-related injuries and illnesses that involve death, loss of consciousness, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional (29 CFR 1904.7).

On July 29, 1977, OSHA amended these regulations to partially exempt businesses having ten or fewer employees during the previous calendar year from the requirement to record occupational injuries and illnesses (42 FR 38568). Then, on December 28, 1982, OSHA amended the regulations again to partially exempt establishments in certain lower-hazard industries from the requirement to record occupational injuries and illnesses (47 FR 57699).¹ OSHA also amended the recordkeeping regulations in 1994 (Reporting of Fatality or Multiple Hospitalization Incidents, 59 FR 15594) and 1997 (Reporting Occupational Injury and Illness Data to OSHA, 62 FR 6434). Under the version of § 1904.41 added by the 1997 final rule, OSHA began requiring certain employers to submit their 300A data to OSHA annually through the OSHA Data Initiative (ODI). Through the ODI, OSHA collected data on injuries and acute illnesses attributable to work-related activities in the private sector from approximately 80,000 establishments in selected high-hazard industries. The agency used these data to calculate establishment-specific injury and illness rates, and, in combination with other data sources, to target enforcement and compliance assistance activities.

On January 19, 2001, OSHA issued a final rule amending its requirements for the recording and reporting of

occupational injuries and illnesses (29 CFR parts 1904 and 1952), along with the forms employers use to record those injuries and illnesses (66 FR 5916). The final rule also updated the list of industries that are partially exempt from recording occupational injuries and illnesses.

On September 18, 2014, OSHA again amended the regulations to require employers to report work-related fatalities and severe injuries—in-patient hospitalizations, amputations, and losses of an eye—to OSHA and to allow electronic reporting of these events (79 FR 56130). The final rule also revised the list of industries that are partially exempt from recording occupational injuries and illnesses.

On May 12, 2016, OSHA amended the regulations on recording and reporting occupational injuries and illnesses to require employers, on an annual basis, to submit electronically to OSHA injury and illness information that employers are already required to keep under part 1904 (81 FR 29624). Under the 2016 revisions, establishments with 250 or more employees that are routinely required to keep records were required to electronically submit information from their OSHA Forms 300, 300A, and 301 to OSHA or OSHA's designee once a year, and establishments with 20 to 249 employees in certain designated industries were required to electronically submit information from their OSHA annual summary (Form 300A) to OSHA or OSHA's designee once a year. In addition, that final rule required employers, upon notification, to electronically submit information from part 1904 recordkeeping forms to OSHA or OSHA's designee. These provisions became effective on January 1, 2017, with an initial submission deadline of July 1, 2017, for 2016 Form 300A data. That submission deadline was subsequently extended to December 15, 2017 (82 FR 55761). The initial submission deadline for electronic submission of information from OSHA Forms 300 and 301 was July 1, 2018. Because of a subsequent rulemaking, OSHA never received the data submissions from Forms 300 and 301 that the 2016 final rule anticipated.

On January 25, 2019, OSHA issued a final rule that amended the recordkeeping regulations to remove the requirement for establishments with 250 or more employees that are routinely required to keep records to electronically submit information from their OSHA Forms 300 and 301 to OSHA or OSHA's designee once a year. As a result, those establishments were required to electronically submit only information from their OSHA 300A

¹ All employers covered by the OSH Act are covered by OSHA's recordkeeping and reporting requirements found in 29 CFR part 1904. However, there are several exceptions to OSHA's recordkeeping requirements that apply unless OSHA or the Bureau of Labor Statistics (BLS) informs them in writing that they must keep records (29 CFR 1904.1(a)(1), 1904.2(a)(1)). For example, employers with ten or fewer employees, as well as businesses with establishments in certain industries, are partially exempt from keeping OSHA injury and illness records (29 CFR 1904.1, 1904.2). The provision excepts most employers covered by the OSH Act. All employers covered by the OSH Act, including those that are partially exempt from keeping injury and illness records, are still required to report work-related fatalities, in-patient hospitalizations, amputations, and losses of an eye to OSHA within specified timeframes under 29 CFR 1904.39.

annual summary. The 2019 final rule also added a requirement for covered employers to submit their Employer Identification Number (EIN) electronically along with their injury and illness data submission (83 FR 36494, 84 FR 380, 395–97).

On March 30, 2022, OSHA issued a notice of proposed rulemaking (NPRM or proposed rule) proposing to amend the recordkeeping regulations to require establishments with 100 or more employees in certain designated industries to electronically submit information from their OSHA Forms 300 and 301 to OSHA once a year (87 FR 18528). In addition, OSHA proposed to continue the requirement for establishments with 20 or more employees in certain designated industries to electronically submit data from their OSHA Form 300A annual summary to OSHA once a year. OSHA also proposed to update the appendices containing the designated industries covered by the electronic submission requirement and to remove the requirement for establishments with 250 or more employees not in a designated industry to electronically submit information from their Form 300A to OSHA on an annual basis. Further, OSHA expressed its intention to post the data from the proposed electronic submission requirement on a public website after identifying and removing information that could reasonably be expected to identify individuals directly, such as individuals' names and contact information. Finally, OSHA proposed to require establishments to include their company name when making electronic submissions to OSHA.

Comments on the NPRM were initially due on May 30, 2022 (87 FR 18528). However, in response to requests for an extension, OSHA published a second **Federal Register** notice on May 25, 2022, extending the comment period until June 30, 2022 (87 FR 31793). By the end of the extended comment period, OSHA had received 87 comments on the proposed rule. The issues raised in those comments are addressed herein.

D. Related Litigation

Both the 2016 and 2019 OSHA final rules that addressed the electronic submission of injury and illness data were challenged in court. In *Texo ABC/AGC, Inc., et al. v. Acosta*, No. 3:16-cv-01998-L (N.D. Tex. filed July 8, 2016), and *NAHB, et al. v. Acosta*, No. 5:17-cv-00009-PRW (W.D. Okla. filed Jan. 4, 2017), industry groups challenged OSHA's 2016 final rule that required establishments with 250 or more

employees to electronically submit data from their OSHA Forms 300 and 301 to OSHA (as well as other requirements not relevant to this rulemaking). The complaints alleged that the publication of establishment-specific injury and illness data would lead to misuse of confidential and proprietary information by the public and special interest groups. The complaints also alleged that publication of the data exceeds OSHA's authority under the OSH Act and is unconstitutional under the First Amendment to the U.S. Constitution. After OSHA published a notice in the **Federal Register** on June 28, 2017, noting that the agency planned to publish a proposal that would reconsider the requirements of the 2016 final rule (82 FR 29261), *Texo* was administratively closed. The plaintiffs in *NAHB* dropped their claims relating to the 300 and 301 data submission requirement after the 2019 final rule was published (and moved forward with their other claims, which are still pending in the Western District of Oklahoma).

In *Public Citizen Health Research Group et al. v. Pizzella*, No. 1:19-cv-00166 (D.D.C. filed Jan. 25, 2019) and *State of New Jersey et al. v. Pizzella*, No. 1:19-cv-00621 (D.D.C. filed Mar. 6, 2019), a group of public health organizations and a group of States filed separate lawsuits challenging OSHA's 2019 final rule rescinding the requirement for certain employers to submit the data from OSHA Forms 300 and 301 to OSHA electronically each year. The U.S. District Court for the District of Columbia resolved the two cases in a consolidated opinion and held that rescinding the provision was within the agency's discretion (*Public Citizen Health Research Group et al. v. Pizzella*, No. 1:19-cv-00166-TJK (D.D.C. Jan. 11, 2021)). The court first dismissed Public Citizen's complaint for lack of subject-matter jurisdiction. Next, turning to the merits of the States' complaint, the court held that OSHA's rescission of the Form 300 and Form 301 data-submission requirements was within the agency's discretion based on its rebalancing of the "uncertain benefits" of collecting the 300 and 301 data against the diversion of OSHA's resources from other efforts and potential privacy harms to employees. The court also rejected the plaintiffs' assertion that OSHA's reasons for the 2019 final rule were internally inconsistent. Both groups of plaintiffs have appealed to the U.S. Court of Appeals for the District of Columbia Circuit (Nos. 21–5016, 21–5018).

Additionally, since 2020, the Department of Labor (DOL) has received

multiple adverse decisions regarding the release of electronically submitted 300A data under the Freedom of Information Act (FOIA). In each of the cases, OSHA argued that electronically submitted 300A injury and illness data are exempt from disclosure pursuant to the confidentiality exemption in FOIA Exemption 4. Two courts, one in the U.S. District Court for the Northern District of California and another in the U.S. District Court for the District of Columbia, disagreed with OSHA's position (see *Center for Investigative Reporting, et al., v. Department of Labor*, No. 4:18-cv-02414-DMR, 2020 WL 2995209 (N.D. Cal. June 4, 2020); *Public Citizen Foundation v. United States Department of Labor, et al.*, No. 1:18-cv-00117 (D.D.C. June 23, 2020)). In addition, on July 6, 2020, the Department received an adverse ruling from a magistrate judge in the Northern District of California in a FOIA case involving Amazon fulfillment centers. In that case, plaintiffs sought the release of individual 300A forms, which consisted of summaries of Amazon's work-related injuries and illnesses and which were provided to OSHA compliance officers during specific OSHA inspections of Amazon fulfillment centers in Ohio and Illinois (see *Center for Investigative Reporting, et al., v. Department of Labor*, No. 3:19-cv-05603-SK, 2020 WL 3639646 (N.D. Cal. July 6, 2020)).

In holding that FOIA Exemption 4 was inapplicable, the courts rejected OSHA's position that electronically submitted 300A injury and illness data are covered under the confidentiality exemption in FOIA Exemption 4. The decisions noted that the 300A form is posted in the workplace for three months and that there is no expectation that the employer must keep these data confidential or private. As a result, OSHA provided the requested 300A data to the plaintiffs, and posted collected 300A data on its public website beginning in August 2020. The data are available at <https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data> and include the submissions for calendar years 2016, 2017, 2018, 2019, 2020, and 2021.

E. Injury and Illness Data Collection

Currently, two U.S. Department of Labor data collections request and compile information from the OSHA injury and illness records that certain employers are required to keep under 29 CFR part 1904: the annual collection conducted by OSHA under 29 CFR 1904.41 (Electronic Submission of Employer Identification Number (EIN) and Injury and Illness Records to

OSHA), and the annual Survey of Occupational Injuries and Illnesses (SOII) conducted by the Bureau of Labor Statistics (BLS) under 29 CFR 1904.42. This final rule amends the regulation at § 1904.41. It does not change the SOII or the authority for the SOII set forth in § 1904.42.

The BLS SOII is an establishment-based survey used to estimate nationally representative incidence rates and counts of workplace injuries and illnesses. It also provides detailed case and demographic data for cases that involve one or more days away from work (DAFW) and for days of job transfer and restriction (DJTR). Each year, BLS collects data from Forms 300, 301, and 300A from a scientifically selected probability sample of about 230,000 establishments, covering nearly all private-sector industries, as well as State and local government. Title 44 U.S.C. 3572 prohibits BLS from releasing establishment-specific and case-specific data to the general public or to OSHA. However, BLS has modified its collection procedures to be able to automatically import certain Form 300A submissions from the OSHA ITA into the BLS SOII Internet Data Collection Facility (IDCF). As discussed below, the Department is continuing to evaluate opportunities to further reduce duplicative reporting.

II. Legal Authority

A. Statutory Authority To Promulgate the Rule

OSHA is issuing this final rule pursuant to authority expressly granted by several provisions of the OSH Act that address the recording and reporting of occupational injuries and illnesses. Section 2(b)(12) of the OSH Act states that one of the purposes of the OSH Act is to “assure so far as possible . . . safe and healthful working conditions . . . by providing for appropriate reporting procedures . . . which . . . will help achieve the objectives of th[e] Act and accurately describe the nature of the occupational safety and health problem” (29 U.S.C. 651(b)(12)). Section 8(c)(1) requires each employer to “make, keep and preserve, and make available to the Secretary [of Labor] . . . , such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and illnesses” (29 U.S.C. 657(c)(1)). Section 8(c)(2) directs the Secretary to prescribe regulations “requiring employers to maintain accurate records of, and to

make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job” (29 U.S.C. 657(c)(2)).

Section 8(g)(1) authorizes the Secretary “to compile, analyze, and publish, whether in summary or detailed form, all reports or information obtained under this section” (29 U.S.C. 657(g)(1)). Section 8(g)(2) of the Act broadly empowers the Secretary to “prescribe such rules and regulations as he may deem necessary to carry out [his] responsibilities under th[e] Act” (29 U.S.C. 657(g)(2)).

Section 24 of the OSH Act (29 U.S.C. 673) contains a similar grant of authority. This section requires the Secretary to “develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics” and “compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses . . .” (29 U.S.C. 673(a)). Section 24 also requires employers to “file such reports with the Secretary as he shall prescribe by regulation” (29 U.S.C. 673(e)). These reports are to be based on “the records made and kept pursuant to section 8(c) of this Act” (29 U.S.C. 673(e)).

Section 20 of the Act (29 U.S.C. 669) contains additional implicit authority for collecting and disseminating data on occupational injuries and illnesses. Section 20(a) empowers the Secretaries of Labor and Health and Human Services to consult on research concerning occupational safety and health problems, and provides for the use of such research, “and other information available,” in developing criteria on toxic materials and harmful physical agents. Section 20(d) states that “[i]nformation obtained by the Secretary . . . under this section shall be disseminated by the Secretary to employers and employees and organizations thereof” (29 U.S.C. 669(d)).

The OSH Act authorizes the Secretary of Labor to issue two types of occupational safety and health rules: standards and regulations. Standards, which are authorized by Section 6 of the Act (29 U.S.C. 655), aim to correct particular identified workplace hazards, while regulations further the general enforcement and detection purposes of the OSH Act (see *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1468 (D.C. Cir. 1995) (citing *La. Chem.*

Ass’n v. Bingham, 657 F.2d 777, 781–82 (5th Cir. 1981)); *United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 735 (3d Cir. 1985)). Recordkeeping requirements promulgated under the Act are characterized as regulations (see 29 U.S.C. 657 (using the term “regulations” to describe recordkeeping requirements); see also *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1468 (D.C. Cir. 1995) (citing *La. Chem. Ass’n v. Bingham*, 657 F.2d 777, 781–82 (5th Cir. 1981); *United Steelworkers of Am. v. Auchter*, 763 F.2d 728, 735 (3d Cir. 1985))).

B. Fourth Amendment Issues

This final rule does not infringe on employers’ Fourth Amendment rights. The Fourth Amendment protects against searches and seizures of private property by the government, but only when a person has a “legitimate expectation of privacy” in the object of the search or seizure (*Rakas v. Illinois*, 439 U.S. 128, 143–47 (1978)). There is little or no expectation of privacy in records that are required by the government to be kept and made available (*Free Speech Coalition v. Holder*, 729 F. Supp. 2d 691, 747, 750–51 (E.D. Pa. 2010) (citing cases); *United States v. Miller*, 425 U.S. 435, 442–43 (1976); cf. *Shapiro v. United States*, 335 U.S. 1, 33 (1948) (no Fifth Amendment interest in required records)).

Accordingly, the Fourth Circuit held, in *McLaughlin v. A.B. Chance*, that an employer has little expectation of privacy in the records of occupational injuries and illnesses kept pursuant to OSHA regulations and must disclose them to the agency on request (842 F.2d 724, 727–28 (4th Cir. 1988)).

Even if there were an expectation of privacy, the Fourth Amendment prohibits only unreasonable intrusions by the government (*Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011)). The information submission requirements in this final rule are reasonable. The requirements serve a substantial government interest in the health and safety of workers, have a strong statutory basis, and rest on reasonable, objective criteria for determining which employers must report information to OSHA (see *New York v. Burger*, 482 U.S. 691, 702–703 (1987)).

OSHA notes that two courts have held, contrary to *A.B. Chance*, that the Fourth Amendment requires prior judicial review of the reasonableness of an OSHA field inspector’s demand for access to injury and illness logs before the agency could issue a citation for denial of access (*McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988); *Brock v. Emerson Electric Co.*, 834 F.2d

994 (11th Cir. 1987)). Those decisions are inapposite here. The courts based their rulings on a concern that field enforcement staff had unbridled discretion to choose the employers they would inspect and the circumstances in which they would demand access to employer records. The *Emerson Electric* court specifically noted that in situations where “businesses or individuals are required to report particular information to the government on a regular basis[,] a uniform statutory or regulatory reporting requirement [would] satisf[y] the Fourth Amendment concern regarding the potential for arbitrary invasions of privacy” (834 F.2d at 997, n.2). This rule, like that hypothetical, establishes general reporting requirements based on objective criteria and does not vest field staff with any discretion. The employers that are required to report data, the information they must report, and the time when they must report it are clearly identified in the text of the rule and in supplemental notices that will be published pursuant to the Paperwork Reduction Act.

C. Publication of Collected Data and FOIA

FOIA generally supports OSHA’s intention to publish information on a publicly available website. FOIA provides that certain Federal agency records must be routinely made “available for public inspection in an electronic format” (see 5 U.S.C. 552(a)(2) (2016)). Subsection (a)(2)(D)(ii) provides that agencies must include any records processed and disclosed in response to a FOIA request that “the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records” or “have been requested 3 or more times.”

Based on its experience, OSHA believes that the recordkeeping information from the Forms 300, 301, and 300A required to be submitted under this rule will likely be the subject of multiple FOIA requests in the future. Consequently, the agency plans to place the recordkeeping information that will be posted on the public OSHA website in its Electronic FOIA Library. Since agencies may “withhold” (*i.e.*, not make available) a record (or portion of such a record) if it falls within a FOIA exemption, just as they can do in response to FOIA requests, OSHA will place the published information in its FOIA Library consistent with all FOIA exemptions.

D. Reasoned Explanation for Policy Change

When a Federal agency action changes or reverses prior policy, that action is subject to the same standard of review as an action that addresses an issue for the first time or is consistent with prior policy (*F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514–15 (2009)). As with any other agency action, agencies must simply “provide a reasoned explanation for the change” (*Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016)). An agency that is changing policy must “display awareness that it is changing position,” but “need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one”; “it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates” (*F.C.C.*, 556 U.S. at 515; *accord DHS v. Regents of Univ. of California*, 140 S. Ct. 1891 (2020); *Encino Motorcars, LLC*, 579 at 221; see also *Advocates for Highway & Auto Safety v. FMCSA*, 41 F.4th 586 (D.C. Cir. 2022) (upholding 2020 change to 2015 rule); *Overdevest Nurseries, L.P. v. Walsh*, 2 F. 4th 977 (D.C. Cir. 2021) (upholding 2010 change to 2008 rule)). In sum, the Administrative Procedure Act imposes “no special burden when an agency elects to change course” (*Home Care Ass’n of Am. v. Weil*, 799 F.3d 1084, 1095 (D.C. Cir. 2015)).

Although agencies may need to provide more detailed explanations for changes in policy that “engendered serious reliance interests,” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), OSHA has found no such reliance interests at stake in this rulemaking. The prior policy, contained within the 2019 final recordkeeping rule, represented a return to the pre-2016 status quo wherein large employers were not required to submit their Form 300 and Form 301 information to OSHA. Essentially, the prior policy relieved employers of the requirement to incur the costs they would have had to incur to comply with the 2016 final rule. Therefore, the prior policy did not require employers to take any steps or invest any resources to comply with it. Further, OSHA made it clear in the 2019 final rule that its decision was based on a temporal weighing of the potential risks to privacy against the benefits of collecting the data (*e.g.*, “OSHA has determined that because it already has systems in place to use the 300A data for enforcement targeting and compliance

assistance without impacting worker privacy, and because the Form 300 and 301 data would provide uncertain additional value, the Form 300A data are sufficient for enforcement targeting and compliance assistance *at this time*” (84 FR 392)). Employers were therefore placed on notice that the policy announced in the 2019 rule could change based on OSHA’s weighing of the relevant considerations over time, further alleviating any reliance interests the rule might have engendered. In any event, OSHA provides detailed and specific reasons for the change in prior policy throughout this preamble.²

III. Summary and Explanation of the Final Rule

OSHA is amending its occupational injury and illness recordkeeping regulations at 29 CFR part 1904 to require certain employers to electronically submit injury and illness information to OSHA that employers are already required to keep. Specifically, this final rule requires establishments with 100 or more employees in certain designated industries (*i.e.*, the industries on appendix B to subpart E of part 1904) to electronically submit information from their OSHA Forms 300 and 301 to OSHA once a year. OSHA will not collect certain information, like employee and healthcare provider names and addresses, from the Forms 300 and 301 in order to protect the privacy of workers and other individuals identified on those forms. In addition, the final rule retains the requirements for the annual electronic submission of information from the Form 300A annual summary. Establishments with 20 to 249 employees in certain industries (*i.e.*, those on appendix A to subpart E of part 1904) will continue to be required to electronically submit information from their OSHA Form 300A to OSHA once a year. And, all establishments with 250 or more employees that are required to keep records under part 1904 will continue to be required to electronically submit information from their Form 300A to OSHA once a year. In addition, the final rule requires establishments to

² OSHA has determined that it is necessary and appropriate to require certain establishments to electronically submit case-specific, establishment-specific data from their Forms 300 and 301 to OSHA. Any claimed reliance interest in the prior policy, which did not contain that requirement, is outweighed by the significant benefits to occupational safety and health, discussed in Section III.B.4 of the Summary and Explanation, that OSHA expects to accrue from this rule (see *Regents of the Univ. of California*, 140 S. Ct. at 1914 (it is “the agency’s job” to determine “in the particular context before it, that other interests and policy concerns outweigh any reliance interests”)).

include their legal company name as part of their annual submission. OSHA intends to post some of the information from these annual electronic submissions on a public website after removing any submitted information that could reasonably be expected to identify individuals directly. OSHA received a number of comments on the proposed rule, which was published in March 2022.

Many commenters strongly support this rulemaking effort (e.g., Docket IDs 0008, 0026, 0029, 0033, 0040, 0047, 0048, 0049, 0061, 0063, 0067, 0069, 0073, 0084, 0089), while others are strenuously opposed (e.g., Docket IDs 0043, 0050, 0052, 0053, 0058, 0059, 0062, 0088, 0090). Several commenters requested that OSHA withdraw the proposed rule (e.g., Docket IDs 0042, 0065, 0075). Organizations that represent employees generally advocated for OSHA to proceed with the rulemaking, arguing that collecting and publishing workplace illness and injury information will lead to improvements in worker safety and health in a number of different ways. Organizations commenting on behalf of employers argued, in many cases, that the required submission and subsequent publication of this information could harm businesses or result in violations of employees' privacy. OSHA has evaluated the public comments and other evidence in the record and agrees with commenters who believe that electronic submission of worker injury and illness information to OSHA will lead to safer workplaces. The agency has decided to move forward with a final rule requiring electronic submission of this information.

Public comments regarding the final regulatory provisions and specific issues related to the submission and publication of workplace injury and illness information are discussed throughout this preamble. The Summary and Explanation is organized by regulatory provision, with issues related to each provision discussed in the section for that provision. Comments not specifically related to a regulatory provision and comments that apply to the rulemaking in general are addressed at the end of the Summary and Explanation. OSHA's economic analysis and related issues and comments are discussed in Section IV, Final Economic Analysis, following the Summary and Explanation.

A. Section 1904.41(a)(1)(i) and (ii)—Annual Electronic Submission of Information From OSHA Form 300A Summary of Work-Related Injuries and Illnesses

The final rule requires electronic submission of Form 300A information from two categories of establishments. First, § 1904.41(a)(1)(i) requires establishments with 20–249 employees that are in an industry listed in appendix A of subpart E of part 1904 to electronically submit information from their Form 300A to OSHA. The industries included on appendix A are listed by the NAICS codes from 2017. Second, § 1904.41(a)(1)(ii) requires establishments with 250 or more employees that are required to keep records under part 1904 to electronically submit their Form 300A information to OSHA. For all establishments, the size of the establishment is determined based on how many employees the establishment had during the previous calendar year. Data must be submitted annually, for the previous calendar year, by the date specified in § 1904.41(c), which is March 2.

As discussed in more detail below, the requirements for establishment submission of Form 300A information under the final rule are substantively identical to the requirements previously found in § 1904.41(a)(1) and (a)(2). In other words, all establishments with 250 or more employees are still required to submit information from Form 300A, and establishments with 20–249 employees in industries on appendix A of subpart E are still required to submit information from their Form 300A. However, OSHA has made minor revisions to the language of final § 1904.41(a)(1)(i) and (ii), and the final regulatory text of both provisions has been restructured, with final § 1904.41(a)(1)(i) addressing the Form 300A submission requirements for establishments with 20–249 employees and final § 1904.41(a)(1)(ii) addressing the Form 300A submission requirements for establishments with 250 or more employees. As discussed elsewhere in this preamble, final § 1904.41(a)(2) addresses the submission requirements for OSHA Forms 300 and 301 by establishments with 100 or more employees in the industries listed in appendix B. The final rule's requirements in § 1904.41(a)(1) are discussed below, along with the proposed provisions and related evidence in the rulemaking record.

1. Section 1904.41(a)(1)(i)—Establishments With 20–249 Employees That Are Required To Submit Information From OSHA Form 300A

Under proposed § 1904.41(a)(1), establishments that had 20 or more employees at any time during the previous calendar year, and that are classified in an industry listed in appendix A to subpart E, would have been required to electronically submit information from their OSHA Form 300A to OSHA or OSHA's designee once a year. As OSHA explained in the preamble to the NPRM, this proposed provision was essentially the same as the previous requirements. OSHA requested comment on proposed § 1904.41(a)(1) generally.

OSHA did not receive many comments specifically about the proposed continuation of the requirement for certain establishments with 20 or more employees to submit their Form 300A data electronically. The Laborers Health and Safety Fund of North America stated that the proposal for establishments with 20 or more employees in certain high-hazard industries to electronically submit Form 300A data to OSHA “must be a requirement,” and emphasized the value of the data for numerous interested parties (Docket ID 0080). The Communications Workers of America (CWA) urged OSHA to expand the submission requirements for the 300A by requiring all establishments with at least 20 employees to submit information from the Form 300A, instead of limiting the requirement to only those industries on appendix A (Docket ID 0092). In addition, the National Federation of Independent Business (NFIB) commented on this provision, noting that “the proposed rule lowers the previous threshold that triggers a duty to file with OSHA automatically (*i.e.*, without any request from OSHA) from 250 or more employees to 20 or more employees, increasing the number of small and independent businesses within the appendix A industries required to submit Form 300A” (Docket ID 0036). However, NFIB's comment appears to misunderstand the previous requirements. As OSHA explained in the preamble to the proposed rule, establishments with 20–249 employees, in industries listed in appendix A, were already required to electronically submit information from their OSHA 300A to OSHA every year (87 FR18535–6). OSHA was not proposing an expansion of this requirement.

Having reviewed the evidence in the record, OSHA has decided to retain the

requirement for establishments with 20–249 employees to annually submit their Form 300A data to OSHA. As noted by the Laborers Health and Safety Fund of North America and discussed further below, this requirement provides a good deal of useful data to many types of interested parties and should not be displaced. OSHA acknowledges the comments supporting expansion of the previous requirement but notes that expanding the requirement for submission of Form 300A data to all establishments with 20–249 employees that are covered by part 1904 would expand the data collection to a total of about 557,000 establishments with 20–249 employees, according to 2019 County Business Patterns data (<https://www.census.gov/programs-surveys/cbp/data/datasets.html>). In contrast, OSHA estimates that about 463,000 establishments with 20–249 employees in industries that are in appendix A will be required to submit data under the final rule (<https://www.census.gov/programs-surveys/cbp/data/datasets.html>). OSHA does not believe, at this time, that the benefits from the additional data collection would outweigh the disadvantages of the additional time and resources required for compliance.

In the previous regulation, this requirement was at § 1904.41(a)(2). In the final rule, it is at § 1904.41(a)(1)(i). This final rule will not impose any new requirements on establishments with 20–249 employees to electronically submit information from their Form 300A to OSHA. All establishments that will be required to electronically submit Form 300A information to OSHA on an annual basis under the final rule are already required to do so.

Additionally, as noted above, OSHA revised the language of this requirement slightly for clarity. Specifically, the previous version referred to establishments with “20 or more employees but fewer than 250 employees[.]” while final § 1904.41(a)(1)(i) refers to establishments with “20–249 employees[.]” These clarifying edits do not change the substantive requirements of the provision.

Similarly, OSHA revised the language of proposed § 1904.41(a)(1) in this final rule for clarity without adding any new requirements for employers. Specifically, proposed § 1904.41(a)(1) would have required establishments with 20 or more employees that are in an industry listed in appendix A of subpart E of part 1904 to electronically submit information from their Form 300A to OSHA. The final version of that provision, § 1904.41(a)(1)(i), addresses

only establishments with 20–249 employees, because final § 1904.41(a)(1)(ii) addresses establishments with 250 or more employees. This change was made to eliminate the overlap, and potential confusion, that would have resulted if both § 1904.41(a)(1)(i) and § 1904.41(a)(1)(ii) addressed establishments with 250 or more employees.

2. Section 1904.41(a)(1)(ii)—Establishments With 250 or More Employees That Are Required To Submit Information From OSHA Form 300A

Although OSHA proposed to maintain the same Form 300A submission requirement for establishments with 20–249 employees, the agency proposed to remove the electronic submission requirement for certain establishments with 250 or more employees. Under previous § 1904.41(a)(1), all establishments of this size in industries routinely required to keep injury and illness records were required to electronically submit information from their Form 300A to OSHA once a year. The proposal would have required this submission only from those establishments with 250 or more employees in industries listed in appendix A to subpart E. As explained in the preamble to the proposed rule, OSHA had preliminarily determined that collecting Form 300A data from a relatively small number of large establishments in lower-hazard industries was not a priority for OSHA inspection targeting or compliance assistance activities. OSHA asked for comment on the proposed changes to § 1904.41(a)(1) generally, and also specifically asked the question, “Is it appropriate for OSHA to remove the requirement for establishments with 250 or more employees, in industries not included in appendix A, to submit the information from their OSHA Form 300A?” (87 FR18546).

There were no comments specifically supporting the proposal to remove the requirement for establishments with 250 or more employees, in industries not included in appendix A, to submit the information from their OSHA Form 300A. In contrast, multiple commenters opposed the proposal and urged OSHA to retain the existing requirement for establishments with 250 or more employees that are normally required to report under part 1904 to submit data from their 300As (e.g., Docket IDs 0024, 0035, Attachment 2, 0039, 0040, 0045, 0047, 0048, 0049, 0051, 0061, 0066, 0067, 0069, 0079, 0080, 0083, 0089, 0092, 0093). Reasons for objecting to the

proposed removal of the requirement for some large establishments to submit data from their Form 300As included: OSHA offered no compelling reason for removal; the need for continued oversight over large establishments in lower-hazard industries in general and certain industries in particular; the ability to use the data to protect the large number of employees employed in these establishments; and the value of the public information to employee safety and health efforts.

Some commenters argued that OSHA had not made a persuasive case for removing the requirement for large establishments in industries not listed on appendix A to submit their 300A data. For example, Hunter Cisewski commented, “The proposed rule ultimately fails to present a compelling argument for why ‘lower hazard’ industries should no longer be required to electronically submit Form 300A when they must still keep record of the form, present it to employees on request, and post it publicly in the workplace” (Docket ID 0024). The AFL–CIO argued, “There is no reason that these establishments should be excluded from a standard they are already subject to and have been complying with. OSHA should at minimum, maintain the requirements for large establishments in these sectors that are already in place” (Docket ID 0061; see also Docket ID 0079). Similarly, Public Citizen and the United Food and Commercial Workers International Union (UFCW) noted that there would be no significant burden on employers to maintaining the requirement because these employers are already required to keep Form 300A data and they have systems in place for submitting the data to OSHA electronically (Docket IDs 0093, 0066). The United Steelworkers Union (USW) argued that keeping industries covered helps increase the stability of the system. USW urged OSHA to “focus on expanding, not limiting, those covered by disclosure requirements, and to ensure that all employers currently covered by the reporting requirements remain covered” (Docket ID 0067; see also Docket ID 0080). The UFCW stated that “[A]ll available evidence reflects that OSHA’s current requirements provide easy access to important data that is crucial to reducing and preventing workplace injuries and illnesses” (Docket ID 0066).

Other commenters, such as the National Institute for Occupational Safety and Health (NIOSH) and the International Brotherhood of Teamsters, noted that although the industries that are not listed in appendix A may have

relatively low injury rates overall, “injury rates can vary greatly across employers and establishments within industries. The requirement for large establishments to submit a 300A Log annually would be a reasonable way to identify establishments that have high injury rates for their industry, and to identify subsegments of industries that may have more hazardous work processes and activities” (Docket ID 0035, Attachment 2; see also Docket ID 0083). Similarly, the Seventeen Attorneys General from New Jersey, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, and Vermont (Seventeen AGs) noted their states’ concern that removing the 300A submission requirement for “lower-hazard” industries would leave Federal OSHA and State occupational safety and health agencies with little way of determining whether these industries were becoming more dangerous for workers over time. This, in turn, could affect the States’ outreach and enforcement efforts. “For example, if [s]tates had previously conducted enforcement and outreach in ‘low hazard’ industries, thus keeping risks down, but deprioritize such enforcement based on a lack of reporting, any uptick of illnesses and injuries in those industries, requiring enforcement efforts, may initially go unnoticed by the [s]tates” (Docket ID 0045).

Other commenters emphasized the significant number of workers employed by the large establishments that OSHA had proposed to exclude from submitting their 300A data, and the usefulness of the data in providing them with safe work environments. Hunter Cisewski estimated that at least 666,250 workers are employed by the approximately 2,665 establishments with 250 or more employees that were proposed to be removed from the Form 300A submission requirement (assuming that each establishment employs only 250 workers). The same commenter also noted that the workers in these large establishments already rely on the required reporting of their injuries to OSHA “to ensure compliance with workplace regulations” (Docket ID 0024). Similarly, the Council of State and Territorial Epidemiologists (CSTE) noted that even if the industries proposed for exclusion have lower injury and illness rates than the industries on appendix A, they employ a large number of people. “Numbers [of workers] as well as rates of work-related

injuries or illness need to be considered in setting prevention priorities. These establishments need to provide a safe work environment, and electronic collection of summary data will allow OSHA and public health agencies to monitor their ability to do so” (Docket ID 0040). The International Brotherhood of Teamsters commented, “we think continuing to collect OSHA 300A data for the large numbers of workers employed in these establishments, would help to identify less obvious problems and implement corresponding preventive measures” (Docket ID 0083).

Various commenters pointed to known or potentially hazardous industry segments that would have been exempt from submitting 300A data under the proposal. For example, the National Council for Occupational Safety and Health (National COSH) as well as the Centro de los Derechos del Migrantes pointed to the temporary service industry and the home health care industry as industries with known hazards for which OSHA and the public should have access to injury and illness data (Docket IDs 0048, 0089; see also Docket ID 0049). The AFL–CIO pointed to home health services, an industry heavily affected by COVID–19, employment services, which includes vulnerable temporary workers, and some wholesalers with rates of cases with days away from work, restricted work activity, or job transfer (DART) above 2.0 per 10,000 workers in 2020 (*e.g.*, NAICS 4231, 4233, 4235, 423930, 4244, 4248, 4249) as industries containing large establishments that would be newly exempted from the 300A submission requirements. The AFL–CIO argued that “limiting the data these industries provide the agency would severely limit the ability to track and identify emerging workplace hazards” (Docket ID 0061).

Some commenters argued that maintaining the existing 300A reporting requirement for all large establishments is particularly important because the industries on appendix A reflect injury and illness data from the BLS SOII that is not current. Therefore, exempting industries not on appendix A could result in missing information from industries that may have become more dangerous since publication of the SOII data for 2011 to 2013. The United Steelworkers Union (USW) commented, “By tying the proposed rule to outdated and underreported injury and illness data, many employers with 250 or more employees in potentially high-hazard industries would be exempted, limiting workers’ ability to make informed decisions about a workplace’s safety and health. . . . These industries are

currently covered by reporting requirements and many, like home health, have seen a rise in injuries and illnesses since the COVID–19 pandemic began” (Docket ID 0067). Public Citizen echoed this comment, stating that past injury rates, which are used to designate industries required to submit data, may not reflect more recent safety conditions. Public Citizen noted, in addition, that the pandemic served as a reminder “that even seemingly ‘low-hazard’ workplaces can be the epicenter of deadly outbreaks” (Docket ID 0093).

Finally, a number of commenters underscored the value of the 300A data that is being collected from large establishments. The UFCW urged OSHA to retain the requirement for collection from all large establishments because it would allow many types of users (the public, employers, workers, researchers, and the government) to use the data “in the very positive ways that the UFCW has used it” already. The UFCW described, in its comment, the many specific ways in which UFCW has used published and union-collected illness and injury data from the OSHA Form 300A, among other information, to increase safety and health at large union-represented facilities (Docket ID 0066). Public Citizen commented that “the value of continuing to collect the information from these employers outweighs any supposed burden . . . data collected from electronic submission of injury and illness information can help identify broad patterns from small injury and illness numbers per establishment. Having this additional data from Form 300A summaries would assist with research into specific types of injuries and illnesses” (Docket ID 0093).

In addition to supporting maintenance of the requirement for submission of 300A data by large establishments, several commenters supported expanding the submission requirements for large establishments even further. For example, the National Employment Law Project (NELP) supported requiring all employers with 250 or more employees to submit information from the Form 300 Log in addition to the Form 300A. NELP argued that certain industries, such as home health care and employment services, contain very large employers that have Total Case Rates (TCRs) that are well above the private sector average. NELP therefore urged OSHA to retain as well as expand electronic submission requirements for large establishments with 250 or more employees in industries that are required to keep records under part 1904 so that researchers and other

organizations could more effectively track and monitor occupational health and safety trends in home health care, employment services, and other sectors (Docket ID 0049; see also Docket ID 0089).

The Laborers' Health and Safety Fund of North America argued that OSHA should require all establishments with 250 or more employees to submit the Form 300 and Form 301, in addition to the Form 300A: "Establishments with 250 or more employees account for large contractors that work on larger construction sites that can be considered high-risk. For these reasons, establishments should be required to submit electronic OSHA 300, 300A and 301 forms to not only track injury and illness, but prove to OSHA that they are taking the steps to mitigate and prevent them from happening" (Docket ID 0080).

Having reviewed the information in the record on this issue, OSHA has decided not to make the proposed change of restricting the universe of large establishments that are required to submit data from Form 300A. Instead, the agency will maintain the requirement for all establishments with 250 or more employees that are covered by part 1904 to submit the information from their OSHA Form 300A to OSHA, or its designee, once a year. As explained by commenters, these establishments are already submitting this information, so there is no new burden for employers. Furthermore, access to the information provides multiple benefits for workers, Federal and State occupational safety and health agencies, and other interested parties. For example, continuing to collect and make this data available to the public will allow tracking of industry hazards over time, even for industries that are not on appendix A. Commenters noted that this type of tracking was particularly critical for industry segments and establishments that have injury rates higher than the rate for their 4-digit NAICS industry overall. They also noted that requiring information to be submitted from all large establishments will help blunt the effect of using SOII data that is several years old in determining which NAICS will be included on appendix A. OSHA agrees with these rationales.

Although OSHA stated in the proposal that collecting Form 300A data from this relatively small number of large establishments in lower-hazard industries is not a priority for OSHA inspection targeting or compliance assistance, OSHA is persuaded by commenters who see the value in providing such data to the public; this

includes the UFCW, which has been using this data to make positive safety and health changes in large establishments. In addition, OSHA recognizes the large number of workers represented by the relatively small number of establishments that would have been affected by the proposed change and does not wish to remove resources that could be used to improve their safety and health.

OSHA acknowledges the comments supporting expansion of the final requirement by requiring submission of information from Forms 300 and 301 by all large establishments (250 or more employees) required to keep records under part 1904. However, this change would expand the universe of large establishments required to submit Form 300 and Form 301 data from about 22,000 (establishments with at least 250 employees that are in NAICS listed on appendix B) to about 40,000 (establishments with at least 250 employees that are required to keep records under part 1904), an increase of 80 percent (data are as of 2019; see <https://www.census.gov/programs-surveys/cbp/data/datasets.html>). OSHA does not believe, at this time, that the benefits from the additional data collection would outweigh the disadvantages of the additional time and resources that employers would have to expend to comply. OSHA also values the stability provided to employers by keeping the universe of establishments required to submit 300A data the same, in light of the multiple recent changes to OSHA's data submission requirements.

In the previous regulation, this requirement was at § 1904.41(a)(1). In the final rule, it is at § 1904.41(a)(1)(ii). This final rule will not impose any new requirements on establishments to electronically submit information from their Form 300A to OSHA. All establishments that will be required to electronically submit Form 300A information to OSHA on an annual basis under the final rule were already required to do so under the previous regulation. OSHA made only one non-substantive change in the final regulatory text; whereas the previous regulatory text at § 1904.41(a)(1) contained an example stating that data for calendar year 2018 would be submitted by the month and day listed in § 1904.41(c) of calendar year 2019, that example has been removed from the final regulatory provision at § 1904.41(a)(1)(ii). A similar, updated example is included in final § 1904.41(b)(1).

3. Restructuring of Previous Section 1904.41(a)(1) and (2) Into Final Section 1904.41(a)(1)(i) and (ii)

In the preamble to the proposed rule, OSHA asked the following question about the structure of the regulatory text containing the requirements to submit data from OSHA injury and illness recordkeeping forms: "The proposed regulatory text is structured as follows: § 1904.41(a)(1) Annual electronic submission of information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 20 or more employees in designated industries; § 1904.41(a)(2) Annual electronic submission of information from OSHA Form 300 Log of Work-Related Injuries and Illnesses, OSHA Form 301 Injury and Illness Incident Report, and OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 100 or more employees in designated industries. This is the structure used by the 2016 and 2019 rulemakings. An alternative structure would be as follows: § 1904.41(a)(1) Annual electronic submission of information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments with 20 or more employees in designated industries; § 1904.41(a)(2) Annual electronic submission of information from OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 301 Injury and Illness Incident Report by establishments with 100 or more employees in designated industries. Which structure would result in better understanding of the requirements by employers?" (87 FR 18547).

OSHA did not receive many comments on this proposed alternative structure for the regulatory text. However, NIOSH noted that it preferred the second option. "NIOSH finds the second alternative . . . to be somewhat preferable. That alternative focuses first on which establishments are required to submit OSHA Form 300A, and then focuses on which establishments are required to submit OSHA Forms 300 and 301. This structure may help employers to more directly answer their questions about what forms to submit" (Docket ID 0035, Attachment 2).

OSHA agrees that the proposed alternative structure, which separates the provisions by recordkeeping form, may help employers better understand the regulatory requirements for their establishments. Based on this reasoning, as well as on OSHA's decision to retain the requirement for all establishments with 250 or more employees in industries covered by part 1904 to

submit information from their Form 300A annual summary (discussed above), OSHA has decided to restructure the final regulation by recordkeeping form, rather than establishment size and industry. Therefore, in the final rule, § 1904.41(a)(1) covers the requirement to submit the OSHA Form 300A, with § 1904.41(a)(1)(i) for establishments with 20–249 employees in appendix A industries, and § 1904.41(a)(1)(ii) for establishments with 250 or more employees in industries covered by part 1904. Final § 1904.41(a)(2) covers the requirement to submit the OSHA Forms 300 and 301, as discussed below.

4. Updating Appendix A

Additionally, OSHA proposed to revise appendix A to subpart E to update the list of designated industries to conform with the 2017 version of the North American Industry Classification System (NAICS). Since OSHA revised § 1904.41 in 2016, the Office of Management and Budget has issued two updates to the NAICS codes, in 2017 and 2022. As explained in the preamble to the proposed rule, OSHA believed that the proposed update from 2012 NAICS to 2017 NAICS would have the benefits of using more current NAICS codes, ensuring that both proposed appendix A and proposed appendix B used the same version of NAICS, aligning with the version currently used by BLS for the SOII data that OSHA used for this rulemaking, and increasing the likelihood that employers were familiar with the industry codes.

As OSHA explained, this revision would not affect which industries were required to provide their data, but rather simply reflect the updated 2017 NAICS codes. For appendix A, OSHA limited the scope of this rulemaking to the proposed update from the 2012 version of NAICS to the 2017 version of NAICS. The change from the 2012 NAICS to the 2017 NAICS would affect only a few industry groups at the 4-digit NAICS level. Specifically, the 2012 NAICS industry group 4521 (Department Stores) is split between the 2017 NAICS industry groups 4522 (Department Stores) and 4523 (General Merchandise Stores, including Warehouse Clubs and Supercenters). Also, the 2012 NAICS industry group 4529 (Other General Merchandise Stores) is included in 2017 NAICS industry group 4523 (General Merchandise Stores, including Warehouse Clubs and Supercenters). As noted above, however, the establishments in these industries were already covered by the previous record submission requirements, so this would

not represent a substantive change in those requirements.

The Phylmar Regulatory Roundtable (PRR) supported the proposed update from the 2012 version of NAICS to the 2017 version of NAICS for appendix A, commenting, “It is both practical and logical to align with the most recent codes from an accuracy standpoint” (Docket ID 0094). The Coalition for Workplace Safety (CWS), on the other hand, commented that using the 2017 NAICS codes for Appendices A and B when the 2022 codes have already been released by OMB will lead to confusion and mistakes, unduly complicating the proposed requirements (Docket ID 0058).

While OSHA did not propose modifications to appendix A other than the update from 2012 NAICS to 2017 NAICS, OSHA did discuss one alternative in the proposal that would affect the industries on appendix A: updating appendix A to reflect the 2017–2019 injury rates from the SOII. Appendix A is based on the SOII’s injury rates from 2011–2013. This alternative would have resulted in the addition of one industry to appendix A (NAICS 4831 (Deep sea, coastal, and great lakes water transportation)) and the removal of 13 industries (4421 Furniture Stores, 4452 Specialty Food Stores, 4853 Taxi and Limousine Service, 4855 Charter Bus Industry, 5152 Cable and Other Subscription Programming, 5311 Lessors of Real Estate, 5321 Automotive Equipment Rental and Leasing, 5323 General Rental Centers, 6242 Community Food and Housing, and Emergency and Other Relief Services, 7132 Gambling Industries, 7212 RV (Recreational Vehicle) Parks and Recreational Camps, 7223 Special Food Services, and 8113 Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance).

OSHA did not receive many comments in response to this alternative. The AFL–CIO stated that the use of “outdated” SOII data to determine the industries on appendix A would lead to missing information from industries that might have become (or might become in the future) more hazardous since the time period used as the basis for appendix A (2011–2013). However, this statement was made in the context of the AFL–CIO’s argument that OSHA should not restrict the large establishments required to submit 300A data to those in industries on appendix A, as OSHA proposed. Because OSHA is not adopting that approach, and instead is requiring all large establishments covered by part 1904 to continue submitting data from Form 300A, OSHA

believes this concern will be minimized under the final regulatory requirements.

Having reviewed the record, OSHA has decided to update appendix A to subpart E from the 2012 version of NAICS to the 2017 version of NAICS. As the PRR commented, it is practical and logical to align the industry list in appendix A with the more recent NAICS codes (see Docket ID 0094). Indeed, employers are likely more familiar with the 2017 codes than the 2012 codes. This change would also ensure that appendices A and B use the same version of NAICS. Finally, the 2017 NAICS codes are used by BLS for the SOII data that OSHA is using for this rulemaking. While CWS stated that using the 2017 codes when the 2022 codes have already been released will cause confusion (Docket ID 0058), OSHA notes that both appendices are based on SOII data from BLS, and that no SOII data using the 2022 NAICS codes are currently available. SOII data for 2022 will not be available until November 2023. Thus, it is not possible for OSHA to base appendix A or B on SOII data that use the 2022 NAICS codes, even though the 2022 codes are the most recent ones available.

OSHA has also decided not to update appendix A using more recent SOII data. As discussed in the preamble to the proposed rule, it took several years for the regulated community to understand which industries were and were not required to submit information, and such misunderstandings could result in both underreporting and overreporting. OSHA has determined that changing the covered industries, by changing the data that forms the basis for the NAICS on appendix A, would result in additional confusion for the regulated community that is not warranted at this time. Moreover, three of the industries that would be removed from appendix A if OSHA based that appendix on updated data are also listed in appendix B, indicating that they remain hazardous under other measures. Finally, as noted above, OSHA agrees with interested parties who commented that requiring information to be submitted from all large establishments will help blunt the effect of using the older SOII data in determining which NAICS will be included on appendix A.

The final appendix A to subpart E of part 1904 (Designated industries for § 1904.41(a)(1)(i) Annual electronic submission of information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses by establishments

with 20–249 employees in designated industries) is as follows:³

NAICS	Industry
11	Agriculture, Forestry, Fishing and Hunting.
22	Utilities.
23	Construction.
31–33	Manufacturing.
42	Wholesale Trade.
4413	Automotive Parts, Accessories, and Tire Stores.
4421	Furniture Stores.
4422	Home Furnishings Stores.
4441	Building Material and Supplies Dealers.
4442	Lawn and Garden Equipment and Supplies Stores.
4451	Grocery Stores.
4452	Specialty Food Stores.
4522	Department Stores.
4523	General Merchandise Stores, including Warehouse Clubs and Supercenters.
4533	Used Merchandise Stores.
4542	Vending Machine Operators.
4543	Direct Selling Establishments.
4811	Scheduled Air Transportation.
4841	General Freight Trucking.
4842	Specialized Freight Trucking.
4851	Urban Transit Systems.
4852	Interurban and Rural Bus Transportation.
4853	Taxi and Limousine Service.
4854	School and Employee Bus Transportation.
4855	Charter Bus Industry.
4859	Other Transit and Ground Passenger Transportation.
4871	Scenic and Sightseeing Transportation, Land.
4881	Support Activities for Air Transportation.
4882	Support Activities for Rail Transportation.
4883	Support Activities for Water Transportation.
4884	Support Activities for Road Transportation.
4889	Other Support Activities for Transportation.
4911	Postal Service.
4921	Couriers and Express Delivery Services.
4922	Local Messengers and Local Delivery.
4931	Warehousing and Storage.
5152	Cable and Other Subscription Programming.
5311	Lessors of Real Estate.
5321	Automotive Equipment Rental and Leasing.
5322	Consumer Goods Rental.
5323	General Rental Centers.
5617	Services to Buildings and Dwellings.
5621	Waste Collection.
5622	Waste Treatment and Disposal.
5629	Remediation and Other Waste Management Services.
6219	Other Ambulatory Health Care Services.
6221	General Medical and Surgical Hospitals.
6222	Psychiatric and Substance Abuse Hospitals.
6223	Specialty (except Psychiatric and Substance Abuse) Hospitals.
6231	Nursing Care Facilities (Skilled Nursing Facilities).
6232	Residential Intellectual and Developmental Disability, Mental Health, and Substance Abuse Facilities.
6233	Continuing Care Retirement Communities and Assisted Living Facilities for the Elderly.
6239	Other Residential Care Facilities.
6242	Community Food and Housing, and Emergency and Other Relief Services.
6243	Vocational Rehabilitation Services.
7111	Performing Arts Companies.
7112	Spectator Sports.
7121	Museums, Historical Sites, and Similar Institutions.
7131	Amusement Parks and Arcades.
7132	Gambling Industries.
7211	Traveler Accommodation.
7212	RV (Recreational Vehicle) Parks and Recreational Camps.
7223	Special Food Services.
8113	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance.
8123	Drycleaning and Laundry Services.

³ As noted in the NPRM, OSHA proposed to remove NAICS 7213, Rooming and Boarding Houses, from appendix A (see 87 FR 18536, n.7). Employers in NAICS 7213 are not required to routinely keep OSHA injury and illness records, per

the part 1904 non-mandatory appendix A to subpart B. This NAICS industry group was mistakenly included in appendix A to subpart E when OSHA published its 2016 final rule (see 81 FR 29642). OSHA received no comments objecting to the

removal of NAICS 7213 from appendix A to subpart E and thus has excluded this industry group from the final version of this appendix.

B. Section 1904.41(a)(2)—Annual Electronic Submission of OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 301 Injury and Illness Incident Report by Establishments With 100 or More Employees in Designated Industries

Section 1904.41(a)(2) of the final rule requires establishments that (1) had 100 or more employees at any point during the previous calendar year and (2) are classified in one of the industries listed in appendix B to subpart E of part 1904 to electronically submit certain information from their Forms 300 and 301 to OSHA or OSHA's designee. Data from the 300 and 301 forms must be submitted annually, for the previous calendar year, by March 2 (§ 1904.41(c)). The only change from the proposed rule is the deletion of the proposed rule's reference to Form 300A. That reference has been deleted from this provision because the requirements for establishments to submit Form 300A are contained in § 1904.41(a)(1)(i) and (ii) in this final rule. Comments related to the submission of Form 300A are discussed in that section. Appendix B has also changed from the proposal. Specifically, OSHA has added six industries to appendix B. All six of the industries added to appendix B have been part of appendix A since appendix A's creation in 2016.

As discussed in Section I.C, Regulatory History, in 2016, OSHA issued a final rule that required establishments with 250 or more employees that are routinely required to keep injury and illness records under part 1904 to electronically submit information from their 300 and 301 forms to OSHA once a year. However, OSHA never collected that Form 300 and 301 data, and in 2019, it issued a final rule that removed the requirement for these establishments to electronically submit that information to OSHA.

As noted above, in this rulemaking, OSHA re-proposed a requirement for certain establishments to submit information from their 300 and 301 forms to OSHA annually. The proposed provision in this rulemaking differed from the 2016 final rule in that the proposed provision would apply to establishments that (1) had 100 or more employees (rather than 250 or more employees, as in the 2016 final rule) and (2) are classified in an industry listed in appendix B to subpart E of part 1904 (rather than all industries which are required by part 1904 to keep records,

as in the 2016 rule). OSHA received a wide range of comments on the proposed provision. The issues related to these comments are addressed below.

1. Covered Establishments and Industries

Like the proposed rule, § 1904.41(a)(2) of the final rule requires establishments that had 100 or more employees at any time during the previous calendar year, and that are in an industry listed in final appendix B to subpart E, to electronically submit certain information from their Form 300 and 301 to OSHA or OSHA's designee once a year. As discussed in more detail below, under final paragraph 1904.41(c), employers subject to the reporting requirement in § 1904.41(a)(2) must submit all of the required information to OSHA or OSHA's designee by March 2 of the year after the calendar year covered by the forms.

As discussed above, in 2016, OSHA issued a final rule that required all establishments with 250 or more employees in all industries routinely required to keep part 1904 injury and illness records to electronically submit information from their 300 and 301 forms to OSHA once a year. In that rulemaking, OSHA estimated that establishments with 250 or more employees covered by the submission requirement would report 713,397 injury and illness cases each year. However, the 300 and 301 data submission requirements from the 2016 final rule were never fully implemented, and OSHA never collected 300 and 301 data electronically from covered employers. In 2019, OSHA issued a final rule that removed the requirement for the annual electronic submission of 300 and 301 data to OSHA.

In the NPRM in this rulemaking, OSHA explained that in developing the requirement for establishments with 100 or more employees to electronically submit data from their OSHA Form 300 and 301, OSHA sought to balance the utility of the information collection for enforcement, outreach, and research, on the one hand, and the burden on employers to provide the information to OSHA, on the other hand (see 87 FR 18543). To achieve this balance in the proposed rule, OSHA analyzed five years of injury and illness Form 300A summary data collected through OSHA's ITA. OSHA examined combinations of establishment size and industry hazardousness that, like the 2016 final rule, would provide the agency with information on roughly

750,000 cases of injuries and illnesses per year—roughly the same burden as the case-specific requirement in the 2016 final rule. Based on this analysis, OSHA proposed a reporting requirement for establishments with 100 or more employees in 4-digit NAICS (2017) industries that:

1. had a 3-year-average Total Case Rate (TCR) in the BLS SOII for 2017, 2018, and 2019, of at least 3.5 cases per 100 full-time-equivalent employees, and

2. were included in proposed appendix A to subpart E. (All of the industries in proposed appendix B were also in appendix A).

The proposed rule listed the designated industries in proposed appendix B to subpart E.

OSHA proposed one exception to the above criteria, for the United States Postal Service (USPS), which is the only employer in NAICS 4911 Postal Services. Under the Postal Employees Safety Enhancement Act (Pub. L. 105–241), OSHA treats USPS as a private sector employer for purposes of occupational safety and health, and USPS establishments with 20 or more employees have been required to electronically submit 300A information to OSHA. However, BLS does not include USPS in the SOII. Using the 2017, 2018, and 2019 data submitted by USPS to the ITA, OSHA was able to calculate a TCR of 7.5 for NAICS 4911. Therefore, OSHA included NAICS 4911 in proposed appendix B to subpart E.

Also, in the preamble to the proposed rule, OSHA explained that the agency believed TCR, which represents the number of work-related injuries and illnesses per 100 full-time-employees during a one-year period, was the appropriate rate to use for determining the list of industries in proposed appendix B to subpart E because covered establishments would be required to electronically submit information to OSHA on all of their recordable cases, not just cases that resulted in days away from work, job restriction, or transfer. OSHA explained in the preamble that, in 2020, OSHA received submissions to the ITA of Form 300A data for 2019 from 46,911 establishments that had 100 or more employees and were in one of the industries listed in proposed appendix B to subpart E, accounting for 680,930 total recordable cases and a TCR of 3.6.

The designated industries in proposed appendix B to subpart E were as follows:

PROPOSED APPENDIX B

2017 NAICS code	2017 NAICS title
1111	Oilseed and grain farming.
1112	Vegetable and melon farming.
1113	Fruit and tree nut farming.
1114	Greenhouse, nursery, and floriculture production.
1119	Other crop farming.
1121	Cattle ranching and farming.
1122	Hog and pig farming.
1123	Poultry and egg production.
1129	Other animal production.
1141	Fishing.
1151	Support activities for crop production.
1152	Support activities for animal production.
1153	Support activities for forestry.
2213	Water, sewage and other systems.
2381	Foundation, structure, and building exterior contractors.
3111	Animal food manufacturing.
3113	Sugar and confectionery product manufacturing.
3114	Fruit and vegetable preserving and specialty food manufacturing.
3115	Dairy product manufacturing.
3116	Animal slaughtering and processing.
3117	Seafood product preparation and packaging.
3118	Bakeries and tortilla manufacturing.
3119	Other food manufacturing.
3121	Beverage manufacturing.
3161	Leather and hide tanning and finishing.
3162	Footwear manufacturing.
3211	Sawmills and wood preservation.
3212	Veneer, plywood, and engineered wood product manufacturing.
3219	Other wood product manufacturing.
3261	Plastics product manufacturing.
3262	Rubber product manufacturing.
3271	Clay product and refractory manufacturing.
3272	Glass and glass product manufacturing.
3273	Cement and concrete product manufacturing.
3279	Other nonmetallic mineral product manufacturing.
3312	Steel product manufacturing from purchased steel.
3314	Nonferrous metal production and processing.
3315	Foundries.
3321	Forging and stamping.
3323	Architectural and structural metals manufacturing.
3324	Boiler, tank, and shipping container manufacturing.
3325	Hardware manufacturing.
3326	Spring and wire product manufacturing.
3327	Machine shops; turned product; and screw, nut, and bolt manufacturing.
3328	Coating, engraving, heat treating, and allied activities.
3331	Agriculture, construction, and mining machinery manufacturing.
3335	Metalworking machinery manufacturing.
3361	Motor vehicle manufacturing.
3362	Motor vehicle body and trailer manufacturing.
3363	Motor vehicle parts manufacturing.
3366	Ship and boat building.
3371	Household and institutional furniture and kitchen cabinet manufacturing.
3372	Office furniture manufacturing.
4231	Motor vehicle and motor vehicle parts and supplies merchant wholesalers.
4233	Lumber and other construction materials merchant wholesalers.
4235	Metal and mineral merchant wholesalers.
4244	Grocery and related product merchant wholesalers.
4248	Beer, wine, and distilled alcoholic beverage merchant wholesalers.
4413	Automotive parts, accessories, and tire stores.
4422	Home furnishings stores.
4441	Building material and supplies dealers.
4442	Lawn and garden equipment and supplies stores.
4451	Grocery stores.
4522	Department stores.
4523	General merchandise stores, including warehouse clubs and supercenters.
4533	Used merchandise stores.
4543	Direct selling establishments.
4811	Scheduled air transportation.
4841	General freight trucking.
4842	Specialized freight trucking.
4851	Urban transit systems.
4852	Interurban and rural bus transportation.

PROPOSED APPENDIX B—Continued

2017 NAICS code	2017 NAICS title
4854	School and employee bus transportation.
4859	Other transit and ground passenger transportation.
4871	Scenic and sightseeing transportation, land.
4881	Support activities for air transportation.
4883	Support activities for water transportation.
4911	Postal Service.
4921	Couriers and express delivery services.
4931	Warehousing and storage.
5322	Consumer goods rental.
5621	Waste collection.
5622	Waste treatment and disposal.
6219	Other ambulatory health care services.
6221	General medical and surgical hospitals.
6222	Psychiatric and substance abuse hospitals.
6223	Specialty hospitals.
6231	Nursing care facilities.
6232	Residential intellectual and developmental disability, mental health, and substance abuse facilities.
6233	Continuing care retirement communities and assisted living facilities for the elderly.
6239	Other residential care facilities.
6243	Vocational rehabilitation services.
7111	Performing arts companies.
7112	Spectator sports.
7131	Amusement parks and arcades.
7211	Traveler accommodation.
7212	RV parks and recreational camps.
7223	Special food services.
6239	Other residential care facilities.
6243	Vocational rehabilitation services.
7111	Performing arts companies.
7112	Spectator sports.
7131	Amusement parks and arcades.
7211	Traveler accommodation.
7212	RV parks and recreational camps.
7223	Special food services.

a. The Size Threshold for Submitting Information From OSHA Forms 300 and 301

Like the proposed rule, § 1904.41(a)(2) of the final rule requires establishments in industries listed in appendix B to subpart E with 100 or more employees to electronically submit certain information from their 300 and 301 forms to OSHA once a year. The size criterion of 100 or more employees is based on the total number of employees at an establishment during the previous calendar year. All individuals who are “employees” under the OSH Act are counted in the total. The count includes all full-time, part-time, temporary, and seasonal employees. For businesses that are sole proprietorships or partnerships, the owners and partners would not be considered employees and would not be counted. Other examples of individuals who are not considered to be employees under the OSH Act are unpaid volunteers and family members of farm employers (see 66 FR 5916, 6038).

In the preamble to the proposed rule, OSHA specifically requested comment on whether the threshold of 100 or more employees was the appropriate size criterion for the requirement to

electronically submit data from the OSHA Form 300, 301, and 300A. OSHA also asked whether a different size criterion would be more appropriate (see 87 FR 18546).

OSHA received a number of comments on the 100-or-more-employee criterion as to the submission of OSHA Forms 300 and 301. Some commenters supported the 100-or-more threshold (e.g., Docket IDs 0040, 0048, 0049, 0051, 0054, 0064, 0067, 0073, 0080, 0083, 0089, 0092, 0093). For example, the Council of State and Territorial Epidemiologists stated that setting the threshold at 100 employees will allow OSHA to receive more detailed information from the 300/301 forms on the nature and circumstances of injuries and illnesses (Docket ID 0040). Also, the International Union of Painters and Allied Trades/AFL–CIO commented that while they would have preferred to see the threshold for large establishments dropped even further, they recognized that the reduction from 250 to 100 from the 2016 final rule is significant and will assist their industry and others in capturing additional data (Docket ID 0073).

The National Nurses Union commented, “An OSHA rule requiring reporting from establishments with 100 or more employees is a superior threshold to the 250-employee threshold. As an example, if the establishment threshold was 250 employees, 299 hospitals in California would have had to comply with electronic reporting requirements in 2021, covering over 378,000 hospital employees. Applying a reporting rule to establishments with 100 or more employees would add an additional 73 hospitals and protect nearly 12,017 additional hospital employees in California alone. This is a significant increase in the data available on workplace hazards” (Docket ID 0064). Additionally, the Communication Workers of America commented, “We support OSHA’s proposal to be inclusive of more workplaces by changing the definition of a “large” establishment to those with 100 or more employees, rather than 250 employees. We support large establishments submitting certain information from all three recordkeeping forms. . . .” (Docket ID 0092).

Other commenters opposed or questioned the 100-or-more employee threshold (*e.g.*, Docket IDs 0030, 0050, 0071, 0076, 0087, 0094). Of those commenters who opposed the proposed threshold, most argued that OSHA should set the threshold higher than 100 employees. For example, the Employers E-Recordkeeping Coalition (Coalition) commented that, to the extent employers in industries designated in appendix B are required to submit information from their OSHA Form 300, 301, and 300A, such a requirement should apply to employers with 250 or more employees, not employers with 100 or more employees. The Coalition asserted that, “OSHA does not appear to provide any rationale for lowering the threshold of what it considers to be “larger employers” from those with 250 or more” (Docket ID 0087). Similarly, the National Propane and Gas Association (NPGA) commented that OSHA does not explain its rationale for lowering the size threshold to 100 employees (Docket ID 0050).

OSHA agrees with commenters who supported the proposed 100-or-more-employee threshold and disagrees with commenters who stated that the employee threshold should be higher than 100 or more employees (*e.g.*, 250 or more employees). Increasing the threshold would reduce the number of establishments required to electronically submit information from their 300 and 301 forms, as well as decrease the number of injury and illness case reports collected by the agency. For example, increasing the size threshold from 100 or more employees to 250 or more employees would reduce the number of establishments required to electronically submit 300/301 data by 67 percent (*i.e.*, from 52,092 establishments to 17,106 establishments). Likewise, raising the threshold from 100 or more employees to 250 or more employees would reduce the number of reported injury and illness cases by 32 percent (*i.e.*, from 766,257 cases to 523,562 cases). This reduction in the amount of collected information would significantly limit OSHA’s ability to identify and target hazardous occupations and workplaces. Also, a reduction in the amount of collected information would adversely impact the benefits (discussed elsewhere) of making this information available to employees, the public, and other interested parties. OSHA is concerned that an increase in the employee threshold, along with the corresponding reduction in publicly available injury and illness information, will hinder efforts to prevent

occupational injuries and illnesses in the future.

Moreover, the question is more complex than merely whether to “increase” or “decrease” the establishment-size threshold, because the scope of industries required to submit the Form 300 and 301 data has also changed between the 2016 rule and this one. Under the 2016 final rule, all establishments that (1) had 250 or more employees at any time during the previous calendar year, and (2) were required to keep records pursuant to part 1904 were required to submit Forms 300 and 301. In contrast, in this rulemaking, OSHA proposed requiring establishments with 100-or-more employees to submit only if they are classified in one of the high-hazard industries listed in appendix B. This approach—lowering the establishment-size threshold to capture enough workplaces and cases to allow appropriate targeting and analysis while focusing in on particularly hazardous industries—is fully distinguishable from the agency’s approach in 2016. OSHA’s approach in this rulemaking focuses on higher hazard industries and provides the agency with information on more establishments, as compared to the number of establishments which would have been required to submit their Forms 300 and 301 information under the 2016 final rule. The increase in the number of establishments required to submit information, relative to the 2016 final rule, will allow OSHA to identify more places where intervention will be beneficial, including targeting its compliance assistance efforts.

Other interested parties recommended that OSHA conduct additional analysis to determine which establishments should be required to electronically submit Form 300/301 data to OSHA. For example, the American Industrial Hygiene Association (AIHA) commented, “There should be an analysis of the impact of any company size selected to report electronically. There are at least two considerations here: (1) The number of responses that will be received if the threshold is lowered to 100 (there is also a question of whether OSHA can manage an associated increase in reports); and (2) Most companies in the U.S. are small businesses and new regulations such as this can have an indirect impact on them. Will companies of this size have the capability and IT expertise to participate in electronic reporting? OSHA should conduct a thorough analysis before imposing new reporting requirements on small businesses.” (Docket ID 0030). The Sheet Metal & Air Conditioning Contractors’ National

Association submitted similar comments (Docket ID 0046).

OSHA agrees with AIHA that these factors are important in determining the appropriate threshold for data submission and considered them in setting the threshold. As to the first consideration noted by AIHA, the number of responses, as noted above, OSHA estimates that 52,092 establishments will be required to electronically submit Form 300/301 data each year pursuant to § 1904.41(a)(2) of the final rule. OSHA further estimates that those establishments would annually submit 766,257 injury and illness cases. In choosing the proposed threshold, OSHA sought to balance the utility of the information collection for enforcement, outreach, and research, on the one hand, and the burden on employers to provide the information to OSHA, on the other hand. And OSHA expects that the 100-employee threshold will be an easy threshold for employers to understand and keep track of. Further, as discussed in Section III.B. of this Summary and Explanation, OSHA has determined that it is capable of managing, analyzing, and utilizing the data it will receive pursuant to this requirement.

As to AIHA’s second factor, whether establishments with 100 or more but fewer than 250 employees have the capability and IT expertise to participate in electronic reporting, OSHA has also determined that such establishments are capable of submitting these reports to OSHA. Significantly, because the industries that appear in appendix B are a subset of those in appendix A and the previous version of § 1904.41(a)(2) required all establishments with 20–249 employees which are classified in an industry listed in appendix A to submit information from their Form 300A annually to OSHA, all of the establishments which would be required to submit information from their Forms 300 and 301 to OSHA under the proposal were already required to submit information from their Forms 300A. In other words, the establishments covered under the proposal (and this final rule) already have experience submitting (and thus the ability to submit) such data to OSHA electronically. For more details on this issue, see Section IV, Final Economic Analysis.

OSHA also received comments questioning its preliminary decision to use establishment size as a threshold criterion. For example, the National Safety Council (NSC) supported a risk-based approach, commenting that larger operations are not inherently less safe and that OSHA should move to a risk-

based approach to protect workers. It argued, “OSHA should evaluate factors like the degree of the hazard, the magnitude of exposure (number of workers exposed and duration of exposure), and the relative risk at the site (likelihood of an incident based on current hazards and the level of controls being applied to those hazards and past experience). These data points should govern reporting requirements and guide OSHA inspections, consulting and compliance resources.” (Docket ID 0041).

OSHA agrees that using a risk-based approach to collecting data can be valuable. Indeed, as discussed in Section III.B.14.c in this Summary and Explanation, OSHA anticipates this to be one of the benefits of the data collection for the agency. That is, the data collection will provide OSHA with establishment-specific, case-specific information the agency can use to evaluate risk factors and guide OSHA activities based on risk factors. However, in order to obtain this information, OSHA must first set the criteria for collecting the information, through this final rule. Risk is one of the reasons the agency proposed using a Forms 300 and 301 data collection criteria based on industry hazard level as well as establishment size, *i.e.*, it is reasonable to assume that establishments in industries with higher injury/illness rates are higher-hazard industries with higher risks. As discussed elsewhere in this preamble, the list of higher-hazard industries in final appendix B to subpart E is based on several criteria, including the analysis of average injury and illness rates over several years. OSHA believes this approach represents a practical way of evaluating risks and hazards in specific industries. OSHA also believes it would be difficult to calculate an appropriate employee threshold based on the degree of hazard or the magnitude of exposure at individual establishments, especially when such case-specific data are not now available to the agency. Moreover, OSHA expects that including a numerical threshold of 100 or more employees is easier for employers to understand and provides certainty for the regulated community. The inclusion of a numerical threshold with or without an additional industry criterion is a familiar part of OSHA’s recordkeeping regulations (see, *e.g.*, 29 CFR 1904.1(a)(1); previous 29 CFR 1904.41(a)(1)–(2)). Further, OSHA believes that the 100-employee threshold balances the burden on employers with the benefits to worker safety and health.

Other commenters questioned OSHA’s proposed 100-employee threshold because the agency did not choose that threshold in the 2016 rulemaking. For example, the Coalition pointed out that “OSHA considered a lower threshold of 100 or more employees, and expressly denied that approach in the 2016 rulemaking” (Docket ID 0087). In response to this comment, OSHA notes that the alternative (Alternative E) in the 2013 NPRM (the NPRM which led to the 2016 final rule) to which the Coalition refers differs from the requirement OSHA proposed in this rulemaking. Specifically, with regard to Forms 300 and 301, Alternative E would have required *all* establishments which were required to keep records and had 100 or more employees at any time during the previous calendar year to submit Form 300 and 301 data to OSHA annually (see 78 FR 67264, 67281). However, in this rulemaking, OSHA proposed for only a subset of establishments with 100 or more employees (*i.e.*, those whose industries appear on appendix B) to submit the data. OSHA estimated that it would receive 1,170,000 injury and illness cases with incident report (OSHA Form 301) and Log (OSHA Form 300) data under Alternative E (81 FR 29636). OSHA further estimated that 120,000 establishments would have been required to submit data under the alternative (81 FR 29636). Ultimately, in 2016, OSHA agreed with commenters who stated that reducing the size criterion to 100 would increase the burden on employers with diminishing benefit.

OSHA’s 2016 decision to reject Alternative E was based on the employer burden and benefits under that alternative. As discussed above, under this rule, OSHA estimates that only 52,092 establishments will be required to electronically submit Form 300/301 data each year and those establishments would annually submit only 766,257 injury and illness cases. Thus, an estimated 67,908 fewer establishments will be required to submit data under this rule, as compared to the estimate of those that would have been required to submit under Alternative E in the 2016 final rule, and approximately 403,000 fewer cases are estimated to be submitted than were estimated to have been submitted under that alternative. The number of cases estimated to be submitted under this final rule is similar to that which was estimated to have been required to be submitted under the 2016 final rule (720,000 in 2016). Consequently, OSHA finds that its rejection of Alternative E

in the 2016 rulemaking has no bearing on its decision to use a 100-employee threshold in this rulemaking. In fact, the agency’s finding that it could handle data from 720,000 cases in 2016 actually supports its finding that it can handle a similar number of records in this rulemaking.

The Phylmar Regulatory Roundtable (PRR) objected to OSHA’s proposed 100-or-more-employee threshold for a different reason than the above commenters. Specifically, it maintained that the requirement for establishments with 100 or more employees in certain industries could result in inaccurate or misleading information. In support of this point, it stated that “an establishment with few employees may have a high case rate purely based on numbers which is not reflective of workplace hazards or employer commitment. High injury and illness rates are not an automatic indication that the company or establishment is operating an unsafe environment” (Docket ID 0094).

OSHA disagrees with PRR’s assertion about the 100-or-more employee threshold resulting in misleading information. While a small number of injuries or illnesses could have a disproportionate effect on incidence rates in an establishment with a small number of employees, this is unlikely in larger establishments with 100 or more employees. Incidence rate of injuries and illnesses are computed from the following formula: Incidence rate per 100 full-time employees = (Number of injuries and illnesses × 200,000) / Employee hours worked. The 200,000 figure in the formula represents the number of hours 100 employees working 40 hours per week, 50 weeks per year would work, and provides the standard base for calculating incidence rate for an entire year. Mathematically, the effect of a small change in the numerator (number of injuries and illnesses × 200,000) on the incidence rate becomes smaller as the denominator (employee hours worked) becomes larger, and the more employees there are, the larger the denominator will tend to be. Two recordable injuries or illnesses instead of one, at an establishment with 20 full-time employees, would increase the TCR from 5.0 to 10.0; in contrast, at an establishment with 100 full-time employees, the TCR would only increase from 1.0 to 2.0. As discussed above, the TCR threshold for industry inclusion in Appendix B is 3.5; an establishment with 100 full-time employees would have to have at least 4 recordable injuries in a year to exceed this threshold. In addition, as discussed

elsewhere, OSHA plans to publish narrative information from the Form 300 and 301 (after identifying and removing information that could reasonably be expected to identify individuals directly), which will enable the users of the data to determine the relevance of the data. In fact, OSHA believes that the inclusion of more information about the specific cases (rather than the summary information from Forms 300A) will mitigate against potential misunderstandings, because the public can use that information to determine the circumstances that led to the injury or illness (*e.g.*, through showing that a particular injury or illness occurred for a reason other than a hazard in the work environment). This is further discussed below in Section III.B.4 of this Summary and Explanation, which also explains additional steps OSHA plans to take to provide information to the public to aid their understanding of the data.

OSHA also received a comment from NPGA opposing the proposed 100-or-more employee threshold because it is not included in any other portion of OSHA's recordkeeping regulations (Docket ID 0050). NPGA's statement is accurate: OSHA's proposal in this rulemaking is the first time OSHA has specifically tied a part 1904 recordkeeping requirement to a 100-or-more-employee threshold. However, OSHA does not think the presence of a new threshold is problematic. As stated above, a 100-employee threshold is easy for establishments to understand and balances OSHA's need for the data with the burden on establishments. Moreover, OSHA expects that establishments are familiar with this threshold from their experience with other Federal standards. For example, private sector employers with 100 or more employees are required to file an EEO-1 Component 1 Report with the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, every year (see 42 U.S.C. 2000e-8(c); 29 CFR 1602.7-1.14; 41 CFR 60-1.7(a)).

Other commenters maintained that the 100-employee threshold was not inclusive enough. For example, the AFL-CIO commented that if OSHA did not adopt its recommendation to require all establishments with 100 or more employees to submit data from all their recordkeeping forms (rather than establishments with 100 or more employees which are also classified in an industry listed in appendix B) (comment and OSHA's response discussed below), then OSHA should adopt the provisions contained in the 2016 final rule (*i.e.*, require all

establishments with 250 or more employees to submit data from Forms 300A, 300, and 301). It argued that "[a]t a minimum" OSHA should require establishments with 250 or more employees to submit data from the Forms 300A and 300 (Docket ID 0061). The United Food and Commercial Workers International Union submitted a similar comment (Docket ID 0066).

OSHA disagrees with commenters who suggested that OSHA should adopt a threshold below 100 or more employees or eliminate the threshold completely. OSHA acknowledges commenters who stated that a lower threshold would result in an increase in the amount of injury and illness data collected by the agency. However, the agency notes that any reduction in the employee size threshold would increase the number of establishments required to electronically submit Form 300 and 301 data, and this would result in an increased burden to smaller employers. Again, the agency chose the 100-employee threshold by balancing the utility of the information collection for enforcement, outreach, and research, on the one hand, and the burden on employers to provide the information to OSHA, on the other hand. The 100-employee threshold will provide enough case-specific information, about enough establishments, for wide-spread targeted outreach and enforcement while minimizing the burden on employers, especially smaller employers, as required by Section 8(d) of the OSH Act. In addition, OSHA notes that the 100-or-more-employee threshold is appropriate since larger establishments typically have more resources to support electronic submission of case-specific injury and illness information to OSHA. OSHA also finds that the 100-or-employee threshold is appropriate because there is a lesser risk of employee reidentification from information published regarding larger establishments. (For more information on this issue, see the discussion of indirect identification in Section III.B of this Summary and Explanation.)

In summary, after considering the entire record on the issue of the size threshold for submitting OSHA Form 300 and 301 data, OSHA agrees with commenters who supported the 100-or-more-employee threshold for determining which establishments must electronically submit information from their 300 and 301 forms. The 100-or-more-employee threshold will allow OSHA to strike an appropriate balance between the total number of establishments required to submit case-specific data to OSHA and the total

number of injury and illness cases collected, on the one hand, with burden on employers (especially smaller employers) on the other. As discussed above, as well as in Section IV, Final Economic Analysis, OSHA believes that establishments with 100 or more employees have the necessary personnel and IT resources to comply with the electronic submission requirement in final § 1904.41(a)(2). By setting the threshold at 100 or more employees and limiting the covered industries to the higher hazard industries listed in final appendix B to subpart E, the agency is focusing its data collection efforts in a more targeted manner. This approach is consistent with OSHA's stated intention in the preamble to the proposed rule to balance the utility of the information collection for enforcement, outreach, and research, on the one hand, and the burden on employers to provide the information to OSHA, on the other hand.

Accordingly, like the proposed rule, final § 1904.41(a)(2) requires establishments with 100 or more employees that are in the designated industries listed in appendix B to subpart E to electronically submit data from their 300 and 301 forms to OSHA once a year.

b. The Criteria for Determining the Industries in Appendix B to Subpart E

As stated above, OSHA proposed to require establishments with 100 or more employees at any time during the previous calendar year to annually submit their Form 300 and 301 if they are in an industry listed in proposed appendix B to subpart E. The criteria for including the designated industries in proposed appendix B to subpart E was based on a three-year average rate of Total Case Rate (TCR) in the BLS SOII for 2017, 2018, and 2019, of at least 3.5 cases per 100 full-time-employees. In the preamble to the proposed rule, OSHA requested comment on whether TCR is the appropriate method for determining the list of industries in proposed appendix B to subpart E. In addition, OSHA specifically asked, "Is Total Case Rate (TCR) the most appropriate incidence rate to use for proposed appendix B to subpart E, or would the Days Away Restricted or Transferred (DART) rate be more appropriate?" (87 FR 18546).

The TCR represents the number of work-related injuries and illnesses per 100 full-time-employees during a one-year period. It is based on all work-related injuries and illnesses recorded on the OSHA 300 Log resulting in death, days away from work, work restriction or transfer to another job, and other

recorded cases (e.g., cases resulting in medical treatment beyond first aid). On the other hand, the DART rate is based only on the number of work-related injuries and illnesses recorded on the OSHA 300 Log resulting in days away from work, restricted work activity or transfer to another job.

A number of commenters opined on the appropriate criteria for determining the industries designated in appendix B to Subpart E. Many of these commenters supported the proposed use of the TCR (e.g., Docket IDs 0030, 0040, 0047, 0048, 0054, 0064, 0066, 0084, 0089). For example, AIHA indicated its support for using the TCR in the final rule, adding that, “All incident rate metrics suffer from inaccuracy due to a lack of understanding of complex and intricately nuanced recording rules. The TCR is the most widely used and least misunderstood of these measures in the United States” (Docket ID 0030). Also, the National Nurses Union stated that TCR is a more appropriate metric than a DART-rate-only metric because it includes all types of recorded injuries and illnesses, not just those where an employer gave an injured or ill employee “time to rest and recover” (Docket ID 0064).

Other commenters argued against OSHA’s proposed use of the TCR and for the use of a DART-rate metric. For example, the International Bottled Water Association (IBWA) and the Coalition asserted that, per OSHA’s preamble, “[a]ppendix B is meant to reflect employers in higher hazard industries. While a higher DART may reflect such industries to some extent, a higher TCR does not. This is because the TCR captures relatively minor incidents—those that do not result in days away from work, job restriction, or transfer” (Docket IDs 0076, 0087). Both of these commenters expressed concern that “for example, under the proposal, employers in industries with very few or no ‘major’ incidents (*i.e.*, those that result in days away from work, job restriction, or transfer), but a larger number of ‘minor’ incidents will unfairly be included in [a]ppendix B” (Docket IDs 0076, 0087). On the other hand, other commenters, such as AIHA, argued against the use of the DART rate (Docket ID 0030).

Other commenters suggested other possible metrics in their comments. For example, NIOSH commented, “TCR may be the most appropriate single criterion for selection of industries; however, NIOSH believes that DART (Days Away, Restricted, or Transferred) and fatality rates are also valuable for determining the magnitude of injury risks in specific industries. There are

two basic reasons why some industries would rank differently based on TCR than they would on DART or fatality rate. First, the nature of work differs among industries and can result in different ratios of mild to severe injuries. While the TCR represents mostly relatively mild injuries, the severest injuries are the most important targets of prevention and account for a very large share of the costs of injuries in the workers’ compensation system. Second, some industries may more fully report injuries than others and so tend to have a higher ratio of TCR to DART or fatality rate.” (Docket ID 0035, Attachment 2). The International Brotherhood of Teamsters concurred with NIOSH’s comment (Docket ID 0083). AIHA offered a fourth possible metric: cases with days away, observing, “One other candidate, cases with days away, is perhaps the most intuitive metric and most closely (though not exactly) aligned with workers’ compensation systems” (Docket ID 0030).

Finally, AFL–CIO “urge[d] OSHA to require all large establishments with 100 or more employees, currently subject to recordkeeping standards, to electronically report detailed injury and illness information . . . as the value of these data has been thoroughly explained by the agency and record of evidence in the 2016 final rule” (Docket ID 0061). In other words, AFL–CIO asked OSHA to revise the proposed provision to eliminate the requirement that only those establishments in industries listed in appendix B would be required to report. In AFL–CIO’s recommendation, the only limitations would be establishment size and being routinely required to keep injury and illness records under part 1904.

Having reviewed the information in the record, OSHA rejects AFL–CIO’s suggestion to require all large establishments with 100 or more employees (without regard to industry hazardousness) to submit information. In the provisions related to the electronic submission of Forms 300 and 301, OSHA has decided that it is appropriate to focus on the most hazardous industries. Such a focus is a regular feature of OSHA’s recordkeeping regulations. For example, since 1982, OSHA has exempted some low-hazard industries from maintaining injury and illness records on a regular basis (see <https://www.osha.gov/enforcement/directives/cpl-02-00-135>). This partial exemption for low-hazard industries currently appears in 29 CFR 1904.2. Similarly, since the 2016 final rule, OSHA has only required establishments with 20 or more employees but fewer

than 250 employees to submit information from Form 300A if those establishments are classified in an industry listed in appendix A to subpart E to part 1904, *i.e.*, if they are higher hazard industries.

Focusing some recordkeeping requirements on higher hazard industries has the benefit of enabling OSHA to better focus its attention where it might have the highest impact, and lessens the burden on less hazardous industries. OSHA finds that such a balance is appropriate. Moreover, the agency will continue receiving information from Form 300A from all recordkeeping establishments with 250 or more employees. If the information from submitting establishments’ Forms 300A, or from the BLS SOII and/or Census of Fatal Occupational Injuries (CFOI), were to indicate that industries not listed on appendix B were becoming more hazardous, OSHA could consider engaging in notice-and-comment rulemaking to update appendix B. Further discussion on the possibility of updating appendix B appears below in this section of the Summary and Explanation.

As to the appropriate criteria, OSHA has decided to use several data sources to populate the list of higher hazard industries in final appendix B to subpart E. Specifically, OSHA finds that the TCR, the DART rate, and the fatality rate are all important methods of identifying higher hazard industries. As noted by some commenters, while it is widely used in the United States and includes all types of recorded injuries and illnesses, the TCR also includes data concerning less severe injuries and illnesses (*i.e.*, cases that resulted in medical treatment beyond first aid but did not involve loss of consciousness and/or did not result in restricted work or transfer to another job, days away from work, or death). OSHA still considers the TCR to be an appropriate rate to use for determining the list of industries in appendix B to subpart E, especially since covered establishments will be required to electronically submit information to OSHA on all their recordable cases (*i.e.*, total cases). However, OSHA also agrees with commenters who suggested that information specifically about severe injuries and illnesses is a reliable indication of whether a specific industry is a high hazard industry. As NIOSH noted, the nature of work differs among industries, and this can result in different ratios of less severe and more severe injuries and illnesses.

Accordingly, OSHA has decided to use the DART rate and the fatality rate in the BLS CFOI in addition to the TCR.

Adding the DART rate, which measures severe injuries and illnesses resulting in days away from work, restricted work activity, or transfer to another job, will ensure that industries with higher rates of severe injuries are included, while using the TCR will ensure that OSHA is capturing industries with higher injury and illness rates overall (including less severe injuries and illnesses and, as discussed by NNU, more serious injuries and illnesses in establishments where an employer does not give the injured or ill employee “time to rest and recover”) (see Docket ID 0084).

Adding the fatality rate will also be helpful because fatalities are more consistently reported than other injuries and illnesses. CFOI produces comprehensive counts of workplace fatalities in the United States. It is a Federal-State cooperative program that has been implemented in all 50 States and the District of Columbia since 1992. To compile counts that are as complete and accurate as possible, the census uses multiple sources to identify, verify, and profile fatal worker injuries. CFOI includes specific information about each workplace fatality, including information about occupation and other worker characteristics, equipment involved, and circumstances of the event. All of the information in the CFOI is obtained by cross-referencing the source records, such as death certificates, workers’ compensation reports, and Federal and State agency administrative reports. To ensure that fatalities are work-related, cases are substantiated with two or more independent source documents, or a source document and a follow-up questionnaire. The CFOI fatality rate is based on the number of deaths per 100,000 full-time-or-equivalent employees. Adding the fatality rate from CFOI to the metrics used to determine which industries should report in this final rule allows OSHA to obtain data from industries with low non-fatal injury and illness rates but high fatality rates.

OSHA does not think that the metric offered by AIHA (cases with days away, or DAFW) is appropriate for this rulemaking. The DAFW rate is a subset of the DART rate. It does not include cases in which an ill or injured employee continues to work but is engaged in restricted activities or job transfer. This is obviously more possible in some establishments and industries than in others. For example, there might be no alternative for restricted work or job transfer at a nursing care facility for a patient-care worker who is unable to perform their regular job duties due to an injury; thus, the injury would result

in a DAFW case. In contrast, it might be possible to temporarily reassign an injured production-line worker to a different job on the production line that accounts for the restrictions due to the injury; thus, the injury would not result in a DAFW case. However, both injuries—the days away from work case, as well as the restricted activities/job transfer case—would be DART cases. Thus, the DART rate is a better indicator of hazardousness across establishments and industries.

Given the concerns raised by commenters about specific injury and illness rates, and in order to accurately identify higher hazard industries, OSHA decided to use several factors in determining the list of industries in final appendix B to subpart E. In addition to using the TCR, OSHA analyzed industry hazardousness based on the DART rate and the fatality rate. OSHA believes that using this approach more comprehensively identifies higher hazard industries. The agency also finds that this combination of factors furthers the agency’s intention of balancing the number of establishments covered and injury and illness cases reported with the burden on employers, as well as not expanding the submission requirement beyond establishments that are already required to report information from the Form 300A. OSHA again notes that all of the industries in final appendix B to subpart E are also included in final appendix A to subpart E.

c. Cut-Off Rates for Determining the Industries in Appendix B to Subpart E

Having determined the appropriate metrics (TCR, DART, and fatality rates), OSHA now turns to the appropriate cut-off rates for selecting the designated industries in appendix B to subpart E using the chosen metrics. As discussed above, OSHA proposed including those industries which had a 3-year-average rate of total recordable cases (Total Case Rate, or TCR) in the BLS SOII for 2017, 2018, and 2019, of at least 3.5 cases per 100 full-time-equivalent employees. Some commenters argued that the proposed cut-off (3.5 per 100 workers) was too low (e.g., Docket IDs 0054, 0076, 0087). For example, the Employers E-Recordkeeping Coalition (“Coalition”) argued that, whether the DART or TCR rate is used, “OSHA should establish a higher threshold value than it proposes.” The Coalition explained that the proposed threshold TCR value of 3.5 was based on BLS SOII data for 2017, 2018, and 2019, but that “BLS data—specifically data representing the highest rates for cases with days away from work, restricted work activity, or job transfer (DART)—

from the same time period (2017, 2018, 2019) demonstrates that the *lowest* incidence rate was 4.2.” It further observed, “Similarly, even if use of the TCR for purposes of determining those industries that should be included in [a]ppendix B is maintained in the final rule, a higher threshold value should be used. According to BLS data representing highest rates for total cases from the same time period (2017, 2018, 2019), the lowest incidence rate was 6.8. . . . Accordingly, to the extent the TCR is used for purposes of determining those industries that should be included in [a]ppendix B, the threshold value should be set at no less than 6.8.” (Docket ID 0087). IBWA submitted a similar comment (Docket ID 0076). Additionally, Dow Chemical Company argued that OSHA should use a TCR “triggering” rate that is substantially higher than the private industry average for full time equivalent workers (which was 2.8 in 2019 and 2.7 in 2020). Dow explained, “This will reduce the burden on industry sectors who have a TCR at or below private industry average” (Docket ID 0054).

Other commenters suggested that the proposed cut-off of 3.5 was too high (e.g., Docket IDs 0037, 0047, 0048, 0049, 0066, 0069, 0079, 0084). Several commenters urged OSHA to include more industries in appendix B by lowering the cut-off to the three-year national average for private industry. These commenters expressed concern about many hazardous workplaces and high-risk occupations in industries that are above the national average for private industry but below the proposed 3.5 cut-off, including many industries with establishments operated by the nation’s major employers (Docket IDs 0030, 0047, 0048, 0049, 0066, 0069, 0084). For example, the Strategic Organizing Center (SOC) “applaud[ed] OSHA’s decision to lower the employment threshold for report[ing] the 300/301 data . . . [but] urge[d] OSHA to reject the use of such a high rate threshold for the inclusion of the specific industry codes” (Docket ID0079). In support of this recommendation, SOC argued that OSHA had not justified the proposed TCR level other than projecting that it would result in a volume of cases (roughly 750,000) similar to the 2016 rule (Docket ID 0079).

With regard to the appropriate value for triggering the inclusion of industries in appendix B to subpart E, the final rule, like the proposed rule, has a cut-off of 3.5 cases per 100 employees. As reflected in the comments, the 3.5 cut-off value, which OSHA proposed, represents a balance between more

information and more employer burden with a lower cut-off, and less information and less employer burden with a higher cut-off. For example, the cut-offs suggested by the Employers E-Recordkeeping Coalition in their comment (Docket ID 0087) would only result in the submission of an estimated 90,395 cases from 3,087 establishments (using the 6.8 TCR rate taken from BLS table 19SNR01 “Highest incidence rates of total nonfatal occupational injury and illness cases”, 2019) or an estimated 72,143 cases from 3,946 establishments (using the 4.2 DART rate taken from BLS table 19SNR02 “Highest incidence rates of nonfatal occupational injury and illness cases with days away from work, restricted work activity, or job transfer”, 2019).⁴ The Coalition’s proposal would severely restrict the list of industries which would be required to submit data pursuant to this rulemaking, which would, in turn, restrict OSHA’s ability to target its enforcement and compliance assistance efforts beyond that small subset of industries. It would also limit the information available to interested parties for occupational safety and health purposes, *e.g.*, to evaluate occupational safety and health trends and patterns. Consequently, it would drastically decrease the benefits of the rule.

In addition, for this final rule, OSHA has chosen to use a DART rate of 2.25 per 100 employees and CFOI fatality rate of 5.7 deaths per 100,000 full-time-or-equivalent employees) to identify higher hazard industries. Both represent 1.5 times the national average for private industry for the respective rates. OSHA believes that these thresholds, which are well above the national averages for private industry, represent an appropriate cut-off for determining whether a given industry is a higher hazard industry. As discussed below, adding the DART criterion and the CFOI fatality criterion adds 6 industries to Appendix B (3 per criterion) that are below the TCR threshold; this addresses, to some degree, the concerns expressed by commenters about hazardous workplaces that are below the TCR threshold.

Moreover, OSHA projects that the use of these cutoffs will enable it to receive Form 300 and 301 data on approximately 750,000 cases of injuries and illnesses per year. Based on the record of the 2016 rulemaking, OSHA

determined that roughly this amount of cases would provide OSHA and others with sufficient information to make workplaces safer, while not overburdening employers (see 87 FR 18543). Nothing in the record of this rulemaking, or the comments OSHA had received in the 2019 rulemaking, has convinced OSHA that a different balance should be struck in this rule. However, as discussed above, the agency has tailored the collection to industries and establishments where the information would be most useful for improving workplace safety and health.

OSHA only proposed including industries in appendix B if they also appeared in appendix A; establishments with 20 or more employees in industries in appendix A have already been required to electronically submit information from their Form 300A since 2017. OSHA did not receive any comments objecting to this part of the proposal and has decided to retain this requirement in the final rule. However, several interested parties argued that additional appendix A industries should be listed in appendix B.

For example, the AFL-CIO commented that the proposed exclusion for large establishments in certain industries from appendix B, “which further limits the ability to identify trends among workplace hazards in high risk industries,” means that a significant number of industries will not be required to electronically submit OSHA Form 300 and 301 data to OSHA, including all of the utility sectors and almost all of the construction industry[,] as well as a number of other industries with large establishments (Docket ID 0061). The Communications Workers of America commented that appendix B, like appendix A, should include all industries in the manufacturing sector (Docket ID 0092). SOC similarly characterized OSHA’s proposal to limit the requirement to submit Forms 300 and 301 to industries with a TCR of at least 3.5 as a decision to “arbitrarily exclude entire hazardous industries from the revised reporting requirement.” In particular, SOC objected to the exclusion of the hotel industry, which, based on an analysis by the National Employment Law Project, SOC believes is a high hazard industry (Docket ID 0079).

The AFL-CIO also commented that the industry exclusions from appendix B should not be based on BLS SOII data, because the data are an inadequate measure of industry hazardousness. It argued that SOII data, even recent three-year averages, is not an effective way to ensure that high-hazard industries are captured consistently in the data. The

AFL-CIO further asserted that, “[R]elying on these data to create exclusion criteria ignores the known limitations of current workplace injury and illnesses data. Over the last decade, studies have documented that the BLS injury and illness survey fails to capture an estimated 33–69% of work-related injuries. Some of the undercount has been attributed to injuries and illnesses excluded from the BLS survey’s scope and the design of the survey.” (Docket ID 0061).

In response, OSHA notes that there is no express exemption for specific industries in appendix B to subpart E. The list of industries in final appendix B is based on objective injury and illness data indicating that a specific industry is a higher hazard industry. Any exclusion or omission from the list of designated industries in final appendix B is solely the result of a given industry not meeting the higher hazard industry criteria specified above, criteria which have been expanded under this final rule based on public comments. Moreover, OSHA disagrees with SOC’s characterization of its preliminary decisions regarding the industries included on appendix B as “arbitrar[y]” (Docket ID 0079). As stated throughout the preamble to this final rule, in proposing a higher hazard cut-off level, the agency was seeking to balance the utility of the information collection for enforcement, outreach, and research, on the one hand, with the burden on establishments on the other. That is not to say that the agency found that it would be economically infeasible for industries other than those listed on proposed or final appendix B to submit their Form 300 or 301 data. Indeed, no such finding is required here. Rather, OSHA looked to see what amount of information would be useful, considering the number of establishments that would be reporting under the final rule, the number of cases that would be submitted, the agency’s capacity to review such information, and the benefits that would stem from the collection. The agency has determined that at the current time, requiring larger, high hazard establishments to submit their data can make a substantial impact on worker safety and health, and the benefits of making other employers do so as well is less certain. OSHA has decided to focus the rule on the establishments in industries in which additional information has the most promise of addressing serious workplace hazards. Further, OSHA notes that it will continue to receive 300A data from very large establishments (those with 250 or

⁴ See <https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical/supplemental-table-1-2019-national.xlsx> for the TCR table and <https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/soii-summary-historical/supplemental-table-2-2019-national.xlsx> for the DART table.

more employees) in all industries required to keep records under part 1904 and can continue to use those data for targeting purposes as well. OSHA will monitor the data it receives, and in the future, it may consider new notice-and-comment rulemaking to adjust its approach in light of its experience with the data collected under this final rule.

In addition, OSHA disagrees with the comment from the AFL-CIO that BLS SOII data are not a reliable method for measuring industry hazardousness. While BLS and its research partners have conducted multiple studies which indicate that SOII fails to capture some cases, the BLS SOII is an important indicator of occupational safety and health and is the only source of national-level data on nonfatal injuries and illnesses that spans the private sector and State and local governments. Accordingly, OSHA is not making any adjustments to the proposed appendix B industries based on these comments. However, as discussed in more detail below, OSHA notes that the application of the updated criteria for inclusion on appendix B has led to six new industries being added to appendix B. These industries include NAICS 1133, Logging, NAICS 4853, Taxi and Limousine Services, and NAICS 4889, Other Support Activities for Transportation—all industries that AFL-CIO identified as industries with large establishments not included in proposed appendix B that “should be required to submit the injury and illness data they are already required to collect” (Docket ID 0061). Consequently, the final rule responds to AFL-CIO’s comment in part by adding three additional NAICS codes based on the objective criteria in this final rule.

d. Using the Most Current Data To Determine Designated Industries

In the preamble to the proposed rule, OSHA stated that the agency anticipated that more current industry-level injury and illness data from BLS, as well as more establishment-specific injury and illness information from the ITA, would become available. OSHA therefore explained that the agency may rely on the most current data available, as appropriate, for determining the list of industries in appendix B to subpart E. OSHA sought comment from the public on whether the agency should use the most current data when developing the final rule (see 87 FR 18543).

The Phylmar Regulatory Roundtable (PRR) Occupational Safety and Health, OSH Forum commented that while it agrees with the concept that the most up-to-date information is the most accurate and should determine the list

of industries, OSHA should not include any new industries in appendix B to subpart E in the final rule. According to this commenter, doing so would not allow impacted industries the opportunity to comment on such significant changes. Also, PRR recommended that any additions to the list of industries (or sub-sets of industries) in appendix B that result from OSHA analyzing updated data should be conducted through notice and comment rulemaking (Docket ID 0094).

In response, OSHA agrees with PRR that the list of higher hazard industries in appendix B to subpart E should be based on data that was available at the time of the proposed rule. OSHA notes that, although the criteria used for determining the list of higher hazard industries in appendix B has been modified for the final rule, all of the data used to develop those criteria were available at the time of the proposed rule. Specifically, the cut-off threshold used for the TCR rate is based on a 3-year-average from 2017, 2018, and 2019, the cut-off threshold for the DART rate is based on a 3-year-average from 2017, 2018, and 2019, and the cut-off threshold for the fatality rate is based on data from 2019.

Additionally, in the preamble to the proposed rule, OSHA stated that during the 2016 rulemaking, the agency agreed with commenters who stated that the list of designated industries (listed in appendix A at that time) should not be updated each year. OSHA explained that moving industries in and out of the appendix each year would be confusing. OSHA also stated that keeping the same industries in the appendix each year would increase the stability of the system and reduce uncertainty for employers. Accordingly, OSHA did not, as part of the 2016 rulemaking, include a requirement to annually or periodically adjust the list of designated industries to reflect more recent BLS injury and illness data. OSHA also committed that any such revision to the list of designated industries in the future would require additional notice and comment rulemaking (see 87 FR 29641). However, OSHA again raised the issue of periodic updating of the designated industries in appendix B to subpart E in the preamble to the proposed rule in this rulemaking (see 87 FR 18543). Specifically, in Alternative #2, OSHA explained the above information regarding its decision in the 2016 rulemaking, explained that it “could regularly update the list of designated industries in proposed appendix B (industries where establishments with 100 or more employees must submit information

from the Form 300 and 301 as well as the 300A)—for example, every 6 years, to align with the PRA approval periods,” and then welcomed comment on this issue (87 FR 18543).

OSHA received several comments on this issue. In its comments, Dow stated that it did not support the regular updating of the list of designated industries proposed in appendix B. Dow argued, “Revising this list and moving employers in and out would be extremely confusing and introduce unneeded instability into the data collection process. If the list of designated industries in appendix B were to be revised, OSHA must provide notice and a rulemaking comment period” (Docket ID 0054). In contrast, PRR commented that, if OSHA’s assumption that the collection of establishment-specific data will reduce injury and illness rates, then the agency should be able to analyze data for the designated industries and consider updating and removing industries from the appendices (Docket ID 0094).

OSHA agrees with the comments stating that the list of designated industries in appendix B to subpart E should not be updated on a regular basis. As in the 2016 rulemaking, OSHA finds that moving industries in and out of appendix B to subpart E on a periodic basis would be confusing for employers. Employers are less likely to encounter confusion when trying to determine whether their establishments are required to electronically submit data to OSHA if the list of industries in appendix B remains stable; appropriate future adjustments, if any, would be accomplished through notice and comment rulemaking. OSHA also believes that keeping the same industries in appendix B to subpart E will increase the stability of the electronic submission system and increase compliance with the submission requirement. Accordingly, OSHA will not, as part of this rulemaking, include a provision for the regular or periodic updating of the list of industries in appendix B to subpart E.

In making this decision, OSHA acknowledges that industries’ injury and illness rates may change. As PRR commented, OSHA expects that this rulemaking will aid in the decrease in such rates. If OSHA’s ongoing analyses of injury and illness rates show a decrease in injuries and illnesses in particular industries included on appendix B, then OSHA may consider removing those industries from appendix B. Similarly, if OSHA learns that injury and illness rates in industries that are not included on appendix B are

rising, then OSHA may consider adding those industries to appendix B. However, in either case, OSHA would propose any such change via notice-and-comment rulemaking, in part to obviate the confusion mentioned above.

e. Industries Included in Final Appendix B After Applying the Final Criteria, Cut-Off Rates, and Data Sources

Based on the above decisions, final appendix B to subpart E of part 1904 includes industries that:

1. had a 3-year-average rate of total recordable cases (Total Case Rate, or TCR) in the BLS SOII for 2017, 2018, and 2019, of at least 3.5 cases per 100 full-time-equivalent employees, OR

2. had a 3-year-average DART rate in the BLS SOII for 2017, 2018, and 2019 of at least 2.25 cases per 100 full-time-equivalent employees, OR

3. had a fatality rate in the BLS Census of Fatal Occupational Injuries (CFOI) of at least 5.7 deaths per 100,000 full-time-equivalent employees, AND

4. are included in appendix A to subpart E. (All of the industries in appendix B are also in appendix A.)

No industries were removed from appendix B based on these criteria. However, six new industries have been added to appendix B. The new industries are:

- NAICS 1133—Logging (2019 fatality rate of 47.6),

- NAICS 1142—Hunting and Trapping (three-year average DART rate of 3.1),

- NAICS 3379—Other Furniture Related Product Manufacturing (three-year average DART rate of 2.27),

- NAICS 4239—Miscellaneous Durable Goods Merchant Wholesalers (2019 fatality rate of 15.6),

- NAICS 4853—Taxi and Limousine Service (2019 fatality rate of 6.9), and

- NAICS 4889—Other Support Activities for Transportation (three-year average DART rate of 2.4).

The application of the criteria and cut-offs to each industry that was added to appendix B is summarized in the following table:

NEW INDUSTRIES IN FINAL APPENDIX B

2017 NAICS 4-digit	Industry	High TCR	High DART	High fatality rate
1133	Logging	No .....	.....	Yes.
1142	Hunting and Trapping	No	Yes.	.....
3379	Other Furniture Related Product Manufacturing	No	Yes.	.....
4239	Miscellaneous Durable Goods Merchant Wholesalers	No .....	.....	Yes.
4853	Taxi and Limousine Service	No .....	.....	Yes.
4889	Other Support Activities for Transportation	No	Yes.	.....

All of the establishments with 100 or more employees in these newly included industries are also included in appendix A to subpart E, and, therefore, have been required to electronically submit data from their 300A to OSHA once a year since January 1, 2017. Because of their inclusion in appendix A, OSHA finds that each of these newly included industries should have been aware of this rulemaking. Moreover, in the preamble to the proposed rule, OSHA specifically indicated that the criteria for determining higher hazard industries might be modified for the final rule (indeed, OSHA asked for comment on this issue (see, *e.g.*, 87 FR 18543, 18546)). Consequently, OSHA finds that the proposal placed all six of the newly added industries on notice that they could be included in appendix

B in this final rule and, thus, these industries had an opportunity to comment on issues related to that determination.

In the proposed rule, OSHA stated that it was proposing one exception to these criteria, for the United States Postal Service (USPS), which is the only employer in NAICS 4911 Postal Service. OSHA explained BLS does not include USPS in the SOII. However, under the Postal Employees Safety Enhancement Act (Pub. L. 105–241), OSHA treats the USPS as a private sector employer for purposes of occupational safety and health, and establishments in NAICS 4911 (*i.e.*, USPS establishments) with 20 or more employees are currently required to electronically submit Form 300A information to OSHA. Using the 2017, 2018, and 2019 data submitted by

USPS, OSHA calculated a TCR of 7.5 for NAICS 4911. Because this TCR is greater than the proposed 3.5 criterion for designated industries in proposed appendix B, OSHA included NAICS 4911 in proposed appendix B to subpart E. In so doing, OSHA noted that NAICS 4911 was also included in both current and proposed appendix A to subpart E (87 FR 18543).

OSHA did not receive any comments from interested parties regarding the proposed inclusion of USPS in appendix B. Due to the lack of an objection to its inclusion and USPS's high TCR level (as calculated by OSHA), the agency has decided to include USPS in the final version of appendix B.

The final appendix B to subpart E is as follows:

NAICS	Industry
1111	Oilseed and Grain Farming.
1112	Vegetable and Melon Farming.
1113	Fruit and Tree Nut Farming.
1114	Greenhouse, Nursery, and Floriculture Production.
1119	Other Crop Farming.
1121	Cattle Ranching and Farming.
1122	Hog and Pig Farming.
1123	Poultry and Egg Production.
1129	Other Animal Production.
1133	Logging.
1141	Fishing.
1142	Hunting and Trapping.
1151	Support Activities for Crop Production.
1152	Support Activities for Animal Production.

NAICS	Industry
1153	Support Activities for Forestry.
2213	Water, Sewage and Other Systems.
2381	Foundation, Structure, and Building Exterior Contractors.
3111	Animal Food Manufacturing.
3113	Sugar and Confectionery Product Manufacturing.
3114	Fruit and Vegetable Preserving and Specialty Food Manufacturing.
3115	Dairy Product Manufacturing.
3116	Animal Slaughtering and Processing.
3117	Seafood Product Preparation and Packaging.
3118	Bakeries and Tortilla Manufacturing.
3119	Other Food Manufacturing.
3121	Beverage Manufacturing.
3161	Leather and Hide Tanning and Finishing.
3162	Footwear Manufacturing.
3211	Sawmills and Wood Preservation.
3212	Veneer, Plywood, and Engineered Wood Product Manufacturing.
3219	Other Wood Product Manufacturing.
3261	Plastics Product Manufacturing.
3262	Rubber Product Manufacturing.
3271	Clay Product and Refractory Manufacturing.
3272	Glass and Glass Product Manufacturing.
3273	Cement and Concrete Product Manufacturing.
3279	Other Nonmetallic Mineral Product Manufacturing.
3312	Steel Product Manufacturing from Purchased Steel.
3314	Nonferrous Metal (except Aluminum) Production and Processing.
3315	Foundries.
3321	Forging and Stamping.
3323	Architectural and Structural Metals Manufacturing.
3324	Boiler, Tank, and Shipping Container Manufacturing.
3325	Hardware Manufacturing.
3326	Spring and Wire Product Manufacturing.
3327	Machine Shops; Turned Product; and Screw, Nut, and Bolt Manufacturing.
3328	Coating, Engraving, Heat Treating, and Allied Activities.
3331	Agriculture, Construction, and Mining Machinery Manufacturing.
3335	Metalworking Machinery Manufacturing.
3361	Motor Vehicle Manufacturing.
3362	Motor Vehicle Body and Trailer Manufacturing.
3363	Motor Vehicle Parts Manufacturing.
3366	Ship and Boat Building.
3371	Household and Institutional Furniture and Kitchen Cabinet Manufacturing.
3372	Office Furniture (including Fixtures) Manufacturing.
3379	Other Furniture Related Product Manufacturing.
4231	Motor Vehicle and Motor Vehicle Parts and Supplies Merchant Wholesalers.
4233	Lumber and Other Construction Materials Merchant Wholesalers.
4235	Metal and Mineral (except Petroleum) Merchant Wholesalers.
4239	Miscellaneous Durable Goods Merchant Wholesalers.
4244	Grocery and Related Product Merchant Wholesalers.
4248	Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers.
4413	Automotive Parts, Accessories, and Tire Stores.
4422	Home Furnishings Stores.
4441	Building Material and Supplies Dealers.
4442	Lawn and Garden Equipment and Supplies Stores.
4451	Grocery Stores.
4522	Department Stores.
4523	General Merchandise Stores, including Warehouse Clubs and Supercenters.
4533	Used Merchandise Stores.
4543	Direct Selling Establishments.
4811	Scheduled Air Transportation.
4841	General Freight Trucking.
4842	Specialized Freight Trucking.
4851	Urban Transit Systems.
4852	Interurban and Rural Bus Transportation.
4853	Taxi and Limousine Service.
4854	School and Employee Bus Transportation.
4859	Other Transit and Ground Passenger Transportation.
4871	Scenic and Sightseeing Transportation, Land.
4881	Support Activities for Air Transportation.
4883	Support Activities for Water Transportation.
4889	Other Support Activities for Transportation.
4911	Postal Service.
4921	Couriers and Express Delivery Services.
4931	Warehousing and Storage.
5322	Consumer Goods Rental.
5621	Waste Collection.

NAICS	Industry
5622	Waste Treatment and Disposal.
6219	Other Ambulatory Health Care Services.
6221	General Medical and Surgical Hospitals.
6222	Psychiatric and Substance Abuse Hospitals.
6223	Specialty (except Psychiatric and Substance Abuse) Hospitals.
6231	Nursing Care Facilities (Skilled Nursing Facilities).
6232	Residential Intellectual and Developmental Disability, Mental Health, and Substance Abuse Facilities.
6233	Continuing Care Retirement Communities and Assisted Living Facilities for the Elderly.
6239	Other Residential Care Facilities.
6243	Vocational Rehabilitation Services.
7111	Performing Arts Companies.
7112	Spectator Sports.
7131	Amusement Parks and Arcades.
7211	Traveler Accommodation.
7212	RV (Recreational Vehicle) Parks and Recreational Camps.
7223	Special Food Services.

2. Information To Be Submitted

Section 1904.41(b)(9) of the final rule specifies which information must be submitted under § 1904.41(a)(2). Consequently, comments on the proposed information to be submitted and OSHA's responses to those comments are discussed in Section III.D of this Summary and Explanation, on § 1904.41(b)(9). However, because this summary and explanation section covers comments on issues that relate to the information that establishments must submit under § 1904.41(a)(2), OSHA is briefly previewing those requirements here. Specifically, as laid out in question-and-answer format in § 1904.41(b)(9), establishments that are required to submit information under § 1904.41(a)(2) of this section must submit all the information from the OSHA Forms 300 and 301 *except* for the following case-specific information:

- Employee name (column B), from the Log of Work-Related Injuries and Illnesses (OSHA Form 300).
- Employee name (Field 1), employee address (Field 2), name of physician or other health care professional (Field 6), and facility name and address if treatment was given away from the worksite (Field 7) from the Injury and Illness Incident Report (OSHA Form 301).

Section 1904.41(b)(9) of the final rule is identical to proposed § 1904.41(b)(9).

3. Publication of Electronic Data

As discussed above, OSHA intends to make some of the data it collects public. The publication of specific data elements will in part be restricted by applicable Federal law, including provisions of the Freedom of Information Act (FOIA), as well as specific provisions within part 1904. OSHA will make the following data from Forms 300 and 301 available in a searchable online database:

- Form 300 (the Log)—All collected data fields on the 300 Log will generally be made available on OSHA's website. As specified in § 1904.41(b)(9), employee names will not be collected. OSHA notes that it often collects copies of establishments' Forms 300 during inspections and includes them as part of the enforcement case file. Prior to this rulemaking, OSHA has not conducted a systematic collection of the information on the 300 Log. However, OSHA releases the Forms 300 that it does have (in case files) in response to FOIA requests, subject to application of the FOIA exemptions. In those responses, OSHA redacts employee names pursuant to FOIA Exemptions.

- Form 301 (Incident Report)—All collected data fields on the right-hand side of the form (Fields 10 through 18) will generally be made available. As specified in § 1904.41(b)(9), employee name (Field 1), employee address (Field 2), name of physician or other health care professional (Field 6), and facility name and address if treatment was given away from the worksite (Field 7) will not be collected. OSHA notes that it often collects copies of establishments' Forms 301 during inspections and includes them as part of the enforcement case file. Prior to this rulemaking, OSHA has not conducted a systematic collection of the information on the 301 Incident Report. However, OSHA releases the forms that it does have in response to FOIA requests, subject to application of the FOIA exemptions. Section 1904.35(b)(2)(v)(B) prohibits employers from releasing the information in Fields 1 through 9 (the left-hand side of the form) to individuals other than the employee or former employee who suffered the injury or illness and his or her personal representatives, and OSHA does not release this information under FOIA. Similarly, OSHA will not publish

establishment-specific data from the left side of Form 301.

OSHA intends to publish information from the Forms 300 and 301 as both text-based and coded data. An example of text-based data would be, "Second degree burns on right forearm from acetylene torch" in Field F ("Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill") on the Form 300. An example of coded data for this case, using the Occupational Injury and Illness Classification System (OIICS) Manual, would be:

- *Nature of injury*: 1,520 (heat (thermal) burns, unspecified)
- *Part of body affected*: 423 (forearm)
- *Source of injury or illness*: 7,261 (welding, cutting, and blow torches)
- *Event or exposure*: 533 (contact with hot objects or substances)

For text-based data, as discussed below, OSHA plans to use automated de-identification technology, supplemented with some manual review of the data, to identify and remove information that could reasonably be expected to identify individuals directly from the fields the agency intends to publish (as discussed above); the agency will not publish text-based data until such information, if any, has been identified and removed. For coded data, also as discussed below, OSHA plans to use an automated coding system to code the collected data; until the autocoding system has been tested and is in place, OSHA intends to only use and publish uncoded data. The coded data by its nature will not include any information which could reasonably be expected to identify employees directly, and thus there will be no need to use automated de-identification technology or manual de-identification before publishing coded data.

4. Benefits of Collecting and Publishing Data From Forms 300 and 301

As discussed in more detail below, OSHA has determined that this final rule will improve worker safety and health because the collection of, and expanded public access to, establishment-specific, case-specific, injury and illness data from Forms 300 and 301 will allow OSHA, employers, employees, researchers, safety consultants, and the general public to use the data in ways that will ultimately result in the reduction of occupational injuries and illnesses.

In the preamble to the 2019 final rule, OSHA stated that, because the agency “already has systems in place to use the 300A data for enforcement targeting and compliance assistance without impacting worker privacy, and because the Form 300 and 301 data would provide uncertain additional value, the Form 300A data are sufficient for enforcement targeting and compliance assistance at this time” (84 FR 392). The uncertainty regarding the extent of the benefits was based, in part, on the determination that “[b]ecause . . . publishing the data would do more harm than good for reasons described more fully below and in the privacy discussion above, OSHA would not make the data public even if collected” (84 FR 390). In addition, at the time of the 2019 final rule, “OSHA ha[d] already taken the position that data from Form 300A is exempt from disclosure under FOIA and that OSHA will not make such data public for at least the approximately four years after its receipt that OSHA intends to use the data for enforcement purposes” (84 FR 391).

Since publication of the 2019 final rule, however, OSHA is now better able to collect, analyze, and publish data from Forms 300 and 301, and advances in technology have reduced the risk that information that could reasonably be expected to identify individuals directly will be disclosed to the public. Also, improvements in technology have reduced the manual resources needed to identify and remove sensitive worker information from 300 and 301 forms. These developments will allow OSHA to more effectively review and analyze the collected 300 and 301 data and ensure that information which could reasonably be expected to identify employees directly is removed prior to publication. For example, as discussed below, more advanced autocoding technology will allow OSHA to more efficiently review and analyze the data, allowing the agency to focus its enforcement targeting and compliance assistance resources on specific hazards

at establishments with safety and health problems, resulting in a reduction of work-related injuries and illnesses. Similarly, advances in technology to identify and remove information which could reasonably be expected to identify employees directly will reduce the resources needed to publish text-based information while adequately protecting worker privacy. In addition, OSHA plans to publish the coded data produced by the more advanced autocoding technology, which by its nature will not include any information which could reasonably be expected to identify employees directly.⁵

Additionally, as explained above, since 2020, there have been multiple court decisions adverse to the Department of Labor’s position that electronically submitted Form 300A data are exempt from public disclosure under the FOIA. In these decisions, courts have rejected the Department of Labor’s position that electronically submitted 300A injury and illness data was covered under the confidentiality exemption in FOIA Exemption 4. As a result, in August 2020, OSHA initiated a policy to post collected 300A data on its public website at <https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data>, with submissions for calendar years 2016, 2017, 2018, 2019, 2020, and 2021.

Accordingly, based on the recent developments described above, and the additional information included in the record for this rulemaking, OSHA now believes there are significant benefits resulting from the collection and publication of establishment-specific, case-specific, injury and illness data from Forms 300 and 301. In addition, as explained below, OSHA concludes that the significant benefits associated with the collection and publication of Forms 300 and 301 data outweigh the slight risk to employee privacy. Indeed, the benefits of collection alone would outweigh the slight risk to employee privacy.

As explained in more detail below, after considering the record as a whole, including commenters’ responses to specific questions in the NPRM on this topic, OSHA finds that the collection of, and expanded public access to, establishment-specific, case-specific, injury and illness data will allow OSHA, employers, employees, potential customers, employee representatives, researchers, safety consultants, and the

general public to use the data in ways that will ultimately result in the reduction of occupational injuries and illnesses (see 87 FR 18547).

a. General Benefits of Collecting and Publishing Data From Forms 300 and 301

OSHA received several comments on the general benefits of collecting and publishing data from Forms 300 and 301. For example, Miranda Ames commented, “The more data we have about workplace safety, the better we can do at protecting workers. Collection of information like this by OSHA will enable better statistical analysis of workplace injuries across industries, and incentivize employers to keep more thorough records of workplace incidents and accidents” (Docket ID 0011).

Similarly, Cal/OSHA commented, “Complete and accurate surveillance of occupational injury and illness is essential and holds significant value for informed policy decisions and for effective intervention and prevention programs. The policy of requiring submission of detailed information from larger employers specifically helps identify and abate workplace hazards by improving the surveillance of occupational injury and illness.” (Docket ID 0084). This commenter also explained that the proposed requirements for reporting detailed information, and the transparency that it creates, encourage and support accurate occupational injury and illness reporting (Docket ID 0084). Similarly, Centro de los Derechos del Migrante, Inc. commented that making the data publicly available will increase the accuracy of such records and address underreporting by employers (Docket ID 0089).

In addition, commenters suggested that the collection and publication of Forms 300 and 301 data will allow the agency to receive more detailed information on the nature and circumstances of work-related injuries and illnesses, and target its limited enforcement and compliance assistance resources to protect the greatest number of workers (Docket IDs 0040, 0064). Commenters also noted that this rule may particularly benefit low-income and minority workers (Docket IDs 0045, 0048). For example, National COSH stated that Latino and Black workers are at greater risk of dying on the job than other workers, and this rule “is critical to improving worker safety and health, especially for workers at elevated risk of injury, illness and death” (Docket ID 0048).

On the other hand, some commenters questioned whether OSHA had

⁵ OSHA, like other Federal agencies, is responsible for protecting personally identifiable information (PII) in accordance with law and policy. Throughout this preamble, OSHA identifies and discusses multiple ways in which the agency fulfills this responsibility.

adequately justified the benefits of collecting and publishing data in the proposed rule. For example, NFIB stated that many of the reasons that OSHA gives in the preamble to the proposed rule to justify the collection and publication of information are “rather flimsy” (Docket ID 0036). Some commenters stated that the collected data would not benefit workplace safety and health, concluding that OSHA recordkeeping data are not useful. For example, an anonymous commenter stated that data collection is reactive, and that taxpayer money would be much better spent on proactive programs that improve safety and health in the workplace. This commenter also asked, “How do employers know that OSHA will not start targeting them due to injuries that are reported?” (Docket ID 0014). The U.S. Poultry & Egg Association commented that the existing reporting rules are adequate to allow employers to identify risks and allow OSHA to direct its enforcement activities, and stated that a reduction in injury and illness rates in poultry processing and general manufacturing from 1994 to 2020 is evidence that OSHA’s proposed changes are unnecessary (Docket ID 0053).

Mid Valley Agricultural Services commented, “It is unclear how the proposed rule will result in reductions to injuries/illnesses in the workplace or the frequency and severity of instances. Aggregating more data on workplace injuries/illnesses does nothing in and of itself to reduce the possibility of workplace injuries/illnesses” (Docket ID 0019). The Plastics Industry Association (Docket ID 0086) and Angela Rodriguez (Docket ID 0052) submitted similar comments. In addition, the U.S. Chamber of Commerce resubmitted a comment from the 2016 rulemaking that argued that OSHA’s collection of injury and illness data would not lead to effective targeting of workplaces “because information about an establishment’s incidences of workplace injuries and illnesses does not accurately or reliably correlate with an establishment that is hazardous or that has failed to take OSHA-compliant steps to prevent injuries” (Docket ID 0088, Attachment 2). The comment asserted that a study by the RAND Corporation “found that no research supports the preconception that the goal of reducing workplace injuries and illnesses can be most effectively reached by focusing on workplaces with the highest number of incidents of injuries or illnesses” and that “there appears to be little relationship between the injury rate and the likelihood of violations at inspected

establishments.” The comment concluded that “this proposed database will provide raw data subject to so many caveats, complexities, and assumptions as to be meaningless.”

In response, OSHA agrees with commenters who generally stated that there are benefits resulting from the collection and publication of establishment-specific, case-specific, injury and illness data from Forms 300 and 301. As discussed in more detail below, the primary purpose of the requirement in the final rule for the electronic submission of 300 and 301 data, and the subsequent publication of certain data, is to prevent occupational injuries and illnesses through the use of timely, establishment-specific injury and illness data by OSHA, employers, employees, other Federal agencies and States, researchers, workplace safety consultants, and the public. The collection and publication of data from Forms 300 and 301 will not only increase the amount of information available for analysis, but will also result in more accurate statistics regarding work-related injuries and illnesses, including more detailed statistics on injuries and illnesses for specific occupations and industries. In other words, the increase in collected injury and illness data will necessarily result in more accurate statistics. In turn, more accurate statistics will enhance interested parties’ knowledge regarding specific workplace hazards.

Relatedly, OSHA agrees with commenters that said making the data publicly available will increase the accuracy of occupational injury and illness reporting. To the extent that underreporting is a problem, the public availability of case-specific data will allow employees to assess whether their personally experienced injuries and illnesses have been accurately recorded on their employers’ Forms 300 and 301. Although others would not be able to identify that a specific employee suffered a particular injury or illness, OSHA expects that the injured or ill worker would be able to determine whether their particular injury or illness was recorded. This check would work in tandem with employees’ ability to check such things in an employer’s Forms 300 and 301 and would address employees’ fear that asking to view those forms could result in retaliation. OSHA has also discussed these issues in further detail in Section III.B.4.d of the Summary and Explanation.

The requirement to submit establishment-specific, case-specific data will also assist OSHA in encouraging employers to prevent occupational injuries and illnesses by

expanding OSHA’s access to the information that employers are already required to keep under part 1904. As noted elsewhere, OSHA typically only has access to establishment-specific, case-specific, injury and illness information when it conducts an onsite safety and health inspection at an individual establishment. However, the electronic submission of 300 and 301 data will allow OSHA to obtain a much larger data set of information about work-related injuries and illnesses and will enable the agency to use its enforcement and compliance assistance resources more effectively. OSHA intends to use the collected data to identify establishments with recognized workplace hazards where workers face a high risk of sustaining occupational injuries and illnesses.

The collection of establishment-specific, case-specific information will also provide data for analyses that are not currently possible. OSHA plans to use the data collected from this final rule to assess changes in the types and rates of specific injuries and illnesses in a given industry over a long period of time. In addition, the data collection will allow OSHA to better evaluate the effectiveness and efficiency of its various safety and health programs, initiatives, and interventions in different industries and geographic areas. Additionally, for these reasons, OSHA disagrees with commenters that suggest current reporting requirements are adequate to protect worker safety and health.

OSHA disagrees with commenters that stated that part 1904 injury and illness data are not useful in improving occupational safety and health, and that taxpayer funds would be better spent on more proactive measures. As noted above, OSHA’s injury and illness recordkeeping regulation has been in place since 1971. The information recorded on the OSHA forms is recognized by safety and health professionals as an essential tool for identifying and preventing workplace injuries and illnesses. Historically, employers, employees, and OSHA have used part 1904 information to identify injury and illness trends and to evaluate the effectiveness of abatement methods at an individual establishment. The collection and publication of certain data from the 300 and 301 forms required by this final rule will enable interested parties and OSHA to have access to a much larger data set, resulting in increased knowledge of workplace hazards, and a reduction in occupational injuries and illnesses. In addition, implementation of the collection and publication of

establishment-specific, case-specific, injury and illness data is a cost-effective measure used to improve workplace safety and health. OSHA estimates that the total cost for implementing the requirements of this final rule will have an annual cost to the government of approximately \$554,000 per year. However, the agency expects that the increased knowledge of workplace hazards and injury and illness trends, as well as the expected improved accuracy of part 1904 records, will result in decreased workers' compensation costs for employers and decreased healthcare costs for injured or ill employees by virtue of the reduction in workplace injuries and illnesses that OSHA expects to result from this final rule. OSHA also notes, as discussed below, that the agency's collection of this information will allow it to more effectively prioritize its compliance assistance resources, which will help employers better protect their employees.

OSHA agrees that the injury and illness data collected as a result of this final rule may be used to target certain establishments for safety and health inspection or compliance assistance. The agency considers the use of the collected data for possible targeting of specific establishments for enforcement or compliance assistance intervention as a benefit of this final rule. Again, as noted above, OSHA expects the accuracy and quality of occupational injury and illness data to improve as a result of this final rule. The increased amount of data collected by the agency, along with the expected improvement in data accuracy, will enable OSHA to better analyze and evaluate workplace safety and health hazards. Accordingly, the overall improvement in the data collected by the agency will allow OSHA to more accurately and objectively target specific establishments where workers are at high risk and thereby reduce the overall occurrence of workplace injuries and illnesses.

With regard to the Chamber's comment on the 2013 RAND Corporation study, OSHA notes that the study focuses primarily on the effectiveness of various types of Cal/OSHA inspections (*e.g.*, programmed, planned, and complaint) rather than on issues related to workplace injury and illness rates. Indeed, similar to how OSHA intends to use the collected data from this final rule, one of the recommendations included in the study states, "Workplaces in high-injury-rate industries that have not been inspected at all or not for many years should be identified and deserve some priority in

programmed inspections" (see *Inspection Targeting Issues for the California Department of Industrial Relations Division of Occupational Safety and Health* (John Mendeloff & Seth A. Seabury) (Docket ID 0099) at 13). Finally, as noted above, Cal/OSHA itself commented in this rulemaking that injury and illness surveillance is essential for informed policy decisions and in the identification, prevention, and abatement of workplace hazards (Docket ID 0084).

Additionally, the National Propane Gas Association stated that OSHA "does not provide any details as to how publicly available information could improve workplace safety" (Docket ID 0050). In response, as the agency explained in the NPRM (87 FR 18538), by that point in time, OSHA had successfully collected reference year 2016 through 2020 Form 300A data through the OSHA Injury Tracking Application. (Since publication of the NPRM, OSHA has completed collection of reference year 2021 Form 300A data and has begun collecting 2022 data.) Approximately 300,000 records have been submitted to the agency each year. OSHA has successfully analyzed these data to identify establishments with elevated injury and illness rates and has focused both its enforcement and outreach resources towards these establishments. This experience demonstrates OSHA's ability to collect, analyze, and use large volumes of data to interact with establishments where workers are being injured or becoming ill. However, this same experience has demonstrated the limits of the 300A data currently collected. As explained in more detail below, the collection and publication of establishment-specific, case-specific, injury and illness data from Forms 300 and 301 will result in significant benefits for the agency.

The International Bottled Water Association (IBWA) commented, from an enforcement standpoint, "by the time the data could be evaluated for use in selecting OSHA's enforcement targets, the data would surely be stale and provide no useful basis for the agency to initiate enforcement against employers within the six-month statute of limitations set forth in the OSH Act." This commenter also stated that, "[b]ecause the data is insufficient in and of itself as a targeting tool, and because OSHA would be able to rely on such data only when it likely no longer reflects current conditions at a particular worksite, OSHA's enforcement program is better served by continuing to use 300A summary data to target enforcement resources," and then obtaining a copy employer's current

Forms 300 and 301 at the time of an inspection (Docket ID 0076). IBWA added, "[u]sing the more detailed 300 and 301 data in the context of an individual inspection, as the agency has historically done, is a better and more effective use of this data than OSHA's proposed new plan" (Docket ID 0076).

In response, for purposes of enforcement inspection and compliance assistance targeting, the agency intends to use the collected data from this final rule in two ways. First, OSHA plans to continue to use administrative plans based on neutral criteria to target individual establishments with high injury and illness rates based on submitted Form 300A summary data. Second, OSHA intends to use administrative plans based on neutral criteria to target individual establishments based on submitted case-specific, establishment-specific, injury and illness data from the Forms 300 and 301.

OSHA agrees with IBWA that relying on Form 300A summary data is an effective source of information for targeting the agency's enforcement resources. For example, the Site-Specific Targeting (SST) plan is OSHA's main site-specific programmed inspection initiative for non-construction workplaces that have 20 or more employees. Currently, the SST program targets individual establishments based on 300A injury and illness data that employers are already required to electronically submit to OSHA under 29 CFR 1904.41. OSHA uses submitted 300A data to calculate injury and illness rates for individual establishments. The SST program helps OSHA achieve the goal of ensuring that employers provide safe and healthful workplaces by directing enforcement resources to those workplaces with the highest rates of injuries and illnesses. Moving forward, OSHA intends to continue to use the 300A data submitted under 1904.41(a)(1) of this final rule to calculate injury and illness rates and target individual establishments for inspection under the SST.

OSHA also intends to use collected case-specific, establishment-specific data from the Forms 300 and 301 to identify individual establishments for enforcement inspection and compliance assistance outreach. OSHA believes that reviewing and analyzing specific data from the Forms 300 and 301 is an effective method for the agency to identify individual establishments for enforcement inspection or compliance assistance targeting. For example, OSHA will be able to use 300 and 301 data to identify specific hazards at a given

establishment. In turn, the agency will be able to more effectively deploy its enforcement and compliance assistance resources to eliminate identified hazards and enhance worker safety and health. Of course, and as discussed elsewhere, OSHA enforcement targeting based on the data submitted as a result of this final rule will be conducted in accordance with a neutral-based scheme for identifying workplaces for closer inspection.

OSHA disagrees with IBWA's comment that the collected injury and illness data the agency intends to use for its enforcement inspection and compliance assistance targeting is stale. OSHA acknowledges that the Forms 300 and 301 data are based on injuries and illnesses that occurred during the previous calendar year. However, OSHA's current SST inspection targeting program is also based on Form 300A summary data from the previous calendar year. Even though the injuries and illnesses occurred during the previous calendar year, the information is helpful to OSHA in determining whether a hazard is an ongoing problem at a specific establishment. For example, although a heat-related illness may have occurred more than six months before the submission deadline, it may be reasonable for OSHA to conclude that multiple entries of this illness on the OSHA forms represent an ongoing hazard at that establishment. In addition, research indicates that high injury and illness rates are persistent over time until there is some type of safety and health intervention at the facility (see Evaluation of OSHA's Impact on Workplace Injuries and Illnesses in Manufacturing Using Establishment-Specific Targeting of Interventions: Programmed Inspections and High Hazard Notification Letters, FINAL REPORT. Prepared by: ERG, Lexington, MA, July 16, 2004 (Docket ID 0098)). By identifying an establishment with ongoing hazards, the agency has the opportunity to use its enforcement and compliance assistance resources to conduct an intervention and improve workplace safety and health.

b. Beneficial Ways That OSHA Can Use the Data From Forms 300 and 301

OSHA expects to use the collected data in many ways to improve worker safety and health. Most importantly, having this information will provide OSHA with a much fuller and more detailed understanding of the kinds of injuries and illnesses experienced by workers doing different jobs in a range of industries.

The data available from the 300A forms currently collected by OSHA

show primarily only how many "injuries" and "illnesses" occur. (The 300A ITA data also provide information on the number of cases of illnesses involving hearing loss, poisonings, skin disorders, and respiratory disorders, but even for those, knowing that they occurred at a particular workplace provides little if any useful information about how the workers developed them.) The data provide no meaningful information about the kinds of injuries or illnesses suffered by workers, the kind of work they do, or the hazards present at their workplaces. The establishment-wide scope of the 300A data currently available to OSHA also tends to obscure particular types of injuries and illnesses that may affect only certain classes of workers at large establishments. For example, nursing aides at hospitals may be exposed to very different hazards than those facing other hospital staff who do not perform the same kind of physical work. Yet, looking at hospital-wide generalized data will give no hint of the circumstances giving rise to particular exposures or which workers are affected.

By having access to more precise information about the kinds of injuries and illnesses affecting workers performing different kinds of operations at different kinds of workplaces, OSHA can deploy its resources in ways more calculated to address the specific hazards that actually exist in specific workplaces. It is obvious that the broad categories of "injury" and "illness" provide little useful information about the specific kinds of hazards that exist at a workplace. And even a narrower category of illness like "respiratory conditions" does not indicate whether the respiratory condition is related to a chemical exposure, COVID-19, valley fever (coccidioidomycosis), hantavirus, Legionnaires' disease (Legionellosis), or tuberculosis. In contrast, the collection and analysis of case-specific data from the Forms 300 and 301 would allow OSHA to determine the prevalence of particular respiratory hazards and respond appropriately, whether that response is in the form of targeted enforcement efforts or compliance assistance, general guidance materials or regulatory solutions, or cooperation with local public health authorities.

Having access to case-specific data will also allow OSHA to determine whether workers in particular demographics are being sickened or injured disproportionately. These may be younger or older workers, temporary workers, or workers new to a particular assignment. If OSHA has this information, it will be able to develop

strategies to address the particular demographic factors that lead to these disproportionate outcomes.

Many of the comments questioning the utility of the data for OSHA seemed to be premised on the erroneous belief that OSHA's primary use of the data would be to target enforcement efforts at workplaces with higher injury and illness rates. But the utility of case-specific data is much broader. While the data certainly can be used to help target enforcement, as well as compliance assistance efforts, it is also valuable to OSHA in that it allows for the types of analyses that can make all of OSHA's work more effective.

As noted above, OSHA can analyze the data to identify the specific conditions that are injuring workers as well as the specific classes of workers who are being injured. OSHA can identify trends in the types of injuries and illnesses that are occurring and, as noted by the AFL-CIO, the agency can identify and assess emerging hazards (Docket ID 0061). Being able to make these identifications allows OSHA to promote safer workplaces in myriad ways. OSHA can disseminate information about trends in injuries and illnesses and emerging hazards to the public so that both workers and employers can take steps to prevent similar injuries and illnesses at their own facilities. For example, the AFL-CIO noted that the data could have been utilized in the first years of the COVID-19 pandemic to identify where effective mitigation measures were necessary to reduce exposures, and could have been incorporated into agency guidance, enforceable standards, and enforcement initiatives, and used to inform employer and union COVID-19 safety plans (Docket ID 0061). OSHA can also prioritize use of its own limited resources to have the greatest impact. This may mean providing more useful compliance assistance or guidance, considering development of new standards, or revising enforcement programs to focus on workplaces where OSHA has determined that hazards are more likely to be found. As noted by the Laborers' Health and Safety Fund of North America, this also means that OSHA can "become more data driven in its compliance and enforcement efforts" and, "[i]n being a more online and easily accessible agency, OSHA can push its consulting efforts and services" (Docket ID 0080).

One example of how OSHA can use the information in Forms 300 and 301 relates to OSHA's efforts to address indoor and outdoor heat-related hazards. As climate change has accelerated, heat hazards have become

more prevalent, sickening and killing more workers every year (see https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf). OSHA's efforts to address these hazards are multi-pronged, with ongoing enforcement, compliance assistance, and guidance efforts, as well as a regulatory component. Without case-specific injury and illness data, OSHA's understanding of the scope of the problem and its ability to identify specific operations and types of establishments where workers are most at risk, are limited, impeding its ability to intervene at an early enough stage to prevent worker illnesses and deaths. Currently, OSHA most often learns of these hazards after an employer reports a worker hospitalization or death (pursuant to 29 CFR 1904.39). The Form 300A listing of the number of illnesses at various establishments gives no sense of how many of those illnesses are heat-related. In contrast, Forms 300 and 301 data will allow OSHA to identify patterns and trends in the occurrence of heat-related illness, and not only focus its enforcement and compliance assistance resources appropriately, but also inform OSHA's efforts to develop a permanent standard addressing heat hazards. These types of longer-term strategic activities can help make OSHA a more effective agency overall, and in doing so, make all workers safer.

c. Beneficial Ways That Employers Can Use the Data From Forms 300 and 301

In the preamble to the proposed rule, OSHA asked, "What are some ways that employers could use the collected data to improve the safety and health of their workplaces?" Multiple commenters provided comments on employers' use of the collected data to improve the safety and health of their workplaces, including information about benchmarking and incentives. (Docket IDs 0030, 0035, 0046, 0061, 0063, 0093). For example, AIHA commented, "Benchmarking against other employers is an important management tool for understanding and improving occupational safety and health programs" (Docket ID 0030). Similarly, the AFL-CIO commented that the collected data would provide employers direct access to detailed injury and illness information to compare their injury and illness records and experience with others in the same industry (Docket ID 0061). NIOSH made similar comments and added that, currently, employers may compare their injury rates to those of their industry as reported in the SOII, but because of the large number of injury and illness records that will be collected under this

rulemaking, employers will be able to compare their injury and illness rates to those of many more specific groups of establishments and employers. This commenter also stated, "Benchmarking safety performance to more comparable establishments and employers instead of large, anonymous aggregates would provide more accurate as well as more compelling metrics for guiding and motivating improvement of safety programs" (Docket ID 0035).

More generally, the Sheet Metal and Air Conditioning National Association (SMACNA) commented, "SMACNA members believe that any additional data that is collected should be used in tandem with Bureau of Labor Statistics (BLS) data so our industry can better understand loss trends and use the information accordingly. SMACNA members provide a unique service and would like the data to be broken down by the specific North American Industry Classification System (NAICS) codes. Such as detailed OSHA incident rate information for NAICS code 238220—Plumbing, Heating, and Air-Conditioning Contractors." (Docket ID 0046).

Additionally, Worksafe commented that access to more electronic data will allow businesses to compare their safety performance to other firms and enable competition for improved safety. Also, this commenter explained that suppliers, contractors, and purchasers of a firm's goods or services could also consider the information in their business decisions, such as whether to support a business with a poor safety record. In addition, regarding the issue of incentives for employers, this commenter stated, "When employers know that injury or illness incidents will be published online, the risk of social stigma will encourage them to take appropriate precautions and avoid violations" (Docket ID 0063).

Similarly, Public Citizen commented, "Bringing performance information out into the open is an effective form of behavioral economics impacting employer decision-making. It serves as a strong incentive for employers to improve their safety records and support their reputations. It would encourage employers to implement systems, protocols, education and workplace alterations, resulting in less worker injuries and illnesses. Employers can also use establishment-specific, case-specific injury and illness information to compare their safety record to similar establishments and set benchmarks for improvement of their own safety and health performance. Negative publicity has been shown to improve not just the behavior of the

highlighted employer, but also other employers. This general deterrence effect has been demonstrated by improved compliance with safety standards by employers after OSHA issued press releases on OSHA violations uncovered during inspections. The impact was so powerful that press releases led to 73 percent fewer safety violations identified during programmed inspections at neighboring enterprises and a drop in injury reports from the same enterprises." (Docket ID 0093).

On the other hand, several commenters stated that employers would not be able to use the collected data to improve the safety and health of their workplaces (Docket IDs 0086, 0090, 0094). For example, the Plastics Industry Association commented, "The rule will not assist employers in managing workplace safety as it does not provide information that is not already available to them and their employees. When companies publish incident reports internal to all employees, all personal information is removed, and no medical information is provided." This commenter also stated that companies track different types of information and that some companies already benchmark with others (Docket ID 0086).

The Phylmar Regulatory Roundtable OSH Forum also commented that there is already benchmarking by employers, saying, "Many employers, such as PRR members are part of trade organizations and already participate in formal benchmarking on injury and illness data. PRR members also review BLS data. Therefore, we believe that OSHA's posting of establishment specific data will be of NO additional benefit to the resources already available to employers who actively pursue these methods." (Docket ID 0094).

In addition, a few commenters stated that the data would harm employers. For example, Angela Rodriguez commented, "There is a perceived risk of business competitors using the establishment-level data to gain an advantage by comparing/contrasting results in a negative context. E.g., 'Company X lets their employees get seriously injured 3x more than us'" (Docket ID 0052). Similarly, the National Retail Federation commented, "Given President Biden's expressed desire to lead the 'most pro-union Administration in American history,' it is likely that the true motivation of this rulemaking is to weaponize injury and illness data for labor union leaders' benefit. Labor unions will likely use this data to gain support for their organizing efforts, claiming the data proves an

employer is not protecting its workers.” (Docket ID 0090). This commenter also stated that unions may use the data to pressure employers in negotiations over collective bargaining agreements, and competitors may use the information for anticompetitive purposes, such as poaching top workers or hurting the reporting entity’s standing in the community (Docket ID 0090). Likewise, the Phylmar Regulatory Roundtable OSH forum commented, “This type of risk profile and data tool could also be used by insurance companies when determining policies and rates for a company’s worker compensation insurance plan. In addition, an insurance company could use the risk profile and data tool to deny issuance of disability, long-term, and other types of insurance.” (Docket ID 0094).

In response, OSHA agrees with commenters who stated that employers will be able to use the published establishment-specific, case-specific, injury and illness data to improve their workplace safety and health. Specifically, employers will be able to use the data to compare case-specific injury and illness data at their establishment with that of comparable establishments and set safety and health goals benchmarked to the establishments they consider most comparable. OSHA also plans to include information regarding establishments’ NAICS codes. As SMACNA suggests, interested parties can use that information to better understand loss trends, which will help them make improvements in worker safety and health.

Since employers will have access to a much larger data set, OSHA disagrees with commenters who suggested that employers already have access to enough information from trade associations to conduct benchmarking with injury and illness data. OSHA notes that employers will be able to access data from the entire range of establishments covered by the electronic submission requirements in this final rule. Thus, employers will have the opportunity to compare and benchmark their injury and illness data with not only the safest establishments in their industry, but with the safest establishments in all industries covered by the final rule. In addition, OSHA anticipates that employers will be able to review the establishment-specific injury and illness data, identify safer establishments in their industry, and potentially develop and establish similarly effective safety and health programs at their own facilities.

OSHA also agrees with commenters who stated that the publication of

establishment-specific, case-specific, injury and illness data will incentivize employers to minimize the number of occupational injuries and illnesses at their workplace. For example, the publication of the data will encourage potential customers or business partners to evaluate the full range of injury and illness cases at a specific establishment. In turn, employers will work to improve the occupational safety and health at their facility, which will result in reduced work-related injuries and illnesses, thereby enhancing the employer’s standing with potential customers and business partners.

In addition, OSHA disagrees with commenters who stated that the collection and publication of establishment-specific, case-specific, injury and illness data will harm employers or that labor unions will “weaponize” the data. Again, as noted above, the only purpose for the collection and publication of injury and illness data required by this final rule is to improve occupational safety and health and to reduce injuries and illnesses to workers. At the same time, OSHA considers the publication of an establishment’s injury and illness data, which can be a valid measure of a company’s overall safety culture, to be an effective incentive for employers to improve occupational safety and health. As a result, OSHA concludes that the collection and publication of this data will encourage employers with more hazardous workplaces to make improvements in safety and health to reduce the number of occupational injuries and illnesses at their workplaces. Such changes will also be of benefit to employers, in that workplace illnesses and injuries impose costs on employers beyond the cost to the injured or ill employee.

In response to the Phylmar Group’s comment that insurance companies may use the collected data to calculate insurance rates or deny insurance coverage to companies based on the data, OSHA notes that insurance companies could engage in these practices using the 300A data OSHA has been collecting and publishing for several years now if they wanted to. The Phylmar Group does not identify any reason why the collection of data from Forms 300 and 301 would make these practices more likely or widespread, nor does it provide any evidence that insurance companies are or are not already doing this. Moreover, the possibility that insurance companies may raise rates or deny insurance coverage based on an employer’s higher-than-average rates of occupational injuries and illnesses would provide

further incentive for employers to improve workplace safety and health at their establishments.

Finally, and as discussed below, access to the collected data will improve the workings of the labor market by providing more complete information to job seekers. Using data newly accessible under this final rule, potential employees will be able to examine case-specific information to help them make more informed decisions about future employment and, in turn, could encourage employers to make improvements in workplace safety and health in order to attract potential employees. In addition, this would help address the problem of information asymmetry in the labor market, where the businesses with the greatest problems have the lowest incentive to self-disclose.

Accordingly, after consideration of the rulemaking record, OSHA has determined that employers will be able to use the collected and published data to improve workplace safety and health and reduce occupational injuries and illnesses.

d. Beneficial Ways That Employees Can Use the Data From Forms 300 and 301

In the preamble to the proposed rule, OSHA asked “What are some ways that employees could use the collected data to improve the safety and health of their workplaces?” 87 FR 18547.

OSHA received many comments on how employees will benefit from increased access to information from the 300 and 301 forms and on how employees will use the collected data to improve safety and health at their workplaces. Several commenters provided information on how employees will generally be able to use the collected data from Forms 300 and 301 (Docket IDs 0035, 0061, 0063, 0065, 0066, 0078). For example, AIHA commented, “Under a Total Worker Health model, injury data about specific tasks, operations, job titles, and industries could be used for worker training and education” (Docket ID 0030). Similarly, NIOSH commented, “While the BLS Annual Survey data provide good metrics for injury risks by industry, they are not ideal for engaging workers and helping them to understand the risks that they may face in their own jobs.” This commenter also explained that the narrative case-specific data that would be collected under the rule could provide employees with concrete, real-world, accounts on how injuries and illnesses occur and instruct them on how they can be prevented (Docket ID 0035). The AFL–

CIO submitted similar comments (Docket ID 0061).

The National Nurses Union commented, "Public posting of this data would enable workers and their representatives to better understand the scope of injuries and illnesses in particular work sites and to do so in a more timely and efficient manner. While workers and their representatives can access logs at their own workplace, they currently cannot compare those logs to other workplaces in the industry. For nurses, patterns of injury and illness could be identified, compliance with existing standards could be more efficiently examined, and emerging occupational risks could be better evaluated. When action to correct workplace safety and health hazards is inefficient or delayed, workers are unnecessarily exposed to predictable and preventable hazards. Delays in correcting a workplace hazard pointlessly cost the lives, limbs, and livelihoods of NNU members and other workers." (Docket ID 0064).

Additionally, Worksafe commented that unions and worker advocacy groups will be able to use case-specific information to seek safety improvements, "Currently, these groups can access Form 300 logs only by requesting them from employers, and the information may be provided in an inefficient manner such as in PDF files or on paper. As detailed below, unions and worker advocacy groups have the expertise to analyze this information to identify necessary workplace fixes. Electronic publication of more granular data will make it possible for them to better identify the cause of worker injuries and illnesses, more efficiently analyze large quantities of information, and appropriately direct their efforts." (Docket ID 0063). Worksafe also provided several examples of how establishment-specific, case-specific, injury and illness data has been used by employees and their representatives to reduce workplace injuries and illnesses. For example, it included a narrative from a meatpacking labor organization, "In 2008, leaders from the UFCW Tyson meatpacking locals union accessed Form 300 logs collected from one meatpacking plant for a one-month period. They analyzed injuries that could be related to ergonomic hazards and then placed red "sticky dots" on a hand-drawn map of a human body, depicting injury areas. The resulting body map looked as though the hands were dripping blood because so many red dots were placed in that area. The leaders were able to confirm that, despite known under-reporting, a lot of hand-specific injuries occurred amongst

their members. The leaders later presented the body map in a meeting with Tyson management, where it became a powerful tool. This meeting included an individual who had been in charge of the company's ergonomics program some years earlier and who had recently returned as a top-level manager. Seeing the map, he agreed with the union to start a series of efforts to revitalize the ergonomics program." (Docket ID 0063).

In contrast, some commenters stated that the collection and publication of certain data from Forms 300 and 301 could potentially harm employees, including harm to employee privacy and employability. For example, R. Savage commented, "I have concerns with organizations uploading their OSHA Forms 300 and 301 because both forms contain identifiable personal information. My concern is the privacy of the injured employee. Government agencies have accidentally released personal information in the past. Removing the employee's name in OSHA form 300 and removing sections 1–9 of OSHA form 301 does not guarantee that the employee will not be identifiable." (Docket ID 0018). Also, an anonymous commenter stated, "This would seem to make employees feel like they need to share even more private information to their employers than they already do" (Docket ID 0044). However, this last comment seems to be based on a misunderstanding. This rulemaking does not amend the type of information that employers must enter on their recordkeeping forms, nor does it amend the recordkeeping forms used to track injuries and illnesses. Instead, this rulemaking addresses the electronic submission to OSHA of certain information on the recordkeeping forms that employers are already required to keep.

In response to the comments above, OSHA agrees that employees will be able to use the collected and published data from Forms 300 and 301 to improve workplace safety and health. The collection and subsequent publication of this data will allow employees to analyze injury and illness data that is not currently available. The online availability of such data will allow employees to compare their own workplaces to other workplaces in their industries. Also, with access to establishment-specific, case-specific data, employees will be better able to identify emerging injury and illness trends in their industries and push for changes in safety and health policies to better protect workers. In addition, employees and their representatives will be able to use the large amount of newly

available case-specific information to develop effective education and training programs to identify and reduce workplace hazards.

With regard to the comments expressing concern about employee privacy, as discussed elsewhere, OSHA is confident that the agency will be able to protect information that could reasonably be expected to identify individuals directly. The combination of not requiring employers to submit certain information, and the improved technology used to identify and remove personal information in the collected data, greatly reduces the risk that reasonably identifiable employee information will be disclosed to the public. Again, OSHA believes the significant benefits to improved workplace safety and health outweigh the slight risk of information that could reasonably be expected to identify individuals directly being disclosed to the public.

Other commenters stated that, currently, employees and their representatives only have online access to general data from the Form 300A or aggregate data from the BLS SOII (Docket IDs 0063, 0078). Worksafe commented, "electronic publication of case-specific information on injuries, illnesses, and even fatalities will allow firms' own employees to access timely information that they can use to improve their own workplaces" (Docket ID 0063). Also, Unidos US, Farmworker Justice, and Texas RioGrande Legal Aid commented that, using currently available BLS data, it is impossible to know how many farmworkers specifically suffer from heat-related illnesses. These commenters explained that with access to case-specific Forms 300 and 301 data, employees and their representatives will be able to search information online to identify specific workplace hazards and direct their resources to those hazards (Docket ID 0078).

On the other hand, some commenters stated that employees already have access to the information they need. The National Propane Gas Association commented, "Potential employees or the general public can assess an entire industry through the Bureau of Labor Statistics data that OSHA referred to in the proposal" (Docket ID 0050).

In response, OSHA disagrees with the National Propane Gas Association that potential employees only need access the aggregate industry information though the SOII. As discussed above, aggregate data from the SOII, as well as the general summary data from the Form 300A, do not provide employees with access to case-specific information

at individual establishments. As explained by other commenters, online access to the establishment-specific, case-specific, injury and illness data will allow employees to search and identify other establishments and occupations in their industries and compare the injury and illness data at their establishments with the safest workplaces. Also, both current and potential employees will have better access to health and safety information about specific occupations and workplaces and will be able to better identify and understand the specific risks they face in their own jobs. Importantly, and as noted by commenters, access to Forms 300 and 301 data will enable employees to track specific injuries and illnesses, such as heat-related illnesses, throughout their industries.

Some commenters stated that, even though employees have a right of access to the OSHA recordkeeping forms under 29 CFR 1904.35, some workers may fear retaliation from their employer if they request access to information from the 300 and 301 forms at their workplace (e.g., Docket IDs 0049, 0061, 0063, 0089, 0093). National COSH commented, "Making the case specific data publicly available as proposed in the standard will also increase worker safety for the employees in the establishments with 100 or more employees. Workers are too often scared of retaliation if they request this information, even though employers are required to provide access to the full 300 logs to employees upon request. This information will allow employees in these establishments access to this data without fear of retribution and it will help them better identify patterns of injuries and hazards and to take actions to have the hazards abated." (Docket ID 0048). NELP submitted a similar comment (Docket ID 0049). Additionally, Centro del Derecho del Migrante commented, "Public access to these data will also improve worker safety by allowing workers and their advocates to better identify patterns of injuries and hazards in workplaces and across industries . . . Publishing this information will allow employees in these establishments access to this data without fear of retribution, and to demand abatement of hazards in their own workplaces and industries." (Docket ID 0089).

There were also comments stating that, despite the access requirements in 29 CFR 1904.35, many employers either deny or delay access to case-specific information to employees and their representatives. The United Food and Commercial Workers Union (UFCW)

commented, "The public access provisions of this rule allow workers to get important information through the OSHA website, rather than navigate these hurdles with employers" (Docket ID 0066). UFCW added that it has had success in monitoring injury and illness data and working with employers to apply the data to injury and illness prevention efforts, but noted that workers in non-union workplaces do not have the same ability to access the data, and that this rule would help "bridge that gap" by providing all workers with access (Docket ID 0066). Another commenter explained that, even when injury and illness information is provided to employees, the information is not in a usable format. The Strategic Organizing Center commented that, even when workers request access to part 1904 information, "they do not have any specific right to receive them in a way which achieves the goal of facilitating the analysis. This is especially important for workers at the larger employers covered by the proposed reporting requirement for the 300/301 data" (Docket ID 0079).

In response, and as discussed above, OSHA's recordkeeping regulation at 29 CFR 1904.35 already provides employees and their representatives with access to the three OSHA recordkeeping forms kept by their employers, with some limitations. Under § 1904.35, when an employee, former employee, or employee representative requests access to certain information on Forms 300 or 301, the employer must provide the requester with one free copy of the information by the end of the next business day. Any delay or obstruction by an employer in providing the required information to employees or their representatives would be a violation of the recordkeeping regulation. And, retaliation against an employee for requesting this information would violate Section 11(c) of the OSH Act.

OSHA agrees with commenters who stated that making establishment-specific, case-specific, injury and illness information available online will enhance worker safety and health, particularly where employees are reluctant to request access to such information. If workers fear possible retaliation from their employer, employees will easily be able to access the case-specific data for their own workplace online, thus avoiding the need to request the information from their employer. This uninhibited access will allow employees to better identify and address hazards within their own workplaces.

In addition, since certain case-specific injury and illness data will be posted online, employees will easily be able to search the collected information to identify specific hazards at their workplaces. Online posting also eliminates the problem noted by some commenters that, in some cases, when employees request injury and illness information from their employer, the information is provided on paper or in a format that is not searchable. Also, the online posting of data allows employees to conduct searches at any time to identify injury and illness trends at their workplaces.

Public Citizen commented, "[P]otential employees will benefit from the availability of injury and illness data from establishments as they make informed decisions about employment. Workers can compare injury rates between potential employers and choose to work for the safer employer. This puts power in the hands of labor, incentivizing employers to improve safety given the competition for workers." (Docket ID 0093).

On the other hand, the Phylmar Regulatory Roundtable OSH Forum expressed concern that the Form 300 and 301 data could be used to build worker profiles that result in hiring decisions based on an employee's injury and illness history and a high number of days away from work (Docket ID 0094). Similarly, Brian Evans commented, "Since this data is public record, future employers would have access to this information and could potentially discriminated against future hires based on injured parties being listed in a work place related injury. It could also lead to retaliation if the employee who was injured on the job choses to stay employed in their current role. Leadership, management, administration could view them as unsafe employees and limit their growth potential at their organization, or seek ways to terminate their employment due to the filing of a work place injury." (Docket ID 0080).

In response, OSHA agrees with the comment from Public Citizen that the published Form 300 and 301 data will assist potential employees in researching establishments where the risk to workers' safety and health is low. At this time, potential employees only have access to the limited injury and illness data that is currently available to the public as discussed above. Access to Form 300 and 301 data not only provides job seekers with an opportunity to review information about individual workplaces, but also allows them to analyze the injury and illness history of specific job titles within a

given industry or workplace. Potential employees can also identify trends among and between occupations, and at specific sites within one workplace. Also, as noted by Public Citizen, access to this information by potential employees should provide an incentive to employers to improve workplace safety and health. Specifically, the publication of Form 300 and 301 data will encourage employers with more hazardous workplaces in a given industry to make improvements in workplace safety and health to prevent injuries and illnesses from occurring, because potential employees, especially the ones whose skills are more in demand, might be reluctant to work at more hazardous establishments. OSHA disagrees that employers will use the published data from this final rule to discriminate against current or potential employees. With regard to potential employees, and as discussed in more detail in Sections III.B.6 and III.D of this Summary and Explanation, because OSHA is not requiring the electronic submission of information that could reasonably be expected to identify individuals directly (*e.g.*, name, contact information), and because the agency is using improved technology to identify and redact such information before publication, it is extremely unlikely that employers will be able to use the published data to identify specific individuals and determine their injury and illness history. As for current employees, OSHA notes that employers are already required under part 1904 to include certain potentially identifiable information about an employee when they sustain a work-related injury or illness (*e.g.*, employers must enter the injured or ill employee's name on the OSHA 300 log). As a result, the publication of case-specific de-identified injury and illness data under this final rule will have no impact on an employer's ability to identify their own injured or ill employees.

After consideration of these comments, OSHA has determined that employees, potential employees, and employee representatives will be able to use the collected data from Forms 300 and 301 to improve workplace safety and health, including through better access to the data in usable formats and without fear of retaliation. OSHA notes the many examples in the rulemaking record provided by commenters on not only how employees and their representatives currently use establishment-specific, case-specific, injury and illness data, but also on how they will be able to use the greater access to such information provided by

this final rule to reduce occupational injuries and illnesses.

e. Beneficial Ways That Federal and State Agencies Can Use the Data From Forms 300 and 301

OSHA received a number of comments in response to the question in the NPRM about the ways in which Federal (besides Federal OSHA, which is addressed above) and State agencies will be able to use the data collected under this final rule to improve workplace safety and health. Multiple commenters, including the National Employment Law Project, the Centro de los Derechos del Migrante, and Richard Rabin, noted generally that the centralized collection of and access to case-specific data will benefit the worker safety and health efforts of NIOSH, State agencies, and the public health community (*e.g.*, Docket IDs 0040, 0045, 0048, 0049, 0051, 0064, 0084, 0089). AIHA stated that "With the limited resources available to most federal and state worker health and safety programs, targeted programs will provide the most benefit for workers and companies. These data will provide information so that priorities can be set and outcome trends monitored" (Docket ID 0030).

There were also comments from Federal entities about their intended uses of the data. For example, NIOSH commented, "As potential end users of the data, NIOSH supports the improvements that are being proposed by OSHA. NIOSH believes that the increased coverage of employers within identified industries and the collection of the additional detailed information that is not currently electronically captured will offer greater potential for detailed and comprehensive data analyses compared with the current data. NIOSH uses occupational injury data to monitor injury trends, identify emerging areas of concern, and propose research intervention strategies and programs. Current OSHA data reflect a smaller proportion of select industries and offer limited details. This new rule would offer greater coverage of select industries and more detailed data, which would increase the value and utility of these occupational injury data to NIOSH." (Docket ID 0035, Attachment 2; see also Docket ID 0089).

In addition, NIOSH's comment listed more specific purposes for which it can use the collected data, including:

- Using the narrative data from Forms 300 and 301 for learning the particular ways in which injuries occur in specific work tasks and industries (citing work NIOSH has done with narrative data

from individual workers' compensation claims in Ohio).

- Using the coded OSHA Log case data with narratives as a very large training data set that could be used to improve the autocoding of workers' compensation claims. As NIOSH stated, "[a]utocoding workers' compensation claim narratives is critical to producing injury rate statistics that can guide prevention efforts by identifying high and increasing rates of specific types of injuries in specific industries and employers."

- Improving the effectiveness and efficiency of workplace inspections through the evaluation of more complete, detailed data on certain types of injuries at specific workplaces. As an example, NIOSH noted a series of studies supported by NIOSH where amputation cases at specific workplaces were identified based on hospital records and workers' compensation claims; the information was then provided to Michigan OSHA, which used it to target inspections.

- Linking workers' compensation data to OSHA logs in order to provide a more complete set of information than either data set provides separately. This effort has the potential to improve identification and prevention of injuries, especially among temporary employment agency workers, who constitute a vulnerable population of workers with a disproportionate burden of workplace injuries.

- Collaborating with National Occupational Research Agenda Councils and OSHA to "improve dissemination and use of the published data to improve identification, mitigation, and prevention of workplace injuries and illnesses" (Docket ID 0035, Attachment 2).

National COSH agreed with NIOSH, noting that making these data publicly available will assure that researchers and other agencies, like NIOSH, can use the data for surveillance, evaluation, and research purposes (Docket ID 0048).

In addition to the benefits of the data at the Federal level, multiple commenters addressed the value of the final rule's data collections to the States and to State occupational safety and health efforts. In the preamble to the 2019 final rule, OSHA acknowledged "that systems to collect this volume of data would be costly for States to implement. Centralized collection might be more efficient and cost-effective than state-by-state collection . . ." At that time, OSHA stated that it had "doubts about the usefulness of the data and concerns about the costs of collection," but reiterated that States were nonetheless "empowered to do as

OSHA ha[d] and weigh the substantial costs of collection against the likely utility of the data” (84 FR 394). In response to the NPRM in the current rulemaking, many commenters made it clear that State efforts to improve workplace safety and health will benefit from the data that is made available by this rule, and that a national collection system is a far more efficient means of achieving these benefits than individual State efforts. National COSH noted similar benefits at the State level as at the Federal level, stating that State and community public health agencies will be able to use the data to better understand the hazards in high-risk establishments and then target those establishments for assistance and information regarding best practices (Docket ID 0048). Likewise, the Council of State and Territorial Epidemiologists (CSTE) commented, “Access to these data would also facilitate public health agency efforts to reduce work-related injuries and illnesses in the States and significantly increase the potential for more timely identification of emerging hazards. Electronic collection of existing records is in line with 21st century advances in health data collection made possible by advances in information technology that involve centralized collection, analysis, and dissemination of existing data from multiple entities. These include, for example, collection at the State level of data on all hospitalizations, all emergency room visits, and all ambulance runs, and in over 20 States, data on all public and private insurance claims (excluding workers’ compensation claim data). . . . Making this information broadly available is consistent with the growing recognition, predominant in the patient safety field, that transparency—sharing of information, including information about hazards—is a critical aspect of safety culture.” (Docket ID 0040).

In addition, CSTE provided specific examples of ways in which the electronic reporting of case-level workplace injury and illness data can enhance State health department and others’ efforts to reduce work-related injuries and illnesses and hazards in States and communities. These examples included:

- *Identification of emerging problems:* “The ability to search file level data not only in the establishment where the index case is/was employed but also other establishments in the industry to identify similar cases has the potential to facilitate timely identification of emerging hazards” that are “both new and newly recognized.” CSTE discussed an example from

Michigan, where a State agency identified several deaths associated with bathtub refinishing, raising new concerns about the hazards of chemical strippers used in this process. Subsequent review of OSHA IMIS data identified 13 deaths associated with bathtub refinishing in a 12-year period.⁶ These findings from the State and Federal databases together led to the development of educational information about the hazards associated with tub refinishing and approaches to reducing risks; this material was disseminated nationwide to companies and workers in the industry.

- *Targeting establishments for preventive outreach in our communities:* “Public health investigations of work-related incidents result not only in prevention recommendations to those involved in the incident, but in case studies which allow us to then take lessons learned and disseminate these lessons broadly to other stakeholders. The availability of information on high-risk establishments will allow for more targeted and efficient information dissemination. The ability to identify lower risk establishments may also provide new opportunities to learn from employers who are implementing best practices—and potentially to help identify under-reporters. The availability of establishment specific information offers the opportunity to incorporate occupational health concerns in community health planning, which is increasingly providing the basis for setting community health and prevention priorities.”

- *Improvement of data quality and use of the data:* “Observations from interviews with OSHA record-keepers in Washington State suggest that incomplete OSHA records arise in part from lack of knowledge or confusion on the part of some employers about how to accurately and consistently record OSHA reportable cases and from poor employer prioritization of this task. . . . Electronic data collection and the subsequent public release of the data are means to improve data quality, knowledge, and compliance with OSHA recordkeeping requirements. Electronic collection of data offers the opportunity to provide employers with electronic tools (e.g., prompts, definitions, consistency edits, and industry-specific

drop-down lists) to improve the quality of the data reported. Standardized feedback to establishments and potential reports of establishment-specific data would promote the use of the data by employers and workers to set health and safety priorities and monitor progress in reducing workplace risks.”

- *Improvements in Medical Care:* “This record keeping rule, by facilitating the diagnosis of work-related conditions, will allow for better diagnosis and management of workplace illnesses by health care providers in the community, thereby contributing to a reduction in morbidity, absenteeism, and health care costs.” CSTE described an example from Massachusetts, which has a sharps injury prevention control program. This program supplements OSHA’s bloodborne pathogens standard by requiring hospitals to report select data from the OSHA-required log of sharps injuries annually to the Massachusetts Department of Public Health (MDPH). In recent years, data from all hospitals, which range in size from less than 150 to over 20,000 employees, have been submitted through a secure electronic transmission. Annual hospital-specific data and statewide reports prepared by MDPH provide information on patterns of sharps injuries and sharps injury rates for use by hospitals and hospital workers as well as MDPH. As CSTE stated, this experience in Massachusetts “indicates the utility of electronic reporting of person level occupational injury data for targeting prevention efforts at multiple levels” (Docket ID 0040).

The International Brotherhood of Teamsters noted that they agreed with these comments from CSTE (Docket ID 0083).

Similarly, the Strategic Organizing Center commented that States can use the collected data to compare injury and illness rates at specific establishments to the rates for that industry in general. The SOC also emphasized that “OSHA’s collection and distribution of . . . key metrics will finally provide a measure of transparency to workers, OSHA and its state partner agencies, the media and the public about the nature of the serious injuries afflicting workers at large employers in hazardous industries across the nation” (Docket ID 0079).

OSHA also received comments from the States themselves (e.g., Docket IDs 0045, 0069, 0084). One comment that was strongly supportive of the rule came from the Seventeen AGs. These State officials represented nine States with OSHA-approved State Plans that cover both private and State and local

⁶ The OSHA Integrated Management Information System (IMIS) was designed in 1991 as an information resource for in-house use by OSHA staff and management, and by State agencies which carry out federally approved OSHA programs. It was replaced by the OSHA Information System (OIS) as the primary repository of OSHA’s data, starting in 2012.

government workers (California, Hawaii, Maryland, Michigan, Minnesota, Nevada, New Mexico, Oregon, and Vermont), four States that have OSHA-approved State Plans that cover State and local government workers only (Connecticut, Illinois, New Jersey, and New York) and four States without a State Plan (Delaware, the District of Columbia, Massachusetts, Rhode Island). Their comment cited increased transparency regarding workplace safety, as well as benefits to key interested parties (including employees, consumers, employers, researchers, and the States themselves) (Docket ID 0045).

The Seventeen AGs commented that States planned to use the collected data for multiple specific purposes, including to: improve targeting and outreach (New Jersey); develop the next strategic inspection plan (Connecticut); ease administrative burden (Hawaii); target recordkeeping inaccuracies (Illinois); prioritize and increase efficiency of enforcement efforts (Maryland); improve the ability of a State advisory board on occupational safety and health to develop effective workplace injury prevention programming (Massachusetts); discern patterns in the frequency and severity of injuries (Minnesota); and inform future enforcement plans (Nevada). With the data that will become available to them, States will also be able to institute or improve targeted training and outreach programs, identify and investigate incidents in particular categories of concern (such as those that lead to ongoing disability and require accommodations under the Americans with Disabilities Act), compare the data to other data sources (such as workers' compensation data), identify workplace injury and illness underreporting, improve their ability to consider companies' workplace safety and health records when making contracting decisions, and increase the specific workplace injury and illness information available to State health agencies (Docket ID 0045). The AFL-CIO touted the prevention index created by Washington State, which operates both an OSHA State plan and the State workers' compensation program. The State "utilizes the detailed injury and illness data collected through its workers' compensation system, similar to the data contained in the Form 300 and Form 301, to develop a prevention index. The index identifies the most common and costly injuries and illnesses and the industry sectors with the greatest potential for prevention" (Docket ID OSHA-2013-0023-2088, Attachment 1).

In addition, the Seventeen AGs noted, "[T]hese benefits will only accrue if OSHA collects and publishes such data. Not all states have the resources to create and manage their own databases, and, in any event, it is costlier and more inefficient for individual states to create separate databases. Data from a single jurisdiction is also much less likely to reveal patterns in workplace health and safety. Uniform national data collection efforts, by contrast, will also allow states to benchmark their performance—overall or in specific industries—against peer states in ways that might encourage or promote reforms, interventions, or legislation to address workplace safety issues. Moreover, even if the [s]tates are not able to engage in targeted enforcement now, it is nonetheless important to begin collecting and publishing more detailed data now. . . . And when the [s]tates implement targeting in the future, having a larger database of historic data on which to 'train' targeting algorithms will ensure that these algorithms are more accurate." (Docket ID 0045). The International Brotherhood of Teamsters commented with support for "the benefits touted by the letter [from the Seventeen AGs] on the need for public reporting of detailed injury and illness information to the [s]tates' enforcement and regulatory agencies" (Docket ID 0083).

The California Department of Industrial Relations (DIR), Division of Occupational Safety and Health (Cal/OSHA), and the Connecticut Council on Occupational Safety and Health (ConnectiCOSH) also provided separate comments in support of the proposed rule, citing benefits to worker safety (Docket IDs 0069, 0084). Cal/OSHA stated that the availability of the additional data would aid in "identifying patterns that are currently masked by the aggregation of injury/illness data by industry in existing data sources." Furthermore: "[D]etailed case level data could be used when proposing new prevention-oriented regulations to California's Occupational Safety & Health Standards Board (OSHSB), when responding to petitions to OSHSB for new or amended standards, and in the creation of specific compliance assistance materials oriented to existing or emerging workplace safety problems." Cal/OSHA also emphasized that centralized data collection by OSHA "is the most efficient and cost-effective way to compile and utilize the data for prevention purposes," and the cost to States of "setting up parallel systems . . . would be significant" (Docket ID

0084; see also Docket ID OSHA-2013-0023-2088, Attachment 1).

After consideration of these comments and others in the record, OSHA has determined that the expected benefits to Federal and State agencies overcome any doubts the agency expressed in the 2019 final rule related to the usefulness of the data and the costs of collection. OSHA has determined that Federal and State agencies will be able to use the collected data to improve workplace safety and health. The agency especially notes the benefits for States, which may not have the resources to create and manage their own data collections; the inefficiency of multiple State-specific databases versus a single national database; and the advantages of a uniform national data collection requirement. OSHA finds particularly convincing the examples of State and Federal entities' past and planned future uses of the data to monitor, target, and prevent occupational injuries and illnesses.

f. Beneficial Ways That Researchers Can Use the Data From Forms 300 and 301

Multiple commenters provided examples of ways that researchers could use the collected data to improve workplace safety and health. Most generally, AIHA commented, "Researchers require a stable data source to conduct studies that depend on unbiased, complete data sets. By collecting and making the data available to researchers, stratified analyses with sufficient power can be conducted that will make the results more generalizable to specific workers and industries." (Docket ID 0030). Similarly, Centro del Derecho del Migrante commented, "Public access to these data will better allow organizations like CDM to identify patterns of injuries and hazardous conditions in workplaces and advance worker safety and health" (Docket ID 0089).

Numerous commenters pointed out the limitations of currently available data from BLS, and the need for more data to produce statistically significant, robust results for more detailed categories of injuries, establishments, and employers. NIOSH commented that the release of summary injury data for all establishments of 20 or more employees in certain industries and of individual injury case data for injuries in establishments of 100 or more employees in certain industries would produce more accurate and statistically meaningful data than the BLS Annual Survey can provide "because the number of included injury records would be much greater than that included in the BLS sample of

establishments of this size in these industries.” NIOSH stated that “the proposed data collection in higher risk industries would enable more detailed and accurate statistics on the state as well as the national level.” In addition, the new data collection OSHA plans to make available “would provide establishment-specific, case-specific injury and illness data for analyses that are not currently possible.” NIOSH also stated that the release of the data collected by OSHA should make it possible to produce meaningful statistics and perform more in-depth analysis by combining records across several years by industry, employer, or establishment, which is not possible with the BLS SOII data that is currently available (Docket ID 0035). The International Brotherhood of Teamsters concurred with this comment (Docket ID 0083).

The National Employment Law Project (NELP) commented on the need for expanded, more detailed data: “NELP recently used the currently available establishment-level Injury Tracking Application data to conduct state-specific analyses on injury and illness rates in the warehousing sector. However, with access only to electronically submitted data from Form 300A and not from Forms 300 and 301, we were limited by an inability to disaggregate by the types of serious injuries and serious illnesses. In addition, having access to case-specific injury and illness data as reported in 300 and 301 forms would have allowed NELP to identify specific injury and illness trends, and correlate these with job titles, in order to more directly address and prevent hazards that put workers at risk.” (Docket ID 0049).

The AFL-CIO commented that access to more detailed data would provide researchers with an invaluable source of information on workplace safety and health hazards (Docket ID 0061). The AFL-CIO also pointed to the limitations for researchers of the BLS SOII data: “Studies have shown that the SOII data have significant limitations and that consistent and representative mandatory reporting would provide a more accurate data source for research on causes of injuries and illnesses and prevention methods to track improvements and emerging issues.” (Docket ID 0061).

Commenters also provided examples of how researchers have used data to improve workplace safety and health. For example, The Strategic Organizing Center described its analysis of ITA data to prepare reports on occupational injury rates among warehouse workers. It stated: “This example, we believe,

completely vindicates OSHA’s original intent in establishing the Injury Tracking Application, including the public release of the data received from employers. Absent the easy availability of these data, it would be difficult if not impossible for those outside the management structure of major employers to understand the basic details of the worker safety and health situation at these companies, much less to force employers with deficient performance to change their practices. It is vital that employers who attempt to misrepresent the failures of their worker safety and health systems understand that they are subject to the independent oversight and review that can only be offered by broadly-available distribution of key metrics, such as the numbers, rates and characteristics of worker injuries and illnesses.” (Docket ID 0079).

The Strategic Organizing Center also pointed to injury research in the hotel industry as an example of the value of OSHA’s providing the 300 and 301 data for further analysis: “In the mid-2000’s, as the hotel industry was rapidly introducing heavier mattresses and increased workloads for housekeepers, the hotel union UNITE HERE undertook an analysis of the 300 logs and employee personnel demographic data to determine injury trends by injury type, job title, gender and race/ethnicity. We published [a] study by Buchanan et al in 2010, the value of which OSHA recognized in the preamble to the 2016 Final Injury Tracking Rule (81 FR 29685, Col. 3). It revealed that the rates of different injury types varied greatly across the study population of 55,327 person-years over a 3-year period at 50 hotels in five of the largest US hotel chains. We found that MSD’s were highest among housekeepers, and acute traumatic injuries highest among cooks/kitchen workers, and injury rates higher among women than men. Much of the various increased risks was driven by the exceptionally high risks endured by hotel housekeepers (7.9 injuries/100 person-years).” (Docket ID 0079).

The Communication Workers of America (CWA) commented on the value of access to large datasets of workplace injury and illness information. It gave examples of data analyses it has conducted to address safety and health issues:

- CWA has analyzed large quantities of OSHA Log data for certain regions from some large telecommunications employers. It was able to compare aggregate worksite data from two different regions for the same employer for the same year. Its comparison of aggregate OSHA 300 Log data from two

different regions for the same employer shows a large discrepancy in work-related COVID cases recorded on the OSHA 300 Logs and also demonstrates the value of the Cal/OSHA COVID standard’s reporting requirements given the increased reporting for sites in California.

- Recent and past analyses by a telecommunications employer of its OSHA Log data for work locations in NY has shown the toll of injuries and lost work days related to manhole cover lifting. The employer, the union and union members worked together to conduct ergonomic assessments using biometric sensors to evaluate the strain of manhole cover lifting using different designs of manhole cover lifters. The biometric assessments combined with worker feedback led to design of a new, vehicle mounted manhole lifting device. The employer will likely use the newly-approved manhole cover lifters in other areas of the country where it operates. Aggregate OSHA 300 Log data will aid in evaluating the effectiveness of this intervention in reducing and preventing manhole cover lifting injuries.

- An analysis by one employer of OSHA recordable injury/illness data for the previous year from all worksites on Long Island, NY revealed there had been over 11,000 lost work days due to extension ladder accidents. After training, the number of extension ladder accidents in those work locations dropped significantly, to almost none. This initiative looked at aggregate data from one employer’s multiple worksites. Establishment-specific data, on its own, would not have revealed the extent of the problem and the need for interventions, nor would it have incentivized the employer to take action and provide training.

- Analyses of OSHA 300 Log data has led to multiple safety improvements in CWA-represented manufacturing facilities with active health and safety committees. At locations where CWA members build engines and engine parts, OSHA 300 Log data analyses has resulted in ergonomic assessments and training, the provision of better PPE, and improved safety protocols.

(Docket ID 0092)

After consideration of these comments, OSHA has determined that researchers will be able to use the collected data to improve workplace safety and health. OSHA finds particularly convincing the examples of past and planned future uses of the data by researchers to monitor, target, and prevent occupational injuries and illnesses.

g. Beneficial Ways That Workplace Safety Consultants Can Use the Data From Forms 300 and 301

In the proposed rule, OSHA asked, “What are some ways that workplace safety consultants could use the collected data to improve workplace safety and health?” (87 FR 18547). OSHA received several comments about ways that workplace safety consultants could use the collected data to improve workplace safety and health (Docket IDs 0026, 0030, 0035). Most generally, AIHA commented that the value that workplace safety consultants bring to a company is directly related to the availability of high-quality data, and “[c]ompanies that engage consultants depend on the consultant to be fully informed of the inherent risks of specific operations, tasks, and industries so that the recommendations for improvement and correction are based on evidence” (Docket ID 0030). Justin Hicks commented that the collected data would be useful “[a]s a young safety professional . . . when educating my employer on safety culture” (Docket ID 0026). Additionally, NIOSH identified a number of ways in which workplace safety consultants might use this data, including “identifying and disseminating useful facts about the comparative safety performance of establishments, employers, and employer groups,” and “analy[zing] patterns of injury causation at their client workplaces and appropriate comparisons of workplaces” (Docket ID 0035, Attachment 2). NIOSH also noted that consultants’ work with the collected data “promises to assist other stakeholders in identifying patterns of injuries and targets for prevention and to complement the research disseminated by state and federal agencies” (Docket ID 0035, Attachment 2).

OSHA agrees with these commenters that the collected data will help workplace safety consultants to be fully informed of the risks of specific operations, tasks, and industries and, in turn, will give consultants the information necessary to advise their employers on safety and health practices. Accordingly, OSHA has determined that workplace safety consultants and other workplace safety professionals will be able to use the collected data to improve workplace safety and health.

h. Beneficial Ways That the Public Can Use the Data From Forms 300 and 301

In the proposed rule, OSHA asked, “What are some ways that members of the public and other stakeholders, such

as job-seekers, could use the collected data to improve workplace safety and health?” (87 FR 18547). Several commenters provided insights about how the general public, the media, and prospective employees will be able to use the collected data to improve workplace safety and health. With respect to the general public, Hunter Cisewski commented that the public availability of data would “allow the public to hold companies accountable for creating unsafe workplaces” and “make informed decisions about . . . what industries they should support,” as well as “incentivize employers to create safe working conditions” (Docket ID 0024). The Seventeen AGs commented that the availability of data would benefit consumers, “who can use information about employer safety to inform their purchasing and contracting decisions” (Docket ID 0045). In addition, Worksafe commented that the press and advocacy organizations could “monitor and report on the data” (Docket ID 0063).

Commenters also addressed how job seekers could use the collected data to improve workplace safety and health (Docket IDs 0020, 0024, 0030, 0063, 0082). For example, Hunter Cisewski commented that the data would allow prospective employees “to make informed decisions about where they should work” (Docket ID 0024). AIHA commented that access to the collected data would allow job seekers to “inquire about specific health and safety practices or culture during interviews,” help them to be more informed, and encourage prospective employers to be more transparent (Docket ID 0030). Similarly, Worksafe commented that the availability of injury and illness data would allow job seekers “to better assess the types, severity, and frequency of injuries and illnesses in a particular workplace” and make more informed decisions regarding their employment” (Docket ID 0063). Additionally, the Seventeen AGs commented that public access to detailed injury and illness data would “empower” workers who are most impacted by occupational hazards, *i.e.*, low-income workers and workers belonging to racial and ethnic minority groups, “to make informed decisions regarding where they choose to work” (Docket ID 0045).

On the other hand, multiple commenters asserted that the data would not be useful to the public. The overarching concern of these commenters was that the public would lack the context necessary for the data to provide an accurate picture of an establishment’s safety and health practices (Docket IDs 0021, 0043, 0050,

0052, 0053, 0062, 0071, 0075, 0086, 0090). For example, the National Propane Gas Association commented that the collected data would “mislead” the public because it is “only a fraction of information regarding a workplace” and, in order to provide accurate information about worker safety, OSHA would also need to publish information such as “the number of uninjured or healthy individuals working for the establishment; . . . the safety procedures or policies implemented, days/weeks/months/years without injuries or illnesses; . . . a comparison of the frequency or average for the industry versus the specific establishment; . . . actions by the employee that caused or contributed to the injury or illness; . . . [and] the corrective actions by the establishment” (Docket ID 0050). Similarly, Angela Rodriguez commented that injury and illness data may be misleading “without the explanation of contributing root causes” (Docket ID 0052). Likewise, Representatives Virginia Foxx (R-North Carolina) and Fred Keller (R-Pennsylvania) commented that “an employer’s injury and illness logs say nothing meaningful about an employer’s commitment to safety and compliance with OSHA standards,” and “[m]any factors outside an employer’s control may lead to workplace injuries and illnesses” (Docket ID 0062). And, the Plastics Industry Association commented that when viewing an employer’s injury and illness data in isolation, “[t]here is insufficient context to draw conclusions about the employer’s safety program or practices” (Docket ID 0086).

Commenters pointed to a number of reasons for their concern about misinterpretation or misleading data. Some commenters expressed concern that the collected data may be misleading specifically because it may include injuries or illnesses that are not the employer’s fault (Docket IDs 0021, 0043, 0052, 0075, 0086, 0090). For example, the Motor and Equipment Manufacturers Association and the Flexible Packaging Association commented that data may be misinterpreted because many workplace injuries occur due to circumstances entirely outside of an employer’s control (Docket ID 0075, 0090). More specifically, AWCI commented that some injuries and illnesses are “due solely to employee misconduct,” or “the fault of neither the employer nor the employee” (Docket ID 0043). AWCI also commented that “falsified or misrepresented workplace injury or illness claims” may result in inaccurate

data, as will workplace fatalities that are later determined not to be work-related (Docket ID 0043). Similarly, Angela Rodriguez commented that under 29 CFR 1904.5(b)(2)(ii), employers are required to record injuries and illnesses for which symptoms surface at work but result solely from a nonwork-related event or exposure that occurs outside the work environment (Docket ID 0052). The Chamber of Commerce claimed that injury and illness data are unreliable because workers' compensation programs and the presence of collective bargaining agreements affect the number of injuries and illnesses reported to OSHA, therefore, "[t]wo employers with the same kinds of injuries will be viewed by OSHA and the public as differently culpable" (Docket ID 0088, Attachment 2). Finally, the Plastics Industry Association commented that "many injuries that have no bearing on an employer's safety program must be recorded," and pointed to injuries resulting from employee misconduct, substance abuse, and accidents as examples (Docket ID 0086).

Other commenters were concerned that the collected data would lead to misinterpretation because the data do not provide an accurate picture of what is currently happening or what will happen in the future. The Motor and Equipment Manufacturers Association commented generally that "injury and illness data would become stale by the time it is made public" (Docket ID 0075). AWCI commented that "[l]agging indicators . . . such as OSHA recordable/reportable injury and illness data[] have shown to be poor indicators of future safety and health performance" because they "present information about what has occurred in the past with no mechanism for accurately predicting what may occur in the future" (Docket ID 0043).

Still other commenters said that the public would be even more likely to misinterpret data from small businesses. AWCI commented that "the formula that OSHA uses [to calculate injury and illness rates] is based on 100 full-time workers and the denominator in the equation is the total number of hours worked by all employees," so "the resulting incidence rates often depict extremely inaccurate perceptions of smaller establishments' safety and health cultures and past safety and health performances" (Docket ID 0043). Similarly, the Associated Builders and Contractors commented, "by expanding the mandate to 100 or more employees from 250, OSHA's proposal puts smaller companies at a disadvantage by making them appear to be less safe than larger companies by comparison. A smaller

company with the same number of injuries and illnesses as a larger company is likely to have a higher incident rate" (Docket ID 0071).

In response, OSHA agrees with those commenters who stated that the public will be able to use the published establishment-specific, case-specific, injury and illness data to improve workplace safety and health. The online availability of such data will allow members of the public to determine which workplaces in a particular industry are the safest, and identify emerging injury and illness trends in particular industries. As noted by commenters, the public may use this data to make decisions about what companies and industries they support and want to work for. The availability of data will also facilitate the press's ability to monitor and report on it, which will further ensure that members of the public are well-informed and can make decisions accordingly. For these reasons, and as explained above, OSHA finds that public access to this data will ultimately help to improve workplace safety and health.

Generally, to the extent the commenters suggest that the case-specific data from Forms 300 and 301 will not be useful information to the public, OSHA disagrees, and finds that the benefits of expanded public access to this data outweigh commenters' concerns. As OSHA explained in the final rule on Occupational Injury and Illness Recording and Reporting Requirements (January 19, 2001), injury and illness records have long made employers more aware of the injuries and illnesses occurring in their workplaces, and are essential in helping employers to effectively manage their safety and health programs. Additionally, such records ensure employees are better informed about hazards they face in the workplace and encourage employees to both follow safe work practices and report workplace hazards to employers (66 FR 5916–67). For similar reasons, as identified by commenters and explained above, the public can use such data to improve workplace safety and health.

However, OSHA acknowledges commenters' concerns about potential misinterpretation and recognizes that the public may need more assistance in understanding the data than employers, researchers, and other similar interested parties. OSHA recognizes the need to provide information to the public to aid their understanding of the data. The web page for the ITA (<https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data>) contains several explanations of the data that address

commenters' specific concerns, including:

- "Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits."

- "While OSHA takes multiple steps to ensure the data collected is accurate, problems and errors invariably exist for a small percentage of establishments. OSHA does not believe the data for the establishments with the highest rates in these files are accurate in absolute terms. Efforts are made during the collection cycle to correct submission errors; however, some remain unresolved. It would be a mistake to say establishments with the highest rates in these files are the 'most dangerous' or 'worst' establishments in the nation."

The web page for the data collected through the OSHA Data Initiative (https://www.osha.gov/ords/odi/establishment_search.html) also includes the second explanatory note.

OSHA also notes the many examples in the rulemaking record provided by commenters on not only how various interested parties currently use establishment-specific, case-specific, injury and illness data, but also on how they will be able to use the greater access to such information provided by this final rule to reduce occupational injuries and illnesses. Some commenters' concerns seem to hinge on the assumption that the general public lacks the sophistication necessary to understand the collected data. However, this section of the preamble provides many examples of the ways in which employers, employees, government agencies, researchers, and other interested parties will use this data to perform more detailed and accurate analyses of workplace safety and health practices, create education and training programs to reduce workplace hazards, develop resources, and conduct studies. To the extent that members of the public require additional context to make sense of injury and illness data, other interested parties will make that information available through their own use of the data.

Additionally, as explained in more detail in Section III.B.14 of this Summary and Explanation, commenters provided suggestions for ways to make published data more useful to interested parties. The Seventeen AGs also commented that the public may only benefit from the publication of injury and illness data "if it is aware of its existence," and suggested that OSHA "evaluate and choose effective avenues

for publicizing the availability of the data” (Docket ID 0045). OSHA will take these comments into consideration when designing tools and applications to make the published data more accessible and useful to interested parties.

After consideration of these comments, OSHA has determined that members of the public and other interested parties will be able to use the collected data to improve workplace safety and health. OSHA will continue to consider additional ways to assist the public in both awareness of and understanding the data, including through web-based search applications and other products. As explained in the preamble to the proposed rule, the agency plans to make the data available and able to be queried via a web-based tool. Interested parties who are interested in learning about occupational injuries and illnesses will have access to information on when injuries and illnesses occur, where they occur, and how they occur. In addition, interested parties can use the tool to analyze injury and illness data and identify patterns that are masked by the aggregation of injury/illness data in existing data sources. As explained in the preamble to the proposed rule, in developing a publicly accessible tool for injury and illness data, OSHA will review how other Federal agencies, such as the Environmental Protection Agency (EPA), have made their data publicly available via online tools that support some analyses.

For the above reasons, and based on the record in this rulemaking, OSHA believes that the electronic submission requirements, along with the subsequent publication of certain injury and illness data, set forth in this final rule will result in significant benefits to occupational safety and health. OSHA also concludes that the significant benefits to employers, employees, OSHA, and other interested parties described in this section outweigh the slight risk to employee privacy. Accordingly, OSHA has determined that it is necessary and appropriate to require certain establishments to electronically submit case-specific, establishment-specific, data from their Forms 300 and 301 to OSHA once a year.

5. The Freedom of Information Act (FOIA)

Many of the comments OSHA received on proposed § 1904.41(a)(2) related not to the proposed requirement to *submit* information from OSHA Forms 300 and 301, *per se*, but rather to OSHA’s plan to make some of the data

which it receives publicly available on its website (as detailed above). The agency is doing so for two main reasons. First, based on its experience with previous FOIA requests for particular establishments’ Forms 300A, 300, and 301 (as contained in inspection files) and for all Form 300A data submitted electronically, OSHA anticipates that it will receive FOIA requests for the Form 300 and 301 data submitted under the requirements of this final rule. Once the agency releases the Form 300 and 301 data submitted under the requirements of this final rule (after applying the appropriate FOIA exemptions), OSHA anticipates (again based on the previous FOIA requests) that it would be required to post the released information online under 5 U.S.C. 552(a)(2)(D), which requires agencies to “make available for public inspection in an electronic format . . . copies of all records . . . that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or . . . that have been requested 3 or more times[.]” OSHA finds that proactively releasing the electronically submitted information from establishments’ Forms 300 and 301 would conserve resources that OSHA would otherwise spend responding to such FOIA requests (before the information would be posted online after the agency’s initial responses to such requests).

Second, and more importantly from a safety and health perspective, as explained in detail in Section III.B.4 of this Summary and Explanation, above, OSHA believes that the public release of case-specific data from establishments’ Forms 300 and 301 will generate many worker safety and health benefits. In short, OSHA anticipates that employers, employees, Federal and State agencies, researchers, workplace safety consultants, members of the public, and other interested parties can use the collected data to improve workplace safety and health. (Comments related to benefits are addressed above in Section III.B.4 of this Summary and Explanation.)

OSHA explained both of these reasons in the proposal (see 87 FR 18535, 18542). OSHA also discussed the similarities between the way it intends to treat the data it would collect and publish under this rule and the way it responds to requests for the same data under FOIA. OSHA explained that it already collects Forms 300 and 301 during many inspections, and often receives requests for them under FOIA. As a rule, OSHA releases copies of the Forms 300 and 301 for closed cases after

redacting the same information that will either not be collected or not be published under this rule. OSHA explained that it uses FOIA Exemptions 6 and 7(C) to withhold from disclosure information in personnel and medical files and similar files that “would constitute a clearly unwarranted invasion of personal privacy” or records or information compiled for law enforcement purposes to the extent that the production of such law enforcement records or information “could reasonably be expected to constitute an unwarranted invasion of personal privacy” (5 U.S.C. 552(b)(6), 552(b)(7)(C)). OSHA intended this discussion to reassure the regulated community that it has a great deal of experience in protecting privacy interests when it releases the forms that are at issue in this rule.

Separately, OSHA also pointed out that in multiple cases where it had denied FOIA requests for Form 300A data, which does not include personal information about injured employees, courts had ruled that OSHA had to release the data (see 87 FR 18531). OSHA believes those rulings support its decision here to release non-personal information from the Forms 300 and 301. (One commenter said that the name and telephone number of the executive certifying the accuracy of Form 300A should be considered private information (Docket ID 0086); OSHA agrees; in fact, the agency has never even collected this information as part of its routine data collection of information from the Form 300A through either the ODI or the ITA. Likewise, it will not do so pursuant to this rule.)

A number of commenters reacted to OSHA’s discussion of FOIA (e.g., Docket IDs 0042, 0050, 0070, 0071, 0072, 0076, 0088, 0090, 0094). For example, the National Propane Gas Association (NPGA) said that it “strongly disagrees” with OSHA’s argument “that since case-specific, establishment-specific information is subject to FOIA requests, the information is available to the public inevitably and, thereby, the agency’s proposal to create a public website merely eliminates the procedural step of a stakeholder submitting a FOIA request.” According to NPGA, a “FOIA request is defined to a specific incident or event, date, and establishment and initiated on the basis of a defined interest by the submitter” (Docket ID 0050). OSHA does not agree. FOIA requests can be filed by any member of the public, with no requirement to show why the requester is seeking the information, and researchers and members of the press

file such requests frequently. These requests are often for large quantities of data, not for material related to “a specific incident or event, date, and establishment.”

The Phylmar Regulatory Roundtable (PRR) also expressed concern with OSHA’s statements in the preamble about how the agency “generally releases copies of the 300 logs [(i.e., Form 300)] maintained in inspection files in response to FOIA requests after redacting employee names (column B)” (see 87 FR 18532) commenting, “[i]t is not clear what is meant by ‘generally releases’ but it can be assumed it is not often. Currently, OSHA only has access and, more importantly, the ability to release Form 300 Logs that are collected as part of an inspection” (Docket ID 0094). PRR added, “It is commonly known, and stated in the NPRM, that OSHA does not have the resources to conduct a fraction of the inspections that collection through the proposed rule would produce. In actuality, the previous risk is much lower than what OSHA is now proposing. Also, the privacy is no longer central to FOIA requests because once the data is posted, anyone will have access, without having to make any official requests. Finally, the little protection the FOIA process does provide to protect worker confidentiality will be gone as well.” (Docket ID 0094).

This comment misunderstands OSHA’s purpose in discussing its FOIA practice. The section of the NPRM preamble in which the OSHA statements quoted by PRR appear is an explanation of which data from the OSHA Forms 300 and 301 the agency proposed to make available on OSHA’s website. In the paragraph in which the sentence commented on by PRR appears, OSHA explained that it plans to collect all the fields in establishments’ Form 300 except employee name (column B) and that “[a]ll collected data fields on the 300 Log will generally be made available on OSHA’s website” (87 FR 18532). At the end of this paragraph, OSHA explained that it currently “generally releases copies of the 300 Logs maintained in inspection files in response to FOIA requests after redacting employee names” (87 FR 18532). This information was included to explain that releasing information from establishments’ Forms 300s is not new; OSHA has been releasing information from both the 300 and 301 forms for some time.

When OSHA said it “generally releases” data, it meant that the default is to release it, unless there is a reason not to do so (i.e., one or more FOIA Exemptions). For example, if a Form

includes information that could reasonably be expected to identify individuals directly, the agency would withhold that information from release under FOIA Exemption 6 or 7(C). Likewise, and as discussed in more detail below, OSHA is utilizing multiple layers of protection to ensure that information which could reasonably be expected to identify individuals directly is protected from disclosure.

OSHA also disagrees with PRR’s assertion that “the little protection the FOIA process does provide to protect worker confidentiality will be gone” when this rulemaking goes into effect and with its claim that the risk of worker identification under OSHA’s FOIA practice is far lower than that in this rulemaking (Docket ID 0094). As explained extensively throughout this section, OSHA has included multiple layers of protection to protect information that could reasonably be expected to identify individuals directly. Significantly, this includes not collecting some information that is included on the Forms 300 and 301 that OSHA collects during inspections (e.g., employee names). Thus, the information obtained in this rulemaking is already starting at a less-identifiable point than the information obtained during inspections. And OSHA expects that the remainder of the process, i.e., system design, only releasing certain fields, and using scrubbing technology, will provide comparable protection to that provided under the FOIA process.

OSHA also received comments from a number of interested parties expressing concern about the proposed requirement for establishments to submit and OSHA’s plan to publish particular information that appears on establishments’ Forms 300 or 301. These commenters alleged that their businesses would suffer in various ways if such information was collected and released. For example, some of these commenters argued that the proposed rule would require employers to submit to OSHA data that the commenters consider to be proprietary and confidential to their businesses, e.g., the number of employees and the hours worked at a particular location are regarded as proprietary information by many companies (Docket IDs 0042, 0071, 0072, 0088, 0090). A comment from the Louisiana Chemical Association is representative of this argument: “The number of employees and the hours worked at a particular location [are] regarded as proprietary information by many companies. This information if revealed provides details regarding the business processes, production volumes, security, and

operational status of a facility” (Docket ID 0042). Similar comments were made by the National Retail Federation (Docket ID 0090), the U.S. Chamber of Commerce (Docket ID 0088), and the Associated Builders and Contractors (Docket ID 0071).

Similarly, other commenters opposed the publication of an establishment’s name and address, as well as case-specific injury and illness data from the Forms 300 and 301, on the ground that doing so would harm a company’s overall reputation (e.g., Docket ID 0036, 0043, 0050, 0068, 0071).⁷ For example, according to NAM, “This newly available data immediately puts employers, manufacturers in particular, in a defensive posture whereby compliance with this rule adds unintended risks to company reputation. Prematurely publishing sensitive establishment data would damage those companies who are improving their safety programs, leaving smaller businesses the most vulnerable in such a scenario. Manufacturers need to know that their good faith compliance will not hurt their business.” (Docket ID 0068).

When considering whether a particular piece of information OSHA proposed to collect and make publicly available in this rulemaking will be problematic in any way, including as to a company’s competitiveness or its reputation, it is important to consider which information is currently publicly available and whether posting such data has actually resulted in the harm raised by commenters on this rulemaking. OSHA began publishing individual establishment 300A annual summary data, then submitted through the OSHA Data Initiative (ODI), in 2009, and data for calendar years 1996 through 2011 is posted in a searchable format at: https://www.osha.gov/ords/odi/establishment_search.html. The ODI data files include information on the number of employees and the hours worked hours, as well as establishments’ names and street addresses (see “DataDictionary1996–2001.txt”, “DataDictionary2002–2011.txt” available at the ODI website cited in the previous sentence). Despite the fact that these data have been publicly available for more than a decade, OSHA is not aware of, and no commenter has provided, any specific examples of reputational harm, of firms losing business opportunities or potential

⁷ OSHA notes some of the issues noted in this paragraph are addressed below in Section III.E of the Summary and Explanation, on section 1904.41(b)(10). However, OSHA sees some utility in reviewing this issue in this part of the preamble as well.

employees, or any other harm resulting from the public availability of these data.

This point was emphasized in comments submitted by the Strategic Organizing Center for this rulemaking (Docket ID 0079), including one previously submitted during the proceeding leading the 2016 rule. That comment pointed out that none of the employers expressing concern about “reputational damage” during a 2013 public meeting on what became the 2016 rule “could point to a single instance of such damage arising from the release of workplace injury/illness records.” The comment added that “the representatives of several large trade associations . . . made the same claim, and offered the same paucity of evidence.” SOC further opined that if any of their members had actually suffered any reputational damages, then these “highly sophisticated participants . . . would either already know about it or been able to find at least a pattern of compelling examples worthy of the Secretary’s consideration in this rulemaking,” but they did not offer any such examples at the public meeting, “even in response to repeated questions by OSHA.” Almost a decade has passed since that meeting, even more information is available, and OSHA has still seen no evidence of reputational or other harm to employers that submitted required data.

Moreover, OSHA has also published data from establishments’ Forms 300A for calendar years 2016 through 2021 in downloadable data files at <https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data>. These published data include, among other things, company name and address, annual average number of employees, and total hours worked (see Data Dictionary available at the OSHA website cited in the previous sentence). Again, OSHA is not aware of, and no commenter has provided, any specific examples of reputational harm, of firms losing business opportunities or potential employees, or any other harm resulting from the public availability of these data. Consequently, OSHA is not persuaded that these unsubstantiated concerns regarding potential harms that may result from OSHA’s posting of information from their recordkeeping forms in any way outweigh the worker safety and health benefits that will be realized from OSHA’s collection and posting of certain data from establishments’ recordkeeping forms.

OSHA also received comments arguing that the proposed rule was arbitrary and capricious or that OSHA’s statements within the proposed rule’s

preamble were otherwise suspect, problematic, or confusing because OSHA has taken a different position during past FOIA litigation. For example, the U.S. Chamber of Commerce commented that in the *New York Times Co. v. U.S. Dep’t of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004), and in *OSHA Data/CIH, Inc. v. U.S. Dep’t of Labor*, 220 F.3d 153 (3d Cir. 2000), OSHA took the position that the total number of employees and hours worked at a particular establishment was “confidential and proprietary business information,” in contrast to its position in the NPRM (Docket ID 0088, Attachment 2).

The Chamber accurately characterizes OSHA’s arguments in the *New York Times* case but fails to mention one key fact: the court found that the information was not confidential. Specifically, in its decision, the court concluded that basic injury and illness recordkeeping data regarding the average number of employees and total number of hours worked does not involve confidential commercial information (see 350 F. Supp. 2d 394 at 403). It held that competitive harm would not result from OSHA’s release of lost workday injury and illness rates of individual establishments, from which the number of employee hours worked could theoretically be derived (id. at 402–403). Additionally, the court explained that most employers do not view injury and illness data as confidential (id. at 403).

In the years after the court’s decision rejected the Secretary’s argument that the injury and illness rates requested in the FOIA suit could constitute commercial information under Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), the Secretary reconsidered their position. Beginning in 2004, in response to FOIA requests, OSHA’s policy has been to release information from Form 300A on the annual average number of employees and total hours worked by all employees during the past year at an establishment. Similarly, OSHA began releasing establishment Forms 300 and 301 in response to FOIA requests (after appropriately redacting certain personal identifiers under Exemption 7(C)). And, as noted above, the agency began posting information from establishments’ Forms 300A online in 2009 as part of ODI. Thus, OSHA included a statement in the 2013 proposed rule and 2016 final rule explaining that the Secretary no longer believes that the injury and illness information entered on the OSHA recordkeeping forms constitutes confidential commercial information.

OSHA’s general practice of releasing recordkeeping forms to FOIA requesters (with appropriate redactions largely related to information that could identify employees, e.g., employee names) continued in the years prior to the Supreme Court’s decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) (“*Argus Leader*”). In *Argus Leader*, the Court held that “at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of Exemption 4” (id. at 2366). After the issuance of the *Argus Leader* decision, OSHA changed its practice and began processing requests for OSHA Forms 300, 300A, and 301 under Exemption 4, a decision which the agency believed was supported by *Argus Leader*. Then, after several courts disagreed with OSHA’s interpretation, the agency reverted to its previous practice and began releasing the recordkeeping forms as before (see 87 FR 18531 (discussing three adverse rulings in which courts rejected OSHA’s position that electronically submitted 300A injury and illness data are covered under the confidentiality exemption in FOIA Exemption 4)). In other words, although OSHA has previously argued that some of the Form 300, 300A, and 301 information should not be released under FOIA, the agency changed its posture to comport with adverse court rulings. Consequently, the agency is not persuaded by comments reiterating those court-rejected arguments.

In making this decision, OSHA notes that many employers already routinely disclose information about the number of employees at an establishment. Since 2001, OSHA’s recordkeeping regulation has required employers to record information about the average annual number of employees and total number of hours worked by all employees on the OSHA Form 300A. Section 1904.35 also requires employers to provide to employees, former employees, and employee representatives non-redacted copies of the OSHA Form 300A. In addition, § 1904.32(a)(4) requires employers to publicly disclose information about the number of employees and total number of hours worked through the annual posting of the 300A in the workplace for three months from February 1 to April 30.

OSHA notes that it also received comments from interested parties arguing that OSHA should rescind the requirement to submit the 300A Summary Form to OSHA because that form contains confidential business

information (CBI) (e.g., Docket ID 0059). Such comments are reiterating legal arguments which courts rejected in the cases discussed above. Consequently, OSHA disagrees with the assertion that the 300A forms contain CBI and declines to make the requested change.

6. Safeguarding Individual Privacy (Direct Identification)

As explained above, OSHA's decision to collect certain data from establishments' Forms 300 and 301 stems from its determination that OSHA will be able to use the data to improve worker safety and health. Similarly, the agency's decision to publish some of the Forms 300 and 301 data it receives pursuant to this rulemaking flows from its expectation that it will receive FOIA requests requesting the data and its determination that such publication will result in many occupational safety and health benefits. Importantly, in the proposal, OSHA also preliminarily determined that these benefits would not be at the expense of employee privacy. In other words, OSHA preliminarily determined that it would be able to adequately protect information that could reasonably be expected to identify individuals directly—both in the collecting and possession of the data and in its decisions surrounding which information will be made publicly available.

This question, *i.e.*, whether OSHA would be able to adequately protect information that could reasonably be expected to identify individuals directly, was raised in the rulemaking that culminated in the issuance of the 2016 final rule. It was also a major factor in OSHA's decision to rescind the requirement for certain employers to electronically submit information from Forms 300 and 301. Specifically, in the preamble to the 2019 final rule, OSHA stated that it was rescinding that requirement “to protect sensitive worker information from potential disclosure under the Freedom of Information Act (FOIA)” and that “OSHA has always applied a balancing test to weigh the value of worker privacy against the usefulness of releasing the data” (84 FR 383–384). The preamble to the 2019 final rule also stated the agency's belief at the time that OSHA could withhold the data from Forms 300 and 301 from publication under FOIA Exemptions 6 and 7(C) (84 FR 386), but OSHA concluded at that time that the risk of disclosure of case-specific, establishment-specific, information could not be justified “given [the agency's] resource allocation concerns and the uncertain incremental benefits

to OSHA of collecting the data” (84 FR 387). Moreover, in the preamble to the 2019 final rule, OSHA characterized information such as descriptions of workers' injuries and the body parts affected (Field F on Form 300, Field 16 on Form 301), as “quite sensitive,” and stated that public disclosure of this information under FOIA or through the OSHA Injury Tracking Application (ITA) would pose a risk to worker privacy. It added that “although OSHA believes data from Forms 300 and 301 would be exempt from disclosure under FOIA exemptions, OSHA is concerned that it still could be required by a court to release the data” (84 FR 383).

As noted in the preamble to the proposed rule for this rulemaking, however, OSHA has determined those bases for the removal of the 300 and 301 data submission requirement are no longer compelling. As to the risk to employee privacy, OSHA preliminarily determined that the proposed data collection would adequately protect information that could reasonably be expected to identify individuals directly, such as name and address, with multiple layers of protection. Of particular importance, OSHA explained that improvements in technology have decreased the resources needed by the agency to collect, analyze, and publish data from Forms 300 and 301 (87 FR 18538). In addition, OSHA noted the 2019 final rule took an overly expansive view of the term “personally identifiable information” and preliminarily determined that the 2019 final rule's position on such information was at odds with the agency's usual practice of regularly releasing such data (87 FR 18539).⁸

A number of commenters expressed concern about OSHA's reasoning for the collection and publication of Forms 300 and 301 data in the preamble to the proposed rule (e.g., Docket ID 0038, 0058, 0059, 0072, 0088, 0091). For example, NPGA argued that OSHA should evaluate the data it already collects from industries listed in appendix A to determine whether additional information collection will further workplace safety (Docket ID 0050). As discussed extensively above in Section III.B.4 of this Summary and Explanation, OSHA has evaluated and used the 300A data it collects and

anticipates that many workplace safety and health benefits will flow from the collection of the *case-specific* data that will be submitted by establishments pursuant to final 1904.41(a)(2).

Other commenters focused on whether OSHA had adequately explained its change of opinion on whether the risk of collecting and publishing Form 300 and 301 data outweighs the benefits to worker safety and health. For example, the American Feed Industry Association (AFIA), the Coalition for Workplace Safety, and the Flexible Packaging Association all expressed disagreement with OSHA's determination that the significant benefits of collecting establishment-specific, case-specific data from the 300 and 301 forms outweigh the slight risk to employee privacy (Docket IDs 0038, 0058, 0091). On the other hand, the National Council for Occupational Safety and Health noted that OSHA needs “workplace injury and illness information . . . to work effectively,” and that it is “unlike almost any other government agency in charge of protecting public safety” in not receiving it already (Docket ID 0048).

As discussed above, OSHA believes it has good reasons to collect and publish information from the covered establishments' Forms 300 and 301 (see Section III.B.4 of this Summary and Explanation). And, as to the risk to employee privacy, OSHA has determined that it can implement multiple layers of protection described above to protect such information that could reasonably be expected to identify individuals directly, *e.g.*, names and addresses. These protective measures include limiting the amount of information submitted by employers, reminding employers not to submit information that could reasonably be expected to identify individuals directly, withholding information from certain fields from publication, and using automated information technology to detect and remove any remaining information that could reasonably be expected to identify individuals directly. These measures will ensure that individual privacy is protected while key information on workplace hazards is disseminated to employees, employee representatives, and other interested parties. The following discussion explains how each layer of protection will help to ensure that individual privacy is protected.

In the proposed rule, OSHA stated that its first measure to prevent the release of information that could reasonably be expected to identify individuals directly is to not collect most of that information in the first

⁸ In this preamble, OSHA generally uses the phrases “information that could reasonably be expected to identify individuals directly” and “information that could reasonably be expected to identify individuals indirectly,” rather than the broader term “personally identifiable information” (PII) to aid interested parties in understanding precisely what type of information OSHA is referring to in the discussion. The information referred to in both phrases can be considered PII.

place. Specifically, as discussed above and detailed in Section III.D of this Summary and Explanation, on § 1904.41(b)(9), the proposal explained to establishments that employers did not need to submit the following information: (1) from the Form 300 Log: the employee name column (column B) and (2) from the Form 301 Incident Report: the employee name (Field 1), employee address (Field 2), name of physician or other health care professional (Field 6), and facility name and address if treatment was given away from the worksite (Field 7). OSHA explained that, since this information would not be collected, there would be no risk of publication disclosure of the data in the fields (87 FR 18538).

Some interested parties submitted comments agreeing with OSHA's logic on this point (e.g., Docket IDs 0030, 0063, 0064). For example, Worksafe supported the proposed omission of employee name and address, physician names, and treatment facilities from collection and publication to protect individual privacy (Docket ID 0063). And AIHA commented that if PII is not collected by OSHA, there would be no need to redact submitted information (Docket ID 0030). Based on this feedback, and as discussed further in Section III.D of this Summary and Explanation, the final rule, like the proposed rule, does not allow employers to submit the above information.

Again, as discussed in Section III.D of this Summary and Explanation, OSHA received comments from interested parties requesting that OSHA add other fields from Forms 300 and 301 to the list of fields which establishments are not required to submit under the final rule. These comments are addressed in detail in Section III.D, but OSHA also notes here that these interested parties' true concerns appear to relate to whether OSHA can keep the collected data private (e.g., will OSHA have to release it in response to a FOIA request or otherwise release it accidentally, such as because an employee name or other direct employee identifier is contained in a narrative field) or whether the fields OSHA intends to release will allow third parties to indirectly identify employees. OSHA's plan to mitigate each of these concerns is discussed in detail below. Thus, again as stated in the summary and explanation for § 1904.41(b)(9), the agency declines to add further fields to the list of fields from establishments' Forms 300 and 301 which will not be collected under this final rule.

As discussed in the proposal, OSHA's second measure to prevent the release of

information that could reasonably be expected to identify individuals directly relates to system design (87 FR 18538). Specifically, the agency explained that it planned to design its data collection system to provide extra protections for the personal information that establishments would be required to submit under the proposal. For example, OSHA stated that although the proposal would require employers to submit the employee's date of birth from Form 301 (Field 3), it planned to design the data collection system to immediately calculate the employee's age based on the date of birth entered and then store only the employee's age, not the employee's date of birth. OSHA also indicated its intent to post reminders to establishments to omit from the text fields they submit any information that could reasonably be expected to identify individuals directly, including names, addresses, Social Security numbers, and any other identifying information (see 87 FR 18538).

In addition to these proposed system design solutions, OSHA included a question in the proposal asking: "What additional guidance could OSHA add to the instructions for electronic submission to remind employers not to include information that reasonably identifies individuals directly in the information they submit from the text-based fields on the OSHA Form 300 or Form 301?" (87 FR 18546). OSHA received a number of responses to this question. For example, AIHA commented, "The electronic forms that OSHA provides should be designed to automatically exclude personal identifiers with an option to include the fields if required. The import side of the electronic form data could also block the importation of these fields" (Docket ID 0030).

The Plastics Industry Association (PIA) commented that, although it does not believe the reminder would be "an acceptable remedy for inadequate software," "[i]f OSHA were to proceed in this way. . . , OSHA should include the warning about not including personal identifiers in an online screen and require the submitter to click a confirmation that it has not included any personal identifiers before allowing the submitter to proceed to the data entry step." PIA also stated that after the data entry is completed, the system should provide the employer with an opportunity to review the complete data submission, view how it would be presented to the public, and correct any inaccurate data or inadvertently included personal identifiers. After completing that step, PIA recommended

that the submitter should have to click through a second screen that repeats the warning about not including personal identifiers and confirm that none were submitted before allowing the submitter to click on the final submit button. Finally, PIA said that "[b]efore requiring compliance with the contemplated data submission requirements for the OSHA Form 300 or Form 301 data, OSHA needs to have a qualified, independent body test and validate that the software, as integrated into the OSHA ITA, will reliably remove any personal identifiers" (Docket ID 0086).

OSHA thanks the commenters who responded to the specific question on additional instructions to employers on not submitting information that identifies individuals. OSHA intends to take commenters' specific responses into account when designing the expanded collection system. Based on those comments, OSHA will include reminders in the instructions for the data collection system for employers not to submit information that could reasonably be expected to identify individuals directly. OSHA agrees that is an effective way to reduce the amount of identifiable information collected by the system. In turn, that will decrease the likelihood that such information will be published. OSHA has routinely used these types of instructions, such as when it requests comments from interested parties in rulemakings such as this one (see the section on "Instructions" above) and has found them to be an effective way to prevent the unintentional submission of information that could reasonably be expected to identify individuals directly.

Also, OSHA notes that the current ITA manual data entry option already includes a screen that provides establishments with an opportunity to review the complete data submission of Form 300A information and to make edits or corrections as appropriate. OSHA plans to gather additional information from similar data collection systems and incorporate best practices in the final design for the collection system for data from the Forms 300 and 301. Moreover, the Forms 300 and 301 themselves already include a box with the warning, "Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes." In addition, the Form 301 includes the warning, "Re [F]ields 14 to 17: Please do not include any personally identifiable information (PII) pertaining

to worker(s) involved in the incident (e.g., no names, phone numbers, or Social Security numbers).” Fields 14–17 do not ask for information likely to implicate privacy concerns, rather, they request information related to the injury or illness and how it occurred. OSHA believes these warnings are adequate and does not believe it is practical to develop a system that would remove remaining information between an establishment’s draft and final electronic submissions. Such systems take time to run (see, e.g., Docket ID 0095), which would increase the time between employer submission (i.e., when the employer clicks on the ‘submit’ or ‘upload’ button) and employer receipt of confirmation of successful submission, potentially creating concerns about whether the submission system is working. OSHA therefore believes that it is more appropriate to identify and remove any information that could reasonably be expected to identify individuals directly after submission and before publication, rather than during submission. Moreover, OSHA thinks its plans to protect such data will adequately protect worker privacy without adding this additional, impractical, potentially expensive (adding additional functionality to system) step. Finally, as to system design, OSHA’s system will not allow establishments to enter the fields that are excluded from collection under § 1904.41(b)(9).

As discussed in the proposal, OSHA’s third measure to prevent the release of information that could reasonably be expected to identify individuals directly is to withhold certain information that is submitted to it from public disclosure. As noted above, OSHA will not collect employees’ names from either form, and will not collect employees’ addresses or the names or addresses of healthcare providers from Form 301. However, the proposed rule would have required (and the final rule actually requires) submission of some fields that contain personal information, including date of birth (which will be converted to age) (Field 3), date hired (Field 4), gender (Field 5), whether the employee was treated in the emergency room (Field 8), and whether the employee was hospitalized overnight as an in-patient (Field 9) (see 87 FR 18539). OSHA proposed to collect that information, but not to make it public, and specifically requested comment on those proposals (see 87 at FR 18540).

OSHA received a number of comments, virtually all from employers and their representatives, expressing concern over the potential risk to employee privacy presented by the

proposed collection and potential publication of information from Forms 300 and 301 that could reasonably be expected to identify individuals directly (e.g., Docket IDs 0055, 0056, 0057, 0062, 0070, 0075, 0087, 0090, 0094). For example, the Precision Machined Parts Association (PMPA) commented, the Form 300 contains sensitive information that may be released under FOIA or “through the inadvertent publication of information due to the agency’s reliance on automated de-identification systems to remove identifying information” or through the actions of “future administrations” (Docket ID 0055). The North American Die Casting Association (Docket ID 0056) and National Tooling and Machining Association and Precision Metalforming Association (Docket ID 0057) expressed similar concerns. Rep. Virginia Foxx (R-North Carolina) and Rep. Fred Keller (R-Pennsylvania) echoed that “there are no guarantees that this data may not be disclosed accidentally” (Docket ID 0062).

In contrast, commenters representing the workers whose injuries and illnesses are recorded on these forms did not share employers’ concerns about the potential publication of sensitive worker information. For example, the AFL–CIO stated that “The preamble to the 2016 final rule included a comprehensive review of privacy issues raised by interested parties in requiring the collection of detailed injury and illness data and the final language was crafted to provide safeguards to protect the release of personally identifiable information (PII).” It explained the NPRM “has also considered PII and includes the same safeguards as the 2016 final rule and discusses recent technological developments that increase the agency’s ability to manage information” (Docket ID 0061 (citing 87 FR 18538–46)). In addition, AFL–CIO observed that the type of information that OSHA proposed to collect in this rulemaking “has already been shown by other agencies it can be collected and shared without violating confidentiality, such as by Mine Safety and Health Administration (MSHA)[, and a]ll data provided under the Freedom of Information Act and Form 300 and Form 301 provided to workers and their representatives upon request under § 1904.35 provide detailed injury and illness information without releasing PII.” In summary, AFL–CIO argued that “OSHA should maintain the same privacy safeguards in the rule it issued in 2016, also proposed in this preamble and used by other agencies to protect sensitive information” (Docket ID 0061).

Similarly, the National Nurses Union affirmed that the NPRM “includes appropriate procedures to allow electronic data reporting and publication while protecting worker privacy.” To support this statement, it specifically referenced OSHA’s “plans to instruct employers to omit the fields on Form 301 that include personal information about the worker” and the agency’s plan to use data analysis tools to ensure that published data does not include any personal data that employers may accidentally submit. NNU concluded that “[t]he multiple measures to remove identifying information in the final rule will ensure that workers’ privacy is protected while key information on workplace hazards is shared” (Docket ID 0064).

OSHA agrees with the latter commenters who stated that there are multiple measures in place to protect the privacy of individuals under this final rule. As discussed above, OSHA will not collect much of the information the commenters opposing this provision expressed concern about. In addition, the collection system will provide further safeguards and reminders. For example, OSHA will redact any identifying material from the portions of the forms it intends to publish (e.g., Fields 10 through 18 of Form 301).

Further, and as discussed in more detail below in Section III.B.7 of this Summary and Explanation, OSHA will withhold from publication all of the collected information on the left side of the Form 301 (i.e., employee age, calculated from date of birth (Field 3), employee date hired (Field 4), and employee gender (Field 5), as well as whether the employee was treated in emergency room (Field 8) and whether the employee was hospitalized overnight as an in-patient (Field 9)) that could indirectly identify injured or ill employees when combined with other potentially available information. As noted in the proposal, this decision is consistent with OSHA’s handling of FOIA requests, in response to which the agency does not release data from Fields 1 through 9.

It is important to note that these forms have never been private. The information that OSHA will publish from the Forms 300 and 301 under this final rule is consistent with the information available in the agency’s longstanding records access provisions. The recordkeeping regulation at 29 CFR 1904.35 allows current and former employees and their representatives access to the occupational injury and illness information kept by their employers, with some limitations. When an employee, former employee, personal

representative, or authorized employee representative asks an employer for copies of an employer's current or stored OSHA 300 Log(s), the employer must give the requester a copy of the relevant OSHA 300 Log(s) by the end of the next business day (see 29 CFR 1904.35(b)(2)(ii)). Cases labeled as "privacy concern cases," described below, are excluded from this requirement. Finally, an authorized representative is entitled, within 7 days of requesting them, to copies of the right-hand portion of all 301 forms for the establishment(s) where the agent represents one or more employees under a collective bargaining agreement. As discussed above, the right-hand portion of the 301 form contains the heading, "Tell us about the case," and includes information about how the injury or illness occurred, including the employee's actions just prior to the incident, the materials and tools involved, and how the incident occurred, but should not include the employee's name. No information other than that included on the right-hand portion of the Form 301 may be disclosed to the authorized employee representative.

Put more simply, OSHA's decision not to release the collected information on the left-hand side of the Form 301 (*i.e.*, age (calculated from date of birth), date hired, gender, whether the employee was treated in the emergency room, and whether the employee was hospitalized overnight as an in-patient) is consistent with records access provisions in OSHA's recordkeeping regulation, § 1904.35(b)(2)(v)(A) and (B), which prohibit the release of information in fields 1 through 9 to individuals other than the employee or former employee who suffered the injury or illness and their personal representatives.

To protect employee privacy, § 1904.29(b)(7) requires the employer to enter the words "privacy concern case" on the OSHA 300 log, in lieu of the employee's name, for certain sensitive injuries and illnesses: an injury or illness to an intimate body part or the reproductive system; an injury or illness resulting from a sexual assault; a mental illness; an illness involving HIV infection, hepatitis, or tuberculosis; needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material (see § 1904.8 for definitions); and other illnesses, if an employee independently and voluntarily requests that their name not be entered on the log. In addition, under § 1904.29(b)(9), if employers have a reasonable basis to believe that

information describing a privacy concern case may be personally identifiable even though the employee's name has been omitted, they may use discretion in describing the injury or illness as long as they include enough information to identify the cause of the incident and the general severity of the injury or illness. Thus, contrary to the arguments of the Phylmar Regulatory Roundtable (PRR) (Docket ID 0094), OSHA's recordkeeping rule distinguishes between PII and "sensitive PII," which is deserving of even higher protection. OSHA's definition of privacy concern cases is very similar to the DHS definition of "sensitive PII, which this comment urged OSHA to adopt (see <https://www.dhs.gov/publication/handbook-safeguarding-sensitive-personally-identifiable-information>, p. 15). Although DHS and OSHA collect and maintain information for different purposes, the provisions in 29 CFR 1904.29 addressing privacy concern cases protect details about injuries and illnesses that workers would consider sensitive to the same extent that the DHS rule does. Therefore, it is unlikely that information describing sensitive body parts will even be recorded by employers, much less subsequently submitted to OSHA under the data collection requirements of this final rule.

Section 1904.29(b)(10) also protects employee privacy if an employer decides voluntarily to disclose the Forms 300 and 301 to persons other than those who have a mandatory right of access, by requiring employers to remove or hide employees' names or other personally identifiable information before disclosing the forms to anyone other than government representatives, employees, former employees, or authorized employee representatives, with only a few exceptions. The exceptions include disclosure to authorized consultants hired by employers to evaluate their safety and health programs; where disclosure is necessary to process a claim for workers' compensation or other insurance benefits; and disclosure to a public health authority or law enforcement entity for uses and disclosures for which consent, or authorization, or opportunity to agree or object is not required under the HIPAA privacy rule at 45 CFR 164.512. These exceptions are not relevant here or are discussed in Section III.B.10 of this Summary and Explanation, below.

OSHA acknowledged the tension between the safety and health benefits of disclosing injury and illness records on the one hand, and the desire for privacy by the subjects of those records

on the other, more than two decades ago. In OSHA's 2001 final rule overhauling its recordkeeping system, it explained that while agency policy is that employees and their representatives with access to records should treat the information contained therein as confidential except as necessary to further the purposes of the Act, the Secretary lacks statutory authority to enforce such a policy against employees and representatives (see 66 FR 6056–57 (citing, *e.g.*, 29 U.S.C. 658, 659) (Act's enforcement mechanisms directed solely at employers)). Thus, it has always been possible for employees and their representatives to make the recordkeeping data they have accessed public if they wish to do so (see 81 FR 29684). Nonetheless, OSHA also concluded that the benefits to employees and their representatives of accessing the health and safety information on the recordkeeping forms carry greater weight than any particular individual employee's possible right to privacy (see 66 FR 6055). Similarly, in the current rulemaking, OSHA continues to believe that the benefits of publication of injury and illness data at issue in this rule, discussed in detail above, outweigh the slight possibility that some employees could be identified from that data. There are even more exclusions from the data that will be made public under this rule than from the data available to employees and their representatives, and OSHA is unaware of any instances where an employee took the currently available recordkeeping information and used it to publicize the identity of an injured or ill worker.

Some commenters, however, thought there should be a distinction between the information available to workers at an establishment and their representatives, and information available to the broader community. The U.S. Poultry & Egg Association, the Plastics Industry Association, and PRR all acknowledged the value of providing this information to those workers but argued that similar value is not provided by making the information available to others in the industry (Docket IDs 0053, 0086, 0094). OSHA disagrees. As explained in Section III.B.4 of this Summary and Explanation, OSHA believes that expanding access to such information on a public website will increase information about workplace hazards, create awareness of potential hazards for other members of an industry, provide useful information for potential and current employees, and allow all

establishments to address hazards more effectively.

OSHA notes that it also received comments from interested parties expressing concern that courts might order the agency to release some of the data it collects and does not plan to release in this rulemaking, *i.e.*, in a decision in a FOIA lawsuit. Based on its years of experience processing FOIA requests to which establishments' Forms 300 and 301 were responsive and redacting and releasing those forms, OSHA believes this outcome is highly unlikely. As noted in the proposal and discussed in more detail above, the agency often collects such forms during inspections. When releasing the forms to FOIA requesters, it has long redacted the information that it will collect as a result of this rulemaking but does not intend to publish.

Specifically, as noted above and explained in the proposal, OSHA uses FOIA Exemption 7(C) to withhold from disclosure information that reasonably identifies individuals directly included anywhere on the three OSHA recordkeeping forms. And OSHA has used FOIA Exemption 6 to protect information about individuals in "personnel and medical and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy" (5 U.S.C. 552(b)(6)). Together, these Exemptions clearly cover the information about which commenters are concerned (*i.e.*, *directly* identifying information—concerns about indirect identifiers are discussed below) and OSHA is confident that it will continue to be able to withhold such information from public exposure under these Exemptions.

In addition, OSHA notes that its plan to release only certain fields will also prevent accidental release of information that could reasonably be expected to identify individuals directly. Specifically, when OSHA publishes the information collected in this rulemaking, that release will by design exclude the fields that OSHA does not intend to release. This is similar to OSHA's current practice as to the collection of information submitted with establishments' Forms 300 A. Specifically, as part of the process for collecting information from the Form 300A through the ITA, OSHA collects the name and contact information for the person associated with the account that is electronically submitting information from the Form 300A for a given establishment. OSHA also previously collected this information for establishment submissions of information from the Form 300A

through the ODI. OSHA does not make this information public. Indeed, there is little risk that the agency might accidentally do so because the data release only includes information from the Form 300A. It plans to follow that same practice with the data from establishments' Forms 300 and 301.

OSHA's fourth measure to prevent the release of information that could reasonably be expected to identify individuals directly is through the use of scrubbing technology. In the preamble to the 2019 final rule, OSHA stated that "de-identification software cannot fully eliminate the risk of disclosure of PII or re-identification of a specific individual and manual review of the data would not be feasible" (84 FR 388). However, in the preamble to this proposed rule, OSHA preliminarily determined that this reason was no longer compelling. The agency explained that recent advancements in technology have reduced the risk that information that could reasonably be expected to identify individuals directly will be disclosed to the public. In addition, OSHA expected the improved technology used to protect sensitive employee data to reduce costs and resource-allocation issues for OSHA by eliminating the need to manually identify and remove information that could reasonably be expected to identify individuals directly from submitted data and by decreasing the resources required to analyze the data. OSHA added that, because of these improvements in automated de-identification systems, OSHA would now be better able to collect, analyze, and publish data from the 300 and 301 forms, so the anticipated benefits of collecting the data would be more certain. The collection of case-specific data would allow the agency to focus its enforcement and compliance assistance resources based on hazard-specific information and trends, and to increase its ability to identify emerging hazards, at the establishment level. Accordingly, OSHA preliminarily believed that the significant benefits of collecting establishment-specific, case-specific data from the 300 and 301 forms would outweigh the slight risk to employee privacy (87 FR 18538).

In the preamble to the proposed rule, OSHA specifically asked the following questions about automated de-identification systems:

- What other agencies and organizations use automated de-identification systems to remove information that reasonably identifies individuals directly from text data before making the data available to the general public? What levels of

sensitivity for the automated system for the identification and removal of information that reasonably identifies individuals directly from text data do these agencies use?

- What other open-source and/or proprietary software is available to remove information that reasonably identifies individuals directly from text data?

- What methods or systems exist to identify and remove information that reasonably identifies individuals directly from text data before the data are submitted?

- What criteria should OSHA use to determine whether the sensitivity of automated systems to identify and remove information that reasonably identifies individuals directly is sufficient for OSHA to make the data available to the general public?

- What processes could OSHA establish to remove inadvertently-published information that reasonably identifies individuals directly as soon as OSHA became aware of the information that reasonably identifies individuals directly?

(87 FR 18546–47)

Overall, there were no comments about the technical aspects of software to identify and remove information that could reasonably be expected to identify individuals directly. However, Worksafe commented, "Worksafe encourages OSHA to consult with technical experts. The Federal Government has two groups of experts that may be able to help: the U.S. Digital Service, a group of technology experts that assist agencies with pressing technology modernization, and 18F, a 'technology and design consultancy' housed within the General Services Administration. Technical experts should be able to advise on both the capabilities and limits of software to accomplish the sort of filtering that OSHA has proposed." (Docket ID 0063). In addition, AIHA's comment supported use of software to remove the information before submission: "If the personally identifiable information (PII) is not submitted, there would be no reason to have an automated system capable of removing the sensitive portions of the information. A unique identifier could be auto-generated by the system instead of utilizing PII" (Docket ID 0030).

There were also comments that OSHA should select, identify, test, and demonstrate the results of de-identification software before proceeding with a final rule. For example, the Coalition for Workplace Safety commented, "OSHA has not yet conducted tests of [its privacy

scrubbing] technology on the Forms 300 or 301,” and “OSHA acknowledges that the information it will collect and publish can still be used to identify individuals indirectly by combining it with other publicly available information.” The commenter also stated that OSHA “relies heavily on automated information technology to remove information that can directly identify individuals,” which is “not 100 percent accurate so there will still be information made publicly available which can be used to directly identify individuals” (Docket ID 0058).

Similarly, the National Association of Manufacturers commented, “The new online requirement places an unintentional burden on the agency that it may not be prepared to implement. The agency’s pledge to design a system that both abides by FOIA protocols and uses scrubbing technology to protect PII is problematic because such a system is unproven and untested at OSHA. The agency should demonstrate the effectiveness and stability of such a system before it proceeds further with this rulemaking. (Docket ID 0068).

The Motor and Equipment Manufacturers Association commented, “OSHA says it will also address this risk by using existing privacy scrubbing technology that it claims is capable of de-identifying information that reasonably identifies individuals directly (such as name, phone number, email address, etc.). However, OSHA made this same claim in the preamble to the 2016 injury and illness reporting rule, which the agency rejected in the preamble to the 2019 rescission rule . . . the Proposed Rule provides no details on the systems, software, or platforms that are available now but were not available at the time of the 2019 rescission rule. In fact, all but one of the data scrubbing products identified by OSHA in the Proposed Rule were commercially available prior to the issuance of the rescission rule.” (Docket ID 0075).

The Plastics Industry Association commented, “First, we are concerned that OSHA is referring to technically feasible automated software that could identify unique personal identifiers, but it is unclear whether it currently exists. Second, as the foregoing discussion from the January 19, 2001 preamble makes clear, there are likely to be many cases in which disclosure of a generic identifier or data point becomes a personal identifier in the context of those with knowledge of the site (e.g., “only one woman works at the plant”), a situation that we believe is beyond the shield that could be provided by any automated software. If OSHA had

identified automated software capable of scrubbing unique personal identifiers, we would have expected OSHA to have provided an appropriate certification from a qualified testing organization that the software, after integration into the OSHA ITA, will accurately perform that function—possibly with some acceptable, minimal error rate. However, the following questions OSHA posed in the preamble suggest the necessary software is not yet available or, if it is, OSHA has not yet identified it and verified it would be adequate and within the agency’s budget.” (Docket ID 0086).

The Employers E-Recordkeeping Coalition (Coalition) commented, “The supposed improved technology to decrease the number of resources required to analyze this data has neither been presented to employers nor explained in the Notice of Proposed Rulemaking. The “scrubbing application” and automated information technology is neither tested or verified, nor is there any reason to consider it trustworthy. In fact, the proposed use of automated information technology to detect and remove information that reasonably identifies individuals is, OSHA admits, a “preliminary” finding that has not been vetted. (The point is further underscored by the Agency’s request for information on what proprietary software is out there that is capable of removing information that reasonably identifies individuals directly from text data).” (Docket ID 0087).

The agency disagrees with the comments that it is necessary to select, identify, test, and demonstrate the results of de-identification software before proceeding with a final rule. AI and machine learning—technologies that OSHA plans to use to detect, redact, and remove information that reasonably identifies individuals directly from structured and unstructured data fields—have advanced rapidly in recent years. Commercially available products that were introduced to the marketplace during the previous rulemaking process are now well-established. In the preamble to the proposed rule, OSHA listed and described three packages initially released between November 2017 and March 2018, as well as a fourth package that was released in March 2021 (87 FR 18540). There has now been time for these packages to go through multiple updates, as well as for studies of comparative performance to be performed and published. For example, a study entitled “A Comparative Analysis of Speed and Accuracy for Three Off-the-Shelf De-Identification Tools” was published in May 2020 in

AMIA Summits on Translational Science Proceedings; it compared three text de-identification systems that can be run off-the-shelf (Amazon Comprehend Medical PHId, Clinacuity’s CliniDeID, and the National Library of Medicine’s Scrubber). This study found that “No single system dominated all the compared metrics. NLM Scrubber was the fastest while CliniDeID generally had the highest accuracy” (Docket ID 0095). While the study concluded that “no perfect solution exists for text de-identification,” the system with the highest accuracy displayed 97% or greater precision (positive predicted value) and recall (sensitivity) for name, age, and address. The study mentions but does not compare two additional commercially available packages, and OSHA is aware of at least two more packages that have become commercially available since the publication of the proposed rule (see <https://atlasti.com/> and <https://privacy-analytics.com/health-data-privacy/health-data-software/>).⁹ The PRR agreed that available software is capable of “scrap[ing] the data and remov[ing] direct identifiers” and supported the agency’s use of this technology (Docket ID 0094).

As explained in the preamble to the proposed rule, OSHA intends to test multiple systems, including systems that are commercially available, and analyze the results carefully to select the best option to secure and protect information that could reasonably be expected to identify individuals directly. No option is expected to be 100% effective. Therefore, OSHA will supplement the selected system with some manual review of the data, in order to ensure the system adequately protects such information.¹⁰

In summary, OSHA has determined that the agency will be able to adequately protect information that could reasonably be expected to identify individuals directly using the safeguards in this final rule and OSHA’s planned data collection system, in combination with warnings to

⁹ The inclusion of links to particular items or references to particular companies or products is not intended to reflect their importance, nor is it intended to endorse any views, or products, or services.

¹⁰ OSHA notes that the 2019 final rule contemplated two levels of manual case-by-case review of submitted data (84 FR 400). In this rulemaking, the agency finds that such review is not necessary. OSHA will guard against the publication of information which could directly identify or lead to the identification of workers using the measures discussed above, including the use of automated de-identification technology, supplemented with some manual review of the data. OSHA finds that these measures appropriately mitigate employee-privacy-related concerns.

employers and available automated information technology. OSHA also intends to consult with technical experts within the Federal Government, and agrees with the commenters who pointed out the relevance of MSHA's data collection to OSHA's proposed data collection (see Section III.B.8 of this Summary and Explanation). In addition, the use of the automated informational technology will significantly decrease the need for the type of resource-intensive manual reviews that OSHA was concerned about in the 2019 rulemaking. OSHA does recognize the possibility that information could be released that could be used to identify an employee—this is a risk whenever any organization collects information that relates to individuals; however, OSHA intends to minimize this risk to the extent possible. The most reliable means of protecting individuals' information is by not requiring its submission in the first instance; therefore, OSHA has determined that it will not collect fields like employee name as part of this expanded data collection (see Section III.D of this Summary and Explanation). Even if some minimal risk to privacy remains, however, OSHA finds that the benefits of collecting and publishing the data for improving safety and health outweigh that risk.

7. Indirect Identification of Individuals

In the proposal, OSHA acknowledged that the OSHA Forms 300 and 301 also contain fields that are not direct identifiers but that could act as indirect identifiers if released and combined with other information, such as job title on the Form 300, time employee began work on the Form 301, and date of death on the Form 301 (87 FR 18538). However, because this risk of re-identification already exists (given that OSHA has previously released such information in response to FOIA requests) and OSHA had not been made aware of widespread issues regarding employee reidentification, the agency preliminarily did not see any cause for concern.¹¹ Nonetheless, some

commenters argued that OSHA underestimated the possibility that personal information will be disclosed under this rule because third parties (such as data miners, the media, or even neighbors or acquaintances of an injured or ill worker) will be able to determine the identity of that worker.

Some of these comments seem to assume that establishments will submit all information on the Forms 300 and 301 to OSHA, something that has never been under consideration (see, e.g., Docket IDs 0007, 0013, 0062). Others, however, expressed concern that, even though OSHA intends to delete names and other identifiable information from the collected 300 and 301 data, enough information will remain in the published data for the public to identify injured or ill employees (Docket IDs 0053, 0059, 0062, 0081, 0086, 0090). For example, the Motor and Equipment Manufacturers Association commented, “concerns that individual data fields could be linked and used to identify injured employees—even if the information, standing alone, would not be considered traditional PII—were raised in prior rulemakings and were a part of OSHA’s justification for issuing the 2019 rescission rule” (Docket ID 0075).

Some such commenters expressed concerns about the publication of specific fields. For example, the Plastics Industry Association (PIA) expressed concern about the identification of workers through the publication of information about job title, department, and gender (Docket ID 0086). PIA also noted that “many employees have established social network accounts that list their name and position with their employer. Those profiles typically include the month and year the employee began working for the employer, a potentially reliable personal identifier that corresponds to the date of hire listed in field 4. Some unknown number of those profiles include birth dates, a potentially reliable personal identifier that corresponds to field 3” (Docket ID 0086). Consequently, PIA argued that OSHA should either exclude birth date and hiring date data from the collected information or reliably establish certain fields of collected information that are available only to OSHA and not the general public (Docket ID 0086).

An anonymous commenter also stated that “columns C, D, E, and F of the 300 form and [(job title, date of injury of onset of illness, where the event occurred, and the description of the

outweighed by what OSHA believes is a minimal risk to employee privacy.

injury or illness, parts of body affected, and object/substance that directly injured or made person ill)] and fields 3, 11, 13, 14, 15, 16, and 17 of the 301 form [(date of birth, date of injury or illness, time of event, and descriptions of what the employee was doing just before the incident occurred, what happened, what the injury or illness was, and what object or substance directly harmed the employee)] should be submitted but not made accessible by an member of the public on the internet” (Docket ID 0074).

According to some of the commenters who expressed concern about indirect identification, the concern is particularly acute in smaller communities where more of the residents know each other. The U.S. Poultry and Egg Association commented, “We emphasize that many of our members operate establishments in small, rural locations. People know one another. Publishing this information and data will significantly impact employee privacy. And simply redacting the names of the persons affected will not prevent people—particularly in small towns—from knowing exactly who was injured and the extent of the injury.” (Docket ID 0053). The North American Insulation Manufacturers Association and National Association of Home Builders made similar comments (Docket IDs 0081, 0059).

A related concern involves data companies that have developed tools that scrape data and link to relational databases. PRR commented that “developers will be able to create tools that scrape [public injury and illness data] . . . , including job titles, facility locations, company names and facts from open narrative text fields” and, when used in combination with information obtained via other internet sources, “developers will be able to potentially re-identify individuals with a high degree of accuracy.” In addition, this commenter stated that developers will be able to use the same tools, including artificial intelligence algorithms, for a multitude of reasons including to develop targeted sales campaigns and recruitment strategies, which would not contribute to workplace safety (Docket ID 0094).

As discussed in detail in Section III.B.4.c–h of this Summary and Explanation, other commenters supported the publication of the fields OSHA proposed to publish. For example, AFL–CIO agreed with the agency’s determination about what to publish and what to collect but not publish, noting that the agency “carefully considered issues of worker

¹¹ The only report OSHA has received regarding actual reidentification of employees from data released by OSHA is discussed below. And, as noted in that discussion, it is not clear from the report that the information which caused the reidentification is comparable to the information that would be released pursuant to this rulemaking (e.g., the size of the establishment where the identified employees worked, the information that caused them to be reidentified). Given that uncertainty and the fact that OSHA has been releasing information from establishments’ Forms 300 and 301 in response to FOIA requests for many years, this single report does not persuade the agency that the benefits of this rulemaking are

privacy” (Docket ID 0061). Similarly, the National Employment Law Project (NELP) stated that “adopting the proposed standard will not put individual privacy at risk” (Docket ID 0049, Attachment 2). NELP cited to OSHA’s preliminary decision to withhold certain fields from disclosure as one of the reasons it believed that worker privacy was not at risk (Docket ID 0049, Attachment 2).

Still other interested parties argued in favor of publication of such information. For example, NIOSH noted that information such as age and date of hire could be useful information to publish (Docket ID 0035, Attachment 2; see also Docket ID 0083 (agreeing with NIOSH’s comment)). However, NIOSH added that if cannot be released as part of the individual injury case records, it is still important for this data to be used in aggregate analysis of injuries on the industry and occupation levels” (Docket ID 0035, Attachment 2). NIOSH further requested that OSHA facilitate analysis of these data “under terms of data use agreements with other Federal or State government agencies (such as NIOSH or State health departments) (Docket ID 0035, Attachment 2). The Council of State and Territorial Epidemiologists also generally supported the dissemination of collected information from existing records, stating that “[m]aking this information broadly available is consistent with the growing recognition, predominant in the patient safety field, that transparency—sharing of information, including information about hazards—is a critical aspect of safety culture (Docket ID 0040). Further, again as discussed in Section III.B.4.c—h of this Summary and Explanation, commenters argued that the publication of the data OSHA proposed to make public will be beneficial to employers, employees, Federal and State agencies, researchers, workplace safety consultants, members of the public and other interested parties.

Having considered the comment on these issues, OSHA recognizes the concerns of interested parties who are concerned about publication of select information from establishments’ Forms 300 and 301, but believes these risks are mitigated by decisions OSHA has made with regard to which data should be collected and published and other safeguards that OSHA will be observing (e.g., only requiring larger establishments to submit data). First, as noted above, OSHA has decided to collect but not publish five fields from Form 301 that it has decided contain information about personal characteristics, employment history, and medical treatment: Age (calculated

from date of birth in field 3), date hired (field 4), gender (field 5), whether the employee was treated in the emergency room (field 8), and whether the employee was hospitalized overnight as an in-patient (field 9). The agency believes it is appropriate to refrain from releasing these data because of privacy concerns and the potential risk of indirect individual identification raised by commenters regarding the publication of this information. As noted above, this decision is consistent with the manner in which OSHA handles responses to FOIA requests, as well as 29 CFR 1904.35(b)(2)(v)(A)–(B).

However, as discussed below in Section III.D of this Summary and Explanation, OSHA still finds that there is a significant safety and health benefit with the collection and analysis of information about these fields. For example, in some cases, young workers lack necessary training and experience and may be assigned to more hazardous tasks, subjecting them to higher rates of injury or illness in some industries and occupations. Likewise, it is important for OSHA to know whether older workers are more vulnerable to certain types of injuries and illnesses. Also, information about gender is valuable to OSHA in determining whether men or women face greater risk to certain workplace hazards (e.g., injury victims of intentional attacks in the workplace are disproportionately likely to be women). In addition, information about visits to emergency rooms and hospitals assists OSHA in tracking the type and severity of employee injuries and illnesses in specific industries and occupations. Further, OSHA could use these data in combination with other available data, such as Severe Injury Reporting data, to assess data accuracy and reporting compliance.

Although OSHA has found that it is not appropriate to publish the five fields from Form 301, the agency notes and will consider NIOSH’s suggestion that those fields could be shared with NIOSH and other government agencies outside of this rulemaking utilizing appropriate privacy protections, e.g., via a written data sharing agreement with robust privacy protections.

As to the fields that OSHA plans to collect and publish (e.g., job title), the agency believes that the final rule appropriately protects against re-identification of individuals via the release of this information. Specifically, the final rule requires only establishments with 100 or more employees, in certain designated, high-hazard industries, to electronically submit information from their Forms 300 and 301. OSHA believes it is less

likely that employees in these larger establishments would be identified based on the limited recordkeeping data posted on the public website, even in small towns. Moreover, in the vast majority of cases, at establishments with 100 or more employees, OSHA believes it is unlikely that anyone other than employees at the workplace would be able to use the collected and published data from the Forms 300 and 301 to identify the injured or ill employee. For example, if only one individual performs a certain job at an establishment with 100 or more employees, OSHA believes that it is highly unlikely that anyone other than employees with specific knowledge of that workplace would be able to use the remaining information from the Forms 300 and 301 to identify that employee. As discussed above, employees at the worksite already have access to information from the Forms 300 and 301, and thus publication of these forms would not add any risk of individual employee identification.

In fact, even though OSHA has released redacted Forms 300 and 301 in response to FOIA requests for more than a decade (see the discussion of the Freedom of Information Act in Section III.B.5 of this Summary and Explanation for more details), only one commenter claimed knowledge of any employees being identified through OSHA data. Specifically, the Coalition asserted that several members of the Coalition have had third parties, including the media, contact their employees about their personal and medical information, including information related to COVID-19, because their identities were discerned from information provided to and released by OSHA (Docket ID 0087).

The Coalition’s comment did not specify the size of the establishments at which the employees contacted by the third parties worked (i.e., whether the establishments employed fewer than 100 employees), how the third parties used the information OSHA released to identify those employees, or whether there is any reason to believe that the employees’ identities were not already publicly known. It also does not specify whether the employee identities became known through the release of the injury and illness data at issue in this rulemaking (i.e., Forms 300 and 301), another document in the released portion of the inspection files, or a combination of the two. Consequently, based on the information submitted by this commenter, it is impossible to tell whether the third parties would have been able to identify these “several” employees using the case-specific information OSHA plans to collect and

release in this rulemaking—information that will be submitted by relatively large establishments.

Nevertheless, OSHA takes the issue of employee privacy and the possibility of employee re-identification very seriously. As discussed in Section III.B.1 of this Summary and Explanation, OSHA chose the 100-employee threshold for the collection of case-specific data, in part, to minimize the burden on small businesses and to protect the identity of employees by only requiring relatively large businesses to submit their data. It similarly has carefully considered which fields from these forms should be collected and released with employee re-identification in mind. With these safeguards, OSHA believes the risk of indirect employee identification is minimal.

Moreover, as discussed throughout this preamble, OSHA finds that the benefits to worker and safety and health that stem from the release of this information outweigh any privacy risks. For example, as to job title specifically, researchers will be able to use this information to analyze and identify specific occupations associated with particular types of injuries and illnesses in the workplace. Also, publication of such data will allow the public to better understand and evaluate the injury and illness rates for certain jobs, tasks, and/or occupations. Potential employees will be able to review published data to assess the workplace injury/illness experience of a given job at a particular facility. In turn, employers will focus their safety and health efforts to reduce the number of injuries and illnesses associated with certain jobs as a way to attract well-qualified job candidates. Similarly, the publication of information about job title will assist researchers in analyzing and identifying injury and illness trends for specific jobs, tasks, or occupations. Better analysis of these data should result in the development of improved mitigation strategies and result in the reduction of injuries and illnesses for certain jobs. Similarly, OSHA believes that the publication of the other fields it proposed to publish will have safety and health benefits that outweigh any small risks to worker privacy. For example, time employee began work will help OSHA, employers, researchers, and others assess the relationship between workplace safety/health and known risks such as shift work and fatigue.

8. The Experience of Other Federal Agencies

As noted above, OSHA's belief that it can collect and publish the data at issue without harm to privacy or other interests is supported by the experience of its sister agency, the Mine Safety and Health Administration (MSHA). Under 30 CFR part 50, MSHA requires mine operators to submit an incident report (*Mine Accident, Injury and Illness Report*, MSHA Form 700–1) within ten working days for every occupational injury, illness, or near-miss incident occurring at a mine. The MSHA Form 700–1 includes 27 mandatory fields, including a description of the incident, the nature of the injury or illness, the job title of the affected worker, and the employee's work activity at the time of the injury or illness. Under this reporting system, mine operators use an authentication code and password to securely submit establishment-specific, case-specific, injury and illness data online. MSHA maintains the injury and illness information on its website and the information is made available to the public through downloadable format. The submitted information is reviewed by at least three approving authorities, and PII is redacted, before it is uploaded to the database for public release. This system has been in place since 1999 with no adverse results.

Several commenters also suggested that MSHA's experience supports OSHA's plan to publish redacted information on occupational injuries and illnesses (e.g., Docket IDs 0049, 0061, 0063). The National Employment Law Project commented, "MSHA keeps and has kept for decades the PII on the form protected. Clearly, MSHA's system demonstrates that the Department of Labor can post case specific data without releasing PII" (Docket ID 0049). The AFL–CIO recommended that OSHA collaborate with MSHA, NIOSH and other agencies "with a demonstrated commitment and capability to collect and utilize injury and illness data, while protecting employee privacy, and institute similar procedures for the collection, sharing and utilization of injury and illness data reported on the OSHA Form 300 and Form 301" (Docket ID 0061). Worksafe submitted similar comments and added that OSHA's proposed rule is quite modest compared to the reporting requirements for employers in the mining industry (Docket ID 0063). OSHA has been and expects to continue consulting with MSHA, NIOSH, and other Federal agencies while implementing the injury and illness data collection and

publication requirements of this final rule.

Finally, on this topic, OSHA notes that MSHA is not alone in its release of information that theoretically could identify individuals indirectly if released and combined with other information. The Federal Railroad Administration (FRA) posts Accident Investigation Reports filed by railroad carriers under 49 U.S.C. 20901 or made by the Secretary of Transportation under 49 U.S.C. 20902; in the case of highway-rail grade crossing incidents, these reports include personally identifiable information (age and gender of the person(s) in the struck vehicle). In addition, the Federal Aviation Administration (FAA) posts National Transportation Safety Board (NTSB) reports about aviation accidents. These reports include information about employees, including job history and medical information. Again, OSHA is not aware of any issues related to the release of such information, a lack that OSHA believes supports its decision to release the relevant information collected in this rulemaking.

9. Risk of Cyber Attack

Cyber security is another issue that OSHA has considered in thinking through how to protect the Form 300 and 301 information safe. OSHA received comments on this issue in the rulemaking that led to the 2016 final rule and, after considering those comments, the agency disagreed with those commenters who suggested that OSHA would not be able to protect employee information (81 FR 29633). In so doing, OSHA observed that "[a]ll federal agencies are required to establish appropriate administrative and technical safeguards to ensure that the security of all media containing confidential information is protected against unauthorized disclosures and anticipated threats or hazards to their security or integrity" (81 FR 29633). Similarly, in the 2019 final rule, OSHA again received and considered comments on the issue of cyber security, ultimately finding that "the ITA data meet the security requirements for government data" (84 FR 388). In addition, the agency did "not find that collecting the data from Forms 300 and 301 would increase the risk of a successful cyber-attack" (84 FR 388). However, the agency noted that some risk of cyberattack and subsequent data risk remained (84 FR 388). And OSHA stated that it shared concerns of some commenters about how having thousands of businesses upload a large volume of additional data could

generally increase risk for cyber-security issues (84 FR 388).

OSHA received some comments about cyber security in response to the NPRM in this rulemaking. For example, the U.S. Poultry & Egg Association commented, “On August 14, 2017, the U.S. Department of Homeland Security notified OSHA of a security breach of the recently activated online incident reporting page. While the full extent of this breach is unknown, it is an unsettling circumstance for employers that a security incident occurred and to learn of the occurrence of a security breach significant enough to shut down the reporting system.” (Docket ID 0053).

The Coalition submitted a comment that addressed the same potential security breach: “As OSHA is well aware, industry concerns about worker privacy breaches came to fruition shortly after the ITA was rolled-out. As determined by the Department of Homeland Security (“DHS”), a serious potential breach of the ITA system occurred . . . virtually immediately after the ITA system had gone live. Although the security issues associated with that breach have since been resolved, industry is fearful of submitting hundreds of thousands of pieces of personal data with personal identifier information (“PII”) on a portal that has already had suspicious activity that warranted DHS scrutiny. As OSHA notes, the ITA episode demonstrated that such large data collection will inevitably encounter malware and may even incentivize cyber-attacks on the Department of Labor’s (“DOL”) IT system. We are aware of OSHA’s view that, since 2019, the DOL’s cybersecurity protective software has improved. However, the cyber security risk of employees’ highly confidential and personal medical information being hacked and published, or used in other even more nefarious ways, has become even more serious since the Agency decided it was too risky to collect 300 and 301 level data a few years ago. Since 2019, the threat and sophistication of cybersecurity attacks has also grown immensely, outpacing the development of cybersecurity protections. The lack of confidence in protecting data has never been greater in this country.” (Docket ID 0087).

In response, OSHA notes that an investigation of the 2017 incident by the Department of Labor’s IT team found there was no breach of data. The ITA detected a virus on a user’s computer and blocked that user from accessing the system, as it was designed to do. In other words, the ITA’s security system functioned properly and there was no security breach. No other cyber-security

issues have been reported. In addition, as explained above, the agency’s decision to change course on collecting information from Forms 300 and 301 was not based on cyber-security concerns.

This successful performance of the ITA’s security system in this attempted breach underscores OSHA’s finding in 2016: although here is some risk cyber attack, the Department of Labor’s systems are prepared to defend against such attacks. As explained in the 2016 final rule, regardless of the category of information, all Department of Labor agencies must comply with the Privacy and Security Statement posted on DOL’s website. As part of its efforts to ensure and maintain the integrity of the information disseminated to the public, DOL’s IT security policy and planning framework is designed to protect information from unauthorized access or revision and to ensure that the information is not compromised through corruption or falsification. Consequently, in this rulemaking, OSHA finds that the data that will be collected in compliance with this final rule will be protected from cyber attack in accordance with the appropriate government standards.

10. The Health Information Portability and Accountability Act (HIPAA)

OSHA also received comments from some interested parties expressing concern about how the proposed rule would relate to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 101–191 (e.g., Docket IDs 0007, 0013, 0059, 0082). For example, two interested parties commented that the OSHA Forms 300 and 301 include personal and private information about an employee’s health and wellness, and that requiring the submission of such information to OSHA will place employers in legal liability due to HIPAA restrictions (Docket IDs 0007, 0013). But as explained below, HIPAA’s implementing regulations specifically allow employers to release workplace injury and illness data to OSHA.

The U.S. Department of Health and Human Services (HHS) implements HIPAA through regulations at 45 CFR parts 160 and 164, known as the HIPAA “Privacy Rule.” The Privacy Rule protects the privacy of individually identifiable health information (referred to as “protected health information” or “PHI”) maintained or transmitted by HIPAA-covered entities and their business associates. The term “covered entity” includes health plans, health care clearing houses, and health care providers who transmit health

information in electronic form (see 45 CFR 160.104). OSHA is not a covered entity for purposes of the Privacy Rule, so the use and disclosure requirements of the Privacy Rule do not apply to OSHA.

The HIPAA Privacy Rule also excludes certain individually identifiable health information from the definition of PHI. For example, employment records held by a covered entity in its role as an employer are not PHI and the HIPAA Privacy Rule does not prohibit the disclosure of health information contained in employment records to OSHA (see 45 CFR part 160.103). Even for information that qualifies as PHI, the Privacy Rule specifically permits disclosures of PHI without an individual’s authorization for certain purposes, including when they are required to do so by another law (see 45 CFR 164.512(a)). HHS has made clear that this provision encompasses an array of binding legal authorities, including statutes, agency orders, regulations, or other Federal, State, or local governmental actions having the effect of law (see 65 FR 82668). Similarly, a covered entity may also disclose PHI without an individual’s authorization to “public health authorities” and to “health oversight agencies” (see 45 CFR parts 164.512(b) and (d)). The preamble to the Privacy Rule issued in 2000 specifically mentions OSHA as an example of both (see 65 FR 82492, 82526). Finally, the Privacy Rule also permits a covered entity who is a member of the employer’s workforce and provides healthcare at the request of an employer, to disclose to employers protected health information concerning work-related injuries or illnesses, or work-related medical surveillance in situations where the employer has a duty under the OSH Act, the Federal Mine Safety and Health Act, or under similar State law to keep records on or act on such information. Accordingly, covered entities generally may not restrict or refuse to disclose PII required by an OSHA standard or regulation based on the provisions of the Privacy Rule.

OSHA also received comments from interested parties that, while recognizing that HIPAA does not apply to the information disclosures at issue here, argued that OSHA “should examine the principles of HIPAA in determining how to proceed—or not proceed—with this rule” (Docket ID 0059; see also Docket ID 0082). For example, NAHB asserted “HIP[A]A recognizes the legitimate privacy interests that individuals have with respect to their own health information.

HIP[A]A also recognizes that aspects of a person's health record can serve as an identifier of a person under certain circumstances. And HIP[A]A recognizes that this is not acceptable" (Docket ID 0059). NAHB further argued that "[t]he procedure for OSHA reviewing this should have been thoroughly considered and addressed in the proposed regulation; it was not" (Docket ID 0059).

OSHA agrees with commenters who suggested that the agency consider applying the principles set forth in the Privacy Rule for the de-identification of health information. Health information is individually identifiable if it does, or potentially could, identify the individual. As explained by commenters, once protected health information is de-identified, there are no longer privacy concerns under HIPAA. Again, it is OSHA's policy under the final rule not to release any individually identifiable information. As discussed elsewhere in this document, procedures are in place to ensure that individually identifiable information, including health information, will not be publicly posted on OSHA's website.

However, OSHA disagrees with NAHB's claim that "OSHA has provided no thought regarding what types of information it will or should redact to protect employees, except to mention that it may redact names and other information that it would otherwise need to redact under the Freedom of Information Act" or that the agency's procedure was not "thoroughly considered and addressed" in the proposal (Docket ID 0059). As reiterated above, the proposal specified which fields the agency proposed to collect and what subset of that collected information it planned to release. It also detailed its plans to ensure that it did not collect certain data (e.g., by not requiring the submission of certain data fields and designing the system to remind establishments not to submit certain data) and ways to protect the data it does receive (e.g., carefully choosing which fields would be publicly released and using scrubbing technology to ensure that data contained in the fields to be released did not unintentionally include information which could reasonably be expected to identify individuals directly). In sum, contrary to NAHB's assertion, the agency has carefully considered how to protect information that could reasonably be expected to identify individuals directly and explained its plans and thinking in the proposal.

11. The Americans With Disabilities Act (ADA)

OSHA also received comments related to the Americans with Disabilities Act (ADA). Specifically, in their comment, the Seventeen AGs noted that "if a certain type of occupational injury regularly leads to ongoing disability in a particular industry or place of work," the case-specific data that would be collected and published under the proposed rule would allow States to "explore what accommodations those employers provide, for example, whether affected workers have been placed in appropriate positions with reasonable accommodations as required under the [(ADA)] and similar State laws" (Docket ID 0045). OSHA agrees with this commenter that this kind of inquiry is one of the many benefits that will stem from this final rule.

The Seventeen AGs' mention of the ADA raises the question of its applicability to this final rule, a question that has been raised in the rulemakings culminating in the 2016 and 2019 final rules (see 81 FR 29665–66; 84 FR 387). At various times as OSHA has considered whether to collect and publish information from establishments' Forms 300 and 301 (and 300A, as well), commenters have raised concerns about whether the ADA would prohibit establishments from releasing health and disability-related information to OSHA. It would not. The ADA would permit the collection by employers of such information.

By its terms, the ADA limits disability-related inquiries and medical examinations of job applicants or employees and requires confidentiality for medical information obtained from any such inquiries or medical examinations. However, the ADA also states that "nothing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any federal law" (see 29 U.S.C. 12201(b)). In enacting the ADA, Congress was aware that other Federal standards imposed requirements for testing an employee's health, and for disseminating information about an employee's medical condition or history, determined to be necessary to preserve the health and safety of employees and the public (see H.R. Rep. No. 101–485 pt. 2, 101st Cong., 2d Sess. 74–75 (1990), reprinted in 1990 U.S.C.A.N. 356, 357 (noting, e.g., medical surveillance requirements of standards promulgated under the OSH Act and the Federal Mine Safety and Health Act, and stating "[t]he Committee does not intend for [the ADA] to override any medical standard or requirement

established by federal . . . law . . . that is job-related and consistent with business necessity"); see also 29 CFR part 1630 App.). The ADA yields to the requirements of other Federal safety and health standards and regulations. The implementing regulation, codified at 29 CFR 1630.15(e), explicitly states that an employer's compliance with another Federal law or regulation may be a defense to a charge of violating the ADA (see Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA | U.S. Equal Employment Opportunity Commission ([eeoc.gov](https://www.eeoc.gov)) Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA | U.S. Equal Employment Opportunity Commission ([eeoc.gov](https://www.eeoc.gov)) (available at: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>), at Question 21). The ADA recognizes the primacy of other Federal laws including Federal safety and health regulations; therefore, such regulations, including mandatory OSHA recordkeeping requirements and disclosure requirements, pose no conflict with the ADA (cf. *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555, (1999) ("When Congress enacted the ADA, it recognized that federal safety and health rules would limit application of the ADA as a matter of law.")).

It also is worth noting that the information in the OSHA injury and illness records is similar to that found in workers' compensation forms and may be obtained by employers by the same process used to record needed information for workers' compensation and insurance purposes. The Equal Employment Opportunity Commission (EEOC), the agency responsible for administering Title I of the ADA, which addresses employment, recognizes a partial exception to the ADA's strict confidentiality requirements for medical information regarding an employee's occupational injury or workers' compensation claim (see generally 29 CFR 1630.15(e) and EEOC Enforcement Guidance: Workers' Compensation and the ADA (available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-workers-compensation-and-ada>), (September 3, 1996)). For these reasons, OSHA does not believe that the mandatory submission and publication requirements in § 1904.41 of this final rule conflict with the confidentiality provisions of the ADA.

12. The Privacy Act

The Plastics Industry Association commented that a failure by OSHA to exclude or reliably redact all personal identifiers and personally identifiable medical information would violate the Privacy Act of 1974, 5 U.S.C. 552a, as well as other privacy laws (Docket ID 0086).

In response, OSHA notes that the Privacy Act is a Federal statute that establishes a code of fair information practices that governs the collection, maintenance, use, and dissemination of personal identifiable information by Federal agencies. The Privacy Act only applies to records that are located in a “system of records.” As defined in the Privacy Act, a system of records is “a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual” (see 5 U.S.C. 552a(a)(5)). Because OSHA injury and illness records are retrieved neither by the name of an individual, nor by some other personal identifier, the Privacy Act does not apply to OSHA injury and illness recordkeeping records. As a result, the Privacy Act does not prevent OSHA from posting recordkeeping data on a publicly accessible website. However, OSHA again wishes to emphasize that, consistent with the applicable exemptions under FOIA, the agency does not intend to post personally identifiable information on the website.

13. Privacy Impact Assessment

Section 208 of the E-Government Act requires Federal agencies to conduct a Privacy Impact Assessment when developing or procuring new information technology involving the collection, maintenance, or dissemination of information in identifiable form or when making substantial changes to existing information technology that manages information in identifiable form. In the preamble to the proposed rule, OSHA stated that it expected to complete a Privacy Impact Assessment before issuing the final rule (87 FR 18540). Several commenters supported this step (Docket IDs 0058, 0068, 0072, 0077, 0094).

OSHA now has completed a Privacy Impact Assessment for this final rule which is available at <https://www.dol.gov/agencies/oasam/centers-offices/ocio/privacy> (Docket ID 0107). In the Privacy Impact Assessment, OSHA determined that the safeguards and controls described in this preamble will

adequately protect the collected and published data addressed in the final rule.

14. Other Issues Related to OSHA’s Proposal To Require the Submission of and Then Publish Certain Data From Establishments’ Forms 300 and 301

a. Miscellaneous Comments

OSHA received a variety of other comments related to its proposal to require certain establishments to submit certain data from their Forms 300 and 301 and its plan to then publish a subset of that data. For example, some interested parties expressed concern over repeated rulemakings addressing the electronic submission of injury and illness data to OSHA (e.g., Docket IDs 0058, 0060, 0071, 0072, 0077). The Associated Builders and Contractors (ABC) commented, “we hope that OSHA recognizes that the frequent revisions it has made related to the requirements surrounding electronic reporting of injury and illness data has caused confusion and uncertainty among construction contractor employers in respect to what requirements apply to their businesses, especially for small businesses” (Docket ID 0071). Similarly, the Window and Door Manufacturers Association commented, “OSHA must also consider the impact that the agency’s repeated changes and reversals to its recordkeeping policies has had on employers, especially smaller entities. This year’s proposed rule is now the third such rulemaking by OSHA on injury and illness recordkeeping since 2014.” This commenter added that the frequent changes to recordkeeping regulations have resulted in confusion among employers regarding what requirements apply to their business (Docket ID 0072). The Coalition for Workplace Safety, the National Demolition Association, and the National Lumber and Building Materials Association submitted similar comments (Docket IDs 0058, 0060, 0077).

OSHA acknowledges that some employers may be confused by the multiple rulemakings amending the part 1904 requirements for certain employers to electronically submit injury and illness data from their Forms 300 and 301. However, OSHA believes this rulemaking provided potentially affected employers with clear notice of the possibility that their obligations might change. And OSHA plans to implement a robust roll-out plan to alert employers of the final rule’s requirements. Moreover, even if some confusion remains, OSHA must place

primary importance on whether new occupational safety and health requirements will help “assure so far as possible . . . safe and healthful working conditions . . . by providing for appropriate reporting procedures . . . which will help achieve the objective of th[e] Act and accurately describe the nature of the occupational safety and health problem” (see 29 U.S.C. 651(b)(12)). As discussed above in Section II, Legal Authority, Section 8 of the OSH Act provides OSHA with broad authority to prescribe regulations as necessary or appropriate for the enforcement of the OSH Act and for developing information about the causes and prevention of occupational injuries and illnesses. Federal agencies, furthermore, are permitted to change or reverse prior policies, provided that they provide a reasoned explanation for the change. In this rulemaking, OSHA has made every effort to balance the benefits of this rule to occupational safety and health against any potential burden created for the regulated community, and has explained the reasons supporting any changes in OSHA’s prior policies throughout this preamble.

As explained in more detail below, based on its experience with the collection of injury and illness data through the ITA, and with the advancements in technology to protect individual privacy, OSHA has determined that it is necessary and appropriate at this time to require certain larger establishments in higher hazard industries to electronically submit data from their Forms 300 and 301 to OSHA once a year. OSHA believes that this requirement to submit case-specific data will have significant benefits for occupational safety and health, especially since the requirement applies to certain establishments in higher hazard industries where such reporting will have the greatest impact on reducing injury and illness rates.

b. The Effect of the Rule on the Accuracy of Injury and Illness Records

OSHA received comments expressing concern that OSHA collection and publication of data from Forms 300 and 301 would lead to less accurate data, because employers may respond by recording fewer injuries and illnesses (i.e., under-recording) (e.g., Docket IDs 0052, 0053, 0088, 0090). One commenter, Angela Rodriguez, stated that some employers may be tempted to avoid logging recordable cases (Docket ID 0052). The U. S. Poultry & Egg Association commented that employers might record less information because of fears that recording more cases could

harm recruitment and retention of employees (Docket ID 0053), while the National Retail Federation stated that “fear of developing a negative image in their communities, may cause managers to underreport injuries and illnesses that occur at the workplace to protect their business reputation” thereby reducing the accuracy of the data OSHA collects (Docket ID 0090). NIOSH commented that employers might submit inflated employee counts to OSHA in order to reduce their injury and illness rates or alter their NAICS code to avoid the rule’s requirements (Docket ID 0035, Attachment 2).

In response, OSHA notes that, as discussed above in Section III.B.4 of this Summary and Explanation, the agency already publishes establishment-specific information from the OSHA Form 300A. Because the new information employers will be submitting under the final rule (*i.e.*, the information from Forms 300 and 301) is simply the more specific information underlying the data from the 300A that employers are already submitting (and that is already being published online), it is not clear to OSHA why publishing the additional information would change any existing incentives to under-record or to falsify information. Commenters did not provide any examples of increased under-recording as a result of the collection and publication of Form 300A data, nor is OSHA aware of any. While OSHA believes that most employers act in good faith when carrying out their recordkeeping duties under the OSH Act, failing to record injuries or illnesses, or submitting false information to OSHA, could result in a citation for a violation of OSHA’s recordkeeping regulations. In addition, employers that falsify information provided to the government could also be found to have violated 18 U.S.C. 1001(a), which prohibits the knowing and willful provision of false information regarding material facts on matters that are under the jurisdiction of the Executive branch, or Section 17(g) of the OSH Act, 29 U.S.C. 665(g), which prohibits knowingly making any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the OSH Act.

Some commenters raised the possibility that expanded data collection and publication could lead some employers to record fewer injuries and illnesses for which work-relatedness is unclear (*e.g.*, Docket IDs 0042, 0086, 0088). For example, the Chamber of Commerce stated that employers “will reconsider whether to

record as many injuries or illnesses” and pointed in particular to cases in which work-relatedness is difficult to determine (Docket ID 0088).

While OSHA recognizes that there are cases in which the analysis of work-relatedness may not be straightforward, OSHA also notes that employers are required to make good faith efforts to determine whether an injury or illness is work-related in order to establish whether the case is recordable under part 1904 (see § 1904.4(a)). There is a good deal of guidance in OSHA’s recordkeeping regulations themselves (see § 1904.5) on how to determine if an employee’s injury or illness is work-related, including: general guidance for when a case is considered to be work-related and when work-relatedness is presumed (§ 1904.5(a)); a list of circumstances in which cases that occur in the work environment are not work-related (§ 1904.5(b)(2)); and instructions for how to determine work relatedness when employees are injured or become ill during work travel or while working from home (§ 1904.5(b)(6), (7)). Further guidance on the work-relatedness determination, as well as useful examples, can be found on OSHA’s web page, Detailed Guidance for OSHA’s Injury and Illness Recordkeeping Rule (<https://www.osha.gov/recordkeeping/entry-faq>). While OSHA does not issue citations for over-recording, to the extent that this rule encourages employers to record only cases that they have determined are work-related, OSHA would expect the rule to increase the accuracy of the data that is recorded and then submitted to OSHA. Indeed, the Chamber of Commerce appears to support this as a likely outcome, stating that employers “may look more closely as to whether the injury or illness is work related and needs to be recorded” (Docket ID 0088).

Some commenters also expressed concern that expanded data collection and publication would lead to greater underreporting by employees of their workplace injuries and illnesses, thereby reducing the data’s accuracy (*e.g.*, Docket IDs 0042, 0055, 0056, 0070, 0086, 0087). The Employers E-Recordkeeping Coalition stated that it “is very concerned that the increased risk of employee personal and medical information being collected by a Federal agency and then publicized, albeit inadvertently, will create a significant disincentive for employees to report workplace injuries that are recordable events” (Docket ID 0087). Worksafe and the Strategic Organizing Center suggested that OSHA add a provision to prohibit employer practices that discourage the reporting of injuries and

illnesses by employers, pointing to employer programs that disincentive reporting as well as workers’ fear of retaliation for reporting an injury or illness to their employer (Docket IDs 0063, 0079).

With respect to the impact of privacy concerns on employee reporting, OSHA understands the importance of protecting personally identifiable information and notes that there is a very low risk that information that could reasonably be expected to identify individuals directly will be disclosed as a result of this final rule. OSHA acknowledges commenters’ concerns about the potential posting of this type of information on a publicly accessible website. However, the posting or disclosure of information that could reasonably be expected to identify an individual directly is not the intent, nor is it a likely result, of this rulemaking. As explained in more detail in Section III.B.6 of this Summary and Explanation, above, OSHA believes it has, and will have, effective safeguards in place to prevent the disclosure of that type of information. Further, OSHA hopes that employers will educate their employees about the safeguards OSHA is putting into place to protect against the disclosure of information that could reasonably be expected to identify individuals directly. OSHA also intends to include materials for employees in the materials that will be created to educate interested parties about the requirements of the rule as well as those safeguards.

In response to Worksafe’s comment proposing a new regulatory provision prohibiting employer practices that discourage employee reporting, OSHA notes that the recordkeeping regulations, at § 1904.35(b)(1)(i), already require employers to establish reasonable procedures for reporting work-related illnesses and injuries that do not deter or discourage employees from accurately reporting their injuries or illnesses. Furthermore, the regulations explicitly prohibit employers from discharging or otherwise discriminating against employees for reporting work-related injuries and illnesses (§ 1904.35(b)(1)(iv); see also § 1904.36). And as OSHA clarified in the 2016 final rule which contained these recordkeeping provisions, a workplace safety incentive program could be found to violate § 1904.35 if employees are penalized for reporting work-related injuries or illnesses as part of the program (81 FR 29673–74). OSHA further stated that the changes were designed to “promote accurate recording of work-related injuries and

illnesses by preventing the under-recording that arises when workers are discouraged from reporting these occurrences” (81 FR 29669). Thus, OSHA has addressed this issue in its regulations since 2016. Moreover, OSHA has recognized since at least 2012 that incentive programs that discourage employees from reporting injuries and illnesses by denying a benefit to employees who report an injury or illness may be prohibited by Section 11(c) (see <https://www.osha.gov/laws-regs/standardinterpretations/2012-03-12-0>; 81 FR 29673–74).

In contrast to those who argued that the final rule will lead to less accurate data, other commenters argued that the expanded data collection and publication will lead to more accurate data, because of increased transparency and oversight (e.g., Docket IDs 0049, 0066, 0084, 0089). For example, the United Food and Commercial Workers International Union (UFCW) stated, “We anticipate that the requirement that companies submit data electronically will improve the quantity, quality, and accuracy of their records, and increase OSHA’s and the public’s oversight ability, all of which will improve worker health and safety also” (Docket ID 0066). Cal/OSHA noted that the increased transparency created by the publication of the data will encourage and support accuracy in injury and illness reporting (Docket ID 0084).

OSHA agrees with commenters who stated that the final rule will result in improved accuracy of injury and illness records, due to increased transparency and oversight by OSHA, employees, and others, as well as awareness by employers that their records could be subject to additional scrutiny. Section 1904.32 already requires company executives subject to part 1904 requirements to certify the annual summary (Form 300A); this process requires them to examine the OSHA 300 Log and certify that the annual summary is correct and complete based on their examination of the OSHA 300 Log and their knowledge of the process by which the information was recorded. OSHA recognizes that most employers are diligent in complying with this requirement. However, a minority of employers is less diligent, leading to violations of the recordkeeping regulations. It is OSHA’s hope that, if these employers know that their data must be submitted to the agency and may also be examined by members of the public and their own employees, they may pay more attention to the requirements of part 1904, which could lead both to improvements in the quality and accuracy of the information

and to better compliance with § 1904.32. Increased oversight by labor unions or a company’s employees could lead to corrections to the data if, for example, a labor union discovers that a known workplace injury of a union member is not included in the published data and reports the omission to the employer (e.g., Docket ID 0049). Finally, OSHA notes the comment from NIOSH suggesting various means of investigating the effect of implementation of this final rule on compliance with the requirements of part 1904 (Docket ID 0035, Attachment 2). While the agency has determined that staggered implementation, where industries with the highest injury rates would be required to comply first, would be too confusing to implement, OSHA encourages future studies to assess the effect of the final rule on injury and illness recording, reporting, and data submission, and to identify solutions if problems are found.

c. Collecting and Processing the Data From Forms 300 and 301 Will Help OSHA Use Its Resources More Effectively

In the preamble to the 2019 final rule, OSHA stated that collecting and processing the Form 300 and 301 data and keeping information confidential which could reasonably be expected to identify an employee directly would require the agency to divert resources from other priorities, including the analysis of Form 300A data (84 FR 392; see also 84 FR 387). In particular, OSHA was concerned that collecting and processing this data would prevent it from “fully utilizing the data from the Form 300As and severe injury reports it is already collecting to improve its enforcement and outreach objectives to ensure compliance with the OSH Act” (84 FR 393). However, in the NPRM, OSHA explained that because of improvements in available technology, it would no longer need to rely on manual review or analysis for Form 300 and 301 data and had preliminarily determined that the agency’s resource-related concerns described in the 2019 final rule were no longer compelling (87 FR 18541–42). In addition, OSHA explained that the proposed rule would increase the agency’s ability to focus resources on those workplaces where workers are at high risk (87 FR 18533). In other words, the proposal would, in some ways, save agency resources by helping the agency be more efficient, e.g., “allow[ing] the agency to focus its enforcement and compliance assistance resources based on hazard-specific information and trends, and . . . increas[ing] its ability to identify

emerging hazards, at the establishment level” (87 FR 18538).

A number of interested parties submitted comments on this issue and generally agreed that the data collected and published under this final rule will actually help OSHA use its limited resources more effectively to protect workers. For example, some interested parties, including the Council of State and Territorial Epidemiologists, National COSH, the Laborers’ Health and Safety Fund of North America, Worksafe, the International Brotherhood of Teamsters, Centro de los Derechos del Migrante, and Public Citizen, commented that requiring regular electronic submission of injury and illness data would help OSHA to use its limited enforcement and compliance assistance resources more effectively (Docket IDs 0040, 0048, 0063, 0080, 0083, 0089, 0093). The AFL–CIO agreed that because OSHA’s resources are very limited, it “must maximize the use of existing tools” (Docket ID 0061).

Commenters also provided examples of how this data would help OSHA use its resources more effectively. For example, National COSH, the National Employment Law Project, and the Centro de los Derechos del Migrante commented that “case-specific data will help the agency identify the hazard-specific materials and other compliance assistance resources they could direct to employers who report high rates of injuries or illnesses related to those hazards,” and “to workers in those industries” (Docket IDs 0048, 0049, 0089). These commenters also said that the data would “aid the agency in identifying emerging hazards . . . and focus outreach to employers and workers whose workplaces might include those hazards.”

Similarly, Public Citizen commented that the collected data would enable OSHA to “quickly pinpoint workplace hazards . . . and target its enforcement efforts” (Docket ID 0093). The International Union of Painters and Allied Trades/AFL–CIO commented that this requirement would “ensure factors responsible for those pronounced illness and injuries trends are identified and addressed in a timely manner for the well-being of workers” (Docket ID 0073). Worksafe also noted that electronic submission would allow the agency “to search and analyze the data” and provide “timely and systematic” injury and illness information that will help OSHA to focus its enforcement efforts on “hazards that are affecting workers now” (Docket ID 0063).

On the other hand, the Chamber of Commerce questioned whether the data

could actually help OSHA target its enforcement efforts (Docket ID 0088, Attachment 2). The Chamber stated that injury and illness data are complex and “unavoidably subjective,” and asserted that because the log only includes work-related injuries, it does not show actual risks—rather, “it shows whether the employer believes that there is a connection between the working environment and the injuries.” Additionally, several commenters reiterated OSHA’s concerns from the 2019 final rule regarding the diversion of OSHA’s resources from other important initiatives (e.g., Docket IDs 0058, 0070, 0076). Some such commenters argued that any resource diversion would be inappropriate because OSHA is incapable of processing and utilizing the Forms 300 and 301 data that would be received under the proposal. OSHA has addressed those comments elsewhere in this preamble, explaining that the agency has the capability to collect and use such data (see, e.g., Section III.B.14.d of this Summary and Explanation). Other commenters merely referenced OSHA’s 2019 determination that its resources would be diverted without analyzing the reasons OSHA gave for reconsidering its previous decision. Still other commenters attacked OSHA’s findings that improvements in technology will decrease the resources required to collect and process the Form 300 and 301 information and ensure that information which could reasonably be expected to identify an individual directly is not publicly released. OSHA has covered these comments elsewhere as well (see, e.g., Section III.B.6 of this Summary and Explanation).

Finally, the International Bottled Water Association (IBWA) pointed to district court rulings on the 2019 final rule and argued, “[T]he reviewing court agreed with OSHA’s determinations that costly manual review of collected 300 and 301 data would be needed to avoid a meaningful risk of exposing sensitive worker information to public disclosure, finding that the uncertain benefits of collecting the 300 and 301 data did not justify diverting OSHA’s resources from other efforts.” (Docket ID 0076).

IBWA’s comment misconstrues the court’s decision. The court did not “agree” with OSHA’s determination. Rather, the court found that OSHA’s decision was neither arbitrary nor capricious, *i.e.*, that OSHA had not “entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency” at the time OSHA made its

decision (see *State of New Jersey et al. v. Pizzella*, No. 1:19-cv-00621 (D.D.C. Jan. 11, 2021) (citation and internal quotations omitted)). Importantly, the court stated that “the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the agency (id. (citation and internal quotations omitted)). Rather, reviewing court’s decisions are “based on a consideration of the relevant factors and whether there has been a clear error in judgment” (id. (citation and internal quotations omitted)). In short, the court did not do an independent review of all the record evidence and determine that OSHA made the correct decision. Instead, it looked to see if OSHA considered all the relevant factors and made a reasonable decision. The fact that an agency’s decision based on the record at the time was reasonable does not prevent the agency from subsequently making a different reasonable decision based on new information.¹² That is what OSHA has done here.

After consideration of these comments, OSHA agrees with commenters that collection of case-specific information from the Form 300 and 301 will help the agency use its enforcement and compliance assistance resources more effectively by enabling OSHA to identify the workplaces where workers are at high risk. As explained in the 2001 final rule, and as identified by commenters, establishment-specific injury and illness information will help OSHA target its intervention efforts on the most dangerous worksites and the worst safety and health hazards, and injury and illness data will help OSHA to identify the scope of safety and health hazards and decide whether regulatory intervention, compliance assistance, or other measures are warranted (see 66 FR 5917). OSHA disagrees with the Chamber’s claim that the case-specific data would not help OSHA target its enforcement efforts because it does not show actual risks. The Chamber is correct in that a single recorded injury or illness, in and of itself, does not necessarily indicate the existence of a risk. Similarly, recording a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible

¹² It also does not necessarily follow that an agency could not have made a different, non-arbitrary-and-capricious decision based on the record before the agency at the time it made its original decision. This is part of the reason why reviewing courts do not substitute their judgment for that of the agency: at times, more than one reasonable decision could follow from a given record.

for workers’ compensation or other benefits (see Note to § 1904.0). However, an injury or illness recorded under part 1904 is an indicator of a potential risk in the workplace, *i.e.*, the employer has determined that a particular injury or illness of an employee meets the definition of work-relatedness in 29 CFR 1904.5(a). In other words, such data *can* indicate a failure in an area of an establishment’s safety and health program or the existence of a hazard. The fact that they do not *always* do so is not persuasive (see Section III.B.4 of this Summary and Explanation). Thus, rather than diverting OSHA’s resources from higher priority issues, OSHA has determined that the data collected and published under this rule will help OSHA use its limited resources more effectively to protect workers.

d. OSHA’s Capacity To Collect and Process the Data From Forms 300 and 301

The preamble to the 2019 final rule cited the costs of building the data collection system and processing the data from Forms 300 and 301 as one reason OSHA was rescinding some of the 2016 rule’s data submission requirements (84 FR 389). As discussed throughout this preamble, in the NPRM to this rulemaking, OSHA found that the reasons given in the preamble to the 2019 final rule for the removal of the 300 and 301 data submission requirement are no longer compelling (87 FR 18538).

As to the collection of the data, OSHA (and more broadly, the Department of Labor) has the technical capacity to build the necessary data collection system. OSHA’s ability is supported by its success in building and utilizing the system to collect data from establishments’ Forms 300A. Since 2017, the ITA has collected submissions of Form 300A from roughly 300,000 establishments per year. In addition, OSHA’s ability to build such a system is supported by the fact that other Department of Labor agencies, *i.e.*, BLS and MSHA, successfully built and are utilizing similar collection systems (see, e.g., Docket ID 0079). BLS’s system, in particular, is illustrative of the Department’s ability to create and utilize such systems: each year, the BLS Survey of Injuries and Illnesses (SOII) collects the same case-specific information, from the same OSHA records, from roughly 200,000 employers, nearly 150,000 more submitters than will provide data to OSHA under this final rule. NIOSH also effectively built and is using a similar system (Docket IDs 0035, Attachment 2, 0079). Based upon this information, it is

reasonable to anticipate that OSHA will have the technical capacity to collect the case-specific submissions. OSHA discusses the costs to build the data collection system in Section IV, Final Economic Analysis.

As to data processing, the preamble to the 2019 rule does not specifically explain what is included in the “processing” of data; however, the discussion included a comment from NIOSH “offering to help with data analysis” and “not[ing] that it has already developed auto-coding methods for categorizing occupation and industry based on free text data and has successfully utilized similar free text data collected from workers’ compensation claims” (84 FR 389, referencing Document ID 2003–A2). As explained in the NPRM for the current rulemaking, the agency preliminarily found that these concerns about “processing” costs were no longer compelling, due to technological developments in automated data coding for text-based fields that have made it easier and more cost-effective for OSHA to efficiently use electronically submitted, establishment-specific, case-specific injury and illness data. As discussed below, coding data is helpful for characterizing, analyzing, and making use of large amounts of text-based information.

In the preamble to the proposed rule, OSHA declared an intention to use automated systems to assign standardized codes based on the information contained in the text fields (e.g., type of accident is “fall”) to categorize and more efficiently use the data (87 FR 18540). This standardized, automated coding of information from text fields in Forms 300 and 301 is already being done by BLS. As explained in the preamble to the proposed rule, in 2018, after the beginning of the previous rulemaking process, BLS switched to an autocoding system that uses deep neural networks (87 FR 18541). This system outperformed the alternatives across all coding tasks and made an average of 24% fewer errors than the logistic regression autocoders, and an estimated 39% fewer errors than the manual coding process.¹³ OSHA explained in the preamble that, by 2019, according to BLS, “automatic coding had been expanded to include all six primary coding tasks (occupation, nature, part, source, secondary source, and event), with the model assigning approximately

85% of these codes.”¹⁴ OSHA asked for public comment on the issue of automated coding of text-field data and other available technology that would enable OSHA to automatically code these data and also specifically asked, “In addition to the automated methods for coding text-based data discussed above, what additional automated methods exist to code text-based data?” (87 FR 18547).

In response, NIOSH commented, that it “collects occupational injury data from a national probability sample of emergency departments.” It further explained: “These data are collected through the occupational supplement to the National Electronic Injury Surveillance System (NEISS-Work) [NIOSH 2022a]. Beginning with the 2018 NEISS-Workdata, injury event or exposure and source codes from the BLS Occupational Injury and Illness Classification System (OIICS) Version 2.01 were assigned through a machine learning algorithm with manual quality control efforts.” (Docket ID 0035).

NIOSH clarified that the machine learning algorithm “relies mostly on the information in the narrative injury incident description field.” Further, NIOSH explained that it “has continued to enhance [its] machine learning process using more technologically advanced approaches, including incorporating additional quantitative variables, which has increased the coding accuracy and further reduced the need for manual coding.” It also noted that it recently collaborated with a partner university to develop a machine learning algorithm that assigns Bureau of Census industry codes based on the narrative fields of employer name and business type (Docket ID 0035).

Similarly, the Strategic Organizing Center (SOC) referenced the work that BLS has done, stating that BLS “faced a problem of similar magnitude when constructing the addition to the Annual Survey of Occupational Injuries and Illnesses in the early 1990’s—the Detailed Case and Demographic series, based on its sampling of the exact same data types from employers Form 301’s” and it “developed and refined the Occupational Injury and Illness Coding System (OIICS).” SOC extolled BLS’s system: “[t]his system is now successfully used annually to code all those cases, with extraordinary benefits for all parties interested in both the BLS survey and the underlying data from the employer sources themselves” (Docket ID 0079).

In contrast, AIHA commented, “Automated methods to analyze text-based responses are very difficult to develop due to the variation of words and writing styles used around the United States. It would be more cost effective to expand the use of checkboxes and radio buttons to assist in interpreting and extracting data from text responses.” (Docket ID 0030). Similarly, the U.S. Poultry and Egg Association commented, “the idea that OSHA will assess the OSHA 301’s is unrealistic. The amount of data from the OSHA 301 will be massive and the answers for most questions are not standardized” (Docket ID 0053).

The Phylmar Regulatory Roundtable also expressed doubts about OSHA’s ability to process the data it would receive pursuant to the proposed rule, commenting that, “[t]he amount of information and data points that this regulation will produce is exponentially larger than what OSHA currently collects from Form 300A alone.” It added that “[i]t is also not clear whether, despite the use of technology such as AI or deep learning models to process and interpret the data, OSHA has the resources in place to constructively utilize the information.” PRR estimated that OSHA would receive “1,065,363” documents if the proposed rule was promulgated, a number which PRR claimed is “3 times more than the number of documents OSHA has experience working with” (Docket ID 0094).

The Employers E-Recordkeeping Coalition (Coalition) similarly expressed concerns with OSHA’s plans, arguing that “[t]he proposed use of an automated system to assign standardized codes based on text identified in the 300 and 301 forms is unrealistic.” Specifically, the Coalition doubted that a system which relies on keyword searches would be helpful because “[they] are literal in the sense that computers find terms wherever they appear—even if part of a larger phrase or used in a different context. Words often have multiple meanings, so keyword searches tend to return irrelevant results (false positives), failing to disambiguate unstructured text.” The Coalition added that such “searches also may fail to identify useful information that does not use the express search terms (false negatives).” Further, it noted, “OSHA’s proposed use depends on employers typing words without spelling errors, abbreviated text, or industry-specific language, acronyms or codes that are not encapsulated in a word search. Under these conditions, OSHA would miss mountains of pertinent information, be flooded by

¹³ See “Deep neural networks for worker injury autocoding”, Alexander Measure, U.S. Bureau of Labor Statistics, draft as of 9/18/2017 (Ex. 96).

¹⁴ See <https://www.bls.gov/iif/automated-coding/deep-neural-networks.pdf>.

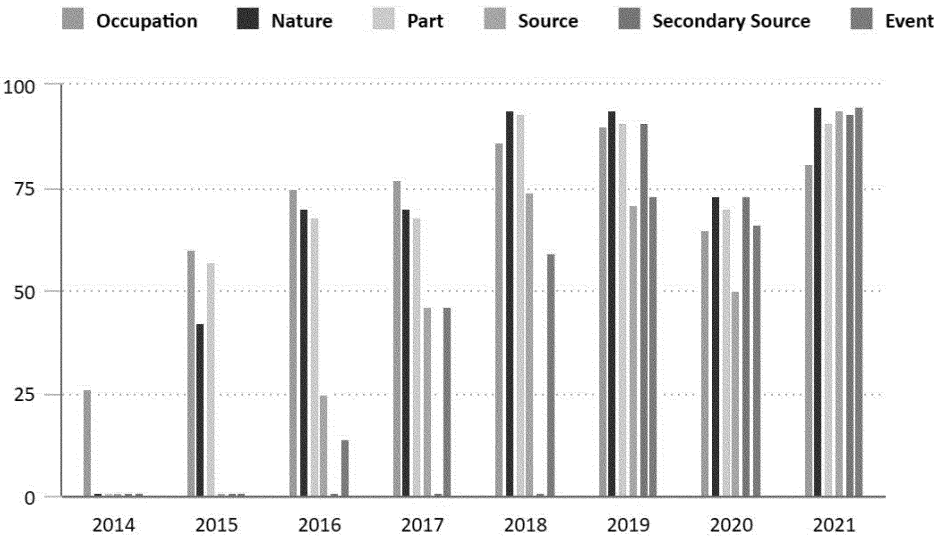
irrelevant information, and, in our view, simply would not effectively identify workplaces that should be targeted for enforcement.” The Coalition concluded: “[a]n accurate analysis of employer 300 and 301 information requires individualized analyses by real people—not IT systems using word searches” (Docket ID 0087; see also Docket ID 0076).

In response, OSHA notes that no coding system, including manual coding, is 100% accurate. However, as discussed in the preamble to the proposed rule, a system to collect and

autocode text-based data from OSHA Forms 300 and 301 already exists, and BLS is effectively using it (see, e.g., Docket ID 0102¹⁵). In fact, BLS continues to expand use of autocoding, explaining that “For survey year 2020, all cases mentioning ‘covid’ or ‘corona’ were manually coded due to their novel nature and prevalence, dropping the percentage of cases autocoded. Since then, COVID–19 cases were integrated into the autocoder training process, allowing for the automated coding of approximately 92 percent of codes for survey year 2021. Starting with survey

year 2021, BLS expanded collection of case data from all sampled establishments to include details for cases involving days of job transfer or restriction only. Previously BLS collected complete details only for cases involving days away from work. Biennial estimates of detailed case circumstances for cases involving days away from work, job transfer, or restriction covering survey years 2021–2022 will first be published in the fall of 2023.”¹⁶ Chart 1, below, illustrates the SOII autocoder performance for data collected annually.

Percent of SOII codes automatically assigned by survey year*



*Metrics presented for Survey Year 2021 and forward represent autocoder performance during that collection period. Biennial estimates of case circumstances will be published every other year beginning with 2021–2022, for which estimates will be available in the fall of 2023. Click legend items to change data display. Hover over chart to view data. Source: U.S. Bureau of Labor Statistics.



NIOSH also currently has the capability to accurately autocode text-based data related to occupational injuries and illnesses. OSHA is continuing discussions with BLS and NIOSH about adopting and/or modifying their autocoding source code to create a pilot system where the autocoding of OSHA data collected by OSHA could be tested and compared to manual coding of the same data. Upon successful testing and adoption of the autocoding system, OSHA plans to consult and work with BLS, NIOSH, and other agencies with experience autocoding text-based occupational safety and health data for long-term system maintenance to continuously

update the neural network code and refine automation of the data. Until the autocoding system has been tested and is in place, OSHA intends to only use and publish uncoded data. Both uncoded and coded data can be useful for OSHA, as well as researchers, employers, and employees. Once the data are coded, OSHA expects to use the data similarly to how the agency currently uses coded data from the Severe Injury Reporting (SIR) program (see Docket ID 0005 for an example of a search interface for the data that will be collected under this final rule). OSHA also intends to combine the coded data with other data sources (e.g., inspection data or SIR data) to increase the utility of the data

for both the agency as well as other users (e.g., employers, employees, researchers, and the public). The specific estimated cost burden on OSHA and employers for data collection and processing is discussed in Section IV, Final Economic Analysis, below.

e. Data Submission

In the preamble to the proposed rule, OSHA also asked the following two questions related to helping employers meet the requirements of the proposed rule:

- Are there electronic interface features that would help users electronically submit part 1904 data, particularly for case data from the OSHA Form 300 and Form 301 and for

¹⁵ Measure, Alexander. “Six Years of Machine Learning in the Bureau of Labor Statistics.”

Advances in Business Statistics, Methods and Data Collection, Jan. 2023, pp. 561–72.

¹⁶ <https://www.bls.gov/iif/automated-coding.htm>.

establishments that submit using batch files? For example, would it be helpful for OSHA to provide a forms package or software application that exports the required files into a submission-ready format?

- What features could OSHA provide to help establishments determine which submission requirements apply to their establishment?

OSHA received a number of comments related to these questions. Electric Boat commented that their company currently uses proprietary recordkeeping software to compile injury and illness data. Data from the Form 300A is then manually entered in order to submit it to OSHA. Electric Boat asked how OSHA will require data on the Forms 300 and 301 to be submitted and noted that manually entering data for each case would be difficult, costly, and could result in errors in the submitted data. The company asked for “clarification on the method of submission and whether or not scanned versions or PDF uploads of the forms would be an acceptable means of submission” (Docket ID 0028).

The Sheet Metal and Air Conditioning Contractors’ National Association expressed concern about being required to use OSHA-provided software on their systems, alleging that this would require additional resources for familiarization with the software and that it could create potential cyberliability claims for their member companies (Docket ID 0046). On the other hand, AIHA urged OSHA to “consider providing software with recordkeeping logic to enable the completion of data forms and automatic generation of logs for posting and reporting. . . . Employers struggle with interpreting recordkeeping requirements, and a user interface could include interpretation logic as well as assist in paperwork completion” (Docket ID 0030). The AFL–CIO similarly stated that it would be useful for OSHA to provide basic software for “injury and illness recordkeeping from which the data can be easily uploaded/ reported to OSHA through a secure website as OSHA envisions” (Docket ID OSHA–2013–0023–1350, Attachment 2). And Cal/OSHA “encourage[d] the design of a data submission system that is compatible with other existing electronic systems used to track and report establishment-specific injury and illness data” (Docket ID 0084).

For the expanded data collection under this final rule, OSHA plans to continue to enable three methods of data submission: manual data entry, batch file, and API. In manual data entry, the user enters the data into a web form and then submits the web form. In

batch file submission, the user uploads a csv file (a delimited text file in which commas separate the values). In API (application programming interface), the user uses a software program that communicates directly with OSHA’s data collection program. In response to Cal/OSHA’s comment, OSHA notes that the API submission method is compatible with other existing electronic systems used to track and report injury and illness data. In addition, OSHA intends to continue to require electronic submission of the recordkeeping data, *i.e.*, OSHA will not permit the uploading of scanned documents or pdfs.

None of the data submission methods described above require establishments to use OSHA-provided software on their systems. Indeed, OSHA has never provided, and does not intend to require employers to use, OSHA-developed software for data submission. OSHA, however, is aware that some employers—particularly small employers—might find OSHA-provided software useful for data submission, as reflected in the comments from the AIHA and the AFL–CIO. OSHA will therefore consider developing and providing such software in the future; however, use of such software would not be required and the other data submission options would remain available. Regardless of whether OSHA decides to provide such software, OSHA expects that developers of proprietary recordkeeping software will expand their applications that enable automated electronic submission of the required information from the OSHA Form 300A to also include submission of information from the Forms 300 and 301; this is further discussed in the Final Economic Analysis, below.

AIHA noted that “Built-in error checks for key data problems would be helpful,” stating that the usefulness of the online data could be affected by errors in submissions: “For example, the 2020 data for NAICS codes in the 331500 industry series contain five entries with more than 150,000 hours worked per employee. In one case, an employer with 150 employees reported working 24 million hours. On the other hand, there were a couple of anomalies in the opposite direction, including an employer with 27 employees who reported a total of only 40 hours worked for the entire year, less than two hours per employee. The result of these obvious errors is that the average hours for the industry were 3,713 per worker, almost double the expected number. . . . OSHA should consider adding some editing features that would

highlight potential errors.” (Docket ID 0030).

In response, OSHA notes that the Injury Tracking Application (ITA) already contains built-in edits that warn users of potential data errors, including warnings about too many or too few hours worked per employee. However, OSHA decided to allow the user to bypass the warning in order to avoid discouraging or prohibiting the user from meeting their reporting obligations. Each year, OSHA follows up with users who submitted questionable data by informing them of the potential errors and providing step-by-step guidance on how to correct the error. OSHA encourages data corrections, but does not require them. This follow-up process is limited to establishments under Federal OSHA jurisdiction. OSHA anticipates incorporating similar built-in edits into the expanded ITA for collection of Form 300/301 information in order to warn users of potential errors in their submissions; the agency, however, does not intend to prevent users from submitting their information if they bypass the warning.

On a related topic, the Coalition for Workplace Safety (CWS) requested that OSHA “establish clear procedures for employers to make corrections to already-submitted data, and improve internal processes to ensure those corrections are reflected in the publicly posted data” because “[c]urrently, upon notice from an employer of a required correction, it takes months for OSHA to make these corrections online” (Docket ID 0058). OSHA notes that these comments seem to reflect a misunderstanding of the process for correcting injury and illness information that has already been submitted. For changes to data for the current collection year, the Injury Tracking Application allows respondents to edit their already submitted data, and those changes take place immediately within the application. To make the data publicly available, OSHA posts each year’s data on its public website three times: (1) an initial file is posted in April of the collection year; (2) an updated file is posted in September of the collection year; and (3) a final file is posted in the beginning of the following year. Users may also make requests for changes to previous years via the Help Request Form on the Frequently Asked Questions page for the Injury Tracking Application (<https://www.osha.gov/injuryreporting/ita/help-request-form>). During the six years OSHA has been collecting information from the Form 300A, OSHA is aware of only one request to change the data for an establishment in the publicly posted

file. That change was made within days, and a revised file was posted. Because this system has been working so far to incorporate changes made to already-submitted data, OSHA intends to continue to follow these procedures for correcting and posting updated data.

More generally, the NSC recommended that OSHA develop tools and resources to help employers understand the forms and questions, “which could include a mentoring program allowing for larger, more sophisticated employers to assist small and mid-sized businesses with reporting” (Docket ID 0041). While OSHA certainly does intend to develop additional tools and resources to enable employers to comply with the final rule, it does not currently have plans to develop such a mentoring program. However, OSHA encourages collaboration between regulated entities, whether as part of industry associations, union efforts, or the type of collaboration mentioned by NSC. In addition, OSHA notes that the compliance assistance materials the agency will offer could be used as part of such collaborative efforts.

Regarding the means of determining an establishment’s NAICS codes and number of employees, NIOSH recommended that employers use, as a starting point, the NAICS and employee counts that are reported quarterly, on a per-establishment basis, to their State workforce agencies. NIOSH noted that these reports are submitted as part of their unemployment insurance (UI) filings and/or as part of the Quarterly Census of Employment and Wages (QCEW), a Federal-State partnership (Docket ID 0035). In addition, NIOSH suggested that “a single summary ‘lookup’ table be provided to make it easy to simply look up any industry and see the requirements for form submission by establishment size.” Furthermore, NIOSH suggested that OSHA could provide a table or tables that would include different generations of NAICS codes, to account for the fact that different employers will be using NAICS codes from different years. (Docket ID 0035, Attachment 2).

In response, OSHA agrees with NIOSH that it would be appropriate for employers to use the reports they make to State workforce agencies as a starting point for determining their NAICS and employee numbers. OSHA also concurs that a look-up table by industry and establishment size could help establishments determine whether and how they are affected by the data submission requirements. The agency currently has a look-up app at <https://www.osha.gov/itareportapp> to help

employers determine if their establishment is required to submit 300A data to OSHA, based on State location, peak employment in the previous year, whether the establishment is a government facility, and the establishment’s NAICS code. The agency plans to modify the app to cover the new requirements before they become effective.

Finally, OSHA asked the following question in the proposal about requiring versus allowing establishments that already have accounts in the ITA to update their accounts to the 2022 NAICS: “Going forward, OSHA intends to use the 2022 NAICS in the ITA for establishments that are newly creating accounts. However, for establishments that already have accounts in the ITA, the version of NAICS used is the 2012 NAICS. BLS anticipates that establishments that already have accounts in the ITA, are also subject to the SOII, and have 2022 NAICS codes that are different from their 2012 NAICS codes, would be unable to use the data-sharing feature . . . to prefill their BLS SOII submission with data already submitted through the OSHA ITA, unless these establishments updated their accounts to revise their industry classification from the 2012 NAICS to the 2022 NAICS. What are the advantages and disadvantages of requiring establishments that already have accounts in the ITA to update their accounts to the 2022 NAICS? How much time would an establishment require to determine whether their 2022 NAICS is different from their 2012 NAICS? How much time would an establishment require to edit their NAICS code in the ITA to reflect any changes?” (87 FR 18547).

In response to this question, NIOSH expressed a preference for all users to update their NAICS codes to the 2022 version in the OSHA ITA: “As potential end users of the data, NIOSH believes the use of multiple NAICS code schemes will require extra work to analyze the data and increase the potential for errors during data entry and data analysis because the codes often change between versions. . . . For end users who are interested in analyzing the submitted data, the first step will be to crosswalk the codes across the various coding schemes, mapping old codes to new codes so that a single coding scheme can be used. Depending on the changes from version to version, crosswalking codes is often a tedious, time-consuming task and can potentially introduce error when the crosswalked categories are not the same or certain codes cannot be easily

crosswalked.” (Docket ID 0035, Attachment 2).

CWS also commented on the issue of updating NAICS codes in the OSHA ITA: “OSHA also states that establishments creating new accounts within the Injury Tracking Application (“ITA”) that OSHA uses for data submission will be identified using 2022 NAICS codes, while establishments with existing ITA accounts will continue to be identified by the 2017 NAICS code. These inconsistencies will cause confusion for employers, may require employers to keep multiple sets of records, and may result in either over- or under-reporting.” (Docket ID 0058).

OSHA has decided to allow, but not require, employers that already have accounts in the ITA to update the NAICS for their establishments to the 2022 codes. OSHA understands NIOSH’s concern about the time-consuming and potentially inaccurate process of using crosswalks to convert from 2012 NAICS to 2022 NAICS when using the data for research purposes. However, the same concern applies to individual establishments using a crosswalk to update their NAICS. In fact, end users of the data may have more experience with NAICS and crosswalk use than those submitting data. OSHA has therefore determined not to burden establishments that already have accounts in the ITA with a requirement to update their NAICS codes from 2012 NAICS to 2022 NAICS. Establishments will have the option to update, but the update will not be required. Establishments that want to take advantage of the data-sharing feature to prefill their BLS SOII submission with data submitted to OSHA will, therefore, be able to use that feature if they update their NAICS.

In response to CWS comment, OSHA notes that establishments creating new accounts in the ITA choose their NAICS from a pull-down menu of NAICS codes; with an update optional but not required, the only difference under this final rule will be that the pull-down menu will be loaded with 2022 NAICS codes instead of 2012 NAICS codes. (No accounts in the ITA use the 2017 codes, as the Coalition mistakenly stated in its comment). Establishments that already have accounts in the ITA will not have to do anything with respect to their NAICS codes. It is not clear to OSHA why this would cause confusion for employers, require employers to keep multiple sets of records, or result in over- or under-reporting. And, even if it did, an employer could simply choose to update their NAICS code in the ITA.

f. Tools To Make the Collected Data From Forms 300 and 301 More Useful

In the preamble to the proposed rule, OSHA also asked for comment about tools that would make the published data more available and useful to interested parties (including employers, employees, job-seekers, customers, researchers, workplace safety consultants, and the general public) (87 FR 18543). Several commenters provided suggestions for ways to make published data more useful to interested parties. NIOSH's primary concern was that "some data users might draw unwarranted conclusions about the overall safety record of establishments or employers when the numbers of employees and injuries are low." To prevent misinterpretation, NIOSH suggested that "OSHA could publish statistical estimates of the extent to which an observed injury rate for an individual industry or establishment is predictive of future injury rates, or the extent to which any such injury rate reflects the underlying risk of injury." NIOSH also commented that to address potential inaccuracies in OIICS codes and "increase data users' understanding of the degree of reliability of the coding, OSHA may consider posting or making available the probabilities of code accuracy that are generated by the autocoding system, both on the individual injury case level and the aggregate level" (Docket ID 0035).

Additionally, Unidos U.S., Farmworker Justice, and Texas RioGrande Legal Aid suggested that OSHA "publish the data in a way that is accessible, searchable, and sortable using a greater level of detail than is currently available" and make the data "available in a way that allows the public to search for injuries and deaths among workers in specific industries—including by six-digit NAICS codes" and to "refine that data by type of hazard down to the most detailed subcategories of event, exposure, or source, and then to sort by other relevant fields such as location, employer, race, and ethnicity" (Docket ID 0078). Additionally, the commenters suggested that OSHA make the data available in multiple languages, including Spanish, to "ensure that Spanish-speaking Latinos themselves have access to the information" (Docket ID 0078).

The International Brotherhood of Teamsters suggested that OSHA "develop tools and resources within its website, especially where data is to be downloaded, that would allow better user interface and help users understand what they are looking at and

what conclusions to draw," such as providing more information on Total Case Rate (TCR), and Days Away Restricted or Transferred (DART) rates (Docket ID 0083).

OSHA will take these comments into consideration when designing tools and applications to make the published data more available and useful to interested parties. As discussed above, there are considerable potential benefits to occupational safety and health resulting from publishing the collected data, and the easier it is for all interested parties to access and use the published data, the more these benefits will be realized.

C. Section 1904.41(b)(1)

Section 1904.41(b)(1) of the final rule includes clarifying information on the injury and illness record submission requirements for establishments of various sizes that are contained in final § 1904.41(a)(1) and (2). The information, like many of the provisions in part 1904, is conveyed in question-and-answer format. The final provision addresses the question of whether every employer has to routinely make an annual electronic submission of information from part 1904 injury and illness recordkeeping forms to OSHA. The answer clarifies that not every employer has to routinely submit this data, and that, in fact, only three categories of employers must routinely submit information from these forms. The answer then describes the three categories of employers and the information they must submit. The first category is establishments that had 20–249 employees at any time during the previous calendar year, and are classified in an industry listed in appendix A. Establishments in this category must submit the required information from Form 300A to OSHA once a year. The second category is establishments that had 250 or more employees at any time during the previous calendar year, and are required by part 1904 to keep records. Establishments in this second category must also submit the required information from Form 300A to OSHA once a year. The third category is establishments that had 100 or more employees at any time during the previous calendar year, and are classified in an industry listed in appendix B. Establishments in this category must submit the required information from Forms 300 and 301 to OSHA once a year, in addition to the required information from Form 300A.

The answer in § 1904.41(b)(1) also specifies that employers in these three categories have to submit the required information by the date listed in

§ 1904.41(c) of the year after the calendar year covered by the form. Since the date in paragraph (c) is March 2, that means that, for example, employers must submit the required information covering calendar year 2023 by March 2, 2024. Finally, the answer clarifies that establishments that are not in any of the three categories must submit information to OSHA only if OSHA notifies that establishment that it must do so for an individual data collection.

Proposed § 1904.41(b)(1) would have provided employers with further clarity on which employers and establishments needed to submit data under proposed § 1904.41(a)(1) and (2) and how the requirements of those provisions interacted with each other. These proposed provisions, like the final provision, were written in question-and-answer format to help employers easily identify the information they seek.

Proposed § 1904.41(b)(1)(i) reiterated the question posed in the previous version of § 1904.41(b), which asked whether every employer has to routinely make an annual electronic submission of information from part 1904 injury and illness recordkeeping forms to OSHA. The proposed answer was updated to be consistent with the requirements in proposed § 1904.41(a)(1) and (2). Proposed § 1904.41(b)(1)(ii) would have clarified that an establishment that has 100 or more employees, and is in an industry included in both appendix A and appendix B, need only make one submission of the OSHA Form 300A in order to fulfill the requirements of both proposed § 1904.41(a)(1) and (2).

OSHA welcomed public comment on proposed § 1904.41(b)(1)(i) and (ii), including on whether the proposed provisions appropriately clarified the proposed requirements for employers. OSHA did not receive any comments specifically related to the text of proposed § 1904.41(b)(1), and the agency has addressed comments related to the substantive submission requirements in § 1904.41(a)(1) and (2), above. Therefore, OSHA has decided to finalize § 1904.41(b)(1) with changes from the proposal to reflect the revised structure of final § 1904.41(a)(1) and (2). Final § 1904.41(b)(1) therefore describes three categories of establishments that are required to submit information under the final rule, as opposed to the two categories described in proposed § 1904.41(b)(1)(i). The three categories are: (1) establishments with 20–249 employees in industries on appendix A that are required to submit information from their Form 300A under final § 1904.41(a)(1)(i); (2) establishments

with 250 or more employees that are required to keep records under part 1904 and are required to submit information from their Form 300A under final § 1904.41(a)(1)(ii); and (3) establishments with 100 or more employees in industries on appendix B that are required to submit information from their OSHA Forms 300 and 301.

Similar to the proposal, the remainder of final § 1904.41(b)(1) notes that employers with establishments falling into any of these three categories must submit the required information by the date listed in paragraph (c) of this section of the year after the calendar year covered by the form. The example given in the final regulatory text—which specifies that submission for 2023 forms must occur in 2024—has been updated to reflect the first year OSHA anticipates employers having to submit information under this final rule. Finally, the provision specifies that if an establishment is not in any of the three specified categories, the employer must submit information to OSHA only if OSHA notifies the employer to do so for an individual data collection. OSHA anticipates that final § 1904.41(b)(1), along with the additional compliance information the agency intends to issue, will assist employers in determining their compliance responsibilities under the final rule.

Proposed § 1904.41(b)(1)(ii) has not been included in the final rule; it is no longer necessary due to the restructuring of the final regulation. As discussed above, final § 1904.41(a)(1) relates only to the OSHA Form 300A, and final § 1904.41(a)(2) relates only to the OSHA Forms 300 and 301. This restructuring is expected to eliminate any confusion regarding whether an establishment might be required to submit information from its Form 300A twice. Therefore, there is only one question under final § 1904.41(b)(1), as opposed to the two that were proposed.

One commenter requested additional guidance related to how the submission requirements will work. S.W. Anderson Company asked for clearer guidance for companies in designated industries that have 100 employees across multiple sites. The company stated that “we have just reached the 100-employee threshold. We have previously only submitted electronically the OSHA 300A for our company headquarters since we have more than 20 employees. Our other locations all have less than 20 employees” (Docket ID 0008).

In response, OSHA clarifies that this final rule does not affect how employees are counted for recordkeeping or information submission purposes under part 1904. As OSHA states in reporting

requirement FAQs on the agency’s Injury Tracking Application website (<https://www.osha.gov/injuryreporting>), OSHA’s electronic reporting requirements are based on the size of the establishment, not the firm. An establishment is a single physical location where business is conducted or where services or industrial operations are performed (see 29 CFR 1904.46). Therefore, under the facts described by this commenter, if the firm has only one establishment (the company’s headquarters) with more than 20 employees, that is the only establishment for which the commenter might need to submit injury and illness information. That single establishment would have to submit the required information from its Form 300A under final § 1904.41(a)(1)(i) if the establishment falls under a NAICS code listed in appendix A. The company would not, however, have to submit information from its Form 300 or 301 for that establishment, regardless of NAICS, because the establishment does not have at least 100 employees. More generally, OSHA plans to revise and expand the FAQs on its recordkeeping website as part of its compliance efforts related to this final rule.

D. Section 1904.41(b)(9)

Section 1904.41(b)(9) of the final rule specifies which information employers must submit from the OSHA Forms 300 and 301. Final § 1904.41(b)(9) asks and answers the following question: If I have to submit information under paragraph (a)(2) of this section, do I have to submit all of the information from the recordkeeping forms? Paragraph (a)(2) contains the submission requirements for information from the OSHA Forms 300 and 301.

The answer in the final rule is no, employers who have to submit information under paragraph (a)(2) of this section must submit all the information from the OSHA Forms 300 and 301 *except* for the following case-specific information:

- Employee name (column B), from the Log of Work-Related Injuries and Illnesses (OSHA Form 300).
- Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), and facility name and address if treatment was given away from the worksite (field 7) from the Injury and Illness Incident Report (OSHA Form 301).

Proposed § 1904.41(b)(9) was the same as final § 1904.41(b)(9). In the preamble to the proposed rule, OSHA explained that collecting data from these fields would not add to OSHA’s

ability to identify establishments with specific hazards or elevated injury and illness rates. Therefore, OSHA proposed excluding these fields from the submittal requirements to minimize any potential release or unauthorized access to any PII contained in those fields. Because the data collection would not include the information from these fields, there would be no risk of public disclosure of the information from these fields through the data collection. OSHA requested comment on all aspects of proposed § 1904.41(b)(9), including whether the proposed specified fields should be excluded from data that would be collected, and whether other data should be similarly excluded to protect employee privacy or for other reasons. OSHA also asked more specific questions, as addressed below.

1. Collecting Employee Names

In the preamble to the proposed rule, OSHA specifically asked the following question about collecting employee names, in the context of data-sharing between OSHA and BLS: “OSHA is proposing not to collect employee names under proposed § 1904.41(a)(2) and (b)(9), consistent with worker privacy concerns expressed in public comments during previous rulemakings. However, BLS uses the “employee name” field on the Form 300 and Form 301 in their data collection for the SOII. Beginning in 2021, a data-sharing feature has allowed some establishments that are required to submit Form 300A information to both OSHA and BLS, under the current regulation, to use their data submission to the OSHA ITA in their submission to the BLS SOII. BLS anticipates an inability to use this data-sharing feature for establishments required to submit under proposed § 1904.41(a)(2), unless OSHA requires these establishments to submit the “employee name” field on the Form 300 and 301. Without the data-sharing feature, establishments that submit data to OSHA under proposed § 1904.41(a)(2), and that also submit data to the BLS SOII, would not be able to use their OSHA data submission of case-specific data to prefill their BLS SOII submission. What would be the advantages and disadvantages, in terms of employer burden and worker privacy concerns or otherwise, of requiring all establishments subject to proposed § 1904.41(a)(2) to submit employee names, to support this data-sharing feature for Form 300 and 301 submissions? (Please note that OSHA would not intend to publish employee names.)” (87 FR 18547).

In response, OSHA received multiple comments about the desirability of data-sharing between BLS and OSHA, but there were no comments supporting the collection of employee names. In fact, as discussed in more detail above in this preamble, numerous commenters expressed concerns about worker privacy and advocated that employee names be excluded from the data submission.

The Coalition for Workplace Safety commented in support of data-sharing, “Employers who submit data to OSHA should not be required to separately submit the same data to BLS. These duplicative reporting requirements are unacceptable, and OSHA’s current proposal only serves to exacerbate this existing problem” (Docket ID 0058). Similarly, the National Association of Manufacturers commented that it would be in the best interest of OSHA and manufacturers for OSHA to gather detailed information about workplace injuries and illnesses “in conjunction with the BLS SOII survey rather than in a separate data collection process” (Docket ID 0068). However, the Coalition for Workplace Safety and the National Association of Manufacturers also expressed great concern in their comments that collection of case-specific information from the Form 300 and Form 301 would risk employee privacy.

Other commenters also expressed support for data-sharing without expressing support for collection of employee names. For example, the American College of Occupational and Environmental Medicine commented in support of avoiding duplicate reporting and encouraged streamlining and simplifying the importation of data from OSHA to SOII (Docket ID 0037). Similarly, the National Safety Council commented, “OSHA and BLS should continue their collaboration to enable more businesses to benefit from single reporting and make reporting easier” (Docket ID 0041).

Having reviewed the comments on this issue as well as the comments on employee privacy described in more detail elsewhere in this preamble, OSHA has decided not to collect employee names under final § 1904.41(a)(2) and (b)(9). This decision is consistent with worker privacy concerns expressed in a number of public comments during this rulemaking and discussed elsewhere in this preamble. Not collecting employee names is, of course, the best way to ensure that this information does not get released online. The agency also, however, recognizes the value in providing ways to reduce the time and

burden for employers that are required to submit data to both OSHA and BLS. As such, the agency will continue to work with BLS to identify and implement data-sharing methods that do not require submission of employee names to OSHA in order to reduce the burden for the subset of establishments that are required to submit their Form 300 and 301 data to OSHA and also to submit data to the BLS SOII.

2. Excluding Other Specified Fields

In addition, in the preamble to the proposed rule, OSHA welcomed more general public comment on proposed § 1904.41(b)(9), including whether the proposed specified fields should be excluded from data that would be collected, and whether other data should be similarly excluded to protect employee privacy or for other reasons (87 FR 18546). OSHA asked that any comments suggesting exclusion of other fields or data from the proposed submission requirements also address whether the exclusion of that particular field or data from collection would hinder OSHA’s ability to use the collection to protect employee safety and health. Exclusion of employee names is discussed above. Similar to employee names, there were no comments arguing that OSHA should collect the fields listed in proposed § 1904.41(b)(9) (*i.e.*, from Form 301 employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7)).

However, there were some commenters that wanted additional fields to be excluded. For example, the Plastics Industry Association commented that OSHA should not collect job title, department, gender, birth date, date of hire, and date of death to avoid identifying individual employees, and urged excluding job titles in particular because there may only be a small number of employees, or a single employee, with a job title in a facility (Docket ID 0086). Other comments discussed elsewhere in the preamble also expressed concern that employees may be identified by the data fields OSHA intends to make public, (*see, e.g.*, Docket IDs 0062, 0094). The Plastics Industry Association also commented on the possibility that these data fields could be cross-referenced with other data available publicly online, such as social network accounts like LinkedIn, to identify employees (Ex. 86). Similarly, R. Savage commented that “job title, date of hire, date of injury, and social media” could be used to identify the injured employee

(Ex. 18). However, other commenters countered that the detailed data can be used to improve workplace safety and health, (*see, e.g.*, Docket IDs 0030, 0079, 0090). The Plastics Industry Association’s comments did not address whether the exclusion of these fields from the collection would hinder OSHA’s ability to use the collection to protect employee safety and health.

In response to these concerns and, as discussed elsewhere in this preamble, OSHA has determined that the benefits of collecting the data for improving safety and health outweigh potential privacy concerns. Each of these data variables included in the data collection gives OSHA the ability to identify unique hazards. The age of workers is relevant to indicating increased hazards for certain age groups. The date of hire demonstrates when injuries disparately impact new employees versus more experienced employees. An injury that occurs mostly in recent hires may indicate a greater need for training and monitoring new employees, while other illnesses or injuries can occur predominantly in longer term employees. Gender is similarly helpful to indicate workers at higher risk. For example, women are at a higher risk for workplace violence. Job titles aid OSHA in indicating specific jobs with higher rates of illnesses and injuries. The date of injury and date of death are also useful to OSHA for identifying hazards. For example, certain illnesses may have a lag time between the date of injury and the date of death. Other injuries and illnesses may have a seasonal component, such as heat illnesses in the summer.

Further, as part of OSHA’s determination that the benefits of collecting *and publishing* the data outweigh potential privacy concerns, the agency emphasizes that it will be able to adequately protect workers’ information that could reasonably be expected to identify individuals directly. OSHA notes that employee birth dates will not be made available to OSHA for outreach, enforcement, or research/analytical purposes.¹⁷ Instead, establishments will enter the birth date, the system will convert the information to age, and OSHA will retain the age. The data from the fields for age (calculated from date of birth in field 3),

¹⁷ Note that, as explained in the Privacy Impact Assessment (Docket ID 0107), establishments that submit their data by uploading a csv file (*see* III.B.14.e Data Submission) will include the Date of Birth field in the csv file, and the csv files will be temporarily stored in a secure, encrypted folder on the Department’s IT network (*see* III.B.9 Risk of cyber attack) for technical support purposes only, and purged on a regular basis.

date hired (field 4), gender (field 5), whether the employee was treated in an emergency room (field 8), and whether the employee was hospitalized overnight (field 9) will be collected, but these fields will not be published. OSHA also notes regarding the date of death field that deceased individuals do not have a right to privacy; further, since January 1, 2015, § 1904.39(a)(1) has required employers to report the death or hospitalization or amputation or loss of an eye of any employee as a result of a work-related incident within eight hours of the death, and OSHA publishes the reports at <https://www.osha.gov/severeinjury>, including narrative information. In addition, as discussed elsewhere, HIPAA does not apply.

After consideration of these comments, OSHA has decided to exclude the following fields from the data collection, as proposed:

- Log of Work-Related Injuries and Illnesses (OSHA Form 300): Employee name (column B).
- Injury and Illness Incident Report (OSHA Form 301): Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7).

E. Section 1904.41(b)(10)

Section 1904.41(b)(10) of the final rule addresses how establishments identify themselves in their electronic recordkeeping submissions. As noted above, OSHA's recordkeeping regulation requires employers to maintain and report their injury and illness data at the establishment level. An establishment is defined as a single physical location where business is conducted or where services or industrial operations are performed (see 29 CFR 1904.46). Part 1904 injury and illness records must be specific for each individual establishment. The text of final § 1904.41(b)(10) is in question-and-answer format and responds to the question of whether a company may use numbers or codes as its establishment name when submitting data to OSHA. The answer to the question is yes, a company may use numbers or codes as its establishment name. However, the submission must also include a legal company name, either as part of the establishment name or separately as the company name.

Final § 1904.41(b)(10) is identical to the proposed provision except for changing "company name" to "legal company name." The final version of § 1904.41(b)(10) is intended to address a problem OSHA identified with the

previous rule, which was that the company name was not required. Specifically, as OSHA explained in the preamble of the proposed rule, the ITA (the data submission portal) includes two text fields which OSHA uses to identify each establishment: Company Name and Establishment Name. The Establishment Name field is a mandatory field, and users must provide a unique Establishment Name for each establishment associated with their user account. In contrast, the Company Name field is an optional field. OSHA's review of five years of data electronically submitted under § 1904.41 showed that some firms submitted data with codes in the required Establishment Name field and nothing in the optional Company Name field. For example, in the 2020 submissions of 2019 Form 300A data, users submitted data for more than 18,000 establishments with a code in the Establishment Name field and no information in the Company Name field. The data are considerably less useful and more difficult for both OSHA and other interested parties to work with when establishments have a code in the Establishment Name field and no information in the Company Name field. For example, it is not possible for a data user to search for data by company for companies that use codes without including a company name. In addition, without the legal company name, OSHA is unable to determine whether a particular establishment in that company met the reporting requirements.

To address this problem of missing data under the previous rule, OSHA proposed a provision to require employers who use codes for the Establishment Name to include a legal company name. The proposed provision, § 1904.41(b)(10), provided: "My company uses numbers or codes to identify our establishments. May I use numbers or codes as the establishment name in my submission? Yes, you may use numbers or codes as the establishment name. However, the submission must include the company name, either as part of the establishment name or separately as the company name."

The final provision, § 1904.41(b)(10), states: "My company uses numbers or codes to identify our establishments. May I use numbers or codes as the establishment name in my submission? Yes, you may use numbers or codes as the establishment name. However, the submission must include the legal company name, either as part of the establishment name or separately as the company name."

OSHA changed "company name" to "legal company name" in the final regulatory text to clarify that the legal company name should be entered as opposed to a more generic company name. For example, "Company X, LLC" would be entered if that is the legal company name for the establishment, not "Company X." This clarification is consistent with the Summary and Explanation for proposed § 1904.41(b)(10), which stated "[t]he submission must include the legal company name, either as part of the establishment name or separately as the company name" (87 FR 18523, 18546 (March 30, 2022)). All companies must enter a legal company name, either as part of the establishment name field or the company name field. Users will be reminded during data submission that the information about the establishment must include the company's legal name, either in the establishment field or in the company name field.

OSHA welcomed public comment on the proposed requirement to submit the company name, including any comments on the utility of such a requirement and how the company name should be included in an establishment's submission (87 FR 18456). The agency received a number of comments in response to the comment solicitation on this topic. For example, Worksafe supported the proposed requirement to submit both establishment name and company name (Docket ID 0063). Similarly, Cal/OSHA commented, "The proposed inclusion of employers' entity names, which we support, makes detailed information usable even when employers use numbers or codes to identify their facilities" (Docket ID 0084). In their comment, Seventeen AGs also supported the requirement, which they described as "critical[]" (Docket ID 0045). The comment further described the proposal as an improvement to existing reporting requirements, noting that the requirement to disclose a legal name will aid job-seekers in making informed decisions about the injury and illness data for a specific employer (Docket ID 0045).

In contrast, several organizations argued against requiring a company name. For example, the National Propane Gas Association argued that "any research to evaluate the general performance or safety of a particular industry can be investigated on the basis of industry NAICS code; not company name" (Docket ID 0050). OSHA recognizes the value of data that is industry-wide for industry-based research, but there is additional value obtained through collecting and

publishing company names. OSHA intends to use the data to engage in company-specific activities to effectively address occupational health and safety issues, and such activities require the company name.

The Phylmar Regulatory Roundtable (PRR) also opposed OSHA's proposed requirement to include the legal company name. It explained that it is concerned "about OSHA's, and particularly the public's, ability to remain objective. To alleviate this concern, PRR recommends OSHA does not publish this information publicly, does not collect the company name, and uses this data for statistical purposes only" (Docket ID 0094). In addition, the Association of the Wall and Ceiling Industry also expressed strong opposition to including the company's name, noting its concern "about provisions in the proposed rule that would unintentionally and unnecessarily harm construction businesses," such as "any requirement that would result in public access to any affected company's name and address, and/or signatory executive's name and telephone number" (Docket ID 0043). The National Propane Gas Association similarly argued that OSHA's assessment of the utility of the collected information did "not include the regulated companies because there is no evaluation of the potential damage by misunderstanding or misconstruing the information that is proposed for the public website" (Docket ID 0050). It further stated that "[t]he injury and illness reports do not include explanations of employees' conduct, variations from company policies, common practices, or comparisons to indicate positive safety practices, days without injuries or illnesses, or other safeguards companies implement" (Docket ID 0050).

OSHA understands these commenters' concerns. However, as discussed elsewhere, OSHA notes that it has published injury and illness data by company name since 2009, and most establishments were already submitting company name under the previous requirements. Despite this history, opposing commenters did not provide any examples of burden or damage resulting from the publication of company names, nor is OSHA aware of any. Moreover, as discussed in more detail in Section III.G of this Summary and Explanation, OSHA's existing Note to § 1904.0 makes clear that "[r]ecording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for

workers' compensation or other benefits." Further, OSHA notes that the signatory executive's name and telephone number will not be collected or published under the final rule, nor were they under the previous rule. Consequently, OSHA does not find these comments persuasive.

OSHA agrees with comments that inclusion of the legal company name will improve workplace safety and health. The primary purpose of collecting the company name is to make the data more useful for OSHA for activities at the company level, such as inspection targeting, compliance outreach, research, and assessment of company-wide compliance with the submission requirement. With the company name included, OSHA will, for example, be able to identify company-wide trends of occupational illnesses or injuries. Additionally, interested parties may also use company name data to improve workplace health and safety or to inform themselves about the injury and illness records of specific employers.

One commenter offered an example of how it used company-specific information to improve workplace safety. The Strategic Organizing Center explained in its comment how it used the release of the 2020 and 2021 Injury Tracking Application data to publish reports on the rate of serious injuries at a particular company, which was much higher than the rate at other similar businesses. After the reports were published, the company responded by announcing that safety improvements were underway. OSHA agrees with this commenter that "the availability of more detailed information, including names and locations of employers, allows employers and others to make more meaningful comparisons"—and, as a result, can lead to improvements in worker safety and health (Docket ID 0079).

After consideration of these comments, OSHA has decided to require establishments to submit company name, as proposed, in order to aid both OSHA and other interested parties in using the data more effectively. Users will be reminded during data submission that the information about the establishment must include the company's legal name, either in the establishment field or in the company name field.

F. Section 1904.41(c)

Section 1904.41(c) of the final rule requires employers to electronically submit the required information to OSHA by March 2 of each year. The final provision simplifies the regulatory

language in § 1904.41(c)(1)–(2) of the previous rule concerning the dates by which establishments must make their annual submissions. Previously, § 1904.41(c)(1) included information for establishments on what to submit to OSHA during the phase-in period of the 2016 final rule and the deadlines for submission during that phase-in period. That information is no longer relevant and, thus, OSHA removed it to streamline the section. The substantive information already contained in the previous § 1904.41(c)(1) was consolidated into § 1904.41(c) of the final rule. Like previous § 1904.41(c)(2), § 1904.41(c) of the final rule requires all covered establishments to make their electronic submissions by March 2 of the year after the calendar year covered by the form(s). Also, § 1904.41(c) of the final rule provides an updated example of that requirement, explaining that the forms covering calendar year 2023 would be due by March 2, 2024. As the example indicates, because this final rule becomes effective on January 1, 2024, OSHA intends for March 2, 2024 to be the first submission deadline for the new information required to be submitted under this rule.

The Coalition for Workplace Safety commented, "Employers must have notice of the exact requirements of any final rule at the beginning of the year for which collected data will be submitted." Otherwise, they argued, employers will not have sufficient notice and time to adjust their information collection and review processes (Docket ID 0058). The Flexible Packaging Association made a similar comment (Docket ID 0091). On the other hand, the AFL–CIO expressed frustration that the date of the proposed rule "already delayed the ability of OSHA to institute final reporting requirements . . . until at least 2024" (Docket ID 0061).

OSHA does not agree that employers must have notice of the requirements of any final rule at the beginning of the calendar year for which the data will be submitted. The commenters who made this assertion cite no official rule or other legal authority to support it, and OSHA is not aware of any such rule regarding calendar years and reporting requirements. It is OSHA's position that it was not necessary for the final rule to be published before the end of 2022 in order for OSHA to begin collecting 2023 data in 2024. OSHA anticipates that employers will have sufficient time between publication of the final rule in 2023 and the first submission deadline in 2024 to make any changes to their submission systems that they determine should be made. Indeed, the final rule

does not make any changes to the recordkeeping requirements for 2023; employers will continue to record the same information as they were required to record before this final rule was issued.

Both the Flexible Packaging Association and the Coalition for Workplace Safety commented that the changes in the final rule will require technological changes within and outside of OSHA that will require testing for accuracy and effectiveness, and that OSHA must account for the time it will take to make such adjustments (Docket IDs 0058, 0091). To the extent that these commenters are concerned about changes they plan to make to their own recordkeeping or data submission systems, OSHA notes that these types of changes are not a requirement of the final rule. The final rule simply requires submission of the data. OSHA will continue to provide three options for employers to submit the data (manual entry via web form, batch upload via csv file, and API), and it will continue to be up to the individual employer to decide which option to use. To the extent that these comments focus on changes OSHA must make to the ITA to accept the new submissions, OSHA has considered this issue and anticipates being prepared to accept these submissions beginning in early 2024.

Some commenters also argued for an annual submission date later than March 2 to allow employers more time to collect and submit the data from the previous year. For example, the Coalition for Workplace Safety commented that “OSHA should push future deadlines to allow companies to submit past March 2; this date is too early in the year and does not provide enough time for companies to collect and submit this data” (Docket ID 0058; see also Docket ID 0091). The Employers E-Recordkeeping Coalition similarly commented: “For example, one national employer with approximately 700 establishments that would be covered by the new requirement to submit 300 and 301 level data currently takes approximately 3 months to audit and submit its injury and illness records to ensure that its 300A data submissions are accurate. Manually keying in every line of hundreds of 300 log data, or if that is not necessary, at least keying in thousands of 301 Reports would be exponentially more burdensome—likely infeasible given the annual March 2nd submission deadline.” (Docket ID 0087).

In response, OSHA is not persuaded that the March 2 date is too early in the year to submit data for the previous year. OSHA notes that § 1904.32 already

requires employers to review the Form 300 Log entries and complete, certify, and post the Form 300A annual summary no later than February 1 of the year following the year covered by the records. Therefore, employers must already have collected and reviewed all of their establishments’ 300 Log information for the previous year by February 1 of each year. Having completed this review, they will then have an additional month to submit the data. The scenario posed by the Employers E-Recordkeeping Coalition regarding manually typing in hundreds or thousands of lines of data would only arise if a company with many establishments chose to enter all the data via webform. There are three data submission methods available, as discussed further elsewhere in this preamble, and entering data via webform would be the least efficient method for a company with many establishments.

After consideration of these comments, OSHA has decided to retain the proposed data submission deadline in the final rule and require submission of the previous calendar year’s data by March 2 of each year.

G. Additional Comments Which Concern More Than One Section of the Proposal

1. General Comments

There were several comments asking OSHA to add data submission requirements for other types of establishments. For example, Worksafe recommended adding a requirement for companies with five or more establishments to collect and submit part 1904 occupational injury and illness data for those work locations and establishments (Docket ID 0063). Similarly, the National Nurses Union recommended adding a submission requirement for companies with 500 or more employees across multiple establishments (Docket ID 0064). Neither of these recommendations is being incorporated into the final rule. Data submission requirements for multi-establishment companies, regardless of the number of establishments or size of the employer, were not included in any proposed regulatory provision or alternative in the NPRM; nor was the topic otherwise addressed by OSHA as part of the proposed rule. As such, OSHA does not believe that a requirement for multi-establishment employers to submit data to OSHA would be a logical outgrowth of the proposal. (Although OSHA believes that these recommendations are out of the scope of the proposal, the agency notes

that it proposed similar ideas as Alternative I in the 2016 rulemaking and rejected that Alternative, in part, due to practicality concerns. OSHA does not believe that those concerns have been obviated in the years since the issuance of the 2016 final rule.)

Similarly, there was a comment expressing concern that the rule will not capture data for workers classified as independent contractors, and “encourag[ing] OSHA to study the benefits of data collection for all workers, regardless of classification, including those who may be improperly designated as independent contractors” (Docket ID 0045). As interested parties are generally aware, the Occupational Safety and Health (OSH) Act of 1970 only applies to “employment” (see 29 U.S.C. 653(a)). Businesses do not meet the definition of the term “employer” in Section 3(5) of the OSH Act, 29 U.S.C. 652(5), unless they have employees. Similarly, individuals are not considered “employees” under the OSH Act unless they are employed by an employer (29 U.S.C. 652(6)). Thus, independent contractors are not covered under the OSH Act. The agency understands that, at times, employees are misclassified as independent contractors and are consequently not receiving the protections that they should. OSHA has other initiatives to address that important issue. However, the agency finds that it is beyond the scope of this rule, which only covers employees.

There were also comments asking OSHA to expand the data requested on OSHA’s recordkeeping forms. For example, the National Safety Council commented that OSHA should collect more demographic data, such as race or ethnic origin, and that OSHA should include a method to identify and collect basic information on musculoskeletal disorders (MSDs) (Docket ID 0041). Similarly, Unidos US, Farmworker Justice, and Texas RioGrande Legal Aid commented that OSHA should require employers to report race and ethnicity data in case-specific reports and publish the data alongside the other case-specific information (Docket ID 0078). ConnectiCOSH proposed a requirement for employers to document when workers have complained about retaliation (Docket ID 0069).

Also related to expanding the data requested on the OSHA recordkeeping forms, the Phylmar Regulatory Roundtable (PRR) commented that instead of requesting information from the Forms 300 and 301, OSHA should revise the Form 300A to include more useful identifiers. For example, including “heat” as a type of illness,

and “indoor,” “outdoor,” “office,” “distribution facility,” and “off-site” for a field titled “location” would give OSHA more information without identifying employees (Docket ID 0094). More generally, the Employers E-Recordkeeping Coalition commented that OSHA should create a committee or task an existing committee to explore changes to injury and illness recordkeeping, including to consider adopting ASTM E2920–14 (Standard Guide for Recording Occupational Injuries and Illnesses), an international standard that would allow data comparisons with other countries (Docket ID 0087).

These recommendations to expand or change recordkeeping forms, or to explore broader changes to injury and illness recordkeeping, such as adopting an ASTM standard, were not included in any proposed regulatory provision or alternative in the NPRM, nor were these topics otherwise addressed by OSHA as part of the proposed rule. As such, these topics are not within the scope of this rulemaking. Similarly, comments raising issues with OSHA’s recording criteria or other parts of part 1904 that are not at issue in this rulemaking (e.g., Docket ID 0017 (related to the recordability of COVID–19 cases)) are out of scope of this rulemaking.

The National Safety Council (NSC) provided a comment about OSHA enforcement of the reporting requirements: “First, OSHA must take steps to improve reporting compliance. The Department of Labor Office of Inspector General report provides some key recommendations for OSHA to improve reporting: 1. Develop guidance and train staff on identifying underreporting, 2. Issue citations for all late reporters, 3. Clarify guidance on documenting essential decisions, collecting evidence to demonstrate employers corrected all identified hazards, and monitoring employer conducted investigations, and 4. Conduct inspections on all Category 1 incidents. These are key recommendations to improve the original data. Additionally, the National Academy of Sciences (NAS) produced a 2018 study on OSHA data collections acknowledging the limitations of the current data system(s) and made several recommendations for improving and supplementing the OSHA data that should also guide OSHA actions.” (Docket ID 0041; see also Docket ID 0080 (recommending OSHA evaluate procedures for compliance and enforcement)).

With respect to the Office of the Inspector General’s 2018 Report, *OSHA Needs to Improve the Guidance for its*

Fatality and Severe Injury Reporting Program to Better Protect Workers, OSHA agreed that better case documentation can help promote consistency in the issuance of citations, as well as the determination of whether to conduct an inspection or a rapid response investigation. However, OSHA was concerned that the OIG’s report suggested that the burden to ensure reporting falls on the agency when the OSH Act clearly states that it is the employer’s responsibility to comply with the standards under Section 5(a)(2). The agency encourages employers to comply with illness and injury reporting requirements through a variety of enforcement, outreach, and compliance assistance tools. OSHA’s full response to the OIG’s report can be found in Appendix B of that report at <https://www.oig.dol.gov/public/reports/oa/2018/02-18-203-10-105.pdf>.

With respect to the National Academies of Science, Engineering, and Medicine (NAS) report, *A Smarter National Surveillance System for Occupational Safety and Health in the 21st Century*, OSHA concludes the final rule is responsive to that report (see OSHA–2021–0006–0097). This NAS report was the result of a joint request from NIOSH, BLS, and OSHA to NAS, asking NAS to conduct a study in response to the need for a more coordinated, cost-effective set of approaches for occupational safety and health surveillance in the United States. The NAS report suggested that electronic collection of Form 300 and 301 data would allow OSHA to focus its interventions and prevention efforts on hazardous industries, workplaces, exposures, and high-risk groups. Additionally, the NAS report made recommendations on ways the public data could be utilized by employers, researchers, government agencies, and workers (Docket ID 0061). Further, according to the report, collecting Form 300 and 301 data electronically would also allow for expanding and targeting outreach to employers to improve hazard identification and prevention efforts, and would give OSHA the opportunity to advise employers on how their rates of injury and illness compare with the rest of their industry. OSHA agrees with these assessments regarding the value of electronically collecting Form 300 and 301 data, as reflected by the final rule.

PRR commented, “to ensure the Agency remains fair, balanced, and trusted, any targeting for enforcement that results from submission of Forms 300, 301 and 300A should be based on a systematic approach that is standardized and impacts all industries

in [a]ppendix B subpart E, equally” (Docket ID 0094). In response, OSHA agrees that it should take a systematic approach to enforcement targeting based on the data it collects from these recordkeeping forms. As addressed elsewhere in this preamble (e.g., Section III.B.4 of this Summary and Explanation), OSHA’s systematic approach to enforcement in site-specific targeting using data collected from the Form 300A is illustrated by OSHA’s directive on Site-Specific Targeting (SST) (CPL 02–01–064, issued on February 7, 2023, <https://www.osha.gov/enforcement/directives/cpl-02-01-064>). In this directive, OSHA states that it will generate inspection lists of: (1) establishments with elevated Days Away, Restricted, or Transferred (DART) rates for CY 2021; (2) establishments with upward trending rates for the range of CY 2019–2021; (3) establishments that did not provide the required 2021 Form 300A data to OSHA; and (4) establishments with low DART rates in CY 2021 to verify data accuracy and quality control. OSHA’s Office of Statistical Analysis provides each Area Office (AO) with access to software and databases that include the establishments on the Inspection List. AOs must generate inspection cycles using the SST software that randomly selects the establishments and shall determine inspection cycle size (i.e., 5 to 50 establishments) based on available resources and the geographic range of the office. Once initiated, the entire cycle must be completed. Within a cycle, the AO may schedule and inspect the selected establishments in any order that makes efficient use of available resources.

As indicated by the content of the directive, while OSHA does take a systematic approach to enforcement targeting, OSHA does not agree that any targeting for enforcement resulting from submission of the data from Forms 300, 301, and 300A should necessarily impact all industries in appendix B subpart E equally. If reported data were to show a particular industry had a very high rate of occupational illnesses or injuries, enforcement targeting that particular industry would be appropriate. The final rule provides more accurate and detailed information that will be used to protect workplace health and safety.

Reps. Foxx and Keller commented, “DOL further revealed its intention to reward Big Labor in its extension of the proposed rule’s comment period, citing a single request from the AFL–CIO, despite the fact that it has routinely denied similar requests from business stakeholders and members of Congress”

(Docket ID 0062). In response, OSHA notes that the agency received two requests for extension of the comment period: from the AFL-CIO in a letter dated May 5, 2022 (Docket ID 0027), and from the Employers E-Recordkeeping Coalition in a letter dated May 20, 2022 (Docket ID 0032). OSHA determined that it would be reasonable to extend the comment period and offered the same additional 30 days to everyone (see 87 FR 31793–4 (May 25, 2022)).

2. Misunderstandings About Scope

Some commenters expressed concern that the proposal would expand the number of employers required to submit data. The Chamber of Commerce commented that the lists of designated industries in Appendices A and B “are long and not that limiting,” and the National Propane Gas Association commented, “[a]ccording to the proposed revisions to [a]ppendix A and proposed creation of [a]ppendix B, the NPRM would expand reporting requirements to more establishments within the propane industry” (Docket IDs 0050, 0088). The National Propane Gas Association also expressed disagreement with “the proposed creation of [a]ppendix B to the extent that it includes all the industries already listed in [a]ppendix A” (Docket ID 0050). In response, OSHA notes that appendix B does not include all the industries listed in appendix A; rather, appendix B is a subset of appendix A. Additionally, as explained in the NPRM and elsewhere in this preamble, all of the establishments that will be required to submit information to OSHA under the new requirements in this final rule were already required to submit information to OSHA under the previous requirements, so it is not the case that this rule expands the number of establishments required to report.

The National Propane Gas Association also recommended that “OSHA retain the current scope and applicability of [§ 1904.41(a)(1)] to apply to employers with 250 or more employees within the industries identified in [a]ppendix A,” rather than “expanding” the requirement to “more employers and more establishments” (Docket ID 0050). As explained in the NPRM and the preamble to this final rule, OSHA did not propose to expand the scope of [§ 1904.41(a)(1)]. Rather, the agency explicitly stated that the proposal “would not impose any new requirements on establishments to electronically submit information from their Form 300A,” however, “proposed § 1904.41(a) would remove the electronic submission requirement for certain establishments with 250 or more

employees.” Accordingly, the commenter’s concerns are misplaced.

The National Propane Gas Association also stated that OSHA is proposing to increase “the frequency of submissions” of injury and illness reports (Docket ID 0050). OSHA did not propose to increase the frequency of submissions of injury and illness data; rather, employers required to submit such data will continue to be required to do so once a year, as under the current requirements.

3. Diversion of Resources

In the 2019 final rule, OSHA stated that rescinding the information submission requirements would allow employers to devote more of their resources towards compliance with safety and health standards (84 FR 394). Similarly, several commenters to the current NPRM also asserted that the proposed rule would be counterproductive to the goal of improving safety and health because complying with the rule would divert resources that would otherwise be devoted to other worker safety and health efforts (e.g., Docket IDs 0060, 0062, 0070, 0088). In most cases these assertions were unsupported (e.g., Docket ID 0062 (simply asserting that compliance with the rule would divert employer resources from workplace safety and health initiatives without further explaining how it would do so)).

A few commenters, however, did make more concrete statements that might relate to this issue. For example, the Chamber of Commerce, in challenging OSHA’s economic analysis, claimed that the proposal would require safety department personnel to spend time on preparation of the data for submission, presumably at the cost of spending time improving safety (Docket ID 0088). But that diversion, if it occurs, would be required by the recordkeeping rule itself, not by the requirement to submit records. Employers have always been required to keep accurate records. To the extent that the argument is that employers will take greater care with records to be submitted to OSHA and eventually published, that is not a result of the rule so much as it is a result of employers not having taken adequate care previously. Similarly, the need to ensure that information that could compromise workers’ privacy is not submitted inappropriately (see, e.g., Docket ID 0081) should be obviated by entering the information carefully in the first place (see, e.g., the instructions on Form 301: “Re fields 14 to 17: Please do not include any personally identifiable information (PII) pertaining to worker(s) involved in the incident (e.g., no names,

phone numbers, or Social Security numbers”)).

4. Lagging v. Leading Indicators

OSHA also received several comments which focused on OSHA’s recordkeeping system’s use of lagging, rather than leading indicators. Broadly speaking, leading indicators are proactive, preventive, and predictive measures that provide information about the effective performance of an employer’s safety and health activities. They measure events leading up to injuries, illnesses, and other incidents and reveal potential problems in an employer’s safety and health program. In contrast, lagging indicators measure the occurrence and frequency of events that occurred in the past, such as the number or rate of injuries, illnesses, and fatalities (see https://www.osha.gov/sites/default/files/OSHA_Leading_Indicators.pdf).

On the issue of lagging versus leading indicators, the American Society of Safety Professionals (ASSP) commented, “ASSP advocates a comprehensive risk-based approach that measures leading as well as lagging indicators. Leading indicators provide critical information about an organization’s true commitment to safety and health, at times acting as a better gauge of a system’s vulnerabilities or effectiveness than lagging indicators” (Docket ID 0031; see also Docket IDs 0041, 0053). Similarly, PRR commented, “The safety community has been actively moving away from using case rates as indicators of a safety program’s effectiveness and has been experimenting with various leading indicators” (Docket ID 0094). PRR further commented that the use of lagging indicators “leads the general public, which is uninformed, to think that there is direct correlation between injury and illness rates and the effectiveness of an employer’s worker safety and health programs and practices” (Docket ID 0094; see also Docket IDs 0043, 0088).

In addition, ASSP “recommends that OSHA develop guidance on leading indicators and overhaul the current recordkeeping system to use both leading and lagging indicators as indicators of the effectiveness of a business’ safety and health management system” (Docket ID 0031). In its comment, ASSP referred the ANSI/ASSP Z16.1–2022 standard (“Safety and Health Metrics and Performance Measures”), which contains leading indicators, to OSHA for consideration. (OSHA has placed a copy of ANSI/ASSP Z16.1–2022 standard in the docket as a copyright protected reference (Docket ID 0101).)

In response to ASSP's recommendation that OSHA "overhaul the current recordkeeping system to use both leading and lagging indicators as indicators of the effectiveness of a business' safety and health management system[.]" including through a review of the referenced ANSI/ASSP standard, OSHA notes that such an overhaul is outside of the scope of this rulemaking, which focuses only on the annual electronic submission of data which employers are already required to keep. The agency did not propose changes to the data which should be kept, *e.g.*, whether such data should include leading indicators, and if so, which.

That said, OSHA agrees with ASSP that leading indicators are an important tool to assess the effectiveness of workplace safety and health programs. However, as ASSP acknowledges, leading indicators are not the only such tool. As OSHA has explained many times before (see, *e.g.*, <https://www.osha.gov/safety-management/program-evaluation/>), both leading and lagging indicators are valuable performance measures. These two measures work together to provide a comprehensive picture of worker safety and health in an industry or particular workplace. (For more information on the benefits and utility of the lagging indicators that will be collected and published in this rulemaking, see Section III.B.4 of this Summary and Explanation.) This rulemaking and OSHA's recordkeeping system in general focuses on lagging indicators. Other OSHA programs, such as the Voluntary Protection Programs (VPP) which recognizes employers and workers in the private industry and Federal agencies who have implemented effective safety and health management systems and maintain injury and illness rates below national Bureau of Labor Statistics averages for their respective industries, encourage the use of leading indicators. And, as ASSP suggests, OSHA has previously published guidance related to leading indicators (see, *e.g.*, https://www.osha.gov/sites/default/files/OSHA_Leading_Indicators.pdf; <https://www.osha.gov/leading-indicators>).

Moreover, OSHA notes that its recordkeeping system is in line with Congress' instructions in the OSH Act (see, *e.g.*, Section 8(c)(2) ("The Secretary . . . shall prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of

consciousness, restriction of work or motion, or transfer to another job[.]"); see also Section 8(g)(1) ("The Secretary and Secretary of Health and Human Services are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section.")).

As to the argument that OSHA's planned publication of lagging information will mislead the public, OSHA has previously published data from establishments' CY 2016–2021 300A forms online and has long given out redacted Forms 300 and 301 in response to FOIA requests, and the agency has not received reports of widespread public confusion, nor have interested parties pointed to such reports of confusion in their comments in this rulemaking. Consequently, OSHA is not persuaded that these parties' hypothetical concerns should change the course of this rulemaking. Nevertheless, to help decrease the risk that members of the public might inaccurately assume that an establishment's report of an injury or illness always suggests a deficiency in that establishment's safety and health system, OSHA will continue to include a reference to the Note to 29 CFR 1904.0 in the notes below the links to the website on which it publishes the safety and health data submitted pursuant to this rulemaking (see Note to § 1904.0 ("Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers' compensation or other benefits."))).

OSHA also received comments arguing that requiring the submission of injury and illness data from the recordkeeping forms, and publishing data from the submissions, will divert employer focus from leading indicators. For example, ASSP commented, "OSHA's focus on lagging injury and illness data has at times created a stumbling block to systemic safety program improvements by actively discouraging employers from embracing a holistic risk-based approach" (Docket ID 0031). Similarly, the U.S. Poultry & Egg Association commented, "In this proposal, OSHA is myopically focusing on injuries and injury rates . . . Despite what OSHA may believe, because employers will know that their information will be made available worldwide, they will focus greater attention on these issues at the expense of focusing on leading safety metrics" (Docket ID 0053). The North American

Meat Institute made a similar comment (Docket ID 0076).

In response, OSHA notes that, as discussed in Section III.G of this Summary and Explanation, employers are already required to complete these forms, and there is no reason why the new requirement to submit information from these forms would prevent employers from additionally implementing proactive measures as part of a comprehensive safety and health program. The agency is unaware of any resulting increase in inappropriate focus by employers on recordable injuries/illnesses vs. leading indicators, commenters did not provide any examples, and it is not clear why publishing case-specific information from the OSHA Form 300 and 301 would cause employers to focus inappropriately on recordable injuries and illnesses in a way that collecting and publishing establishment-specific information from the OSHA Form 300A Annual Summary did not. Moreover, as discussed in Section III.B.4 of this Summary and Explanation, OSHA's publication of the establishment-specific, case-specific, injury and illness data will benefit employers by giving them access to a larger data set that can be used for benchmarking. This increased access to information will enable employers to proactively improve their workplace safety and health.

5. Employer Shaming

The National Propane Gas Association commented: "It is assumed that the agency's ambition is to embarrass, shame, or otherwise damage the reputation of employers as a means to induce some undefined improvement. Underscoring this ambition is the agency's presumption that employers are not invested in employees' safety; that public scrutiny is the only enticement to improve the workplace rather than an employers' natural concern for employees' safety. We disagree with the agency's lack of faith in employers" (Docket ID 0050).

In response, this appears to be a misunderstanding. There is no mention in the preamble to the proposed rule of shaming, embarrassing, or damaging the reputation of employers; nor is this the agency's intent. On the contrary, the preamble specifically stated that "publication of establishment-specific, case-specific injury and illness data would benefit the majority of employers who want to prevent injuries and illnesses among their employees, through several mechanisms" (87 FR 18533–4). Those mechanisms include "enable[ing] interested parties to gauge

the full range of injury and illness case types at the establishment,” allowing employers to “compare case-specific injury and illness information at their establishments to those at comparable establishments, and set workplace safety/health goals benchmarked to the establishments they consider most comparable,” and “allow[ing] employees to compare their own workplaces to the safest workplaces in their industries” (id.). OSHA further stated that, “if employees were able to preferentially choose employment at the safest workplaces in their industries, then employers might take steps to improve workplace safety and health (preventing injuries and illnesses from occurring) in order to attract and retain employees” (id.). As OSHA has discussed elsewhere in this preamble, the currently available 300A data has already been critical to efforts to improve worker safety and health, and publishing the case-specific data required to be submitted under this rule will further improve workplace safety and health (see, e.g., Section III.B.4 of this Summary and Explanation). The purpose of this rule is to improve workers’ well-being not by shaming their employers, but by providing employers and other interested parties with valuable information that can be used to better understand and address occupational safety and health hazards.

6. Impact on Employee Recruiting

The Precision Machined Parts Association commented, “PMPA believes that posting this information on the internet without explanation will not improve workplace safety but will make it tougher for manufacturers to recruit young people and qualified employees into manufacturing careers” (Docket ID 0055).

Similarly, the North American Die Casting Association commented, “This proposed rulemaking will only serve to hurt the image of the industry and discourage individuals from seeking careers in manufacturing. In a recent survey, 96 percent of NADCA members report they have job openings in their facilities, and OSHA’s actions in making these reports public will create a false image of the industry as dangerous. . . . At a time when businesses are already struggling to recruit employees and compete globally, OSHA should not continue to erect additional barriers to job growth and drive a wedge between employer and employee.” (Docket ID 0056). The Precision Metalforming Association and National Tooling and Machining Association expressed similar concerns in their joint comment (Docket ID 0057).

In response, OSHA notes that supporting and explanatory information has always been included on its website for ODI as well as ITA data, and the agency plans to continue this practice. For example, the ITA website contains several explanations of the data that address commenters’ specific concerns, including a note that “[r]ecording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers’ compensation or other benefits” (<https://www.osha.gov/Establishment-Specific-Injury-and-Illness-Data>). The ODI website also includes explanatory notes (https://www.osha.gov/ords/odi/establishment_search.html). The agency has published establishment-specific information from the Form 300A summary since 2009 but is unaware of any resulting detrimental effects on the recruitment of young people and qualified employees into manufacturing careers; nor did the commenters provide any examples. On the other hand, OSHA notes that the data could assist with new employee recruitment efforts by providing prospective employees with more information about injuries and illnesses occurring at the establishment. For example, a prospective employee might be concerned by the number of injuries or illnesses listed in the information from an establishment’s 300A Summary, but the case-specific forms allow establishments to provide more information regarding the injuries and illnesses summarized in the 300A, allowing prospective employees to make more informed decisions.

7. Legal Disputes

AIHA commented, “Data related to personal injury can be combined with other readily available data from newspapers, community ‘gossip’, etc., and then used to identify the affected individuals. Once identified, the individuals could be harassed or encouraged to file lawsuits or additional claims against employers” (Docket ID 0030). Similarly, the National Propane Gas Association stated that OSHA ignored the “potential for frivolous lawsuits or investigations that could be fueled by the incomplete information that the agency intends to publish” (Docket ID 0050).

The Motor and Equipment Manufacturers Association commented, “Making such data publicly available would allow third parties to use it for reasons wholly unrelated to safety.” This commenter provided the following example: “plaintiffs’ attorneys, labor

unions, competitors, and special interest groups would be able to use such information—selectively or otherwise—as leverage against companies during legal disputes, union organizing drives, contract negotiations, or as part of an effort to prevent a company from entering a specific market” (Docket ID 0075; see also Docket ID 0088).

The Chamber of Commerce similarly argued that, “[M]aking these data publicly available would very likely lead to less desirable outcomes, such as increased litigation from plaintiffs’ attorneys looking to assert that the employer was at fault to overcome workers’ compensation no-fault limitations, as well as unions using these data to mischaracterize an employer’s safety record during organizing campaigns or contract negotiations.” (Docket ID 0088).

As discussed above, the agency has published establishment-specific information from the Form 300A summary since 2009 but is unaware of any resulting increase in legal disputes or unwarranted reputational damage; nor did the commenters provide any specific examples. As noted above, given that this final rule requires the submission of information that can provide details on, and context for, the information from the Form 300A that is already being made public, the new information may help provide a fuller, more accurate picture of worker safety and health at a given establishment. This additional context and detail could actually help protect businesses against attempts to mischaracterize their safety records, whether in the legal context or otherwise. As discussed above, it is also important to note that employees and their representatives already have the right to request and receive injury and illness records from their employers (see 29 CFR 1904.35). While OSHA recognizes that such access is on a smaller scale, there is already the potential for the data to be used for these purposes, independent of this regulation. Finally, also as discussed above, to the extent that the published data serves to address the problem of information asymmetry in the labor market, OSHA considers that a positive consequence of the final rule.

8. No Fault Recordkeeping

OSHA also received several comments asserting that the proposed rule would be inconsistent with the “no fault” nature of the recordkeeping system, as set forth in the note to 29 CFR 1904.0: “Recording or reporting a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an OSHA

rule has been violated, or that the employee is eligible for workers' compensation or other benefits" (e.g., Docket IDs 0053, 0086, 0087, 0090, 0091). OSHA received similar comments on the 2013 NPRM (the rulemaking which culminated in the 2016 final rule) (see 81 FR 29666–67).

These comments misconstrue what OSHA means by no fault reporting. As OSHA has explained previously, it will not use the mere fact that an employer has recorded or reported an injury or illness as evidence that the employer violated the OSH Act or an OSHA standard. But that is not the same as saying that the data recorded and reported have no valid use or effect. OSHA has used employer reports of worker deaths and injuries, as well as press reports and referrals from other agencies, as a basis for investigating conditions at an affected workplace throughout its entire history. For just as long, OSHA's first step in all of its workplace inspections has been an examination of the establishment's injury and illness records. OSHA's very first Compliance Operations Manual, issued in January 1972, states that "During the course of a routine inspection, the CSHO shall inspect those employer records required to be kept by the Act and by [p]art 1904" (Docket ID 0100, p. V–15). And today, the instruction is the same: "At the start of each inspection, the CSHO shall review the employer's injury and illness records (including the employer's OSHA 300 logs, 300A summaries, and 301 incident reports) for three prior calendar years" (see OSHA's Field Operations Manual, CPL 02–00–164, Chapter III, Paragraph VI.A.1 (April 14, 2020) available at <https://www.osha.gov/enforcement/directives/cpl-02-00-164>).

And OSHA has always used the information in those records to guide the nature of its inspections (see, e.g., *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988) (noting that during a complaint inspection about a particular machine, "it would be reasonable for the investigator to determine if there had been injuries from the use of said machine")). Indeed, for many years, OSHA's inspections plans explicitly conditioned the scope of inspections on the data found in those records (*In re Establishment Inspection of Kohler Co.*, 935 F.2d 810 (7th Cir. 1991) ("OSHA applied to a federal magistrate for an administrative search warrant that would require Kohler to produce the records and to submit to a comprehensive inspection of its entire facility if those records revealed that Kohler's injury rate exceeded the national average for

manufacturing concerns.'')). In the last five years OSHA has used information from establishments' 300A Forms submitted under the 2016 final rule to prioritize which workplaces to inspect through OSHA's Site-Specific Targeting program. It does so by using a neutral administrative scheme to identify hazards that OSHA wants to address through its enforcement resources. However, OSHA will not use the case-specific injury and illness information submitted to simply choose a particular employer to inspect outside of the neutral administrative scheme noted above (see *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978)). Thus, the assertion by the Employers E-Recordkeeping Coalition, "that the principal reason that the data collected pursuant to this proposed rule is published by OSHA presumes and is based on a premise of employer fault," is wrong (see Docket ID 0087).

OSHA continues to recognize that the mere fact of any particular injury or illness occurring is not an indication of employer fault. But the reports of those injuries and illnesses can provide important information about hazards that exist at workplaces, whether or not those hazards are addressed by existing OSHA standards. As explained elsewhere, this information can be useful not only to OSHA, but also to researchers, workers, and even other employers with similar facilities (see, e.g., Docket IDs 0030, 0045). For the same reasons, as discussed elsewhere in this preamble, publication of the submitted data is not intended to "shame" employers (see Docket ID 0081); it is merely to allow use of the data in ways that will promote occupational safety and health.

9. Confidentiality of Business Locations

One commenter was concerned about the consequences of disclosing business locations for certain establishments. Specifically, the National Retail Federation commented that some business locations need to remain confidential because "[m]any retailers deal with pharmaceuticals, hazardous materials, or other highly sought after and/or dangerous products," and "[e]xposing the locations of these operations could leave them vulnerable to bad actors seeking the materials for their own use or sale on the black market" (Docket ID 0090).

In response, OSHA notes that it has long published certain information from employers' Form 300A, including business locations. As explained elsewhere, the agency began publishing information from establishments' electronic submissions of Form 300A

annual summary data in 2020; in addition, beginning in 2009, OSHA published information from the establishments' submissions of the Form 300A to the OSHA Data Initiative (ODI), which was replaced by the current data collection. The information published from both data collections included establishments' addresses. Furthermore, OSHA is not aware of any instances of damage from bad actors as a result of data collected through the ITA or the ODI and published since 2009, and commenters did not provide any examples. Nor is OSHA aware of any law that classifies business addresses as confidential business information or personally identifiable information, and commenters have provided none.

Moreover, OSHA notes that the Environmental Protection Agency already publishes information about the location of workplaces with hazardous materials and chemicals. For example, facilities must inform local communities of the presence of hazardous chemicals at specific worksites under the Emergency Planning and Community Right-to-Know Act. Also, EPA maintains hazardous materials information in the Resource Conservation and Recovery Act Information (RCRAInfo), which provides a searchable public website for the identification of facilities that generate, handle, and store hazardous materials (see, e.g., the Toxic Release Inventory: <https://www.epa.gov/enviro/tri-search> and the Emergency Planning and Community Right-to-Know Act (EPCRA) Reporting Requirements: <https://www.epa.gov/epcra/state-tier-ii-reporting-requirements-and-procedures>). Given the availability of such information, OSHA does not expect that the minimal amount of information regarding hazardous materials that it may publish will lead to the problems envisioned by this commenter.

Finally, OSHA believes that the benefits of publishing this information outweigh the purported risks. As discussed in greater detail in Section III.B.4 of this Summary and Explanation, OSHA has identified a number of ways in which employees, researchers, consultants, and the general public may benefit from the publication of data from Forms 300 and 301, and if those groups do not have access to businesses' addresses, many of those benefits will not be realized. For example, injury and illness data may help job seekers make more informed decisions regarding their employment, but only if they can accurately identify their potential employers. Accordingly, OSHA declines to change its

longstanding practices regarding publication of business locations.

10. Employer-Vaccine-Mandate-Related Concerns

OSHA also received a comment from an interested party who was concerned that non-OSHA actors will mischaracterize the injury and illness data which OSHA intends to publish on its websites as “vaccine-related,” especially if those injuries and illnesses occur in establishments with known vaccine mandates. Specifically, the National Retail Federation (NRF) commented that “throughout the COVID-19 pandemic and continuing beyond, various groups have targeted employers for implementing vaccine mandates in their workplaces. Such employers could face unwarranted attacks or unfair mischaracterizations of their workplace safety records due to vaccination policies. Sadly, we have already seen anti-vaccine advocates manipulate publicized workplace injuries and unjustly characterize them as vaccine-related. Employers who implemented vaccine mandates consistent with the Administration’s wishes, should not be unfairly targeted by those who would eagerly mischaracterize the impact of mandates and policies” (Docket ID 0090).

OSHA understands this commenter’s concern. However, OSHA published calendar year 2021 data from OSHA Form 300A on its website in April 2022, September 2022, and January 2023. The information made available in that release (like previous releases of the data from Form 300A) includes, among other things, company names and data regarding total number of deaths; total numbers of cases with days away from work and job transfers or restrictions, total number of other restrictions, and injury and illness types (e.g., the total number of injuries, skin disorders, respiratory conditions, poisonings, and all other illnesses). If the groups referenced by NRF were going to use OSHA data to target the establishments with vaccine mandates, OSHA believes that they already had the opportunity to do so using the published 300A data. There is no such evidence of OSHA data being used for these kinds of attacks in the record, and NRF did not point to any such evidence. Moreover, the publication of case-specific data will provide more information about the injuries and illnesses occurring at establishments, perhaps making it more obvious that a mischaracterization of an injury or illness as vaccine-related is just that: a mischaracterization.

Finally, if NRF is suggesting that the groups referenced in its comment could

somehow determine that a given employer or establishment had a vaccine mandate in place by viewing the Form 300 or 301 data which OSHA plans to make publicly available, OSHA thinks such a thing is unlikely. This final rule does not include a vaccination mandate for employees, nor does it require the collection and publication of information about vaccine mandates at a given establishment. Further, OSHA is currently not enforcing 29 CFR 1904’s recording requirements in the case of worker side effects from COVID-19 vaccination. Thus, OSHA does not expect that any information regarding vaccine side effects will appear in establishment’s injury and illness data. And NRF has not pointed to any other data or evidence that would be submitted and made public pursuant to this rulemaking that could alert the groups discussed above of an employer or establishment’s vaccine mandate. Consequently, for the reasons discussed above, OSHA is not persuaded that the potential harm referenced by NRF is anything other than purely speculative.

11. Constitutional Issues and OSHA’s Authority To Publish Information From Forms 300 and 301

a. The First Amendment

OSHA received two comments relating to the First Amendment of the U.S. Constitution. On the one hand, a comment from the U.S. Chamber of Commerce argues that OSHA’s proposed rule would violate the First Amendment because it would force employers to submit their confidential and proprietary information for publication on a publicly available government online database (Docket ID 0088, Attachment 2). In its comment, the Chamber noted that the First Amendment protects both the right to speak and the right to refrain from speaking. The Chamber commented: “While OSHA’s stated goal of using the information it collects from employers ‘to improve workplace safety and health,’ 78 FR 67254, is unobjectionable, ‘significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest.’ *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam). Instead, where the government seeks to require companies to engage in the type of speech proposed here, the regulation must meet the higher standard of strict scrutiny: Meaning that it must be narrowly tailored to promote a compelling governmental interest. See *United States v. Playboy Entm’t Grp.*,

Inc., 529 U.S. 803, 819 (2000). Once subjected to strict scrutiny, the publication provision of this Proposed Rule must fail because it is not narrowly tailored towards accomplishing a compelling government interest. See *Playboy*, 529 U.S. at 819. Under the narrow tailoring prong of this analysis, the regulation must be *necessary* towards accomplishing the government’s interest. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002) (“[T]o show that the [requirement] is narrowly tailored, [the government] must demonstrate that it does not ‘unnecessarily circumscrib[e] protected expression.’” (fourth alteration in original) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982))).” (Docket ID 0088, Attachment 2) (footnote omitted).

In support of these arguments, the Chamber alleged that OSHA’s proposal would undermine (not improve) workplace safety and health because it “would substantially deplete OSHA’s resources.” In addition, the Chamber asserted that “even if OSHA were able to maintain this database and analyze this information in an effective and timely manner, there is no evidence that publication of this information will have any effect on workplace safety” (Docket ID 0088, Attachment 2).

On the other hand, Worksafe commented that the rule would merely compel employers to submit to OSHA information that they are already required to maintain about workplace incidents (Docket ID 0063). It further explained that this is a form of commercial speech, in which the speaker’s constitutional interest in non-disclosure is minimal (Docket ID 0063 (citing *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985))). Additionally, Worksafe argued that OSHA could address First Amendment concerns by identifying the following in the final rule (1) OSHA’s interest in the case-specific reports and publication, (2) how the rule advances that interest, and (3) why the rule is not unduly burdensome (Docket ID 0063).

After considering these comments, OSHA disagrees with the Chamber’s assertion that this rulemaking violates the First Amendment. OSHA notes that, contrary to the Chamber’s comment, the decision in *Buckley v. Valeo* only applies to campaign contribution disclosures and does not hold that other types of disclosure rules are subject to the strict scrutiny standard (see 424 U.S. 1, 64 (reasoning that campaign contribution disclosures “can seriously infringe on privacy of association and belief guaranteed by the First Amendment”)). Later cases also clarify

that disclosure requirements only trigger strict scrutiny “in the electoral context” (see *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)).

Further, OSHA agrees with WorkSafe that *Zauderer* is applicable to this rulemaking. In *Zauderer*, the Supreme Court upheld Ohio State rules requiring disclosures in attorney advertising relating to client liability for court costs (471 U.S. at 653). The Court declined to apply the more rigorous strict scrutiny standard, because the government was not attempting to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein” (471 U.S. at 651). Because it concluded the disclosure at issue would convey “purely factual and uncontroversial information,” the rule only needed to be “reasonably related to the State’s interest in preventing deception of consumers” (id.). More recently, in *American Meat Institute v. U.S. Dept. of Agriculture*, the U.S. Court of Appeals for the D.C. Circuit held that the *Zauderer* case’s “reasonably related” test is not limited to rules aimed at preventing consumer deception, and applies to other disclosure rules dealing with “purely factual and uncontroversial information” (760 F.3d 18, 22 (D.C. Cir. 2014) (en banc) (finding that the speakers’ interest in non-disclosure of such information is “minimal”); see also *NY State Restaurant Ass’n v. NYC Bd. Of Health*, 556 F.3d 114, 133 (2d Cir. 2009) (accord), *Pharmaceutical Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 310 (1st Cir. 2005) (accord), *cert denied*, 547 U.S. 1179 (2006)).

This rule only requires disclosure of purely factual and uncontroversial workplace injury and illness records that are already kept by employers. The rule does not violate the First Amendment because disclosure of workplace injury and illness records is reasonably related to the government’s interest in assuring “so far as possible every working man and woman in the Nation safe and healthful working conditions” (29 U.S.C. 651(b)). Further, as discussed in more detail in Section III.B.4 of this Summary and Explanation, OSHA has determined that the collection and publication of this information will have a positive effect on worker safety and health. In addition, as discussed in Section III.B.14 of this Summary and Explanation, OSHA does not believe that its decision to devote a portion of its resources to collecting the workplace injury and illness data covered by this final rule will negatively impact worker safety and health. On the contrary,

OSHA expects that the data submitted in response to the requirements put into place by this final rule will allow OSHA to allocate its resources in a more informed fashion. The remainder of the Chamber’s comment addresses the requirement that the government “narrowly tailor” regulations that deal with essential rights, which, as explained above, does not apply to an employer’s minimal interest in non-disclosure of purely factual and uncontroversial information.

b. The Fourth Amendment

The Plastics Industry Association (Docket ID 0086), as well as one private citizen commenter (Docket ID 0023), generally assert that the collection and publication of site- and case-specific data would violate employers’ Fourth Amendment rights. However, as discussed above in Section II, Legal Authority, the Fourth Amendment protects against government searches and seizures of private property only when a person has a legitimate expectation of privacy related to the thing being searched or seized. There is little or no expectation of privacy for records of occupational injuries and illnesses kept in compliance with OSHA regulations, which employers are legally required to disclose to OSHA and others on request. Moreover, even if there were an expectation of privacy in these records, the Fourth Amendment prohibits only unreasonable incursions by the government. The test for reasonableness requires balancing the need to search against the invasion that the search entails (see *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 536–537 (1967)). The information submission requirement in this final rule is reasonable. As explained in Section II, Legal Authority, the submission requirement serves a substantial government interest in protecting the health and safety of workers, has a strong statutory basis, and uses reasonable, objective criteria for determining which employers must report information to OSHA. In addition, again, as noted above and below, the submission requirement results in little to no invasion of employer or establishment privacy given that employers must already retain these forms and provide them to multiple individuals and entities upon request.

OSHA also received a comment from the U.S. Chamber of Commerce (the Chamber) asserting that OSHA’s use of injury and illness data submitted under the proposed rule for enforcement purposes would violate employers’ Fourth Amendment rights. The

Chamber argued that OSHA’s use of the information collected for enforcement purposes will fail to constitute a “neutral administrative scheme” and will thus violate the Supreme Court’s holding in *Marshall v. Barlow’s Inc.*, 436 U.S. 307 (1978) (Docket ID 0088, Attachment 2). Additionally, the Chamber maintained that the raw data to be collected under the proposed rule would fail to provide any defensible neutral predicate for enforcement decisions: “Under this Proposed Rule, OSHA will be able to target any employer that submits a reportable injury or illness for any reason the agency chooses, or for no reason at all, under this unlimited discretion it has sought to grant itself to “identify workplaces where workers are at great risk.”” (Docket ID 0088, Attachment 2 (quoting 78 FR 67256)).

In response, OSHA notes that *Barlow’s* concerned the question of whether OSHA must have a warrant to enter and inspect the nonpublic areas of a worksite without the employer’s consent. Section 1904.41 of this final rule involves electronic submission of injury and illness recordkeeping data; no entry of premises or compliance officer decision-making is involved. Thus, the *Barlow’s* decision provides very little support for the Chamber’s sweeping Fourth Amendment objections (see *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 414 (1984) (reasonableness of a subpoena is not to be determined on the basis of physical entry law, because subpoena requests for information involve no entry into nonpublic areas)). Moreover, the final rule is limited in scope and leaves OSHA with limited discretion. The recordkeeping information required to be submitted is highly relevant to accomplishing OSHA’s statutory mission. The submission of recordkeeping data is accomplished through remote electronic transmittal, without any intrusion of the employer’s premises by OSHA, and is not unduly burdensome. Also, as noted above, all of the injury and illness information establishments will be required to submit under this final rule will be taken from records employers are already required to create, maintain, post, and provide to employees, employee representatives, and government officials upon request, which means the employer has a reduced expectation of privacy in the information.

With respect to the issue of enforcement, OSHA disagrees with the Chamber’s Fourth Amendment objection that the agency will target employers “for any reason” simply because they submit injury and illness

data. Instead, OSHA plans to continue the practice of using a neutral-based scheme for identifying employers and industries for greater enforcement attention. More specifically, the agency will use the data submitted by employers under this final rule in essentially the same manner in which OSHA has used data from the ODI and the current collection of Form 300A data in all of its iterations of the Site-Specific Targeting (SST) program. The SST includes for selection establishments that meet pre-determined injury and illness rate thresholds. All establishments at or above the threshold are eligible for inspection. Establishments in this pool are then randomly selected for inspection. In the future, OSHA plans to analyze the recordkeeping data submitted by employers to identify injury and illness trends, establish neutral criteria to determine which employers may be inspected, and then make appropriate decisions regarding enforcement efforts based on those criteria. OSHA also notes that the agency currently uses establishment-specific fatality, injury, and illness reports submitted by employers under § 1904.39 to target enforcement and compliance assistance resources. As with the SST and National Emphasis programs, a neutral-based scheme is used to identify which establishments are inspected and which fall under a compliance assistance program. Accordingly, OSHA's using injury and illness recordkeeping data to target employers for inspection will not be arbitrary or unconstitutional under the Fourth Amendment.

c. The Fifth Amendment

One commenter raised concerns that the proposed rule would violate the Fifth Amendment's requirement that the Federal Government ensure equal protection. Specifically, Hunter Cisewski commented that the proposal to remove the requirement from former § 1904.41(a)(1) for certain establishments with 250 or more employees to electronically submit Form 300A data, "would deprive workers in the affected industries of holding their employers accountable to produce workplace related injury data to OSHA while simultaneously providing this protection to workers in similar industries" and "presents no reason for why employees in these affected industries should no longer have the guarantee that their employers will report workplace injury and illness data to the governing agency" (Docket ID 0024).

As explained in Section III.A of this Summary and Explanation, OSHA has decided not to make the proposed change of restricting the universe of large establishments that are required to submit data from Form 300A. Instead, the agency will maintain the requirement for all establishments with 250 or more employees that are covered by part 1904 to submit the information from their OSHA Form 300A to OSHA, or its designee, once a year. Therefore, although OSHA disagrees with this commenter's assertion that the proposal would have violated the Fifth Amendment's guarantee of equal protection had it been finalized, the agency finds that this particular comment is moot.

d. OSHA's Authority To Publish Information Submitted Under This Rule

Several commenters asserted that OSHA lacks the statutory authority under the OSH Act to publish a database that makes submitted injury and illness recordkeeping data available to the general public (Docket IDs 0050, 0059, 0071, 0086, 0088, 0090). These commenters acknowledged that Sections 8 and 24 of the OSH Act provide the Secretary of Labor with authority to issue regulations requiring employers to maintain accurate records of work-related injuries and illnesses. However, according to these commenters, nothing in the OSH Act authorizes OSHA to publish establishment-specific injury and illness records on a public website. The National Retail Federation (NRF) stated: "NRF believes the NPRM itself is fundamentally flawed in that the agency does not have the statutory authority to publish the data as proposed" (Docket ID 0090). The National Propane Gas Association commented: "Lastly, the agency radically interprets its authority to justify the publicly accessible website. In the NPRM, OSHA argues that its general purpose justifies any rulemaking that presents the potential to improve safety. The general purpose of the agency to improve workplace safety is not equivalent to a foregone conclusion that any proposal by the agency will result in improvements to workplace safety. The NPRM fails to present information to demonstrate that public shaming is an effective means to improve workplace safety." (Docket ID 0050).

Similarly, NAHB pointed to other statutes, such as the Federal Coal Mine Safety and Health Act of 1969, Public Law 91-173 (December 30, 1969), which it maintains provided more express authority to publish records than the OSH Act (Docket ID 0059). NAHB

further argues that the language in the OSH Act only authorizes OSHA to publish analysis, not "raw data" (Docket ID 0059).

As OSHA stated in the 2016 final recordkeeping rule, the OSH Act provides ample statutory authority for OSHA to issue this final rule and publish the submitted data. As explained in Section II, Legal Authority, the following provisions of the OSH Act give the Secretary of Labor broad authority to issue regulations that address the recording and reporting of occupational injuries and illnesses.

Section 2(b)(12) of the Act states that one of the purposes of the OSH Act is to ensure safe and healthy working conditions through appropriate reporting procedures designed to further the objectives of the OSH Act and accurately characterize the nature of workplace safety and health hazards (29 U.S.C. 651(b)(12)).

Section 8(c)(1) requires employers to create and retain the records that OSHA has specified are necessary and appropriate either for the Act's enforcement or to develop information related to the underlying reasons for and prevention of work-related illnesses and accidents (29 U.S.C. 657(c)(1)). Section 8(c)(1) also requires employers to make such records available to the Secretary. The authorization to the Secretary to prescribe such recordkeeping regulations as he considers "necessary or appropriate" emphasizes the breadth of the Secretary's discretion in implementing the OSH Act. Section 8(c)(2) further tasks the Secretary with promulgating regulations which require employers to keep accurate records of, and to make periodic reports on, occupational illnesses, injuries, and deaths (29 U.S.C. 657(c)(2)).

The grant of authority in Section 8(g)(1) is particularly pertinent to OSHA's stated intention to publish the collected information online. Section 8(g)(1) authorizes the Secretary to compile, analyze, and publish, either in summary or detailed form, all reports or information the Secretary obtains under section 8 of the OSH Act. Section 8(g)(2) of the Act generally empowers the Secretary to promulgate any rules and regulations that the Secretary determines are necessary to perform the Secretary's duties under the OSH Act (29 U.S.C. 657(g)(2)).

Section 24 contains a related grant of regulatory authority. Section 24(a) directs the Secretary to create and maintain an effective program of collection, compilation and analysis of work-related safety and health statistics. In addition, Section 24(a) states that the Secretary shall compile accurate

statistics on occupational illnesses and injuries (29 U.S.C. 673(a)). Finally, Section 24(e) provides that, based on the records the employers create and retain in accordance with Section 8(c) of the OSH Act, employers must file, with the Secretary, the reports prescribed by regulation as necessary to carry out the Secretary's functions under the OSH Act (29 U.S.C. 673(e)). Given the numerous statutory provisions authorizing and requiring OSHA to collect information about occupational safety and health, along with the provision (Section 8(g)(1)) specifically addressing the publication of such information, it is clear that Congress determined that both collection and publication of this information were critical to OSHA's mission of protecting the health and safety of the nation's workers.

In addition, as described in Section III.B of this Summary and Explanation, OSHA has made the determination that electronic submission and publication of injury and illness recordkeeping data are "necessary and appropriate" for the enforcement of the OSH Act and for gathering and sharing information regarding the causes or prevention of occupational accidents or illnesses. Where an agency is authorized to prescribe regulations "necessary" to implement a statutory provision or purpose, a regulation promulgated under such authority is valid "so long it is reasonably related to the enabling legislation" (*Morning v. Family Publication Service, Inc.*, 441 U.S. 356, 359 (1973)).

OSHA further notes that, contrary to comments made by some commenters, and as explained above, the final rule will not result in the publication of raw injury and illness recordkeeping data or the release of records containing personally identifiable information or confidential commercial and/or proprietary information. The release and publication of submitted injury and illness recordkeeping data will be conducted in accordance with applicable Federal law (see discussion above in this preamble). The purpose of increasing access to injury and illness report data is not to conduct public shaming, but rather to allow employers to compare their safety records to other employers, enable employees to gain greater awareness of the hazards and safety records in their workplaces without fear of retribution, and pursue the numerous other safety and health-related purposes discussed in this rulemaking.

Many commenters stated that collection and publication of detailed injury and illness data will support the OSH Act's goals of reducing

occupational accidents and illnesses through greater understanding, prevention, and effective enforcement (e.g., Docket IDs 0010, 0011, 0012, 0024, 0029, 0030, 0031, 0035, Attachment 2, 0045, Attachment 1, 0048, 0049, Attachment 1). The Seventeen AGs summarized the ways that publication of data will enhance the effectiveness of OSHA's efforts to achieve the purposes of the OSH Act: "Requiring the submission of certain data from Forms 300 and 301, in addition to the summary Form 300A, will provide the public with injury-specific data that is critical for helping workers, employers, regulators, researchers, and consumers understand and prevent occupational injuries and illnesses. . . . These [case-specific] fields paint a far more detailed picture of the nature and severity of workplace safety incidents and risks. The proposed rule recognizes the importance of this more detailed information, which will help OSHA and States better target their workplace safety and enforcement programs; encourage employers to abate workplace hazards; empower workers to identify risks and demand improvements; and provide information to researchers who work on occupational safety and health." (Docket ID 0045).

OSHA agrees. In sum, publication of the data required to be submitted under this final rule is clearly within the broad authority granted the agency by the OSH Act.

OSHA also received comments arguing that the online posting of covered employers' injury and illness recordkeeping data violates the Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA) (Pub. L. 107-347, December 17, 2002) (Docket ID 0088, Attachment 2). For example, the Chamber of Commerce noted that CIPSEA prohibits BLS from releasing establishment-specific injury and illness data to the general public or to OSHA, and that OSHA has not adequately addressed how the release of part 1904 information under this rulemaking is consistent with the Congressional mandate expressed in the law.

In response, OSHA notes that CIPSEA provides strong confidentiality protections for statistical information collections that are conducted or sponsored by Federal agencies. The law prevents the disclosure of data or information in identifiable form if the information is acquired by an agency under a pledge of confidentiality for exclusively statistical purposes (see Section 512(b)(1)). BLS, whose mission is to collect, process, analyze, and disseminate statistical information, uses

a pledge of confidentiality when requesting occupational injury and illness information from respondents under the BLS Survey.

The provisions of CIPSEA apply when a Federal agency both pledges to protect the confidentiality of the information it acquires and uses the information only for statistical purposes. Conversely, the provisions of CIPSEA do not apply if information is collected or used by a Federal agency for any non-statistical purpose. As noted elsewhere in this document, the information collected and published by OSHA in the final rule will be used for several non-statistical purposes, including for the targeting of OSHA enforcement activities. Therefore, the CIPSEA confidentiality provisions are not applicable to the final rule.

12. Administrative Issues

a. Public Hearing

The Chamber of Commerce recommended that OSHA hold formal public hearings throughout the United States for this rulemaking (Docket ID 0088, Attachment 2). The Chamber felt that, given both the burden on employers and the far-reaching implications of publishing confidential and proprietary information, formal public hearings were necessary to give people outside Washington, DC the opportunity to participate in the rulemaking process. Additionally, the National Propane Gas Association commented that OSHA should hold "public listening sessions to solicit more concepts from employers, employees, and other stakeholders" (Docket ID 0050).

OSHA considered these requests and is not persuaded that hearings or public listening sessions are required or necessary. First, as to whether a hearing is required, because this rulemaking involves a regulation rather than a standard, it is governed by the notice and comment requirements in the APA (5 U.S.C. 553) rather than Section 6 of the OSH Act (29 U.S.C. 655) and 29 CFR 1911.11. Section 6 of the OSH Act and 29 CFR 1911.11 only apply to promulgating, modifying, or revoking occupational safety and health standards. Therefore, the OSH Act's requirement to hold an informal public hearing (29 U.S.C. 655(b)(3)) on a proposed rule, when requested, does not apply to this rulemaking.

Similarly, Section 553 of the APA does not require a public hearing. Instead, it states that the agency must "give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity

for oral presentation” (5 U.S.C. 553(c)). In the NPRM, OSHA invited the public to submit written comments on all aspects of the proposal and received 87 comments in response (see 87 FR 18555). OSHA believes that interested parties had a full and fair opportunity to participate in the rulemaking and comment on the proposed rule through the submission of written comments. This belief is supported by the fact that OSHA extended the comment period for an additional thirty days based on requests from the public (87 FR 31793). With that extension, interested parties were afforded 92 days to review and comment on OSHA’s proposal. OSHA did not receive any requests to further extend the comment period.

Second, as to the necessity of the hearing to provide interested parties outside of Washington, DC an opportunity to participate in the rulemaking process, or holding public listening sessions, OSHA does not believe it needs to do so for the same reasons it does not find that the APA requires a hearing. Specifically, the opportunity for notice and comment afforded by the NPRM was sufficient to both allow participation by interested parties and fully develop the record.

b. The Advisory Committee on Construction Safety and Health (ACCSH)

The National Association of Homebuilders (NAHB) commented that OSHA must seek input from the Advisory Committee on Construction Safety and Health (ACCSH) during this rulemaking “to better understand the impacts and consequences of its proposal” (Docket ID 0059).

As pointed out by NAHB in their comments, ACCSH is a continuing advisory body established under Section 3704(d) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 *et seq.*, commonly known as the Construction Safety Act), to advise the Secretary of Labor and Assistant Secretary of Labor for Occupational Safety and Health in the formulation of construction safety and health standards and policy matters affecting federally financed or assisted construction. In addition, OSHA’s regulation at 29 CFR 1912.3 provides that OSHA must consult with ACCSH regarding the setting of construction standards under the OSH Act.

OSHA notes that both the Construction Safety Act (40 U.S.C. 3704(a)) and 29 CFR 1912.3 only require OSHA to consult with ACCSH regarding the formulation of new construction “standards.” As discussed above, the requirements in 29 CFR part 1904 are

regulations, not standards. Therefore, as NAHB itself acknowledged in its comment (“the statute and the agency’s own regulations only require OSHA to consult with the ACCSH regarding the setting of construction *standards*, and not *regulations*” (Docket ID 0059)), OSHA was not required to consult with ACCSH in formulating this final regulation. In addition, as noted in the NPRM, OSHA consulted and received advice from the National Advisory Council on Occupational Safety and Health (NACOSH) prior to issuing the proposed rule. NACOSH indicated its support for OSHA’s efforts, in consultation with NIOSH, to modernize the system for collection of injury and illness data to assure that the data are timely, complete, and accurate, as well as accessible and useful to employees, employers, government agencies, and members of the public.

c. Reasonable Alternatives Considered

Associated Builders and Contractors commented that under the APA, OSHA is required “to consider reasonable alternatives to its proposed reversal of the current reporting requirements,” and asserts that “the failure to do so will likely lead to nullification upon judicial review” (Docket ID 0071). In response, OSHA notes that the Supreme Court has held that an agency is not required to “consider all policy alternatives in reaching [its] decision,” but when an agency rescinds a prior policy, it must consider the alternatives that are “within the ambit of the existing [policy]” (*Dep’t of Homeland Security v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (alterations in original)).

The commenter does not point to a particular policy alternative that OSHA failed to consider, nor is OSHA required to consider every possible policy alternative. To the extent the comment suggests that OSHA should have considered, as an alternative, maintaining the requirements of the 2019 rule, OSHA has complied with this requirement. As explained in the NPRM, OSHA proposed requiring establishments with 100 or more employees at any time during the previous calendar year, and in an industry listed in proposed appendix B to subpart E, to electronically submit certain information from OSHA Forms 300, 301, and 300A (87 FR 18537). This was a change from the 2019 final rule, which had removed the requirement for the annual electronic submission of 300 and 301 data to OSHA because of both the risk of disclosure of sensitive worker information and resource concerns. In the NPRM, OSHA explained that it had

preliminarily determined that the reasons given in the preamble to the 2019 rule for the removal of the 300 and 301 data submission requirement were no longer compelling. The agency discussed in detail the ways in which the benefits of collecting data from the 300 and 301 forms outweighed the slight risk to employee privacy and explained how technological improvements have mitigated resource concerns (87 FR 18537–18542). The NPRM also explained the ways in which publication of 300 and 301 data may benefit interested parties and improve worker safety and health (87 FR 18542–18543). Furthermore, in Section III.B of this Summary and Explanation, OSHA has discussed these issues in further detail and responded to a number of comments opposing the new reporting requirement. By analyzing these issues and responding to comments, OSHA has weighed the proposal against maintaining the status quo and provided a well-reasoned explanation for its decision, which illustrates OSHA’s consideration of alternatives to its proposal and fulfills its obligations under the APA.

OSHA also considered alternatives to several aspects of this final rule. In the preliminary economic analysis of the NPRM, the agency explained that appendix A is based on 2011–2013 injury rates from the SOII, and that OSHA was not proposing to modify appendix A because it took several years for the regulated community to understand which industries were required to submit information and which were not (87 FR 18552). However, OSHA asked for comment on a possible alternative: updating appendix A to reflect 2017–2019 injury rates, which would result in the addition of one industry and the removal of 13 (87 FR 18552–53). Additionally, OSHA explained that the 2016 final rule did not include a requirement to regularly update the list of designated industries in appendix A because it believed that moving industries in and out of the appendix would be confusing (87 FR 18553). The agency requested comment on another possible alternative: regularly updating the list of designated industries in proposed appendix B (87 FR 18553). In Section III.A of this Summary and Explanation, OSHA has responded to the comments received in response to the first alternative and provided explanations for its decision not to adopt the alternative. Likewise, in Section III.B of this Summary and Explanation, OSHA responded to comments received in response to the

second alternative, and its decision not to adopt that alternative.

OSHA also proposed to change the requirement in § 1904.41(a)(1) that required establishments with 250 or more employees, in all industries routinely required to keep OSHA injury and illness records, to electronically submit information from their 300A to OSHA once a year. The proposal would have required this submission only for establishments in industries listed in appendix A, thus reducing the number of establishments required to electronically submit 300A data (see 87 FR 18536). The agency received many comments on the proposal, which overwhelmingly opposed it, and urged OSHA to retain the existing requirement for establishments with 250 or more employees that are normally required to report under part 1904 to submit data from their 300As. In Section III.A of this Summary and Explanation, these comments are discussed in greater detail, as is OSHA's explanation for rejecting the proposed change and retaining current reporting requirements for Form 300A data.

OSHA's presentation of proposed alternatives, analysis of comments, and ultimate decisions to reject those proposals illustrates OSHA's consideration of alternatives within the ambit of its current policy. For these reasons, OSHA has met its obligations under the APA to consider alternatives to its proposal.

IV. Final Economic Analysis and Regulatory Flexibility Certification

A. Introduction

As described above, OSHA is amending its recordkeeping regulations in 29 CFR part 1904 to revise the requirements for the electronic submission of information from employers' injury and illness recordkeeping forms. Specifically, OSHA is amending its recordkeeping regulation at § 1904.41 to require establishments with 100 or more employees in certain designated industries (*i.e.*, those on appendix B in subpart E of part 1904) to electronically submit information from their OSHA Forms 300 and 301 to OSHA once a year. This is the only new requirement of the final rule, and therefore the only one that imposes new costs on employers. The other main provisions in the final rule, which involve submission of data from the Form 300A annual summary, represent non-substantive changes to requirements that already exist. OSHA intends to post the data from the annual electronic submissions on a public website after

identifying and removing information that could reasonably be expected to identify individuals directly, such as individuals' names and contact information.

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of the intended regulation and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not an economically significant regulatory action under Section 3(f) of Executive Order 12866 and has been reviewed by the Office of Information and Regulatory Affairs in the Office of Management and Budget, as required by executive order.

As explained in this analysis, OSHA estimates that this rule will have economic costs of \$7.7 million per year. These costs include \$7.1 million per year to the private sector to become familiar with the rule's requirements, update software, and submit forms electronically to OSHA, and \$0.6 million per year to the government for processing the data, updating and maintaining software, and providing additional IT support. OSHA estimates average costs of \$136 per year for affected establishments (those with 100 or more employees in NAICS industries listed on appendix B of subpart E of part 1904), annualized over 10 years with a discount rate of seven percent.

The final rule is not a significant regulatory action under Executive Order 12866 Section 3(f)(1), and it is not a "major rule" under the Congressional Review Act (5 U.S.C. 801 *et seq.*). The agency estimates that the rulemaking imposes far less than \$100 million in annual economic costs. In addition, it does not meet any of the other criteria specified by the Congressional Review Act for an economically significant regulatory action or major rule.¹⁸ This Final Economic Analysis (FEA)

¹⁸ The Chamber of Commerce objected to the preliminary finding that this rule is not an economically significant regulatory action under Executive Order 12866 (Ex. 88), arguing that the first-year costs of compliance require such a finding. This assertion is based on the Chamber of Commerce's own estimates of the costs of compliance with this rule, which are significantly higher than OSHA's. The Chamber estimates first-year costs of \$130 million, whereas OSHA's estimated annual costs in the FEA to affected employers are just over \$7 million. The Chamber of Commerce's more specific comments regarding costs are discussed throughout this section.

addresses the costs, benefits, and economic impacts of the rule.

B. Changes From the Preliminary Economic Analysis (PEA) (Reflecting Changes in the Final Rule From the Proposal)

The final rule makes limited substantive changes to employer obligations when compared to the requirements that were costed as part of the proposed rule. These changes, as described in more detail below, are to the requirement for establishments with 250 or more employees to submit data from their 300A annual summaries to OSHA and to the industries included on appendix B to subpart E of part 1904.

More generally, the final rule does not add to or change any employer's obligation to complete, retain, and certify injury and illness records under OSHA's regulations at 29 CFR part 1904. The final rule also does not add to or change the recording criteria or definitions for these records. Nor does the final rule change the requirement to electronically submit information from the OSHA 300A Annual Summary. As discussed in Section III.A of the Summary and Explanation, the final rule does not remove the reporting requirement from any establishment that is currently required to electronically report Form 300A information to OSHA nor impose a new reporting requirement on any establishment that is not currently required to electronically report Form 300A information to OSHA.

1. Continued Submission of OSHA 300A Annual Summaries by Establishments With 250 or More Employees

In the NPRM, OSHA proposed removing the requirement for establishments with 250 or more employees in select industries to submit information from their OSHA 300A annual summary forms electronically. To reflect this proposed change, OSHA estimated in its PEA that the reduction in the number of establishments required to submit this information would result in a total annual cost savings of \$27,077 (87 FR 18549). For this final rule, as explained in Section III.A of the Summary and Explanation, OSHA has decided not to make the proposed change and to retain the existing requirement. Therefore, these cost savings have been removed from the cost analysis.

2. Additional Appendix B Industries

In the NPRM, the agency proposed a selected list of industries, in appendix B, to designate which establishments

with 100 or more employees would have to submit information from their OSHA Form 300 Log and Form 301 Incident Reports electronically. The industries on proposed appendix B were based on the average total case rate (TCR) of injuries and illnesses in each industry. Because the requirement for establishments in industries on appendix B to submit data from Forms 300 and 301 is a new requirement,

OSHA analyzed the costs and impacts to establishments in those industries in the PEA. For the final rule, OSHA has decided to add additional industries to the list of industries that were on appendix B in the proposed rule; these additional industries are listed in Table 1, below. As explained in Section III.B.1 of the Summary and Explanation, OSHA has decided to add industries from appendix A that meet the criteria of

having either a high DART rate (defined as 1.5 times the private industry DART rate) or a high fatality rate (defined as 1.5 times the private industry fatality rate). Employers that have 100 or more employees and are in an industry listed on final appendix B must submit information from their Forms 300 and 301 to OSHA, electronically, on an annual basis.

TABLE 1—INDUSTRIES ADDED TO APPENDIX B

2017 NAICS 4-digit	Industry	High DART rate criteria	High fatality rate criteria
1133	Logging	No	Yes.
1142	Hunting and Trapping	Yes	No.
3379	Other Furniture Related Product Manufacturing	Yes	No.
4239	Miscellaneous Durable Goods Merchant Wholesalers	No	Yes.
4853	Taxi and Limousine Service	No	Yes.
4889	Other Support Activities for Transportation	Yes	No.

With the additions in Table 1, above, the final appendix B to subpart E is as follows:

NAICS	Industry
1111	Oilseed and Grain Farming.
1112	Vegetable and Melon Farming.
1113	Fruit and Tree Nut Farming.
1114	Greenhouse, Nursery, and Floriculture Production.
1119	Other Crop Farming.
1121	Cattle Ranching and Farming.
1122	Hog and Pig Farming.
1123	Poultry and Egg Production.
1129	Other Animal Production.
1133	Logging.
1141	Fishing.
1142	Hunting and Trapping.
1151	Support Activities for Crop Production.
1152	Support Activities for Animal Production.
1153	Support Activities for Forestry.
2213	Water, Sewage and Other Systems.
2381	Foundation, Structure, and Building Exterior Contractors.
3111	Animal Food Manufacturing.
3113	Sugar and Confectionery Product Manufacturing.
3114	Fruit and Vegetable Preserving and Specialty Food Manufacturing.
3115	Dairy Product Manufacturing.
3116	Animal Slaughtering and Processing.
3117	Seafood Product Preparation and Packaging.
3118	Bakeries and Tortilla Manufacturing.
3119	Other Food Manufacturing.
3121	Beverage Manufacturing.
3161	Leather and Hide Tanning and Finishing.
3162	Footwear Manufacturing.
3211	Sawmills and Wood Preservation.
3212	Veneer, Plywood, and Engineered Wood Product Manufacturing.
3219	Other Wood Product Manufacturing.
3261	Plastics Product Manufacturing.
3262	Rubber Product Manufacturing.
3271	Clay Product and Refractory Manufacturing.
3272	Glass and Glass Product Manufacturing.
3273	Cement and Concrete Product Manufacturing.
3279	Other Nonmetallic Mineral Product Manufacturing.
3312	Steel Product Manufacturing from Purchased Steel.
3314	Nonferrous Metal (except Aluminum) Production and Processing.
3315	Foundries.
3321	Forging and Stamping.
3323	Architectural and Structural Metals Manufacturing.
3324	Boiler, Tank, and Shipping Container Manufacturing.

NAICS	Industry
3325	Hardware Manufacturing.
3326	Spring and Wire Product Manufacturing.
3327	Machine Shops; Turned Product; and Screw, Nut, and Bolt Manufacturing.
3328	Coating, Engraving, Heat Treating, and Allied Activities.
3331	Agriculture, Construction, and Mining Machinery Manufacturing.
3335	Metalworking Machinery Manufacturing.
3361	Motor Vehicle Manufacturing.
3362	Motor Vehicle Body and Trailer Manufacturing.
3363	Motor Vehicle Parts Manufacturing.
3366	Ship and Boat Building.
3371	Household and Institutional Furniture and Kitchen Cabinet Manufacturing.
3372	Office Furniture (including Fixtures) Manufacturing.
3379	Other Furniture Related Product Manufacturing.
4231	Motor Vehicle and Motor Vehicle Parts and Supplies Merchant Wholesalers.
4233	Lumber and Other Construction Materials Merchant Wholesalers.
4235	Metal and Mineral (except Petroleum) Merchant Wholesalers.
4239	Miscellaneous Durable Goods Merchant Wholesalers.
4244	Grocery and Related Product Merchant Wholesalers.
4248	Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers.
4413	Automotive Parts, Accessories, and Tire Stores.
4422	Home Furnishings Stores.
4441	Building Material and Supplies Dealers.
4442	Lawn and Garden Equipment and Supplies Stores.
4451	Grocery Stores.
4522	Department Stores.
4523	General Merchandise Stores, including Warehouse Clubs and Supercenters.
4533	Used Merchandise Stores.
4543	Direct Selling Establishments.
4811	Scheduled Air Transportation.
4841	General Freight Trucking.
4842	Specialized Freight Trucking.
4851	Urban Transit Systems.
4852	Interurban and Rural Bus Transportation.
4853	Taxi and Limousine Service.
4854	School and Employee Bus Transportation.
4859	Other Transit and Ground Passenger Transportation.
4871	Scenic and Sightseeing Transportation, Land.
4881	Support Activities for Air Transportation.
4883	Support Activities for Water Transportation.
4889	Other Support Activities for Transportation.
4911	Postal Service.
4921	Couriers and Express Delivery Services.
4931	Warehousing and Storage.
5322	Consumer Goods Rental.
5621	Waste Collection.
5622	Waste Treatment and Disposal.
6219	Other Ambulatory Health Care Services.
6221	General Medical and Surgical Hospitals.
6222	Psychiatric and Substance Abuse Hospitals.
6223	Specialty (except Psychiatric and Substance Abuse) Hospitals.
6231	Nursing Care Facilities (Skilled Nursing Facilities).
6232	Residential Intellectual and Developmental Disability, Mental Health, and Substance Abuse Facilities.
6233	Continuing Care Retirement Communities and Assisted Living Facilities for the Elderly.
6239	Other Residential Care Facilities.
6243	Vocational Rehabilitation Services.
7111	Performing Arts Companies.
7112	Spectator Sports.
7131	Amusement Parks and Arcades.
7211	Traveler Accommodation.
7212	RV (Recreational Vehicle) Parks and Recreational Camps.
7223	Special Food Services.

3. Updated Data

The FEA has updated data used in the PEA to the most recent data available.

The data from the PEA and the updated data used for this FEA appear in Table 2, below.

TABLE 2—DATA IN THE PEA AND THE FEA

PEA estimates			FEA estimates		
Name	Value	Source	Name	Value	Source
Base Wages SOC 19–5011	\$37.55	BLS OEWS 5/2020	Base Wages SOC 19–5011 (safety specialist)	\$37.86	BLS OEWS 5/2021. ¹
			Base Wages 15–1252 (software developer)	\$58.17	BLS OEWS 5/2021. ¹
Fringe Benefits Civilian	0.312	BLS ECEC 6/2021	Fringe Benefits Civilian	0.310	BLS ECEC 9/2022. ²
Base Wages GS–13 Step 6	\$48.78	OMB FY 2020	Base Wages GS–13 Step 6	\$55.06	OMB 2023. ³
Fringe Benefits Government	0.381	BLS ECEC 6/2021	Fringe Benefits Government	0.381	BLS ECEC 9/2022. ²
Appendix B Establishments	48,919	OSHA/OSA 2021	Appendix B Establishments	52,092	OSHA/OSA 2022. ⁴
Total Submissions	718,316	OSHA/OSA 2021	Total Submissions	766,257	OSHA/OSA 2022. ⁴
Manual Submission Time 300/301	10 minutes	PRA 04/22 ⁵	Manual Submission Time 300/301	15 minutes	OSHA/OSA 2022. ⁴

¹ BLS May 2021 Occupational Employment and Wage Statistics data, released March 31, 2022. <https://www.bls.gov/oes/current/oes195011.htm#nat>. Accessed October 05, 2022.

² BLS September 2022 Employer Costs for Employee Compensation, released December 15, 2022. <https://www.bls.gov/news.release/pdf/ecec.pdf>. Accessed February 20, 2023.

³ OMB January 2023 Salary Table 2022–RUS. https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/RUS_h.pdf. Accessed February 22, 2023.

⁴ Docket ID 0103.

⁵ Recordkeeping and Reporting Occupational Injuries and Illnesses (29 CFR part 1904). OMB Control #1218–0176.

C. Cost

§ 1904.41(a)(2): Annual Electronic Submission of Information From OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 301 Injury and Illness Incident Report by Establishments With 100 or More Employees in Designated Industries

OSHA is retaining the same cost methodology in this FEA as in the PEA. In the PEA, the agency estimated the cost of electronic data submission per establishment by multiplying the hourly compensation (in dollars) of the person expected to submit the records electronically by the time required for the submission. OSHA then multiplied this cost per establishment by the estimated number of Appendix B establishments required to submit data, resulting in the total estimated cost of this part of the proposed rule.

OSHA also calculated the estimated cost for establishments to become familiar with the process of electronically submitting the required information. The total estimated cost of this part of the proposed rule was calculated by multiplying the hourly wages (in dollars) of the person expected to submit the records electronically by the time required to learn how to use OSHA's system. The resulting value was then multiplied by the number of establishments in appendix B (87 FR 18549–551).

1. Wages

a. Wage Estimates in the PEA

OSHA has retained the same wage assumptions and methodology from the PEA but has updated the figures to include current data. In the PEA, the agency estimated the compensation of the person expected to perform the task of electronic data submission, assuming

that this task would be performed by an Occupational Health and Safety Specialist. As indicated in Table 2, above, the agency used BLS's Occupational Employment and Wage Statistics (OEWS) data to determine that the mean hourly wage for an Occupational Health and Safety Specialist was \$37.55 per hour. Then, OSHA used June 2021 data from the BLS National Compensation Survey to derive a mean fringe benefit factor of 1.45 for civilian workers in general.¹⁹ OSHA then multiplied the mean hourly wage (\$37.55) by the mean fringe benefit factor (1.45) to obtain an estimated total compensation (wages and benefits) for Occupational Health and Safety Specialists of \$54.58 per hour $(\$37.55 \text{ per hour} \times 1.45)$. OSHA next applied a 17 percent overhead rate to the base wage $(\$37.55 \text{ per hour} \times 0.17)$, totaling \$6.38 per hour.²⁰ The \$6.38 was added to the total compensation (\$54.58), yielding a fully loaded wage rate of \$60.96 $[\$54.58 + \$6.38]$ per hour.

b. Comments on OSHA's Wage Estimates

Some commenters expressed the opinion that the wage rate estimates used in the PEA were too low. For example, the National Federation of Independent Business (NFIB) and the Chamber of Commerce commented that the potential impacts from OSHA publishing work-related injury and illness information would require that

¹⁹ Fringe benefit factor calculated as $[1/(1-0.312)]$, where 0.312 is the proportion of the average total benefits constituted by fringe benefits among civilian workers in all industries, as reported on Table 2 of the BLS's ECEC report, June 2021: https://www.bls.gov/news.release/archives/ecec_09162021.pdf.

²⁰ Seventeen percent is OSHA's standard estimate for the overhead cost incurred by the average employer.

companies have senior executives and legal counsel review the logs for both employee privacy and reputational harm (Docket IDs 0036, 0088). The Chamber estimated that involving executives and legal counsel would increase the wage rate used for this analysis to \$67.01 per hour (Docket ID 0088).

OSHA concludes that an appropriate wage rate has been used for this rule. While some companies may choose to involve executives or lawyers in the submission process, others will delegate duties to administrative assistants or office managers. OSHA considers the wage rate for Occupational Safety and Health Specialists to represent a rough average among the wages for various possible job categories that might submit the data under this rule.²¹ It should be emphasized, however, that this wage is intended to reflect only the cost of entering the data to submit it electronically to the agency—the employer is already responsible for recording the data correctly. If some employers consider it necessary for employees in very high wage categories to review the cases that are already required to be recorded, that is not an incremental cost of this rule.²² In addition, the Chamber of Commerce commented that OSHA is using an incorrect overhead estimate when calculating the loaded wage of the

²¹ This wage category has also been widely used for similar administrative purposes for other OSHA rulemakings, without controversy (e.g., the 2016 recordkeeping rulemaking—see 81 CFR 29675).

²² One commenter even suggested the physicians may be needed to determine whether injuries were work-related now that the injury and illness reports will be made public (Docket ID 0088). However, like related discussions elsewhere in this FEA, this obligation (i.e., the need to determine work-relatedness of an injury) existed prior to this rule. Because it is not an additional cost created by this rule, it is not included.

Occupational Health and Safety Specialist (Docket ID 0088). It argued that the correct factor for computation of overhead is 0.6949 (rather than OSHA's longstanding reliance on the PEA's 0.17 for overhead costs), which the commenter sourced from the Bureau of Economic Analysis, Table 7 (Relation of Gross Domestic Product, Gross National Income, and National Income). The Chamber of Commerce's overhead factor estimate would increase the overhead amount from \$6.38 per labor hour to \$26.09 per labor hour.

The agency believes the Chamber has incorrectly inflated the "overhead" cost factor by including what it refers to as a "profit opportunity cost element" (Docket ID 0088). The overhead rate that OSHA uses in this cost analysis (17 percent) is based on the EPA's "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002. OSHA has used this overhead rate for several economic impact analyses previously, and it is a standard estimate for this agency, the Employment and Training Administration,²³ the Wage and Hour Division,²⁴ and the EPA.²⁵ As expressed in a prior OSHA rule, OSHA does not believe the inclusion of "profit opportunity cost elements" in an overhead estimate is appropriate in the context of this economic analysis.²⁶

c. Wage Estimates in the FEA

For the final rule, OSHA has updated the fully loaded wages to \$61.31 per hour, using the same calculation method as in the PEA and the updated data listed in Table 2, above.²⁷ Specifically, OSHA multiplied the mean hourly wage (\$37.86) by the mean fringe benefit factor (1.45)²⁸ to obtain an estimated total compensation (wages and benefits) for Occupational Health

and Safety Specialists of \$54.87 per hour $(\$37.86 \text{ per hour} \times 1.45)$. OSHA next applied a 17 percent overhead rate to the base wage $(\$37.86 \text{ per hour} \times 0.17)$, totaling \$6.44.²⁹ The \$6.44 was added to the total compensation (\$54.87) yielding a fully loaded wage rate of \$61.31 $(\$54.87 + \$6.44)$. In response to comments, OSHA has added additional costs to the FEA that use loaded wages for a Software Developer at \$94.19,³⁰ based on an hourly base wage of \$58.17, in the calculation of those costs.

2. Estimated Case Counts

In the PEA, based on the 2020 data collection of 2019 OSHA Form 300A data, OSHA estimated that establishments with 100 or more employees, in proposed appendix B industries, reported 718,316 cases to OSHA. The Phylmar Regulatory Roundtable (PRR) asserted, without pointing to specific support, that "industries required to submit have a history of higher incident rates" and questioned the average of 14.7 cases per establishment on this basis (Docket ID 0094). PRR stated that "it does not seem plausible that there are enough establishments with zero cases to bring the estimates this low." In support, PRR described several large employers, with up to 12,000 employees each, that recorded more than 14.7 cases (up to 155 cases) in certain years. OSHA notes that it used the average number of cases submitted by establishments with 100 or more employees in NAICS industries on appendix B. PRR's limited examples do not disturb the calculated averages, which are based on data from affected establishments. OSHA used the average number of cases on Form 300A submissions across all affected establishments to represent the average number of cases an establishment would submit via manual entry. For this final rule, OSHA has updated the estimate of total cases reported by establishments with 100 or more employees in appendix B industries to 766,257 cases,³¹ as mentioned in Table 2, above. This estimate has been updated from the PEA. OSHA has expanded the number

of establishments to include all establishments with at least 100 employees in industries that are on final appendix B, which includes six industries that were not included on proposed appendix B.

3. Familiarization

In the PEA, OSHA estimated that establishments would take 10 minutes, on average, to familiarize themselves with changes to the recordkeeping requirements in the proposed rule. Based on this, the agency calculated a one-time cost for familiarization of \$497,033 $[(48,919 \text{ establishments}) \times (10 \text{ minutes/establishment}) \times (1 \text{ hour}/60 \text{ minutes}) \times (\$60.96/\text{hour})]$. The number of establishments in the PEA was based on submissions in 2019 to the ITA for establishments that were in the proposed appendix B in the NPRM.

The U.S. Poultry and Egg Association, the North American Meat Institute, the Chamber of Commerce, and the Phylmar Regulatory Roundtable argued that OSHA undercounted the amount of time required to complete rule familiarization for the proposed rule (Docket IDs 0054, 0070, 0088, 0094). The Chamber of Commerce asserted that OSHA's estimate "ignores the familiarization time cost that establishments not covered will incur to determine their non-covered status, and it suggests an extremely optimistic but empirically baseless view of the time that will be required by those covered to read the rule, review its requirements relative to their current operations and procedures, identify and implement new policies and procedures to comply with the new rule, and to train administrative and operational employees in their new compliance duties" (Docket ID 0088). Other commenters claimed additional time would be required for processing by a corporate safety department subject matter expert (Docket ID 0054) and for "legal analysis" (Docket ID 0070).³²

For the establishments that do not need to submit the Form 300 and 301 data but must determine if they are subject to the requirement, the Chamber of Commerce estimated, based on unspecified sources, that the 1.9 million establishments with 10 to 99 employees will spend 5 minutes determining that

²³ See ETA Final Rule, Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States, 88 FR 12760, 12788 (Feb. 28, 2023).

²⁴ See Wage and Hour Division Final Rule, Increasing the Minimum Wage for Federal Contractors, 86 FR 67126, 67205 (Nov. 24, 2021).

²⁵ For an example of an earlier OSHA economic analysis that used the EPA overhead rate, see OSHA's final rule on Walking-Working Surfaces and Personal Protective Equipment (Fall Protection Systems) at 81 FR 82494, 82931 (Nov. 18, 2016).

²⁶ As noted in a previous related Federal Register notice (see 81 FR 29683), in principal, the labor costs of affected workers reflect the opportunity costs of that labor.

²⁷ See Docket ID 0103 for a spreadsheet with the full calculations. Slight discrepancies in results are likely due to rounding.

²⁸ The fringe benefit factor was calculated as $[1/(1-0.310)]$, where 0.310 is the proportion of average total benefits constituted by fringe benefits among civilian workers in all industries, as reported on Table 2, above.

²⁹ Seventeen percent is OSHA's standard estimate for the overhead cost incurred by the average employer.

³⁰ For BLS Occupational Code 15-1252 "Software Developer," total compensation is \$84.30 $(\$58.17 \text{ mean hourly wage} + \$26.13 \text{ fringe benefits})$ plus \$9.89 in overhead $(\$58.17 \times 0.17)$.

³¹ OSHA's estimate of injury and illness cases is based on calendar year 2019 data submitted to the agency through the Injury Tracking Application (ITA) (Docket ID 0106). Establishments with 100 or more employees in appendix B industries reported a total of 766,257 recordable fatalities, injuries, and illnesses for that year.

³² One of those commenters suggested that OSHA include costs for creating training materials and conducting training sessions as part of familiarization (Docket ID 0054). Another made a more general statement that the agency's estimate for rule familiarization did not account for the time it will take to prepare or implement OSHA's proposed changes or develop processes to comply with the new requirements (Docket ID 0094). These elements are discussed under Training later in this analysis.

they are not affected. According to the Chamber of Commerce, at \$1.65 per minute, the total cost would be \$15.9 million. Additionally, “for the 172,277 establishments with 100 or more employees, on average a 15-minute review by senior managers or in-house legal counsel may be able to answer the basic affected or not affected question for an aggregate familiarization cost of \$4.3 million.” (Docket ID 0088).

Finally, the Chamber of Commerce asserted that rule familiarization is more complicated than OSHA estimates. The commenter believed that OSHA failed to consider that each establishment that has determined that it is subject to the reporting requirement “must now consider how the new requirements impact existing policies and procedures, what are the risks of reputational damage or of employee privacy violation liability and how can those risks be mitigated by changing policies and procedures” (Docket ID 0088). For the PEA’s estimated 48,919 establishments required to comply with the new reporting requirement, the commenter estimates a lower bound estimate of 8 hours of professional time, which would result in an aggregate cost of \$38.7 million. OSHA does not, however, require such considerations: the final rule has accounted for privacy concerns (comments on costs related to privacy are addressed later in this section) and, as discussed later, employers should already be familiar with the reporting system because they are using it to submit Form 300A data. Furthermore, the commenter’s recommendation of an *average* of 8 hours per establishment vastly exceeds OSHA’s traditional estimates of familiarization time. For comparison, in the 2016 final recordkeeping rule, OSHA included only 10 minutes for familiarization costs, which included the time for establishments to create accounts and enter basic establishment information in the ITA (see 81 FR 29680), none of which has to be done again for purposes of complying with the final rule at issue here.

OSHA disagrees that more than 10 minutes will be required for rule familiarization in this case. Under the existing recordkeeping rule, employers are already required to keep part 1904 injury and illness records. In addition, all establishments that will have to submit case-specific information from their Form 300 Log and 301 Incident Report under this rule are already required to submit establishment information from their Form 300A Annual Summary, using the same interface (the ITA) they will use to submit their case information. OSHA

intends to notify all establishments required to submit data under the new rule of this new obligation. In addition, OSHA will update its online ITA application to be consistent with this final rule. Employers unsure about whether they are covered by this final rule can use this application (at <https://www.osha.gov/itareportapp>) to immediately determine their data submission obligations. Thus, there will be no need for establishments to spend time to determine whether they are affected by the final rule or not. Altogether, OSHA concludes that 10 minutes is an appropriate amount of time for employers to become familiar with the rule (with assistance from OSHA’s application or OSHA website materials, if necessary).

OSHA has decided to retain the assumptions and the methodology from the PEA for this final rule. Using the updated numbers reported in Table 2, above, OSHA now estimates the one-time cost for familiarization as \$532,257, calculated as $[(52,092 \text{ establishments}) \times (0.17 \text{ hours/establishment})]^{33} \times (\$61.31/\text{hour})$. Annualizing this rate over ten years with a 7 percent discount rate yields an annual cost of \$75,781³⁴ to the private sector.

4. Record Submission

For the time required for the data submission in the PEA, OSHA used the estimated unit time requirements reported in OSHA’s paperwork burden analysis for 29 CFR part 1904 Recording and Reporting Occupational Injuries and Illnesses (OMB Control Number 1218–0176). The agency estimated that it would take 10 minutes to submit information about each case manually; this estimate does not apply when establishments submit the records as batch files, because batch files are a means of submitting multiple cases at one time.

In the PEA, OSHA estimated that there would be 48,919 establishments reporting 718,386 cases total, or 14.7 cases per establishment, on average (87 FR 18549–50). The agency estimated that about half of all reporting establishments (24,460) would submit half of the total cases (359,193 cases) via one batch file per establishment.³⁵ This yielded an estimated cost of \$248,517

$[(24,460 \text{ establishments}) \times (10 \text{ minutes/establishment}) \times (1 \text{ hour}/60 \text{ minutes}) \times (\$60.96/\text{hour})]$. The average cost per establishment was estimated to be \$10.16 per establishment for establishments submitting via batch file.

OSHA then estimated that the other half of establishments (24,460) would manually submit each case from their establishment individually. Using the mean of 14.7 cases per establishment (718,386 total cases divided by 48,919 total establishments) and an estimated time of 10 minutes per case, OSHA estimated 147 minutes per establishment to submit records electronically, on an individual case basis. This produced a total cost for manual submission of \$3,649,520 $[(24,460 \text{ establishments}) \times (0.17 \text{ hours/case})^{36} \times (14.7 \text{ cases}) \times (\$60.96/\text{hour})]$, or \$149 per establishment. Finally, OSHA summed the estimated batch-file submissions (\$248,517) and manual submission (\$3,649,520), which resulted in estimated total cost of \$3,898,037 to submit the 718,316 records.

Dow, the Chamber of Commerce, and the Phylmar Regulatory Roundtable (PRR) commented that OSHA is underestimating the amount of time required for an establishment to submit Form 300A information (Docket IDs 0054, 0088, 0094). Dow said that establishments must spend time to “locate the website, create an account, retrieve password, read instructions, gather, and prepare incident information etc.” (Docket ID 0054). The commenter indicated that it would take more than 10 minutes per case per establishment. Specifically, it would take 1–2 hours to prepare the submission, and 15–20 minutes per case to input the information because there are more than 25 fields that must be filled in. Dow added that when the submission is completed via batch file, 1–2 hours is required to generate and review the reports for submission, even if it only takes 10 minutes to actually upload the 300A data. It asserted that this time estimate will only increase with additional forms (Docket ID 0054).

The Chamber of Commerce commented that OSHA’s reporting burden estimate of 10 minutes per case is not based on empirical data. It indicated that this reporting burden should be inclusive of the following activities: compiling, analyzing, preparing, reviewing internally, and submitting the data electronically. The Chamber’s estimate was 60 minutes per case using a blended management and professional rate. It maintained that its

³³ 0.17 hours is a rounded value representing 10 minutes, or 10/60th of an hour, per establishment.

³⁴ \$62,397 annualized over ten years with a 3 percent discount rate.

³⁵ Form 300A data submitted to OSHA through the Injury Tracking Application (ITA) for 2019 indicated that almost half of establishments (47 percent) were already submitting their data by batch file at that time (Docket ID 0103).

³⁶ 0.17 hours is a rounded value representing 10 minutes, or 10/60th of an hour, per case.

higher time estimate accounted for the “necessity for internal review of each case and of the final compiled reports by various levels of management and internal legal counsel.” The Chamber added that its “more realistic estimate of aggregate internal labor time for preparation and review increases the previous calculation of \$11.9 million to \$71.1 million. (718,386 cases × 60 minutes per case × \$1.65 per minute).” Finally, the Chamber suggested that firms would need to hire outside legal counsel to complete their review process which the Chamber estimated would increase costs by \$4.8 million (\$6.67 per minute of outside legal counsel time) for the total estimated 718,386 cases (Docket ID 0088).

The National Federation of Independent Businesses and the Precision Machined Products Association commented on the differences in small and medium employers compared to large employers (Docket IDs 0036, 0055). These commenters noted that small and medium employers typically cannot afford the experts, accountants, and lawyers needed to comply with regulations. Additionally, they asserted that small and medium employers do not have the resources or technology to submit batch files and therefore must manually input each case. The Precision Machined Products Association added that the cost per submission for small and medium companies is closer to double what OSHA estimated in the PEA (Docket ID 0055).

The North American Meat Institute, the Plastics Industry Association, the Employers E-Recordkeeping Coalition, and the Chamber of Commerce specifically cited time spent on quality assurance as a concern (Docket IDs 0070, 0086, 0087, and 0088). The Plastics Industry Association wrote that “the cost of quality assurance procedures necessary to ensure compliance with a proposed rule must be treated as a component of the burden hours required by the rule. The audit is, in effect, not a voluntary measure, but one that needs to be incurred to ensure compliance and avoid over-reporting” (Docket ID 0086). The Chamber of Commerce focused on the risk associated with publicly posting these injury and illness records, which in turn would result in increased “pre-submission due diligence” (Docket ID 0088).

OSHA concludes that more information must be submitted from the Form 300 Log and Form 301 Incident Report than from the Form 300A Annual Summary. Therefore, the agency is adjusting the estimated time required

to manually submit electronic records from 10 minutes per case per establishment to 15 minutes per case per establishment. Given the additional amount of information required, OSHA believes that a 50 percent increase in the burden estimate is sufficient. OSHA notes, however, that employers are likely to spend less time, because employers will likely only copy and paste information from existing forms into the fields in OSHA’s ITA. Employers for which it takes longer per case to submit the information could choose instead to transmit all their data in one batch-file submission.

OSHA disagrees with commenters’ assertions that the final rule necessitates the use of additional experts, accountants, senior managers, physicians, or lawyers beyond those employers currently engage to comply with existing recordkeeping and submission requirements under part 1904. The final rule does not change employer obligations beyond the requirement that establishments electronically submit specific illness and injury information that the establishment already records. Furthermore, there is a requirement in § 1904.32 for employers to verify the entries on the Form 300 Log to ensure that they are complete and accurate. Section 1904.32 also requires a company executive to certify the Form 300A once it is completed, by examining the Form 300 Log. Costs to perform these verification and certification tasks were accounted for in the previous rule that imposed these requirements (see 66 FR 6092–93). Thus, OSHA’s expectation is that employers have already taken measures to ensure the information employers have recorded and will be submitted is accurate. Any due diligence or audit measures an establishment chooses to take should predate this rule and should not be attributed as an additional cost specific to this rule. Finally, OSHA’s estimate of an hourly wage for the recordkeeper submitting the data is based on the assumption that this task is performed by a safety and health specialist who is already familiar with the establishment’s safety and health records.

While OSHA is not requiring submission via batch filing, OSHA disagrees that smaller companies affected by this rule do not have the capability to do batch file submissions. Currently, approximately half of all establishments that are required to submit their records electronically do so using batch files, and an analysis of that information shows that smaller establishments actually use batch file

submission more frequently than some categories of larger establishments.³⁷ Further, OSHA believes that the time estimated to manually upload the required information is appropriate for small, medium, and large employers. It is also worth reiterating that the new requirement to submit data from the Form 300 and Form 301 only affects establishments with more than 100 employees, so the smallest employers are not affected.

A couple of commenters argued that OSHA should account for additional costs for compliance due to the necessity of maintaining two sets of records as a result of the final rule’s submission requirements (Docket IDs 0042, 0058). As the Louisiana Chemical Association said, “[b]esides the out-of-pocket expenses associated with compliance, there are other administrative burdens, for example, the duplicative work of maintaining two sets of 300 and 301 forms (a hard copy and one form for electronic submission with redacted information)” (Docket ID 0042).

This rule does not, however, require duplicative recordkeeping. As noted in Section III.B of the Summary and Explanation, OSHA cautions employers against including personally identifiable information on the Forms 300 and 301 when they initially fill out those forms. The forms themselves contain language about confidentiality of personal information and indicate that PII should not be included. To the extent employers choose to include PII on those forms despite these warnings, it is per a decision by the employer. Such data can be excluded during data submission to the extent it is on the employer’s forms. Furthermore, as described elsewhere in this preamble, OSHA is taking multiple steps to protect against the publication of any information that could reasonably be expected to identify individuals directly, including not collecting certain information and using de-identification software to remove any such information that is submitted by employers.

OSHA has decided to retain the methodology from the PEA for estimating the cost of data submission but has added an additional 5 minutes (an increase from 10 to 15) per submitted case for establishments that do not submit batch files and has

³⁷ For example, 2019 Form 300A data submitted to OSHA through the ITA indicate that establishments with 100–199 employees submitted 50% of data by batch file, which was higher than the percentage submitted by batch file for employers with 500 or more employees (Docket ID 0103).

updated other data to more recent figures. Using the updated data in Table 2, above, OSHA calculated a new average cost per establishment for batch file submitters of \$10.22 per establishment. Additionally, OSHA calculated an updated cost to those submitting manually of \$242.41 per establishment. That yields a total cost for electronic submission of OSHA Forms 300 and 301 of \$133.46 per establishment on average,³⁸ or a total of \$6.9 million annually, to submit the currently estimated 766,257 records.

The calculations above are based on an estimated 52,092 establishments reporting 766,257 cases total, or 15.82 cases per establishment submitting manually and 13.48 cases per establishment reporting with batch-files. An estimated 47 percent of all reporting establishments (24,668) submitting via batch file would submit 43 percent of the total cases (332,498 cases), at an estimated total cost of \$252,048 [(24,668 establishments) $\times$ (0.17 hours/establishment)³⁹ $\times$ (\$61.31/hour)], or \$10.22 per establishment on average for batch file submission. For the other 53 percent of establishments (27,424) that OSHA estimates would manually submit each case, using OSHA's assumption of a mean of 15.82 cases per establishment and the increased time of 15 minutes per case, the result is an estimated 237 minutes per establishment to submit their information electronically each year. This produces a total cost for manual submission of \$6,647,982 [(27,424 establishments) $\times$ (0.25 hours/case)⁴⁰ $\times$ (15.82 cases) $\times$ (\$61.31/hour)], or \$242.41 per establishment for manual submission.

As suggested in the PEA, the agency believes that this approach likely overestimates costs, because while OSHA's estimates reflect manual entry of the data for nearly half of establishments, in the agency's experience, as indicated previously, nearly half of the covered establishments were already submitting data to the ITA by uploading a batch file in 2019. This percentage will likely increase over time as a result of this rule. As indicated elsewhere in the FEA, OSHA expects more of the cases to be

submitted by batch file once this rule goes into effect, because OSHA expects companies with many establishments and/or many cases will have computer systems that can export their part 1904 injury and illness recordkeeping data into an easily uploaded file format.⁴¹

The agency notes that some establishments will have no recordable injuries or illnesses in a given year; thus, their time and cost burden for submission under this rule will be zero. In contrast, establishments with many recordable injuries and illnesses could have a time burden of significantly more than the average of about four hours if they enter the data manually. OSHA believes that establishments with many cases are likely to submit a single batch file, while establishments that only have a few cases are more likely to submit cases manually than by batch file.⁴²

5. Custom Forms

OSHA received multiple comments regarding the difficulty of submitting electronic records when the establishments use custom forms for their recordkeeping. The International Bottled Water Association, the Plastics Industry Association, the Employers E-Recordkeeping Coalition, and the Phylmar Regulatory Roundtable (PRR) explained that forms such as California Form 502025 require most, or all of, the same information as the OSHA forms (Docket IDs 0076, 0086, 0087, 0094). PRR noted that forms such as 502025 contain other information that is PII and are organized differently, both of which mean that manual entry will take longer than 10 minutes (Docket ID 0094). PRR added that significant additional time is required to review and ensure PII and sensitive information is not included. The North American Meat Institute said that current use of other forms would require significant administrative burden to translate the required information into the online form (Docket ID 0070).

OSHA notes that § 1904.29(a) states that employers must use the OSHA 300

Log, 301 Incident Report, and 300A Annual Summary—or equivalent forms—when recording injuries and illnesses under part 1904. Section 1904.29(b)(4) further states that an equivalent form is one that has the same information, is just as readable and understandable, and is completed using the same instructions as the OSHA form it replaces. As discussed earlier in the summary and explanation of the rule, OSHA acknowledges that while it may be possible to avoid duplication in recording by reliance on equivalent forms, it will be necessary in some cases for reporting to re-enter that information into a system that is compatible with OSHA's system. OSHA is aware, for instance, that for reporting, many employers use an insurance form instead of the Form 300 or the Form 301 or supplement an insurance form by adding any additional information required by OSHA. The agency notes, however, that use of a custom form for recordkeeping does not change the information the employer copies into the electronic system to comply with OSHA data submission requirements, including the submission requirements included in this final rule. To the extent that an insurance form or other form includes information not relevant to OSHA reporting, it would not increase the time and cost for OSHA reporting. Where relevant, the employer may just skip inapplicable sections of a custom form when submitting their information to OSHA. Therefore, the time for transmitting the information from the Forms 300 and 301 is just the time to manually copy the required information into OSHA's system, regardless of which form the information is recorded on initially. In addition, the use of custom forms that can capture information for multiple purposes does not prevent employers from designing those forms so that they can export the appropriate data and submit their data to OSHA via batch file.

While OSHA did not find compelling evidence to increase the estimated compliance costs based on potential difficulties companies face from using custom forms, the agency has increased, by 50 percent, the estimated time it takes to submit records manually in response to comments received on other issues. This increased time could be considered as accounting for costs associated with using custom forms in the event employers face costs due to this issue. Elements of this discussion run parallel to and may interface with the discussion of potential software upgrades, discussed below.

³⁸ The average cost per establishment to submit the Form 300 and 301 data to OSHA (\$133.46) was calculated as [(Cost per establishment to submit batch files (\$10.22) $\times$ establishments submitting batch files (24,668)) + (Cost per establishment to submit individual files (\$242.41) $\times$ establishments submitting cases manually (27,424))]/Total establishments (52,092).

³⁹ 0.17 hours is a rounded value representing 10 minutes, or 10/60th of an hour, per establishment.

⁴⁰ 0.25 hours represents 15 minutes, or 15/60th of an hour, per case.

⁴¹ OSHA's assumption that batch files are submitted on a per establishment basis may overestimate the costs of the rule, as batch files are typically submitted at the firm level on behalf of multiple establishments. As documented in the accompanying spreadsheet (Docket ID 0103), if OSHA assumed that batch files are submitted by firms rather than establishments, the costs would be a fraction of the estimate presented here—approximately \$7,316 annually, as opposed to the estimated \$252,048.

⁴² For example, data submitted from 2019 Form 300A to OSHA through the ITA shows submissions from 52,092 establishments with 100+ employees. The information for these establishments was submitted by 18,156 users. Of those, 716 users submitted the data for 24,668 establishments and 332,498 recordable cases using batch files (Docket ID 0103).

6. Batch-File Submissions

In the PEA, OSHA estimated that half of all respondents would upload their logs in one batch-file submission. The Strategic Organizing Center (SOC) expressed strong agreement with OSHA's assumption that larger, more sophisticated users will use batch file submission (Docket ID 0079). It added that OSHA's cost estimates, which rely on this assumption, are appropriate and that OSHA is correct to not assume widespread use of manual-entry submission. Further, SOC agreed that OSHA's assumption that half of employers will submit records manually "may result in an overestimate of the total and per-establishment costs of this part of the proposed rule" (Docket ID 0079).

The Chamber of Commerce disagreed with OSHA's PEA assumption that half of the 48,919 affected establishments will be able to "drastically reduce their report submission times and costs by using a 'batch' process of submitting multiple individual case records through an electronic portal that OSHA will provide." Specifically, it stated that the assumption is not realistic because the portal has not yet been built or tested. The Chamber further argued that it would be more reasonable to assume, at least for the first year of submission and maybe for subsequent years, that "all 48,919 affected establishments will upload the required case information manually or will have to delete various fields to accommodate data OSHA does not want to collect." This would double the cost of data submission (Docket ID 0088).

Data from 2019 on usage of batch uploads for OSHA 300A information indicates that data for approximately 47 percent of establishments were already being submitted via batch files (Docket ID 0103). For the purposes of the FEA, OSHA estimates that the usage of batch files submissions will at least continue at the same rate as was the case in 2019 (47 percent). However, as noted above, OSHA believes it is likely that batch filing will increase as a result of the requirements associated with this rule. As a comment from the Laborers Health Safety Fund of North America emphasized, electronic recordkeeping and data submission is a more cost-effective way for establishments to meet OSHA standards (Docket ID 0080). Additionally, Eastern Research Group (ERG) (Docket ID 0105) interviewed a number of commercial aftermarket software vendors who remarked that the number of users of their software is rapidly growing.

Notwithstanding the agency's belief that electronic submission will become increasingly common, OSHA has decided to adjust its projected estimate from the PEA, that 50 percent of establishments would submit their Form 300 and Form 301 information via a single batch file, based on OSHA's analysis of existing data collected in 2019. These data show that approximately 47 percent⁴³ of establishments submitted their records by batch file in 2019. However, to the extent that more employers continue to adopt this time-saving technology, the cost of submission will decrease, and the average reporting costs will be below OSHA's cost estimate in this FEA.

7. Software/System Upgrades Needed

The PEA did not include a cost for employers to upgrade their systems in order to submit their files electronically or in batch files. OSHA received several comments on this topic. Electric Boat, the International Bottled Water Association, and the Employers E-Recordkeeping Coalition indicated that software currently used by employers does not easily facilitate transmission of 300 and 301 information to OSHA (Docket IDs 0028, 0076, 0087). The Employers E-Recordkeeping Coalition stated that the "costs to modify the internal software, purchase new software, automate injury and illness recordkeeping, audit the records, and in many instances, manually key in huge volumes of data would cost hundreds of thousands of dollars" (Docket ID 0087). Electric Boat stated that proprietary recordkeeping software for OSHA logs is not compatible with requirements to upload to OSHA and that large companies may have many cases in their logs. It further maintained that a requirement to manually enter data for each case would be "very difficult, costly and potentially inaccurate due to transcription errors" (Docket ID 0028). For employers not currently using software, Electric Boat surmised that information for the Form 301 incident report is often recorded on handwritten forms at individual establishments, and thus the time and resources needed to transition to a fully automated system would be considerable.

The U.S. Poultry and Egg Association, the Employers E-Recordkeeping Coalition, the Chamber of Commerce, the National Retail Federation, and the Flexible Packaging Association, and

Phylmar Regulatory Roundtable wrote about increased costs due to either reprogramming recordkeeping software to meet OSHA's format or investing in new software altogether (Docket IDs 0053, 0087, 0088, 0090, 0091, 0094). The U.S. Poultry and Egg Association commented that OSHA's analysis "does not consider that some employers utilize proprietary electronic recordkeeping systems that would require program changes, possibly at a high cost, so that the information could be electronically submitted to OSHA" (Docket ID 0053). The Phylmar Regulatory Roundtable (Docket ID 0094) stated that two or three days of labor would be necessary to reconfigure the coding and modify programs currently used to electronically upload Form 300A to include submission of Forms 300 and 301. The Chamber of Commerce addressed the issue of small businesses that do not have electronic recordkeeping programs in place and was concerned that small businesses would not be able to afford the software (Docket ID 0088).

OSHA believes that employers who use custom software for their recordkeeping will incur some, though limited, additional costs to upgrade custom computer systems. OSHA also believes that employers who use commercially available software are unlikely to incur any costs.⁴⁴ Many establishments required to submit injury and illness data from their Form 300A already use software to submit that data.⁴⁵ The larger employers that have created their own custom software, instead of relying on commercially available software, likely have IT employees already on staff that conduct system upgrades as part of their daily

⁴⁴ OSHA believes employers who already own and use commercially available software are unlikely to face any additional costs because aftermarket software vendors will need to upgrade their software to ensure the software does not become irrelevant to the needs of their customers. Research conducted by ERG indicates that software vendors plan to upgrade software free of charge (Docket ID 0104). The business model selected by the software vendors means that they will inherently incur some minor costs as a result of providing a service without charge. The record is not sufficient for OSHA to provide a quantitative estimate of what those costs would be, but the fact that the vendors chose to offer this service without charge makes it clear that providing this update would not pose any threat to the economic stability of the software vendor industry.

⁴⁵ The use of recordkeeping software provides significant advantages in terms of streamlining recordkeeping and data submission capabilities. Specifically, software is available that produces OSHA-ready reports for work-related injuries and illnesses; generates files in the exact format required for the OSHA ITA; and offers additional features, including ways to capture near-misses and hazards of all types, detailed incident investigations, and the root cause of an injury.

⁴³ This percent was calculated by dividing the 24,668 establishments submitting individual 300/301 data manually (i.e., not by batch file) by the 52,092 total establishments submitting data (Docket ID 0103).

routine. For these companies, existing IT staff can conduct any software upgrades needed, and OSHA has included a discussion of these costs below. If upgrading systems is cost prohibitive for an establishment, the establishment can still submit the required information from their part 1904 forms manually, which is accounted for in OSHA's estimates.

Nonetheless, after a full consideration of comments, and notwithstanding the possibility that switching to commercial aftermarket software might be more economical, OSHA recognizes that there may be an incremental cost to modifying custom software unique to the rule. While comments provided limited guidance on what the cost of updating software may be, including how many firms might be affected, the agency determined that 20 hours of reprogramming is a reasonable time for the task (Docket ID 0104). This estimate also corresponds to the estimate submitted in the comment by the Phylmar Regulatory Roundtable of 2–3 days (Docket ID 0094).⁴⁶

OSHA also estimates that the group of firms affected by the custom software modification costs is a limited set. OSHA found that approximately 40 percent of employers who must report injuries currently already use software to report the files,⁴⁷ and the number is growing. The agency believes the set of firms using customized software to report cases is not a randomly distributed group but sorts heavily by the size of the firm. The agency examined the current universe of firms currently electronically batch-filing injury reports via its ITA system and found that of the 716 firms reporting for affected establishments, approximately 36 percent are reporting for only one establishment (Docket ID 0106). OSHA believes the cost of updating custom software would predominantly affect only the other 64 percent of firms (456) that represent more than one establishment and report data using batch files (ITA cite). Those 456 firms also account for a disproportionate number of cases reported to the agency. For those 456 firms to upgrade their software, the agency assumes that this

work would be performed by a software engineer at the wage rate (\$94.19) referenced in Table 2. The FEA therefore calculated the cost of custom software as \$859,042 [(456 firms) × (20 hours) × (\$94.19/hour)], or \$122,308 annualized over 10 years at a 7 percent discount rate.⁴⁸

As indicated previously, employers are not required to modify their software to comply with the standard, but for very large employers, this might be their least-cost method for compliance. As laid out earlier in the analysis, other employers might decide that for purposes of OSHA compliance, it makes more sense to employ commercially available software, or even manually enter the cases. Therefore, issues of software modification do not raise questions of technological feasibility, as discussed later in the analysis, nor do they pose questions of economic feasibility.

8. Other Costs

OSHA also received comments on other potential cost items, addressed below.

a. Harm to Reputation

OSHA received multiple comments stating that OSHA should include costs to capture the argued negative reputational effects to companies after OSHA publishes their illness and injury information. The Plastics Industry Association and the Chamber of Commerce commented on the potential liabilities associated with publishing these work-related injury reports (Docket IDs 0086, 0088). The Plastics Industry Association noted the “unknown consequences of public shaming and misuse of the information” that could lead to reputational damage (Docket ID 0086).

Related comments are covered in Section III.G of the Summary and Explanation, but the agency emphasizes here that there is insufficient basis for altering the economic analysis to reflect this issue. Regarding reputational and civil liability damages, OSHA disagrees that the mere posting of injury and illness recordkeeping data on a publicly available website will adversely impact an employer's reputation. As the Note to § 1904.0 of OSHA's recordkeeping regulation makes clear, the recording or reporting of a work-related injury, illness, or fatality does not mean that an employer or employee was at fault, that an OSHA rule has been violated, or that the employee is eligible for workers'

compensation or other benefits. In addition, OSHA already publishes data from the Form 300A that is collected through the ITA, as well as establishment-specific, case-specific information about reported work-related fatalities, hospitalizations, amputations, and losses of an eye (see <https://www.osha.gov/severeinjury> and <https://www.osha.gov/fatalities>). Despite online publication of this information for a number of years, commenters did not provide any examples of harm to reputation occurring as a result, nor did they provide any examples of misuse of the data that has already been published.

b. Additional Time Needed To Review for PII

As an adjunct to the earlier discussion regarding quality assurance concerns and the appropriate wage rate for the cost of submitting cases, some commenters also suggested that it will take additional time to remove PII from case files before they are submitted. As in that discussion, OSHA reiterates that this is an action that should already be addressed when the cases are recorded under existing practices to meet existing recordkeeping requirements at § 1904.4, § 1904.29, and § 1904.41.⁴⁹ Therefore, this is not a new cost of this rule, and the agency is not including cost for privacy checks in the Final Economic Analysis.

c. Company Name

One commenter, the National Demolition Association, stated that the final rule's new requirement for establishments to submit their company name as part of their data submissions would impose an additional administrative and financial burden on employers. This commenter argued that the requirement, which is in final § 1904.41(b)(10), “would be particularly onerous and complex for employers who have multiple establishments and limited staff resources to comply with the additional administrative paperwork and reporting requirements” (Docket ID 0060).

Submission of an establishment's company name is not expected to be particularly time consuming. First, most establishments are already including their company names as part of their 300A data submissions, so this new requirement will only affect

⁴⁶ The agency has also performed a sensitivity analysis to recognize that some of the more complex software in the typically larger firms, with many establishments, might take as much as 50 hours to reprogram, depending on the complexity of the software (Docket ID 0103). These estimates assume there are not time savings from bundling these software updates with others needed to maintain and update the software, or efficiencies to be gained from incorporating commercial software.

⁴⁷ Docket ID 0105.

⁴⁸ \$100,706 annualized over 10 years at a 3 percent discount rate.

⁴⁹ Additionally, OSHA will use software capable of detecting and redacting PII not redacted by establishments.

establishments that are using only codes to identify their establishments. Second, establishments that are not already submitting their company name only have to input that one additional field, and they have to do that only one time if they are doing a batch file submission (i.e., once per batch file).⁵⁰ Regardless, the time necessary to include the company name is included in the 15 minutes OSHA has estimated as the time necessary to complete one submission.⁵¹

d. Training Costs

The U.S. Poultry and Egg Association, Dow, the North American Meat Institute, the Motor and Equipment Manufacturers Association, the Chamber of Commerce, and the National Retail Federation commented that training costs should be included in the cost analysis (Docket IDs 0053, 0054, 0070, 0088, 0090). The U.S. Poultry and Egg Association wrote that the analysis “does not consider additional training of staff that might be required, nor does the rule consider costs associated with training existing and new staff on the variety of state and federal privacy laws that could be impacted by employers now knowing that the information they submit will necessarily be made available worldwide” (Docket ID 0053). The Chamber of Commerce commented on the need for training managers on how to comply with reporting formats, schedules, and procedures, as well as training for additional staff “to cover multiple shifts, absences, and internal review needs.” The Chamber further stated that time would be needed to “train administrative and operational employees in their new compliance duties” (Docket ID 0088).

OSHA concludes that additional training should not be necessary either to fill in a web form with information that has already been recorded, or to transmit records from an existing electronic recordkeeping system with which the employee is already familiar. Employees have already been trained on how to record injuries and illnesses on the Forms 300 and 301, pursuant to

other previously existing requirements under part 1904. Thus, OSHA has already accounted for the time required to learn how to keep the records themselves. Any time required to learn how to submit the Form 300 and Form 301 data to the ITA (the only new requirement in this rule) is already included in OSHA’s rule familiarization time estimate, described above.⁵²

D. Effect on Prices

An anonymous commenter commented, “This is unnecessary overreach which is going to cost employers and cost the tax payers additional resources to process the collected data . . . It will only cost employers more, who will charge the consumer more” (Docket ID 0025). OSHA disagrees. As discussed throughout this section, the costs to comply with the final rule for individual employers are expected to be about \$136 per establishment to submit the Form 300 and 301 data. Costs at this level of magnitude are not expected to lead to price increases or raise issues of economic feasibility.⁵³

E. Budget Costs to the Government

In the PEA, OSHA included an estimate of the costs of the new requirement to the government because these costs represent a significant fraction of the total costs of the new requirement. OSHA received estimates for the costs from the U.S. Department of Labor Office of the Chief Information Officer (DOL OCIO). OSHA estimated that modification of the reporting system hardware and software infrastructure to accept submissions of Form 300 and 301 data would have an initial one-time cost of \$1.2 million. If annualized over 10 years at a 7 percent discount rate, the \$1.2 million total cost would equal \$170,853 per year, or if annualized at 3 percent, it would be \$140,677 per year. The agency also estimated \$201,128 as the annual cost of additional IT transactions necessary to implement this rule (\$0.28 per case times 718,316 cases for additional internal IT support services). Finally, OSHA estimated that annual help desk support costs would increase by \$25,000. This estimate was based on the annual help desk support costs under the 300A submission provisions. This

resulted in a total cost to the government, annualized over 10 years at a 7 percent rate, of \$397,001.⁵⁴

OSHA sought comment on this methodology and cost estimate and received no responses. After consideration, OSHA has decided to maintain the framework used in the proposal but has updated the estimate to account for the current wage rate indicated in Table 2, above. Therefore, OSHA retained the estimate of \$1.2 million for the one-time cost of modifying the reporting system hardware and software infrastructure to accept submissions of Form 300 and 301 data. If annualized over 10 years at a 7 percent discount rate, the \$1.2 million total cost would equal \$170,853 per year. If annualized at 3 percent, it would be \$140,677 per year. The agency also estimated \$128,716 as the annual cost of additional IT transactions necessary to implement this rule (\$0.28 per case times 459,701 cases for additional internal IT support services). Next, the agency estimated \$204,485, based on 2023 wages, for OSHA to hire an additional IT Specialist. Finally, OSHA estimated that annual help desk support costs will increase by \$50,000. Summing these figures, and assuming a seven percent discount rate, results in a total annualized cost to the government of \$554,054.

F. Total Cost

Summing the estimated batch-file submission (\$252,048) and manual submission (\$6,647,982) costs results in an estimated total cost of \$6,900,030 to submit 766,257 records. Combined with the annualized cost of \$75,781 per year for familiarization, and \$122,308 for software upgrade cost to employers submitting batch-files using custom computer software, estimated above (at 7 percent), the estimated total annual private-sector cost of this part of the

⁵⁴ When preparing the final rule, the agency found inadvertent discrepancies between the written text of the PEA that was in the **Federal Register** notice for the NPRM (87 FR 18550–51) and the spreadsheet (Ex. 2) used to calculate the estimated governmental costs in the PEA. The agency describes those discrepancies here for the purposes of transparency. The annual cost of IT transactions was listed in the spreadsheet as \$107,309 rather than \$201,128 in the **Federal Register** notice. Annual help desk support costs were listed as \$50,000 in the spreadsheet and \$25,000 in the **Federal Register** notice. And, the cost of an additional IT Specialist was included in the spreadsheet (at an estimated \$181,162) but omitted from the discussion in the **Federal Register** notice. Whereas the total costs to the government reported in the spreadsheet were \$509,324, the total costs to the government in the **Federal Register** notice were \$397,001. Because the costs listed in the spreadsheet are more inclusive of the universe of estimated costs, the estimates in the PEA are derived from those costs.

⁵⁰ As OSHA said in the NPRM, OSHA’s review of five years of electronically submitted Form 300A data indicates that many large firms with multiple establishments use codes for the Establishment Name field in their submission (87 FR 18546). This is the type of employer this new requirement will likely apply to and, because they are large firms submitting for multiple establishments, they are likely submitting via batch file. This means that company name would only need to be inputted once.

⁵¹ To the extent the commenter is arguing that determining a firm’s legal name is administratively difficult or would take substantial time, OSHA presumes that employers know their company names and has included no cost for that.

⁵² This approach is also consistent with that taken in OSHA’s 2016 final recordkeeping rule, which also required electronic submission of injury and illness data to OSHA (see 81 FR 29674).

⁵³ As discussed in the Regulatory Flexibility Certification, the costs would be no more than approximately .01% of revenues (\$136 costs/\$13,627 being the 1% threshold of revenues), implying a negligible price increase, if any, to recoup the increase in costs.

final rule is \$7,098,120. To obtain the estimated average cost of submission per establishment of \$136.26, OSHA

divided the total estimated cost of submission (\$7,098,120) by the estimated number of establishments that

would be required to submit data (52,092 establishments). Total costs are detailed in Table 3, below.^{55 56}

TABLE 3—TOTAL COST SUMMARY

Cost element	Annual cost	One-time cost
Annual electronic submission of OSHA Form 300 Log and OSHA Form 301 Incident Report by establishments with 100 or more employees in designated industries.	\$6,900,030	\$0
One-Time Rule Familiarization Cost	NA	532,257
Annualized 10 yr at 7%	75,781	NA
Annualized 10 yr at 3%	62,397	NA
One-Time Software Upgrade	NA	859,042
Annualized 10 yr at 7%	122,308	NA
Annualized 10 yr at 3%	100,706	NA
Total Private Sector Costs ***	7,098,120	1,391,299
Average Cost per 52,092 Establishments	136	NA
Processing of annual electronic submissions of OSHA 300/301.	128,360	0
Annual Contractor Software Support	50,000	0
Annual Government Software Support	204,485	0
One-Time Software Design and Development	NA	1,200,000
Annualized 10 yr at 7%	170,853	NA
Annualized 10 yr at 3%	140,677	NA
Total Government Costs ***	553,698	1,200,000
Total *	7,651,818	2,591,299

* One-time costs are annualized and appear in annual cost column; the one-time cost is not an additional cost.

** Annualized over 10 years at 7%.

G. Benefits

As explained in the PEA and elaborated on elsewhere in this preamble, in particular in Section III.B of the Summary and Explanation, the main purpose of the final rule is to prevent worker injuries and illnesses through the collection and use of timely, establishment- and case-specific injury and illness data. With the information obtained through this rule, OSHA, employers, employees, employee representatives, State and local agencies, consultants, and researchers will be better able to identify and mitigate workplace hazards and thereby prevent worker injuries and illnesses. The final rule will support OSHA's statutory directive to assure safe and healthful working conditions for working people by providing for appropriate reporting procedures

regarding occupational safety and health that will help achieve the objectives of the OSH Act (29 U.S.C. 651(b); (b)(12)).

The number of workers in the U.S. who are injured or made ill on the job remains unacceptably high, and the importance of this final rule lies largely in increasing access to information to better enable OSHA and other organizations to prevent workplace injuries and illnesses. According to BLS's Survey of Occupational Injuries and Illnesses (SOII), in 2021, employees experienced 2.6 million recordable nonfatal injuries and illnesses at work.⁵⁷ This number is widely recognized to be an undercount of the actual number of occupational injuries and illnesses that occur annually.⁵⁸ As described extensively above in Section III.B of the Summary and Explanation, the final rule will increase the agency's ability to focus resources on those workplaces

where workers are at greatest risk. Even with improved targeting, OSHA Compliance Safety and Health Officers can inspect only a small proportion of the nation's workplaces each year, and it would take many decades to inspect each covered workplace in the nation even once. As a result, to reduce worker injuries and illnesses, it is of great importance for OSHA to leverage its resources for workplace safety at the many thousands of establishments in which workers are being injured or made ill but which OSHA does not have the resources to inspect.

As discussed in more detail in Section III, Summary and Explanation, the final rule will help OSHA prevent worker injuries and illnesses by greatly expanding OSHA's access to the establishment-specific, case-specific information employers are already required to record under part 1904. The

⁵⁵ OSHA has determined that the other new regulatory provisions in this final rule, such as § 1904.41(b)(1) (which is a clarifying provision), § 1904.41(b)(9) (which sets out which data should be excluded from submissions), § 1904.41(b)(10) (which requires employers to provide their company name as part of their submission), and § 1904.41(c) (which sets the submission deadline), do not impose costs beyond those accounted for in the costs of submission and familiarization discussed in this FEA.

⁵⁶ One commenter, the US Poultry & Egg Association, objected to OSHA's estimate of costs

and suggested that OSHA should "conduct a pilot program (preferably on Federal Government agencies) to determine the actual cost of compliance" (Ex. 53). OSHA has a long history of estimating costs of its regulations and standards without the need for a pilot program. It is confident that the estimates in this rulemaking, which carefully consider comments from interested parties, are sufficient to accurately characterize the costs of compliance for employers.

⁵⁷ See "Employer-Reported Workplace Injuries and Illnesses—2021", news release from the Bureau of Labor Statistics/U.S. Department of Labor,

November 9, 2022 (<https://www.bls.gov/news.release/pdf/osh.pdf>).

⁵⁸ See, e.g., Leigh JP, Du J, McCurdy SA. An estimate of the U.S. government's undercount of nonfatal occupational injuries and illnesses in agriculture. *Ann Epidemiol*. 2014 Apr; 24(4):254–9 (<https://pubmed.ncbi.nlm.nih.gov/24507952/>); Spieler EA, Wagner GR. Counting matters: Implications of undercounting in the BLS survey of occupational injuries and illnesses. *Am J Ind Med*. 2014 Oct; 57(10):1077–84 (<https://onlinelibrary.wiley.com/doi/10.1002/ajim.22382>).

provisions requiring regular electronic submission of case-specific injury and illness data will allow OSHA to obtain a much larger data set of establishment-specific, case-specific information about injuries and illnesses in the workplace. This information will help OSHA use its enforcement and compliance assistance resources more effectively by enabling OSHA to identify the workplaces where workers are at greatest risk. In addition, OSHA will be able to use the information to identify emerging hazards, support an agency response, and reach out to employers whose workplaces might include those hazards.

In addition to OSHA obtaining better information, this information will be available to employers, employees, members of the public, employee representatives, trade associations, and workplace safety and health professionals, among others. This increased access and transparency of information about workplace injuries and illnesses can be used by all interested parties to better understand workplace hazards and improve occupational safety and health. OSHA also expects the information to improve research on the occurrence and prevention of workplace hazards, injuries, and illnesses.

In response to the PEA, the National Propane Gas Association and the Chamber of Commerce said that OSHA should quantify benefits for the rule (Docket IDs 0050, 0088, Attachments). The National Propane Gas Association stated that OSHA “does not provide any details as to how publicly available information could improve workplace safety” and argued that OSHA should “provide concrete benchmarks to define the safety improvements that the agency expects to be met by publicly accessible case-specific, establishment-specific information” (Docket ID 0050). The Chamber of Commerce said that OSHA “makes no attempt to estimate or quantify the purported economic benefits of this Proposed Rule; instead, it asserts that these benefits will ‘significantly exceed the annual costs,’” going on to say that OSHA did not “explain how electronic quarterly reporting or the creation of a public database that will publish the private and confidential information of employers and employees will provide any increase in workplace safety” (Docket ID 0088).⁵⁹

⁵⁹ Note that the agency did not propose quarterly reporting; the proposed rule envisioned annual reporting, and the final rule similarly will require annual reporting.

The agency respectfully disagrees about quantifying the economic benefits. Quantifying benefits is not always feasible in practice. However, the infeasibility of quantifying benefits does not demonstrate a lack of benefits. In contrast to the occupational safety and health standards the agency promulgates, quantifying benefits for a recordkeeping regulation is particularly challenging.⁶⁰ OSHA notes that the commenters did not attempt to themselves quantify the benefits of the proposed rule, nor did commenters propose any approach that would allow the agency to effectively quantify those benefits in order to compare them against the costs.

H. Economic Feasibility

In the PEA, OSHA preliminarily concluded that the proposed rule would be economically feasible and received no comment specifically on this conclusion. After further consideration, OSHA has concluded that the final rule will be economically feasible. Under the final rule, for establishments with 100 or more employees in the industries designated in appendix B, the average additional cost of electronically submitting information from the OSHA Forms 300 and 301 will be roughly \$136 per year. These costs will not affect the economic viability of these establishments.

I. Regulatory Flexibility Certification

The requirement in the final rule requiring the electronic submission of Form 300 and 301 information from establishments with 100 or more employees in designated industries will affect some small entities, as determined by the definitions of small entity used by the Small Business Administration (SBA). In some sectors, such as construction, where SBA’s definition only includes relatively smaller firms, there are unlikely to be many entities with establishments with 100 or more employees that meet SBA small entity definitions. In other sectors, such as manufacturing, many SBA-defined small entities will be subject to this rule. Thus, this part of the final rule will affect only a small percentage of all SBA-defined small entities.⁶¹ However,

⁶⁰ For the difference between a standard and a regulation, please see the discussion in Section II, Legal Authority.

⁶¹ The portion of the rule that addresses the submission of Form 300A information does affect smaller entities, as establishments with 20 or more employees are required to electronically submit Form 300A information. However, because this final rule makes no substantive changes to that submission requirement, which was enacted as part of the 2016 final rule, there are no new costs for entities with fewer than 100 employees.

because some SBA-defined small entities will be affected, especially in manufacturing, OSHA has examined the impacts of this final rule on small businesses.

OSHA did not convene a Small Business Advocacy Review panel under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA Panel) for this rule. At least one commenter, the Chamber of Commerce, argued that OSHA should have convened a SBREFA Panel to further evaluate the effect of the proposed rule on small businesses (Docket ID 0088). The commenter said that the panel was particularly important because “the vast majority of employers and establishments that will be affected by this Proposed Rule’s electronic-only reporting requirements will be small businesses, many of which do not currently record injuries electronically.” This commenter offered no evidence to support its assertion that the majority of the employers and establishments affected would be small businesses, nor did it offer evidence that small businesses do not currently record injuries electronically.

OSHA considers the possibility of disproportionate impacts on small businesses when deciding whether a Small Business Advocacy Review (SBAR) panel is warranted. Because OSHA preliminarily determined that the proposed rule would not result in a significant impact on a substantial number of small businesses (see 87 FR 18553), OSHA determined that a SBREFA panel was not required for this rule. Nothing in the record has disturbed OSHA’s preliminary determination that this rule will not have a significant impact on a substantial number of small businesses. Therefore, OSHA does not believe a SBREFA panel was required for this rule.

OSHA’s typical procedure for assessing the significance of final rules on small businesses is to first determine if costs are greater than one percent of revenues or five percent of profits for the average firm. If so, OSHA conducts an additional assessment. To meet this level of significance at an estimated annual average cost of \$136 per affected establishment per year (including annualized familiarization costs), annual revenues for an establishment with 100 or more employees would have to be less than \$13,627 (or less than \$136 per employee, assuming 100 employees), and annual profits would have to be less than \$2,725 (or less than \$28 per employee, assuming 100 employees). There are no impacted industries that have average revenues of

less than \$13,627.⁶² Furthermore, integrating those data with profit data from the 2013 Corporation Source Book⁶³ indicates there are no impacted industries earning less than \$2,725 in profit per establishment among establishments with 5 or more employees.⁶⁴ These are extremely unlikely combinations of revenues and profits for firms of this size and would only occur for a very small number of firms in severe financial distress. As indicated, OSHA's cost estimates would have to be in error by more than an order of magnitude to reach these thresholds.⁶⁵

As a result of these considerations, per Section 605 of the Regulatory Flexibility Act (5 U.S.C. 605), OSHA certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Thus, OSHA has not prepared a final regulatory flexibility analysis.

V. OMB Review Under the Paperwork Reduction Act of 1995

A. Overview

The final "Improve Tracking Workplace Injury and Illness" rule contains information collection (paperwork) requirements that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and OMB regulations, 5 CFR part 1320. The PRA defines a collection of information as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to

third parties or the public, of facts or opinions by or for an agency, regardless of form or format." 44 U.S.C. 3502(3)(A). The aforementioned regulations mandate that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, a Federal agency generally cannot conduct or sponsor a collection of information and the public will generally not be penalized for not responding to an information collection, unless it is approved by OMB and the agency displays a currently valid OMB Control Number. See 44 U.S.C. 3507 and 3512, 5 CFR 1320.5(a) and 1320.6.

On March 30, 2022, OSHA published a notice of proposed rulemaking (NPRM) (87 FR 18528) to amend its occupational injury and illness recordkeeping regulation to require establishments with 100 or more employees in certain designated industries to be able to electronically submit information from their OSHA Forms 300, 301, and 300A once a year. OSHA prepared and submitted an Information Collection Request (ICR) to OMB, proposing to revise certain collection requirements currently contained in the package, as required under 44 U.S.C. 3507(d). The proposed rule invited the public to submit comments to OMB, in addition to OSHA, on the proposed collections of information. On May 25, 2022, OSHA published a second **Federal Register** notice (87 FR 31793), extending the comment period to allow the public an additional 30 days to comment on the proposed rule and the information collection requirements contained in the proposed rule. OSHA received 87 public comments.

In accordance with the PRA (44 U.S.C. 3506(c)(2)), OSHA solicited public comments on the collection of information contained in the 2022 proposed rule. OSHA encouraged commenters to submit their comments on the information collection requirements contained in the proposed rule under docket number OSHA–2021–0006, along with their comments on other parts of the proposed rule. In addition to generally soliciting comments on the collection of information requirements, the proposed rule indicated that OSHA and OMB were particularly interested in comments that addressed the following:

- Whether the collection of information is necessary for the proper performance of the agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and cost) of the

collection of information, including the validity of the methodology and assumptions used;

- The quality, utility, and clarity of the information collected; and
- Ways to minimize the compliance burden on employers, for example, by using automated or other technological techniques for collecting and transmitting information.

On May 5, 2022, OMB issued a Notice of Action (NOA) assigning the proposal's ICR a new control number, 1218–0279, to be used in future ICR submissions. OMB noted that this action had no effect on any current approvals. OMB also noted that the NOA is not an approval to conduct or sponsor the information collection contained in the revision proposal. Finally, OMB requested that, "[p]rior to publication of the final rule, [OSHA] should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments. In addition, the agency must enter the correct burden estimates." OSHA did not receive any comments in response to the proposed ICR submitted to OMB for review. However, the agency did receive 87 comments related to the proposed rule.

Concurrent with publication of this final rule, the Department of Labor submitted the final ICR, containing the full analysis and description of the burden hours and costs associated with the final rule, to OMB for approval. A copy of this ICR is available at <http://www.reginfo.gov/public/do/PRAOMBHistory?ombControlNumber=1218-0279> (this link will become active on the day following publication of the final rule). OSHA will publish a separate notice in the **Federal Register** that will announce the results of that review. This notice will also include a list of OMB-approved information collection requirements and total burden hours and costs imposed by the new regulation.

B. Summary of Information Collection Requirements

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about this ICR.

1. *Title:* Improve Tracking Workplace Injury and Illness.

2. *Description of the ICR:* This final rule revises the currently approved Recordkeeping and Reporting Occupational Injuries and Illnesses Information Collection and changes the existing information collection requirements currently approved by OMB.

⁶² The average revenue numbers were obtained from the 2017 Economic Census. This is the most current information available from this source, which OSHA considers to be the best available source of revenue data for U.S. businesses. OSHA adjusted these figures to 2019 dollars using the Bureau of Economic Analysis's GDP deflator, which is OSHA's standard source for inflation and deflation analysis. These average revenue figures would include any non-profits falling within the affected industries.

⁶³ Profits were calculated as profit rates multiplied by revenues. The before-tax profit rates that OSHA used were estimated using corporate balance sheet data from the 2013 Corporation Source Book (Internal Revenue Service, 2013; <https://www.irs.gov/statistics/soi-tax-stats-corporation-source-book-publication-1053>). The IRS discontinued the publication of these data after 2013, and therefore the most current years available are 2000–2013. The most recent version of the Source Book represents the best available evidence for these data on profit rates.

⁶⁴ While descriptive of most establishments in these industries, this figure would significantly underestimate the profits of the average affected establishment covered by this rule, which only affects those with 100 or more employees.

⁶⁵ The lowest potential threshold of impact (for profits) is \$2,725 per establishment. The agency estimates an average cost per establishment of \$136. It would need to be approximately 20 times higher to reach this threshold.

3. Brief Summary of the Information Collection Requirements.

Under “Information Requirements on Recordkeeping and Reporting Occupational Injuries and Illnesses,” OMB Control Number 1218–0176, OSHA currently has OMB approval to conduct an information collection that requires covered employers to, among other things, record each recordable employee injury and illness on an OSHA Form 300, which is the “Log of Work-Related Injuries and Illnesses,” or equivalent. In addition, employers must also prepare a supplementary OSHA Form 301 “Injury and Illness Incident Report” or equivalent that provides additional details about each case recorded on the OSHA Form 300, and, at the end of each year, employers are required to prepare a summary report of all injuries and illnesses on the OSHA Form 300A, which is the “Summary of Work-Related Injuries and Illnesses,” and post the form in a visible location in the workplace.

Under 29 CFR 1904.41, certain employers were only required to electronically submit injury and illness information from their OSHA Forms 300A (the summary) annually. OSHA did not receive establishment-specific, case-specific, injury and illness data. For the purposes of the PRA, the final rule makes two changes to § 1904.41.

First, OSHA newly requires all establishments that have 100 or more employees and are in certain designated industries to electronically submit information from the OSHA Form 300 and 301 to OSHA or OSHA’s designee. This is in addition to the current requirement for these establishments to electronically submit information from the OSHA Form 300A. Each establishment subject to this provision will require time to familiarize themselves with the reporting website. This change is similar to requirements contained in OSHA’s Improve Tracking of Workplace Injuries and Illnesses final rule, 81 FR 29624 (May 12, 2016) which were removed by the Tracking of Workplace Injuries and Illnesses final rule, 84 FR 380 (January 25, 2019).

Second, OSHA newly requires establishments that are required to electronically report information from their injury and illness records to OSHA under part 1904, to include their company name as part of the submission. No additional paperwork burden is associated with the provision.

In addition, Docket exhibit OSHA–2021–006–0004 shows an example of an expanded interface to collect case-specific data. Screenshots of this interface can also be viewed on OSHA’s website at <http://www.osha.gov/>

[recordkeeping/proposed_data_form.html](http://www.osha.gov/recordkeeping/proposed_data_form.html).

4. *OMB Control Number*: 1218–0279 .
5. *Affected Public*: Business or other for-profit.

6. *Total Estimated Number of Respondents*: 52,092.

7. *Frequency of Responses*: Annually.

8. *Total Estimated Number of Responses*: 475,943.

9. *Average Time per Response*: Average time per response varies from 10 minutes for establishments using batch file submission to 237 minutes for establishments using manual submission.

10. *Total Estimated Annualized Burden Hours*: 118,485.

11. *Total Estimated Costs (Capital-Operation and Maintenance)*: 0.

VI. Unfunded Mandates

OSHA reviewed this final rule according to the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*), as well as Executive Order 13132 (64 FR 43255 (Aug. 4, 1999)). As discussed above in Section IV, Final Economic Analysis, the agency has determined that this final rule does not include any Federal mandate that may result in increased expenditures by State, local, and Tribal governments, or increased expenditures by the private sector, of \$100 million or more in any one year. In addition, OSHA’s regulations do not apply to State and local governments except in States that have elected voluntarily to adopt a State Plan approved by OSHA. Consequently, this final rule does not meet the definition of a “federal intergovernmental mandate” (see 2 U.S.C. 1502, 658(5)). Therefore, for the purposes of the UMRA, the agency certifies that this final rule does not mandate that State, local, or Tribal governments adopt new, unfunded regulatory obligations of, or increase expenditures by the private sector by, \$100 million or more in any year.

VII. Federalism

OSHA reviewed this final rule in accordance with Executive Order 13132 (64 FR 43255 (Aug. 4, 1999)), regarding federalism. E.O. 13132 requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States before taking actions that would restrict States’ policy options, and take such actions only when clear constitutional authority exists and the problem is of national scope.

Section 18(a) of the OSH Act states that nothing in the Act shall prevent any State agency or court from asserting jurisdiction under State law over an

occupational safety or health issue with respect to which no standard is in effect under Section 6 of the Act (29 U.S.C. 667(a)). Because this rulemaking involves a “regulation” issued under Sections 8 and 24 of the OSH Act (29 U.S.C. 657, 673), and not an “occupational safety and health standard” issued under Section 6 of the OSH Act (29 U.S.C. 655), the rule will not preempt State law under Section 18(a) (see 29 U.S.C. 667(a)). The effect of the final rule on States and territories with OSHA-approved occupational safety and health State Plans is discussed in Section VIII, State Plans.

VIII. State Plans

Pursuant to Section 18 of the OSH Act (29 U.S.C. 667) and the requirements of 29 CFR 1904.37, 1902.3(j), 1902.7, 1953.4(b), and 1956.10(i), within 6 months after publication of the final OSHA rule, State Plans must promulgate occupational injury and illness recording and reporting requirements that are substantially identical to those in 29 CFR part 1904. State Plans must have the same requirements as Federal OSHA for determining which injuries and illnesses are recordable and how they are recorded (29 CFR 1904.37(b)(1)). All other part 1904 injury and illness recording and reporting requirements (for example, industry exemptions, reporting of fatalities and hospitalizations, record retention, or employee involvement) that are promulgated by State Plans may be more stringent than, or supplemental to, the Federal requirements, but, because of the unique nature of the national recordkeeping program, States must consult with OSHA and obtain approval of such additional or more stringent reporting and recording requirements to ensure that they will not interfere with uniform reporting objectives (29 CFR 1904.37(b)(2)).

There are 29 State Plans. The States and territories that cover both private sector and public sector employers are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only.

IX. National Environmental Policy Act

OSHA has reviewed the provisions of this final rule in accordance with the requirements of the National

Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) NEPA regulations (40 CFR parts 1500–1508), and the Department of Labor's NEPA Procedures (29 CFR part 11). As a result of this review, OSHA has determined that the final rule will have no significant adverse effect on air, water, or soil quality, plant or animal life, use of land, or other aspects of the environment.

X. Consultation and Coordination With Indian Tribal Governments

OSHA reviewed this final rule in accordance with Executive Order 13175 (65 FR 67249 (Nov. 9, 2000)) and determined that it does not have “tribal implications” as defined in that order. The rule does not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

List of Subjects in 29 CFR Part 1904

Health statistics, Occupational safety and health, Reporting and recordkeeping requirements.

Authority and Signature

This document was prepared under the direction of Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. It is issued under Sections 8 and 24 of the Occupational Safety and Health Act (29 U.S.C. 657, 673), Section 553 of the Administrative Procedure Act (5 U.S.C. 553), and Secretary of Labor's Order No. 8–2020 (85 FR 58393 (Sept. 18, 2020)).

Signed at Washington, DC, on July 12, 2023.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons stated in the preamble, OSHA amends part 1904 of chapter XVII of title 29 as follows:

PART 1904—[AMENDED]

Subpart E—Reporting Fatality, Injury and Illness Information to the Government

- 1. The authority citation for part 1904, subpart E, is revised to read as follows:

Authority: 29 U.S.C. 657, 673, 5 U.S.C. 553, and Secretary of Labor's Order No. 08–2020 (85 FR 58393, Sept. 18, 2020) or 1–2012 (77 FR 3912, Jan. 25, 2012), as applicable.

- 2. Amend § 1904.41 as follows:

- a. Revise paragraphs (a)(1) and (2) and (b)(1);
- b. Add paragraphs (b)(9) and (10); and
- c. Revise paragraph (c).

The revisions and additions read as follows:

§ 1904.41 Electronic submission of Employer Identification Number (EIN) and injury and illness records to OSHA.

* * * * *

(a) * * *
(1) *Annual electronic submission of information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses.* (i) If your establishment had 20–249 employees at any time during the previous calendar year, and your establishment is classified in an industry listed in appendix A to subpart E of this part, then you must electronically submit information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses to OSHA or OSHA's designee. You must submit the information once a year, no later than the date listed in paragraph (c) of this section of the year after the calendar year covered by the form.

(ii) If your establishment had 250 or more employees at any time during the previous calendar year, and this part requires your establishment to keep records, then you must electronically submit information from OSHA Form 300A Summary of Work-Related Injuries and Illnesses to OSHA or OSHA's designee. You must submit the information once a year, no later than the date listed in paragraph (c) of this section of the year after the calendar year covered by the form.

(2) *Annual electronic submission of information from OSHA Form 300 Log of Work-Related Injuries and Illnesses and OSHA Form 301 Injury and Illness Incident Report by establishments with 100 or more employees in designated industries.* If your establishment had 100 or more employees at any time during the previous calendar year, and your establishment is classified in an industry listed in appendix B to subpart E of this part, then you must electronically submit information from OSHA Forms 300 and 301 to OSHA or OSHA's designee. You must submit the information once a year, no later than the date listed in paragraph (c) of this section of the year after the calendar year covered by the forms.

* * * * *

(b) * * *
(1) *Does every employer have to routinely make an annual electronic submission of information from part 1904 injury and illness recordkeeping forms to OSHA?* No, only three categories of employers must routinely

submit information from these forms. The first category is establishments that had 20–249 employees at any time during the previous calendar year, and are classified in an industry listed in appendix A to this subpart; establishments in this category must submit the required information from Form 300A to OSHA once a year. The second category is establishments that had 250 or more employees at any time during the previous calendar year, and are required by this part to keep records; establishments in this category must submit the required information from Form 300A to OSHA once a year. The third category is establishments that had 100 or more employees at any time during the previous calendar year, and are classified in an industry listed in appendix B to this subpart; establishments in this category must also submit the required information from Forms 300 and 301 to OSHA once a year, in addition to the required information from Form 300A. Employers in these three categories must submit the required information by the date listed in paragraph (c) of this section of the year after the calendar year covered by the form (for example, 2024 for the 2023 form(s)). If your establishment is not in any of these three categories, then you must submit the information to OSHA only if OSHA notifies you to do so for an individual data collection.

* * * * *

(9) *If I have to submit information under paragraph (a)(2) of this section, do I have to submit all of the information from the recordkeeping forms?* No, you are required to submit all of the information from the forms except the following:

(i) Log of Work-Related Injuries and Illnesses (OSHA Form 300): Employee name (column B).

(ii) Injury and Illness Incident Report (OSHA Form 301): Employee name (field 1), employee address (field 2), name of physician or other health care professional (field 6), facility name and address if treatment was given away from the worksite (field 7).

(10) *My company uses numbers or codes to identify our establishments. May I use numbers or codes as the establishment name in my submission?* Yes, you may use numbers or codes as the establishment name. However, the submission must include a legal company name, either as part of the establishment name or separately as the company name.

(c) *Reporting dates.* Establishments that are required to submit under paragraph (a)(1) or (2) of this section

must submit all of the required information by March 2 of the year after the calendar year covered by the form(s) (for example, by March 2, 2024, for the forms covering 2023).

* * * * *

■ 3. Revise appendix A to subpart E to read as follows:

**Appendix A to Subpart E of Part 1904—
Designated Industries for
§ 1904.41(a)(1)(i) Annual Electronic
Submission of Information From OSHA
Form 300A Summary of Work-Related
Injuries and Illnesses by Establishments
With 20–249 Employees in Designated
Industries**

NAICS	Industry
11	Agriculture, Forestry, Fishing and Hunting.
22	Utilities.
23	Construction.
31–33	Manufacturing.
42	Wholesale Trade.
4413	Automotive Parts, Accessories, and Tire Stores.
4421	Furniture Stores.
4422	Home Furnishings Stores.
4441	Building Material and Supplies Dealers.
4442	Lawn and Garden Equipment and Supplies Stores.
4451	Grocery Stores.
4452	Specialty Food Stores.
4522	Department Stores.
4523	General Merchandise Stores, including Warehouse Clubs and Supercenters.
4533	Used Merchandise Stores.
4542	Vending Machine Operators.
4543	Direct Selling Establishments.
4811	Scheduled Air Transportation.
4841	General Freight Trucking.
4842	Specialized Freight Trucking.
4851	Urban Transit Systems.
4852	Interurban and Rural Bus Transportation.
4853	Taxi and Limousine Service.
4854	School and Employee Bus Transportation.
4855	Charter Bus Industry.
4859	Other Transit and Ground Passenger Transportation.
4871	Scenic and Sightseeing Transportation, Land.
4881	Support Activities for Air Transportation.
4882	Support Activities for Rail Transportation.
4883	Support Activities for Water Transportation.
4884	Support Activities for Road Transportation.
4889	Other Support Activities for Transportation.
4911	Postal Service.
4921	Couriers and Express Delivery Services.
4922	Local Messengers and Local Delivery.
4931	Warehousing and Storage.
5152	Cable and Other Subscription Programming.
5311	Lessors of Real Estate.
5321	Automotive Equipment Rental and Leasing.
5322	Consumer Goods Rental.
5323	General Rental Centers.
5617	Services to Buildings and Dwellings.
5621	Waste Collection.
5622	Waste Treatment and Disposal.
5629	Remediation and Other Waste Management Services.
6219	Other Ambulatory Health Care Services.
6221	General Medical and Surgical Hospitals.
6222	Psychiatric and Substance Abuse Hospitals.
6223	Specialty (except Psychiatric and Substance Abuse) Hospitals.
6231	Nursing Care Facilities (Skilled Nursing Facilities).
6232	Residential Intellectual and Developmental Disability, Mental Health, and Substance Abuse Facilities.
6233	Continuing Care Retirement Communities and Assisted Living Facilities for the Elderly
6239	Other Residential Care Facilities.
6242	Community Food and Housing, and Emergency and Other Relief Services.
6243	Vocational Rehabilitation Services.
7111	Performing Arts Companies.
7112	Spectator Sports.
7121	Museums, Historical Sites, and Similar Institutions.
7131	Amusement Parks and Arcades.
7132	Gambling Industries.
7211	Traveler Accommodation.
7212	RV (Recreational Vehicle) Parks and Recreational Camps.
7223	Special Food Services.
8113	Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance.

NAICS	Industry
8123	Drycleaning and Laundry Services.

■ 4. Add appendix B to subpart E to read as follows:

**Appendix B to Subpart E of Part 1904—
Designated Industries for
§ 1904.41(a)(2) Annual Electronic
Submission of Information From OSHA
Form 300 Log of Work-Related Injuries
and Illnesses and OSHA Form 301
Injury and Illness Incident Report by
Establishments With 100 or More
Employees in Designated Industries**

NAICS	Industry
1111	Oilseed and Grain Farming.
1112	Vegetable and Melon Farming.
1113	Fruit and Tree Nut Farming.
1114	Greenhouse, Nursery, and Floriculture Production.
1119	Other Crop Farming.
1121	Cattle Ranching and Farming.
1122	Hog and Pig Farming.
1123	Poultry and Egg Production.
1129	Other Animal Production.
1133	Logging.
1141	Fishing.
1142	Hunting and Trapping.
1151	Support Activities for Crop Production.
1152	Support Activities for Animal Production.
1153	Support Activities for Forestry.
2213	Water, Sewage and Other Systems.
2381	Foundation, Structure, and Building Exterior Contractors.
3111	Animal Food Manufacturing.
3113	Sugar and Confectionery Product Manufacturing.
3114	Fruit and Vegetable Preserving and Specialty Food Manufacturing.
3115	Dairy Product Manufacturing.
3116	Animal Slaughtering and Processing.
3117	Seafood Product Preparation and Packaging.
3118	Bakeries and Tortilla Manufacturing.
3119	Other Food Manufacturing.
3121	Beverage Manufacturing.
3161	Leather and Hide Tanning and Finishing.
3162	Footwear Manufacturing.
3211	Sawmills and Wood Preservation.
3212	Veneer, Plywood, and Engineered Wood Product Manufacturing.
3219	Other Wood Product Manufacturing.
3261	Plastics Product Manufacturing.
3262	Rubber Product Manufacturing.
3271	Clay Product and Refractory Manufacturing.
3272	Glass and Glass Product Manufacturing.
3273	Cement and Concrete Product Manufacturing.
3279	Other Nonmetallic Mineral Product Manufacturing.
3312	Steel Product Manufacturing from Purchased Steel.
3314	Nonferrous Metal (except Aluminum) Production and Processing.
3315	Foundries.
3321	Forging and Stamping.
3323	Architectural and Structural Metals Manufacturing.
3324	Boiler, Tank, and Shipping Container Manufacturing.
3325	Hardware Manufacturing.
3326	Spring and Wire Product Manufacturing.
3327	Machine Shops; Turned Product; and Screw, Nut, and Bolt Manufacturing.
3328	Coating, Engraving, Heat Treating, and Allied Activities.
3331	Agriculture, Construction, and Mining Machinery Manufacturing.
3335	Metalworking Machinery Manufacturing.
3361	Motor Vehicle Manufacturing.
3362	Motor Vehicle Body and Trailer Manufacturing.
3363	Motor Vehicle Parts Manufacturing.
3366	Ship and Boat Building.
3371	Household and Institutional Furniture and Kitchen Cabinet Manufacturing.
3372	Office Furniture (including Fixtures) Manufacturing.
3379	Other Furniture Related Product Manufacturing.
4231	Motor Vehicle and Motor Vehicle Parts and Supplies Merchant Wholesalers.

NAICS	Industry
4233	Lumber and Other Construction Materials Merchant Wholesalers.
4235	Metal and Mineral (except Petroleum) Merchant Wholesalers.
4239	Miscellaneous Durable Goods Merchant Wholesalers.
4244	Grocery and Related Product Merchant Wholesalers.
4248	Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers.
4413	Automotive Parts, Accessories, and Tire Stores.
4422	Home Furnishings Stores.
4441	Building Material and Supplies Dealers.
4442	Lawn and Garden Equipment and Supplies Stores.
4451	Grocery Stores.
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4851	Urban Transit Systems.
4852	Interurban and Rural Bus Transportation.
4853	Taxi and Limousine Service.
4854	School and Employee Bus Transportation.
4859	Other Transit and Ground Passenger Transportation.
4871	Scenic and Sightseeing Transportation, Land.
4881	Support Activities for Air Transportation.
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4889	Other Support Activities for Transportation.
4911	Postal Service.
4921	Couriers and Express Delivery Services.
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5322	Consumer Goods Rental.
5621	Waste Collection.
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7212	RV (Recreational Vehicle) Parks and Recreational Camps.
7223	Special Food Services.

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[FR Doc. 2023-15091 Filed 7-17-23; 8:45 am]

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